Federal Court Cour fédérale

Date: 20090608

Docket: IMM-4649-08

Citation: 2009 FC 606

Ottawa, Ontario, June 8, 2009

PRESENT: The Honourable Max M. Teitelbaum

BETWEEN:

ALI REZA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under section 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) of the decision by the Refugee Protection Division of the Immigration and Refugee Board (IRB or panel) dated September 28, 2008, that the applicant is not a Convention refugee or a person in need of protection under sections 96 and 97 of the Act.

[2] The applicant, Ali Reza, is 9 years old. He was born in the United Arab Emirates (UAE) of a Sunni Hazara Pakistani mother and a presumed Shiite Pakistani father, joined in a temporary Muta marriage in the Shiite tradition. A Muta marriage is generally repudiated by Sunnis; thus, the

applicant's maternal grandparents never accepted the legitimacy of the Muta. In fact, they never accepted the legitimacy of the applicant, and wanted to kill him.

[3] In March 2001, fearing for the life of her child, the applicant's mother fled to the United States. There, she left her son with her brother-in-law Abdullah Ali and his wife before returning to the UAE. She officially married the applicant's presumed father, and they had two more children. However, it is alleged that the applicant continues to be rejected by his mother's family in the UAE and in Pakistan, and therefore cannot return to live with his mother.

[4] Mr. Ali and his wife had no legal status in the United States even though they had been living there for a long time. In May 2003 they came to Canada with the applicant and claimed refugee protection. For administrative reasons, the applicant's claim for refugee protection was filed only in December 2003.

[5] On August 10, 2004, Mr. and Mrs. Ali's claims were denied. In a judgment by the Superior Court of Quebec dated October 6, 2005, they were granted parental authority over the applicant. Their stay in Canada was extended so that they could look after the applicant until his claim was resolved.

[6] The hearing before the IRB took place over three days: February 13, 2007, September 17, 2007 and July 28, 2008. Mr. Ali testified for the applicant. Marion Shumake, the applicant's designated representative, was also present.

[7] Before the IRB, Mr. Ali alleged that the applicant could not return to the UAE because he had no legal status there and was at risk of being killed by his mother's family. He could not go to Pakistan either, because he was not recognized as a Pakistani citizen. Even if he went to Pakistan, it was feared that the members of his mother's family who lived there would kill him. In fact, being Shiite and part Hazara, the applicant would be persecuted in Pakistan, which is mainly Sunni.

[8] In a letter dated October 2, 2008, the applicant was informed that his refugee claim was rejected.

THE DECISION

[9] In its decision dated September 28, 2008, the IRB stressed the importance of the minor applicant's interests, noting that it was aware of commitments under the *Convention on the Rights of the Child.*

[10] The IRB noted that the applicant and Mr. and Mrs. Ali formed a family unit. The applicant had been raised by his uncle and aunt since he was 18 months old, and they were his *de facto* parents. In fact, the applicant believed that they were his biological parents because he had never been told about his mother in the UAE.

[11] The IRB rejected Mr. Ali's argument that Pakistan would not grant the applicant citizenship because he did not have an authentic birth certificate. The IRB also rejected the allegation that Pakistan did not recognize children born of temporary marriages outside Pakistan, noting that Mr. Ali had not provided any evidence to corroborate his statements.

[12] In fact, the evidence indicated that children born of Muta marriages to Pakistani parents outside Pakistan follow the same procedures for the recognition of their Pakistani citizenship because citizenship is based on parentage, not place of birth. Thus, the IRB concluded that the administrative problems described by Mr. Ali were not insurmountable.

[13] The IRB also refused to accept Mr. Ali's allegation that he would be prohibited from adopting the applicant in Pakistan because the concept of adoption does not exist in that country. The IRB based itself on documentary evidence in stating that abandoned children were indeed adopted in Pakistan, and that Mr. Ali, as the child's uncle, would be an ideal candidate, given that his biological parents had given him custody of the applicant and that Mr. and Mrs. Ali were his legal guardians. The IRB therefore found that there was no risk of their being separated from him in Pakistan.

[14] As for the danger that the applicant would be killed by his mother's family in Pakistan, the IRB found Mr. Ali's testimony very vague. Mr. Ali was unable to identify his sister-in-law's "rare" Sunni Hazara tribe (most Hazara are Shiite). From the IRB's point of view, Mr. Ali's lack of knowledge about the tribe undermined the credibility of his allegation:

> It is not plausible that the claimant's uncle, a man who cares for the boy, and who considers him his son, would not be aware of where the original threats the boy faces in Pakistan originates. This total lack of knowledge of basic facts, this extreme vagueness, leads me to conclude that the child is not at risk of being persecuted by any Hazara tribe or clan in Pakistan.

[15] The IRB also found that the behaviour of the applicant's mother, in returning to the UAE, was inconsistent with the claim that she had been persecuted for giving birth to her son under a temporary marriage.

