Date: 20080228

Docket: IMM-2018-07

Citation: 2008 FC 263

BETWEEN:

SAMIRA WILSON BINYAMIN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

GIBSON J.

INTRODUCTION

[1] These reasons follow the hearing at Toronto on the 19th of February, 2008 of an application for judicial review of a decision of the Refugee Protection Division (the "RPD") of the Immigration and Refugee Board wherein the RPD determined the Applicant not to be a Convention refugee and not to be a person otherwise in need of the protection of Canada. The decision under review is dated the 11th of April, 2007.

BACKGROUND

[2] The Applicant is a citizen of Iraq. She bases her claim for protection from removal to Iraq on her nationality, Assyrian, her religion, Christian, and her political opinion alleging that she is

against the American "occupation" and the current Iraqi government. Further, the Applicant also fears the "insurgents". The Applicant claims a fear of removal to Australia "…because of the abuse I have suffered [at] the hands of my husband in Australia".

[3] The Applicant alleges that she was born into a very conservative and religious family in Iraq. She is not well educated. She attests that this reality is by reason of her father's conservatism.

[4] The Applicant, on the 24th of March, 2004 married one Sargon Kenna, an Iraqi Assyrian and a citizen of Australia. Shortly after the wedding, the Applicant's husband returned to Australia on the understanding that the Applicant would follow him there.

[5] In early April, 2004, the Applicant was the subject of an attempted kidnapping. By reason of that event, the Applicant attests that her parents sent her to Syria where she remained for almost two (2) years. On the 18th of March, 2006, the Applicant left Syria for Australia.

[6] Unfortunately, the Applicant's brief stay in Australia, with assured temporary residence, did not live up to her expectations. She found her husband to be unemployed, living on social assistance and living a lifestyle that she could not condone. The Applicant's husband was, according to the Applicant, "…very controlling and abusive to [her] verbally and physically". She relates in her Personal Information Form narrative that her husband beat her on three (3) occasions during the short period that she remained in Australia.

[7] A friend of the Applicant and her husband advised that he was planning to get married in Canada and invited them to attend the wedding. The Applicant and her husband accepted the invitation and arrived in Canada on the 18th of June, 2006, exactly three (3) months after the Applicant had arrived in Australia.

[8] The Applicant and her husband attended the wedding on the 24th of June, 2006. At the wedding, the Applicant's husband behaved badly. In the result, the Applicant determined to leave her husband and to stay in Canada. Her claim to Convention refugee status or like protection in Canada followed.

[9] The Applicant's husband returned to Australia with her return plane ticket. The Applicant has sought a divorce from her husband.

[10] The Applicant's husband had sponsored her for residence in Australia. She was granted "provisional" residence status on the 27th of February, 2006, shortly before she left Syria for Australia. Her visa read in part:

> Holder(s) permitted to travel to and remain in Australia until notified that the permanent visa application has been decided or until the permanent visa application is withdrawn. Multiple travel.[1]

[11] By letter dated the 21st of November, 2006, the Applicant was advised by a lawyer acting for her husband that her husband's support for her application for more permanent status in

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[1] Tribunal Record, page 82.

Australia would be withdrawn.[2]

[12] By letter dated the 15th of January, 2007, the Applicant was advised by the Australian Department of Immigration and Multicultural Affairs that her husband's support had in fact been withdrawn. She was advised:

> Before a decision is made on your application, you have the opportunity to provide a response [to advice from the Applicant's husband], explaining your current circumstances and the reason for the breakdown of your relationship.
> …
> You may wish to withdraw your application, which must be done in writing. If you do withdraw your application, you will be granted or will already hold a bridging visa which will permit you to remain in Australia for 28 days after your withdrawal. During this period you would be required to depart Australia, unless you had been granted another visa other than the bridging visa mentioned above. If you are outside Australia, you will not be granted a bridging visa.[3]

[13] The Applicant withdrew her application for more permanent residential status in Australia. By letter dated the 12th of March, 2007, the Australian Department of Immigration and Citizenship advised her:

> Thank you for your written advice that you have withdrawn your application. Your application has now been finalised as WITHDRAWN.[4]

[14] I interpret the foregoing notification as signifying that the Applicant, as of the 12th of March, 2007, that is to say before the date of the decision under review, no longer had status in Australia.

