

Date: 20080814

Docket: IMM-3638-07

Citation: 2008 FC 946

Ottawa, Ontario, August 14, 2008

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

**MATIN MARSHALL and DIANA MARSHALL
And SARA MARSHALL**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA or the Act) for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated July 15, 2007, which found that the applicants were neither Convention refugees nor persons in need of protection.

[2] The applicants requested that the decision be set aside and the matter be referred back to a newly constituted panel of the Board for redetermination.

Background

[3] The applicants are a family consisting of a husband (Matin), a wife (Diana) and their young daughter (Sara). The applicants are all citizens of Afghanistan; the minor applicant was born in Pakistan, but she has not claimed Pakistani citizenship.

[4] Both adult applicants are of Tajik ethnicity, but while Matin is Sunni Muslim, Diana is a Shiite Muslim. They both come from very non-religious, secular backgrounds and were raised in very progressive families. They both left Afghanistan before the ousting of the Taliban and change of government in 2001 because their families did not agree with the extreme conservative conditions under that regime. Matin Marshall left Afghanistan in 1992, and Diana Marshall left in 1996. They met while living in Pishawar, Pakistan, a border city with Afghanistan where Afghan refugees reside.

[5] In their Personal Information Forms (PIFs), the adult applicants provided examples of the alleged persecution. Specifically, Diana Marshall recounted how while living in Pishawar she could not leave her home without being in full burqa and escorted by a male relative. Moreover, she described an incident wherein she told a friend that she would love to go swimming in a local lake. As women were forbidden to swim, the friend's father approached Diana Marshall's father and

reminded him of the need to teach his daughter Muslim values. For his part, Matin Marshall recounted an incident wherein he was physically threatened and called an ‘infidel’ for having spoken to an unrelated woman. On another occasion, while being shown videos of Taliban corporal punishment by his co-workers, Matin Marshall voiced his opposition to the videos and was subsequently beaten by his co-workers’ friends.

[6] The adult applicants submitted that upon the birth of their daughter Sara in December 2001, they felt compelled to escape the situation in Afghanistan. The applicants were especially concerned that they had to live a life based on ‘pretending’ that they shared the same conservative values that dominated both Pishawar and Afghanistan. The applicants entered Canada on or about April 16, 2006 and claimed refugee status on April 19, 2006.

[7] In a decision dated July 15, 2007, the Board found that the applicants were neither Convention refugees, nor persons in need of protection.

Board’s Decision

[8] The Board noted that the applicants’ identity had been established and that they were credible witnesses. The Board stated “the claimants were patently honest and forthright, and made no attempt to exaggerate or to embellish the particulars of their specific circumstances, although there would have been ample opportunity to do so.”

[9] The Board stated that the applicants based their claims on the general situation in Afghanistan, as well as the general situation of women in that country. The Board noted that it had considered the *Gender Guidelines*, and accepted that women may need refugee protection on account of their gender in appropriate cases.

[10] The Board then considered the situation in Afghanistan. The Board described the Taliban governance as being repressive and brutal towards women, but stated that since the Taliban regime collapsed at the end of 2001, the new government had made efforts to implement democratic principles, gender equality and principles of international human rights law. The Board noted that implementation and results of these measures have been mixed and that the new measures on gender equality were not available to all women in Afghanistan.

[11] The Board then noted that as in all refugee claims, the case had to be determined on the basis of the evidence as it relates to the specific applicants. The Board identified the following challenges in the present case:

1. Whether under section 96 there was any reasonable chance or serious possibility of harm to the applicants amounting to persecution?
2. Whether the applicants faced a risk to their lives or of cruel and unusual treatment or punishment or a danger of torture which was particular to them and not general to other individuals in Afghanistan?

[12] Having reviewed the documentary evidence, the Board then rendered its findings on the specific fears alleged by the applicants. The Board's overall determination was that the evidence did not support a finding that the applicants needed refugee protection. The Board acknowledged that women faced "serious disadvantage and discrimination in Afghanistan" and that it would take time before Afghan women had the level of equality experienced by women in Western countries. However, the Board stated that this did not mean that Afghan women were in need of refugee protection for those reasons alone.

