

Date: 20071017

Docket: IMM-3001-06

Citation: 2007 FC 1060

Toronto, Ontario, October 17, 2007

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

**MD ABUL BASHAR
and SHAHEDA AKHTER**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] In 2006, a panel of the Immigration and Refugee Board dismissed refugee claims advanced by Mr. Bashar and Ms. Akhter. Their claims were heard jointly because they are spouses; they married in Canada shortly after arriving separately from Bangladesh in 2003. They advanced similar grounds for fearing political persecution in Bangladesh although they say they did not know one another before they met in Canada.

[2] At a hearing on December 5, 2005, amongst the evidence before the Board were documents that had been seized from the Canada Customs Mail Centre in 2004 and disclosed to the applicants several months before the hearing. The applicants filed an affidavit from Ms. Akhter's father in

response to that evidence. At the hearing, the applicants objected to the introduction of the seized evidence on grounds of privilege and a violation of the *Canadian Charter of Rights and Freedoms*. The Board adjourned the hearing in order to allow proper written notice of the issues to be given to the Minister of Citizenship and Immigration and a Notice of Constitutional Question to be served. Counsel for the applicants undertook to provide the necessary documents by December 12, 2005. The hearing was rescheduled for Wednesday, March 22, 2006.

[3] Despite written reminders, counsel for the applicants did not serve the Notice of Constitutional Question until Monday, March 13, 2006. He filed further written materials in support of his motion on Friday, March 17, 2006. Counsel for the Minister requested a further adjournment of the hearing in order to prepare a proper response. The Board convened the parties on the date scheduled for the hearing and heard their submissions on the question whether it should entertain the applicants' legal arguments on the disputed evidence. The Board concluded that it would not hear those arguments because the applicants had failed, without explanation, to comply with the Board's Rules. The Board proceeded to hear the merits of the applicants' refugee claims and dismissed them for want of credible evidence. In doing so, it considered the disputed evidence filed by the Minister, as well as the applicants' responding evidence.

[4] The applicants argue that they were treated unfairly by the Board and that the Board failed to consider important evidence supporting their claims. However, I can find no basis for overturning the Board's decision and must, therefore, dismiss this application for judicial review.

I. Issue

1. Did the Board treat the applicants unfairly?
2. Did the Board err in its treatment of the evidence?

II. Analysis

1. *Did the Board treat the applicants unfairly?*

[5] The applicants argue that the Board unfairly refused to consider their legal arguments and, in doing so, displayed bias against them.

[6] In deciding not to hear the applicants' constitutional argument, the Board relied on Rule 59 of the *Refugee Protection Division Rules*, (SOR/2002-228, see Annex). Rule 59(4) provides that a Notice of Constitutional Question must be received by the intended recipients no later than ten days before the day the constitutional argument will be made. The applicants served their notice nine days before the hearing. Their written argument was served five days in advance of the hearing, on a Friday, three months after it was promised.

[7] In the circumstances, I cannot see any unfairness in the Board's decision. In order to deal with the issues properly, the Board would have had to adjourn the hearing again after already adjourning it for three months to accommodate the applicants. Under its Rules, the Board has the power to extend or shorten a time limit (Rule 69). Here, the Board agreed to a time frame that was

proposed by the applicants' counsel. To conclude that the applicants had not provided timely notice of the issues they wished to raise was not unfair.

[8] The applicants also argue that the Board should have allowed them to make an argument based on common law. From the record, I see that the Board was concerned that the Minister be given notice of the issues the applicants wished to raise, whether they involved a constitutional question or not. While a party to the proceedings, the Minister was not represented at the hearing in December 2005 when the applicants first raised these issues. The Board felt it could not proceed without the Minister's having received notice and an opportunity to make proper submissions. On that basis, as well as counsel's undertaking, the Board granted an adjournment. The Board pointed out to counsel that, under the Rules, he should have provided written notice of his application even if it was not based on a constitutional argument (Rules 43 and 44). Again, in the circumstances, I cannot find any unfairness in the Board's decision.

[9] Finally, the applicants submit that the Board's conduct gave rise to a reasonable apprehension of bias. I have reviewed the transcripts of the proceedings and see no basis whatsoever for this submission. On one occasion, the applicant's counsel stated that he did not appreciate the Board's "tone". This is an inadequate basis for a claim of reasonable apprehension of bias.