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[2] Tribunal Record, page 107.
[3] Tribunal Record, page 109.
[4] Tribunal Record, page 128.

THE DECISION UNDER REVIEW

[15] Early in the reasons for the decision under review, the RPD wrote under the hearing "DETERMINATION":

> After considering all of the evidence, the panel determines that the claimant is not a Convention refugee as she does not have a well-founded fear of persecution for a Convention ground in Canada, nor is she a person in need of protection for the following reasons.
>
> Briefly, the panel finds that the evidence before the panel was that she is a resident of the United States; therefore, exclusion under Article 1 E applies.
>
> The panel finds that the claimant would not face a risk to life, or a risk of cruel and unusual treatment or punishment, or a danger of torture, if she was to return to her country of residence.

[16] Clearly, the reference in the foregoing quotation to the United States is nothing more than a technical error. The reference should have been to Australia, the country of her former, albeit brief residence.

[17] The RPD made no general finding of want of credibility on the part of the Applicant. It did, however, find three (3) discreet elements of her testimony to be implausible and two (2) discreet elements of her testimony not to be credible. There is no cloud cast on the Applicant's testimony regarding her sense of disorientation in Australia, and I am prepared to take judicial notice of the fact that Australian culture is dramatically different from the culture of the middle-eastern countries in which she had lived. Further, she apparently did not speak the language that is dominant in Australia. Equally, no doubt is cast on her testimony that her husband supported her in her interest in coming with him to Canada. Nor is doubt cast on the purpose of their visit to Canada or as to her husband's behaviour in Canada that she alleges constituted the final event leading her determination to leave her husband and to not return to Australia. In essence, in determining the Applicant to be

excluded under Article 1 E of the Convention, the RPD simply determined the Applicant to be "jurisdiction-shopping".

[18] In light of the exclusion decision, the RPD determined not to examine the Applicant's claim for protection against return to Iraq. That being said, the import of the RPD's decision is such that, if it stands, the Applicant now has no alternative but to return to Iraq, although removals to Iraq are "temporarily" suspended.[5]

THE LEGISLATIVE SCHEME

[19] Section 98 of the *Immigration and Refugee Protection Act* [6]excludes from Convention refugee protection and like protection persons referred to in section E or F of Article 1 of the United Nations Convention Relating to the Status of Refugees, signed at Geneva on July 28, 1951, and the Protocol to that Convention, signed at New York on January 31, 1967. Those sections of Article 1 of the Convention are set out in the Schedule to the *Immigration and Refugee Protection Act*.

[20] Article 1 E reads as follows:

E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

E. Cette Convention ne sera pas applicable à une personne considérée par les autorités compétentes du pays dans lequel cette personne a établi sa résidence comme ayant les droits et les obligations attachés à la possession de la nationalité de ce pays.

[5] Citizenship and Immigration Canada, "Temporary Suspension of Removals" (7 December, 2006), online: Fact Sheets on Refugee Issues <http://www.cic.gc.ca/English/about/laws-policy/responses.asp>.
[6] S.C. 2001, c. 27.

THE ISSUES

[21] In the Memorandum of Argument filed in this matter on behalf of the Applicant, counsel for the Applicant identifies two (2) issues which I paraphrase as follows: first, did the Board err by finding that the Applicant was excluded by Article 1 E of the Refugee Convention and secondly, did the RPD exceed its jurisdiction and err in law in assessing the Applicant's claim against Australia? At the hearing before me, counsel for the Applicant restated the issues and subdivided them into three (3). I am satisfied that there is essentially only one issue on this application for judicial review which I would identify broadly as: Did the RPD err in a reviewable manner in determining the Applicant to be excluded under Article 1 E of the Refugee Convention?

