Date: 20060814

Docket: IMM-6877-05

Citation: 2006 FC 965

Montréal, Quebec, the 14th day of August 2006

PRESENT: THE HONOURABLE MR. JUSTICE BLAIS

BETWEEN:

HAMIDOU THIAW and
FATY MAMADOU NDIAYE

Applicants

and

MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application under section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) for judicial review of the decision of the Immigration and Refugee Board, Refugee Protection Division (the Board), dated October 21, 2005, determining that Hamidou Thiaw and his wife Faty Mamadou Ndiaye (the applicants) were not Convention refugees or persons in need of protection under sections 96 and 97 of the Act.

RELEVANT FACTS

[2] The applicants are citizens of the Islamic Republic of Mauritania (Mauritania). Hamidou Thiaw (the principal applicant) claims to be a member of the Fulani ethnic group. In 1989, at the time of the political events that caused millions of black Africans to flee to Senegal, the applicant's wife was forced to leave the country. The principal applicant says that he had to travel to Senegal and then to Gambia to see his wife and children, who were born outside Mauritania. His wife returned to Mauritania in 1992.

[3] The principal applicant claims that on several occasions in 1987, 1991 and 1999, he was arbitrarily arrested and was detained and beaten by the police because he was suspected of being a member of the illegal organization Front de Libération des Africains de Mauritanie (FLAM). In 1999, the principal applicant says, he worked on a committee in the village where he was born, Niakwar, whose mission it was to make representations to the authorities to assist citizens to recover the goods and property belonging to them that had been confiscated in their absence. The applicant says that he was arrested at a village meeting on May 27, 1999, and detained in prison for three months, succeeding in escaping on August 16, 1999, and that he travelled to the capital, Nouakchott, where he began his efforts to leave the country.

[4] After obtaining a new passport on August 29, 1999, and an American visa on September 6, 1999, the principal applicant left Mauritania on December 20, 1999, and went to the United States.

Because his visitor visa had expired, the principal applicant had to leave the United States voluntarily. He then claimed refugee status, in April 2000, and his claim was rejected a second time in 2004. His wife had joined him in the United States on November 16, 2003. They came to Canada together on December 20, 2004, and claimed the protection of Canada, fearing for their safety and their lives if they were to return to their country.

ISSUES

[5] 1. Did the Board err when it found that the applicants had been victims of discrimination?

2. Did the Board err by failing to analyze the applicants' imputed political membership?

3. Did the Board err by failing to analyze the female applicant's situation?

4. Did the Board err when it found that circumstances in Mauritania have changed?

5. Did the Board err by failing to have regard to subsection 108(4) of the Act?

ANALYSIS

1. Did the Board err when it found that the applicants had been victims of discrimination?

[6] The applicants submit that the Board erred in law when it characterized the acts suffered by the applicants as discrimination, those acts having been in reality persecution. The respondent argues that it was not unreasonable for the Board to find that the applicants had suffered discrimination and not persecution.

[7] In *Koken v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 882, at paragraph 15, Madam Justice Eleanor Dawson observed that the identification of persecution is a question of mixed law and fact and the applicable standard of review is reasonableness *simpliciter*:

> The line between persecution and discrimination or harassment may be difficult to establish in a particular circumstance. However, the identification of persecution is a question of mixed fact and law. Where the RPD proceeds "with a careful analysis of the evidence adduced and a proper balancing of the various elements contained therein" the intervention of the Court is not warranted unless the conclusion reached by the RPD is unreasonable. See: *Sagharichi v. Canada (Minister of Employment and Immigration)* (1993), 182 N.R. 398 (F.C.A.) at paragraph 3. As the identification of persecution is a mixed question of fact and law, such a finding is reviewable on the standard of reasonableness *simpliciter*. An unreasonable decision on this standard is one that, "in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it". See: *Canada(Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at paragraph 56.

[8] After hearing the applicants' testimony and reviewing the documentary evidence submitted, the Board found as followed in respect of persecution and discrimination:

> [TRANSLATION]
>
> The panel heard the claimants' testimony. Although it was ambiguous on some points, the panel agrees that the principal claimant was discriminated against by the authorities of his country because he is a member of a black African ethnic group, the Fulani.
>
> …

> According to the existing documentary evidence, black African populations are in fact discriminated against in some aspects of everyday life in Mauritania. However, the documentary evidence does not report any persecution of those black African ethnic groups.

