

Date: 20080508

Docket: IMM-4202-07

Citation: 2008 FC 583

Ottawa, Ontario, May 8, 2008

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

**DEACHON TSERING KHAN
HOWARD KHAN**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction and Background

[1] Deachon Tsering Khan, a citizen of Tibet, married Howard Khan, a citizen of Guyana in the United States in 1999. They challenge, in this judicial review proceeding, the August 28, 2007 decision of the Refugee Protection Division (the tribunal) finding the applicants not to be Convention Refugees nor to be in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act* (the Act).

[2] Counsel for the applicants raises the following issues:

1. With respect to Deachon Tsering Khan (Mrs. Khan) that (a) the tribunal erred in law in finding she had citizenship or the right to citizenship in Guyana and therefore had to make a case against both Tibet and Guyana and (b) in the alternative, the tribunal made an evidentiary error when finding there was no evidence and no argument advanced that would support a conclusion that she might be rejected as a citizen of Guyana on the basis of national security or public policy.

2. With respect to Howard Khan (a) whether the tribunal erred in providing no analysis of his need for protection under section 97 of the *Act* and (b) whether the tribunal erred in concluding state protection was available to him in Guyana.

[3] Howard Khan, as noted, was born in Guyana and is a citizen of that country. Deachon Tsering Khan was born in Tibet and is a citizen of China. She was raised in Nepal after her family sought refuge there after China's occupation of Tibet.

[4] In his early childhood Mr. Khan, his parents and his siblings experienced incidents of violence at the hands of Afro-Guyanese bandits. In 1995, he went to the United States where he lived and worked illegally from 1995 to 2005.

[5] In 1997, Deachon Tsering came to the United States by buying a false Nepali passport. Two years later, she met Mr. Khan and they married there. Mrs. Khan applied for a marriage certificate using the name in her false passport containing false personal details.

[6] They have two children. In February 2005, they came to Canada making a refugee claim which, as noted, was dismissed on August 28, 2007.

The Tribunal's decision

(a) With respect to Mrs. Khan

[7] The tribunal ruled she had the right to status in Guyana and could seek protection there. This ruling by the tribunal was made despite the assertion by her she had no absolute right to Guyanese citizenship as a result of her marriage to Howard Khan, a view supported by a legal brief Messrs. Radhamohan and Singh, lawyers familiar with the laws of Guyana.

[8] The question of her right to Guyanese citizenship turns on article 45 of the Constitution of Guyana which reads:

Any person who, after the commencement of this Constitution, marries a person who is or becomes a citizen of Guyana shall be entitled, upon making an application in such manner and taking such oath of allegiance as may be prescribed, to be registered as a citizen of Guyana: Provided that the right to be registered as a citizen of Guyana under this article shall be subject to such exceptions or qualifications as may be prescribed in the interests of national security and public policy.

[9] The tribunal's analysis and conclusions on this point are expressed as follows:

They argue that the female claimant's right to citizenship is not absolute because the Minister's discretionary power allows refusal of citizenship in the interests of national security or public policy. The panel rejects this conclusion as well. There is no evidence and no argument was advanced in the hearing that would support a conclusion that the female claimant might be rejected as a citizen of Guyana on the basis of national security or public policy. Counsel attempted to elicit an opinion in regard to this matter from the Guyana High Commission. None was forthcoming.

In her written submissions, counsel argued that the female claimant's misrepresentation of her identity information would result in a denial of citizenship

by the Government of Guyana on the basis of some threat to national security. I reject this argument. The issue of false identity information with regard to the marriage has been dealt with above. With regard to citizenship application, there is no constraint in the female claimant's disclosing true identify information to the Government of Guyana, including the fact of her marriage to the male claimant, a Guyanese citizen. Case law indicates that a claimant is obligated to seek protection in a country where he or she has rights before seeking protection in Canada.

I find, on a balance of probabilities, that the female claimant has a right to Guyanese citizenship on the basis of her marriage to the male claimant and that the discretionary powers available to the Minister noted above will not constrain the offer of citizenship to her. In that context, as in the case of her husband's claim, the female claimant has no need for protection in Canada. No concern regarding possible persecution in Guyana was noted in the female claimant's claim. [Emphasis mine.]

[10] I touch upon another aspect of the tribunal's consideration of Mrs. Khan's situation. The tribunal considered her well-founded fear in respect of China:

The female claimant's claim for protection is founded on her fear of persecution if she were sent to China. If this were a straight-forward claim of an ethnic Tibetan who fears possible persecution in either Nepal or China, the evidence supports the well-foundedness of that claim. It is clear that she should be offered refugee protection as an alternative to enforced return to Nepal or the possibility of being sent to Tibet and therefore China. [Emphasis mine.]

