

Federal Court



Cour fédérale

Date: 20110329

Docket: IMM-4760-10

Citation: 2011 FC 380

Ottawa, Ontario, March 29, 2011

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

MOHSIN ALI KAMRAN

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of the decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board, dated 30 March 2010 (Decision), which refused the Applicant's application to be deemed a Convention refugee or a person in need of protection under sections 96 and 97 of the Act.

BACKGROUND

[2] The Applicant is a citizen of Pakistan where he fears persecution based on his Ahmadi religious background.

[3] The Applicant belongs to a well-known and devout Ahmadi family in the city of Rabwah. He claims that, ever since the founding of the Ahmadi faith in the time of his great-grandparents, members of the Ahmadiyya Muslim Community have been subjected to religious persecution by the state of Pakistan and by Pakistani society in general. The Applicant claims that he, too, was threatened and attacked while preaching and participating in faith-related activities in Rabwah and its environs.

[4] The Applicant claims that in 2004, while serving on the executive of a local Ahmadi organization, he came to the attention of anti-Ahmadiyya religious groups, particularly the Majlis Tahaffaz Khatm e Nabuwat (MTKN). He began to receive threats from anonymous callers, warning him to stop his activities or face the consequences.

[5] He was threatened again by unknown callers after being involved in Ahmadiyya activities in 2006 and after organizing a free medical camp in March 2008, when he was also threatened by fanatical students who warned him to abandon his un-Islamic activities. In June 2008, he was ridiculed and punched by one of his hostel mates, Tajdar Khan (Tajdar), after the Applicant asked

him to return a shirt to him. The Applicant reported the incident to a person in authority at the hostel, who advised him to ignore it and keep a low profile. The next day, Tajdar's parents warned the Applicant against complaining about their son. More than a week later, the Applicant's father received a call on behalf of Mullah Allah Yar Arshad (Mullah Arshad), ordering him to advise the Applicant not to mess with his associates or he would be "taught a lesson."

[6] In September 2008, a First Information Report (FIR) was registered against a number of Ahmadis in Rabwah. The Applicant's father attended court with some of the accused. He was subsequently harassed by the authorities and warned by unknown callers to keep away from the persons accused or his and his son's names would be added to the FIR. The callers also threatened to harm the Applicant and his siblings. In consequence, the Applicant began to accompany his father on all outings to protect him.

[7] In February and March of 2009, the Applicant invited non-Ahmadi friends and relatives to some Ahmadi programs. Consequently, in April of that year, anonymous phone callers threatened to take "severe action" and to charge him with blasphemy; the Applicant believes that these calls were instigated by Mullah Arshad, who had been monitoring his activities. In June 2009, the Applicant was telephoned in Lahore by an anonymous caller who wanted to know his whereabouts and who said that he would find the Applicant sooner or later. The Applicant feared being located in Lahore, so he travelled to Rawalpindi.

[8] On 13 June 2009, three masked men entered the Applicant's hostel room. They did not identify themselves, but they shouted and kicked and punched the Applicant until other students

intervened. That night, the Applicant's father received an anonymous phone call saying that the Applicant was lucky that his life had been spared but that it may not be the next time. The Applicant believes that this incident was connected to Mullah Arshad or the MTKN.

[9] The Applicant's family decided that that he should leave the country. He left Pakistan on 30 July 2009 and arrived in Calgary on 1 August 2009, at which time he made a claim for refugee protection. The Applicant appeared before the RPD on 30 March 2010. He was represented by counsel and an interpreter was present. In its Decision dated 6 July 2010, the RPD found that the Applicant did not have a well-founded fear of persecution because he would not face a serious possibility of persecution if he were to return to Pakistan. This is the Decision under review.

DECISION UNDER REVIEW

[10] The RPD accepted that the Applicant was a member of the Ahmadiyya Muslim Community and found that his evidence demonstrated a nexus to a Convention ground, namely religion.

Preliminary Observations

[11] Although the Applicant indicates in his PIF that, at times, he kept a low profile, a review of the Applicant's evidence reveals that he was often involved with Ahmadi activities and organizations.

