

**Date: 20090212**

**Docket: IMM-495-08**

**Citation: 2009 FC 149**

**Ottawa, Ontario, February 12, 2009**

**PRESENT: The Honourable Mr. Justice Russell**

**BETWEEN:**

**JANNAT HUSSAIN SHAIQ**

**Applicant**

**and**

**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 a judicial review of a decision of the Refugee Protection Division (RPD) of December 27, 2007 (Decision) dismissing the refugee claim of Jannat Hussain Shaiq.

[2] The Applicant is a citizen of Pakistan who says he fled his country because he was persecuted for his political opinions. The Applicant was a member of the United Kashmir Peoples National Party (UKPNP) that sought the independence of Pakistan Occupied Kashmir (POK).

[3] The Applicant says he fears persecution from the government authorities of Pakistan and Azad Kashmir, the military, the Pakistan Secret Service (ISI), the police, Islamic fundamentalists, Jihadi organizations and pro-accession Pakistan gangsters.

## **BACKGROUND**

[4] The Applicant was born in Bosagala, Azad Kashmir, or POK in 1946. While attending college, the Applicant says he met some activists who promoted the peaceful settlement of the independence of Kashmir from Pakistan. He became interested in the issue and attended meetings.

[5] The Applicant objected to the political policies in Jammu and Kashmir, where the government allowed little employment for young people in order to increase their dependence on a unified Pakistan. As a result, the Applicant says he was forced to seek employment in Saudi Arabia. During his frequent visits to Kashmir, he remained in contact with other like-minded activists.

[6] The Applicant became a member of UKPNP after its formation in 1994. He says his assistance to the party was initially limited. The party came under increasing state scrutiny and, in 1995, the party Chairman, Sardar Shoukat Ali Kashmiri, was detained, tortured, and warned to stop

promoting the independence of Kashmir. The party became more active and held public demonstrations in POK. The Applicant says that he became very distressed at this point because the state was repressing freedom of speech.

[7] The Applicant also claims that the government openly supported militant Islamic organizations to help suppress the movement for an independent Kashmir. A “jihad” was encouraged to attack the secularism of Kashmir.

[8] In January 1998, Sardar Shoukat Ali Kashmiri was kidnapped again by the ISI. The UKPNP protested and the state retaliated by making false criminal accusations against party members. Some members were jailed, others went underground, and the rest left the country and sought refugee protection abroad. At this time, the Applicant suggested that the party hire the best lawyer in Pakistan and seek the assistance of international organizations to pressure the government to release the party Chairman. However, the Chairman was once again tortured, warned, and then released. The Chairman did not heed the warning and, instead, went to Kashmir where he painted a defamatory picture of the ISI. As a result, in 1999, the party believed the Chairman was at risk of being rearrested and killed, so they advised him to leave the country. He fled to Switzerland and was granted refugee status.

[9] In 2004, the Applicant retired and returned to his place of birth. He became more politically active and acquired official membership of the UKPNP in August 2004. In November 2004, he became the Vice President of UKPNP for the Bosagala unit. He was in charge of disseminating the

party's literature, and he made sure that the party's slogan and banners were hung in public places. As a result of his work, more people joined the party. This worried the state.

[10] On October 8, 2005, Kashmir, and in particular the POK, was hit by an earthquake that had devastating effects on the area. An estimated 100,000 people were killed, 100,000 were wounded and 3.2 million became homeless. Houses, property and businesses were destroyed and there was no electricity, water, shelter, medical aid, or food. The government stole much of the relief aid, so that thousands of people died because of the lack of medical care, food and shelter. Corrupt army generals, politicians, and the Speaker of the Assembly appropriated most of the foreign aid. The rest was distributed to those who were loyal to the government.

[11] The Applicant protested against the unjust and corrupt distribution of foreign aid by putting up posters. As a result, he and his publicity secretary were arrested on December 20, 2005 at Thorar. They were held at the Thorar police station for more than 8 hours before they were released with a warning to stop putting up posters and criticizing the Pakistan army and other state authorities.

[12] The UKPNP continued to protest the corruption of the government in stealing most of the foreign aid. On January 6, 2006, the party organized a protest and posters were put up that criticized corruption, nepotism and the unjust distribution of foreign aid. Demands were made for an independent Kashmir. The Pakistan army was also denounced for the way the aid had been distributed.

[13] The Applicant was arrested on January 8, 2006 at his home in Bosagala. He was detained at the Thorar police station for two days, where he was tortured, beaten and humiliated. The police accused him of causing unrest and warned him to stop his activism and to be loyal to the government.

