Date: 20091014

Docket: IMM-1031-09

Citation: 2009 FC 997

Ottawa, Ontario, October 14, 2009

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

BASEM HAMAISA
KIFAYA HAMAISA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision (the Decision) made by the Immigration and Refugee Board (the Board), Refugee Protection Division, dated January 7, 2009 wherein the Tribunal determined the Applicants are not Convention Refugees and not persons in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA).

[2] The Applicants raise two issues:

(a) Did the panel err in determining that there was no nexus to the Convention as vendettas and blood feuds are not considered Convention grounds?

(b) Did the panel misapply the test for state protection and ignore documentary evidence that contradicted its conclusion?

[3] For the reasons set out below the Board's decision was reasonable and the application is dismissed.

I. Background

[4] The Applicants are Basem Hamaisa (the Principle Applicant) and his wife Kifaya Hamaisa (the Female Applicant), who are both 30 year old Israeli citizens. They have a Canadian born son who is not part of this application. The Applicants arrived in Canada on September 17, 2006 and made a refugee claim the next day. Both claims are based on the Principle Applicant's fears and the Female Applicant does not have a separate claim.

[5] The Principle Applicant is a member of the Bedouin Tribe of Hamaisa. He states that he fears returning to Israel as he is the primary target of a blood feud declared in 2006 by the

Abu Sharaf family against his family. The Principle Applicant is the target of the feud as he is considered the most valuable member of his family.

[6] Since the feud was declared the Abu Sharaf family has attacked several members of the Principle Applicant's family that resulted in hospitalization. Attempts to mediate the feud have been unsuccessful. As a result of the feud, the Principle Applicant stated he quit his job and could not leave his house. The Principle Applicant told the Board that he did not contact the police as feud resolution is undertaken by secret family councils and therefore he would have no concrete evidence and because the police do not tend to get involved in blood feuds.

[7] The Board rejected the claims under section 96 of IRPA on the basis that there is no nexus between blood feuds and the 1951 Convention Relating to the Status of Refugees (the Convention). They rejected the claims under section 97(1)(b) of IRPA on the basis that the claimants failed to rebut the presumption of state protection in Israel. On page 2 of the Decision, the Board stated that the case turned on state protection. The Board did not raise credibility as an issue.

II. Standard of Review

[8] The standard of review for questions of law is correctness while other issues are reviewed on a reasonableness standard (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190). At paragraph 47 of *Dunsmuir*, above, reasonableness has been articulated as:

> [...] concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process.

> But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[9] The standard of review in this matter is reasonableness.

[10] The Court should show a high degree of deference to decisions of the IRB as a specialized tribunal. At paragraph 46 of *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 Justice Binnie, for majority of the Supreme Court of Canada, stated:

> [46] More generally, it is clear from s. 18.1(4)(d) that Parliament intended administrative fact finding to command a high degree of deference. This is quite consistent with Dunsmuir. It provides legislative precision to the reasonableness standard of review of factual issues in cases falling under the Federal Courts Act.

III. Issues

A. *Did the Panel Err in Determining That There was No Nexus to the Convention as Vendettas and Blood Feuds Are Not Considered Convention Grounds?*

[11] The Applicant argues that the Board misapplied the decision of Justice Heneghan in *Bojaj v. Canada (Minister of Citizenship and Immigration)*, 194 F.T.R. 315, 9 Imm. L.R. (3d) 299, a case involving a derivative claim of persecution. *Bojaj*, above, involved a refugee claim made by a nineteen-year old Albanian male who advanced a well-founded fear of persecution based on his fear of being murdered in a blood feud where revenge would be sought against him. Justice Heneghan

held that the Applicant's grandfather was the primary victim of the alleged persecution and the Applicant had a derivative claim.

[12] The Applicant also relies on a United Nations High Commission on Refugees (UNHCR) position paper on blood feuds ("UNHCR Position on Claims for Refugee Status Under the 1951 Convention relating to the Status of Refuges Based on a Fear of Persecution Due to an Individual's Membership of a Family or Clan Engaged in a Blood Feud", issued by the Protection Operations and Legal Advice Section Division of International Protection Services, UNHCR, Geneva (17 March 2006)) in which the UNHCR states that persons fearing persecution as the result of a blood feud could be considered refugees under the Convention. The position paper distinguished blood feuds from cases of common criminality and argued that the family unit represents an example of an enumerated ground under the Convention: particular social group.

[13] The Respondent argues that the Board did not err in accepting that the Principle Applicant was the main target of the blood feud or in basing its decision on *Bojaj*, above. They state that the Principle Applicant in this matter is similarly situated as the applicant in *Bojaj*, above, as the Principle Applicant committed no crime but is a revenge target of feuding families.

[14] The Federal Court has stated that revenge vendettas have no link to Convention grounds and blood feuds are not considered to be members of a particular social group under Canadian law.

