Date: 20070802

Docket: IMM-397-07

Citation: 2007 FC 813

Ottawa, Ontario, the 2nd day of August 2007

PRESENT: THE HONOURABLE MR. JUSTICE MAX M. TEITELBAUM

BETWEEN:

MOHAMED BOUGHERBI
SAMIRA TADJINE

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) of a decision dated January 10, 2007, by the Refugee Protection Division (RPD).

FACTS

[2] The applicants are citizens of Algeria. The principal applicant was a high-ranking military aviation technician in Algeria. He claims that he left the military in 1992 for reasons of conscience. In 1996, the applicant was allegedly approached by the Salafist Group for Call and Combat (GSPC), a fundamentalist terrorist organization in Algeria, which wanted the applicant to join the group

because of his military experience. The applicant allegedly refused to join and was then allegedly repeatedly the victim of threats and attacks on his family home. The applicant allegedly lodged a complaint with the gendarmerie and the police, but to no avail.

[3] In 1998, the applicant was allegedly called to testify in the trial of a member of the GSPC, who was allegedly subsequently condemned to death *in absentia*. The applicant later allegedly moved to Algiers in 2001, where he lived until 2003 and married the female applicant (Ms. Tadjine), with whom he had a child. In Algiers, the applicant allegedly ran a computer products business with a partner.

[4] The applicant claims that, in April 2003, he received a threatening telephone call, and he moved himself and his family several times. After having obtained a visitor's visa, in August 2003, the applicant left Algeria for England, and his wife joined him there in October 2003. The couple's child, however, remained in Algeria.

[5] The applicants allegedly made a claim for refugee protection in England, but this was allegedly rejected in 2005 for the reason that there was reportedly an internal flight alternative within Algeria. The applicants then allegedly paid a smuggler to procure forged French passports, which they used to enter Canada. The applicants arrived in Montréal in September 2005, when Ms. Tadjine was eight months pregnant. They claimed refugee protection in Canada upon their arrival.

IMPUGNED DECISION

[6] In its decision dated January 10, 2007, the RPD rejected the claim for reasons of credibility. In particular, the RPD found that it was implausible that the applicant, someone with a military career, would have been approached by a terrorist organization to join them. In addition, the fact that the applicant did not submit any documentary evidence relating to the GSPC, about which he allegedly testified, or the letter that he allegedly received in April 2003 (the triggering event that led him to leave Algeria), along with the fact that the applicant had no problems for the five years that he lived in Algiers, seems to have planted doubt in the mind of the RPD panel with regard to this claim.

PARTIES' SUBMISSIONS

Applicants

[7] The applicants' principal argument is that the RPD could not find, without supporting evidence, that the applicant possibly witnessed certain acts committed by soldiers without giving the applicant an opportunity to be heard on the subject. The applicants challenge the RPD's mention of the fact that the Minister "concluded that there were no grounds for intervening, and the panel regrets this fact". The applicants also claim that the RPD erred in imposing a heavier burden of proof than that imposed in *Adjei v. Canada (Minister of Employment and Immigration)* [1989] 2 F.C. 680 by requesting documentary evidence that the applicants were unable to provide.

Respondent

[8] The respondent's principal argument is that the panel was able to consider the applicants' failure to submit even a single piece of evidence that could support their claims. Furthermore, the respondent maintains that *Adjei v. Canada (Minister of Employment and Immigration), supra*, actually states that the standard of proof applicable to the facts underlying a claim is that of a balance of probabilities. Viewed in this light, the respondent argues that the applicants did not discharge this burden. The respondent maintains that, owing to the Minister's non-intervention, the panel did not have to further question the applicant about his military career.

ISSUE

[9] Did the RPD make an error warranting the Court's intervention?

STANDARD OF REVIEW

[10] It is settled law that the appropriate standard of review for findings of fact and credibility by the RPD is patent unreasonableness (*Aguebor v. Canada (M.E.I)*, [1993] F.C.J. No.732 (F.C.A.) (QL), *Thavarathinam v. Canada (M.C.I.)*, 2003 FC 1469 (F.C.A.); *Saeed v. Canada (M.C.I.)*, 2006 FC 1016; *Ogiriki v. Canada (M.C.I.)*, 2006 FC 342; *Mohammad v. Canada (M.C.I.)*, 2006 FC 352*; Juan v. Canada (M.C.I.)* (2006), 149 A.C.W.S. (3d) 1103, 2006 FC 809; *Milushev v. Canada (M.C.I.)*, [2007] F.C.J. No. 248 (QL)).

[11] However, for issues of natural justice or procedural fairness, the standard of review is correctness; in other words, if the Court finds that there was a breach in this regard, the application

for judicial review will be allowed (*Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539; *Milushev v. Canada (M.C.I.)*, [2007] F.C.J. No. 248 (QL)).

ANALYSIS

Did the RPD make an error warranting the Court's intervention?

