

Federal Court



Cour fédérale

Date: 20150702

Docket: IMM-5766-14

Citation: 2015 FC 814

Ottawa, Ontario, July 2, 2015

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

**KHALID PARVEZ ALI
AROOSA KHALID ALI
FALAH KHALID ALI**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION
AND
THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Respondents

JUDGMENT AND REASONS

[1] The refugee claims of Khalid Parvez Ali and his two minor children, Aroosa Khalid Ali and Falah Khalid Ali were denied by the Refugee Protection Division [RPD]; moreover, the Member found that Mr. Ali was “entirely lacking in credibility, and that he fabricated a story ...

in order to establish a refugee claim.” She further found that he “made numerous false or misleading representations to the panel, and provided fraudulent documents to support his claim.” For these reasons, the Member found that the claim for protection was manifestly unfounded pursuant to subsection 107.1 of the *Immigration and Refugee Protection Act, SC 2001, c 27 [IRPA]*. As a consequence of this finding, the applicants have no right of appeal to the Refugee Appeal Division: Paragraph 110(2)(c) of *IRPA*.

Background and Basis of the Claim

[2] The applicants are citizens of Pakistan. Mr. Ali moved to Kuwait in 1994, when he was 15 years old. His sister Naila remained in Pakistan and married Ameen Merchant. Mr. Merchant was violently abusive towards Naila. As a result, Naila joined her family in Kuwait. Mr. Merchant began harassing and threatening the family members who remained in Pakistan. The Ali family are Ismaili Muslim, whereas Mr. Merchant is Sunni.

[3] After leaving Pakistan, Mr. Ali returned back only four times. He returned in 2003 to marry his current wife and the mother of his children. Mr. Ali and his wife returned to Pakistan in 2004 for the birth of twins, the two minor applicants. They returned again in 2005, for the birth of a second set of twins, and subsequently travelled to Karachi to visit with his grandmother. His last visit to Pakistan was in 2010 when he returned for nine days to obtain a new passport.

[4] In 2005, a “couple of days” after they arrived in Karachi, two individuals dressed in traditional clothing broke into the grandmother’s home. They hit Mr. Ali’s wife with a cricket

bat, the blow glancing off her head and breaking her shoulder. Mr. Ali suffered a cut to his left eyebrow, and the assailants kidnapped the five day old son of the applicant.

[5] Mr. Ali and his wife went to receive medical treatment. After leaving the hospital to go to the police station to report the kidnapping, Mr. Ali received a phone call from Mr. Merchant “welcoming” him to Pakistan. Mr. Ali believes that Mr. Merchant may have been behind the attack and kidnapping.

[6] Mr. Ali says that police made him wait at the station to report the assault and kidnapping and seemed to have little interest in his case. They did take a report and said they would get back to him. The next day Mr. Ali was called into the police station to identify the kidnapped baby’s body. The baby’s death was confirmed. The police stated they would investigate but nothing came of it. The family left for Kuwait on October 10, 2005.

[7] While in Kuwait, Mr. Ali continued to receive harassing phone calls from Mr. Merchant. In 2011, Naila and her family made refugee claims in Canada that were successful. The remaining family members continued to be harassed by Mr. Merchant. One of Mr. Ali’s uncles, Rahim, converted to Sunni Islam and he then also harassed the applicant’s family. On October 1, 2013, Mr. Ali’s grandmother’s body was found in the street. The police investigation is ongoing.

[8] On December 25, 2013, Mr. Ali’s employer notified him that his employment was being terminated. He and his family applied for visas for Canada. Only Mr. Ali’s visa application was

accepted. He made a refugee claim on January 28, 2014. The two minor applicants had US visas and Mr. Ali brought them over the border to Canada.

The RPD Proceeding

[9] Mr. Ali's sister, Naila Sikandar Ismaili, his brother Waheed Parvez Ali, and his brother-in-law Irfan Hameed Sheikh, had all received positive decisions from the RPD on their claims for refugee status on the basis of fear of persecution from Naila's former husband, Ameen Merchant. The Member noted that Mr. Ali primarily alleged the same fear, as well as fear of "religious fanatics" in Pakistan. The Minister was invited to intervene on "integrity."

