Date: 20080407

Docket: IMM-608-07

Citation: 2008 FC 449

Ottawa, Ontario, April 7, 2008

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

MUHAMMAD SHEHZAD KHOKHAR and NAJMA SHEHZAD KHOKHAR

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act), for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (Board) dated January 10, 2007 (Decision), wherein the Board determined that the Applicants were not Convention refugees under section 96 of the Act or persons in need of protection under section 97 of the Act.

BACKGROUND

[2] The Principle Applicant, Muhammad Shehzad Khokhar, and his wife, Najma Shehzad Khokhar, are citizens of Pakistan. They are members of different tribes. They claim an alleged fear of persecution by the wife's powerful family that traditionally requires marriage within the larger family.

[3] The Applicants claim they were beaten by Najma's family members in 1989 when the family learned of their plans to marry. Muhammad, having been threatened with death if he didn't leave the area, went to Rawalpindi, Pakistan, where he stayed for two years.

[4] In 1990, Muhammad went to Dubai for work. In May 1998, he returned to Pakistan and the couple married in Lahore. While they were on their honeymoon, members of Najma's family allegedly attacked Muhammad's parent's house in Lahore and asked about the couple's whereabouts. Having heard about the attack, the couple went to Sialkot, Pakistan, where they stayed with Muhammad's uncle. A few days later, the couple returned to Lahore. Around this time, Najma's family was living in the Tobatigson District of Pakistan, which is approximately 250 kilometres from Lahore.

[5] The couple stayed in hiding at Muhammad's parents' house in Lahore. Approximately a month and a half later, Muhammad returned to work in Dubai, leaving his wife with his parents. Muhammad's parents allegedly began to insult Najma and threatened to kill her because they too

disagreed with the marriage. Muhammad took Najma to Dubai in May 2001 after learning of his parents' treatment of her.

[6] On at least two occasions, the couple returned to Pakistan for vacations and stayed in the Kasur District for approximately one month at a time. When Muhammad's contract in Dubai expired in August 2004, the couple returned to Pakistan to live in Lahore. In November 2004, Muhammad started a business there with a partner.

[7] In November 2005, some individuals armed with rifles allegedly tried to break into the couple's home. According to Muhammad, he noticed two of his wife's brothers. The couple escaped and called the police. A First Information Report was not registered. The police allegedly took the Applicants to the police station where they slapped and beat Muhammad and demanded a bribe of 50,000 rupees.

[8] The Applicants then went to Sialkot to stay with Muhammad's distant uncle where they each obtained visas for the United Kingdom and Canada through a smuggler. The Applicants left Pakistan from Lahore and arrived in Canada on April 11, 2006. They filed a claim for refugee status based on their membership in a social group on April 19, 2006.

DECISION UNDER REVIEW

[9] The Board concluded that the Applicants did not have a well-founded fear of persecution based on a Convention ground and there was not a serious possibility that they would face a risk to life or a risk of cruel and unusual treatment or punishment, or a danger of torture, if they returned to Pakistan.

[10] The Board found that, on a balance of probabilities, the Applicants' evidence was neither credible nor trustworthy because of inconsistencies and omissions in their testimony, as well as a number of implausibility findings concerning their story. In this regard, the Board found the following:

a. It was implausible that Najma's family, if they were against the marriage, made no attempts to harm Najma who continued living at his parents' residence in Lahore for almost two years;
b. The Applicants' allegations were untrue because they did not correspond with the country condition documents;
c. Muhammad's explanation that he returned to Lahore from Dubai in 2004 because he thought everything was calm was unsatisfactory given his statement that he still feared his wife's parents;
d. It was not plausible that Muhammad would fear persecution when he returned to Pakistan many times and had no problems. The actions of Muhammad were not those of a person who had a subjective fear;

e. It was implausible that Najma's family, if they intended to harm the couple because of their marriage, would not have made an attempt to do so between the one incident in 1998 and the incident in November 2005;

f. The Applicants had no police reports or newspaper articles reporting the attack on their home in November 2005. The Board drew an adverse inference and found the incident never happened; and

g. Muhammad testified that he was beaten by the police. This information was not in his PIF narrative. The Board found that Muhammad was not credible and drew an adverse inference from the omission.

[11] The Board then set out the test in *Thirunavukkuransu v. Canada (Minister of Employment and Immigration)* (1993), [1994] 1 F.C. 589, [1993] F.C.J. No. 1172 (F.C.A.) (QL), and made an alternative finding that the Applicants had an internal flight alternative (IFA) in Rawalpindi or Kasur.