ANALYSIS

a) Standard of Review

[22] In *Romero v. Canada (Minister of Citizenship and Immigration)*[7], my colleague Justice Snider, on a judicial review of an exclusion decision involving Article 1 E wrote at paragraph 6 of her reasons:

> The first task before me is to establish a standard of review for the Board's decision on the exclusion issue. The Applicants held permanent resident status, as evidenced by their Permanent Resident Cards. These cards were described as "conditional" in that they expired two years after issuance but could be extended pursuant to the provisions of s. 216 of the U.S. *Immigration and Naturalization Act*. Thus, the Board's decision, in part, required that the Board analyze and interpret relevant provisions of this statute. In my view, this particular aspect of the Board's decision is a question of law that is reviewable on a correctness standard. However, provided that the Board's interpretation of this statute is correct, its findings of whether the Applicants meet the requirements of s. 98 of the *IRPA* have been held to a standard of review of patent unreasonableness…
>
> [citations omitted, emphasis added]

I agree with the foregoing and adopt it as my own.

[7] [2006] F.C.J. No. 647, April 21, 2006.

b) The Burden of Proof

[23] Justice Snider, in her reasons in *Romero*, continued at paragraph 8:

> The recent case law on this issue has established the relevant burden of proof for each party in determining whether Article 1 (E) applies… . Initially, the burden is on the Minister to establish a *prima facie* case that a claimant can return to a country where he or she enjoys the rights of the nationals of that country. At that point, the onus shifts to the claimant to demonstrate why, having allowed the permanent residency to expire, she could not have re-applied and obtained a new permanent resident card .
>
> [citations omitted]

[24] On the facts of this matter, the Minister did not participate before the RPD. The RPD was left to its own devices, apparently without the relevant Australian law before it, on the issue of the Applicant's right of return to Australia on the relevant date. This begs the question as to the "relevant date" for determination of a right of return.

c) The relevant date for determination of a right of return

[25] In *Mahdi v. Canada (Minister of Citizenship and Immigration)*[8], the Federal Court of Appeal addressed the issue of the relevant date for determination of exclusion under article 1E of the Convention. On the facts before it, Justice Pratte, for the Court, wrote at paragraph 12:

> …the real question that the Board has to decide in this case was whether the Respondent was, <u>when she applied for admission to Canada</u>, a person who was still recognized by the competent authorities of the United States as a permanent resident of that country. ….
>
> [emphasis added]

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[8] (1995), 191 N.R. 170 (F.C.A.).

On the facts of this matter, and substituting Australia for "United States" in the foregoing quotation, there can be no doubt that the Applicant had the status of a resident of Australia "…when she applied for admission to Canada", albeit that her visa was of a temporary nature.

[26] In *Canada (Minister of Citizenship and Immigration) v. Manoharan*[9], I commented on the *Mahdi* decision in light of a subsequent decision of this Court in *Canada (Minister of Citizenship and Immigration) v. Choovak*[10]. I wrote at paragraph 28 of my reasons:

> The evidence before the Court indicates that, when the Respondent applied for admission to Canada, to paraphrase the words of Article 1 E of the Convention, he was a person who was recognized by the competent authorities of Germany as having the rights and obligations attached to the possession of the nationality of Germany. That being said, I do not read the words of the *Mahdi* decision as being absolute. I prefer an interpretation of those words that reflects the rationale provided by Justice Rouleau in the *Choovak* decision. While Article 1 E should be read in a manner that precludes the abuse of "jurisdiction shopping", it should also be read, in the words of Justice Rouleau, "…in a more purposive light so as to provide safe-haven to those who genuinely need it…". Such a reading is consistent with the first objective stated in subsection 3(2) of the *Immigration and Refugee Protection Act*, which provides that among the objectives of that *Act* with respect to refugees [is] "…to recognize that the refugee programme is in the first instance about saving lives and offering protection to the displaced and persecuted". That objective was not a stated objective of Canadian Refugee law at the time of either the *Mahdi* or *Choovak* decisions,… That being said, on the very particular facts of this matter, I am satisfied that the "exclusion" decision in favour of the Respondent and his mother was correct and that the *Mahdi* decision is distinguishable by reason of the different factual background that was there at issue and of the newly stated statutory objective just referred to.
>
> [some text omitted]

Counsel for the Applicant in *Manoharan*, there the Minister of Citizenship and Immigration, sought certification on precisely the issue of interpretation of *Mahdi* raised by the foregoing quoted paragraph. I declined to certify the proposed question on the ground that the paragraph in question was "*obiter*" in the context of that decision.

