Federal Court  Cour fédérale

Date: 20100830

Docket: IMM-559-10

Citation: 2010 FC 861

Ottawa, Ontario, August 30, 2010

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

FERYDON GHORBAN
a.k.a. FERYDON GHORBON
a.k.a. FERYDON GHORDON

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, who is a citizen of Iran, seeks judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated January 8, 2010, wherein pursuant to section 109 of the *Immigration and Refugee Protection Act* (the Act), the Board vacated its previous decision rendered on November 16, 1998, that the applicant was a Convention refugee (the original decision).

[2] In the impugned decision, the Board concludes that the respondent has met its onus of establishing that the applicant had, directly or indirectly, misrepresented or withheld material facts relating to a relevant matter. As well, the Board finds that there was not sufficient untainted evidence considered at the time of the first determination to justify refugee protection. Accordingly, the applicant's claim is deemed to be rejected and the original decision is nullified.

[3] It is not challenged that the Board's findings of fact or of mixed fact and law in a vacation proceeding should be reviewed on a standard of reasonableness. Thus, unless the applicant can demonstrate to the Court that the Board made an error of law, the sole issue to be decided is whether the impugned decision of the Board falls within the range of possible, acceptable outcomes that are defensible in respect of the facts and the law. For the reasons stated below, my answer is yes, but first I will examine the test under section 109 of the Act.

[4] Section 109 of the Act reads as follows:

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	(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

first determination to justify refugee protection.	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.

[5] The parties do not dispute the proper approach to an application to vacate a decision granting refugee status. The text of section 109 and the caselaw are clear. The Board must first conclude that the decision granting refugee protection was obtained as a result of a direct or indirect misrepresentation, or of withholding material facts relating to a relevant matter. Having found so, it may nevertheless deny the application to vacate if there remains sufficient evidence considered at the time of the determination of the claim for refugee protection to justify refugee protection.

[6] A careful reading of the impugned decision shows that the Board clearly understood what its task was in this case. The Board was well aware of the applicable test and relevant caselaw (and doctrine), as appears from the direct references to subsections 109(1) and 109(2) respectively, and the citations in the impugned decision from the Federal Court of Appeal decision in *Coomaraswamy v. Minister of Citizenship and Immigration*, 2002 FCA 153 and the *Immigration Law and Practice*, Second Edition, Volume 1, updated 2009, Lorne Waldman, Lexus/Nexus.

[7] Despite the general suggestion made by the applicant that an error of law has been made by the Board, in fact what the applicant really questions is the reasonableness of the Board's

finding that there were material misrepresentations in respect of a relevant matter. In this regard, the applicant submits that the Board failed, at the first stage, to consider or give proper weight to the new evidence submitted at the hearing, notably a letter from the applicant's aunt dated September 25, 2009, which apparently corroborates the fact that he had been detained and tortured in Iran after he was deported from the United States in December 1996. However, upon closer examination of the evidence on record, this latter ground of attack must fail.

[8] With respect to its assessment under subsection 109(1) of the Act, the Board found that the applicant misrepresented a material fact relating to a relevant matter in his Personal Information Form (PIF) and provided misleading evidence at the original hearing. This conclusion is supported by the evidence presented by the Minister and must be allowed to stand. Moreover, the Board's factual findings are supported by the applicant's own admission that he had lied on a number of key aspects of his asylum claim. The new evidence submitted by the applicant, i.e. the aunt's letter, merely corroborates the misrepresentations that were made to the immigration authorities by the applicant back in 1997 when he arrived in Canada and claimed refugee status. The Board's reasons for ignoring the aunt's letter are reasonable and, overall, they support the finding that the first part of the test has been met.

[9] The misrepresentations conclusively established before the Board are as follows:

(a) The applicant stated originally that he lived his life in Iran and was captured by the Islamic regime, tortured and imprisoned for 22 months from May 1995 to

March 1997. However, the applicant now admits that he lived in the United States from 1968 to 1996;

(b) The applicant provided a comprehensive “back story” to his refugee claim when it was initially filed in 1997. He claimed to have worked as a restaurant manager from 1980 to 1997 in Tehran. During that time, following the death of his father in prison in 1991, he engaged in political activities against the regime. However, his participation in such activities is untrue and he could not have been arrested in May 1995 as claimed since he was in the United States from 1968 to 1996.

(c) With respect to a police record, the applicant made no mention of the numerous drug convictions and property offences that he perpetrated while living in the United States. He also failed to mention that he had been deported to Iran in late December 1996. He only mentioned the alleged 22 months in prison in Iran, which we now know did not occur.

[10] The main argument advanced today by the applicant is that, when he returned to Iran after being deported to the United States in December of 1996, he was kept in prison for a three-month period, which would be corroborated by the aunt’s letter. So, the argument goes, the applicant still suffered the treatment in question; albeit in a different timeframe. However, even if the Board were to believe the applicant, the fact that the concocted story provided by the applicant in 1997 contained some kernels of truth does not mitigate against the numerous misrepresentations noted above and which were conceded by the applicant. Given that the applicant was in the United States, and not in Iran, from 1968 to December 1996, it was open to the Board to conclude that this

misrepresentation was material. The new evidence submitted by the applicant was duly considered and otherwise found not to alter the materiality of the misrepresentation and withholding of evidence, apart from the fact that any such evidence cannot be used to bolster a totally new and different claim.

[11] The applicant also submits that the Board should not have considered the *mens rea* or intention of the applicant in not telling the truth in the first place in 1998, as it is not a relevant consideration in the assessment done by the Board under subsection 109(1) of the Act. In the Court's opinion, the reasons of the Board must be read in totality and I am satisfied that the Board did not include, in its analysis under section 109(1), any irrelevant consideration. At best, the comment made by the Board about the lack of explanation is unfortunate but it does not affect the analysis and ultimate conclusion of the Board in this case. Overall, it is clear, upon a reading of the impugned decision and a review of the tribunal's record, that the original decision was obtained as a result of directly or indirectly withholding material facts relating to a relevant matter.

[12] As aforesaid, there is a second component in the subsection 109(2) of the Act. There is thus still the issue of whether the Board acted in an unreasonable manner in refusing to exercise its discretion to dismiss the Minister's application to vacate on the ground that, at the time of the determination, there was other sufficient evidence considered which justified the determination. In the case at bar, the Board provided articulate and cogent reasons for finding that this was not the case, as there was no credible and independent evidence, apart from the applicant's assertions in his PIF, to establish any reason why he would be subject to persecution, torture or a personalized risk if

he were returned to Iran. These findings of the Board should also be allowed to stand as they are not unreasonable in respect of the facts and the law. In passing, the Board rightly refused to consider the new evidence submitted by the applicant, notably the aunt's letter.

[13] In conclusion, the Court concludes that the applicant has failed to demonstrate that a reviewable error has been committed by the Board. Consequently, the present application must fail. No general question of importance which would be determinative of the result is raised and none shall be certified by the Court.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed. No question is certified.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-559-10
STYLE OF CAUSE:	**FERYDON GHORBAN** **a.k.a FERYDON GHORBON** **a.k.a. FERYDON GHORDON** **v.** **THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	August 17, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	MARTINEAU J.
DATED:	August 30, 2010

APPEARANCES:

Lobat Sadrehashemi	FOR THE APPLICANT
Edward Burnet	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Pivot Legal LLP Vancouver, BC	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Vancouver, BC	FOR THE RESPONDENT