[13] The Board noted the applicants' submission that "the whole system", including the volatile nature of Afghan society at the present time and the traditional conservative nature of society, generated an elevated level of risk for the applicants. However, the Board found that these conditions did not lead to a conclusion that the female applicants faced a reasonable chance of persecution, or a risk to their lives or of cruel and unusual treatment or punishment, or a danger of torture. The Board stated:

In order to make such a finding in this case, in the absence of any specific circumstances which would lead these claimants into harm's way, but rather on the basis of the general situation in Afghanistan, including the general situation of women, it would be necessary to find that the claimants need refugee protection because of their citizenship, and gender, alone.

[14] The Board rejected the applicants' argument that the government of Afghanistan had only made token gestures in favour of gender equality. In doing so, the Board noted the percentage of women in Parliament, the number of women registered to vote in elections and the rate of women occupying positions throughout the civil service.

[15] The Board also found that the evidence did not support a finding that people from Afghanistan, apart from their gender, were in need of refugee protection because of their nationality or citizenship alone. The Board noted that the applicants had taken no steps to approach the state authorities for protection against the harm feared and acknowledged that given the context of the applicants' fears, state protection was a difficult question. The Board noted that the applicants would have to make some approach to see what protection could be offered, or they would have to show that it would be unreasonable to expect them to make such an approach.

[16] In conclusion, the Board stated:

The end result is that it would be entirely speculative for the panel to find that the claimants face more than a mere possibility of persecution, or a risk to their lives or of cruel and unusual treatment or punishment, or a danger of torture. Accordingly their claims for refugee protection under sections of 96 and 97 f [sic] the Act are rejected.

Issues

[17] The applicants submitted the following issues for consideration:

1. Did the Board err in determining that section 97 of IRPA does not apply to risks faced generally by other individuals and does not protect groups of people in society?
2. Did the Board err in not extending freedom to exercise one's religion to the right not to exercise any religion?
3. Did the Board err by not considering the objective documents, or even if it considered them, reach a patently unreasonable conclusion?

[18] I would rephrase the issues as follows:

1. What is the appropriate standard of review?
2. Did the Board err in law in its analysis of section 97 by failing to recognize the section could apply to groups of individuals facing similar persecution?
3. Did the Board err in finding that the fear faced by the applicants did not amount to persecution?

Applicants' Submissions

[19] In their written submissions, the applicants submitted that the Board's finding that women in Afghanistan are not persons in need of protection under section 97 was entirely incorrect and contrary to case law. The applicants submitted that women subject to collective abuse at the hands of strangers are a particular social group in need of protection. The applicants noted that the Board acknowledged the systemic discrimination against women in Afghanistan and the numerous limitations on their freedom. In light of these acknowledgements it was unreasonable for the Board to find that women in Afghanistan are not being persecuted. The applicants also submitted that as individuals who are westernized, non-religious and secular, they were 'uniquely' different from the majority of the Afghan population which made the persecution faced even more serious.

[20] The applicants' also argued that the Board erred in not extending freedom to exercise one's religion to the right not to exercise any religion. Freedom of religion includes the right to manifest one's religion in public, or private, in teaching, practice, worship and observance (*Fosu v. Canada*

(Minister of Employment and Immigration) (1994), 27 Imm. L.R. (2d) 95 (F.C.T.D.)). The applicants submitted that the right to manifest religion in public also includes the right not to manifest it in public. Thus, the applicants forced adherence to the Islamic dress code and other codes of conduct is a violation of their freedom of religion and conscience. The applicants cited at length portions of the hearing transcript wherein they testified as to their opposition to such religious dress codes and other codes of conduct. The applicants also noted the case of *Kassatkine v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 1105, wherein the Court held that a law which requires a minority of citizens to breach the principles of their religion is patently persecutory. The applicants submitted that in light of the finding in *Kassatkine* above, it must also be true that a law that forces a minority to practice a religion they do not believe in is also persecutory. Moreover, the applicants submitted that as per *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 SCR 593, what constitutes a basic human right is determined by the international community and not by any one country. The right to religion, including the right not to adopt a certain religion is a basic human right and violation of this right amounts to persecution.