[14] On February 11, 2006, the Applicant attended a large protest against the Pakistan army. The party leader, Sharaz Chughtai, criticized the army for its corruption and mistreatment of the people of Pakistan in the aftermath of the earthquake. The party demanded that the United Nations should take over the affairs of Kashmir. That evening, some party members, including Sharaz Chughtai, were arrested.

[15] The situation escalated when the government announced general elections in POK. The UKPNP spoke out against the corruption of the government in dealing with earthquake relief and demanded an impartial commission to investigate.

[16] The Applicant says that the government, Islamic fundamentalist groups, the Pakistan army, police, and the ISI are all committed to ensuring that Kashmir remains part of Pakistan.

[17] As the election date approached, several politicians in the area, including the president of Azad Jammu Kashmir People Party (AJKPP), Khalid Ibrahim, threatened the Applicant and warned him to stop his political activities or he would be imprisoned.

[18] The Applicant says that the Speaker of the Legislature, Seyab Khalid, had stolen two truckloads of foreign aid goods, but the case against him was dismissed. However, the details were published in the newspapers. At a meeting on April 10, 2006, the UKPNP unit in Bosagala decided to oppose Seyab Khalid with their full strength. Subsequently, the Applicant distributed posters that accused Seyab Khalid of stealing foreign aid. Seyab Khalid came to Bosagala on April 22, 2006 and put pressure on the Applicant through the Deputy Superintendent of Police. He said that he would win the election “through hook or crook” and “you damaged my reputations by posting the poster in area. Therefore, you must remove these posters by yourself and apology publicly for what you have done.” He told the Applicant, in front of the police, that he would face “horrible consequences” if he did not comply.

[19] On April 23, 2006, the Bosagala unit of the UKPNP met to discuss Seyab Khalid’s threat and decided it was serious. In response, they decided to publicize the threat to the people in the area at a procession on April 25, 2006. They met on April 24, 2006 to discuss the arrangements for the procession. After the meeting, the Applicant did not go home because he expected retaliation from the government. That night, the police raided his house, destroyed his belongings, insulted his family and demanded to know his whereabouts. His family immediately informed him of the attack, so he left his hometown and stayed in the village of Mong for the night. The next day, he left for Rawalpindi.

[20] From Rawalpindi, the Applicant contacted Sardar Mohammad Altaf Khan, the president of the UKPNP unit in Thorar, for an update on the situation. He was told that the police were looking

for him and wanted him “on any cost.” He contacted his lawyer for advice and was told that a case was registered against him for working against the solidarity of the country and for giving a bad name to the Pakistan army and its agents. He was told that his life was in danger and he would be arrested if he came back.

[21] The Applicant fled to Canada and claimed political asylum.

## **DECISION UNDER REVIEW**

[22] On December 27, 2007, the RPD decided that the Applicant was not a Convention refugee or a person in need of protection pursuant to sections 96 and 97 of the Act.

### **Identity**

[23] The RPD found that the Applicant had established his identity as a citizen of Pakistan.

### **Harm Feared**

[24] The RPD made a negative credibility finding on the issue of whether the Applicant has a fear of being subjected to serious harm or death if he is returned to Pakistan:

If he were to return to Pakistan, the claimant fears that he will be subjected to serious harm or killed by the Pakistan police, the Pakistan Inter-Services Agency as well as the current governments of POK, also known Azad Kashmir, and Pakistan. At the hearing, the claimant

testified that he also feared persecution at the hands of members of extremist or terrorist groups often referred to as *jihadi* or Islamist militant groups operating in POK and elsewhere in Pakistan. However, the claimant does not state that he experienced any problems with these jihadi or Islamist militant groups in POK or Azad Kashmir in his PIF narrative – no did he testify to this effect at this effect [sic].

### **Reason for Harm**

[25] The RPD found that the Applicant's fear was based on his political opinion as a member of the UKPNP in Kashmir.

### **Credibility and Risk of Harm**

[26] The RPD found that the Applicant was not at risk of persecution for a Convention ground in Pakistan. Nor was it more likely than not that he would be subjected personally to a risk to his life or to a risk of cruel and unusual treatment or punishment, or to a danger of torture, if he were returned to Pakistan.

[27] The RPD found that the Applicant was not a credible witness for several reasons. First, the Member did not accept that the Applicant would have waited until April 2006 to flee from Pakistan if he had been arrested and detained on December 20, 2005 and on January 8, 2006. The Applicant's explanation was that, although he was arrested on these occasions, there were no police cases or charges against him as a result; therefore, he only decided to flee upon learning that the

police had registered a case against him in April, 2006. The RPD did not accept the Applicant's explanation on the basis that his allegations of police abuse were "all allegations of a very serious nature," so that he would not have waited to leave Pakistan when he had the opportunity to leave earlier.