[9] In reviewing the transcript of the hearing and the decision of the Board, I am of the opinion that the Board's finding is not unreasonable.

[10] The applicants assert that during the hearing the Board expressly acknowledged that the principal applicant had been persecuted. The applicants quote a passage from what was said by the Board: [TRANSLATION] "the panel is satisfied that Mr. Thiaw experienced what he experienced; I think it is not necessary to revisit that, but I would like to hear you on the danger of returning … ."

[11] In rereading the hearing transcript, I do not agree with the applicants' argument. Neither the transcript nor the decision says that the Board acknowledged that the principal applicant had been persecuted.

2. Did the Board err by failing to analyze the applicants' imputed political membership?

[12] The applicants assert that the board erred by basing its analysis solely on the applicants' black African ethnicity. The political membership imputed to the applicants should also have been analyzed by the Board.

[13] I do not agree with the applicants' argument. On the question of political membership, the Board said:

> [TRANSLATION]
>
> The claimant made no argument that was credible and trustworthy, based either on his ethnic group or on imputed sympathies with the FLAM, which has now become a party that advocates political dialogue and not armed confrontation, to show that he would be in danger if he were to return to his country.

[14] The Board plainly addressed the question of political membership. I am of the opinion that the Board did not err in analyzing this issue.

3. Did the Board err by failing to analyze the female applicant's situation?

[15] The applicants submit that the Board erred because it failed to analyze the experiences of the female applicant, Faty Ndiaye. The applicants state that in its reasons, the Board made no reference to the sexual assaults and persecution that she suffered. As well, the applicants assert that the Board had an obligation to determine the question of the risk to which she would be subject if she returned to her country.

[16] The female applicant must establish a nexus between the harm she fears and one of the grounds set out in the Convention. In this case, the principal applicant's claim was based on fear of persecution based on his imputed political opinion. The female applicant's claim was based on her membership in a particular social group: her husband's family.

[17] The Board found that the principal applicant had suffered discrimination and not persecution by reason of his imputed political opinion and his membership in the Fulani group. I am of the opinion that the Board had regard to the female applicant's experiences when it determined the principal applicant's claim. That is, because the principal applicant's claim was unfounded, the female applicant's claim was also unfounded. In addition, I find that the Board did in fact examine all of the evidence. It focused on the main issue and, after assessing the evidence, it made a decision. The Board did not refer to each of the alleged incidents in its reasons, but I do not believe that it had to do so, as long as it is clear that it analyzed the essential events. The fact that the Board did not refer to the incidents relating to the sexual assaults alleged by the female applicant and the risks to which she would have been subject if she returned to her country does not show that the Board's finding is arbitrary or unreasonable.

4. Did the Board err when it found that circumstances in Mauritania have changed?

[18] The applicants assert that the Board erred when it found that circumstances in Mauritania have changed. The applicants argue that the Board had no valid basis for finding that circumstances had changed, particularly given the fact that the coup d'état that supposedly changed the circumstances in Mauritania took place on August 2, 2005, and the applicants' hearing was held on October 13, 2005, only two months later.

[19] In *Fernandopulle v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 91, at paragraphs 22 and 23, the Court of Appeal held that the determination of changes in the circumstances in a country is a question of fact:

> The same point is made in *Yusuf v. Canada* (M.E.I.) (1995), 179 N.R. 11 (F.C.A.), per Hugessen J.A., speaking for the Court at paragraph 2:
>
> We would add that the issue of so-called "changed-circumstances" seems to be in danger of being elevated, wrongly in our view, into a question of law when it is, at bottom, simply one of fact. A change in the political situation in a claimant's country of origin is only relevant if it may help in determining whether or not there is, at the date of the hearing, a reasonable and objectively foreseeable possibility that the claimant will be persecuted in the event of return there. That is an issue for factual determination and there is no separate legal "test" by which any alleged change in circumstances must be measured. The use of words such as "meaningful", "effective" or "durable" is only helpful if one keeps clearly in mind that the only question, and therefore the only test, is that derived from the definition of Convention Refugee in s. 2 of the Act: does the claimant now have a well-founded fear of persecution? Since there was in this case evidence to support the Board's negative finding on this issue, we would not intervene.
>
> The principle established by these cases is correctly summarized as follows in paragraph 10 of the reasons of the judge in this case:
>
> I agree with the Respondent that past persecution is insufficient of itself to establish a fear of future persecution, although such persecution is capable of forming the foundation for present fear. With respect to the impact of changed country conditions, the Federal Court of Appeal has indicated that there is no separate legal test to be applied when considering a Convention refugee claim where there has been a change in country conditions in an applicant's country of origin, and that the only issue to be determined is the factual question of whether, at the time of the hearing of the claim, there is a well-founded fear of persecution in the event of return *(Yusuf* v. *Canada (M.E.I.)* (1995), 179 N.R. 111 at p. 12 (F.C.A.). ...

