

Date: 20090123

Docket: IMM-2229-08

Citation: 2009 FC 67

OTTAWA, Ontario, the 23rd day of January 2009

Present: The Honourable Louis S. Tannenbaum

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

applicant

and

KHALID HAIDAR

respondent

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 (panel) dated April 3, 2008, in which the panel determined that the respondent was a “refugee” within the meaning of section 96 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act), and a “person in need of protection” within the meaning of section 97 of the Act, and accordingly allowed the respondent’s refugee claim.

[2] Article 1(F)(a) of the United Nations Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (Convention) is of particular relevance in this judicial review. The Minister is challenging the panel’s finding that the Minister did not discharge the burden of proving that the

applicant was guilty of violating article 1(F)(a) of the Convention and submits that the panel erred in law by imposing the wrong burden.

[3] Article 1(F) of the Convention reads as follows:

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that :

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

F. Les dispositions de cette Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser :

a) Qu'elles ont commis un crime contre la paix, un crime de guerre ou un crime contre l'humanité, au sens des instruments internationaux élaborés pour prévoir des dispositions relatives à ces crimes;

b) Qu'elles ont commis un crime grave de droit commun en dehors du pays d'accueil avant d'y être admises comme réfugiés;

c) Qu'elles se sont rendues coupables d'agissements contraires aux buts et aux principes des Nations Unies.

[4] The respondent, Kalid Haidar, was born in Meknes, Morocco, on August 21, 1967. He arrived in Canada from the United States, entering at Windsor on August 24, 2004, and claimed refugee status.

[5] The respondent alleges that in 1978, his older brother Mahfoud, who was a member of the Moroccan army, decided to join the Polisario Front of Western Sahara after witnessing atrocities committed by the Moroccan army and authorities against the Sahrawi people, a majority of whom ended up in refugee camps in Tindouf, Algeria.

[6] In 1991, a United Nations resolution to settle the dispute over Western Sahara gave the Sahrawis the opportunity to vote freely, by means of a referendum, for the self-determination of the region. However, the Moroccan authorities did not put the respondent's name on the list for the referendum, which was to be conducted by the United Nations Mission for the Referendum in Western Sahara. The respondent believes that the government left him off the list because it did not want to give people who supported self-determination for Western Sahara the right to vote.

[7] In 1998, the respondent became a messenger for the Mauritanian mission at the United Nations in New York City. He held that job until May 2004, when his contract ended.

[8] The respondent went back to Morocco for about 40 days when his mother was seriously ill in 2004. In cafés, with friends, he spoke up and voiced his favourable opinion of the referendum and a positive outcome, and his support for the Baker plan, which recognized the independence of Western Sahara.

[9] The respondent's older brother, Mahfoud, is one of the leaders of the Polisario Front. The respondent and Mahfoud have spoken by telephone, but the respondent says they did not talk about military or political matters.

[10] Because of his political opinion, the respondent fears that if he returns to Morocco he will be detained and tortured.

[11] I think it is useful to quote the following passages from the panel's decision here:

In comparing Morocco's misdeeds with those of the Polisario Front, the claimant stated that Morocco was by far the worse violator of human rights. The claimant stated that he had never taken part in Polisario activities, even though, in his statement, question 15 of the immigration officer's notes reads as follows:

[Translation]

"Association with any groups, societies or organizations? ... The answer noted is the following: "Polisario Front – member only because it is the Sahara independence party."

...

In his notice of intervention, the Minister of Public Safety and Emergency Preparedness stated that:

[Translation]

1. The claimant indicated that he supported the Polisario Front.
2. The existing documentary evidence shows that the Polisario Front allegedly violated human and international rights.
3. In this context, the claimant may have committed or been complicit in the commission of crimes against humanity or acts contrary to the purposes and principles of the United Nations.

DECISION

The panel concludes that the claimant has discharged his burden of establishing that there exists a serious possibility that he would be tortured if he were to return to Morocco.

As regards the request for exclusion, the panel is not of the opinion that the Minister has discharged his burden of demonstrating on a balance of probabilities that the claimant was responsible for violating human or international rights, or that the claimant may have committed or been complicit in the commission of crimes against humanity or acts contrary to the purposes and principles of the United Nations.

...

Exclusion

Article F of the Convention is at issue, given the Minister's intervention. The panel begins by stating that the Minister has not demonstrated, on a balance of probabilities, that the Polisario Front is an organization principally directed to a limited, brutal purpose, which would lead to the presumption that any member of that organization is knowledgeable of the organization's illicit activities and is presumed to support them.

[12] The applicant argues that the panel erred in law when it imposed too heavy a burden on him, that is, requiring that he prove on a balance of probabilities that Mr. Haidar was complicit in crimes against humanity by reason of his association with the Polisario Front. It is settled law that the applicable burden of proof is that there are "serious reasons to believe" that the claimant committed acts set out in article 1(F) of the Convention.

[13] The respondent allegedly stated on a form when he arrived in Canada that he was associated with [TRANSLATION] "the party that represents the people of the Sahara for independence" and had supported the Polisario Front. He also allegedly explained at an interview with an immigration

officer that he was a [TRANSLATION] “member only because it is the Sahara independence party”.

[14] The respondent submits that the decision would have been the same if the panel had imposed a less onerous burden of proof on the Minister. I do not agree. The Minister, like any other party, is entitled to have his case decided in accordance with the principles and burdens set out in the legislation and case law. In this case, the panel did not follow the law when it imposed the burden it imposed. For that reason, the decision should be set aside.

[15] No question of general importance was submitted for certification.

JUDGMENT

For the foregoing reasons, the decision made on April 3, 2008, is set aside for all legal purposes and I order that the matter be referred back for consideration by a differently constituted panel.

“Louis S. Tannenbaum”

Deputy Judge

Certified true translation
Brian McCordick, Translator

AUTHORITIES CONSIDERED BY THE COURT

1. *Bains v. Minister of Employment and Immigration* (1990), 109 N.R. 239 (F.C.A.)
2. *Dunsmuir v. New Brunswick*, 2008 SCC 9
3. *Harb v. Minister of Citizenship and Immigration*, 2003 FCA 39
4. *Moreno v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 298 (C.A.)
5. *Petrov v. Canada (Citizenship and Immigration)*, 207 FC 465
6. *Ramirez v. Canada (Minister of Employment and Immigration)* [1992] 2 F.C. 306 (C.A.)
7. *Sivakumar v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 433 (C.A.)
8. *Torres Rubianes v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1140
9. *Valère v. Minister of Citizenship and Immigration*, 2005 FC 524
10. *Cardenas v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 139 (QL)
11. *Ruiz v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1177
12. *Balta v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 146 (QL)
13. *Murugamoorthy v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 985
14. *Saftarov v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1009
15. *Thomas v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1114
16. *Bedoya v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1092

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SOLICITORS OF RECORD

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