Federal Court  Cour fédérale

Date: 20120829

Docket: IMM-817-12

Citation: 2012 FC 1035

Vancouver, British Columbia, August 29, 2012

PRESENT: THE CHIEF JUSTICE

BETWEEN:

ABDUL JAWAD

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, Abdul Jawad, and his wife Tabasum Jawad, are citizens of Afghanistan. They claimed refugee protection upon their arrival in Canada in June 2009.

[2] In December 2011, the Refugee Protection Division of the Immigration and Refugee Board of Canada accepted Ms. Jawad's claim on the basis of her fear of persecution at the hands of a distant relative ("Usman"). Usman is a former Taliban commander and currently works in the Afghan government's intelligence operations. After Ms. Jawad rejected Usman's marriage proposal,

Usman threatened to kill her if she ever thought of marrying anyone else and to kill any prospective suitor. Shortly afterwards, the Jawads secretly got married in Pakistan and then fled to the United States, where they stayed for a few weeks before travelling to Canada. Prior to their marriage, the Jawads had been maintaining a secret relationship over the Internet since they first met in a restaurant in 2007.

[3] After accepting Ms. Jawad's claim, the Board proceeded to reject Mr. Jawad's claim, on the basis that he had not established that he would face a serious possibility of being persecuted if he were to return to Afghanistan, as contemplated by section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA"), or that he would face a risk described in section 97.

[4] In the course of reaching that conclusion, the Board accepted that Mr. Jawad is a member of the social group consisting of the "family" of him and Ms. Jawad. However, in the absence of any evidence to the contrary, it appeared to assume that if he were required to return to Afghanistan, Ms. Jawad would stay in Canada. It then assessed his claimed risks at the hands of Usman from the perspective of him returning to Afghanistan without Ms. Jawad.

[5] Mr. Jawad submits that the Board erred by assessing his claims on the basis of what would happen to him if he returned to Afghanistan without his wife, rather than on the basis of what would happen to him if he and his wife returned to Afghanistan together.

[6] I disagree. For the reasons that follow, this application is dismissed.

The Standard of Review

[7] The parties are not in agreement as to the applicable standard of review. That is because of the different ways in which they have framed the issue. For Mr. Jawad, the issue is whether the Board may determine the claims of each member of a nuclear family on the basis of what would happen to them if they returned to their home country alone, rather than together. He characterizes this as being a question of jurisdiction or law that is reviewable on a standard of correctness.

[8] For the Respondent, the issue is whether the Board erred by finding that Mr. Jawad had failed to establish that he would face more than a mere possibility of a risk of persecution, as contemplated by section 96 of the IRPA, or that he would be subjected to a risk described in section 97. The Respondent characterized this as being a question of fact that is reviewable on a standard of reasonableness. The Respondent also recognized that the issue could be stated in terms of whether the Board properly approached its review of joint claims made by family members. This was also characterized as a question of mixed fact and law.

[9] In my view, the appropriate way in which to characterize the issue in this case is whether the Board erred in assessing Mr. Jawad's claim for protection from the perspective that, if his claim were unsuccessful, he would return home to Afghanistan without his wife. This is a question of mixed fact and law that is reviewable on a standard of reasonableness. (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at paras 51-55 [*Dunsmuir*]; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339, at paras 46-47; *Tomov v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1527, at para 4 [*Tomov*]; *Zheng v Canada (Minister of Citizenship and Immigration)*, 2011 FC 181, at para 16 [*Zheng*]).

[10] Contrary to Mr. Jawad's assertions, the law's recognition of the family as a "social group" that may be entitled to protection under section 96 does not logically imply that "members of a nuclear family comprised of spouses and minor children are entitled to have their refugee claims determined on the basis of their fundamental right to live together." The law may strive to facilitate family unity in certain circumstances, such as those contemplated by section 25 of the IRPA and section 176(1) of the *Immigration and Refugee Protection Regulations*, SOR/ 2002-227. However, it does not recognize any such fundamental right for refugee claimants to live together or require the Board to assess the claims of family members from the perspective that they will invariably remain together.

[11] This is entirely consistent with the absence of the concept of family unity in section 96 of the IRPA (*Castellanos v Canada (Solicitor General)* (1994), [1995] 2 FC 190 at paras 21-24 [*Castellanos*]; *Addullahi v Canada (Minister of Citizenship and Immigration)*, [1996] FCJ No 1433 at paras 14-15; *Rafizade v Canada (Minister of Citizenship and Immigration)* (1995), 92 FTR 55 at paras 10-13 [*Rafizade*]; *Musakanda v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1300, at para 24; *Cortes Silva v Canada (Minister of Citizenship and Immigration)*, 2005 FC 738, at para 5.)