[21] And lastly, the applicants submitted that in light of the documentary evidence, the Board erred in concluding that the conditions in Afghanistan do not amount to persecution.

Respondent's Submissions

[22] The respondent submitted that the Board's unchallenged finding of state protection is dispositive of this application for judicial review. An applicant must either show that they sought state protection, but it was not forthcoming, or else that it would be "objectively unreasonable" for them to have done so. As the Board found, the applicants failed to show either in the present case.

[23] The remainder of the respondent's submissions were made in the alternative. The respondent submitted that the Board's interpretation of section 97 is reviewable on a standard of correctness. The Board's finding that the female applicants were not at a particular risk under section 97 as "westernized, non-religious, secular" females is reviewable on a standard of patent unreasonableness.

[24] The respondent submitted that contrary to the applicants' argument, the Board clearly considered the gender-based claim under section 97. Moreover, the Board correctly found that a generalized risk is a limiting factor under section 97. The respondent noted that the wording of section 97 and current jurisprudence (see *Sanchez v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 604; *Bouaouni v. Canada (Minister of Citizenship and Immigration)*, [2003] FC 1211) both support the established conclusion that a risk under section 97 must be personal or individual to the claimant. The Board's finding that section 96 and 97 were not met was reasonable given the Board's assessment of "personalized risk" versus "generalized risk", and the Board's

finding that there was insufficient evidence of “personalized risk” and “generalized risk” is not enough.

[25] As to the applicants’ argument that the Board erred in not extending freedom of expression to the right not to express religion, the respondent submitted that the Board reviewed the relevant factors but concluded that the applicants faced discrimination, not persecution. The respondent noted that the adult applicants are in fact Muslim, albeit perhaps not fundamentalists. The respondent submitted that the Board considered the circumstances in Afghanistan including religious codes of conduct imposed on the population as per the documentary evidence, but found that these did not amount to persecution. The respondent submitted that given the mixed documentary evidence and given the Board’s acknowledgement of widespread discrimination, the finding that the discrimination did not amount to persecution was reasonably open to the Board.

[26] And lastly, the respondent submitted that the Board clearly reviewed the *Gender Guidelines*, and reasonably found that women in Afghanistan were not in need of protection on the basis of gender. The respondent submitted that the applicants are asking the Court to reweigh the evidence. This is not the role of the Court on judicial review (*Scherzad v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1224).

Analysis and Decision

[27] Before engaging in an analysis of the issues raised by the applicants, I first feel it necessary to address the respondent's argument that as the applicants have not challenged the Board's finding on state protection, this judicial review must fail. In my opinion, this argument cannot be accepted. It is true that the Board made comments on state protection. Specifically the Board commented on the applicants' failure to show that they had either tested the state protection mechanisms or that it was objectively unreasonable to expect them to. However, in my opinion, the Board did not conduct an analysis of state protection, nor did it make a finding on the adequacy of state protection. The statements made by the Board were comments on the applicants' situation; the determinative factor was not state protection, but yet lack of persecution. The Board had already found that the applicants were neither refugees, nor persons in need of protection and as such, there was no requirement on the Board to make a finding on state protection. In light of this, I will proceed to my analysis of the issues raised by the applicants.

[28] **Issue 1**

What is the appropriate standard of review?

The issue of whether the Board erred in its section 97 analysis is a question of law reviewable on a standard of correctness. The Board's conclusion as to whether the discrimination and hardship faced by a refugee claimant constitutes persecution is a question of mixed fact and law, and is therefore subject to review on a standard of reasonableness (*Lopez v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 1452).

[29] **Issue 2**

Did the Board err in law in its analysis of section 97 by failing to recognize the section could apply to groups of individuals facing similar persecution?

The applicants submitted that the Board erred in denying the applicants' section 97 claim on the basis that section 97 did not apply to individuals who faced a risk as a group, that is a general risk. The respondent submitted that the Board did not err in its analysis as section 97 requires a "personalized" risk; a "general" risk does not suffice.

