Federal Court  Cour fédérale

Date: 20110217

Docket: IMM-3343-10

Citation: 2011 FC 191

Ottawa, Ontario, February 17, 2011

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

SRI SUNARTI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] In *Mendivil v Canada (Secretary of State)* (1994), 167 NR 91, 46 ACWS (3d) 943, the Federal Court of Appeal was of the opinion that the issue was one of state protection. The Immigration and Refugee Division of the Immigration and Refugee Board (Board) found that the

Applicant established a subjective fear, but not an objective one. The Federal Court of Appeal found that the Applicant was part of a particular social group: persons singled out and personally targeted by terrorists. The Board, therefore, erred by failing to consider whether the state was capable of arbitrarily protecting identified targeted members of that social group (not individuals chosen at random):

> [11] **…** members of a particular social group, might still have good grounds for fearing persecution when a state is capable of protecting ordinary citizens but incapable of protecting members of that particular social group…

[2] In addition, in *Avila v Canada (Minister of Citizenship and Immigration)*, 2006 FC 359, 295 FTR 35, the Court clearly states:

> [31] … the degree to which a state tolerates corruption in the political or judicial apparatus correspondingly diminishes its degree of democracy…

[3] In *Zhuravlvev v Canada*, [2000] 4 FC 3, 187 FTR 110 (TD), the Board rejected the refugee claim:

> [33] …The CRDD's cursory analysis amounted to a failure to consider relevant factors and justifies setting the decision aside and sending the matter back for determination by a differently constituted panel. [Emphasis added].

II. Introduction

[4] The Board found the Applicant to be credible. Her fear stems from a terrorist group in Indonesia. The Applicant alleges that the police did not investigate the disappearance of a similarly situated friend. The friend invited her to join “a prayer group” which, in fact, was not what she had thought it was; she went in order to disassociate herself from it. She fears reprisals by the extremist group if she approaches the police as the police is known to be corrupt; yet, the Board found that the Applicant’s fear of approaching the police is a subjective reluctance.

III. Judicial Procedure

[5] This is an application, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), for judicial review of a decision of the Board, dated May 20, 2010, wherein the Applicant was determined to be neither a "Convention refugee" nor a "person in need of protection" within the meaning of section 96 and subsection 97(1) of the IRPA.

IV. Background

[6] The Applicant, Ms. Sri Sunarti, a citizen of Indonesia, fears persecution from the Negra Islam Indonesia (NII). She was invited by her friend Yunita to attend prayer meetings. The two were asked to give financial contributions. Within a few months the group was addressed by a leader who stated that they were all choosing to "fight" for Islam. Ms. Sunarti became frightened; if she did not attend a meeting, members of the group would call her at home and at work, insisting that she attend the next meeting and attempted to send someone to meet her to bring her to meetings.

[7] The NII is an Indonesian terrorist group that fights for an Islamic state. One of its off shoots was allegedly involved in the bombing of the Australian embassy in Indonesia.

[8] Ms. Sunarti stated in her narrative:

> 11. I was so frightened by this group and their fundamentalist ideas and behavior that I became depressed and found it increasingly difficult to work. In March 2008, I had to leave my job as office manager for Pt Atap Teduh Lestari due to the fear and terrible anxiety I was experiencing.

(Applicant's Affidavit at p 2).

[9] Ms. Sunarti was afraid to seek protection from the police. She explained that the police is corrupt and she feared reprisals; the police did not investigate the disappearance of her friend.

[10] In her Affidavit, Ms. Sunarti specified:

> 13. It was at the end of April 2008, after Yunits disappeared, that I first noticed a man with a beard and short trousers outside my house. Every day after that, a man, not always the same man, was there watching my house. I therefore restricted [m]y comings and goings and only left the house when no one was watching. I did not go to the police, because the police in Indonesia are corrupt and I was afraid that it would only make things worse.

V. Issue

[11] In light of the Supreme Court of Canada's decision criteria in *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, 41 ACWS (3d) 393, did the Board err in law by failing to conduct a proper analysis of state protection?

VI. Standard of Review

[12] The Supreme Court established in *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982, 160 DLR (4th) 193, that the standard for issues involving error of law is that of **correctness**.