[28] Secondly, the Applicant was issued a United Kingdom Visitor's Visa on August 17, 2005 which was valid until August 17, 2010. In addition, he was issued a United States Visitor's Visa on October 3, 2005, which was valid until September 11, 2010. He was asked why he did not leave Pakistan earlier than April 2006 and go to either the United Kingdom or the United States under his travel visas and make a refugee claim there. In response, the Applicant testified that, although he had been arrested and detained by the police twice in Pakistan, the conditions in Pakistan were not yet so bad that he felt he needed to leave. However, the RPD decided that, because the Applicant has a daughter residing in the United States, he could have traveled to the United States in January 2006, but he had simply chosen not to.

[29] Thirdly, the RPD found that if the Applicant was credible, he would have made a refugee claim immediately upon entering Canada. Instead, he arrived in Canada on April 28, 2006 and waited until June 13, 2006 to make a refugee claim. When asked why he waited approximately six weeks before making the claim, the Applicant said that when he first arrived in Canada he intended to make a refugee claim, but he did not have any knowledge of how to do it. As soon as he learned that he could make a refugee claim, he did so in the last week of May 2006, and he was given an appointment to meet with immigration officials on June 13, 2006. He testified that he waited until

he had retained a lawyer to assist him. The RPD rejected the Applicant's response that he did not know how to make a refugee claim in Canada because the Applicant told the immigration officer that he had heard in Kashmir that there were a lot of UKPNP members living in Calgary. Also, a UKPNP member picked him up at the airport when he arrived in Calgary. The RPD concluded that he had been in a position to consult with the members of the Kashmiri community about how to make a refugee claim in Canada shortly after he arrived.

[30] Fourthly, the Applicant testified that he used his passport to leave Pakistan on April 28, 2006 and claimed that he had no trouble leaving the country. The RPD found that the documentary evidence on security measures in Pakistan indicated that everyone who leaves Pakistan from an airport must go through the Personal Identification, Security, Comparison and Evaluation System (PISCES). As a person wanted for political reasons, the RPD decided that the Applicant would have been on the Exit Control List (ECL) as a "wanted criminal or individual under investigation." The Applicant therefore would have been prevented from leaving the country or at least questioned by the authorities. The RPD concluded that the Applicant was not wanted by the Pakistan police or other state agencies for political reasons.

[31] Fifthly, the RPD made a negative credibility finding based on the Applicant's delay in submitting a First Information Report (FIR), a Warrant of Arrest, and an August 7, 2007 letter from a lawyer in Azad Kashmir, Pakistan. The FIR was issued by the Thorar police and accuses the Applicant of publicly criticizing the government of Azad Kashmir, the government of Pakistan and the Pakistan army for their handling of the earthquake relief at a UKPNP procession on April 25,

2006. The FIR was not received by the RPD until September 12, 2007, more than one year after the Applicant completed his PIF on July 10, 2006. The Applicant was represented by counsel at the time he completed his PIF. The RPD found that a copy of a FIR is not difficult to obtain from Pakistan because, according to Section 265-C of the Criminal Procedure Code of Pakistan, copies of a FIR, and other documents, “shall be supplied free of cost to the accused not later than seven days before the commencement of the trial.” According to the documentary evidence, the RPD found that, as well as the accused, even members of the public could obtain a FIR. The letter from the lawyer, which was also not received by the Board until more than one year after the PIF was made, stated that the lawyer had already obtained copies of the FIR and the Warrant of Arrest as of February 8, 2007. The FIR and the Warrant of Arrest were evidence of central importance to the Applicant’s claim, so the RPD drew a negative inference based on the Applicant’s waiting a year to produce them, stating that “I find the claimant’s substantial delay in obtaining the FIR and Warrant of Arrest allegedly registered against him significantly undermines the authenticity and reliability of these documents.”

[32] The RPD decided that the Applicant had submitted fraudulent documents and relied on the following evidence from the Information Centre on Asylum and Migration of the German Federal Office for the Recognition of Foreign Refugees in making this finding:

[I]n nearly all cases, the documents presented [by asylum seekers] for proof of persecution (reports under the penal code, warrants for arrest, court judgments, lawyers’ correspondence) were falsified or of incorrect content.

In Pakistan, it is not...difficult to have a (simulated) criminal proceedings initiated against oneself, in order to get authentic

documents (e.g. a “First Information Report” or a decision to set the accused free until the date of trial...

It is possible...either [to] pay for or to use private contacts to have a newspaper article published depicting a situation of persecution.

