Date: 20090212

Docket: IMM-3352-08

Citation: 2009 FC 139

Ottawa, Ontario, this 12th day of February 2009

Present: The Honourable Orville Frenette

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
and
THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicants

and

Fakera Tanveer WARAICH
Sahrash Tanveer WARAICH
Adeel Tanveer WARAICH
Anza Tanveer WARAICH

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board (the "Board") dated June 30, 2008, dismissing the applicants' application to vacate, pursuant to section 109 of the *Immigration and Refugee Protection*

Act, S.C. 2001, c. 27 (the "Act") and section 57 of the *Refugee Protection Division Rules*, SOR/2002-228, the decision to allow the claim to refugee protection of the respondents.

The Facts

[2] The respondents, a mother and her three minor children, are citizens of Pakistan. They filed a claim for refugee protection on June 10, 2002 claiming that the primary respondent feared persecution because of her support of the Pakistan Muslin League – Nawaz Group (PMLN). The primary respondent alleged that she and her husband were sought by the police in relation to false cases that were registered against them by their political opponents.

[3] In support of their claim for refugee protection, the respondents submitted copies of two First Information Reports (FIRs) and the warrants of arrest corresponding to the FIRs. The documents indicated that the primary respondent and her husband were wanted by the police in Pakistan for having allegedly participated in anti-government activities.

[4] The applicants' representatives were not present at the time of the hearings on the respondents' refugee status but filed documentary evidence indicating that they had not established their identity to the satisfaction of Canadian immigration officials.

[5] On March 8, 2004, the first Immigration and Refugee Board panel rendered its decision granting the respondents refugee protection. Satisfied that the respondents had succeeded in addressing the identity issues that had been raised, the first panel based its decision on the primary respondent's credible testimony.

[6] The primary respondent claimed that she and her husband were sought by the police to be arrested for political activities against the government.

[7] She also had problems in establishing her credibility and her case had to be postponed for this purpose. The hearing of her refugee claim took place on two different days, in 2003, culminating in the final hearing of February 6, 2004.

[8] Later in 2004, the Immigration authorities, upon verification of the FIRs made in 2002, found that they were false. Both her and her husband's FIRs were found to be fraudulent as they concerned other persons and different criminal offences.

[9] The applicants presented the instant application under section 109 of the Act to vacate the previous Immigration and Refugee Board decisions granting asylum and based upon these false documents.

The Impugned Decision

[10] The Board's decision, dated June 30, 2008, rendered by Me Michael Hamelin, in a two and one-half page decision, rejected the applicants' request to vacate the decision, consequently upholding the granting of the respondents' refugee status.

[11] The Board recognized that the respondents produced two documents, FIRs which were found to be false and upon which the Convention refugee decision was based together with the

testimony of the primary respondent and general documentation of the social and political situation in Pakistan.

[12] The Board considered that notwithstanding this fraudulent misrepresentation there was other sufficient evidence to justify applying subsection 109(2) of the Act.

[13] The Board also learned and considered the fact that the primary respondent had returned twice to Pakistan for lengthy stays in 2005 and 2006 without reporting any problems.

[14] However, the Board refused to consider this fact because this was not in evidence at the original hearing of the case.

[15] The Board concluded that it would not grant the application to vacate the respondents' refugee status because "there is other sufficient evidence considered at the time of the first determination to justify the original decision".

The Issue

[16] The issue in this case is whether the Board's decision was reasonable.

The Standard of Review

[17] The applicable standard of review, according to the jurisprudence, for the assessment of facts or mixed facts and law, is one of reasonableness (*Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190).

The Legislation

[18] The relevant provision of the Act reads:

109. (1) The Refugee Protection Division may, on application by the Minister, vacate a decision to allow a claim for refugee protection, if it finds that the decision was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter.	**109.** (1) La Section de la protection des réfugiés peut, sur demande du ministre, annuler la décision ayant accueilli la demande d'asile résultant, directement ou indirectement, de présentations erronées sur un fait important quant à un objet pertinent, ou de réticence sur ce fait.
(2) The Refugee Protection Division may reject the application if it is satisfied that other sufficient evidence was considered at the time of the first determination to justify refugee protection.	(2) Elle peut rejeter la demande si elle estime qu'il reste suffisamment d'éléments de preuve, parmi ceux pris en compte lors de la décision initiale, pour justifier l'asile.
(3) If the application is allowed, the claim of the person is deemed to be rejected and the decision that led to the conferral of refugee protection is nullified.	(3) La décision portant annulation est assimilée au rejet de la demande d'asile, la décision initiale étant dès lors nulle.

Analysis

Insufficient reasons

[19] The applicants contend that errors of law were committed and that the decision is ill-founded in fact and in law. They argue that in its two and one-half page decision, the Board did not discuss and analyse the consequences of the fraudulent misrepresentations committed by the primary respondent and its consequences on the remainder of the evidence, mainly the testimony based around these documents.

