Federal Court

Cour fédérale

Date: 20111004

Docket: IMM-7032-10

Citation: 2011 FC 1130

BETWEEN:

AHAD VALAEI-BAKHSHAYESH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] Mr. Valaei-Bakhshayesh, an Iranian citizen, came to Canada in 2004 to seek refugee status; not that he feared persecution should he be returned to Iran, but rather that he feared persecution should he be returned to Denmark. Thus became a blatant attempt to asylum shop, an attempt which is not yet over.

[2] As an Iranian, he was declared ineligible by the Immigration and Refugee Protection Board of Canada [IRB] to claim refugee status because he had already been accorded that status in Denmark. He then applied for a pre-removal risk assessment [PRRA] on the basis he should not be

returned to Denmark because of then current conditions. That decision was negative, and his application for leave and judicial review thereof was dismissed.

[3] He then claimed to have lost status in Denmark due to prolonged absence from that country. He applied for and was given a second PRRA, this time in relation to Iran. That assessment was also negative. He applied for and obtained leave to have that decision judicially reviewed. This is that review.

[4] Although I shall grant judicial review, there are many disturbing elements and gaps in the record. The matter shall be referred back for re-determination in accordance with the directions set out herein. To put this matter in context, a timeline would be helpful.

TIMELINE

1979-1984

[5] Mr. Valaei-Bakhshayesh served in the Iranian Air Force.

1979

[6] The Shah of Iran was deposed.

1984

[7] Mr. Valaei-Bakhshayesh left Iran for Turkey, allegedly because he could no longer accept the policies of the new regime. Unable to obtain status in Turkey, he was directed to Denmark by the United Nations High Commissioner for Refugees. He was found to be a Convention refugee and eventually became a permanent resident of Denmark.

24 March 2004

[8] Mr. Valaei-Bakhshayesh arrived in Canada and sought refugee status.

22 November 2006

[9] Two-and-a-half years later, he was found ineligible to claim refugee protection in accordance with section 101(1)(d) of the *Immigration and Refugee Protection Act* [IRPA]. That section provides that a claimant is ineligible to be referred to the Refugee Protection Division of the IRB if he has been recognized as a Convention refugee by another country "and can be sent or returned to that country". [My emphasis.]

[10] The record does not indicate that he applied for leave and judicial review of that decision.

27 April 2009

[11] Another two-and-a-half years later, a negative PRRA decision was issued with respect to Denmark.

27 November 2009

[12] Mr. Valaei-Bakhshayesh's application for leave and judicial review of the negative PRRA was dismissed.

16 October 2010

[13] He sought and obtained a second PRRA based on a potential return to Iran. That assessment was also negative and is the subject of this judicial review.

THE NEGATIVE PRRA

[14] As a stand-alone decision, I hold the assessment to be unreasonable. The basis of the application was Mr. Valaei-Bakhshayesh's bold assertion in an affidavit that he has lost permanent resident status in Denmark, and that he would be at risk in Iran. The officer stated: "the evidence before me does not support that the applicant has attempted to determine whether avenues of

recourse are available to him regarding the re-instatement of his Danish permanent residency." With respect, there is no hard evidence that Mr. Valaei-Bakhshayesh lost his permanent resident status in Denmark in the first place or even if so, that he has lost his status there as a Convention refugee.

[15] Nevertheless, the officer went on to assess the risks facing Mr. Valaei-Bakhshayesh should he be returned to Iran.

[16] At the heart of the officer's decision was her finding that there is no evidence that Mr. Valaei-Bakhshayesh is being sought by the Iranian authorities. While that finding is reasonable (the standard of review being reasonableness – *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190), it is not the question which should have been asked. No doubt he has been out of sight and out of mind of the Iranian authorities for more than 25 years. The question is how would Mr. Valaei-Bakhshayesh, a successful refugee, be treated on return? That analysis was not really done. He claims that he would be persecuted because he joined the Air Force while the Shah of Iran was still in power. Assuming he was at risk in 1984, he may or may not have been at risk when the PRRA decision was rendered in 2010. It seems to me that the Iranian regime of 1984 should have been compared with the regime of 2010.

[17] As a result, I find the decision unreasonable.

DISCUSSION

[18] In November 2006, the IRB held that Mr. Valaei-Bakhshayesh was ineligible for consideration in Canada as a Convention refugee because he had been recognized as such in Denmark and could be returned to that country. He asserts that this is no longer the case due to his prolonged absence from Denmark. If that assertion is true, the situation is of his own making. In any event, all Mr. Valaei-Bakhshayesh says is that he lost his status as a permanent resident. He does not state one way or another whether he lost his status as a Convention refugee.

[19] Unfortunately, the 2006 decision of the IRB is not in the record before me. However, it is common ground between the parties that the ineligibility decision was based on section 101(1)(d) of IRPA, rather than section 98 which provides that a person referred to in Article 1E of the U.N. Convention is neither a Convention refugee nor a person in need of protection. Article 1E thereof provides that the Convention does not apply to a person recognized in the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country. The focus in section 101, unlike section 98, is on refugee status, not permanent residency, or nationality, status.

[20] Mr. Valaei-Bakhshayesh should not have been allowed a second PRRA without his status in Denmark being clarified. The questions which should be put to the Danish authorities are both whether he has lost his permanent status there, and whether he has lost his status as a Convention refugee and would not be permitted to return.

