Federal Court  Cour fédérale

Date: 20120504

Docket: IMM-6317-11

Citation: 2012 FC 533

Ottawa, Ontario, May 4, 2012

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

SYED BAKHTAWAR GILLANI

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*, SC 2001, c 27 [the Act] for judicial review of the decision rendered by the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated August 19, 2011, which refused the applicant's claim to be deemed a Convention refugee or a person in need of protection under sections 96 and 97 of the Act.

[2] The applicant seeks an order setting aside the decision and remitting the matter for redetermination by a differently constituted panel of the Board.

Factual Background

[3] Mr. Syed Bakhtawar Hussain Gillani (the applicant) is a thirty-seven (37) year old citizen of Pakistan, who seeks protection in Canada as he alleges that he faces persecution as a homosexual.

[4] In Pakistan, the applicant lived in the city of Sialkot, in the Punjab province of Pakistan.

[5] The applicant maintains that his chief persecutor is Mr. Sufi Mehmood, who was the applicant's former employer and sexual partner. In 2004, the applicant alleges that Mr. Mehmood aided him financially in order for him to acquire his company, Gold Farrie Surgical.

[6] In 2006, at the insistence of his parents, the applicant married and the money that he obtained from his wife's dowry helped him to expand his business. The applicant and his wife had two children together.

[7] In 2007, the applicant alleges that he began sexual relations with Mr. Shahbaz Butt.

[8] In November of 2008, the applicant maintains that while he was walking in a market with Mr. Butt, he was confronted by Mr. Mehmood. The applicant contends that Mr. Mehmood requested that he give up his homosexuality. The applicant alleges that he refused to comply with

Mr. Mehmood's request and consequently, in June of 2009, Mr. Mehmood informed the applicant's family of his sexual activities. As a result, the applicant's wife left him and took their children.

[9] The applicant alleges that he was arrested on June 25, 2009, at the insistence of his father-in-law. In jail, the applicant submits that he was brutalized and attacked.

[10] When the applicant was released, he went to Mr. Butt's residence to recover. On June 29, 2009, at Mr. Butt's residence, the applicant was allegedly confronted once again by Mr. Mehmood, who was accompanied by Mr. Qari Yasir Rana, an Imam of a local mosque. Mr. Mehmood and the Imam declared that they witnessed Mr. Butt and the applicant engaging in sexual activities, thereby making them liable for arrest under Shariah law. The applicant affirms that the Imam also pronounced a fatwa against him. Consequently, the applicant submits that he is threatened with death by stoning if he were to return to Pakistan.

[11] Fearing for his life, the applicant fled to Canada on July 7, 2009, as he already had a Canadian temporary resident visa. The applicant filed a refugee claim on August 17, 2009 in Montreal.

[12] Since his arrival in Canada, the applicant alleges that his whole community learned of his homosexuality and he maintains that there have been numerous indications that he is sought by the police.

[13] The applicant's refugee claim was heard by the Board on April 5, 2011 and June 22, 2011.

Decision under Review

[14] The Board rejected the applicant's refugee claim as it had concerns about the credibility of his story. The Board also concluded that a viable Internal Flight Alternative (IFA) existed in Pakistan.

[15] Regarding the applicant's credibility, the Board noted that the applicant was very vague and evasive on the subject of his company Gold Farrie Surgical and concerning his financial affairs in Pakistan. The Board observed that the applicant could not confirm the current status and value of his business with any certainty. The Board found the applicant's behaviour and lack of knowledge concerning his company to be puzzling as the business had at one time been clearly important to the applicant. However, the Board did not make a final determination regarding the applicant's credibility as it stated that regardless of any possible credibility findings, an IFA was available to the applicant in Karachi.

[16] The Board dismissed the applicant's two arguments to contest the possible IFA: 1) that he would be found wherever he went by his persecutors; and 2) that as a homosexual he would be in danger wherever he was in Pakistan because of religious extremism.

[17] Concerning the first argument raised by the applicant, the Board concluded that there was no evidence to suggest that the police are currently searching for the applicant, such as an official arrest warrant or a First Information Report. The Board held that given the size and population of Pakistan, and in the absence of an official arrest warrant, the applicant would not be at risk of arrest outside of Sialkot. With respect to document P-11 (Tribunal Record, p. 215) filed by the applicant –

a Punjab provincial initiative that instructs owners of hotels to record information concerning their guests, including copies of ID cards and complete addresses – the Board concluded that there was no serious possibility that this mechanism would be effective in transmitting the applicant's location in Karachi to anyone in Sialkot.

