

Federal Court



Cour fédérale

Date: 20120222

Docket: IMM-5624-11

Citation: 2012 FC 244

Ottawa, Ontario, February 22, 2012

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

CHENG HSIANG LIU

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, Cheng Hsiang Liu, seeks judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated July 27, 2011. The Board determined that he was not a Convention refugee or person in need of protection within the meaning of sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA).

I. Background

[2] The Applicant was born in Calcutta, India. His ethnicity is Hakka Chinese. He is also considered a British Subject.

[3] In India, the Applicant worked at his family's shoe company. He alleges having encountered problems with gangsters because his family is Chinese. According to the Applicant, these gangsters threatened to set the company on fire and kill him.

[4] The Applicant closed the company and came to Canada on May 31, 1999. He waited 10 years before making a refugee claim.

II. Decision Under Review

[5] The Applicant's identity was established as a British Subject based on a copy of his United Kingdom of Great Britain and Northern Ireland passport. The Board did not have sufficient evidence to conclude that the Applicant was a citizen of India, given his passport had various entries showing that he was issued a visa valid for different periods of time in that country. If he were a citizen of India, the Board considered it unlikely that he would need a visa to enter the country.

[6] The Board considered the determinative issues to be the lack of nexus to a Convention ground and credibility of the claim as put forward. The Applicant could not be a Convention

refugee due to the possibility of being targeted by gangsters in India since this implied he was a victim of a crime.

[7] The Board proceeded with an analysis of possible harm that would come to the Applicant from gangsters in India under section 97, but did not reach a decision in the Applicant's favour as a result of credibility concerns. While the Applicant did not have a good command of English and only knew Hakka and Hakka people, no credible reason was given as to why he could not go to the United Kingdom as a British Subject or pursue British citizenship. This negative credibility finding was made despite the Applicant's minimal education of three years.

[8] It was also noted that the Applicant did not answer the question as to why he waited 10 years before making a refugee claim. If the Applicant had a subjective fear due to the problems experienced in India, he would have made a claim within a reasonable timeframe.

[9] Finally, the Board stated that it "simply does not believe the reasons for the claimant's alleged problems in India" since no corroborating evidence had been submitted to support his claim.

III. Issues

[10] This application raises the following issues:

(a) Did the Board err in finding that there was no nexus to a Convention ground?

- (b) Did the Board err in its assessment of the Applicant's credibility?
- (c) Did the Board err by proceeding with the hearing in the absence of the Designated Representative (DR)?
- (d) Did the Board breach procedural fairness in the conduct of the hearing?

IV. Standard of Review

[11] The nexus to a Convention ground is a question of mixed fact and law reviewable on a standard of reasonableness (see *Chekhovskiy v Canada (Minister of Citizenship and Immigration)*, 2009 FC 970, [2009] FCJ No 1180 at paras 17-18). Questions of fact and credibility also require this standard (see *Aguirre v Canada (Minister of Citizenship and Immigration)*, 2008 FC 571, [2008] FCJ no 732 at para 14).

[12] Applying the reasonableness standard, this Court must look for “the existence of justification, transparency and intelligibility” as well as “whether the decision falls within the range of possible, acceptable outcomes defensible in respect of the facts and law” (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

[13] However, questions of natural justice or procedural fairness demand the correctness standard (see *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, 2009 CarswellNat 434 at para 43).

V. Analysis

A. *Did the Board Err in Finding that there was no Nexus to a Convention Ground?*

[14] The Applicant contends that the Board did not analyze the substance of his claim, namely that he feared persecution by gangsters in India who were against Chinese and jealous of his family's business. His refugee claim related to persecution based on race and ethnicity.

[15] The Respondent maintains that the Board reasonably found no nexus to a Convention ground for the Applicant as a possible target of gangsters in India. In general, victims of crime are not considered Convention refugees (see *Zefi v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 636, [2003] FCJ no 812 at para 40). Moreover, the Applicant failed to establish that he had been targeted due to race or ethnicity.

