

Date: 20080306

Docket: IMM-3150-07

Citation: 2008 FC 305

Ottawa, Ontario, March 6, 2008

PRESENT: The Honourable Mr. Justice Lagacé

BETWEEN:

**ANWAR Tehseen
TEHSEEN Zahira
BUTT Nosheen
BUTT Mohammad Waleed
BUTT Mohammad Bilal**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants seek judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) of a decision of the Refugee Protection Division of the Immigration and Refugee Board (RPD) dated July 10, 2007, which found them not to be Convention refugees or persons in need of protection. The relief sought is that the RPD's decision be quashed.

FACTS

[2] The applicants are citizens of Pakistan and constitute a family unit for whom Tehseen Anwar acts as the principal applicant. Their claim is based on a well-founded fear of persecution on the grounds of the principal applicant's political opinion and membership in a "Group of businessmen victims of corruption".

[3] The principal applicant claims to have owned a leather business in Sialkot, Pakistan and sold goods on credit to Mumtaz Cheema, a relative of the Industry Minister and well known in Sialkot and the leather business as an important exporter. The principal applicant states that following his attempt to collect his due from Cheema, he was threatened, beaten, falsely charged with rape and detained by the police who were allegedly acting on behalf of his debtor. The principal applicant claims to have escaped upon the payment of a bribe. He also claims to have contacted a lawyer who advised him that the debtor's influence meant legal recourse was not a viable option.

THE RPD's DECISION

[4] The Member noted that the determinative issues were the principal applicant's credibility, the subjective and objective components of the well-founded fear, and the availability of state protection.

[5] The Member noted that she found much of the principal applicant's testimony to be implausible enough to rebut the presumption of its truthfulness. She also noted that both the subjective and the objective components of well-founded fear were missing.

[6] The Member noted that the principal applicant provided only three rent receipts (April, May and June 2006) and a page of letterhead as evidence of his business. The Member also noted that the principal applicant claimed to have evidence of Cheema's debt, back in Pakistan. The Member drew a negative inference from the lack of evidence regarding the business transaction central to the claim. The Member also drew a negative inference from the principal applicant's inability to produce evidence of his business transactions given that he could produce rent.

[7] The Member noted that the principal applicant claimed to have been forced to close his business because of the non-payment of the Cheema's debt despite the fact that his purchase order constituted only about 1/8th of his total business revenue. The Member wrote that she did not accept the explanation that all other purchase orders had to be stopped when a big purchase order came in, and that "it would be reasonable ... to determine that since the claimant's testimony was that most of his business was done on credit that he would, on a balance of probabilities, have been equipped to handle such an eventuality". The Member found this evidence totally untrustworthy and lacking in any credibility.

[8] The Member did not find plausible the principal applicant's claim that he could not receive protection from the state because of Cheema's influence, while this alleged influence still could not prevent his father from bribing the police to get him out of jail. Because of this implausibility, the Member placed no weight on the letter from the lawyer from Pakistan, the PIR (police preliminary information report), and the Arrest Warrant allegedly registered against the Claimant, and noted the prevalence of fraudulent documents in Pakistan and the ease with which it is possible to obtain such false documents. The Member finally determined that for these reasons and "on a balance of

probabilities that this (documentary) evidence was manufactured in an attempt to embellish his claim”.

[9] The Member also took the position that by failing to seek justice through the Pakistani courts, the applicant has not shown that Pakistan cannot protect its own citizens. The Member acknowledged that the Pakistani judiciary is plagued by corruption, but also noted a number of oversights built into the Pakistani legal system. The Member drew a negative inference from the claimant’s lack of effort in taking any measures to seek justice.

[10] Finally, the Member found that the applicants’ desire to live in Canada is motivated by a desire for a better life, and that the claim should be dealt with under immigration rather than refugee law. The Member concluded by finding that the applicants are not Convention refugees or persons in danger of torture, or persons who face a risk to life, or a risk of cruel and unusual treatment or punishment in Pakistan.