[10] The Minister's intervention noted that there was a credibility concern because Nailia's Personal Information Form [PIF] made no reference to Ameen, her former husband.

[11] At the commencement of the hearing on June 3, 2014, counsel for the applicants informed the Member that she had also been counsel for Nailia and the other family members. She informed that Member that she had been retained by Nailia after the original PIF was filed and she had prepared an amended narrative that provided "extensive evidence" about her former spouse. She observed that the Minister must not have been aware of the amended narrative. She further advised the Member that prior to the hearing she had discussions with staff of the RPD and as counsel for Nailia, gave permission for the document to be disclosed to the Member but not to Mr. Ali, as it contained personal information of Nailia that was not germane to his claim and concerning which she did not want her family to be aware. That was not done and the

Member expressed concern that her file may have been archived and the PIF not readily available.

[12] Accordingly, counsel had his office fax a copy of Nailia's PIF to the Member during the hearing. It was read by her and added as item 14 to the disclosure. Given her confidentiality concerns, counsel raised a concern and the Member responded that she was going to redact the personal information and the item in the record would be the redacted version of the PIF. That was not done.

[13] The hearing adjourned to be continued on July 2, 2014. The Member handed back to Mr. Ali his original documents and unfortunately included in the package, the complete copy of Nailia's unredacted narrative that had been obtained from counsel. Upon realizing that he had his sister's narrative, Mr. Ali returned it to his counsel the following day.

[14] Counsel for Mr. Ali wrote to the RPD advising that she had the document and that it had been provided to her client by the Member. In her letter dated June 4, 2014, she wrote:

At this time, I am deeply concerned by the actions of this Board member. I am shaken by what can best be described as gross sloppiness on her part. **Her conduct has totally eroded any confidence that my client—or I-had in her judgement and adjudication of Mr. Ali's claim.**

...

My client felt that the Board member totally dismissed his legitimate concerns and coupled with her unacceptable incompetence displayed yesterday, I am seeking to have a new hearing with a different Board member. I would like this hearing expedited and heard by a member with an open mind, as my client deserves no less. I am also seeking to have disciplinary action commenced against this Board member by the IRB, as her conduct

has directly exposed me to a breach of confidentiality claim by my former client, Nailia (who is not even aware of the breach as yet). I sincerely believe that this Board member's actions have brought disrepute to the IRB, as it exposes the IRB to allegations of incompetence and legal liability by the actions of a careless and unduly sloppy Board member, to whom issues such as confidentiality seem to mean nothing.
[sic and bolding in original]

[15] By letter dated June 13, 2014, counsel wrote to formally bring a motion for the Member to recuse herself from the hearing, and to have a new hearing scheduled on an expedited basis.

She wrote:

As I previously stated, my client has lost complete confidence in this member, given her conduct. Additionally, given that the presiding member has been made aware that my client and I have complained against her, he is extremely nervous about now reappearing before the very member who is the subject of my complaint. He is very nervous and stressed.

...

It is reasonable to assume that the presiding member is returning to a hearing with my client, knowing full well that he and his lawyer have formally complained about her and his lawyer is seeking to have her actions investigated and steps taken. There is an apprehension of bias and for that reason, I am seeking to have the member recuse herself from the resumption and a new hearing booked, with a new member.

[16] By decision dated June 23, 2014, the presiding Member dismissed the applicant's recusal motion. She wrote:

The entirely inadvertent disclosure of documents does not impact the panel's view of the claim or the claimant. The application for bias on this basis is denied.

As for the submission that the Member's knowledge of the complaint against her and that counsel is seeking to have her actions investigated and steps taken leads to an apprehension of

bias, this argument too must fail. If counsel could succeed in establishing bias on this basis counsel could 'create' a reasonable apprehension of bias simply by filling out a complaint against any Member in any given hearing. The application for this reason is also denied.

[17] The Member issued her reasons and decision five days following the second hearing day.