[33] Based upon the Applicant’s delay in producing key documents and the ease with which such documents can be obtained in Pakistan, the RPD made the following finding:

I prefer the foregoing documentary evidence to the claimant’s evidence, as it comes from an independent and reliable source with no interest in the outcome of these proceedings. Given this documentary evidence and my adverse credibility findings, I find that the FIR, the Warrant of Arrest and the letter from the lawyer in District Poonch, Azad Kashmir, Pakistan that the claimant has submitted to the Board are not authentic and genuine, and therefore I attach no weight to these documents as corroborative evidence of police or government interest in the claimant in Pakistan.

[34] In addition, the RPD found that there was insufficient documentary evidence to prove that UKPNP members and activists in Azad Kashmir are persecuted in Pakistan. However, the RPD did find that, according to the documentary evidence, it was reported that Sardar Shaukhat Ali Kashmiri was the leader and Chairman of the UKPNP until he was exiled in 1999, and that he had been arrested and tortured by Pakistani forces on two occasions. The RPD did not believe, however, that UKPNP members were arrested or detained by the Pakistan authorities after the October 1999 coup or the 1997 protests because that information did not appear in the documentary evidence. Similarly, the RPD did not believe that UKPNP members were the ongoing victims of persecution by the state because the Applicant did not have documentary evidence to prove it.

[35] The RPD made a global negative credibility finding as follows:

In summary, based upon the foregoing negative credibility findings, I do not believe that the claimant was arrested and detained by the police in POK or Pakistan in December 2005 and in January 2006 and that there is an FIR registered against him and a warrant for his arrest in Pakistan, all because of his UKPNP political membership and activities as is alleged. I find that all of these allegations to be an attempt by the claimant to embellish his refugee protection claim.

As a result, the RPD found that the Applicant lacked credibility concerning the central elements of his refugee claim and rejected the Applicant's other evidence from family members and newspaper articles.

## **ISSUES**

[36] The Applicant raises the following issues:

1. That the RPD erred in law in this case;
2. That the RPD based its decision upon an erroneous finding of fact that it made in perverse or capricious manner or without regard to the material before it; and
3. That the RPD failed to observe a principle of natural justice in this case.

## **STATUTORY PROVISIONS**

[37] The following provisions of the Act are applicable in these proceedings:

### **Convention refugee**

**96.** A Convention refugee is a person who, by reason of a well-founded fear of

### **Définition de « réfugié »**

**96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant

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.

### **Person in need of protection**

**97.** (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or,

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.

### **Personne à protéger**

**97.** (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne

because of that risk, unwilling to avail themselves of the protection of that country,

veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

#### **Person in need of protection**

#### **Personne à protéger**

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

### **STANDARD OF REVIEW**

[38] Erroneous findings of fact that are made in a “perverse or capricious manner or without regard to the material,” have traditionally been reviewed on the patent unreasonableness standard:

*Canada (Minister of Citizenship and Immigration) v. Thanabalasingham*, [2004] 3 F.C.R. 523

(F.C.) at paragraph 51; *Powell v. Canada (Minister of Human Resources Development)*, [2000] F.C.J. No. 1008 (F.C.A.); *Mugesera v. Canada (Minister of Citizenship and Immigration)* 2003 FCA 325 at paragraph 25; and *Harb v. Canada (Minister of Citizenship and Immigration)* 2003 FCA 39 at paragraph 18.

[39] However, in *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada recognized that, although the reasonableness *simpliciter* and patent unreasonableness standards are theoretically different, “the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review”: *Dunsmuir* at paragraph 44. Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of “reasonableness” review.

[40] The Supreme Court of Canada in *Dunsmuir* also held that the standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[41] Thus, in light of the Supreme Court of Canada’s decision in *Dunsmuir* and the previous jurisprudence of this Court, I find the standard of review applicable to issues one and two 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 paragraph 47. Put another way, the Court should only intervene if the Decision was unreasonable in the sense that it falls outside the “range of possible, acceptable outcomes which are defensible in respect of the facts and law.”

[42] The Applicant’s third issue is that the RPD failed to observe the principles of natural justice in this case. *Mainville v. Canada (Attorney General)*, [2007] F.C.J. No. 323 at paragraph 9 states:

So far as questions regarding procedural fairness or the principles of natural justice are concerned, it is not necessary to discuss the applicable standard of review: if those principles have been violated, the decision will be set aside and returned to the Minister for reconsideration.

Alternatively, *Jayasinghe v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 275 (F.C.) states at paragraph 17 that whether a breach of natural justice has occurred is a question of law, reviewable on a standard of correctness: *Harb v. Canada (Minister of Citizenship and Immigration)* 2003 FCA 39 and *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247 at paragraphs 55-56.

