Federal Court  Cour fédérale

Date: 20110719

Docket: IMM-7563-10

Citation: 2011 FC 905

Montreal, Quebec, July 19, 2011

PRESENT: The Honourable Madam Justice Bédard

BETWEEN:

KHORAM SHAHZAD

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION
and
THE MINISTER OF PUBLIC SAFETY

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada (the Board), dated November 22, 2010, allowing an application to vacate a prior decision, wherein the applicant had been granted refugee status, pursuant to section 109 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

1. Preliminary matter - Style of cause

[2] At the outset of the hearing, I raised the issue of the discrepancy between the respondent in this proceeding and the applicant who applied for the vacation order under section 109 of the *IRPA*. The application for a vacation order was filed by the Minister of Public Safety and Emergency Preparedness (now, the Minister of Public Safety), yet the Minister of Citizenship and Immigration had been listed as the only respondent. The parties agreed that the style of cause should be amended and that the Minister of Public Safety should be added as respondent.

2. Background

[3] The applicant, born December 4, 1978, is a citizen of Pakistan and is of Shia faith.

[4] He arrived in Canada in September of 2002 and claimed refugee protection. He alleged that he feared persecution by a Sunni extremist group, the Sipah-e-Sahaba Pakistan (SSP), who had attacked him in the past and had threatened his life. Although he had sought protection from the police in Pakistan, the applicant claimed that they not only refused to provide him with assistance, but that they, in fact, falsely charged him with kidnapping.

[5] In support of his claim, the applicant provided a copy of a First Information Report (FIR) and an arrest warrant. The FIR recorded a complaint, supposedly filed with police on July 20, 2002, which alleged that the applicant was responsible for the kidnapping of a local girl. The arrest

warrant was dated August 30, 2002 and was issued against the applicant in relation to the incidents alleged in the FIR.

[6] On March 10, 2004, the Board heard the applicant's claim for refugee protection. On April 1, 2004, it granted his claim, finding him to be a Convention refugee pursuant to section 96 of the *IRPA*.

[7] The Board provided written reasons for its decision on April 26, 2004. In its reasons, the Board acknowledged that the country conditions evidence demonstrated that there was ongoing sectarian violence between Sunni and Shia groups in Pakistan. Although the Board was of the opinion that the efforts of the Pakistani government to quell the violence and to provide protection met the standard of being adequate and effective, it nonetheless decided to "award the benefit of the doubt to the claimant, especially in the absence of any major discrepancies in his testimony." The Board acknowledged that it was not yet entirely clear whether banning the SSP had been effective.

[8] Also in April of 2004, officials with the Canada Border Services Agency (CBSA) endeavoured to verify the authenticity of the FIR and arrest warrant provided by the applicant. Officials with the CBSA in Islamabad contacted the police station listed on the FIR. They were informed that the FIR number on the document provided by the applicant was, in fact, registered against a different person in relation to a different set of allegations. Upon inquiring as to whether any FIR had been registered at the police station on July 20, 2002, CBSA officials were informed that the only FIR registered on that date had been registered at the request of a "Mr. Khurram Shahzad" who had reported that his sister had been kidnapped. CBSA officials concluded, based on

this information, that the FIR provided by the applicant was counterfeit and that therefore the arrest warrant was also counterfeit.

[9] On August 21, 2008, the Minister of Public Safety and Emergency Preparedness (the Minister) filed an application with the Board, pursuant to section 109 of the *IRPA*, to vacate the April 2004 decision granting the applicant refugee status. The Minister alleged that the applicant had materially misrepresented that he was wanted by Pakistani police on kidnapping charges. The basis for the Minister's allegation was the CBSA's determination as to the authenticity of the FIR and the arrest warrant based on the FIR. The Minister submitted that had the Board known about the material misrepresentation, its determination would have been different.

[10] On August 25, 2010, the Board heard oral submissions from both the applicant's counsel as well as counsel for the Minister. The applicant submitted that he had contacted his lawyer in Pakistan who had verified with Pakistani police that the FIR and arrest warrant were, in fact, authentic.

[11] The Board was confronted with contradictory documentary evidence.