2. Did the Board err in its treatment of the evidence?

[10] The Board noted a number of grounds for disbelieving the applicants' versions of events. However, it stated that its primary basis for dismissing their claims arose from the seized documents.

[11] The Board noted that, in December 2004, the applicants supplied a number of documents in support of their claims. Among them were letters of support from the Awami League (AL) and Ms. Akhter's lawyer in Bangladesh. Earlier that year, the Minister had seized documents sent to the applicants by Ms. Akhter's father and which included a letter from the AL, some blank AL stationery, and a blank sheet of Ms. Akhter's lawyer's letterhead with a handwritten date and a signature at the bottom of the page. A covering letter from Ms. Akhter's father provided instructions on how to use the documents he provided to advance their claims.

[12] The Board compared the seized documents to the other evidence tendered by the applicants and concluded that the applicants had clearly set about to produce fraudulent documents in support of their claims. As a result, it gave no weight to the documents on which the applicants relied. I can find no error in the Board's interpretation of the evidence before it.

[13] The applicants argued that there was some additional documentary evidence supporting their claims that the Board should have considered, notwithstanding its rejection of other documents. Again, I see no error in the Board's conclusion that the applicants' credibility had been so seriously undermined that it could not give any weight to the remainder of the evidence.

[14] Accordingly, I must dismiss this application for judicial review. I will entertain any submissions regarding a question for certification that are filed within 10 days of this judgment.

JUDGMENT

THIS COURT'S JUDGMENT IS THAT:

1. The application for judicial review is dismissed.
2. Any submissions regarding a certified question shall be filed within 10 days of this judgment.

“James W. O’Reilly”

Judge

Annex

Refugee Protection Division Rules, SOR/2002-228

Règles de la Section de la protection des réfugiés, DORS/2002-228

APPLICATIONS

DEMANDES

General provision

Disposition générale

43. Unless these Rules provide otherwise

43. Sauf indication contraire des présentes règles :

(a) a party who wants the Division to make a decision on any matter in a proceeding, including the procedure to be followed, must make an application to the Division under rule 44;

a) la partie qui veut que la Section statue sur toute question soulevée dans le cadre d'une procédure, notamment sur le déroulement de celle-ci, lui en fait la demande selon la règle 44;

(b) a party who wants to respond to the application must respond under rule 45; and

b) celle qui veut répondre à la demande le fait selon la règle 45;

(c) a party who wants to reply to a response must reply under rule 46.

c) celle qui veut répliquer à la réponse le fait selon la règle 46.

HOW TO MAKE AN APPLICATION

COMMENT FAIRE UNE DEMANDE

Form of application and time limit

Forme de la demande et délai

44. (1) Unless these Rules provide otherwise, an application must be made in writing and without delay. The Division may allow a party to make an application orally at a proceeding if the party with reasonable effort could not have made a written application before the proceeding.

44. (1) Sauf indication contraire des présentes règles, toute demande est faite sans délai par écrit. La Section peut permettre que la demande soit faite oralement pendant une procédure si la partie n'aurait pu, malgré des efforts raisonnables, le faire par écrit avant la procédure.

Content of application

Contenu de la demande

(2) Unless these Rules provide otherwise, in a written application the party must

(2) Dans sa demande écrite, sauf indication contraire des présentes règles, la partie :

(a) state what decision the party wants the Division to make;

(b) give reasons why the Division should make that decision; and

(c) if there is another party and the views of that party are known, state whether the other party agrees to the application.

a) énonce la décision recherchée;

b) énonce les raisons pour lesquelles la Section devrait rendre cette décision;

c) indique si l'autre partie, le cas échéant, consent à la demande, dans le cas où elle connaît l'opinion de cette autre partie.

Affidavit or statutory declaration

(3) Unless these Rules provide otherwise, any evidence that the party wants the Division to consider with a written application must be given in an affidavit or statutory declaration that accompanies the application.

Affidavit ou déclaration solennelle

(3) Sauf indication contraire des présentes règles, la partie énonce dans un affidavit ou une déclaration solennelle qu'elle joint à sa demande écrite tout élément de preuve qu'elle veut soumettre à l'examen de la Section.

Providing the application to another party and the Division

(4) A party who makes a written application must provide

(a) to any other party, a copy of the application and any affidavit or statutory declaration; and

(b) to the Division, the original application and any affidavit or statutory declaration, together with a written statement of how and when the party provided the copy to any other party.

