

Federal Court



Cour fédérale

**Date: 20120618**

**Docket: IMM-7171-11**

**Citation: 2012 FC 771**

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

**Ottawa, Ontario, June 18, 2012**

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

**BETWEEN:**

**ALI BEN ZAIED  
HEDIA CHERIF EP BEN ZAIED**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application for judicial review filed in accordance with subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (Act), of a decision dated September 16, 2011, in which the Refugee Protection Division of the Immigration and Refugee Board (panel)

found that the applicant was not a refugee or a person in need of protection under sections 96 and 97 of the Act.

I. Background

A. *Factual background*

[2] Ali Ben Zaied (the principle applicant), sixty-seven years old (67), and his spouse, Hedia Cherif Ep Ben Zaied (the female applicant), sixty-five years old (65), are Tunisian citizens. The applicants are claiming refugee protection in Canada under sections 96 and 97(1) of the Act.

[3] The applicants allege that their problems began in June 2008. The principal male applicant submits that he was approached and intercepted by two strangers as he exited the mosque in his neighbourhood. The principal male applicant contends that the male individuals ordered him to refrain from going to the mosque owing to the fact that he was Shi'ite and could not participate in the rites of the faith. However, the principal male applicant returned to the mosque. He learned that other Shi'ites had been victims of the same verbal threats.

[4] Subsequently, the male principal applicant alleges that he received threatening calls and was warned to stop participating in the mosque's rites. One week after the calls, the male principal applicant submits that three men intercepted him and that he was kicked and punched in the face. The individuals warned him to stop his activities.

[5] The male principal applicant explained that he made an unsuccessful attempt to file a complaint with the police. Also, the male principal applicant maintains that the female applicant

started to become anxious in light of those threats and, as a result, her health began to deteriorate. After discussions with their four children, all residents of Canada, the applicants decided to leave Tunisia. The applicants came to Canada on September 20, 2008, and obtained a visa for a period of six months. They were subsequently granted a six-month extension. Following a one-year stay in Canada, a work permit application for the male principal applicant was refused.

[6] The applicants allege that they declared themselves *sur place* refugees on March 10, 2010, owing to the precarious situation in Tunisia.

[7] The hearing before the panel was held on July 18, 2011.

*B. Impugned decision*

[8] The panel rejected the applicants' refugee claim as it found that the applicants were immigrants rather than refugees.

[9] Essentially, the panel determined that the applicants came to Canada for economic and medical reasons and to remain with their children. The panel found the principal male applicant's testimony about his fear of the Sunni individuals in Tunisia to be confusing and imprecise. Moreover, the panel drew a negative inference from the fact that the applicants did not claim refugee status upon arrival and the fact that they were illegal when they declared themselves *sur place* refugees in 2010. Furthermore, the panel noted that the applicants had already been to Canada twice to visit their children: they stayed in Canada for six months in September 2004 and they stayed in Canada for another month in April 2007. Accordingly, the panel concluded that the male

applicant did not demonstrate a well-founded fear of persecution at the hands of Sunni individuals in Tunisia.

## II. Issue

[10] The Court is of the view that the only issue is the following: did the panel err by finding that the applicants failed to demonstrate the existence of a subjective fear?

## III. Applicable statutory provisions

[11] The applicable statutory provisions of the *Immigration and Refugee Protection Act* read as follows:

REFUGEE PROTECTION,  
CONVENTION REFUGEES AND  
PERSONS IN NEED OF  
PROTECTION

Convention refugee

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

NOTIONS D'ASILE, DE RÉFUGIÉ  
ET DE PERSONNE À PROTÉGER

Définition de « réfugié »

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

country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Person in need of protection

Personne à protéger

**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

**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) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,
- (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,
- (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and
- (iv) the risk is not caused by the inability of that country to provide adequate health

- (i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
- (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) 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) la menace ou le risque ne résulte pas de l'incapacité du pays de

or medical care.

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.