[12] The Board then turned its mind to the emotion that Najma had shown in the hearing when her mother's name was mentioned during the hearing. The Board found that the reasons Najma "broke down" was because she could not see her mother and because she, herself, could not become a mother. The Board concluded that her emotions did not indicate that the couple would be harmed in Pakistan by Najma's family because of their marriage.

[13] In summation, the Board found Muhammad was not credible and that his numerous trips back to Pakistan constituted re-availment and a lack of subjective fear. In the alternative, both Applicants had an IFA in Rawalpindi or Kasur District. The Board dismissed Muhammad's claim and then rejected Najma's claim, as it was based on that of her husband.

ISSUES

[14] The Applicants raised the following issues:

(1) Did the Board err in law by ignoring or misinterpreting evidence properly before it?

(2) Did the Board err by making patently unreasonable findings of fact, or basing its decision on findings of fact made in a perverse and capricious manner, without regard for the material properly before it?

(3) Did the Board misapply or misconstrue the definition of Convention refugee, thereby erring in law?

(4) If the Board's errors were not reviewable errors of law, then did the cumulative effect of these errors amount to an error of law?

REASONS

[15] I find no merit to the allegation that the Board misapplied or misconstrued the definition of Convention refugee. The Board properly considered whether or not there was more than a mere

possibility that the Applicants would face persecution in Pakistan. Similarly, the Board correctly identified the burden of proof on the Applicants as being a "serious possibility" of persecution or a risk to life, a risk of cruel and unusual treatment or punishment, or danger of torture (*Adjei v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 680, [1989] F.C.J. No. 67 at para. 9 (F.C.A.) (QL) [*Adjei*]). Consequently, applying a standard of correctness, I find no reviewable error on this ground.

[16] The real issues in this case can be rephrased as follows:

1. **Did the Board err by making unreasonable negative credibility inferences and implausibility findings or by ignoring or misinterpreting evidence properly before it?**

2. **Did the Board err in finding that the Applicants had a viable IFA?**

3. **If the Board's errors are not reviewable when taken alone, does their cumulative effect amount to an error of law?**

STANDARD OF REVIEW

[17] In *Dunsmuir v. New Brunswick*, 2008 SCC 9 [*Dunsmuir*], the Supreme Court of Canada reconsidered the standard of review analysis applicable to administrative decisions and posited two

standards: reasonableness and correctness. The Court also provided guidance for determining the appropriate standard of review in a given case:

> […] questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness while many legal issues attract a standard of correctness. Some legal issues, however, attract the more deferential standard of reasonableness (*Dunsmuir* at para. 51).

The Court further stated that the standard of review analysis is composed of two steps:

> First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of defence to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review (*Dunsmuir* at para. 62).

[18] In the present case, the Applicant attacks the Board's implausibility and credibility findings. These findings are highly factual in nature. In numerous pre-*Dunsmuir* decisions, this Court has held that the appropriate standard of review was patent unreasonableness (*Soosaipillai v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1040 at para. 9; *Xu v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1701, [2005] F.C.J. No. 2127 (QL) at para. 5; *Asashi v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 102, [2005] F.C.J. No. 129 (QL) at para. 6; *Canada (Minister of Citizenship and Immigration) v. Elbarnes*, 2005 FC 70, [2005] F.C.J. No. 98 (QL) at para. 19). In *Aguebor v. Canada (Minister of Employment and Immigration)*, (1993) 160 N.R. 315, [1993] F.C.J. No. 732 at para. 4 (F.C.A.) (QL), the Federal Court of Appeal discussed the standard of review for the Board's determination of a claimant's credibility, noting the high degree of deference to be given to such determinations:

> There is no longer any doubt that the Refugee Division, which is a specialized tribunal, has complete jurisdiction to determine the plausibility of testimony: who is in a better position than the Refugee Division to gauge the credibility of an account and to draw the necessary inferences? As long as the inferences drawn by the tribunal are not so unreasonable as to warrant our intervention, its findings are not open to judicial review.

[19] However, the Court may intervene and set aside a plausibility finding where the reasons that are stated are not supported by the evidence before the Board. As stated by Justice MacKay in *Yada v. Canada (Minister of Employment and Immigration)* (1998), 140 F.T.R. 264, [1998] F.C.J. No. 37 (QL) at paragraph 25:

> Where the finding of a lack of credibility is based upon implausibilities identified by the panel, the court may intervene on judicial review and set aside the finding where the reasons that are stated are not supported by the evidence before the panel, and the court is in no worse position than the hearing panel to consider inferences and conclusions based on criteria external to the evidence such as rationality, or common sense.