[18] With regards to the second argument, the Board was of the view that although the documentation adduced in evidence indicates certain examples of the mistreatment of homosexuals in Pakistan, these examples are limited and the documentation reveals that conclusions are mixed on this subject. Responding to the documents submitted by the applicant, the Board stated that there was very little evidence of any crackdown against homosexuals, let alone a systematic enforcement of the law prohibiting homosexuality. The Board concluded that "the relative absence of examples of repression is telling in a country this size and population and implies that there is little if any effort made to locate homosexuals and that the range of societal authorities are purposefully looking the other way given that the persecution of homosexuals is an anomaly in Pakistan" (Board's reasons, para 16).

[19] Consequently, the Board concluded that the danger that the applicant faced was localized and was presented by non-state actors. Thus, the Board noted that the applicant faced only a mere chance of persecution for homosexuality if he were to relocate to Karachi. Finally, the Board held that the proposed IFA would not be unreasonable for the applicant given that he would be able to find work in Karachi and that he had severed ties with his family (he was divorced by his wife and disinherited by his father).

Issues

[20] The Court finds that the applicable issues in the case at hand are the following:

a. Did the Board err in determining that a viable IFA was available to the applicant?

b. Did the Board err in its evaluation of the applicant's credibility?

Statutory Provisions

[21] The following provisions of the *Immigration and Refugee Protection Act* are applicable in these proceedings:

REFUGEE PROTECTION, CONVENTION REFUGEES AND PERSONS IN NEED OF PROTECTION	NOTIONS D'ASILE, DE REFUGIE ET DE PERSONNE A PROTEGER
Convention refugee	Définition de « réfugié »
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,	**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*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	*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	*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.

country.

Person in need of protection

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
(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or
(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,
(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,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

Personne à protéger

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) 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) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(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) la menace ou le risque ne résulte pas de sanctions légitimes – sauf celles infligées au mépris des normes internationales – et inhérents à celles-ci ou occasionnés par elles,
(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] In the present case, two issues were highlighted by the Board: the applicant's credibility and the existence of a viable IFA in Karachi. With respect to the issue of the applicant's credibility, the jurisprudence since *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*] has established that the appropriate standard of review to be applied to determinations of fact is that of reasonableness (*Malocaj v Canada (Minister of Citizenship and Immigration)*, 2011 FC 80 at para 26, [2011] FCJ No 91; *Dong v Canada (Minister of Citizenship and Immigration)*, 2010 FC 55 at para 17, [2010] FCJ No 54). Concerning the issue of the possible IFA, the applicable case law has indicated that such determinations are also reviewable according to the standard of reasonableness (*Mejia v Canada (Minister of Citizenship and Immigration)*, 2009 FC 354 at para 29, [2009] FCJ No 438; *Khokhar v Canada (Minister of Citizenship and Immigration)*, 2008 FC 449 at para 21, [2008] FCJ No 571). In accordance with the standard of reasonableness, the Court will only intervene if it determines that the Board's conclusions were not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (*Dunsmuir*, above, at para 47).

Arguments

Applicant's Position

[23] The applicant argues that the Board erred in its analysis with regards to the existence of a viable IFA and with regards to his credibility.

[24] Firstly, the applicant submits that the Board erred with respect to its findings concerning the applicant's business in Pakistan. The applicant maintains that the Board ignored the explanations that the applicant gave in his testimony regarding the Board's concerns.

[25] The applicant also contends that the documentary evidence on the country conditions in Pakistan dispute the findings of the Board. The applicant asserts that homosexuality is a serious crime in Pakistan and the maximum punishment is either death or life imprisonment. As well, the applicant maintains that the documentation is mixed; some sources reveal that there are several convictions each year, while others state that the Pakistani government rarely prosecutes cases. Consequently, the applicant affirms that the risk of persecution and prosecution therefore exists. As such, the applicant states that since the risk of persecution clearly exists in Pakistan, the Board clearly had the obligation to estimate this risk. Furthermore, the applicant maintains that the Board erred by referring to the Bangladesh National Documentation Package in its analysis of an IFA in the footnotes included on pages 4 and 5 of the Board's reasons. The applicant questions whether this was a mere typing mistake on the part of the Board or whether the Board failed to properly analyze the documentary material. The applicant also states that the Board referred to the 2009 UK Country of Origin Information Report for Pakistan in paragraph 15 of its reasons. However, in actual fact, the Pakistan National Documentation Package on the Immigration and Refugee Board website does

not contain this report. The applicant affirms that the Board's assertions do not match up with the documents included in the Pakistan National Documentation Package and in some cases are entirely contradictory.

