Date: 20080620

Docket: IMM-5361-07

Citation: 2008 FC 779

Toronto, Ontario, June 20, 2008

PRESENT: The Honourable Maurice E. Lagacé

BETWEEN:

ALI SHIRAZ NAQVI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review made pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), of a decision of the Refugee Protection Division (Board), dated November 28, 2007, wherein the applicant was determined not to be a Convention refugee or a person in need of protection.

I. Facts

[2] The applicant, Ali Shiraz Naqvi, is a citizen of Pakistan who has claimed refugee status on the basis that he would be persecuted by Sipah-e-Sahaba Pakistan (SPP) because he is a Shi'a Muslim in the predominantly Sunni Pakistan. The applicant related one alleged incident where he was assaulted by SPP members near campus, and the police did nothing to help him, although he did not ask for help. Prior to coming to Canada, the applicant lived in the United States for a period of eleven months on a student visa, where he had allegedly been sent to study and for his own protection, but without claiming protection. Eventually, the applicant's father retired and could not support his education, so the applicant came to Canada and made his claim for protection.

[3] The applicant is no stranger to the refugee process in Canada. His first hearing for refugee status was on April 27, 2004, and his first rejection was on June 8, 2004. That decision was judicially reviewed and set aside in a decision of this Court dated July 19, 2005.

[4] The applicant's second hearing took place on March 6, 2006, resulting in a second rejection on March 23, 2006. Judicial review was again sought, and again the decision of the Board was set aside on March 7, 2007, on an issue of missing materials in the record. This decision has no bearing on the present affair.

II. The Impugned Decision

[5] The Board determined that the applicant is not a Convention refugee as he did not have a well-founded fear of persecution in Pakistan. The Board also determined that he was not a person in need of protection.

[6] The Board first considered state protection for Shi'a Muslims in Pakistan and found " that the preponderance of the evidence before it indicates that police do take action against extremist groups, including the SPP". It also noted the following facts revealed by the country documentary evidence it preferred to that of the applicant, as it was gathered from "a number of human rights and other organizations" without interest in the claim, and ultimately found that the state protection was available:

- Of the religious minorities, Ahmaddiya, Christians and Buddhists are most at risk for societal victimization with no police protection or state protection;
- Members of both Sunni and Shi'a are at risk from extremists from the opposite sect, mostly while in mosques;
- While the majority of Muslims are Sunni, there is a larger minority of Shi'a, a 10% of the population 14.9 million people, with the Shi'a population claiming the numbers are closer to 20%;
- The rhetoric is against Christians, Sikhs, Buddhists and Parsis and Ahmadiyya;
- The government sponsors interfaith dialogue, with the exception of Ahmadiyya;
- The police turn a blind eye to attacks against Ahmadiyya;

- Targets for assassination are clerics, government officials and professionals;
- There is a major crackdown on SSP and other terrorist organizations;
- The government sends in the army to assist in state protection for major celebrations, including Muherram;
- The government continues to freeze the funds of terrorist organizations;
- There are a number of Shi'a publications;
- The government increases security in the Muherram, including procession routes;
- Police take action and courts punish extremists.

[7] The Board indicated that it preferred that evidence to that of the applicant "because it is gathered from a number of human rights and other organizations with no interest in this (claim) or any refugee claim". In doing so, the Board also noted that the applicant "does not have the profile of those who are targeted by extremists, or anyone else", and that he did not attempt to get help from the campus police.

[8] The Board then considered the applicant's eleven month stay in the United States. It noted that the applicant was in the US some time before the US began to "register 'against' Pakistanis" – apparently his impetus for seeking protection in Canada – and explained that he did not make a claim in the US before that started happening because, he felt safe under his student visa. The Board noted that the applicant knew that he would have to return eventually, and further could have applied for protection in the United States after his father retired and could no longer support his education. From this, the Board determined that the applicant had no intention to come to Canada to

make his claim, that he was forum shopping between countries, lacks credibility, and had not established that he truly fears for his safety.

III. Standard of Review

[9] Reasonableness is the standard applicable to a decision determining the adequacy of state protection (*Wong v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 534, at paragraph 5, [2008] F.C.J. No. 679; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9 at paragraphs 57, 62, and 64).