[30] In *Bouaouni v. Canada (Minister of Citizenship and Immigration)*, above at paragraph 41, Justice Blanchard made the following findings regarding a section 97 analysis:

A claim under section 97 must be evaluated with respect to all the relevant considerations and with a view to the country's human rights record. While the Board must assess the applicant's claim objectively, the analysis must still be individualized. I am satisfied that this interpretation is not only consistent with the United Nations CAT decisions considered above, but is also supported by the wording of paragraph 91(1)(a) of the Act, which refers to persons, "...whose removal... would subject them personally...".

[31] It is clear from the above passage that while the risk may be shared by others similarly situated, the risk must nonetheless be individual to the applicant. That is, while a "personalized" risk will suffice, a "general" risk will not.

[32] The relevant portions of the Board's decision reads as follows:

In this case, the challenge is to identify, under section 96, any reasonable chance or serious possibility of harm to the claimants, and whether that amounts to persecution, and, under section 97, whether they face a risk to their lives or of cruel and unusual treatment or punishment which is particular to them and not general to other individuals in Afghanistan, or a danger of torture.

The Board goes on to state:

The panel finds, however, that these conditions do not lead to a conclusion that the female claimants face a reasonable chance of persecution, or a risk to their lives or of cruel and unusual treatment or punishment, or a danger of torture. In order to make such a finding in this case, in the absence of any specific circumstances which would lead these claimants into harm's way, but rather on the basis of the general situation in Afghanistan, including the general situation of women, it would be necessary to find that the claimants need refugee protection because of their citizenship, and gender, alone.

[33] It is clear by the Board's decision that it considered the applicants' risk, but was of the opinion that without "specific circumstances which would lead these claimants into harm's way" the risk was too general. That is to say that the Board was of the opinion that the applicants had failed to show how the risk faced was particular to them.

[34] I note that the applicants also argued that in its section 97 analysis, the Board failed to recognize the applicants' gender-based arguments. I disagree. The Board clearly stated that it had reviewed the *Gender Guidelines* and accepted that in certain cases women may need refugee protection on account of their gender. Moreover, the Board clearly reviewed the situation of women throughout its analysis of the country conditions as per the documentary evidence. I would not allow the judicial review on this ground.

[35] **Issue 3**

Did the Board err in finding that the fear faced by the applicants did not amount to persecution?

The applicants submitted that their forced adherence to strict Islamic codes amounted to persecution. The respondent submitted that the applicants are really arguing that they will be persecuted for being “Westernized”.

[36] In its decision, the Board reviewed the specific fears alleged by the applicants, canvassed the documentary evidence, and made a number of conclusions. The Board’s overall conclusion was that the evidence did not support a finding that the claimants needed refugee protection. The Board acknowledged that women in Afghanistan faced serious disadvantage and discrimination, but found that this did not amount to persecution.

[37] In my opinion, the Board clearly considered whether or not the applicants’ forced adherence to strict Islamic codes amounted to persecution. The Board found that there was no evidence that at least in Kabul and regional centres women were restricted to the home or required to wear a burqa, although wearing a headscarf was required. The Board also found that although there were limitations to freedom of expression, Afghanistan was in the process of developing a free civil society. Furthermore, the Board found that while there was some indication that the current government intended to re-establish a Ministry of the Vice, there was no evidence upon which to conclude that any threat would be forthcoming from this Ministry to the applicants.

[38] As to the reasonability of the Board's finding that the alleged fear did not amount to persecution, I am of the opinion that the Board's decision was reasonable in light of the documentary evidence before it. The Board clearly acknowledged the discrimination and hardship faced by the applicants as evidenced in the documentary evidence. However, it was satisfied that the documentary evidence also indicated that since the regime change there had been significant improvements. It is not the role of this Court to reweigh the evidence before the Board; in this respect, deference must be given to the Board. I am satisfied that the Board did not err in rendering its decision. I would not allow the judicial review on this ground.

[39] The application for judicial review is therefore denied.

[40] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

[41] **IT IS ORDERED that** the application for judicial review is denied.

“John A. O’Keefe”

Judge

ANNEX

Relevant Statutory Provisions

The relevant statutory provisions are set out in this section.

The *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA):

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

97.(1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne 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:

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

97.(1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée:

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant:

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

(2) A également qualifié de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3638-07

STYLE OF CAUSE: MATIN MARSHALL and
DIANA MARSHALL and
SARA MARSHALL

- and -

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

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