[26] In addition, the applicant maintains that the Board ignored the applicant's psychological and medical reports that were included in the file (Tribunal Record, pp. 261-263). The applicant submits that, as per his request, he should have been designated a representative in light of the medical reports that clearly state that he was unable to understand the nature of the proceedings and should have considered both the UNHCR Guidelines and the IRB Guideline on vulnerable persons when making its determinations.

[27] Finally, in his Further Affidavit and Further Memorandum of Argument, the applicant calls into question the competency of the current Board members and their ability to adjudicate refugee cases in light of recent statistics concerning the Board member's test scores outlined in certain access to information requests made by the applicant. On the whole, the applicant alleges that there is an apprehension of institutional incompetence on the part of all Board members, which renders the Board's decision in the matter at hand *ultra vires*.

Respondent's Position

[28] The respondent submits that the Board's assessment of the applicant's case was reasonable and that the applicant did not succeed in demonstrating that the Board's conclusions were rendered in a perverse or capricious manner or without regard to the material before it.

[29] Regarding the issue of the Board's credibility findings, the respondent submits that this issue does not need to be addressed as the Board stated that even if it were to accept all the allegations made by the applicant as true, an IFA is nevertheless available to him in Karachi. As well, the respondent adds that the Board provided comprehensive and extensive reasons in support of its decision and findings. Moreover, with regard to the Board's concerns concerning the applicant's business, the respondent argues that these inconsistencies were central to the applicant's claim and therefore called into question his version of events underlying his alleged fear of persecution.

[30] Also, with respect to the Board's conclusions on the possibility of an IFA, the respondent asserts that the applicant only raised questions concerning the weighing of evidence, which cannot be considered grounds for the Court's interference. The respondent alleges that the applicant's suggestion that the Board would have purposely or otherwise ignored contrary evidence to its findings is not tenable. The respondent further recalls that it is trite law that an administrative decision-maker has no obligation to refer to every piece of evidence that he or she took into account before making a decision. Consequently, in light of the established case law, the respondent contends that, unless clear evidence is provided to the contrary, an administrative decision-maker is deemed to have considered all of the evidence before reaching a decision.

[31] As a result, the respondent submits that it was not unreasonable for the Board to conclude that the mere existence of a law prohibiting homosexuality cannot prove, if it is not enforced, that homosexuals are persecuted in Pakistan. The respondent asserts that the evidence did not establish on individual or cumulative grounds that the level of discrimination and harassment that the applicant may experience rose to a level of a sustained and systematic denial of basic human rights.

[32] As such, the respondent advances that it was reasonable for the Board to conclude that based on the documentary evidence, although there were instances of discrimination and even violence, homosexuals were not, as a group, being persecuted in Pakistan. Furthermore, with respect to the applicant's argument concerning the Board's error in referring to Bangladesh rather than Pakistan in certain footnotes of its reasons, the respondent affirms that this error was merely clerical error as the Board correctly referred to the documents included in the Pakistan National Documentation Package.

[33] Concerning the issue of the medical reports, the respondent maintains that there is no evidence before the Court to suggest that these reports were specifically put to the Board on the issue of the IFA to Karachi. Moreover, the respondent advances that the applicant's arguments concerning the denial of procedural fairness in being denied a designated representative are untimely, and that he has waived his right to raise such an objection as he failed to do so at the outset. In addition, the respondent affirms that the UNHCR Handbook and the IRB guideline on vulnerable persons are non-binding documents that are not authoritative in Canadian law. The respondent submits that the Board took all the necessary steps to be sensitive to the applicant's alleged condition and psychological situation, as he was designated a vulnerable person by the Board.