[12] First of all, the applicants challenge the fact that, in its decision, the RPD regretted the fact that the Minister decided not to intervene in the case, in view of the applicant's military background. In its decision, the RPD found as follows:

> First, the panel notes the non-intention of the Minister's representative not [sic] to intervene in this case, in view of the claimant's military background during the period when terrorist conflict was at its height. It is possible that the principal claimant, in the performance of his duties, witnessed certain acts committed by soldiers. Unfortunately, the Minister's representative concluded that there were no grounds for intervening, and the panel regrets this fact. Concerning the claimant's military career, when the panel questioned him about his reason for leaving that career, he was very reticent in his answers. He merely stated that he wanted to live among civilians and gave no other details.

[13] It has been established that the RPD may address issues of exclusion even though the Minister has decided not to intervene (*Arica v. Canada (M.E.I.)*, [1995] F.C.J. No. 670 (F.C.A.) (QL), application for leave to appeal to the Supreme Court dismissed, *Arica v. Canada (M.E.I.)*, (S.C.C.), [1995] S.C.C.A. No. 347 (QL)). In such a case, the RPD may, if desired, adjourn the hearing and invite the Minister to intervene (*Malouf v. Canada (M.C.I)*, [1995] 1 F.C. 537 at p. 558, affirmed in *Malouf v. Canada (M.C.I.)*, [1995] F.C.J. No 1506 (QL), but on different grounds).

[14] These principles are explained in *Rivas v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 317, [2007] F.C.J No. 436 (QL):

> ¶ 37 When an issue of exclusion is raised during the hearing, subsection 23(2) of the Rules allows the RPD a certain amount of discretion in deciding if the Minister's participation may help in dealing with the issue of exclusion of the applicant.
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> ¶ 38 With regard to this, in *Arica v. Canada (Minister of Employment and Immigration)*, [1995] F.C.J. No. 670 (C.A.)(QL) at paragraph 8, Mr. Justice Joseph Robertson, for the Federal Court of Appeal, referring the Rules that applied at the time, found the following:
>
> > Rule 9(2) dictates that if the refugee hearing officer or members of the panel hearing the claim are of the opinion that Article 1F might be applicable, the former shall notify the Minister of such. If the matter of exclusion should, however, arise during the hearing then, pursuant to Rule 9(3), the presiding member has a discretion as to whether to direct the refugee hearing officer to notify the Minister. Should the presiding member decide against giving notice to the Minister then it is clear in law that the Board can make a determination with respect to the exclusion clause based on the evidence presented.
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> (Emphasis added.)
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> ¶ 39 I agree that it may be problematic for the panel to proceed without the Minister since the burden of proof normally falls on him. As the applicant argues, it is a situation that can force the member to [TRANSLATION] "descend into the arena". As Lorne Waldman states in *Immigration Law and Practice*, vol. 1, looseleaf (Markham, Ont.: Butterworths, 1992), at paragraph 8.511,
>
> > Since the burden of proof falls squarely on the Minister, it is certainly arguable that it is not appropriate for tribunal members themselves to engage in an investigation with respect to the exclusion matters. For the tribunal members to do so would result in their becoming prosecutors seeking to establish if the claimant falls within the exclusion clauses.

> ¶ 40 Despite this, the caselaw has recognized that the Board may make a decision on the issue of exclusion without the Minister's participation.
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> ¶ 41 In this case, however, I am forced to note that the member, aware that the Minister believed that exclusion was no longer an issue since he had withdrawn his intervention, decided of his own accord (*proprio motu)* to give notice to the applicant without also notifying the Minister. In such a situation, presiding alone, the member should have acted prudently in his approach to the evidence in order to avoid any appearance of bias.

[15] Therefore, circumstances differ from one case to another, but the Federal Court has always stressed the fact that it is important to give sufficient notice to the claimant about the possibility of the issue of exclusion being raised (*Yang v. Canada (M.C.I.),* [2001] F.C.J. No. 412 (QL); *Aguilar v. Canada (Minister of Citizenship and Immigration),* [2000] F.C.J. No. 911 (T.D.) (QL); *Bermudez v. Canada (Minister of Citizenship and Immigration)* (2000), 6 Imm. L.R. (3d) 135 (F.C.T.D); *Arica v. Canada (Minister of Employment and Immigration)* (1995), 182 N.R. 392 (C.A.), and *Malouf v. Canada (Minister of Citizenship and Immigration),* [1995] 1 F.C. 537 (T.D.)).

[16] However, the case at bar differs from all the other cases related to the same issue. In this case, a reading of the Tribunal Record has led me to find the following: there is no indication that notice was ever given to the Minister on the issue of exclusion; the Minister, on his own initiative, decided not to intervene since, in his opinion, after investigation, Article 1F(a) of the Convention did not apply to the applicant; the possibility of exclusion was not mentioned by the RPD at the start of the hearing, meaning that counsel for the applicant did not have to discuss the issue of exclusion with the applicant before the hearing started.

