Date: 20070201

Docket: IMM-2989-06

Citation: 2007 FC 112

Montréal, Quebec, the 1st day of February 2007

Present: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

LOTFI ABBES
NOURCHENE BEN KARIM
NOURHENE ABBES
AHMED ABBES

Applicants

and

MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review brought under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the IRPA), against a decision dated May 10, 2006, of the Refugee Protection Division (RPD) of the Immigration and Refugee Board, according to which the applicants are not "Convention refugees" or "persons in need of protection" within the meaning of sections 96 and 97 of the IRPA.

[2] The principal applicant, Lotfi Abbes, his wife and two children, all citizens of Tunisia, arrived in Canada on August 10, 2005, in possession of Canadian visitor visas. On August 17, they claimed refugee protection in Canada.

[3] They allege the following facts in support of their claim.

[4] The principal applicant and his family lived in Tunis. From 1988 to August 2005, Mr. Abbes was a member of the GN (national guard), acting as a temporary officer who held various positions over the years, the last one being that of protocol officer in charge of welcoming dignitaries visiting senior GN officials.

[5] He alleges having been subjected to harassment, persecution and abuse by his superior at the GN for several years.

[6] Since he feared reprisals and could not resign from the GN or request a transfer, he left his country for Canada with his family, never to return. When he failed to report back for duty in the GN after taking his annual holidays in August 2005, the Tunisian government issued a wanted notice for his arrest.

[7] The applicant alleges that his leaving his employment with the GN (which is an organization in the service of the President and the nation) meant that, if he were to return to Tunisia, he would

be not only arrested, but also jailed and charged with treason. In addition, because his acts would be viewed by Tunisian authorities as treason, he believes he would be tortured and fears for his life.

[8] The RPD concluded that the principal applicant did not demonstrate that, if he were to return, “he would be exposed to sanctions disproportionate to the fact that he left his post without informing his superiors”, and that, “absent evidence of the sanctions that might be imposed on the claimant, this situation does not constitute persecution”.

[9] Because the applicant’s wife based her fear of persecution on the situation of Mr. Abbes, the RPD determined that her claim for protection on this basis was unfounded.

[10] The female applicant also based her claim on the prohibition against wearing the veil, which is contrary to her religious beliefs. On this point, the RPD concluded that “this relates to a law of general application in Tunisia respecting religious dress, that she is not affected personally, and that this therefore does not constitute persecution”.

[11] Case law has established that intervention by the Court is warranted only if the conclusions reached by the RPD are patently unreasonable, having regard to the evidence before it (*Aguebor v. Canada* (*Minister of Employment and Immigration*), [1993] F.C.J. No. 732 (QL), at paragraphs 3-4). In the case at bar, the RPD demanded documentary evidence to corroborate the applicant’s testimony. Therefore, following the hearing, the applicant submitted a brochure from the Tunisian department of the interior which dealt with situations like his. According to this document,

GN officers who are authorized to take holidays outside the country and who do not return as expected are summoned to appear before the honour board of the corps and are dismissed. In addition, the administration must issue [TRANSLATION] "a wanted notice concerning the person in question with a view to his arrest and return to his previous section in order to clarify his administrative status . . . and retrieve property belonging to the corps". Another sanction mentioned is the refusal to renew Tunisian passports through consulates abroad [TRANSLATION] "in order to force him to return to the country to resolve his administrative situation".

[12] In spite of the relevance of such evidence, which corroborates the applicant's testimony about the consequences of deserting his post, the RPD mistakenly concluded that he had not submitted any personal documentary evidence other than the wanted notice. No reasons are given in the decision as to why this relevant evidence was not taken into consideration.

[13] Case law has recognized on many occasions that a Court is not required to refer to every piece of evidence before it (*Hassan c. Canada (Minister of Employment and Immigration*), [1992] F.C.J. No. 260 (C.A.) (QL)). However, as was affirmed by Mr. Justice John M. Evans in *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1425 (QL), at paragraph 17:

> . . . the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence": *Bains v. Canada (Minister of Employment and Immigration)* (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts.

[14] In the case at bar, given the relevance of the document about the sanctions imposed on a person who does not report back for duty, it was patently unreasonable for the RPD to disregard this document without giving reasons.

[15] With regard to her being prohibited from wearing a veil, the female applicant argues that even if this is a law of general application, it still infringes on her fundamental right to freedom of religion and amounts to persecution.

[16] In concluding that the law did not constitute persecution, the RPD relied on the "U.S. Department of State, International Religious Freedom Report 2004: Tunisia", which noted that, although the government restricts the wearing of the veil and the police sometimes demanded that women uncover themselves, some women still wore the veil, even in government offices. This fact was even admitted by the applicant in her testimony before the RPD (Tribunal Record, pages 346-347).

[17] My colleague Madam Justice Anne Mactavish recently had to consider whether a law of general application could give rise to a claim of persecution and concluded that this was possible in certain circumstances, for example, when "compliance with those laws would result in the individual violating accepted international norms" (*Hughey v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 421, [2005] F.C.J. No. 522 (QL) paragraph 108; see also paragraph 137).

[18] However, the fact that a law may contravene a religious practice is not necessarily sufficient to characterize it as persecution.

[19] In *Kaya v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 45, [2004] F.C.J. No. 38 (QL), Mr. Justice Sean Harrington dealt with an issue similar to the one in this case, that is, a claim for refugee protection based on the legal prohibition in Turkey against wearing a veil in public places or buildings.

[20] At paragraph 13, he concluded that legislation must be considered in its social context:

> . . . Turkey is surrounded by religious Islamic states and is situated in a politically volatile part of the world. While the wearing of religious dress may not constitute a threat to the secular essence of the Canadian state, it may well constitute a threat in Turkey. Laws must be considered in their social context . . . . Exhibition of the rituals and symbols of religion without restriction as to place or form could cause pressure on those who do not practice that form of religion or who belong to another religion . . . .
> [Emphasis added]

[21] In addition, he stated the following at paragraphs 16 and 19:

> 16 . . . Turkish government is not harassing her or punishing her because of her adherence to her particular interpretation of Islam. Turkey is attempting to maintain its secular nature in an area of the world in which the wearing of religious dress carries with it considerable political connotations.
>
> . . .
>
> 19 The Turkish government is not coercing anyone, man or woman, to wear religious dress. In furtherance of its secular policies, religious dress of any sort is not to be worn in government buildings.

[22] In the case at bar, considering the lack of evidence about the Tunisian law in question and about the social and political context in Tunisia, I am of the opinion that it was not patently unreasonable for the RPD to conclude that the female applicant did not discharge the burden of proof on her so as to show that the law in question constituted persecution. I note the principle expounded by the Federal Court of Appeal in *Zolfagharkhani v. Canada (Minister of Employment and Immigration)*, [1993] 3 F.C. 540, which concluded that laws of general application must be presumed to be valid and neutral except if the applicant proves that they are persecutory with respect to a Convention ground.

[23] For the preceding reasons, the application for judicial review is allowed. The decision of the RPD is set aside. The case is referred back to a differently constituted panel for redetermination of the principal applicant’s claim.

JUDGMENT

The application for judicial review is allowed. The decision of the RPD is set aside. The case is referred back to a differently constituted panel for redetermination of the principal applicant's claim.

"Danielle Tremblay-Lamer"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

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