[43] Finally, in relation to the credibility of the Applicant, *Aguebor v. Canada (Minister of Employment and Immigration)* [1993] F.C.J. No. 732 (F.C.A.) (*Aguebor*) at paragraph 4 states: “[a]s 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.” In other words, the RPD’s credibility

findings in the present case are entitled to a high degree of deference and the burden rests upon the Applicant to show that the inferences drawn by the RPD could not reasonably have been drawn.

## **ARGUMENTS**

### **The Applicant**

#### **Factual Errors**

[44] The Applicant submits that the RPD made numerous factual errors in the Decision and did not pay adequate attention to the evidence before it. He refers to the following:

- a. The RPD misconstrued the evidence related to when he went to Saudi Arabia. The RPD stated that the Applicant moved to Saudi Arabia in July 1996 for employment purposes; however, the evidence showed that, after his education, the Applicant went to Saudi Arabia for employment in the Airline Industry, specifically for Saudi Arabian Airlines;
- b. The RPD misconstrued evidence in stating that the Bosagala unit of the UKPNP met on October 23, 2006 when, in fact, the Applicant was in Canada on that date. The meeting took place on April 23, 2006;
- c. The RPD misconstrued evidence in stating that the Applicant's UKPNP membership card was issued to him on November 9, 2004. The card was, in fact, issued to him on November 10, 2004;
- d. The RPD misconstrued evidence in stating that the Applicant alleged that the police arrested and detained him on December 20, 2006 in POK or Pakistan. The first arrest occurred on December 20, 2005 in POK, not in Pakistan;

- e. The RPD misconstrued evidence in stating that the Applicant submitted a letter from his lawyer dated August 7, 2007. The letter is dated February 8, 2007;
- f. The RPD misconstrued evidence about the August 22, 2006 letter from the Applicant's brother. The letter from the Applicant's brother is dated July 15, 2007, and the letter dated August 22, 2006 is from the Applicant's wife;

### **Failure to Consider Evidence**

[45] The Applicant also argues that the RPD failed to consider all of the evidence of the persecution he has suffered in the past in Pakistan:

- a. The RPD failed to consider the letter from the Applicant's brother dated July 15, 2007, which included their father's death certificate and the evidence that their father suffered a heart attack when the police humiliated him and illegally detained him for not producing the Applicant for arrest;
- b. The RPD failed to consider two newspaper articles that reported how the poster campaign led to the charges laid against the Applicant;
- c. The RPD failed to consider the August 22, 2006 letter from the Applicant's wife because the RPD assumed that the letter was from the Applicant's brother;
- d. The RPD failed to consider the documentary evidence written by *Human Rights Watch*.

[46] The Applicant points out that the RPD was silent concerning the above noted evidence and submits that the Decision was made “without regard to the evidence”: *Bains v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 497 (F.C.T.D.). Moreover, the Applicant relies upon *Mahanandan v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 1228 (F.C.A.) at paragraph 8 for the following:

Where, as here, documentary evidence of the kind in issue here is received in evidence at a hearing which could conceivably affect the Board’s appreciation of an Appellant’s claim to be a Convention refugee, it seems to us that the Board is required to go beyond a bare acknowledgment of its having been received and to indicate, in its reasons, the impact, if any, that such evidence had upon the Applicant’s claim. As I have already said, the Board failed to do so in this case. This, in our view was a fatal omission, as a result of which the decision cannot stand.

[47] In the present case, the Applicant says that the RPD failed to consider or mention a large portion of the evidence and so failed to consider the totality of the evidence.

### **Baseless Inferences**

[48] The Applicant also submits that the RPD drew inferences that were not supported by evidence. The RPD’s conclusion that the Applicant’s testimony that he was arrested, detained and tortured by the police in POK or Pakistan in December 2005 and January 2006 lacked credibility was mere speculation. In his PIF, the Applicant described how he was illegally detained on December 20, 2005 at the Thorar police station for more than 8 hours before he was released with a warning. He was illegally detained again on January 8, 2006 at the Thorar police station where he was kept for two days. The police held him responsible for creating unrest and he was warned to

cease posting pro-independent Kashmir slogans and to be loyal to the government and the Pakistan army. The Applicant was tortured, beaten and humiliated on this occasion.

[49] The Applicant claimed that he was threatened by Khalid Ibrahim, the president of AJKP, to stop his activities because the Applicant's poster campaign was a big hurdle in the AJKP election campaign. When the Applicant refused to stop his campaign, Khalid Ibrahim threatened that he would send him to prison.

[50] The Applicant claimed that he was also threatened by the Speaker of the Azad Kashmir Assembly. The Speaker came to the Applicant's district on April 22, 2006 and pressured the Applicant through the Deputy Superintendent of the Police. When the Applicant refused to stop putting up posters and to apologize publicly for his actions, false charges were laid against him on April 24, 2006.