[16] The Applicant refers the Court to the decision of *Ahangaran v Canada (Minister of Citizenship and Immigration)* (1999), 168 FTR 315, [1999] FCJ no 772 at para 5 where Justice Donna McGillis acknowledged that the Board was entitled to "consider all of the matters relied on by it in assessing the applicant's credibility", but found an error of law in failing to consider the totality of the evidence where there was no evaluation of "the credibility of his evidence concerning the substance of his refugee claim." In that instance, the Board made credibility findings based solely on the applicant's travel after leaving the country and use of false documents and identities.

[17] Similarly, *Sampu v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 756, [2001] FCJ no 1100 at paras 9-12 faulted the Board for not evaluating “the credibility of the evidence on all central aspects of the claim” where it failed to consider the applicant’s arrest and torture due to the performance of a song viewed as critical by government authorities.

[18] By contrast, *Katwaru v Canada (Minister of Citizenship and Immigration)*, 2007 FC 612, [2007] FCJ no 822 at paras 9-12 upheld a determination by the Board that an attack was not racially motivated as there “was no reliable and persuasive information to suggest that this is the reason the bully targeted the applicant.” Consequently, it was reasonable to conclude that the attack was not racially motivated and preclude a further determination based on mixed motives.

[19] In this case, the Board addressed the substance of the claim advanced by the Applicant in relation to a fear of persecution. It concluded “[t]he threats as alleged by the claimant is a situation where he would be the victim of crime.” This approach is consistent with *Zefi*, above. As the Respondent suggests, the Applicant simply disagrees with the Board’s characterization of his claim in this manner as opposed to focusing on any racial motivation.

[20] It is notable that the Board later stated it did not believe the reasons for the Applicant’s alleged problems in India and found “[n]o corroborating evidence was submitted to support the claim as alleged.” This situation more closely resembles that of *Katwaru*, above because there is no evidence to support the claim as a whole and consequently any ethnic or racial motivation underlying the alleged extortion.

[21] Given the nature of the claim as presented and lack of corroborating evidence, the Board did not commit a reviewable error in finding that there was no nexus to a Convention ground because the Applicant was the victim of a crime.

B. *Did the Board Err in its Assessment of the Applicant's Credibility?*

[22] The Applicant questions the completeness of the Board's credibility assessment. He insists it was unreasonable for the Board to make a negative finding in relation to his lack of action in pursuing British citizenship despite the explanations given as to why he does not want to go to the United Kingdom. He has never been there and his English is not good whereas he has some siblings living in Canada.

[23] I am not persuaded, however, that the Board's credibility findings are unreasonable.

[24] In *Williams v Canada (Minister of Citizenship)*, 2005 FCA 126, [2005] FCJ no 603 at para 22, the Federal Court of Appeal confirmed that "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."

[25] The Board recognized that the Applicant had a United Kingdom of Great Britain and Northern Ireland passport revealing his nationality is that of a British Subject. There is a process in place for the acquisition of citizenship under related British legislation.

[26] The Board considered the Applicant's response as to why he could not go to the United Kingdom but found this was not a sufficient reason. His lack of action in pursuing British citizenship or attempting to live in the United Kingdom had a severe negative impact on his credibility as a person at risk. While the Applicant would have preferred that the Board accepted his explanation, it was entitled to weigh the evidence and place emphasis on that fact that he could claim citizenship in another country as suggested by *Williams*, above.

[27] In addition, the Board's negative inference in this regard was supported by other credibility concerns. The Applicant was faulted for the 10 year delay in making a refugee claim. While the "delay in making a claim to refugee status is not a decisive factor in itself" it is nonetheless a "relevant element which the tribunal may take into account in assessing both the statements and the actions and deeds of a claimant" (see *Huerta v Canada (Minister of Employment and Immigration)* (1993), 157 NR 225, [1993] FCJ no 271). It is reasonable to expect that the Applicant would make a claim at the first possible opportunity and determine that a failure to do so further undermines his credibility (see *Jeune v Canada (Minister of Citizenship and Immigration)*, 2009 FC 835, [2009] FCJ no 965 at para 15).

