Date: 20080205

Docket: IMM-7715-05

Citation: 2008 FC 137

Ottawa, Ontario, February 5, 2008

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

KHADIM HUSSAIN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] [35] The Board must assess the issue of an IFA in light of its findings regarding the credibility of the witness. The Board's findings of fact on the issue of IFA were not perverse or capricious.

[36] The test with respect to an IFA is two pronged: the Board must be satisfied, on a balance of probabilities, that there is no serious possibility of the claimant being persecuted in the proposed IFA and that in all the circumstances, including the circumstances particular to those claimants, the conditions in the proposed IFA are such that it is not unreasonable for the applicants to seek refuge there. (*Rasaratnam*; *Thirunavukkarasu*; *Mohammed*)

(As specified in *Aslam v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 189, [2006] F.C.J. 264 (QL).)

JUDICIAL PROCEDURE

[2] On December 22, 2005, the Applicant filed an application for leave and for judicial review against a decision rendered, on November 28, 2005, by the Refugee Protection Division (RPD) of the Immigration and Refugee Board (IRB), which found the Applicant not to be a Convention refugee or a person in need of protection.

FACTS

[3] The Applicant, Mr. Khadim Hussain, is a 31 year old male citizen of Pakistan. He was born in Malkanwala, Mandi Bahaddin, Punjab, Pakistan.

[4] In January 2003, he fell in love with a girl, named “Sugra”. In May 2003, his father died. Due to his traditions, he could not marry for a year after the death of his father. By January 2004, the Applicant’s girlfriend gave birth to a son.

[5] Mr. Hussain had planned to be married on April 12, 2004 by the authority of a Court.

[6] In the meantime, Mr. Hussain had problems of a religious nature. As a Shia Muslim, he was sought by the Sipae Sahaba Pakistan (SSP). In the context, the SSP threatened to kill the Shia leader.

[7] On March 2, 2004, Mr. Hussain participated in a march after which the Shia leader, Syed Ijaz Hussain Naqvi, was killed, subsequent to which Mr. Hussain was beaten by SSP goons.

[8] On March 5, 2004, the SSP asked Mr. Hussain to spy for it. Mr. Hussain refused and went into hiding, fearing consequences from the SSP for not having cooperated with it.

[9] Mr. Hussain departed from Pakistan on May 5, 2004 and arrived at the Toronto airport on May 7, 2004. He applied for refugee status the same day.

[10] On November 28, 2005, the IRB issued a negative decision.

ISSUES

[11] (1) Was the IRB's finding reasonable in its determination that the Applicant could avail himself of an internal flight alternative (IFA)?

(2) Was Guideline 7, concerning the preparation and conduct of a hearing before the RPD, correctly applied?

ANALYSIS

Internal Flight Alternative

[12] Mr. Hussain does not directly challenge the finding that an IFA was available to him in the city of Karachi.

[13] The IRB concluded that police and radical members of the Sunni community would not pursue him outside his local village. It also considered the reasonableness of travelling and living

outside his village. Finally, the IRB established that Mr. Hussain was questioned and given an opportunity to respond as to the availability of an IFA.

[14] Mr. Hussain does not directly challenge the IFA finding which is determinative in this case. In fact, he makes no comment as to the second and third element of the IFA test; however, Mr. Hussain does challenge the basis of the conclusion. (Reference is made to *Aslam*, above.)

[15] Mr. Hussain provided a First Information Report (FIR), dated May 12, 2004 (Exhibit P-13), a letter from his attorney, dated January 7, 2005 (Exhibit P-4), and a warrant of arrest, dated May 27, 2004 (Exhibit P-5), in support of his allegation that Sunni extremists had filed a complaint against him with police.

[16] These documents were deemed to be fraudulent and of no probative value by the IRB.

[17] The IRB noted that the hearing of Mr. Hussain's claim was initially scheduled for February 7, 2005 and was postponed due to Mr. Hussain's illness.

[18] The warrant of arrest issued in May 2004 and the lawyer's letter, dated January 7, 2005, were received by the IRB on Friday, February 4, 2005.

[19] For its part, the FIR, which was issued in May 2004, was filed with the tribunal almost a year later, i.e. on April 26, 2005, recalling from above that the first hearing was scheduled to take place on February 7, 2005.

[20] When confronted with the late filing of these documents, Mr. Hussain indicated the he had asked his brother to secure these documents but that his brother had forgotten.

[21] This explanation was not deemed credible as Mr. Hussain's brother and his counsel in Pakistan met in either May or June 2004 and that FIRs are readily available upon request from counsel.

[22] On this issue, Mr. Hussain argues that he should have been advised as to where the IRB found its information as to the ease of securing FIRs.

[23] Mr. Hussain's response on this issue was that his brother forgot to seek these documents, not that a government authority denied them.

[24] Furthermore, the lawyer's letter or Mr. Hussain, report no difficulty in obtaining the FIR. The issue, in this case, is not the timely issuance of documents by the authorities of Pakistan, but rather, the time of the attempt by Mr. Hussain to obtain these documents. There is no breach of natural justice in the case at bar.

[25] Moreover, Mr. Hussain initially indicated that the meeting between his brother and his counsel in Pakistan was held on May 9, 2004. As noted by the IRB, this is chronologically impossible since this predates both the FIR and the warrant of arrest issued against Mr. Hussain.

[26] Mr. Hussain then responded “June 2004”. While this is chronologically possible, this does not serve to explain why documents, central to the claim, were not obtained earlier.