[12] On the one hand, there was the report of the CBSA's Assistant Migration Integrity Officer (the Officer) who had made the inquiries about the authenticity of the FIR and the arrest warrant. The report contained the following:

> We telephoned the Khatiala Sheikhan Police Station and found out from Mr. Muhammad Arshad Maikkher that the First Information Report (FIR) number indicated on the document is registered against someone else involved in

> completely different crime (PPC 363) then that indicated in the Arrest Warrant.
>
> . . .
>
> I also checked if any FIR was registered in the police station on 20JUL2002, the date indicated on the document, and learn that the only FIR registered on the date that has reference number 258/2002 and was registered at request of Mr. Khurram Shahzad S/o. Muhammad Ashraf, R/o. Mohalla Sufipura, Mandi Bahauddin, under Pakistan penal Code 11-7/89 reporting kidnap of his sister named Ms. Kishwas Sultana. This case was dropped during investigation as the case was found bogus.
>
> Based on the above we can positively conclude that the Arrest Warrant presented before you is a counterfeit document as the FIR number indicated on the document has proved to be counterfeit.

[13] On the other hand, the applicant provided the Board with an affidavit, dated July 28, 2010, wherein his lawyer in Pakistan swore that a "non bailable warrant of arrest" had been issued against the applicant in relation to a FIR that was registered with Pakistani police on July 20, 2002. The file also contained the affidavit of the applicant's first lawyer who stated that the applicant was accused of kidnapping and that a warrant for his arrest had been issued on August 30, 2002.

3. The decision under review

[14] In a decision dated November 22, 2010, the Board allowed the Minister's application, and vacated the April 2004 decision.

[15] The Board found that the Minister's evidence was of more probative value than the applicant's because the applicant had not "credibly established that the documents were genuine and

that the expertise was wrong." The Board noted that the applicant had testified that the FIR was genuine, "because his Pakistani lawyer told him so after verifying with the police". However, the Board also pointed out that the applicant had testified that his lawyer had told him that, "the police in Pakistan never tell the truth".

[16] The Board rejected the applicant's argument that the Pakistani police knew the CBSA was inquiring about him. It also rejected the applicant's allegations that: his name was mentioned during the telephone conversation between the police and the officer in Islamabad, the Pakistani police gave false information to the officer, and that the police did so with the expectation that the applicant would be returned to Pakistan. The Board found that the Officer had inquired about the FIR without providing the applicant's name. The Board noted that the evidence suggested that the Officer asked about the FIR by number, without providing any name, and that when he inquired regarding FIRs filed on July 20, 2002, again he did not suggest any name.

[17] The Board also found that it would be illogical for the Pakistani police to tell the applicant's lawyer about the case against him, while, at the same time, give false information to Canadian authorities. The Board did not believe that the Pakistani authorities were aware that the applicant was the subject of inquiry by Canadian authorities. It rejected the applicant's arguments.

[18] The Board concluded its analysis of the FIR evidence by saying:

> For these reasons, I give more probative value to the documents produced by the applicant than to the respondent's testimony because I find him generally not credible. Consequently I am of the opinion that that [sic] the respondent made material misrepresentations to the first Tribunal, and that these misrepresentations relate to a relevant matter.

[19] The Board also found that the applicant's material misrepresentation went to the essence of his alleged fear of persecution in that it undermined his claim that he was wanted by the government of Pakistan. Had the original Board known about CBSA's analysis of the FIR, the Board reasoned, it would have evaluated the applicant's credibility differently and would not have given him the "benefit of the doubt". Had he not been found to be credible on his allegations of persecution, the Board explained, the only remaining evidence would have been the objective country conditions evidence which would not have been sufficient to justify the April 2004 decision on its own.

[20] Ultimately, the Board concluded that the applicant had misrepresented material facts in his original claim for refugee protection and that no other sufficient evidence was considered at the time to justify granting refugee protection.

4. Issues

[21] Two issues arise for consideration on this application:

a) *Did the Board err in determining that the initial decision granting refugee protection was obtained as a result of a material misrepresentation?*
b) *Did the Board err in determining that there was no other sufficient evidence to justify refugee protection?*

5. Standard of review

[22] Both questions at issue on this application are questions of mixed fact and law and, as such, will be reviewed using the reasonableness standard of review (*Waraich v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1257 at paras 19-20 [*Waraich*]; *Ghorban v Canada (Minister of Citizenship and Immigration)*, 2010 FC 861 at para 3, 374 FTR 8). The Court will consider the existence of justification, transparency and intelligibility within the decision-making process and whether 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 at para 47, [2008] 1 SCR 190).