[28] More significantly, the Board emphasized that "[n]o corroborating evidence was submitted" of the alleged problems the Applicant faced in India. Drawing a negative inference based on a lack of corroborating evidence was addressed by Justice Yvon Pinard in *Bhagat v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1088, [2009] FCJ no 1368.

[29] Given the concerns associated with the Applicant's story, the Board was justified in drawing a negative inference as to his credibility.

C. *Did the Board Err by Proceeding with the Hearing in the Absence of the Designative Representative (DR)?*

[30] At the Second Sitting for the Applicant's refugee claim, the Board contemplated designating a representative for him. The Applicant's cousin, Mr. Liu, who had initially been waiting in the reception area, was asked if he would fulfill this role. It appeared as though the cousin was prepared to do so but then decided he would not accept the responsibility. However, he remained in the room and continued to communicate with the Board member during the hearing.

[31] The Applicant takes issue with the Board's handling of this matter. He refers to an "on again off again relationship" with the Applicant's cousin. While the Board took the initiative in attempting to designate a representative, the Board proceeded in the hearing without one. Also disconcerting from the Applicant's perspective was the continued presence and involvement of Mr. Liu despite having eschewed formal responsibility.

[32] However, the Respondent notes, and I agree, the Applicant should have raised an objection to proceeding in the absence of a designated representative or Mr. Liu remaining in the room during the hearing. From the decision of *Benitez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 461, [2006] FCJ no 631 at para 220, it is established that "an applicant must raise an allegation of bias or other violation of natural justice before the tribunal at the earliest practical

opportunity.” The “earliest practical opportunity” is when the applicant “is aware of the relevant information and it is reasonable to expect him or her to raise an objection.”

[33] While the Applicant in this case has limited education, he was assisted at all times during the hearing by counsel. This counsel could have addressed the issue of the designated representative, questioned proceeding or objected to the continued presence of Mr. Liu.

[34] I also highlight that in continuing the Board made efforts to ensure that the Applicant understood what was in his Personal Information Form (PIF) and the nature of the proceeding.

[35] As a consequence, the Board did not commit a breach of natural justice or procedural fairness by continuing without designating a representative for the Applicant in this instance.

D. *Did the Board Breach Procedural Fairness in the Conduct of the Hearing?*

[36] The Applicant raises procedural fairness concerns regarding the conduct of the hearing in general. He states that the Board member told him to “hold on” or “hold on and just listen.” He felt he was constantly interrupted and not allowed to speak so that the Board member could rush through to complete the hearing.

[37] In addition, the Applicant complains that although he stated the PIF had been translated to him before signing it, the Board member spent the majority of the Second Sitting reciting its contents to him. As a result, he hardly asked any questions about the substance of the case.

[38] The Respondent maintains that the Applicant is taking the Board member's comments out of context. They were made to ensure he understood the nature of the hearing. The reading of the PIF to the Applicant was for a similar purpose of confirming that he knew its contents.

[39] The Applicant's counsel did not object to the Board member's approach during the hearing. He did not ask questions or make submissions. The onus was on the Applicant, with the assistance of his counsel, to present his case. A failure by a claimant to fulfill his obligations and assume his burden of proof cannot be imputed to the Board so as to make it a Board's failure (*Ranganathan v Canada (Minister of Citizenship and Immigration)* (2000), [2001] 2 FC 164, [2000] FCJ no 2118 at para 11).

[40] I am not persuaded that there is any aspect of the Board member's conduct during the hearing that would affect the Applicant's ability to put forward his case and consequently lead to a breach of procedural fairness warranting the intervention of this Court. Rather, the Board member's interjections were aimed at assisting the Applicant in understanding the process.

VI. Conclusion

[41] The Board was reasonable in its determinations regarding the lack of nexus to a Convention ground and credibility. There were also no procedural fairness issues that arose in continuing without a Designated Representative when the Applicant was represented by counsel or in the conduct of the hearing more generally.

[42] For these reasons, this application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

“ D. G. Near ”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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