[20] The respondents claim the remainder of the evidence was sufficient to satisfy the conditions required.

[21] A simple analysis of this point supports the applicants' point of view, since the Board failed to identify what "other evidence" supported the claim. It also failed to assess the consequences of the fraudulent representations made by the primary respondent.

[22] The Supreme Court of Canada in *R. v. Sheppard*, [2002] 1 S.C.R. 869 at 870, although it involved a criminal case, yet is often quoted in an administrative law context, held that:

> The appeal should be dismissed. The trial judge erred in law in failing to provide reasons that were sufficiently intelligible to permit appellate review of the correctness of his decision.

[23] In *Dunsmuir*, *supra*, an administrative law case, the Supreme Court of Canada, at paragraph 47, stated that for a decision to be reasonable there must be "justification, transparency and intelligibility". This requirement has been applied in immigration cases (*Minister of Public Safety and Emergency Preparedness v. Gunasingnam*, 2008 FC 181, at paragraph 14).

[24] Justice Yvon Pinard in *Minister of Citizenship and Immigration v. Fouodji*, 2005 FC 1327, at paragraph 18, wrote "[t]he panel did not set out clearly and explicitly what part of the remaining evidence filed before the first panel remained credible and why it was credible".

[25] Justice Yves de Montigny in *Minister of Citizenship and Immigration v. Shwaba*, 2007 FC 80, wrote at paragraph 17: "It is impossible to review a decision without being able to evaluate the decision-maker's reasons."

[26] Justice Sean Harrington in *Gunasingnam, supra,* is even more direct. He concludes his judgment in a refugee claim in these words: “It is simply wrong to think one can gain entry to Canada on the strength of a lie” (at paragraph 24).

[27] In the present case, the Board has not satisfied this criterion. In its very brief decision, it did not analyse the consequences of the false information formulated by the primary respondent and its effects on her credibility and it did not provide an evaluation and detailed examination of the evidence which supported the conclusion of credibility.

[28] This failure or serious error constitutes an error of law justifying this Court’s intervention.

Failure to properly weigh the evidence

[29] The applicants submit that even if the Board had supplied sufficient reasons for its decision, it did not analyse the remaining evidence submitted before the first panel:

(a) The first panel made no specific reference to the fraudulent FIRs in its reasons although it relied on documentary evidence. It also referred to the primary respondent’s evidence, which turned out to be mainly false.

(b) The Board did not mention that the first decision was based upon the primary respondent’s false claims and was the basis of her refugee claim. For example, at paragraph 23 of her Personal Information Form (PIF), she states that a false case was registered against her husband. This was later held to be false. She also noted in her PIF, at paragraph 24, that the army and the police were looking for her in Pakistan. Yet she

returned there following her arrival in Canada for lengthy stays in 2005 and 2006 without problems.

[30] The Board refused to consider this element of false representation. Yet, the Board's avoidance of describing and analysing the "other evidence" and the effects of falsity upon the credibility of the primary respondent constitute a reversible error.

[31] This was an important issue because references to documentary evidence of general country conditions alone without evidence of personalized risk cannot form a basis for a valid claim of refugee protection (*Fouodji, supra,* at paragraph 20).

Consideration of an irrelevant factor

[32] The applicants argue that the Board should have considered the length of time the verification of the authenticity of documents takes, and claim it could have been made before the first hearing.

[33] We do not know the weight and direction given by the Board on this point but it appears to be negative. Yet the time element is totally irrelevant in this case since the Court does not impose a time limit and the discovery of fraud depends on many imponderable factors beyond the applicants' control.

[34] This could, in the applicants' opinion, be an indication or an appearance of bias for the respondents.

[35] At the least, it was an unnecessary and irrelevant consideration.

Conclusion

[36] In conclusion, I find the Board committed at least two reversible errors which justify the granting of the present application.

JUDGMENT

THIS COURT ORDERS THAT:

1. the application for judicial review is granted;
2. the Immigration and Refugee Board's decision dated June 30, 2008, is quashed;
3. the matter is returned before the Immigration and Refugee Board to be heard by a different member for re-determination;
4. no important questions are certified.

"Orville Frenette"
Deputy Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-3352-08
STYLE OF CAUSE:	THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS and THE MINISTER OF CITIZENSHIP AND IMMIGRATION v. Fakera Tanveer WARAICH, Sahrash Tanveer WARAICH, Adeel Tanveer WARAICH, Anza Tanveer WARAICH
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	January 21, 2009
REASONS FOR JUDGMENT AND JUDGMENT:	The Honourable Orville Frenette, Deputy Judge
DATED:	February 12, 2009

APPEARANCES:

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Me Stéphanie Valois	FOR THE RESPONDENTS

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