[12] In addition, the Applicant provided very little corroborating documentation in relation to his alleged difficulties. He did not report the threats or incidents to the police and therefore police reports were not available. He provided no corroborating affidavits or letters from officials, instructors or students at school or from other witnesses. He did, however, provide articles and materials regarding discrimination against and persecution of Ahmadis generally.

No Well-founded Fear of Persecution

[13] The RPD cited four factors in support of its finding that the Applicant did not have a well-founded fear of persecution.

[14] First, almost all of the incidents described by the Applicant constituted discrimination (specifically, religious insults, arguments and difficulties at school) or threats. The RPD found that the discrimination was neither serious enough nor persistent enough “to raise the spectre of persecution as contemplated in the Act.” Also, the threats were not demonstrably acted upon between 2004 and 2008, despite the fact that the Applicant was easily accessible while a student at the business school and a resident at a hostel.

[15] Second, the Applicant had been involved in only two physical altercations during 2008 and 2009. The 2008 incident began as a dispute over a shirt and degenerated into physical violence and, only then, into religious insults. The 2009 attack by the masked assailants was never shown to be related to the Applicant’s religion.

[16] Third, the Applicant's family was similarly situated to the Applicant, yet none fled Pakistan. Rather, the Applicant's father continued to operate two jewellery stores in Pakistan. During those times when the Applicant accompanied his father to provide him with protection, there was no evidence of anything untoward happening to either of them.

[17] Finally, during the period of the alleged persecution, between 2005 and 2007, the Applicant travelled to the United Kingdom, the United Arab Emirates, India, Belgium, France and Germany, sometimes on multiple occasions. The Applicant never attempted to seek asylum in any of those countries despite his evidence that his problems in Pakistan had begun in 2003. The RPD inferred from the Applicant's failure to use these available opportunities to seek protection that his fear of persecution was not as grave as he claimed.

Country Conditions Documentation Shows Limited Scope of Persecution

[18] The RPD observed that, while the country conditions documentation demonstrated that discrimination against Ahmadis is a "serious problem" in Pakistan, it also shows that the scope of persecution is limited, particularly considering the substantial number of Ahmadis in the country. It noted that, in 2009, eleven Ahmadis were killed for religious reasons.

[19] For the above reasons, the RPD concluded that, should he return to Pakistan, the Applicant would not face a serious possibility of persecution based on a Convention ground, nor would he, on a balance of probabilities, face a personalized risk to his life, a risk of cruel and unusual treatment or punishment, or a danger of torture. Therefore, his application was rejected.

ISSUES

[20] The Applicant raises the following issues:

- i. Whether the RPD based its Decision on erroneous findings of fact made in a perverse and capricious manner and without regard to the material before it; and
- ii. Whether the RPD erred in its assessment of the cumulative effects of the incidents suffered by the Applicant and in finding that these did not amount to persecution.

STATUTORY PROVISIONS

[21] The following provisions of the Act are applicable in these proceedings:

Convention refugee

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

Définition de « réfugié »

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) 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.

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.

Person in need of protection

Personne à protéger

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

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

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

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

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

(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,

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

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes

standards, and

internationales — et inhérents à celles-ci ou occasionnés par elles,

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

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

Person in need of protection

Personne à protéger

(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.

(2) A également qualité 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.

STANDARD OF REVIEW

[22] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[23] The first issue concerns the RPD's findings of fact and its treatment of the evidence. The appropriate standard of review is reasonableness. See *Aguebor v Canada (Minister of Employment and Immigration)* (1993), 160 NR 315, 42 ACWS (3d) 886 (FCA); *Aguirre v Canada (Minister of*

Citizenship and Immigration), 2008 FC 571 at paragraphs 13-14; *Dunsmuir*, above, at paragraphs 51 and 53; and *Sittampalam v Canada (Minister of Citizenship and Immigration)*, 2009 FC 65 at paragraph 52.