[20] Further, in evaluating credibility, it must be borne in mind that a refugee claimant's allegations are presumed to be true unless there are reasons to doubt their truthfulness (*Valtchev v. Canada (Minister of Citizenship and Immigration)* (2001), 208 F.T.R. 267, 2001 FCT 776 at para. 6 (F.C.T.D.); see also *Moldonado v. Canada (Minister of Employment and Immigration)* (1979), [1980] 2 F.C. 302, [1979] F.C.J. No. 248 (F.C.A.) (QL) [*Moldonado*]).

[21] The issue of whether or not the Board erred in finding that the Applicants had a viable IFA is also a factual inquiry and has, in the past, been reviewed on a standard of patent unreasonableness (see *Sivasamboo v. Canada (Minister of Citizenship and Immigration),* [1995] 1 F.C. 741, [1994]

F.C.J. No. 2018 (QL); *Ramachanthran v. Canada (Minister of Citizenship and Immigration)*, 234 F.T.R. 206, 2003 FCT 673; *Ali v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 193; *Chorny v. Canada (Minister of Citizenship and Immigration)* (2003), 238 F.T.R. 289, 2003 FC 999).

[22] In light of the decision in *Dunsmuir*, and the previous jurisprudence of this Court, I find the standard of review applicable to these factual questions to be reasonableness. When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at para. 47).

[23] With respect to the third issue on this application, having consideration for the discretionary nature of the Board's refugee determinations and the deference afforded to such decisions on judicial review, I am of the view that the applicable standard of review of the Decision when reviewing it as a whole together with the cumulative effect of the errors, if any, committed by the Board in making its determination, is reasonableness. Before continuing, however, I note that regardless of whether I applied the pre-*Dunsmuir* patent unreasonableness standard or the post-*Dunsmuir* reasonableness standard to the issues in this case, my findings are the same.

1. Did the Board err by making unreasonable negative credibility inferences and implausibility findings or by ignoring or misinterpreting evidence properly before it?

[24] The Applicants submit that the Board's assessment of Muhammad's credibility was unduly strict and onerous. They argue that the Board erred by drawing adverse credibility findings based on the absence of attacks from Najma's family between 1998 and November 2005, and by drawing adverse credibility findings because of her family's failure to harm her while she resided in Lahore with Muhammad's parents. These findings, suggest the Applicants, were speculative and wholly unsubstantiated plausibility findings. Further, the findings were unreasonable given that the Applicants were "essentially in hiding" and being "careful," and because of the lack of evidence that Najma's family was aware of her residence during that specific time period.

[25] I do not agree that the Board's findings on this issue were speculative, unsubstantiated or unreasonable. As stated by the Board at page 4 of the Decision:

> The evidence before the panel was that the claimant during his stay in Dubai went to Pakistan many times. He was asked if he had any problems during those visits and he said he did not, but then went on to say that his house had been attacked in 1998, but nothing after that. The panel does not find that plausible that even though he alleges he had a fear, he returned many times and also had no problems….

[26] The Board continued at pages 5 and 6:

> When asked how far Toba-Tek-Singh [where the alleged persecutors lived] was from Gulshan Ravi, Lahore, he said about 250 kilometers. The claimant has returned to [Lahore] from Dubai, from the U.K. and also from Kasur and Rawalpindi, even though he testified that

> his wife's family now resides about 250 kilometers away from that place and that he was aware of the whereabouts of the claimant's family's residence.
>
> The panel finds that the actions of the claimant are not that of a person who has a subjective fear. His only explanation was that he was careful. The panel does not find that explanation satisfactory when the claimant testified that he opened a business and resided with his wife.
>
> The panel finds it implausible that the family of the claimant's wife if they intended to harm them due to their marriage, would not have made any attempts from the one incident he alleges in 1998 to the incident in November 2005, when the claimant had returned to Pakistan on many occasions and when the matter was in its initial stages. The panel finds that the actions of the claimant show a lack of subjective fear and minimizes the presence and effectiveness of the agent of persecution, which, in this case, the claimant states are his in-laws.

[27] Muhammad testified that while living in Dubai, he returned to Lahore approximately every six months. Once the couple moved to Dubai, they returned to Pakistan on numerous occasions and spent approximately one month in the country each year. Further, the couple returned to Pakistan to live in Lahore once Muhammad's contract ended in Dubai. They also visited the U.K. and returned to Pakistan from the U.K.. Based on this evidence, it was not unreasonable for the Board to conclude that the couple not only re-availed themselves to their alleged persecutors, but that these returns were indicative of a lack of subjective fear of persecution by Najma's family, regardless of Muhammad's testimony that the couple was "essentially in hiding" and were "careful." Other conclusions were possible, but the Board's conclusions cannot be said to be unreasonable.

