

Date: 20071024

Docket: IMM-495-07

Citation: 2007 FC 2005

Ottawa, Ontario, October 24, 2007

PRESENT: The Honourable Madam Justice Dawson

BETWEEN:

AFZUL ABDUL KHA MIAH

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Afzul Abdul Kha Miah says that he is a citizen of Bangladesh who has a well-founded fear of persecution based upon his political opinion. Specifically, he fears persecution as a result of his membership in the Awami League.

[2] Mr. Miah's claim for refugee protection was first heard by the Refugee Protection Division of the Immigration and Refugee Board (RPD or Board) in February of 2004. The Board accepted Mr. Miah's identity, nationality and membership in the Awami League, but dismissed his claim to

protection under both sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, because it found he lacked subjective fear. This decision was set aside by this Court on the consent of the parties because it was contrary to the decision of the Federal Court of Appeal in *Li v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1. The order of this Court that set aside the decision directed only that the matter be reconsidered by a differently constituted panel of the RPD.

[3] Mr. Miah's claim for refugee protection was then reheard by a new panel of the RPD on December 21, 2006. At that time, the Board rendered an oral decision dismissing the claim “because central to this claim is your identity as a citizen of Bangladesh and a member of the Awami League and I find that you have not established on a balance of probability that you are who you say you are or that you are a member of the Awami League...”. More specifically, the presiding member of the Board stated “... when I look at what there is on file to establish your identity, I find I have only photocopies of identity documents. ... *BGD100388.E* [footnote omitted] says many false documents exist and that it is very easy to get a document. It is because of corruption and all sorts of other reasons why that is possible. I cannot accept photocopies as good evidence.”

[4] This application for judicial review is allowed upon the narrow ground that I find that the Board's decision was made without regard to the evidence and was therefore patently unreasonable. (See: *Kazadi v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 349 at paragraph 10, and the authorities cited therein with respect to the applicable standard of review).

[5] As to the evidence concerning identity that was before the RPD, Exhibit R-1 consisted of the entire package of documentary evidence that was before the RPD at the first hearing. That, according to the reasons of the Board given in respect of that hearing, included:

- two affidavits attesting to identity;
- an original Bangladeshi birth certificate; and
- an identity document issued by the state of Virginia, which was produced by Mr. Miah at the port of entry.

[6] During the course of the first hearing, the Board did not retain the original birth certificate in its records. Instead, the birth certificate was copied and the original returned to Mr. Miah. The photocopy of the original document was retained as part of the tribunal record. A photocopy of the Virginia identity document was also entered into the tribunal record. The page of the tribunal record that contains this photocopy also bears two stamps added by Immigration Canada, one of which states “THIS PHOTOCOPY CONFORMS TO THE ORIGINAL DOCUMENT WHICH HAS NOT BEEN ALTERED IN ANY WAY”.

[7] At the second hearing before the Board, Mr. Miah testified that subsequent to the first hearing he had been unable to locate his birth certificate in his home.

[8] The second hearing before the RPD was a *de novo* hearing. I am satisfied that, because the first decision was set aside, no issue estoppel arose. See, for example, *Municipal Enterprises Ltd. v. Nova Scotia (Attorney General)*, [2003] N.S.J. No. 26 (C.A.) at paragraphs 8, 9, 39 and 40. This

means that the RPD was not bound by the finding of the prior panel with respect to identity.

However, the evidentiary record before the RPD remained intact and was not quashed.

[9] Thus, it can be seen that when the presiding member of the RPD stated that all that was on file in order to establish Mr. Miah's identity were photocopies, she failed to have regard to the fact that the original Bangladeshi birth certificate had previously been produced before the RPD, but that it was memorialized in the Board's record by way of a photocopy. The Virginia identity document was also recorded by way of a photocopy that bore the stamp of some authentication by Immigration Canada. In my view, the Board was obliged to at least recognize and consider that an original birth certificate had been tendered into evidence before it. This was not a case where the claimant had never produced any original identity documents.

[10] While the Board was critical of Mr. Miah for failing to obtain a replacement birth certificate, and stated that it drew an unspecified negative inference from this failure, it seems to me that, at best, any negative inference could go only to the existence of subjective fear and could not impair the effect that flowed from the fact Mr. Miah had previously tendered an original birth certificate to the RPD.

[11] It follows that the application for judicial review is allowed.

[12] The Minister opposed certification of any question, and I agree that this decision turns solely upon the relatively unique facts that were before the Board. No question will be certified.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is allowed and the decision of the Refugee Protection Division dated January 26, 2007 is hereby set aside.
2. The matter is remitted for redetermination before a differently constituted panel of the Refugee Protection Division of the Immigration and Refugee Board.

“Eleanor R. Dawson”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-495-07

STYLE OF CAUSE: AFZUL ABDUL KHA MIAH, Applicant

and

THE MINISTER OF CITIZENSHIP AND
IMMIGRATION, Respondent

PLACE OF HEARING: WINNIPEG, MANITOBA

DATE OF HEARING: OCTOBER 17, 2007

**REASONS FOR JUDGMENT
AND JUDGMENT:** DAWSON, J.

DATED: OCTOBER 24, 2007

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