[34] Finally, with respect to the applicant's arguments advanced in its Further Affidavit and Further Memorandum of Argument regarding the competency of current Board members to adjudicate refugee cases, the respondent dismisses the applicant's arguments and submits that the

applicant has not provided any evidence to suggest that these statistics would affect this particular Board member or the outcome of the matter at hand.

Analysis

[35] In the present case, the Court notes that the Board made no final conclusion on the applicant's credibility as its findings concerning the existence of an IFA were found to be determinative. After reviewing the documentary evidence and the parties' submissions, the Court is of the view that the Board's IFA findings were reasonable for the reasons that follow.

[36] By way of an introductory comment, the Court notes that it is well established in the case law that an individual must be at risk in all parts of his country in order to be deemed a refugee (see *THSB v Canada (Minister of Citizenship and Immigration)*, 2011 FC 354, [2011] FCJ No 462; *Rasaratnam v Canada (Minister of Employment and Immigration)* (FCA), [1992] 1 FC 706, [1991] FCJ No 1256; *Thirunavukkarasu v Canada (Minister of Employment and Immigration)* (FCA), [1994] 1 FC 589, [1993] FCJ No 1172). As well, the burden of proof rests with the refugee claimant.

[37] The applicant argues that the Board erred with regard to its analysis of the documentary evidence on the country conditions in Pakistan regarding the treatment of homosexuals. The Court notes that it is trite law that it is not the role of a reviewing court to reweigh evidence that was before the Board. As well, the Court recalls that the Board is presumed to have considered all of the documentary evidence when making its decision (*Florea v Canada (Minister of Employment and Immigration)* (FCA), [1993] FCJ No 598). In the case at bar, the Court finds that the applicant has

not demonstrated that the Board ignored any evidence; rather, the Court agrees with the respondent that the Board acknowledged all of the documentary evidence and commented on the country conditions in Pakistan. The Board recognized that the documentation demonstrated examples of the mistreatment of homosexuals in Pakistan. Although, based on the documentation, the law prohibits homosexuality in Pakistan, the Board concluded that, in practice, authorities rarely prosecuted cases (Board's reasons, paras 15 and 16). A reading of the decision demonstrates that the Board was aware of the problematic situation in Pakistan and considered the contradictory evidence. The applicant disagrees with the weighing of evidence. However, based on the objective documentary evidence adduced, the Court cannot conclude that the Board erred based on the evidence before it. The Court, therefore, finds that the Board's conclusion regarding the relative absence of persecution of homosexuals in Pakistan is reasonable (*Birsan v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1861, 86 ACWS (3d) 400).

[38] With respect to the applicant's argument that the Board erred by referring to the Bangladesh National Documentation Package rather than the Pakistan National Documentation Package, the Court finds that the Board's error was merely clerical. While the Board's footnotes on page 4 and 5 of its decision erroneously referred to Bangladesh, in actual fact, the Tab numbers cited by the Board did correctly refer to the documents in the Index of the Pakistan National Documentation Package. As well, though the Board referred to the 2009 (rather than the 2010) UK Country of Origin Information Report for Pakistan in paragraph 15 of its decision, the Court finds this to be a mere typographical error. The Court therefore rejects the applicant's argument that the Board's assertions did not match up with the documents included in the Pakistan National Documentation Package. Similarly, the applicant's argument regarding the Board's use of extrinsic evidence is

equally unfounded. As Justice Russell stated in the case of *Petrova v Canada (Minister of Citizenship and Immigration)*, 2004 FC 506 at para 51, [2004] FCJ No 613: “when a mistake is typographical in nature, the Court should not interfere with the decision, especially if the error does not appear to have been a misunderstanding of the evidence” (see also *Sandhu v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 134, [2002] FCT No 188).

[39] The applicant also raised other arguments pertaining to the medical reports, the UNHCR Handbook and the IRB guidelines on vulnerable persons. There is no evidence that the medical reports were put to the Board on the issue of the IFA to Karachi. Further, upon reading the Board’s decision, the Court is satisfied that the Board took the necessary steps to be sensitive to the applicant’s alleged condition and psychological situation as well as the allegation of persecution on the basis of his sexual orientation. Furthermore, the evidence demonstrates that the Board was cognizant of the applicant’s situation (Tribunal Record, pp. 29 and 34).