[11] The tribunal went on to state: "This, however, is not the issue of primary concern in this claim" and then went on to consider her right to Guyanese citizenship.

(b) With respect to Mr. Khan

[12] The main findings of the tribunal with respect to this applicant are:

- 1) The fact he did not make a refugee claim while residing and working illegally in the United States during the period 1995 to 2005 is indicative of a lack of subjective fear.

- 2) The troubles he cites as his fear of persecution in Guyana were criminal acts, school harassment or prejudice that “do not rise to the level of persecution”. The tribunal also noted Mr. Khan was asked what he feared if he returned to Guyana to which he answered: “that he had no fear for himself but was concerned about the welfare of his wife and children”.

- 3) That state protection, “while not perfect, is available to Mr. Khan and to all citizens of Guyana”. In order to reach this conclusion, the tribunal found the incidents he described in his Personal Information Form (PIF) were criminal acts all reported to and investigated by the police but only one was solved because the bandit was killed by the police during another incident.

[13] The tribunal went on to say that States are presumed capable of protecting their citizens and a claimant has to provide clear and convincing evidence of the state’s inability to do so. Citing the Federal Court of Appeal’s decision in *Canada (Minister of Employment and Immigration) v. Villafranca* (1992), 18 Imm. L.R. 2(d) 130 it stated: “No state can guarantee perfect protection” [and] “Where a state is in control of its territory and makes serious efforts to protect its nationals the mere fact that the state’s efforts are not always successful will not rebut the presumption of available state protection as noted above”.

[14] Prior to outlining these principles on state protection, the tribunal made the following analysis:

“Country documents make clear that there are serious constraints on the implementation of the constitutional guarantees of fundamental rights and non-discrimination. However, they also make clear the range of efforts being made to remove these constraints.

Indo-Guyanese and Afro-Guyanese political leaders signed a joint resolution in 2003, committing themselves and the two major parties to shared democracy, peace and development. A number of constitutional amendments and other legislation have been put in place to combat racial discrimination. An Ethnic Relations Commission was established in 2000 and its efforts have been directed toward racial mixture in housing. A United Nations country team has developed programs to enhance national cohesion in regard to security and governance. In addition, a range of NGOs, including unions, lawyers, and youth groups are dealing with societal divisions. The Guyana Human Rights Association is both active and influential. It is also clear that crime is a problem for all ethnicities in Guyana. Amnesty International has noted its recognition that the Guyanese government is grappling with the problem of violent crime. It has also noted allegations that Indo-Guyanese are disproportionately affected but noted it was unable to either confirm or deny that allegation.

Clearly, documents concerning Guyana give mixed messages regarding the degree of racial and ethnic tension and the impact of confrontation on the lives of Guyanese generally. While the dominance of Afro-Guyanese in the police force raises concerns among Indo-Guyanese, the dominance of Indo-Guyanese in the government raises concerns among Afro-Guyanese. Politicized ethnic identities have led to confrontation, often violent, in the past. It is apparent, however, that while significant differences remain, the situation has improved and government and civic leaders are making a concerted effort to resolve ethnic and racial tensions and the crime problem.”

Analysis

(a) The standard of review

[15] The Federal Court of Appeal’s decision in *Williams v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 126 has settled the standard of review of correctness on the question whether the existence of an option to seek protection in one country is a valid cause for the denial of refugee status which requires an interpretation of section 96 of the *Act* a question of law of such a

nature to be decided on the basis of correctness (see also the Supreme Court of Canada's recent decision on the standard of review in *Dunsmuir v. New Brunswick*, 2008 SCC 9, at paragraph 55).

[16] The issue whether the tribunal misread the evidence there existed no evidence and no argument advanced Mrs. Khan would be rejected in Guyana on national security ground raises a question of fact which is a breach of section 18.1(4)(d) of the *Federal Courts Act* "whether the tribunal based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it" previously labelled as being a "manifestly unreasonable decision", which in the light of *Dunsmuir*, above, is reviewable on the standard of reasonableness as the manifestly unreasonable standard has now been abolished. It goes without saying a breach of section 18.1(4)(d) above necessarily makes the tribunal's decision unreasonable.