ISSUES

1. Did the Member err in her conclusions on credibility?
2. Did the Member err in her conclusions on state protection?

POSITION OF THE PARTIES

[11] The applicants submit that the Member committed two important errors of fact relating to his credibility.

[12] First, the applicants dispute the Member's finding that no further evidence was supplied by the principal applicant to support the existence of the business and the debt. The applicants submitted that additional documents regarding his business were produced after the hearing. In support of this, the applicants provided a number of documents including income tax documents and three notes concerning the alleged debt owed by Mumtaz Cheema.

[13] Second, the applicants submit that the principal applicant never testified that he had to close his business down because of Cheema's non-payment. The applicants note that he actually testified that his business closed because his father could not run the business by himself after he left Pakistan and that some of the merchandise was sold to finance the trip to Canada.

[14] The applicants submit that since the Member's findings on credibility were made on the above findings of fact, a reviewable error has occurred.

[15] The applicants also submit that the Member erred in her conclusion regarding the availability of state protection: *first*, the applicants submit that it is plausible that the police could be bribed, as it is well known that they are subject to bribery in Pakistan, and this without taking away the relative power Cheema has. The applicants submit that the Member erred by not recognizing this. And *second*, the applicants finally claim that the Member erred by deciding no attempt to seek state protection via the courts occurred, as they had contacted a lawyer who said that such recourse was not possible.

[16] As a preliminary issue the Respondent submits that the documentary evidence relating to the principal applicant's business and debt were not considered by the Member because they were not actually submitted to the RPD before the decision. The Respondent notes appropriately that the documents are not found in the RPD file and no explanation was provided as to how and when these documents were provided, and that consequently, the Court should not consider evidence that was not before the decision maker to conclude that an erroneous finding of fact was made. Therefore, those documents and the submissions based on them should be ignored.

[17] The Respondent submits that the Member committed no reviewable errors of fact relating to the principal applicant's credibility: *first*, the standard of review for credibility and weight of evidence is patent unreasonableness as it is a question of fact entirely within the RPD's expertise and the principal applicant has shown no patent unreasonableness findings of fact relating to his credibility; *second*, the Member was entitled to evaluate the documents presented (*i.e. the letter from the lawyer in Pakistan, the PIR and the arrest warrant*) and determine their probative value; and *third*, the Member was entitled to weigh the documentary evidence and draw conclusions from it, and to determine if the explanations given by the principal applicant were satisfactory.

[18] Also, the Respondent states that it is within the Board's powers to weigh the documentary evidence and draw the conclusion that it did regarding state protection.

Legislation

[19] Section 95 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 confers refugee status on individuals who are Convention refugees, while section 96 of the *Act* defines what constitutes a Convention refugee. The text of these sections reads as follows:

95. (1) Refugee protection is conferred on a person when

(a) the person has been determined to be a Convention refugee or a person in similar circumstances under a visa application and becomes a permanent resident under the visa or a temporary resident under a temporary resident permit for protection reasons;

(b) the Board determines the person to be a Convention refugee or a person in need of protection; or

(c) except in the case of a person described in subsection 112(3), the Minister allows an application for protection.

(2) A protected person is a person on whom refugee protection is conferred under subsection (1), and whose claim or application has not subsequently been deemed to be rejected under subsection 108(3), 109(3) or 114(4).

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

95. (1) L'asile est la protection conférée à toute personne dès lors que, selon le cas :

a) sur constat qu'elle est, à la suite d'une demande de visa, un réfugié ou une personne en situation semblable, elle devient soit un résident permanent au titre du visa, soit un résident temporaire au titre d'un permis de séjour délivré en vue de sa protection;

b) la Commission lui reconnaît la qualité de réfugié ou celle de personne à protéger;

c) le ministre accorde la demande de protection, sauf si la personne est visée au paragraphe 112(3).

(2) Est appelée personne protégée la personne à qui l'asile est conféré et dont la demande n'est pas ensuite réputée rejetée au titre des paragraphes 108(3), 109(3) ou 114(4).