[20] There is a presumption that the panel considered all the evidence before it (*Taher v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. 1433). Based on the documentary evidence, the Board noted the following facts:

> [TRANSLATION]
>
> During the 1990s, under pressure from the international community, Mauritania apparently made efforts to institute a multi-party system and free elections. Some 15 political parties were recognized, and three of them apparently ran candidates in the November 2003 presidential election.
>
> …
>
> As well, a number of political movements were established during the 90s to challenge government policy and support the cause of black Africans, the most representative of those movements being FLAM (Force de Libération Africaine de Mauritanie). However, according to the documentary evidence, that movement gradually abandoned armed struggle in favour of achieving a peaceful political solution modeled on the Belgian, Canadian or South African approach.
>
> …
>
> In August 2004, the regime of President Ould Sid Ahmed Taya was overthrown in a bloodless coup d'état led by Ely Ould Mohamed Vall. According to the documentary evidence filed by the claimant, despite the fact that the new president had taken power by force, he stated that he wanted Mauritania to have a democratically elected government in 2007. However, Mr. Ely Vall is quoted as having declared a general amnesty, covering all participants in the 2003 coup d'état who had been imprisoned and charged with treason by his predecessor, Mr. Taya. Numerous political prisoners jailed by the former regime were released "in a spirit of tolerance and reconciliation".
>
> …

> The panel is of the opinion that despite the short time the government has been in power, there seems to have been a significant change in circumstances.

[21] The Board assessed the evidence and found that there had been a change in the political situation in the applicants' country of origin. The Board found that this change showed that at the time of the hearing there was no reasonable and objectively foreseeable possibility that the applicants would be persecuted if they were to return to their country. In my opinion, intervention by this Court to disturb that finding is not warranted.

5. Did the Board err by failing to have regard to subsection 108(4) of the Act?

[22] The applicants assert that the Board erred by failing to have regard to subsection 108(4) of the Act and the fact that there were compelling reasons in their case. Paragraph 108(1)(*e*) of the Act provides that a claim for refugee protection shall be rejected and a person is not a Convention refugee or a person in need of protection where the reasons for which the person sought refugee protection have ceased to exist. Subsection 108(4) provides that paragraph 108(1)(*e*) does not apply, however, to a person who establishes that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment (*Naivelt v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1261, at paragraph 35).

[23] In *Brovina v. Canada (Minister of Citizenship and Immigration),* 2004 FC 635, at paragraph 5, Madam Justice Carolyn Layden-Stevenson stated, in reference to the compelling reasons analysis:

> For the board to embark on a compelling reasons analysis, it must first find that there was a valid refugee (or protected person) claim and that the reasons for the claim have ceased to exist (due to changed country conditions). It is only then that the Board should consider whether the nature of the claimant's experiences in the former country were so appalling that he or she should not be expected to return and put himself or herself under the protection of that state.

[24] The applicants argue that because of the appalling persecution they suffered, the Board had to consider whether there were compelling reasons for them not to return to Mauritania. Notwithstanding the discrimination the applicants suffered, I am not persuaded that the Board had to consider the compelling reasons exception. In this case, there was no finding that persecution occurred in the past. Where there is no finding of past persecution, subsection 108(4) cannot be triggered (*Kudar v. Canada (Minister of Citizenship and Immigration),* 2004 FC 648).

[25] For all these reasons, I find that the applicants have not satisfied me that intervention by this Court is warranted.

[26] The parties submitted no question for certification.

JUDGMENT

- The application for judicial review is dismissed;
- No question will be certified.

"Pierre Blais"
Judge

Certified true translation

Brian McCordick, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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