[17] During the hearing, the RPD did not question the applicant exhaustively about his military career, nor did it mention that it was going to consider issues of exclusion or even call witnesses to that effect. In fact, according to the transcript, the RPD simply asked the applicant why he had left his military career and whether he had had problems with his superiors (see Tribunal Record at pages 312 and 313). Article 1F(a) of the Convention was therefore not among the applicant's principal arguments.

[18] If the RPD had wanted to raise the issue of exclusion, it could have done so at the hearing, but it did not. Accordingly, I cannot find that the RPD was biased, despite its remarks in the decision. The evidence shows that the RPD did not base its negative decision on this factor. Therefore, the applicant did not need to be questioned about his military career.

[19] As for the applicable standard of proof, notwithstanding the applicants' arguments, the claimant must establish the facts underlying the claim on a balance of probabilities (*Hinzman v. Canada (M.C.I.),* [2007] 1 F.C.R. 561; *Adjei v. Canada (Minister of Employment and Immigration),* [1989] 2 F.C. 680 at page 682; *Li v. Canada (M.C.I.),* [2005] 3 F.C.R. 239 (F.C.A) at paragraphs 9 to 14 and 29).

[20] Furthermore, the Court is of the opinion that the RPD may reach reasonable conclusions based on implausibilities, common sense and rationality. It may also reject testimony if it is not consistent with the plausibility of the case as a whole (*Aguebor v. Canada (Minister of Employment and Immigration),* [1993] F.C.J. No. 732 (QL); *Alizadeh v. Canada (Minister of Employment and*

Immigration), [1993] F.C.J. No. 11 (QL); *Shahamati v. Canada (Minister of Employment Immigration)*, [1994] F.C.J. No. 415 (QL); *Singh v. Canada (M.C.I.)*, [2007] F.C.J. No. 97 (QL)). Moreover, it is settled law that the onus is on the applicant to submit sufficient, credible and trustworthy evidence to the RPD (*Soares v. Canada (M.C.I.)*, [2007] F.C.J. No. 254 (QL); *Hazell v. Canada (M.C.I.)*, 2006 FC 1323).

[21] In this case, in order to asses the facts underlying the claim, the RPD questioned the applicants at the hearing about key elements of the claim, but did not receive satisfactory answers. As a result, the RPD asked the applicants to submit documentary evidence in support of their claims, which they failed to do. Therefore, the RPD could take this failure into account. In *Singh v. Canada (M.C.I.)*, [2007] F.C.J. No. 97 (QL), Mr. Justice Shore stated the following:

> 28 It is trite law that the Board may draw an unfavourable conclusion about Mr. Singh's credibility when his story is implausible and when he does not submit any evidence to corroborate his allegations. In *Encinas v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 61, [2006] F.C.J. No. 85 (QL), Mr. Justice Simon Noël wrote the following:
>
> > [21] I would add that it is clear from reading the transcript of the hearing that the applicant did not discharge their onus of proof to convince the RPD that their claim was well-founded. Indeed, the RPD informed them more than once that certain facts should have been put in evidence (the employment relationship in 2003, for example). Consequently, the RPD, not having at its disposal the evidence that it would have liked to receive, found that the version of the facts in the claim was not credible. That finding was certainly open to the RPD. (See *Muthiyansa and Minister of Citizenship and Immigration*, 2002 FCT 17, [2001] F.C.J. No. 162, at para.13).

[22] In the present case, the RPD noted that the applicant did not submit any evidence to corroborate his allegations. In fact, the applicant did not submit any evidence that confirmed the events on which his claim for refugee protection was based. He did not file the complaints lodged with the authorities or any proof of his notice to appear in court for the trial of the member of the GSPC terrorist organization. The Court also notes that the applicants did not submit a copy of the ruling or the reasons related to their claim for refugee protection in England. As for Ms. Tadjine, when the RPD questioned her about her fear of returning, she replied: [TRANSLATION] "I do not know".

[23] The applicants also argue that the RPD erred with regard to the relevant time of conflict in Algeria. Even if it was possible to find that the RPD made an error regarding this or that it gave certain factors too much weight, this Court must counterbalance the errors with the decision of the RPD as a whole (*Miranda v. Canada (M.C.I.)*, [2006] F.C.J. No. 813 (QL) at para. 13).

[24] Taken as a whole, the decision is not patently unreasonable, especially considering the fact that the applicants do not fear for their daughter's safety, having left her in Algeria with a grandparent, but do claim to fear persecution if they were to be removed to Algeria.

JUDGMENT

THE COURT ORDERS that this application for judicial review be dismissed. No question was submitted to be certified.

"Max M. Teitelbaum"
Deputy Judge

Certified true translation
Gwendolyn May, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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