[12] I recognize that spousal members of a family may have a nexus to the grounds of protection contemplated by section 96 of the IRPA by virtue of the fact that they have "voluntarily associate[d] for reasons so fundamental to their human dignity that they should not be forced to forsake the association" (*Ward v Canada (Attorney General)*, [1993] 2 SCR 689 at 739). However, it does not follow from that principle that spouses are entitled to have their refugee claims assessed on the basis

of a hypothetical scenario that may not be supported by the factual matrix established by the evidence before the Board in a particular case.

[13] If that factual matrix establishes that, in the event that a claimant's application for protection is accepted and the application of the claimant's spouse is rejected, the successful claimant is unlikely to return to his or her country with the unsuccessful spouse, their separation typically will not be "forced" upon them by the law. The same is true if that factual matrix is uncertain, and does not reasonably establish that the successful claimant would likely return to his or her country of origin in the event that the spouse's application is not accepted. In both scenarios, the spouse who was granted protection will remain free to join the returning spouse.

[14] As counsel to Mr. Jawad observed in oral argument, people frequently put themselves at risk in order to be with other members of a recognized social group. They may also do so to practice their religion openly or to express their political opinions. That is their choice, and they are entirely at liberty in proceedings before the Board to adduce evidence to establish what is likely to transpire in the event of a negative decision by the Board with respect to claim made by them or by another member of their family. The Board will then be obliged to render a decision that is reasonable, having regard to that evidence and to the other reasonably available options open to them. In the case of spouses, those options may include temporarily separating while they pursue avenues for reunification that may be available under the law.

[15] I do not accept Mr. Jawad's assertion that the Board's decision is inconsistent with past rulings of this Court, which stand for the proposition that persons who have established a nexus to a

ground of protection specified in section 96 of the IRPA and who have established a serious possibility of persecution, cannot be denied protection on the basis that they could hide, for example, the fact of their membership in a social group, their religious views or their political opinions.

[16] The Board is not required to assume that the claimant will be at risk simply because of, for example, his or her religious views, political opinions or membership in a social group. In each case, the claimant will bear the burden of establishing a serious possibility being persecuted based on the particular facts of his or her case. If the evidence before the Board allows the Board to reasonably conclude that the claimant would not face such a risk of persecution, for example, because of the manner in which the claimant has consistently behaved, or chosen to express himself or herself, its decision will withstand review by this Court.

[17] That is precisely what happened in this case. There was no evidence whatsoever before the Board to suggest that there was a serious possibility that: (i) Mr. Jawad would behave or express himself in a way that would give rise to a serious possibility that he would be persecuted, or (ii) others would conduct themselves in a way that would give rise to such a risk, for example, by disclosing the fact of his marriage to persons who are unlikely to maintain the confidentiality of that information. It was therefore reasonably open to the Board to assume that if Mr. Jawad were to return to Afghanistan alone, he and the members of his family would continue to maintain the confidentiality of his marriage, and that therefore he would not face a serious risk of persecution at the hands of Mr. Usman.

[18] The Applicant was not able to identify any authority to support his assertions that the Board must invariably assume that spouses will remain together and that it is an error of law if it fails to do so.

[19] *Zheng*, above, does not stand for the proposition that it is invariably a reviewable error for the Board to conduct its analysis from the perspective that a family member will return to his or her home country without the other members of his or her immediate family, in the event of an unsuccessful application for refugee protection. The Court simply concluded, on the facts of that case, that it was unreasonable for the Board to have assumed that the applicant would return to China without her infant child, particularly given that there were no other family members in Canada who could care for that child in her absence (*Zeng*, above, at para 32).

[20] *Tomov*, above, is also distinguishable. There, the Court only concluded that the Board had erred by failing to consider whether the applicant had a well founded fear of persecution by reason of his membership in the family of his wife, who was of Roma ethnicity. That conclusion was reached after the Court observed that the applicant, who had experienced assaults in Bulgaria because of his relationship to his wife, was at risk so long as he was in a marital relationship with his wife. By contrast, in the case at bar, the Board did assess Mr. Jawad's claims on the basis that he had established a nexus to a ground of persecution recognized by section 96 of the IRPA, by virtue of his membership in the social group that consisted of his immediate family, including his wife.