[40] Finally, the applicant argues that several current Board members applied on a competition by the Public Service Commission of Canada for the recruitment of future members of the Refugee Protection Division and did not qualify. Hence the applicant urges the Court to declare that all current Board members are therefore incompetent to hear a refugee claim until the *Balanced Refugee Reform Act* comes into forces on June 29, 2012. (This same argument was also raised by counsel for the applicant in file IMM-5987-11).

[41] The test referred to by the applicant follows a reform to the appointment procedure for IRB members (Martin Jones & Sasha Baglay, *Refugee Law*, (Toronto: Irwin Law, 2007) at 22):

a. initial screening and a written test;
b. merit-based screening of candidates by an Advisory Panel constituted of academics, lawyers, and NGO representatives;
c. interviews, reference checks, and evaluation review by the Selection Board, comprised of IRB officials and external experts from other tribunals;
d. based on the assessments by the Advisory Panel and the Selection Board, the IRB Chairperson recommends qualified candidates to the CIC Minister;
e. the Minister makes recommendations to the Governor in Council.

[42] The applicant opines that, since a number of the current Board members have failed the test as part of the reform to the appointment procedure for IRB members, all members of the current Board are incompetent to hear refugee claims and that there is necessarily an apprehension of institutional incompetence on the part of all IRB members.

[43] With all due respect, in the circumstances, the applicant's argument is based on speculation. For instance, there is no evidence with respect to the questions in the test. At hearing before the Court, counsel for the applicant confirmed that the results of the test are confidential. In addition, there is no evidence to demonstrate whether the Board member in the case at bar failed the test or whether he was successful. But more importantly, there is no evidence that the Board member indeed wrote the test. Generally speaking, the Court recalls that the limitations of statistics are well-known (*Es-Sayyid v Canada (Minister of Public Safety and Preparedness*, 2012 FCA 59 at para 55, [2012] FCJ No 250). More particularly, in the case at bar, the Court finds that the interpretation advanced by the applicant based on statistics is farfetched and the Court does not agree that there is

reasonable apprehension of bias on the part of the decision-maker. On the basis of lack of evidence and factual basis, the applicant's argument therefore fails.

[44] For the reasons above and the Court's findings of the determinative issue of the IFA, it is not necessary to address the applicant's arguments with respect to the issue of credibility (*Khokhar v Canada (Minister of Citizenship and Immigration)*, 2008 FC 449 at para 42, [2008] FCJ No 571).

[45] The application for judicial review will therefore be dismissed.

Proposed Questions for Certification

[46] The applicant proposed the following questions for certification:

> Question 1:
> "Considering that both, current Governor in Council (GIC) appointees of the Refugee Board and future RPD civil servants of the Refugee Board, will be called upon to interpret the same definition of refugee and of persons in need of protection, does failure of GIC appointees, to succeed in the selection process to become future civil servant RPD members, under C-11, is indicative of an appearance incompetence and disqualify them as decision makers?"
>
> Question 2:
> "If the answer to the first question is YES, Is the Immigration and Refugee Board in violation of principles of natural justice and Charter rights of refugee claimants and of persons in need of protection?"
>
> Question 3:
> "If the answer to the first question is YES, would it result in two discriminatory regimes for refugee claimants and persons in need of protection, one under current law, and another under C-11?"

[47] The Federal Court of Appeal stated the necessary criteria for certifying a question of general importance in *Canada (Minister of Citizenship and Immigration) v Liyanagamage*

(FCA), [1994] FCJ No 1637, 176 NR 4. The proposed questions must transcend the interests of the immediate parties to the litigation, contemplate issues of broad significance or general application and be determinative of the appeal. In the Court's view, the questions formulated by the applicant do not satisfy these criteria.

[48] The first question put forth by the applicant simply invites speculation and, on the fact of this case, would not be dispositive of this appeal. Moreover, the Court found that there was no ground to conclude that there is a reasonable apprehension of bias or institutional incompetence. The Court agrees with the respondent that the question, as formulated, is more in the nature of a reference question (*Pillai v Canada (Minister of Citizenship and Immigration*), 2001 FCT 1417, [2001] FCJ No 1944). Consequently, it is not appropriate for certification.

[49] Considering the negative answer to the first question, there is no need for the Court to answer the second and third question.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed;

2. There is no question for certification.

"Richard Boivin"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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