[13] In a recent decision, this Court, in *Khanna v Canada (Minister of Citizenship and Immigration)*, 2008 FC 335, 166 ACWS (3d) 362, referred to the Supreme Court's decision in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, establishing:

> [4] The Supreme Court of Canada in *Dunsmuir* … has brought much needed clarity to the question of standard of review. There are only two standards, reasonableness and correctness. The standard of correctness must be maintained in respect of jurisdictional and some other questions of law. Reasonableness is a

> deferential standard to be applied where the question is one of fact, discretion or policy and shall apply where the legal and factual issues are intertwined and cannot readily be separated.

[14] In *Canadian Council for Refugees v Canada*, [2006] FC 1046, 299 FTR 114, Justice Roger Hughes states:

> [20] …the standard for granting an Order permitting judicial review is low. The matter at that point is to be dealt with in a summary way. The standard on a leave application is whether or not a fairly arguable case is disclosed (*Bains v. Canada (M.E.I.)* (1990), 47 Admin. L.R. 317).

[15] State protection is generally held to be a mixed question of fact and law.

VII. Analysis

[16] Ms. Sunarti's identity was accepted. Her credibility was never in question, and, thus, not at issue. The single issue raised by the Board is "state protection".

[17] The Board was not satisfied by Ms. Sunarti's explanation of why she did not complain to the police. The Board did not consider the unwillingness of the police to launch an investigation into Yunita's disappearance.

[18] In its decision, the Board states:

> [17] The panel is also of the opinion that the applicant's fear of the police and reprisals by the NII is a subjective reluctance, not clear and convincing evidence of inadequate state protection.

[19] The Board referred to the National Documentation Package on Indonesia, July 31, 2009: Tab (2.1) United States. February 25, 2009. Department of State. "Indonesia." Country Reports on

Human Rights Practices for 2008. The Board characterizes Indonesia as a “democratic state”, and that “the government generally respects the rights of its citizens, even though some rights issues have been reported”. The Board also stated that the police authorities continue to improve, “even though immunity and corruption remain an issue in some areas, and that the polic[e] commonly demand bribes” (Board’s decision at paras 12-13).

[20] The 2008 Human Rights Report on Indonesia states:

> The government generally respected the human rights of its citizens and upheld civil liberties. Nonetheless, there were problems during the year in the following areas: killings by security forces; vigilantism; harsh prison conditions; impunity for prison authorities and some other officials; corruption in the judicial system; limitations on free speech; societal abuse and discrimination against religious groups and interference with freedom of religion, sometimes with the complicity of local officials; instances of violence and sexual abuse against women and children; trafficking in persons; child labor; and failure to enforce labor standards and worker rights.
>
> …
>
> b. Disappearance
>
> The government reported little progress in accounting for persons who disappeared in previous years or in prosecuting those responsible for such disappearances. The criminal code does not specifically criminalize disappearance.
>
> On April 1 and 28, Komnas HAM resubmitted its 2006 report on the 1998 abductions of 12 to 14 prodemocracy activists to the AGO. Despite refusals from military personnel to cooperate in the investigation, Komnas HAM concluded that all victims still missing were dead and identified suspects for an official investigation without publicly releasing their names. During 2006-07 the AGO took no action, stating that it could not prosecute these crimes unless the House of Representatives (DPR) declared them gross human rights violations. In October a special committee of the DPR began conducting hearings into the matter.
>
> …
>
> d. Arbitrary Arrest or Detention

…

…However, impunity and corruption remained problems in some areas. Police commonly extracted bribes ranging from minor payoffs in traffic cases to large bribes in criminal investigations.

e. Denial of Fair Public Trial

The law provides for judicial independence; however, in practice the judiciary remained susceptible to influence from outside parties, including business interests, politicians, and the military. Low salaries continued to encourage acceptance of bribes, and judges were subject to pressure from government authorities, which appeared to influence the outcome of cases.

…

Widespread corruption throughout the legal system continued. Bribes and extortion influenced prosecution, conviction, and sentencing in civil and criminal cases. In 2007 the National Ombudsman Commission reported receiving 218 complaints of judicial corruption involving judges, clerks, and lawyers. Key individuals in the justice system were accused of accepting bribes and of turning a blind eye to other government offices suspected of corruption. Legal aid organizations reported that cases often moved very slowly unless a bribe was paid. With the Judicial Commission stripped of its powers, responsibility for judicial supervision rests with the Supreme Court. [Emphasis added].