[24] With respect to the second issue, Justice Yves de Montigny held in *Tetik v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1240 at paragraph 25, that “[t]he identification of persecution behind incidents of discrimination or harassment is a question of mixed fact and law and, as such, is reviewable on a standard of reasonableness.” I concur. See also *Liang v Canada (Minister of Citizenship and Immigration)*, 2008 FC 450, at paragraphs 12-15; and *Mohacsi v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 429 at paragraph 35.

[25] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with “the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.” See *Dunsmuir*, above, at paragraph 47; and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the “range of possible, acceptable outcomes which are defensible in respect of the facts and law.”

ARGUMENTS

The Applicant

Credibility Findings Support a Well-founded Fear

[26] The Applicant argues that, as the RPD made no express negative credibility finding, his evidence must be believed. See *Camargo v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1434 at paragraph 32.

[27] The Applicant states that the RPD accepted that: his family has been persecuted; he has been heavily involved in Ahmadi activities; he has drawn the attention of anti-Ahmadi groups, who have threatened him with serious harm; and, following the 2009 attack by the masked assailants, the Applicant's father was warned that the Applicant would be killed the next time. Given the Applicant's evidence that, if returned to Pakistan, he will continue to proselytize, the Applicant contends that it was not reasonably open to the RPD to conclude that he did not have a well-founded fear of persecution. As the evidence demonstrates, the severity of the incidents has escalated. The Applicant was assaulted and his life was threatened. The only reasonable conclusion is that these incidents amount to persecution.

The Applicant Was Motivated By Family Loyalty Despite His Well-founded Fear

[28] The Applicant challenges the RPD's finding that accompanying his father to protect him while out in public undermined the Applicant's claim of well-founded fear of persecution. In

Mohammadi v Canada (Minister of Citizenship and Immigration), 2003 FC 1028 at paragraph 15, the Court recognized that the bonds of family loyalty may lead a person to engage in dangerous conduct that might otherwise be viewed as inconsistent with a subjective fear of persecution. The Applicant contends that such was the case here and that the RPD erred in concluding otherwise.

No Proper Assessment of Cumulative Persecution

[29] The RPD has a duty to consider the issue of cumulative persecution. This involves reviewing the discriminatory acts as a whole and appreciating the cumulative effect of the applicant's uncontradicted evidence about the treatment he has endured. See *Tetik v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1240 at paragraph 27. The Applicant argues that the RPD failed to do this. Instead, it compartmentalized the different incidents into those that were merely discriminatory, those that had not resulted in physical harm and those that were not motivated by the Applicant's religion. If the Panel had conducted a proper analysis, the increase in risk over time would have made it clear that the Applicant had a reasonable apprehension of persecution. This is a reviewable error.

[30] The Applicant further argues that the RPD erred in concluding that his failure to claim asylum prior to 2009, despite having visited many countries, demonstrated that he had no well-founded fear of persecution. In *Ibrahimov v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1185 at paragraph 19, Justice Elizabeth Heneghan held that "the issue of delay cannot be used as a significant factor to doubt that person's subjective fear of persecution":

Cumulative acts which may amount to persecution will take time to occur. If a person's claim is actually based on several incidents which

occur over time, the cumulative effects of which may amount to persecution, then looking to the beginning of such discriminatory or harassing treatment and comparing that to the date on which a person leaves the country to justify rejection of the claim on the basis of delay, undermines the very idea of cumulative persecution.

[31] The Applicant contends that only after being threatened with severe consequences and with blasphemy in April 2009 did he begin to consider leaving Pakistan, and only after being violently beaten in June 2009 did he formalize those plans. Therefore his claim was clearly based on cumulative persecution. Accordingly, the Applicant submits that the Panel erred in rejecting his claim based on his failure to claim previously in other countries.

RPD Ignored Relevant Objective Evidence

[32] The Applicant asserts that there is objective evidence that violence against Ahmadis in Pakistan is escalating. He enumerates laws prohibiting defilement of the Qur'an or the name of the Prophet on pain of fine, imprisonment or death and restricting Ahmadis from preaching and propagating their faith. He comments that the role of the MTKN is to act against Ahmadis. He also informed the RPD, as stated above, that he intends to continue proselytizing if he is returned to Pakistan. The RPD never referred to this evidence in finding that the Applicant would not suffer persecution in Pakistan. The Applicant relies on *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35, [1998] FCJ No 1425 (QL) and *Goksu v Canada (Minister of Citizenship and Immigration)*, 2009 FC 382, to argue that, since the RPD has failed to refer to this evidence, which is central to the claim, it failed to consider that evidence and thereby committed a reviewable error.