[21] It may well be that the PRRA with respect to Iran, and the judicial review thereof, is moot. For instance, in the case of a refugee claim by someone with dual nationality if it is found that the applicant is not at risk in one country, it is not necessary to assess the second country.

[22] If due diligence was carried out by the authorities, there is no indication thereof in the record. I see a potential for great mischief. Suppose it had been held in the PRRA under review, or may be held in the new PRRA I have ordered, that Mr. Valaei-Bakhshayesh would be at risk of persecution were he to be returned to Iran. Would that mean that he would be entitled to remain in Canada even though it may well be that he is entitled to return to Denmark? What if a new PRRA, like the current PRRA, determines that he would not be at risk in Iran? If he is entitled to return to Denmark, there has been a considerable waste of time, resources and money. Consequently, the second PRRA must begin with an analysis of his right, if any, to return to Denmark. If he can return, that is the end of the matter.

[23] There are a number of cases which are not precisely on point, but which nevertheless underscore the rationale behind IRPA.

[24] In *Canada (Minister of Citizenship and Immigration) v Zeng*, 2010 FCA 118, 402 NR 154, the Court of Appeal wrestled with a decision based on section 98 of IRPA and the Article 1E exclusion clause. The applicants, Chinese citizens, enjoyed permanent resident status in Chile, a status which they alleged they lost.

[25] In speaking for the Court, Madam Justice Layden-Stevenson pointed out at paragraph 19 that "asylum shopping is incompatible with the surrogate dimension of international refugee protection." The Minister had argued that the refugee claim process is not intended to provide a route to better protection when there is existing and available protection elsewhere. One concern in that case was that if Article 1E was applied to asylum shoppers who could not return to the third country, the potential for removal from Canada to the home country without the benefit of a PRRA would exist. If this were to occur, Canada might run afoul of its international obligations.

[26] However, in this particular case, Mr. Valaei-Bakhshayesh was provided not with just one, but with two PRRAs.

[27] Mindful that the case dealt with Article 1E of the U.N. Convention, rather than section 101 of IRPA, the decision of Mr. Justice Rothstein, as he then was, in *Mohamed v Canada (Minister of Citizenship and Immigration)*, 127 FTR 241, [1997] FCJ No 400 (QL), illustrates the underlying philosophy of international protection. In that case, the applicant's refugee claim in Sweden had been rejected but nevertheless she had been granted permanent resident status there on humanitarian grounds. Even so, she sought protection in Canada because she claimed to have abandoned Sweden as her domicile and lost her permanent resident status. Mr. Justice Rothstein said at paragraphs 8 and 9:

> [8] Applicants' counsel makes the argument that the applicants' status in Sweden is subject to expiry. Therefore they do not have the right of a national envisaged by section E of Article 1 of the Convention. However, the evidence is that having been granted permanent residence status in Sweden, it is only the certificate that must be periodically renewed. There is no evidence that permanent residence status in Sweden is subject to some form of arbitrary cancellation.

> [9] This case raises the disturbing question of asylum shopping. If applicants' counsel were correct in his domicile argument, applicants could, at their own will, reject the protection of one country by unilaterally abandoning that country for another. Indeed, that is what has occurred here. The Geneva Convention exists for persons who require protection and not to assist persons who simply prefer asylum in one country over another. The Convention and the Immigration Act should be interpreted with the correct purpose in mind.

[28] *Mohamed* was relied upon by Mr. Justice Mosley in *Wangden v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1230, [2008] FCJ No 1541 (QL), appeal on a certified question dismissed, 2009 FCA 344, [2009] FCJ No 1540 (QL). It was held that the applicant was ineligible to make her refugee claim in Canada pursuant to section 101(1)(d) of IRPA, the same section which is in play in the case at hand.

[29] Another instructive decision is that of *Wassiq v Canada (Minister of Citizenship and Immigration)*, 112 FTR 143, [1996] FCJ No 468 (QL). That case dealt with Afghani applicants who had been granted refugee status in Germany. Ten years later they came to Canada and argued that their German residency permits had expired. As Mr. Justice Rothstein stated:

> [10] In Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689, La Forest, J. notes at page 726:
>
> > Refugee claims were never meant to allow a claimant to seek out better protection than that from which he or she benefits already.
>
> I would observe that if, by reason of their absence from Germany and sojourn in Canada, the applicants are, in effect, entitled to renounce the protection they received from Germany and claim protection from Canada, such a result is anomalous. In substance, it gives persons who have Convention refugee status in one country the right to emigrate to another country without complying with the usual requirements, solely by reason of their unilateral

> renunciation of the protection initially given to them by the first country. In effect, this means that they can "asylum shop" amongst countries who are signatories to the Geneva Convention and "queue jump" normal immigration waiting lists to the country of their choice. If this is the case, the applicants, who resided in Germany for ten years, may simply abandon Germany for Canada. They would have greater rights to emigrate to Canada than persons of German nationality. That is neither fair nor logical.

CERTIFIED QUESTION

[30] A draft of these reasons was circulated to the parties so as to give the Minister the opportunity to propose a serious question of general importance for certification. Counsel has informed the Court that the Minister does not propose a certified question, and none shall be certified.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that:

1. The application for judicial review is granted.
2. The decision rendered by the pre-removal risk assessment officer is set aside and the matter is referred back to another pre-removal risk assessment officer for redetermination.
3. There is no serious question of general importance to certify.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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