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[9] [2005] F.C.J. No. 1398, August 22, 2005.
[10] [2002] F.C.J. No. 767 (QL).

[27] On this issue in this context, the RPD wrote:

> The first factor to consider is the ability to return and remain in the putative Article 1 E country before this provision can be invoked to exclude from protection under the Refugee Convention. The provision is not limited to a consideration of those countries in which the claimant took up residence as a refugee.
>
> The claimant joined her husband in Australia once she was given permission to enter Australia <u>and subsequent to a sponsorship by her husband</u>.
>
> The panel finds that the claimant is excluded under Exclusion 1 E.
>
> [emphasis added]

[28] While the RPD cites the *Mahdi* decision in conjunction with the first paragraph of the foregoing brief passage, it is not in relation to the element of the *Mahdi* decision of the Federal Court of Appeal that relates to the effective date for determination of the applicability of Article 1 E. Indeed, the RPD ignores the issue of effective date for a determination as well as the concern that I expressed in *Manoharan*, *supra*, regarding the impact of the first stated objective in subsection 3(2) of the *Immigration and Refugee Protection Act*. While I expressed the view that the passage from *Manoharan* quoted above was, in the context of that decision, *obiter*, in refusing to certify a question based on that paragraph, that is not to say that it is for the RPD to ignore entirely the issue of "effective date".

[29] I am satisfied that the issue of effective date is critical to the determination of the applicability of the Article 1 E exclusion on the facts of this matter.

[30] There can be no doubt that the Applicant obtained her conditional Australian visa with the support of her husband and, arguably, only because of the support of her husband. At the time she

applied for protection in Canada, her visa remained in effect, which is to say that she had a right of return and of residence, albeit for a limited period, in Australia. The Applicant's husband withdrew his support for the Applicant's efforts to achieve a permanent resident visa in Australia. In light of that, the Applicant was asked by Australian authorities to indicate her intentions. The Applicant withdrew her application for permanent resident status in Australia. In so doing, it would appear that her temporary resident visa may have expired before her hearing took place before the RPD, which is to say that, as of the date of the hearing before the RPD, and certainly as of the date of the decision under review, she may have had no right of residence in Australia. If such were the case, and if the date of the hearing before the RPD or the date of its decision were indeed the relevant date, the effect of the decision under review would be to leave the Applicant with no right of return other than to Iraq, a nation against which the Applicant claimed protection and which claim was never examined.

CONCLUSION

[31] In light of the foregoing brief analysis, I conclude that the RPD, on whatever standard of review might be applied, erred in a reviewable manner, by conducting a flawed and incomplete analysis, to determine that the Applicant, in her claim for protection, was excluded by Article 1 E of the Refugee Convention. The decision under review will be set aside and this matter will be returned to the RPD for rehearing and redetermination. Given the quotation from *Romero*, above, dealing with the initial burden on the Minister to establish a *prima facie* case that a claimant such as the Applicant can return to a country where he or she enjoys the right of the nationals of that

country, the Respondent may wish to consider whether or not it should take an active role in the rehearing of this matter.

CERTIFICATION OF A QUESTION

[32] At the close of the hearing of this matter, I undertook to provide counsel with an opportunity to make submissions on certification of a question. These reasons will be distributed. Counsel for the Respondent will have ten (10) days from the date of the reasons to serve and file any written submissions. Thereafter, counsel for the Applicant will have seven (7) days to serve and file any responding submissions. The Respondent will then have three (3) days to serve and file any reply submissions.

"Frederick E. Gibson"
JUDGE

Ottawa, Ontario
February 28, 2008

FEDERAL COURT

SOLICITORS OF RECORD

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