[51] The Applicant argues that the RPD made a baseless inference in concluding that he did not experience fear of persecution in Pakistan because of when he chose to leave. The Applicant explained that he did not think the situation was sufficiently bad for him to leave until he learned about the false charges that had been laid against him and the police raid on his house. Immediately after these events occurred, he left the country. He left the country three days after he learned of the events that caused him a high level of subjective fear.

[52] Further, the Applicant argues that the 6-week delay in making his refugee claim in Canada should not be a decisive factor in deciding he did not have a subjective fear of returning to Pakistan. The Applicant waited until he had contacted a lawyer who explained the process to him.

### **The Respondent**

[53] The Respondent submits that the RPD conducted a thorough and proper analysis and did not make a reviewable error. The RPD is an experienced administrative body in the area of refugee protection, so the Court should show a high level of deference when reviewing RPD decisions.

### **Delay**

[54] The Respondent submits that the RPD did not commit an error by considering the Applicant's delay in claiming refugee status. While delay in submitting a claim cannot be the reason for its dismissal, the Federal Court in *Singh v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1451 (F.C.) at paragraph 29 has held that it is a factor to consider:

Delay in applying for Convention refugee status is not an automatic bar to a claim for protection. However, it is a relevant and potentially important consideration. Ultimately, the Board must decide, based on the evidence before it, the significance of a delay to a particular case.

[55] In *Duarte v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1259, the Federal Court held that it was reasonable for the RPD to consider the Applicant's 11-month delay in submitting a refugee claim. The Respondent submits that the present case is similar to *Duarte* in that the Applicant did not provide any evidence to explain the delay.

[56] The Respondent also submits that the RPD properly considered the Applicant's testimony that the police detained him on December 8, 2005 and January 8, 2005. However, this evidence was outweighed by the fact that the Applicant could have left Pakistan earlier because he had a valid passport from Pakistan and visitors visas for the United States and the United Kingdom. The Respondent argues that the RPD has the discretion to assess and weigh the significance of an applicant's failure to make a claim elsewhere, and that where the RPD issues a decision that is reasonably open to it on the evidence that decision is neither perverse or capricious: *Sellathamby v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 839 (F.C.T.D.); *Ilie v. Canada (Minister of Citizenship and Immigration)*, [1994] F.C.J. No. 1758 (F.C.T.D.); *Canada (Minister of Citizenship and Immigration) v. Sivalingam-Yogarajah*, [2001] F.C.J. No. 1414 (F.C.T.D.).

[57] The RPD considered the Applicant's testimony that the situation was not bad enough to leave Pakistan earlier but did not believe him. The RPD had the right to weigh the Applicant's evidence that he had been illegally detained and tortured by the police and to decide that, if these allegations were true, then he would have felt compelled to leave sooner. Further, if the Applicant was really in fear of persecution in Pakistan he would have made a refugee claim in the United States when he went to visit his daughter.

[58] The Respondent also submits that the RPD properly considered that the Applicant waited six weeks before claiming refugee status in Canada. If the Applicant, as he claimed in his PIF, was in contact with members of the Kashmiri community in Calgary as soon as he arrived, he would not have waited until June 13, 2006 before giving notice of his intention to make a refugee claim. If the

Applicant truly had a subjective fear of persecution, he would have notified Canadian authorities immediately that he was seeking asylum.

### **Credibility**

[59] The Respondent submits that the RPD is a specialized tribunal that has complete jurisdiction to determine the credibility of applicants. Further, the assessment of credibility is a question of fact and ought to be given a high level of deference by the Court: *Aguebor; Saha v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1117 at paragraph 23 (F.C.T.D.); and *Razzagh v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 918 at paragraph 2 (F.C.).

[60] This Court has found that the RPD has a well-established expertise in the determination of questions of fact, particularly in the evaluation of the credibility, and the subjective fear of persecution of an applicant: *R.K.L. v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 162 (F.C.T.D.) at paragraph 7; *Rahaman v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1800 (F.C.T.D.) at paragraph 38; and *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1425 (F.C.T.D.) at paragraph 14.

[61] The Respondent submits that the RPD properly considered the objective documentary evidence that contradicted the Applicant's testimony. For example, the Applicant testified that he had no trouble leaving Pakistan via plane; however, the RPD found this not to be credible because

the Pakistan authorities have a list of persons wanted for political reasons, so the Applicant would have been prevented from leaving the country.

[62] The Respondent also submits that the RPD was entitled to consider the Applicant's delay in submitting the FIR and the Warrant of Arrest. These documents would have been easy to acquire, and the Applicant had the benefit of counsel working for him in Pakistan; therefore, there was no reason why the Applicant should wait one year before submitting them to the RPD. Moreover, the Respondent submits that the RPD did not commit a reviewable error by finding that the documents were likely forgeries because of the ease with which people can obtain fraudulent documents in Pakistan.