As noted, the claim was denied on the basis of the applicant's credibility. In particular, the Member made the following findings:

- The applicant was not clear on when exactly the kidnapping of his son took place;
- The applicant's story as to why he went to the hospital and not to the police right after the kidnapping was not credible;
- Fraudulent documents are readily available in Pakistan;
- Mr. Merchant was not mentioned by name in the police report;
- There were inconsistencies between the police report and the applicant's testimony;
- The report does not make mention of the son's death;
- A birth certificate was obtained after the first hearing day but there were errors and irregularities on the document;
- The hospital record of the applicant's wife had irregularities. For example, "clavicle" was misspelled "calvicle" and parts of the report were inconsistent with the applicant's testimony;
- The son's death certificate was not consistent with other death certificates in evidence and it also had spelling and typographical errors;
- The applicant claimed not to know where his son was buried, even though it was on the death certificate; and

- The RPD noted the applicant's psychiatric report, but found that did not overcome the credibility concerns.

Issues

[18] There are two issues that require examination: Was there a reasonable apprehension of bias so that the Member ought to have recused herself, and was the decision on the merits unreasonable?

Analysis

A. *Reasonable Apprehension of Bias*

[19] Whether there was a reasonable apprehension of bias is a question of law and the review of this issue is conducted on the standard of correctness: *Kanto v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1049.

[20] The law of reasonable apprehension of bias was recently considered by the Supreme Court of Canada in *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25. The Supreme Court of Canada reiterated the test previously articulated by it as follows at paras 20 and 24:

... what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly. [Citation omitted; *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394, per de Grandpré J. (dissenting)]

...

For adjudication to be accepted, litigants must have confidence that the judge is not influenced by irrelevant considerations to favour one side or the other": "The Limits to Judges' Free Speech: A Comment on the Report of the Committee of Investigation into the Conduct of the Hon. Mr. Justice Berger" (1984), 29 *McGill L.J.* 369, at p. 389.

[21] There is a strong presumption of judicial impartiality that is not easily displaced and accordingly, the test for a reasonable apprehension of bias requires a "real likelihood or probability of bias": see *Arsenault-Cameron v Prince Edward Island*, [1999] 3 SCR 851, at para 2.

[22] In this case, in addition to the events recited surrounding the disclosure of the document and the lodging of a complaint against the Member, the applicant says that the Member's conduct during the hearing, her selective use of the documentary evidence, her microscopic examination of inconsistencies, and her finding that the claim was manifestly unfounded, all support her submission that there is a reasonable apprehension of bias on the Member's part.

[23] The jurisprudence is clear that when considering whether there is a reasonable apprehension of bias, the conduct of the entire proceeding must be examined in a careful and thorough manner. The record must be considered in its entirety to ascertain whether the cumulative effect of any transgressions or improprieties lead to the apprehension of bias.

[24] During her submissions, counsel stated that a reading of the transcript and the decision leads to the view that the Member was biased, and that she failed to consider the evidence before her with an open mind.

[25] I have carefully read the transcript of the hearing and I am unable to conclude that it and the decision reached lead to a reasonable apprehension of bias on the part of the Member.

During the first day of hearing, and before the disclosure to the applicant of his sister's narrative, the Member diligently directed questions to Mr. Ali in regard to various areas he now uses to support his submission. These include the following:

- The lack of a birth certificate for the dead son;
- The discrepancy between saying the attack occurred the next day and "a couple of days" in the Basic of Claim [BOC];
- That other paragraphs of the BOC were amended but not that referencing "a couple of days;"
- Why he did not proceed immediately to the police to report the kidnapping;
- That he testified that the intruders had a hand gun but the police report says it was an automatic weapon;
- The discrepancies between his evidence and the police report as to when he reported the assault and kidnapping;
- That there is no mention of Mr. Merchant's name on the police report as the suspected instigator of the kidnapping and assault; and
- The discrepancies in the dates on the translated documents.

[26] The fact that many of these issues were relied on to support the finding that Mr. Ali was not credible and that some of the submitted documents were fraudulent cannot support a bias allegation in the absence of a finding that the Member's findings in this regard were without any

foundation. While they may have been unreasonable, as Mr. Ali submits, they do not point to any bias on the Member's part, in the court's view.