6. Legislative framework

[23] Subsection 109(1) of the *IRPA* allows the Board to vacate a decision allowing refugee protection if it finds that the decision was obtained as a result of misrepresenting or withholding material facts relating to a relevant matter. Meanwhile, subsection 109(2) of the *IRPA* indicates that the Board may reject an application to vacate if it is satisfied that other sufficient evidence was considered at the time of the first determination to justify refugee protection.

Vacation of refugee protection	Demande d'annulation
109. (1) The Refugee Protection Division may, on application by the Minister, vacate a decision to allow a claim for refugee protection, if it finds that the decision was obtained as a result of directly or indirectly misrepresenting	109. (1) La Section de la protection des réfugiés peut, sur demande du ministre, annuler la décision ayant accueilli la demande d'asile résultant, directement ou indirectement, de présentations erronées sur un fait important quant à un objet

or withholding material facts relating to a relevant matter.	pertinent, ou de réticence sur ce fait.
Rejection of application	Rejet de la demande
(2) The Refugee Protection Division may reject the application if it is satisfied that other sufficient evidence was considered at the time of the first determination to justify refugee protection	(2) Elle peut rejeter la demande si elle estime qu'il reste suffisamment d'éléments de preuve, parmi ceux pris en compte lors de la décision initiale, pour justifier l'asile.

[24] As such, in considering an application to vacate under section 109 of the *IRPA*, the Board must first conclude that the decision granting refugee protection was obtained as a result of a misrepresentation, or of withholding material facts relating to a relevant matter. The burden of proof is on the Minister in this regard (*Nur v Canada (Minister of Citizenship and Immigration)*, 2005 FC 636 at para 21, 150 ACWS (3d) 455). If the Board finds that facts have been misrepresented or withheld, it may nevertheless deny the application to vacate if there remains sufficient evidence considered at the time of the determination of the refugee claim to justify refugee protection (*Ghorban v Canada (Minister of Citizenship and Immigration)*, 2010 FC 861 at para 5, 374 FTR 8; *Mansoor v Canada (Minister of Citizenship and Immigration)*, 2007 FC 420 at para 23, 157 ACWS (3d) 407).

7. Analysis

a) *Did the Board err in determining that the initial decision granting refugee protection was obtained as a result of a material misrepresentation?*

[25] The applicant argues that the Board erred in concluding that the FIR he had submitted in support of his refugee claim was counterfeit and, as a result, that it erred in determining that he had misrepresented that he was wanted by Pakistani police on false kidnapping charges.

[26] The applicant contends that it was unreasonable for the Board to prefer the Officer's report over the affidavits of the two lawyers who had represented him. The applicant alleges that serious concerns arise from the report and emphasizes that the report is not a sworn or an affirmed statement. First, he notes that there are inconsistencies as the writer sometimes refers to "I" and on other occasions refers to "We". He also notes that the Officer concluded that the arrest warrant was fraudulent, not that the FIR was fraudulent. He further contends that it is not clear from the report that the Officer did not mention his name during the telephone conversation with the Pakistani police. Moreover, he alleges that it is too coincidental that the only FIR filed on July 20, 2002 happened to have been filed by him concerning a sister that does not exist.

[27] The applicant further argues that the Board should have more thoroughly considered his explanation as to why the Pakistani police may have provided the CBSA with misinformation when they called to verify the FIR. He had argued before the Board that, assuming the police in Pakistan really were after him on the basis of false kidnapping allegations, it would have been in their interest, when contacted by the CBSA, to deny the existence of the FIR so as to force the applicant's return to Pakistan. The applicant submits that it was unreasonable for the Board to reject this explanation for the reasons that it did.

[28] The respondent contends that the Board's findings were reasonable: the Board considered the Officer's report and the two affidavits, it gave the applicant an opportunity to address the Officer's report, it heard the applicant's explanation, and its findings were based on the evidence. The respondent argues that the applicant disagrees with the Board's assessment of the evidence and is asking the Court to re-weigh the evidence. I agree with the respondent.