In *Zefi v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 636, [2003] F.C.J. No. 812 at paragraphs 40-41 Justice Lemieux wrote:

> [40] It has been recognized by this Court and by the Federal Court of Appeal that criminality, revenge, personal vendetta, cannot be the foundation of a well-founded fear of persecution by reason of a Convention ground for the simple reason such a persecution is not related to one of Convention ground where the persecution must be because of a person's race, ethnicity, etc.
>
> [41] Revenge killing in a blood feud has nothing to do with the defence of human rights -- quite to the contrary, such killings constitute a violation of human rights. Families engaged in them do not form a particular social group for Convention purposes. Recognition of a social group on this basis would have the anomalous result of according status to criminal activity, status because of what someone does rather than what someone is (see *Ward*, paragraph 69).

[15] Based on the reasons of Justice Lemieux in *Zefi*, above, the Board's decision that the Applicants are not Convention refugees is reasonable.

B. Did the Panel Misapply the Test for State Protection and Ignore Documentary Evidence that Contradicted its Conclusion?

[16] The Applicants argue that the Board applied the wrong tests for assessing state protection, did not properly conduct the assessment, and ignored or misconstrued the documentary evidence.

[17] The Applicants take the position that the test for state protection is adequacy, rather than effectiveness (*Carrillo v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, 69

Imm. L.R. (3d) 309). They argue that the Principle Applicant had no reasonable expectation that protection would be forthcoming based on his past experience and knowledge of police disinterest in matters of family feuds beyond, possibly, a superficial investigation. The Applicants rely on *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 103 D.L.R. (4th) 1 for the position that state protection is not reasonably forthcoming if in past personal incidents state protection was not forthcoming and that refugee claimants need not risk their lives in seeking protection merely to demonstrate that it is ineffective.

[18] The Respondent argues that the Board's decision was correct as the Principle Applicant failed to rebut the presumption of state protection by his failure to report the threat to police and that it is unreasonable to expect the police to investigate if they are not contacted and given the requisite information.

[19] It is presumed that the state is capable of protecting a claimant. This presumption can be rebutted if the claimant presents some clear and convincing evidence of the state's inability to protect them (*Canada (Attorney General) v. Ward*, above). In the present case, the Board considered whether the documentary evidence indicates whether effective state protection is available in Israel. It also considered whether the claimant had attempted to avail himself of state protection. There was evidence before the Board that the police force did investigate crimes and has investigated blood feud related crimes. There was no evidence of state protection not being forthcoming when members of the family had reported blood feud related crimes.

[20] The Applicants argue that there is no requirement for an individual to exhaust all avenues before the presumption of state protection can be rebutted and rely on *Chaves v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 193, 45 Imm. L.R. (3d) 58. In *Chaves*, above, the Court stated that an individual will not be required to exhaust all avenues before the presumption of state protection can be rebutted where agents of the state are themselves the source of the persecution in question. That is not the case in this matter.

[21] The Applicants also rely on *Katwaru v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 612, 62 Imm. L.R. (3d) 140 where Justice Teitelbaum held that democracy alone does not guarantee effective state protection. In *Katwaru*, above, the evidence indicated that the Guyana police force was very weak and was having difficulties responding to the high levels of violent crime that existed in the country as a whole. Again, that is not the case in this matter.

[22] The third position taken by the Applicants is that the Board made no reference to the other documentary evidence submitted by the Applicants, including reports of blood-feud killings and reports suggesting police disinterest in Arab community affairs. The Applicants submit that it is a reviewable error for the Board to disregard relevant evidence (*Avila v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 359, 295 F.T.R. 3) and that this duty increases with the relevance of the evidence in question to the disputed facts (*Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, (1998) 157 F.T.R. 35 (F.C.T.D), [1998] F.C.J. No. 1425).

[23] At page 4 of the Decision, the Board referenced specific documentary evidence on the issue of state protection for similarly situated individuals. The majority of the material submitted by the Applicants to the Board was not directly relevant to the Applicants as it pertained to honor killings of women and Christian Arabs within Israel. The documentary evidence of blood feud killings that were before the Board, as cited in the Applicant's Memo of Fact and Law, all reported some type of police involvement.

[24] It is not for this Court to decide whether effective state protection is available in Israel but rather to review the Board's decision to determine whether it was reasonable. Upon reviewing the evidence that was before the Board, I find that its reasons with respect to the availability of state protection were made with regard to the evidence and were reasonable.

[25] Therefore, the Board's application of the relevant tests and use of the evidence was reasonable.

[26] Neither party proposed a certified question and no question will be certified.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed.

" D. G. Near "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**IMM-1031-09**
STYLE OF CAUSE:	**HAMAISA ET AL.** **v.** **MCI**
PLACE OF HEARING:	**TORONTO**
DATE OF HEARING:	**SEPTEMBER 24, 2009**
REASONS FOR JUDGMENT AND JUDGMENT BY:	**JUSTICE NEAR**
DATED:	**OCTOBER 14, 2009**

APPEARANCES:

Ronald Schacter (416) 323-1215	FOR THE APPLICANTS
Kristina Dragaitis (416) 952-6992	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Helen S. Kim Barrister & Solicitor Toronto, Ontario	FOR THE APPLICANTS
John H. Sims, Q.C. Deputy Attorney General Canada	FOR THE RESPONDENT