B. *Reasonableness of the Decision*

[27] In the court's view, the Member's analysis of the evidence as a whole was unreasonable, and the decision must be set aside on that basis. The Member microscopically dissected the evidence and appears to have done so with a presumption that it was fraudulent, instead of having open-minded view to the veracity of the evidence. She fails to engage in an examination of the evidence that supported the claim of Mr. Ali. She finds an implausibility by considering what she would do but fails to consider the situation from the standpoint of an Ismaili in Pakistan.

[28] The Member failed to engage a reasonable analysis of the narratives provided by Mr. Ali's siblings which appear to speak to the heart of the persecution alleged by him. Rather, she writes that although she could have done so, "they are only peripherally germane to the allegations of the claimant and his personal risk." Specifically, she fails to engage in an examination of how it could be that three other panels had accepted claims from three members of Mr. Ali's family based on their of persecution by Mr. Merchant, when she did not in this case, even though he alleged the same risk.

[29] The Member takes issue with deficiencies in the police report and minor variances with the applicant's evidence, without considering them in light of the objective evidence of poor police work in Pakistan. She appears to have approached the examination with a view that the

police report had to be accurate and exact, when the evidence in the country condition documents shows that is often not the case.

[30] The Member makes plausibility findings, in what is not the clearest of cases. For example, she finds it implausible that Mr. Ali first went to the hospital after the attack with his wife, instead of going to the police to report the attack and kidnapping. She did not properly address the evidence of Mr. Ali that he would have had to wait hours at the police station (and in fact did when he later went to make his report) because he was Ismaili. She also ignored the fact that his wife was so severely injured in the attack that she was later hospitalized for three days. I agree with Mr. Ali that the Member viewed his narrative and explanation of these events through a culturally insensitive lens. She imposed her Western view incorrectly on the facts. Regardless, people react differently in stressful situations, and it is far from clear to me that in the situation as was described, it is implausible that a Canadian would not first seek medical help.

[31] The Member unreasonably focused on superficial errors in grammar and spelling to discredit documents. For example, a misspelling of the word “clavicle” as “calvicle” and “stitches” as “stiches” and notes that the “claimant had no explanation for the issues with the documents.” The Member’s own explanation for finding that these errors “diminished the weight” to be given the documents was that the document’s letterhead was in English and was completed by a physician in English. In the court’s assessment, minor typographical errors of this nature, whether found in a Pakistani medical report, a judgment of the Federal Court, or indeed reasons of a Member of the RPD, cannot be reasonably used to suggest that the document may be fraudulent, as was done in this case.

[32] The Member scrutinized the manner in which Mr. Ali obtained his son's birth certificate but failed to recognize or do so in light of the objective evidence that in Pakistan birth certificates are voluntary and are not uniformly kept.

[33] The most troubling aspect of the decision under review is the Member's failure to examine the risk to the Ismaili within the risk to its larger sect, the Shia Muslims. Ismailis are a minority within a larger minority but have the same risk as a minority religion. The Member writes that the "persecution of Shias is something different than persecution faced by Ismailis, although Ismailis are a sub-sect of the Shias. The panel has little difficulty accepting that mainstream Shias are persecuted." She reaches the conclusion that while the Shia are persecuted, its sub-sect, the Ismaili, is not, based on her conclusion that there are only two references to Ismailis being targeted in Pakistan in the national documentation package. From this she concludes that "the Ismaili community had previously been shielded from the religious-based violence that happens in Pakistan."

[34] I agree with the submissions of the applicant at paragraphs 12 to 22 that the Member's findings in this regard are unreasonable because it ignores and fails to address documentary evidence to the contrary. Specifically, it ignores statements such as the following found in the article 'Pakistan's Shia genocide 101:' "[T]he militant anti-Shia organizations see all Shia as just Shia and do not care about what subsect they come from. It is the overriding Shia belief which is the cause of their killing. All Shia of Pakistan have been victim of persecution."

[35] In light of this observation, the court accepts the submission of the applicant that “while some minorities, such as Shias, receive much more attention and media coverage, the lack of specific reference to Ismaili does not support the ... inference that they have been shielded from persecution.”

[36] Having found the decision to be unreasonable, it will be set aside and the claim for protection will be determined by a different Member of the RPD. Neither party proposed a question for certification, nor is there one on these facts.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is allowed, the decision is set aside, the applicant's claim for refugee status or protection is to be determined by a differently constituted panel, and no question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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