Transmission de la demande

(4) La partie qui fait une demande par écrit transmet :

a) à l'autre partie, le cas échéant, une copie de la demande et, selon le cas, de l'affidavit ou de la déclaration solennelle;

b) à la Section, l'original de la demande et, selon le cas, de l'affidavit ou de la déclaration solennelle, ainsi qu'une déclaration écrite indiquant à quel moment et de quelle façon une copie de ces documents a été transmise à l'autre partie, le cas échéant.

Notice of constitutional question

59. (1) A party who wants to challenge the constitutional validity, applicability or operability of a legislative provision must complete a notice of constitutional question.

Avis de question constitutionnelle

59. (1) La partie qui veut contester la validité, l'applicabilité ou l'effet, sur le plan constitutionnel, d'une disposition législative établit un avis de question constitutionnelle.

Form and content of notice

(2) The party must provide notice using either Form 69, "Notice of Constitutional Question", set out in the *Federal Court Rules, 1998*, or any other form that includes

- (a) the name of the party;
- (b) the Division file number;
- (c) the date, time and place of the hearing;
- (d) the specific legislative provision that is being challenged;
- (e) the relevant facts relied on to support the constitutional challenge; and
- (f) a summary of the legal argument to be made in support of the constitutional challenge.

Providing the notice

(3) The party must provide

- (a) a copy of the notice of constitutional question to the Attorney General of Canada and to the attorney general of every province and territory of Canada, in accordance with section 57 of the *Federal Court Act*;
- (b) a copy of the notice to the Minister;
- (c) a copy of the notice to any other party; and

Forme et contenu de l'avis

(2) La partie établit son avis soit selon la formule 69 des *Règles de la Cour fédérale (1998)* intitulée « Avis de question constitutionnelle », soit selon toute autre formule comportant :

- a) le nom de la partie;
- b) le numéro du dossier de la Section;
- c) les date, heure et lieu de l'audience;
- d) la disposition législative contestée;
- e) les faits pertinents à l'appui de la contestation;
- f) un résumé du fondement juridique de la contestation.

Transmission de l'avis

(3) La partie transmet :

- a) au procureur général du Canada et au procureur général de chaque province et territoire du Canada, en conformité avec l'article 57 de la *Loi sur la Cour fédérale*, une copie de l'avis;
- b) au ministre une copie de l'avis;
- c) à toute autre partie une copie de l'avis;
- d) à la Section l'original de l'avis, ainsi qu'une déclaration écrite indiquant à quel moment et de quelle façon une copie de

(d) the original notice to the Division, together with a written statement of how and when a copy of the notice was provided under paragraphs (a) to (c).

l'avis a été transmise aux destinataires visés aux alinéas a) à c).

Time limit

(4) Documents provided under this rule must be received by their recipients no later than 10 days before the day the constitutional argument will be made.

Délai

(4) Les documents transmis selon la présente règle doivent être reçus par leurs destinataires au plus tard dix jours avant la date à laquelle la question constitutionnelle doit être débattue.

Powers of the Division

69. The Division may

(a) act on its own initiative, without a party having to make an application or request to the Division;

(b) change a requirement of a rule;

(c) excuse a person from a requirement of a rule; and

(d) extend or shorten a time limit, before or after the time limit has passed.

Pouvoirs de la Section

69. La Section peut :

a) agir de sa propre initiative sans qu'une partie n'ait à lui présenter une demande;

b) modifier une exigence d'une règle;

c) permettre à une partie de ne pas suivre une règle;

d) proroger ou abrégé un délai avant ou après son expiration.

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-3001-06

STYLE OF CAUSE: MD ABUL BASHAR, ET AL v. THE MINSITER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: June 12, 2007

**REASONS FOR JUDGMENT
AND JUDGMENT:** O'REILLY J.

DATED: October 17, 2007

APPEARANCES:

Amina Sherazee FOR THE APPLICANTS

Alexis Singer FOR THE RESPONDENT

SOLICITORS OF RECORD:

ROCCO GALATI LAW FIRM
Professional Corporation FOR THE APPLICANTS
Toronto, On.

JOHN H. SIMS, Q.C. FOR THE RESPONDENT
Deputy Attorney General of Canada
Toronto, ON