

Date: 20000524

Docket: IMM-1086-99

Ottawa, Ontario, this 24th day of May, 2000

PRESENT: THE HONOURABLE MR. JUSTICE JOHN A. O'KEEFE

BETWEEN:

MOHAMMAD AFZAL CHAUDHRY

known to the Department of Citizenship & Immigration as

MOHMAD CHOHDRI

Applicant

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

O'KEEFE J.

[1] This is an application by Mohammad Afzal Chaudhry ("applicant") for judicial review of a decision of the Convention Refugee Determination Division of the Immigration and Refugee Board of Canada ("Board") dated February 9, 1999 whereby it was determined that the applicant was not a convention refugee.

[2] The applicant is a citizen of Pakistan who arrived in Canada on July 1, 1997 and claimed refugee status. He indicated that he feared persecution in Pakistan due to political opinion: affiliation with the Pakistan People's Party ("PPP"). The alleged agents of prosecution were the police and the Muslim League ("ML") gangsters. The applicant's political activities with the PPP included distributing literature, opening a PPP office in his village and campaigning for votes.

[3] In his personal information form ("PIF"), the applicant alleged the following incidents of persecution:

- (1) He received threats from ML gangsters throughout his political activities.
- (2) He was beaten by ML supporters subsequent to his opening the local PPP office.
- (3) He was threatened with death by ML supporters during the 1977 elections.
- (4) He was physically attacked by ML gangsters at the PPP offices subsequent to the ML electoral victory.

[4] The applicant also stated that the police had told family members that a local

MNA had filed a complaint against him. The police refused to provide information about the charges. His family's lawyer was unable to obtain the "First Information Report" ("FIR") (complaint).

[5] His family decided that it was unsafe for him to remain in Pakistan and arranged his flight to Canada.

[6] The Board found that the applicant did not have a well-founded fear of persecution in Pakistan.

[7] The Board relied on documentary evidence to find that:

- (1) The applicant's functions and profile within the PPP were similar to other regular PPP members.
- (2) The applicant's family obtained the FIR and arrest warrant in order to support his claim and gave these documents no weight.
- (3) The applicant did not have a well-founded fear of persecution at the hands of the ML

or the police and that there was no reasonable chance of persecution on any Convention grounds if he were to return to Pakistan.

[8] The panel stated that it was aware of some acts of reprisal against PPP members

and officials subsequent to the dismissal of the Bhutto government. An exit control list was made and posted in all airports. The list contained the names of those who would not be allowed to leave the country. The Board found on the balance of probabilities that the applicant was not on that list.

Issue

[9] Did the Board make an error of law in the process of reaching its conclusion that

the application was not a Convention refugee?

Law

[10] Convention refugee is defined in subsection 2(1) of the *Immigration Act*:

"Convention refugee" means any person who

(a) by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(i) is outside the country of the person's nationality and is unable or, by reason of that fear, is unwilling to avail himself of the protection of that country, or

(ii) not having a country of nationality, is outside the country of the person's former habitual residence and is unable or, by reason of that fear, is unwilling to return to that country, and

(b) has not ceased to be a Convention refugee by virtue of subsection (2),

but does not include any person to whom the Convention does not apply pursuant to section E or F of Article 1 thereof, which sections are set out in the schedule to this Act;

réfugié au sens de la Convention" Toute personne_:

a) 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_:

(i) soit se trouve hors du pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de ce pays,

(ii) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ou, en raison de cette crainte, ne veut y retourner;

b) qui n'a pas perdu son statut de réfugié au sens de la Convention en application du paragraphe (2).

Sont exclues de la présente définition les personnes soustraites à l'application de la Convention par les sections E ou F de l'article premier de celle-ci dont le texte est reproduit à l'annexe de la présente loi.

[11] The jurisprudence of this Court holds that the applicant must have a subjective fear of seeking the protection of his country and that that fear must have an objectively reasonable basis.

[12] The standard of review to be applied when reviewing decisions of the Board on questions of law is correctness (see *Pushpanathan v. Canada* [1998] 1 S.C.R. 982). *Pushpanathan, supra*, did not set a standard of review for questions of fact or questions of mixed fact and law, however, in *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.* [1997] 1 S.C.R. 748, the Supreme Court of Canada held that questions of mixed law and fact are to be reviewed on the standard of reasonableness simpliciter. I would be of the opinion that the same standard should apply to the review of factual findings.

[13] The case law with respect to adverse credibility rulings states that if the Board rejects a claim due to the lack of credibility of the applicant, the ground must be stated clearly and the Board must state reasons for its conclusions. (See *Ababio v. Canada (M.E.I.)* (1988), 5 Imm. L.R. (2d) 174 (F.C.A.) and *Armson v. Canada* (1989), 9 Imm. L.R. (2d) 150 (F.C.A.)). Further, if the Board prefers the documentary evidence to the oral testimony of the applicant, the Board must provide reasons for this finding (see *Sidhu v. Canada (M.E.I.)* (1993) 70 F.T.R. 104).

[14] In the present case, the Board heard the applicant's oral evidence that a local MNA had filed a complaint against him with the police and it also had the copy of the FIR and the warrant of arrest. The Board gave no weight to the FIR and the warrant of arrest. If the Board rejected the oral testimony of the applicant with respect to the police visit and the FIR and warrant, it was required to clearly so state and to give the reasons for its conclusion. It did not do this and accordingly, committed an error of law. In addition, it appears that the Board preferred other documentary evidence over the oral testimony of the applicant to be satisfied that there was

"no reasonable chance of persecution for any of the reasons enumerated in the definition of a Convention refugee should he return to Pakistan". Again, the Board did not provide reasons for this finding. This is another error of law. I am of the opinion that the Board committed reviewable errors of law and therefore, the application for judicial review must be granted and the decision of the Board is quashed. The matter is referred back for reconsideration before a differently constituted panel of the Board.

[15] Neither party wished to state a serious question of general importance pursuant to subsection 83(1) of the *Immigration Act, supra*.

ORDER

[16] **IT IS ORDERED that** the application for judicial review is granted.

"John A. O'Keefe"

J.F.C.C.

Ottawa, Ontario

May 24, 2000