[63] The Respondent submits that the credibility findings of the RPD should not be disturbed because the RPD considered the totality of the evidence and reasonably found that the Applicant was not credible.

### **Reweighing of Evidence**

[64] The Respondent concludes that the Applicant is requesting that the Court reweigh the evidence and provide him with a more favourable result. However, the RPD has the discretion to weigh the evidence before it, and its decisions should not be disturbed where they are reasonable: *Aguebor and Petrova v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 613 (F.C.).

[65] The Respondent submits that the RPD did not misconstrue the evidence in the present case. The RPD was not required to mention all of the evidence in its Decision, and its failure to do so is not grounds for judicial review: see *Woolaston v. Canada (Minister of Manpower and Immigration)*, [1972] S.C.J. No. 79 (S.C.C.) which states at paragraph 9:

The fact that it was not mentioned in the Board's reasons is not fatal to its decision. It was in the record to be weighed as to its reliability and cogency along with the other evidence in the case, and it was open to the Board to discount it or believe it.

[66] Further, the Respondent submits that the typographical errors with respect to dates in the Decision were not of material importance.

[67] The Respondent says that the RPD weighed and assessed the country evidence on the treatment of UKPNP members in Pakistan and determined that it did not support the Applicant's allegations of persecution and abuse. The RPD concluded that the Applicant's allegations were implausible. The RPD was within its right to determine that the Applicant had produced fraudulent letters from his family to bolster his refugee claim. These determinations were all based on inferences that the RPD was permitted to make and they were all based on the evidence.

[68] The Respondent submits that the Decision was reasonable on the evidence and should stand.

## ANALYSIS

[69] As the RPD makes clear at paragraph 29 of the Decision, the credibility findings are cumulative but the main problem is that “the claimant lacks credibility respecting the central elements of his refugee protection claim – specifically that I do not believe that the police and other state agents in Pakistan or Azad Kashmir arrested, detained and tortured him in December 2005 and January 2006 – and that there is currently a FIR and Warrant of Arrest issued against him because of his UKPNP membership and political activities in Azad Kashir.”

[70] At the basis of this conclusion lie three important findings by the RPD:

- a. As explained in paragraph 18 of the Decision, there was documentary evidence before the RPD concerning the Pakistan government’s Exit Control List which is used at exit points by immigration authorities to prevent the departure from Pakistan of wanted criminals and individuals under investigation. All international flights are reviewed. This means that, as explained in paragraph 19 of the Decision, the RPD found it “implausible that the claimant would not have been prevented from leaving Pakistan, or at least have been questioned by Pakistani immigration authorities had he been wanted by the Pakistan police or other state agencies in Azad Kashmir or Pakistan for political reasons, namely his anti-government UKPNP political activities in Azad Kashmir”;
- b. As pointed out in paragraph 21 of the Decision, the Applicant was instructed when he completed his PIF in July 2006 to attach copies of any police and other

documents to support his claim. He was represented by counsel at the time. Yet the Applicant did not provide copies of a FIR or the Warrant of Arrest until over a year later. The RPD found that this delay “significantly undermines the authenticity and reliability of these documents – as well as the February 8, 2007 letter from the claimant’s lawyer in District Poonch, Azad Kashmir, Pakistan.”

- c. The RPD also found that general documentary evidence on the UKPNP did not suggest any police or government mistreatment” of UKPNP members and activists in Azad Kashmir.” The RPD concluded that “[b]ased upon this very recent documentary evidence on the UKPNP in Pakistan, had UKPNP members such as the claimant been the on-going victims of police and other state agents in Pakistan while the claimant was residing in Azad Kashmir between August 4, 2004 and April 28, 2006 I find it implausible that such incidents would not be reported in the substantive documentary evidence before me on the political situation in Pakistan, particularly POK or Azad Kashmir.”

[71] As well as these central issues, there were also more peripheral matters that went to the adverse credibility finding, such as the adverse inference concerning his failure to leave Pakistan earlier and to initiate his refugee claim earlier upon reaching Canada. These findings would not be sufficient, in my view, to support a general adverse credibility finding against the central elements of the Applicant’s claim but, taken cumulatively with the other findings, it was not unreasonable for the RPD to take them into account. This Court has held that delay in making a claim is a factor that

the RPD can consider: *Singh* at paragraph 29. It is also open to the RPD to consider and weigh an applicant's failure to make a timely claim elsewhere: *Sellathamby*.

[72] In my view, the typographical and other errors referred to by the Applicant are not material enough to undermine the central elements of the Decision. The RPD rejects the letters from family members and other supporting evidence because it does not believe the central tenets of the Applicant's claim.