Analysis

> *Did the Board err in assessing Mr. Jawad's claim for protection from the perspective that, if his claim were unsuccessful, he would return home to Afghanistan without his wife?*

[21] Before assessing Mr. Jawad's claim, the Board assessed his wife's claim. It accepted her claim, after concluding that Usman would likely search for her and seek revenge on her for having rejected him. Among other things, it also concluded that, in her particular set of circumstances: (i) state protection would not be reasonably forthcoming for her should she require such protection, (ii) she would not likely be able to live safely in another part of Afghanistan, and (iii) it would not be reasonable to expect her to relocate in another part of Afghanistan.

[22] Turning to Mr. Jawad's claim, the Board began by noting that he was not present in Afghanistan when the problems with Usman occurred. The Board then observed that he testified that he and Usman had never seen each other. It also noted that he and his wife had testified that, to the best of their knowledge, Usman does not know that Mr. Jawad is even associated with his wife, let alone married to her. It later noted that there was no evidence that Usman even suspected that Ms. Jawad had married Mr. Jawad.

[23] In the absence of any evidence to the contrary, the Board found that Mr. Jawad's fear that Usman would find out about him and his marriage through relatives who might reveal the existence of the marriage, was "purely speculative." In this regard, the Board noted that the couple and their families had gone to great lengths to keep their marriage a secret. The Board inferred from this that family members would know the importance of keeping this information secret and would not indiscriminately disclose the existence of the marriage to anyone.

[24] Based on the foregoing, the Board concluded that there was less than a reasonable chance that Usman would come into possession of information regarding the marriage, and that therefore

there was less than a reasonable chance that Mr. Jawad would be persecuted at the hands of Usman, should he return to Afghanistan. It also concluded, on a balance of probabilities, that he would not likely face a risk described in section 97 of the IRPA.

[25] After having reached the foregoing conclusions, the Board stated that it did not agree with the submission that it would be unreasonable for it to assess Mr. Jawad's claim on the basis of an assumption that he would return to Afghanistan without his wife.

[26] Based on the evidence that was before the Board in this case, I am satisfied that the conclusions reached with respect to Mr. Jawad's claim were well within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at para 47). In the absence of any evidence to the contrary, it was not unreasonable for the Board to assume that Ms. Jawad would avail herself of the refugee protection that she had received and that Mr. Jawad would return to Afghanistan without her if his application for protection was unsuccessful. The Board's decision was appropriately justified, intelligible and transparent.

Conclusion

[27] The burden was on Mr. Jawad to satisfy the Board that he would face a serious possibility of being persecuted if he were to return to Afghanistan, or that he would likely face a risk described in section 97 of the IRPA. After reviewing the relevant evidence, the Board reasonably found that he had failed to discharge that burden.

[28] In meeting his burden, Mr. Jawad was not entitled to expect that the Board would assess his claims based on the assumption that his wife would return to Afghanistan with him if his claims were rejected but hers were accepted. On the contrary, given the evidentiary record, it was reasonably open to the Board to assume that the couple would not return to Afghanistan together.

[29] This application is dismissed.

No question for Certification

[30] Counsel to Mr. Jawad proposed a question for certification along the following lines:

> For claimants who are spouses and have a nexus to section 96 of the IRPA through their membership in a particular social group consisting of their immediate family, can the Board assess their respective applications on the assumption that the spouses will separate if only one of them is granted protection?

[31] In my view, this is not a serious question of general importance, as contemplated by paragraph 74(a) of the IRPA and the jurisprudence. This question is premised upon a scenario in which one spouse is granted refugee protection based on his or her demonstrated risk and the other spouse will only face risk if he or she returns with the spouse who was granted protection.

[32] During the hearing in this matter, counsel to Mr. Jawad acknowledged that this type of situation is rare. Moreover, in contrast to certain other types of questions that have been certified in relation to seldomly encountered situations, for example in the national security area, the significance of this question cannot be said to rise to the level of being of general importance.

[33] In addition, this has not been a question that has given rise to divergent approaches in this Court which requires the intervention of the Federal Court of Appeal.

[34] Finally, the Board's ability to make assumptions that can withstand review will be a function of the factual matrix in each case. In some cases, it may be reasonably open to the Board to assume that spouses will separate. In other cases, it may be unreasonable for the Board to make such an assumption. It will always depend on the facts of the particular case.

[35] Accordingly, I am not prepared to certify the question set forth above. There will be no question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUGES THAT this application is dismissed. There is no question for certification.

"Paul S. Crampton"
Chief Justice

FEDERAL COURT

SOLICITORS OF RECORD

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