#### IV. Applicable standard of review

[12] According to the case law, the applicable standard of review for determining whether an applicant established a subjective fear of persecution is reasonableness (*Garzon v Canada (Minister of Citizenship and Immigration)*, 2011 FC 299 at paragraph 24, [2011] FCJ No 381; *Qin v Canada (Minister of Citizenship and Immigration)*, 2012 FC 9 at paragraph 34, [2012] FCJ No 14).

#### V. Analysis

[13] In the case at bar, the Court finds that the panel's decision is reasonable for the following reasons.

[14] With respect to the issue of subjective fear, the Court notes that pursuant to *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] SCJ No 9 [*Dunsmuir*], the applicants have the burden of demonstrating that the panel's decision does not fall within the range of acceptable outcomes that

are defensible in respect of the facts and the law. Also, the Court notes that refugee claimants must establish that they have both a subjective fear of persecution in their country of origin and an objective basis for that fear.

[15] In light of the evidence in the record, the Court notes that it was reasonable for the panel to draw negative inferences from, *inter alia*, the fact that (i) the applicants did not provide clear explanations to the panel's questions about their persecutors (Tribunal Record, pages 158 and 174); (ii) that the applicants made a claim for refugee protection following a two-year (2) stay in Canada—and following two (2) visa extensions—(*J.E.P.G. v Canada (Minister of Citizenship and Immigration)*, 2011 FC 744, [2011] FCJ No 938); and (iii) the fact that their responses indicate that they wished to remain in Canada for economic and family reasons (Tribunal Record, page 188). More specifically on that last point, the Court agrees with the respondent that the questions posed by the panel to the applicants fit in [TRANSLATION] “perfectly with the panel's obligations to verify the existence of subjective fear” (*Farfan v Canada (Minister of Citizenship and Immigration)*, 2011 FC 123, [2011] FCJ No 153 [*Farfan*]; *Espinosa v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1324, [2003] FCJ No 1680 [*Espinosa*]).

[16] In fact, when read as a whole, the Court is of the view that the applicants' testimony concerning what could happen to them if they were to return to Tunisia remains speculative (Tribunal Record, pages 182-183), and the evidence in the record does not demonstrate how the applicants' personal situation differs from that of the other Shi'ites in Tunisia.

[17] Furthermore, the Court cannot accept the applicants' argument that there is room for a certain ambiguity in their responses at pages 188 and 189 of the Tribunal Record. A careful reading does not satisfy this Court and, furthermore, if that was the case, counsel for the applicants should have raised it at the hearing before the panel, which was not done. As the respondent points out and, having regard to the evidence in the record, the panel could take the applicants' behaviour into consideration in assessing their subjective fear of being persecuted (see *Espinosa*, above, at paragraphs 16-17; *Heer v Canada (Minister of Employment and Immigration)*, [1988] FCJ No 330). The Court also notes that it is settled law that the lack of subjective fear is fatal to a refugee claim (see *Farfan*, above, at paragraph 16).

[18] That said, with respect to the issue of *sur place* refugees, the Court must also dismiss the applicants' argument that the panel did not consider the issue of *sur place* refugees. The Court noted rather that the panel dealt with the issue of the state of insecurity in Tunisia at paragraphs 13 and 14 of its decision. It was also reasonable for the panel to conclude that there was no connection between that situation and the applicants' claim for refugee protection and that they were affected to the same degree as all Tunisians. In fact, the applicants admitted that they are not specifically affected by the events arising from the revolution and that they would face the same fate as the rest of the Tunisian population (Tribunal Record, page 182).

[19] In light of the foregoing, although the Court sympathizes with the applicants' situation, the Court is of the view that the panel's decision to reject the applicants' claim for refugee protection falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law as stated by the Supreme Court of Canada in *Dunsmuir*, above.



[20] No question was raised by the parties for certification and this case does not involve any.

**JUDGMENT**

**THE COURT ORDERS that**

1. The application is dismissed;
2. There is no question for certification.

“Richard Boivin”

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Judge

Certified true translation

Daniela Guglietta, Translator

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

**DOCKET:** IMM-7171-11

**STYLE OF CAUSE:** ALI BEN ZAIED ET AL  
v. MCI

**PLACE OF HEARING:** Montréal, Quebec

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**REASONS:** BOIVIN J.

**DATED:** June 18, 2012

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