The Respondent

Treatment of the Evidence Was Reasonable

[33] The Respondent submits that the RPD clearly has the discretion to weigh the evidence before it. See *Aguebor*, above. Furthermore, the RPD “need not mention every piece of evidence in its reasons and is assumed to have weighed and considered all evidence before it, unless the contrary is shown.” See *Akram v Canada (Minister of Citizenship and Immigration)*, 2004 FC 629 at paragraph 15.

[34] In the instant case, the RPD acknowledged the Applicant’s claim that his family was at risk in Pakistan; however, it also observed that they had made no attempt to leave the country. Similarly, it recognized that the life of the Applicant’s father had been threatened in 1995 due to his religious beliefs and that the Applicant, in later years, felt it necessary to provide personal protection to his father to keep him from being harmed due to his religious beliefs. However, it was reasonable for the RPD to find that this action undermined the well-foundedness of the Applicant’s alleged fear of persecution and the seriousness of the risks facing him. There was no evidence that either man had been threatened or harmed at that time.

[35] The Applicant relies on *Mohammadi*, above. The Respondent submits, however, that *Mohammadi* is distinguishable on its facts. The applicant in that case had been physically abused by state authorities and threatened with further harm should he return to a particular location. The Court held that the RPD failed to rely on the evidence in determining that the applicant’s choice to

return to the location of harm undermined his claim of a well-founded fear of persecution. The RPD in the instant case did not make a similar error. Each claim turns on its own facts. In the instant case, the Applicant had not been harmed by anyone prior to offering protection to his father in 2008. He had been threatened over the phone on an irregular basis, and those threats had never been fulfilled. Unlike the applicant in *Mohammadi*, the Applicant was not returning to a particular location where he had been threatened with harm. The RPD reviewed the submitted evidence in its entirety before determining that the Applicant's choice to remain in Pakistan undermined his alleged well-founded fear of persecution and alleged risk.

[36] Similarly, *Tetik*, above, is distinguishable from the instant case. In *Tetik*, the Court held that the RPD had committed a reviewable error in failing to consider the most serious incidents of threats and assaults when assessing whether the applicants' experiences of harassment, insults and serious physical violence constituted cumulative harm. In the instant case, the RPD did not commit that error. It considered the entirety of the Applicant's evidence before determining that the majority of the incidents were discriminatory and may not have been attributable to his religion. The RPD noted that these threats had not been followed by attempts to harm or endanger the Applicant, despite his accessibility while attending school.

[37] The Respondent contends that the RPD did not attempt to minimize the discrimination and persecution to which Ahmadis are subjected in Pakistan. It was reasonable for the RPD to assess the scope of persecution and to determine the outcome of the application based on the evidence. The Respondent submits that the Decision falls within the range set down in *Dunsmuir*, above, and therefore should not be disturbed.

The Applicant's Reply

[38] The Applicant challenges the Respondent's comments regarding *Mohammadi*, above, stating that he himself was threatened in March and July of 2008, which was prior to engaging in "risky" behaviour by protecting his father in public. Moreover, he was accompanying his father through the very locations where he had been threatened and could have been targeted at any of them. The Applicant asserts that the instant case falls squarely within the precedent set by *Mohammadi*.

ANALYSIS

[39] The RPD found that the Applicant's account of his problems was credible and that the evidence "demonstrates a nexus to a Convention ground, on the basis of the claimant's Ahmadi religion and background."

[40] Notwithstanding these findings, the RPD found that "he would not face a serious possibility of persecution if he were to return to Pakistan." This conclusion is difficult to understand given the range and severity of what the Applicant has endured over the years.