[29] The Court's role is not to re-weigh the evidence or to substitute its opinions for those of the Board. With respect, I consider that the Board's findings are reasonable and supported by the evidence. The Court will only intervene with the Board's assessment of the evidence where its conclusions are based on erroneous findings of fact made in a perverse or capricious manner or without regard to the evidence. Nothing leads me to conclude that the Board assessed the evidence in a perverse or capricious manner. Its findings are supported by the evidence and are reasonable. Furthermore, its reasoning is clear, its conclusions are well explained and they fall within the range of possible outcomes which are defensible in respect of facts and the law.

[30] I agree that it would have been possible in this case to reach a conclusion different to the one rendered by the Board, but this does not amount to concluding that the Board's analysis was not based on the evidence or that its conclusion is not defensible in respect of the evidence. I consider that it was not unreasonable for the Board to prefer the report prepared by the Officer who made the inquiries and who had no personal interest in the applicant's case over the affidavits provided by the applicant. I also consider that the Board's findings that the Officer did not provide the applicant's name to the Pakistani police could reasonably be inferred from the report, when read as a whole. In short, I consider that the conclusion that the FIR and the arrest warrant were counterfeit can

reasonably be inferred from the report and that the Board had no reason to question the veracity of the information contained in the report. Although I agree that the report could have been more detailed, it is nonethless conclusive and it contains only very minor inconsistencies.

[31] I also find the applicant's contention that the Pakistani police misled the Officer on purpose to ensure that the applicant would be returned to Pakistan is at best speculative as it is not supported by any evidence.

[32] The applicant also argues that the Board erroneously put the onus of proof on the applicant at paragraph 13 of its reasons where it indicated, "the [applicant] has not credibly established that the documents are genuine and that the expertise is wrong." The applicant is correct to point out that the onus should be on the Minister to establish a material misrepresentation under subsection 109(1) of the *IRPA* (*Nur v Canada (Minister of Citizenship and Immigration)*, 2005 FC 636 at para 21, 150 ACWS (3d) 455; *Canada (Minister of Public Safety and Emergency Preparedness) v Gunasingam*, 2008 FC 181 at para 8, 164 ACWS (3d) 847). However, the Board recognized this. At paragraph 9 of its reasons, it indicated, "The burden of proof is on the [Minister]."

[33] When the impugned excerpt from paragraph 13 is read in its entire context, it becomes clear that the Board did not erroneously shift the onus of proof onto the applicant. The Board explained, later in the paragraph, that, "The [applicant] did not present credible evidence to contradict the [Minister]'s evidence" [Emphasis added]. The Board was simply indicating that, given the evidence adduced by the Minister (i.e. the CBSA's report as to the validity of the FIR and arrest warrant),

there was a tactical burden on the applicant to explain why that evidence should be disregarded or given little weight.

[34] The applicant further takes issue with the Board's consideration of the genuineness of his identity documents. He contends that his identity had been proven without a doubt.

[35] The Board indicated, at paragraph 19 of its reasons, that it would "not pursue [its] analysis of the issue of material misrepresentations on the identity because [it had] already determined that there [were] material misrepresentations on other issues." The Board made no determination based on the question of identity and, as such, there can be no reviewable error in this regard.

[36] For all of the above reasons, I consider that the Board's conclusion that the initial decision granting refugee protection was obtained as a result of a material misrepresentation was reasonable. I will now turn to the second issue.

b) *Did the Board err in determining that there was no other sufficient evidence to justify refugee protection?*

[37] The applicant argues that the Board did not consider either the FIR or the arrest warrant in its initial decision granting him refugee protection in 2004 and, as such, even if these documents were counterfeit, there was clearly sufficient remaining evidence to justify granting refugee protection. He points to the fact that neither the FIR nor the arrest warrant was mentioned by the Board in its 2004 reasons or during the associated hearing. The applicant submits that the Board

arrived at its decision based on the strength of his testimonial evidence in conjunction with the objective country conditions evidence – both of which constitute "other sufficient evidence… to justify refugee protection" within the meaning of subsection 109(2) of the *IRPA*.