IV. Analysis

A. *Order of July 19, 2005*

[10] The applicant denies that the Order of this Court to the Board, of July 19, was simply to reconsider the issue of state protection. This is true, since in allowing the application for judicial review, the Order specified was “returned to a different officer for redetermination”. However, the applicant goes on one step further by asserting that the Court did make, on that occasion, a finding on state protection - specifically, that it did not exist in the applicant’s case- to argue that the Board, in its impugned decision, either cannot make a different determination or at least must justify a different conclusion. Unfortunately for the applicant this contention is untrue. The Order in question

contains no such finding, and simply determines that evidence on the availability of state protection had been ignored. This argument is therefore unfounded.

B. *Documentary Evidence*

[11] The applicant submits that given the problems with the credibility finding, including the fact that it was not based on inconsistencies or contradictions, there was no basis for preferring the 3rd party source (*Coitinho v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1037 at par 7). The respondent simply asserts that the preference of evidence is a matter of weight for the Refugee Division.

[12] Despite the applicant's attempt to attach the credibility issue to this determination, it does not appear that the Board's finding on credibility had anything to do with its determination that it preferred the evidence of the country documents to that of the claimant because "it is gathered from a number of human rights and other organizations with no interest in this (claim) or any refugee claim". While a lack of credibility on the part of the applicant can be relevant to the determination by the Board that it prefers the documentary evidence to the applicant's evidence, there is no mention of the credibility issue until after the Board made its determination on state protection. Credibility was only raised with regard to whether or not the applicant had a subjective fear. Nor is it mentioned when the Board gives its cursory explanation for why it preferred the documentary evidence. There is nothing in this particular decision to lead the court to infer that the credibility finding underlay the Board's determination on this issue.

[13] That being said, this court has expressed its reservations in the past about such blanket statements regarding the preference of documentary evidence over the testimony of an applicant (*Malveda v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 447, [2008] F.C.J. No. 527, at para. 39; *Kosta v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 994, [2005] F.C.J. No. 1233 at paras. 28-35; *Ramsaywack v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 781, [2005] F.C.J. No. 999, at paragraphs 13-15).

[14] This type of reasoning was addressed by this Court in *Coitnho*, above at par. 7, and must be reminded once again:

> The Board goes on to make a most disturbing finding. In the absence of stating that the Applicants' evidence is not credible, the Board concluded 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 v. Minister of Employment and Immigration)*, [1995] F.C.J. No. 114 (F.C.A.)), was considered suspect. [Emphasis added]

[15] In *Malveda*, above, this Court disapproved this type of blanket statement by noting at par. 38 that "...such unqualified statements appear to negate, if not reverse, the presumption of truthfulness of a claimant's testimony established in *Maldonado ...*". Further, in *Malveda*, par. 39, the Court notes the following deficiencies in the blanket statement made by the Board in the case before him:

> In the Decision in this case, there is no attempt to raise and discuss what the Applicant actually said on this issue, or to identify those aspects of the documentary evidence that should be preferred, and

> why they are to be preferred, and there is no attempt to deal with aspects of the documentary evidence that might support the Applicant's position. All we have is a blanket dismissal that explains nothing. In my view, this is not adequate in the circumstances and this aspect of its Decision contains a reviewable error.

[16] In the present case, the Board gave such a blanket dismissal, did nothing to indicate why it preferred the documentary evidence over the applicant's other than to note that it came from a disinterested source, and did not give any indication that its credibility finding on the issue of subjective fear had anything to do with its determination on state protection. It did not even review the applicant's allegations, compare them to the documentary evidence, and explain why one was better than the other.

[17] It is trite Law that the Board is not required to refer to every piece of evidence that it received. "However, the more importance the evidence that is not mentioned specifically and analysed in the agency's reasons the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence" (*Cepeda-Gutierrez c. Canada (Minister of Citizenship and Immigration)*, [1998] A.C.F. no 1425, TD, par 17).

[18] There is nothing in the impugned decision to indicate that the Board made some kind of analysis, that took into account the Applicant's, his allegations, and the evidence he provided and considered important, in view of his personal situation, to rebut the presumption of state protection, except for a disturbing and unacceptable blanket dismissal. And this constitutes a reviewable error.

[19] The Court agrees with the parties that there is no question of general interest to certify.

JUDGMENT

FOR THE FOREGOING REASONS THIS COURT:

1. Allows the application for judicial review;
2. Sets aside the decision of the Refugee Protection Division; and
3. The matter is referred back to a different individual for redetermination in accordance with these Reasons.

"Maurice E. Lagacé"

Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

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