[28] It was also open to the Board to conclude that the allegations regarding Najma's family's intention to harm the couple were implausible given that the family made no attempts to harm them

from 1998 to 2005. As noted above, Muhammad returned to Pakistan on numerous occasions from 1998 to 2004. Then, in 2004, he returned to Lahore to live. Despite his presence in Pakistan, the family took no action to harm Muhammad until the alleged incident in 2005, which occurred approximately a year and a half after the couple re-established residency in Lahore.

[29] Further, it was open to the Board to find it implausible that the family would not harm Najma in the initial period after the couple married. From 1998 to 2001, Najma lived in Lahore with Muhammad's parents in the same residence that her family had allegedly attacked. When asked why Najma's family was unable to locate her during this time, Najma explained that her family thought she was in Dubai, and added that she did not leave the house. However, Muhammad also testified that Najma's family was powerful and had financial resources and political affiliations. It was not unreasonable to assume that, given the family's alleged power and the previous attack on Muhammad's parents' home, Najma's family would have located her at Muhammad's parents' home and pursued further attacks if they had been interested in doing so. If Najma's family was truly adamant about killing Najma to defend their honour, one would expect that the family would have returned to Muhammad's parents' home in search of one of the claimants. Her family took no such action. In my view, it was open to the Board to find it implausible that Najma's family, if they were against the marriage, made no attempts to harm her while she continued living at that residence for almost two years. So I cannot say that the board was unreasonable in its findings.

[30] The Applicants further submit that the Board erred by drawing a negative credibility finding from the lack of corroborative police reports and newspaper articles supporting their allegation that

their home was attacked by Najma's family in 2005. According to the Applicants, the Board imposed an unduly onerous standard of proof upon them.

[31] In considering this argument, I have to remember that the burden of proving a claim for refugee protection rests with the claimant (*Thamotharem v. Canada* (*Minister of Citizenship and Immigration)* (2007), 366 N.R. 301, 2007 FCA 198 (F.C.A.)), and the standard of proof underlying the factual elements of a claim must be proven on a balance of probabilities (*Adjei*, above, at para. 5; see also *Hinzman v. Canada (Minister of Citizenship and Immigration)* (2006), [2007] 1 F.C.R. 561, 2006 FC 420 at para. 184 (F.C.T.D.)).

[32] In the case at bar, the Board noted that there was "no corroborative evidence of this incident…in the form of a Police Report or of any newspaper articles that a house in Gulshan Ravi Lahore was attacked" (Decision at page 6). The Board drew an adverse inference from the lack of documentary evidence of this kind and concluded that the incident never happened.

[33] With respect to this finding, the Board made two errors in my view. First, the jurisprudence is clear that a claimant's testimony cannot be discredited simply because it has not been corroborated by documentary evidence. The lack of objective evidence in and of itself is not a ground to disbelieve an Applicant's sworn testimony about his experiences (*Santos v. Canada (Minister of Citizenship and Immigration)* (2004), 37 Imm. L.R. (3d) 241, 2004 FC 937 at para. 17).

[34] Further, in *Ahortor v. Canada (Minister of Employment and Immigration)* (1993), 65 F.T.R. 137, [1993] F.C.J. No. 705 at paras. 45-48, Justice Teitelbaum held that it was not open to the Board to draw adverse inferences and conclude that a claimant's story was not credible because he was not able to provide documentary evidence corroborating his claims.

[35] In *Attakora v. Canada (Minister of Employment and Immigration)* (1989), 99 N.R. 168, [1989] F.C.J. No. 444 (F.C.A.) [*Attakora*], the Immigration Appeal Board disbelieved an applicant's testimony that he had an injured knee on the basis that there was no medical reports to corroborate his testimony. The Federal Court of Appeal held that "the absence of medical evidence is not in itself grounds for doubting the Applicant's story. Indeed, given such absence of medical evidence, it was not open to the Board to find that a fracture to the Applicant's knee would have made it impossible for him to have walked on it" (*Attakora* at 200). The Federal Court of Appeal concluded that the Board erred in law by making a finding for which there was no evidence.

[36] In the present case, Muhammad testified that the couple contacted the police, but the police refused to register an incident report because of Najma's family's alleged influence. Despite this testimonial evidence, the Board focused on the lack of corroborating documentary evidence in the form of police reports and newspaper articles and drew an adverse inference from the Applicant's failure to provide such evidence. In doing so, the Board disregarded the presumption of truthfulness of a claimant's testimony enunciated in *Moldonado* and, without evidence contradicting the allegation, the Board erroneously concluded that the incident never occurred.

[37] Second, the Applicants submitted an affidavit from Muhammad's distant uncle as corroborative evidence of the incident. The affidavit states the following:

> …Both Muhammad Shehzad Khokhar and Najma Shehzad Khokhar came to my house in Sialkot on November 14, 2005. They looked very upset at that time. They told me that some unknown goons had made a murderous attack at their house. They further told me that they had hardly escaped from that murderous attack. They were very scared due to that murderous attack and were hardly able to speak about that attack. Both of the husband and wife stayed at my house in hiding until 10 April 2006…

[38] Although the affidavit vaguely referred to the attackers as "unknown goons," the affidavit constituted evidence supporting the Applicants' allegation regarding the November 2005 incident. Despite the presumption established in *Florea v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 598 at para. 1 (F.C.A.), that the Board has considered all the documents entered in evidence before it, an erroneous finding of fact can be inferred from the failure of an administrative board to "mention in its reasons some evidence before it that was relevant to the finding, and pointed to a different conclusion from that reached by the agency" (*Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R.35, [1998] F.C.J. No. 1425 at para. 15 (QL)).

[39] It was open to the Board to give the affidavit little weight. However, given the relevance of the document and the significance of this event, the Board had an obligation to indicate its reason for rejecting this evidence when it found the alleged attack never occurred. I note, however, that this error in and of itself would not necessarily warrant the setting aside of the Decision. The Board's failure to mention some of the documentary evidence before it is not always fatal in this regard

(*Hassan v. Canada (Minister of Employment and Immigration)* (1992), 147 N.R. 317, [1992] F.C.J. No. 946 (F.C.A.) (QL). However, in my view, the significant error lies in the Board's finding that a key event, i.e. the attack on November 2005, never occurred based on the lack of corroborative evidence in the form of a police report or newspaper articles. Had the Decision been based upon credibility alone, I think it would have to be returned for reconsideration. Likewise, it is difficult to understand the Board's comments concerning Najma's emotional state at the hearing. The Board provides no basis for its conclusions, but it is obvious that the Board was considering the credibility issues and the significance of Najma's emotional state for those issues. But the finding is not supported by any reasons that I can accept and constitutes a reviewable error. However, the Board made a separate and alternative finding regarding the availability of an IFA and, in my view, that finding is sufficient to support the Board's overall conclusion that the Applicant's are not Convention refugees and they are not at risk if returned.

Internal Flight Alternative

[40] As already noted, the Board made an alternative finding that the Applicants had an IFA in Rawalpindi or Kasur. In coming to this conclusion, the Board applied the test set out in *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 589, [1993] F.C.J. No. 1172 (F.C.A.) (QL) [*Thirunavukkuransu*]. This test for determining whether a viable IFA exists is two-pronged: first, the Board must be satisfied on a balance of probabilities that there is no serious possibility that the claimants will be persecuted in the proposed IFA; second, the conditions in the proposed IFA must be such that it is not unreasonable for the claimants to seek refuge there.

[41] I see no error in the Board's conclusions on this issue. It was open to the Board to make a finding that Muhammad and Najma would not be at risk if they lived in Rawalpindi or Kasur, as Muhammad had lived in both places and did not encounter problems from Najma's family and the couple vacationed in Kasur on two occasions without incident. With respect to the second branch of the test, the Board noted that Muhammad had lived in Rawalpindi in the past and that he had returned to live and work in Lahore. I also see no reason to intervene with the Board's finding on this part, as the Board's conclusion is supported by the evidence. Further, any hardship associated with dislocation and relocation is not the kind of hardship that renders an IFA unreasonable. As established in *Thirunavukkuransu*, the threshold is high for what makes an IFA unreasonable in all circumstances. The threshold has not been met in this case.

[42] It is well-established that the existence of a valid IFA is determinative of a refugee claim. Once an IFA is found, the Court need not consider the other issues raised by an applicant on judicial review (*Shimokawa v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 445 at para. 17; *Sran v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 145 at para. 11).

[43] The Applicants have a viable IFA in Rawalpindi or Kasur. As this issue is dispositive of the application, I need not consider the remaining issue raised by the Applicants. This application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application is dismissed.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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