[41] The RPD's rationale is as follows:

The claimant's evidence is that although his family and others in the Ahmadi community have faced discrimination, and to some extent, persecution over a number of years, almost all of the incidents alleged by the claimant were either discriminatory, involving issues

such as religious insults, arguments or difficulties at school that may not be attributable to his religion, or threats that were not demonstrably followed up on. Although some of the claimant's allegations involve discrimination, I find that they are neither serious enough nor persistent enough to raise the spectre of persecution as contemplated in the *Act*. The claimant also alleges receiving a number of threats over a number of years, largely on his cellular phone, but there is no clear evidence before me that these alleged threats were followed by attempts to harm or endanger the claimant even though he was often readily accessible, particularly while attending business school from 2004 to 2008, and while residing at the hostel.

[42] I believe there are several reviewable errors inherent in the RPD's reasons.

[43] First of all, the RPD dealt with the incidents sequentially and compartmentalized them.

Nowhere does the RPD show an awareness of the need to consider whether persecution arises from the cumulative impact of all that has happened to the Applicant. See *Tetik*, above.

[44] Indeed, if one simply summarizes the accepted sequence of incidents, threats and mounting violence to which the Applicant has been subjected – which culminated in a death threat that, even though he had escaped death from a beating, he would not escape the next time – the chronology clearly indicates an escalation of harassment and risk that, in my view, must cumulatively amount to persecution. He has been told that, if returned, he will be targeted and killed. Although the RPD does not question the veracity of this threat, it unreasonably discounts it as not being connected to the history of religious-based threats against the Applicant.

[45] Second, I also think the RPD is led astray by several unreasonable findings of fact.

[46] For example, the RPD accepted the Applicant's evidence that if he was returned to Pakistan he would continue to preach and work on behalf of the Ahmadi faith. As the Applicant points out, the objective evidence before the RPD was that the Pakistani state has outlawed proselytizing by Ahmadis and that such activity can be punished by death. The objective evidence further indicated that prominent Ahmadi religious proponents, such as the Applicant, are targeted by non-state actors such as the MKTN. It was the Applicant's own evidence (not questioned) that he had been targeted and threatened as an Ahmadi. These extremely compelling indicators of risk were not addressed or alluded to by the RPD in determining that the Applicant would not suffer persecution if returned to Pakistan.

[47] Also, the RPD appears to have been of the view that the Applicant's accompanying his father to provide him with protection undermines the well-foundedness of the Applicant's fear and the seriousness of the risks that he says he faces. The RPD fails to consider the jurisprudence of this Court which warns that bonds of family loyalty may lead a claimant to engage in dangerous conduct that might otherwise be viewed as conduct inconsistent with a subjective fear. See, for example, *Mohammadi*, above.

[48] The RPD also appears to rely heavily upon its conclusion that threats made against the Applicant were not followed up by attempts to harm him. However, the Applicant was threatened on many occasions and, in June 2009, he was physically assaulted. This was followed up by a telephone call to the Applicant's father, indicating that the Applicant would be killed next time. It was this precipitating threat, after an accumulation of threats and incidents that caused the Applicant to come to Canada to seek protection.

[49] There are other issues that arise from the Decision that concern me but I do not need to go into them at this time. Based upon what I have already concluded, I feel that this Decision must be returned for reconsideration.

[50] All of the Applicant's evidence was accepted by the RPD. For the reasons given, I have to conclude that the Decision is unreasonable. It lacks justification and intelligibility, given the evidence that was provided and accepted by the RPD, and it falls outside of the range of possible, acceptable outcomes which are defensible in respect of the facts and law. See *Dunsmuir*, above, at paragraph 47.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is allowed, the decision is quashed and the matter is returned for reconsideration by a differently constituted RPD.
2. There is no question for certification.

“James Russell”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4760-10

STYLE OF CAUSE: MOHSIN ALI KAMRAN

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

PLACE OF HEARING: Calgary, Alberta

DATE OF HEARING: February 16, 2011

**REASONS FOR JUDGMENT
AND JUDGMENT** **Russell J.**

DATED: March 29, 2011

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