[16] Finally, the IRB found that, despite the tensions in Pakistan, the evidence did not support the assertion that Shiite Hazara Pakistanis were persecuted. It noted that:

> I understand that this child has never lived in Pakistan. He was raised in the U.S. and in Canada. He has spent at least five years in Montreal living a normal life despite some problems at school. There maybe [*sic*] humanitarian and compassionate grounds to have him stay in Canada with his legal guardians (his aunt and uncle) but this is not within the mandate of this tribunal.

ISSUES

[17] The applicant did not expressly list the issues in dispute. However, his arguments would indicate that he was raising the following points:

1. Did the panel err in finding that the applicant could acquire Pakistani citizenship through a mere formality and was therefore not stateless?

2. Did the panel err in finding that the applicant, whose mother is a Shiite Hazara, would not be persecuted in Pakistan?

POSITIONS OF THE PARTIES

[18] The applicant submits that the panel committed several errors of law and fact. First, he challenges the finding that having his Pakistani citizenship recognized in Pakistan would be a mere formality. As Mr. Ali explained at the hearing, the passport issued to the applicant in New York by

the Pakistani authorities was only temporary and for the purpose of travel. To be an official Pakistani citizen, the applicant would have to be registered with the National Database and Registration Authority (NADRA) in Islamabad. According to the applicant, he has never been registered with NADRA, and since Mr. Ali is not his biological father and does not have his birth certificate, he cannot register him.

[19] Second, the applicant claims that the panel erred in its interpretation of the evidence. Specifically, the panel referred to the request for information No. PAK102631 to support its finding that the applicant was entitled to Pakistani citizenship because of his Pakistani descent, given that both of his biological parents are Pakistani. However, this report makes a distinction between children born before April 18, 2000 (as in the applicant's case) and those born after that date. Those in the first category are recognized as Pakistani citizens only if their father was a citizen *other* than by descent. Since the biological father's situation is unknown, the applicant argues that the panel erred in finding that he would necessarily be recognized as a citizen.

[20] The above-mentioned request for information explains that the child must be registered within a year of its birth. The documentary evidence does not show that his birth was registered within that time, and the panel did not investigate with NADRA.

[21] Third, the applicant reaffirms that the concept of adoption, as recognized in the West, does not exist in Pakistan, where instead there is a type of "legal guardianship". Under these circumstances, the child does not have the same rights as a biological child, and there is no guarantee that it would be recognized as a citizen of Pakistan.

[22] Fourth, the applicant argues that the panel should have considered him a stateless child. The panel's analysis should have been based on the country where he normally lives, and the risk he would face in returning to it.

[23] Finally, the applicant argues that the panel erred in finding that the fact that Mr. Ali did not have detailed knowledge of the applicant's mother's tribe undermined his credibility. He submits that the evidence shows that, regardless of their ethnic group, Shiites are persecuted in Pakistan.

[24] The respondent makes a preliminary point, which is that the applicant did not raise the issue of his stateless status before the panel. Rather, the issue before the panel was whether the applicant could claim his Pakistani citizenship. The respondent therefore asks the Court not to take into consideration the argument that the applicant is stateless, as set out in paragraphs 10 to 25 of his memorandum.

[25] More generally, the respondent argues, in summarizing the IRB's reasoning, that it did not render a decision based on erroneous findings of fact, made in a perverse or capricious manner or without regard to the evidence.

ANALYSIS

1. Did the panel err in finding that the applicant could acquire Pakistani citizenship through a mere formality and was therefore not stateless?

[26] This first question pertains to a determination, based on the documentation and testimony of the applicant's guardian, of the possibility that the applicant could be recognized as a Pakistani citizen. This is a question that largely involves the interpretation of facts and is therefore reviewable

on the standard of reasonableness (*Mijatovic v. Canada (M.C.I.)*, [2006] F.C.J. No. 860, 2006 CF 685, at paragraph 23).

[27] The applicant's central premise is the following: he cannot be forced to return to Pakistan because he has no recognized status in that country. For the following reasons, I cannot accept this argument.

[28] First, the Personal Information Form (PIF) clearly indicates Pakistan as the minor applicant's country of citizenship. The PIF and his birth certificate specify that his parents are Ghulam Ali and Sughra Ali Ahmed, both Pakistani. In fact, the Pakistani government has recognized the boy's citizenship on several occasions.