[21] The Court is in full agreement with the Applicant in that the Board appears remiss as to the following:

a. Whether the failure of the police to investigate the disappearance of a similarly situated person (Yunita), would constitute proof of inadequate state protection;

b. Failure to consider whether the Applicant's fear of persecution at the hands of a terrorist group constituted her as a particular social group which the state was unable or unwilling to protect;

c. Failure to consider whether the evidence of state corruption could establish that the state is unwilling to protect the Applicant;

d. Any one of the above appears to demonstrate that the decision was not reasonable.

[22] Was it not objectively reasonable for Ms. Sunarti to be unwilling to complain against a "terrorist group" when the documentary evidence indicates that the Indonesian police are notoriously corrupt and not investigating incidents of intimidation, violence and disappearance?

[23] The Board failed to consider the questions; thus, the principles established by the Supreme Court in *Ward*, above, as well as subsequent decisions by this Court were ignored. The Board erred in fact and in law by requiring an unfair burden of proof and by engaging in speculation that the police was able or willing to protect.

[24] The Supreme Court of Canada in *Ward*, above, specified:

> …Moreover, it would seem to defeat the purpose of international protection if a claimant would be required to risk his or her life seeking ineffective protection of a state, merely to demonstrate that ineffectiveness.
>
> Like Hathaway, I prefer to formulate this aspect of the test for fear of persecution as follows: only in situations in which state protection "might reasonably have been forthcoming", will the claimant's failure to approach the state for protection defeat his claim. Put another way, the claimant will not meet the definition of "Convention refugee" where it is objectively unreasonable for the claimant not to have sought the protection of his home authorities; otherwise, the claimant need not literally approach the state.
>
> The issue that arises, then, is how, in a practical sense, a claimant makes proof of a state's inability to protect its nationals as well as the reasonable nature of the claimant's refusal actually to seek out this protection. On the facts of this case, proof on this point was unnecessary, as representatives of the state authorities conceded their inability to protect Ward. Where such an admission is not available, however, clear and convincing confirmation of a state's inability to protect must be provided. For example, a claimant might advance testimony of similarly situated individuals let down by the state protection arrangement or the claimant's testimony of past personal incidents in which state protection did not materialize…

[25] In *Mendivil*, above, the Federal Court of Appeal was of the opinion that the issue was one of state protection. The Board found that Ms. Sunarti established a subjective fear, but not an objective one. The Federal Court of Appeal found that the Applicant was part of a particular social group: persons singled out and personally targeted by terrorists. The Board, therefore, erred by failing to consider whether the state was capable of arbitrarily protecting identified targeted members of that social group (not individuals chosen at random):

> [11] **…** members of a particular social group, might still have good grounds for fearing persecution when a state is capable of protecting ordinary citizens but incapable of protecting members of that particular social group…

[26] The Federal Court of Appeal also quoted from both *Canada (Minister of Employment and Immigration) v Villafranca* (1992), 150 NR 232, 37 ACWS (3d) 1259 and *Ward*, above, noting that protection against terrorism is difficult, and that the state's inability to protect is an integral component of a well-founded fear.

[27] This Court echoed *Mendivil* in *Badran v Canada (Minister of Citizenship and Immigration)* (1996), 111 FTR 211, [1996] FCJ No 437 (QL/Lexis). The applicant feared attacks from terrorists in Egypt. The evidence showed that Egypt was a stable country making serious efforts to protect its citizens. The Court found:

> [16] …past personal incidents may qualify an individual as a member of a particular social group which the state is unable to protect…

[28] In addition, in *Avila*, above, the Court clearly states:

> [31] … the degree to which a state tolerates corruption in the political or judicial apparatus correspondingly diminishes its degree of democracy…

[29] In *Zhuravlvev*, above, the Board rejected the refugee claim:

> [33] …The CRDD's cursory analysis amounted to a failure to consider relevant factors and justifies setting the decision aside and sending the matter back for determination by a differently constituted panel. [Emphasis added].

VIII. Conclusion

[30] For all of the above reasons, the Board's decision is unreasonable. The Applicant's application for judicial review is granted and the matter is remitted for redetermination by a differently constituted panel.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be granted and the matter be remitted for redetermination by a differently constituted panel. No question for certification.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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