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Standard of Review

[20] The determination of an applicant's credibility remains at the core of the RPD's jurisdiction (*R.K.L. v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 162, at para. 7), and the RPD has a well established expertise in the determination of questions of fact, particularly with regard to the evaluation of the credibility and the subjective fear of persecution of an applicant (*Rahaman v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1800 (F.C.T.D.), at para. 38). It is well established that the RPD's conclusions on the credibility of claimants' testimony are factual in nature and should attract the Court's deference to the point of patent unreasonableness (*Aguebor v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 732 (FCA), at para. 4; *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100, at para. 38).

[21] This being said, it is undisputed that if the Board makes findings of fact that are erroneous or made in a perverse or capricious manner, or without regard for the proof before it, the Board will have committed a reviewable error as stated in *Harb v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 108 (FCA).

Issues

[22] The Respondent raises as a preliminary issue that the documents alleged by the applicants to have been ignored by the Member were not submitted to the RPD. Therefore as such, they cannot be considered in this judicial review. This proposition is supported by *Ayub v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1411, at para. 10. The applicants offer no reply and concede that they have no proof to show that these documents were submitted before the RPD's decision,

and they have also no authority to support their proposition that these documents should be considered in this judicial review. This preliminary issue is well made and therefore the documents in Exhibit P-2 of the principal applicant's Affidavit and paragraph 21 of the applicants' submissions will be ignored at this stage of the procedure.

[23] On the question of the review of credibility and the assessment of evidence, the applicants submitted no valid argument to justify the Court to substitute its decision for the RPD's decision and they have failed to prove that the RPD's decision was based on an erroneous finding of fact that was made in a perverse or capricious manner or that the decision was made without regard for the material before it.

[24] The credibility issue having been disposed of, the Court will now turn to the second alleged factual error concerning the reasons behind the business' closing.

[25] The transcript clearly shows that the principal applicant did not testify that he was forced to close his business because of Cheema's debt. Instead, he testified that his business was closed because his father could not run it and because he sold some of the equipment to finance his trip. The whole issue of the business closing down because of the debt arises entirely from statements made by the Member while questioning the principal applicant as to what percentage of the principal applicant's business Cheema accounted for.

[26] This is a clear error of fact. It, along with the negative inference drawn from the lack of business records, seems to form the basis for the Member's finding that the incidents described by

the principal applicant never occurred. It is not an insignificant error. It is also a finding made without regard to the facts before the Member; specifically the facts surrounding what the principal applicant said. This important error of fact is sufficient grounds for review in view of the strong negative inference drawn from a wrong understanding of the principal applicant's testimony.

[27] The applicants stated also two errors in the RPD's decision concerning the state protection: first, the Member made a negative inference because the principal applicant failed to go through the Pakistani legal system despite accepting that the system is plagued by corruption; second, the Member erred in finding that he did not go through the system despite having some evidence that the principal applicant discussed the matter with a lawyer who told him not to bother.

[28] The Member specifically found that the applicants did not find the principal applicant or his evidence to be credible. As the testimony of the principal applicant and his evidence formed the entire basis for the claim, there is no need to proceed to a separate section 97 analysis as there is no evidence as to the basis of the applicants' claim that they are in need of protection (see *Priyanto v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 1770, at para. 28, *Ayaichia v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 300, at paras. 17 to 22).

[29] In view of the credibility finding, it is unclear why the state protection analysis was done. It is clear, however, that it is not relevant to the decision that was reached and, therefore, any errors are not material to the result.

[30] No question was submitted for certification.

JUDGMENT

THIS COURT ORDERS that the present application be granted. The decision of the Board is set aside and the matter referred back for redetermination by a different member of the Board.

“Maurice E. Lagacé”

Deputy Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-3150-07

STYLE OF CAUSE: ANWAR Tehseen et al v. THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Montreal, Quebec

DATE OF HEARING: February 19, 2008

**REASONS FOR JUDGMENT
AND JUDGMENT:** Lagacé, D.J.

DATED: March 6, 2008

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