[73] As the Respondent points out, the RPD is entitled to considerable deference when weighing evidence and assessing credibility issues. The Court cannot simply re-weigh the evidence and reach its own conclusions: *Aguebor*.

[74] All in all, then, the RPD based its Decision upon credibility and referred to a list of points that, cumulatively, caused it to disbelieve the central elements of the Applicant's claim:

- a. Delay in leaving Pakistan;
- b. Failure to avail himself earlier of assistance from his children in the U.S.A.;
- c. Delay in making his claim upon arrival in Canada;
- d. Implausibility of his leaving Pakistan on his own passport and not being caught by the Exit Control List system;
- e. Delay in submitting copies of his FIR and Arrest Warrant;
- f. General documentary evidence that did not corroborate police and government mistreatment of UKPNP members and activists in Azad Kashmir.

[75] Having reviewed each of these issues against the record, there are only two that give rise to concern in my view.

[76] It is clear from paragraph 18 of the Decision that the RPD places a great deal of emphasis on the documentary evidence concerning the ECL system for its finding in paragraph 19 of the Decision on implausibility. The Respondent concedes that the Applicant was not questioned about the ECL system at the hearing but says that the onus was upon him to explain how he was able to leave Pakistan on his own passport notwithstanding the existence of the ECL system. The Applicant says that, had he known that the RPD was concerned about the ECL system, he would have been able to lead evidence concerning its application which would have shown why he was not caught by that system. However, he was never asked about it and could not reasonably have anticipated that it would be a concern.

[77] Although the RPD is not required to raise all concerns with an applicant that are related to the Act and the regulations, procedural fairness does require that an applicant be afforded an opportunity to address issues arising from the credibility, accuracy or genuine nature of information submitted. See, for example, *Kuhathasan v. Canada (Minister of Citizenship and Immigration)*, [2008] F.C.J. No. 587 at paragraph 37. Consequently, I think the RPD in the present case should have provided the Applicant with an opportunity to address an issue that was central to its negative credibility finding.

[78] The second issue of concern arises in relation to paragraphs 26 and 27 of the Decision and the RPD's finding that the documentary evidence "does not corroborate police and government mistreatment of UKPNP members and activists in Azad Kashmir":

Based upon this very recent documentary evidence on the UKPNP in Pakistan, had UKPNP members such as the claimant been the ongoing victims of police and other state agents in Pakistan while the claimant was residing in Azad Kashmir between August 4, 2004 and April 28, 2006, I find it implausible that such incidents would not be reported in the substantive documentary evidence before me on the political situation in Pakistan, particularly in POK or Azad Kashmir.

[79] The difficulty with this conclusion is that the RPD was provided with documentation, including a 2006 Human Rights Watch report, which makes it clear that the Pakistani authorities govern Azad Kashmir with strict controls on basic freedoms and practise "routine torture":

Anyone who wants to take part in public life in Azad Kashmir has to sign a pledge of loyalty to Pakistan, while anyone who publicly supports or peacefully works for an independent Kashmir faces persecution.

[80] This documentation is highly supportive of the Applicant's account of what people in his position are likely to suffer in Pakistan and POK, yet the RPD does not refer to it or explain why it has no relevance. The RPD confines itself to specific UKPNP research but does not explain why the Applicant would not face the same persecution as others who, Human Rights Watch tells us, are mistreated by authorities who routinely use torture in a context where tight controls and the suspension of human rights and democratic freedoms are a regular aspect of state control. The Applicant specifically drew the RPD's attention to similarly situated persons who had been subjected to torture and who have sought refugee protection in Canada. None of this is referred to

by the RPD in its reasons. This was evidence that directly contradicted the RPD's conclusions and it should have been referred to and addressed. See *Cepeda*.

[81] The RPD's findings on credibility are cumulative and not all of them can be classified as unreasonable. However, reviewing the Decision as a whole it is obvious that the RPD placed a great deal of emphasis on the ECL matter and the general documentation which it says does not corroborate police and government mistreatment of UKPNP members and activists. This being the case, the RPD should have brought the ECL concerns to the Applicant's attention and allowed him to provide his explanation and it should have addressed the documentation that contradicts its own conclusions.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that**

1. The application is allowed and the matter is returned for reconsideration by a differently constituted Board.
2. There is no question for certification.

“James Russell”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-495-08

**STYLE OF CAUSE:** JANNAT HUSSAIN SHAIQ

v.

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**PLACE OF HEARING:** Calgary, Alberta

**DATE OF HEARING:** 13-JAN-2009

**REASONS FOR :** RUSSELL J.

**DATED:** February 12, 2009

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