[17] The question whether the tribunal breached the Act by not conducting a section 97 analysis is a question of law reviewable on the correctness standard; and the question whether there is an evidentiary foundation to a section 97 claim is a question of mixed fact and law reviewable on the reasonableness standard (see *Sanchez v. the Minister of Citizenship and Immigration*, 2007 FCA 99).

[18] The question of the adequacy of state protection is a mixed question of fact and law reviewable on the standard of reasonableness (see *Arellano v. the Minister of Citizenship and Immigration*, 2006 FC 1265 at paragraph 21).

(b) The dual nationality question

[19] This is an issue which concerns only Mrs. Khan. Counsel for the applicants set out the following legal proposition determinative of this question.

1. Section 96 of the *Act* provides if an applicant for refugee status in Canada has citizenship in more than one country, he or she must demonstrate a well-founded fear of persecution in relation to each country of citizenship before he or she can seek asylum in a country of which that person is not a national. In this respect, section 96 confirms the jurisprudence of the Courts on this point (*Williams*, above, at paragraph 20).
2. This principle has been extended to mean that, if at the time of the hearing an applicant is entitled to acquire citizenship as of right by completing mere formalities then an applicant must demonstrate a well-founded fear of persecution in that country before seeking asylum in Canada. Justice Décary in *Williams*, above, expressed the test to be “if it is within the control of an applicant to acquire the citizenship of a country”. He stated at paragraph 22 of his reasons: “While words such as “acquisition of citizenship in a non-discretionary manner” or “by mere formalities” have been used, the test is better phrased in terms of “power within the control of the applicant” for it encompasses all sorts of situations ...”
3. Relying on Justice McKeown’s decision in *Katkova v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 549, it cannot be said to be within one’s control if the State concerned grants by law to its officials a discretion to grant or refuse

citizenship. He argued this is the case under section 45 of the Guyana Constitution where citizenship is not automatic.

[20] Counsel for the Minister did not disagree with the propositions enunciated by counsel for the applicant but argued, as found by the tribunal, there was no evidentiary basis before it that would support a conclusion the applicant might be rejected by officials in Guyana on the basis of national security or public policy which is a tacit admission officials in Guyana had scope to refuse Mrs. Khan's citizenship application, a fact which the tribunal itself recognized when it found on the balance of probabilities "the discretionary powers available to the Minister [in Guyana] will not constrain the offer of citizenship to her".

[21] The determining error the tribunal made was to trespass upon forbidden territory when, after recognizing the authorities in Guyana were not compelled on her application to grant Mrs. Khan citizenship, it (the tribunal) could opine how the Minister in Guyana might exercise the discretion conferred upon him. Such circumstances are not within her control. Mrs. Khan is not obligated to seek Guyana's protection before she seeks Canada's.

(c) The section 97 question

[22] This question affects Mr. Khan only. As noted, he has not challenged the tribunal's finding he does not have under section 96 of the *Act* a well founded fear of persecution should he return to Guyana.

[23] At the hearing before the Court, counsel for the Respondent confirmed the tribunal made no separate section 97 analysis but argued the tribunal was not required to do so because Mr. Kwan was found not to be credible.

[24] I agree with counsel for the applicants, in this case, the nature of the tribunal's credibility finding did not shelter it from making a section 97 analysis. A reading of the tribunal's decision shows it did not disbelieve the events which Mr. Khan related happened to him in Guyana. Indeed, it found those events to have occurred but they were either criminal in nature or in the nature of harassment or discrimination. What the tribunal found is that his fear was not credible principally because he lacked subjective fear not making a claim in the United States.

[25] It is well recognized one of the purpose of adding section 97 to the *Act* in 2001 was to cover cases where an applicant may be at risk of harm in situations not caught by persecution on one of the five Convention grounds. Such is the case here where the acts Mr. Khan feared were criminal acts which do not fall within section 96 because they were not on account of one of the enumerated grounds. Another example are acts of harassment or discrimination which do not amount to persecution according to the jurisprudence.

[26] Finally, I also agree with counsel for the applicants the tribunal's generalized finding of the availability of state protection in Guyana does not shield the tribunal's decision in respect of Mr. Khan. An analysis of the availability of state protection includes a consideration of the specific instances when and how an applicant sought protection and in what manner an applicant's request for protection was handled by the authorities. Such a level of analysis is lacking in this case in terms

of the efforts being made in Guyana to improve State protection which is the basis for the tribunal's finding.

JUDGMENT

THIS COURT ORDERS that this judicial review application is allowed, the tribunal's decision is quashed and the applicants' claim for refugee status is remitted to a differently constituted tribunal for reconsideration. No certified question was proposed.

“François Lemieux”

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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