[29] Mr. Ali responds that there is no evidence of the applicant being registered with NADRA, and appears to fault the panel for not having looked into this matter. However, the burden of proof remains on the applicant. Nothing prevented Mr. Ali from checking with NADRA whether the applicant was registered. In fact, no effort was made to obtain the applicant's citizenship. Mr. Ali, who claims to have contacted the Pakistani embassy in Canada for information on this point, chose not to file anything before the panel demonstrating the content of the information received. Finally, the evidence does not contain any document indicating that an application for citizenship by the applicant was rejected – evidently because no application was ever made. As noted by Mr. Justice Rothstein when he sat on this Court, "the status of statelessness is not one that is optional for an applicant" (*Bouianova v. Canada (M.E.I.*), [1993] F.C.J. No. 576, at paragraph 12). It is thus well established that the status of statelessness must be beyond an applicant's control. At paragraphs 22

and 23 of *Williams v. Canada (M.C.I.)*, [2005] F.C.J. No. 603, 2005 FCA 126, Mr. Justice Décary wrote for the Federal Court of Appeal:

> **22** … The true test, in my view, is the following: if it is within the control of the applicant to acquire the citizenship of a country with respect to which he has no well-founded fear of persecution, the claim for refugee status will be denied. 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, it prevents the introduction of a practice of "country shopping" which is incompatible with the "surrogate" dimension of international refugee protection recognized in *Ward* and it is not restricted, contrary to what counsel for the respondent has suggested, to mere technicalities such as filing appropriate documents. This "control" test also reflects the notion which is transparent in the definition of a refugee that the "unwillingness" of an applicant to take steps required from him to gain state protection is fatal to his refugee claim unless that unwillingness results from the very fear of persecution itself. Paragraph 106 of the Handbook on Procedures and Criteria for Determining Refugee Status emphasizes the point that whenever "available, national protection takes precedence over international protection, and the Supreme Court of Canada, in *Ward*, observed at p. 752, "[w]hen available, home state protection is a claimant's sole option."
>
> **23** The principle enunciated by Rothstein J. in *Bouianova* was followed and applied ever since in Canada. Whether the citizenship of another country was obtained at birth, by naturalization or by State succession is of no consequence provided it is within the control of an applicant to obtain it. (The latest pronouncements are those of Kelen J. in *Barros v. Minister of Citizenship and Immigration*, 2005 FC 283, and Snider J. in *Choi v. Canada (Solicitor General)*, 2004 FC 291.)
>
> [Emphasis added.]

[30] I note that emphasis has been placed on the result of a DNA test obtained during the administrative process before the IRB to ensure that the applicant was not a victim of child trafficking. This test shows that the husband of the applicant's mother – the man indicated as his

father on the birth certificate – is not his biological father. However, this does not necessarily invalidate his birth certificate or compromise his official status in Pakistan. In fact, the documentary evidence shows that a child born from a Muta marriage becomes a citizen in the same way as a child born from an official marriage. The fact that it was determined during the panel's proceedings that the alleged father was not the biological father does not change the minor applicant's official status or the identity of his official father.

[31] In this case, the panel preferred to focus on the documentary evidence rather than on Mr. Ali's assertions, which it is entitled to do. On page 4 of the decision, the panel wrote:

> … What the rules governing Pakistani citizenship state is that a person born outside of Pakistan is a citizen of Pakistan by descent if either parent is a citizen of Pakistan irrespective of place of birth, of the form of union of his parents or if he has no official father. This was also confirmed by the High Commission for Pakistan in Ottawa. Here, the mother and the official father are Pakistani citizens. The claimant was included in his mother's Pakistani passport. Twice, the Pakistani Consulate in New York issued him a temporary Pakistani passport recognizing him as a citizen of Pakistan. In Canada, the High Commission for Pakistan confirmed that the claimant would be considered a Pakistani citizen. Confronted with all this evidence, the claimant's uncle simply repeated that the B-form was impossible to obtain and that it was a bar to Pakistani citizenship. In light of all the information quoted, the Tribunal concludes that the administrative problems outlined by the claimant's uncle were not insurmountable and the claimant could obtain Pakistani citizenship by a simple formality. [The citations are omitted.]

[32] Having reviewed the evidence before the panel, I find nothing unreasonable in its reasoning or in its conclusion. I am satisfied that "the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v. New Brunswick*, 2008

SCC 9, [2008] 1 S.C.R. 190, at paragraph 47), and I see no reason warranting this Court's intervention.

2. Did the panel err in finding that the applicant, whose mother is Shiite Hazara, would not be persecuted in Pakistan?

[33] Having read through all of the documentary evidence, I am satisfied that the panel did not err in finding that the applicant would not face persecution in Pakistan because of the mother's religion and ethnicity. In this regard, I would note that, if the applicant were to return to Pakistan, it would most likely be to live with his guardians, Mr. and Mrs. Ali, who are Sunni and do not appear to have any connection with his biological mother's family.

CONCLUSION

[34] For these reasons, the application for judicial review is dismissed. No question of general importance was submitted for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review be dismissed.

"Max M. Teitelbaum"
Deputy Judge

Certified true translation
Brian McCordick, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4649-08
STYLE OF CAUSE:	Ali Reza v. MCI
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	May 27, 2009
REASONS FOR JUDGMENT:	TEITELBAUM D.J.
DATED:	June 8, 2009

APPEARANCES:

Luciano Mascaro	FOR THE APPLICANT
Alain Langlois Sylviane Roy	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Luciano Mascaro Attorney	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT