Date: 20080602

Docket: IMM-6414-06

Citation: 2008 FC 689

Toronto, Ontario, June 2, 2008

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

GEORGE FREDERICK NILAM
FLORENCE MONICA NILAM

Applicants

and

MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "IRPA") for judicial review made by George Frederick Nilam and Florence Monica Nilam (the "Applicants") of a decision made by the Refugee Protection Division of the Immigration and Refugee Board (the "Board"), dated November 15, 2006, wherein it was determined that the Applicants were not Convention refugees nor persons in need of protection under sections 96 and 97 of the IRPA.

[2] For reasons set out below I have decided to grant the application for judicial review.

Background

[3] The Applicants are citizens of Pakistan who fear serious harm amounting to persecution in Pakistan because of their Christian faith and religious activities.

[4] Between 1953 and 1967, the male Applicant experienced harassment for reasons of his faith while employed with the Telephone and Telegraph Company of Pakistan. From 1967 to 1995, the Applicant was self-employed. To supplement his income, he would tutor Muslim and Christian children in his home. Although not directly threatened by the Muslim members of his community, the Applicant claims that by virtue of being Christian and teaching Muslim children, he was repeatedly chastised by Muslim members of his community.

[5] The Applicants say their problems began in 2004 when a new religious leader joined their neighbourhood mosque. After the Maulvi's arrival, the earlier chastisements directed to them by their Muslim neighbours turned into threats. In February 2004, the male Applicant claims that the Maulvi stopped him on the street and told him if he did not stop teaching Muslim children the consequences for him would be dire. After this event the number of Muslim children he was tutoring declined until all his students were Christian. In October 2004, the male Applicant claims that the Maulvi came to his home with eight or nine men, one of whom put a gun to his head and threatened to shoot him. The Maulvi informed the Applicant that he would have to either convert to

Islam or move to a Christian country. Further, that if the Applicant did not convert he would be charged with blasphemy.

[6] The Applicant twice went to the police to seek protection and was denied assistance both times. In February 2004 after the first encounter with the Maulvi, the Applicants went to their local police station to make a complaint. A constable standing outside the station asked the male Applicant for his name and nature of his problem but would not let them enter the station. The constable informed the Applicants that the police could not help because nothing yet had happened to them. In October 2004, after the second altercation with the Maulvi and the other individuals, the male Applicant again went to the police station. After learning the Applicant's name, the duty officer was able to infer the Applicant's faith and made no serious effort to assist the Applicant.

Decision Under Review

[7] The Board accepted that the Applicants were members of the Christian community in Pakistan and had been subjected to incidents of employment discrimination and acts of sectarian violence perpetuated by Muslim extremists. However, the Board decided that the Applicants had not overcome the presumption of state protection.

[8] The Board preferred to rely on documentary evidence that came from independent sources with no interest in the outcome of the Board's proceedings over the male claimant's evidence.

[9] The Board noted that the documentary evidence disclosed acts of violence against those of the Christian faith. However, the Board also noted that the government openly discouraged or condemned violence against Christians. The Board concluded that while protection against criminal Muslim extremist groups in Pakistan may not be perfect it was available and adequate.

[10] The Board also considered Pakistan's blasphemy laws and its impact on Christians. It noted that blasphemy laws were often used to harass and intimidate religious minorities. However, the Board found it was not plausible that the Applicants would be victims of Pakistan's blasphemy laws since they had not been previously victims of such laws nor had they been publicly critical of Islam.

[11] The Board found there was no evidence before it that governmental authorities in Pakistan prevented Christians from openly and freely practicing their religious beliefs.

Issue

[12] The determinative issue in this application is whether the Board committed a reviewable error in finding that state protection was available to the Applicants in Pakistan.

Standard of Review

[13] This hearing was conducted prior to the judgment of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, which modified the standard on which judicial reviews are to be conducted. Now, there are only two standards of review: correctness and reasonableness (*Dunsmuir* at para. 34). Prior to *Dunsmuir*, the standard of review applicable to issues of state

protection, where the question was one of mixed fact and law, was reasonableness *simpliciter* (*Chaves v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 193 at para. 11). At paragraph 51, *Dunsmuir* instructs that questions of mixed fact and law are now to be reviewed on the reasonableness standard. Accordingly, the standard of review in this case shall be reasonableness (see also: *Zepeda v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 491 at para. 10).

Analysis

[14] In regards to the Board's decision, reasonableness is concerned with the existence of justification, transparency and intelligibility within the decision making process. It is also concerned with "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at para. 47). Justification requires that a decision be made with regard to the evidence before the decision-maker. A decision cannot be a reasonable one if it is made without regard to the evidence submitted (*Katawaru v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 612 at paras. 18, 22).

[15] The Applicants' testimony about twice approaching the police for protection was not impugned. An applicant is presumed to tell the truth unless there is reason for the Board to question the applicant's credibility (*Katawaru* , above, at para. 15). That situation has not risen in this hearing. Other than stating that it preferred the documentary evidence over that of the Applicants, the Board gives no reasons for disregarding the male Applicant's testimony about twice

approaching the police to no avail. In doing so, the Board has failed to consider relevant evidence before it in arriving at its decision that state protection is available.

[16] In addition, while it is open to the Board to prefer one type of documentary evidence over another type, the basis for this preference cannot be because the Applicant has an interest in the outcome. All applicants have an interest in the outcome of their hearing. The Board states that it preferred the documentary evidence to the Applicants evidence as it came from reliable and independent sources with no interest in the outcome of the proceedings (Tribunal Record at 62). This goes against the proposition set out by the Federal Court of Appeal in *Maldonado v. Canada (Minister of Citizenship and Immigration)*, [1980] 2 F.C. 302, which noted that there is a presumption of truth of the sworn testimony of a claimant. Justice Snider's discussed this point in *Coitinho v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1037 at para. 7, I believe her comments are on all fours with the case at bar:

> **7** The Board goes on to make a most disturbing finding. In the absence of stating that the Applicants' evidence is not credible, the Board concludes that it "gives more weight to the documentary evidence because it comes for (sic) reputable, knowledgeable sources, none of whom have any interest in the outcome of this particular refugee hearing". This statement is tantamount to stating that documentary evidence should always be preferred to that of a refugee claimant's because the latter is interested in the outcome of the hearing. If permitted, such reasoning would always defeat a claimant's evidence. The Board's decision in this case does not inform the reader why the Applicants' evidence, when supposed to be presumed true (Adu, supra), was considered suspect. Further, this reasoning cannot even stand on the facts of this case.

[17] I find that the Board's decision, made without regard to relevant evidence before it, to be unreasonable.

[18] The application for judicial review is granted. The matter will be returned for re-determination by a differently constituted Board.

[19] No general question of importance was proposed for certification.

ORDER

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is granted. The matter is referred back for re-determination by a differently constituted Board.

2. No general question of importance is certified.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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