[38] However, in the decision under review, the Board found that if the panel in 2004 had known that the FIR and arrest warrant were counterfeit, its "evaluation of the [applicant's] overall credibility… would have been different." The fact that the applicant had submitted counterfeit documents led to a "negative inference" as to his overall credibility. This negative inference led the Board, in essence, to conclude that the applicant's testimonial evidence regarding persecution in Pakistan was not credible and, thus, could not constitute "other sufficient evidence... to justify refugee protection" for the purposes of subsection 109(2) of the *IRPA*.

[39] It has been recognized by this Court that where a refugee claimant has supplied a false document, the resulting damage to credibility can reasonably reflect on other aspects of the claimant's evidence (*Osayande v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 368 at para 21, 113 ACWS (3d) 492). Specifically within the context of subsection 109(2) of the *IRPA*, this Court has recognized that it is up to the Board to assess the credibility of residual evidence (*Oukacine v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1376 at para 32, 159 ACWS (3d) 569 [*Oukacine*]).

[40] The Board found that the applicant's claim that "the police had registered a serious but false case of kidnapping" against him was central to his alleged well-founded fear of persecution. Indeed, the alleged false accusation and the fact that the applicant was wanted by the Pakistani authorities

was material to the applicant's decision to leave Pakistan; this is clear from his discussion of the false charges in his PIF, in his interview with immigration officials on entering Canada, and in his testimony during the 2004 hearing.

The Board, in 2004, accepted the applicant's story and found, in essence, that the determinative issue was state protection. Although it was of the opinion that there was adequate state protection in Pakistan generally, and although it was "not entirely persuaded" by the applicant's arguments to the contrary, it nevertheless decided to "award the benefit of the doubt" to the applicant, "especially in the absence of any major discrepancies in his testimony." While the revelation that the FIR and arrest warrant were counterfeit would not constitute a discrepancy in the applicant's testimony, per se, I nonetheless find that since these documents corroborated important allegations made by the applicant regarding the availability of state protection, the finding that they were counterfeit reasonably casts doubt on the allegations themselves, and more generally on the applicant's credibility.

[41] The applicant, argues that no negative inference as to his credibility should have been made at all, because even if the documents he had submitted in support of his allegation that the police in Pakistan would not protect him were counterfeit, he was not aware of it. He argues that the FIR and arrest warrant were sent to him by his lawyer in Pakistan who told him that they were legitimate, as is evidenced by the affidavit provided by that lawyer. In these circumstances, he submits that the counterfeit nature of the documents cannot reasonably reflect on him and, as such, his testimonial evidence should remain unaffected.

[42] This Court must show deference to the Board's assessment of credibility (*Oukacine*, above at para 36). The applicant is asking this Court to accept that his lawyer in Pakistan unilaterally, without him knowing about it or being involved in any way, provided him with a false FIR and arrest warrant that corroborated his otherwise valid testimony. This seems implausible. Nothing on the record before me suggests that it was unreasonable for the Board to find that the applicant's provision of counterfeit documents undermined his credibility.

[43] I have found that the Board reasonably rejected the applicant's testimony as constituting "other sufficient evidence… to justify refugee protection" for the purposes of subsection 109(2) of the *IRPA*. The only evidence remaining before the initial panel was the objective country conditions evidence showing sectarian violence between Sunni and Shia groups. In this regard, the Board indicated that "documentary evidence in itself does not constitute 'sufficient evidence' that could justify the tribunal's decision." This Court has indicated, on numerous occasions, that the existence of objective country conditions evidence is not by itself sufficient to justify a person's claim for refugee protection (*Waraich*, above at para 47; *Canada (Minister of Public Safety and Emergency Preparedness) v Gunasingam*, 2008 FC 181 at para 18, 164 ACWS (3d) 847; *Canada (Minister of Citizenship and Immigration) v Fouodji*, 2005 FC 1327 at para 20, 149 ACWS (3d) 478). As such, the Board's determination in this regard was reasonable.

[44] Ultimately, I find that the Board's determination under subsection 109(2) of the *IRPA*, that there was no other sufficient evidence to justify refugee protection, was reasonable.

[45] The parties did not propose any questions of general importance for certification and no such questions arise in this case.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed. No questions are certified.

"Marie-Josée Bédard"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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