[27] Mr. Hussain gives no explanation for this contradictory testimony, save perhaps for paragraph 9 of his affidavit where he indicates that he had not understood the question. This does not render unreasonable the factual conclusion of the IRB on this issue.

[28] Given Mr. Hussain’s problematic testimony on this issue, the country documentation on the accessibility of FIRs and the problem of fraudulent documents (page 121 of the Court Record), the IRB found that Exhibits P-4, P-5 and P-13 were fraudulent and of no probative value.

[29] With regard to fraudulent documents from Pakistan, this Court has noted the presence of evidence before the IRB on this issue. (*Ranjha v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1491, [2004] F.C.J. No. 1827 (QL); *Khan v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 44, [2005] F.C.J. No. 912 (QL).)

[30] The situation as to delay in providing documents and the presence of forged documents in Pakistan bears much resemblance with that in *Ranjha*, above:

> [30] Furthermore, the Board dismissed the authenticity of the FIR, arrest warrant and Proclamation produced by Mr. Ranjha. By way of reasons, the Board cites the delay in production of these materials (about eight months after the Applicant's arrival in Canada) and the fact that document forgery is well-known to be widespread in Pakistan. Mr. Ranjha's explanation was that he only fled Pakistan in 2001, three years after he was initially tortured (which story the Board does not find credible either, at any rate), because he learned an FIR, warrant of arrest and proclamation had been issued against him. **The Board did have evidence before it that there are high levels of forgery of official court documents such as warrants for arrest in Pakistan; therefore, it was open to the Board to take that into consideration when assessing the credibility of this evidence. The Board also found the claimant's explanation for the delay in requesting and obtaining copies of the documents to be unreasonable, and that this delay put the authenticity of the documents into question. I do not find in these assessments a reason to intervene.** (Emphasis added.)

Guideline 7 - Concerning preparation and conduct of a hearing in the Refugee Protection Division

[31] Section 19 of Guideline 7 provides for the standard practice to be followed as to the order of questioning before the IRB, essentially the Refugee Protection Officer (RPO) or, in his absence, the Board member begins questioning and is followed by counsel for the refugee claimant:

3.2 Questioning	**3.2 Interrogatoires**
19. In a claim for refugee protection, the standard practice will be for the RPO to start questioning the claimant. If there is no RPO participating in the hearing, the member will begin, followed by counsel for the claimant. Beginning the hearing in this way allows the claimant to quickly understand what evidence the member needs from the claimant in order for the claimant to prove his or her case.	**19.** Dans toute demande d'asile, c'est généralement l'APR qui commence à interroger le demandeur d'asile. En l'absence d'un APR à l'audience, le commissaire commence l'interrogatoire et est suivi par le conseil du demandeur d'asile. Cette façon de procéder permet ainsi au demandeur d'asile de connaître rapidement les éléments de preuve qu'il doit présenter au commissaire pour établir le bien-fondé de son cas.

[32] This order of questioning was challenged by Mr. Hussain in the form of an objection which was denied by the Board member. (Tribunal Record, pp. 311-312.)

[33] On May 25, 2007, the Federal Court of Appeal rendered decisions in *Thamotharem* and *Benitez*. In *Benitez*, the Court noted that there is no constitutional right for claimants to be questioned first by their counsel, and that accordingly, Guideline 7 does not breach the duty of fairness:

> [16] Substantially for the reasons given by Justice Mosley (at paras. 47-67) for finding that there is no constitutional right for claimants to be questioned first by their own counsel, as well as for the reasons given in our decision in *Thamotharem* (at paras. 34-51) for concluding that Guideline 7 does not prescribe a procedure which is in breach of the duty of fairness, it is my opinion that Guideline 7 does not violate claimants' right to participate at an RPD hearing conducted in accordance with the principles of fundamental justice.

(*Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198, [2007] F.C.J. No. 734 (QL); *Benitez v. Canada (Minister of Citizenship and Immigration)*, [2007] 1 F.C.R. 107, [2006] F.C.J. 631 (QL), paras. 16 and 38; Leave to appeal to the Supreme Court of Canada was denied in both cases on December 13, 2007: *Benitez v. Canada (Minister of Citizenship and Immigration)*, [2007] SCCA 391 and *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, [2007] SCCA 394.)

[34] As well, the Federal Court of Appeal found that the independence of RPD members is not compromised by Guideline 7. The Court held:

> [88] In my opinion, therefore, the evidence in the present case does not establish that a reasonable person would think that RPD members' independence was unduly constrained by Guideline 7, particularly in view of: the terms of the Guideline; the evidence of members' deviation from "standard practice"; and the

> need for the Board, the largest administrative agency in Canada, to attain an acceptable level of consistency at hearings, conducted mostly be single members.
>
> [89] Adjudicative "independence" is not an all or nothing thing, but is a question of degree. The independence of judges, for example, is balanced against public accountability, through the Canadian Judicial Council, for misconduct. The independence of members of administrative agencies must be balanced against the institutional interest of the agency in the quality and consistency of the decisions, from which there are normally only limited rights of access to the courts, rendered by individual members in the agency's name.

[35] Since the judgments of the Federal Court of Appeal, the matter on the issue of Guideline 7 has been determined to have been resolved. (*Ali v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 309, [2007] F.C.J. No. 1269 (QL), para. 1; *Jacobs v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 646, [2007] F.C.J. No. 861 (QL), para. 6.)

CONCLUSION

[36] For all of the above reasons, the IRB decision is not patently unreasonable and, further to analysis, is even considered to be reasonable; therefore, the application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS that

1. The application for judicial review be dismissed;

2. No serious question of general importance be certified.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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