Federal Court  Cour fédérale

Date: 20100401

Docket: IMM-3504-09

Citation: 2010 CF 357

Ottawa, Ontario, April 01, 2010

PRESENT: The Honourable Mr. Justice Mainville

BETWEEN:

MOHAMMAD ZILANI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application filed pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 whereby Mr. Mohammad Zilani (the "Applicant") is seeking the judicial review of a decision of a panel of the Refugee Protection Division of the Immigration and Refugee Board (the "Panel") dated June 8, 2009 and bearing RDP file number TA6-16369 that determined that the Applicant was not a convention refugee and was not a person in need of protection.

[2] For the reasons set out below, this application shall be granted.

[3] In recent years, the Supreme Court of Canada has clearly stated that, in reviewing a decision from an administrative tribunal, a superior court should avoid substituting its own assessment of the evidence for that of the tribunal. This applies particularly where the administrative tribunal, as in this case, has had the opportunity of hearing the testimony *viva voce* and is thus in a much better position to assess the credibility of witnesses. When reviewing findings of fact by a tribunal, the Court must show deference and thus only interfere if the findings were not reasonable. In this respect, the Court must ascertain that the tribunal's decision is sufficiently justified and that the decision-making process is transparent and intelligible. In this case, the Panel's decision was not reasonable since it provided almost no explanations in support of its findings, and those explanations it did provide were not consistent with the evidence on the record.

Background

[4] The Applicant is a citizen of Bangladesh and a Shia Muslim. He claims persecution by Sunni fundamentalist thugs for his religious convictions. He first came to Canada as a student in September of 2005. He returned to Bangladesh for a short visit with his ailing father in June of 2006. He claims that at the time of that visit, thugs from a Sunni fundamentalist movement came to his father's home to extort money from his family if they did not become Sunni Muslims. He further claims that those threats were not idle threats: he was indeed kidnapped by these thugs on June 21, 2006 and a ransom was demanded if he did not convert.

[5] The Applicant also claims that he met a Bengali woman over an internet dating site and eventually married her. His wife was very young at the time of the marriage and she is a Sunni Muslim. His wife's family was very upset by the marriage and lodged a complaint against him with the police.

[6] Since Sunni fundamentalist thugs as well as the police were after him, he decided to leave Bangladesh for Canada in mid-2006. He nevertheless returned to Bangladesh for a few days between November 1, 2006 and November 5, 2006 in order to visit his ailing father who had been hospitalized for cancer treatments. He claims that this was a secret visit during which he lived in a friend's home to avoid being found by the police or the Sunni fundamentalist who had threatened him. Upon his return to Canada, he made his refugee protection claim.

The decision under review

[7] The decision fills two pages, and a summary of the Applicant's claims constitutes a large portion thereof. The main ground for the decision was essentially that the Panel did not find the Applicant or his story credible. In a four-paragraph analysis, the Panel found:

> (a) "[t]hat the threats and violence arose from terrorist motivations, which were minimal in nature but not addressed by the police, is not credible, given his assertion regarding the influence of his maternal Sunni uncle";
>
> (b) "[t]hat he entered into a mixed marriage after a one-year internet courtship and a personal meeting of a few days defies belief; particularly so, when the marriage was not in compliance with the legal age requirements. That her parents would not seek to legally

> annul such an arrangement, yet pursue and threaten him, makes no sense";
>
> (c) "[the Applicant's] voluntary re-availment on not fewer than two (2) occasions establishes clearly that his alleged fear was not genuine, nor objectively reasonable"; and
>
> (d) "[w]hile the documentary evidence indicates tensions do exist between Shi'as and Sunnis, there is only the merest of possibilities that he would be persecuted, particularly by the balance of his family who are Sunnis."

Standard of review

[8] The law is well settled: the applicable standard of review of refugee determination decisions of the Immigration and Refugee Board based on issues of credibility and assessment of evidence is that of reasonableness: see, e.g., *Aguebor v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 732 (QL), (1993), 160 N.R. 315 (F.C.A.); *Wang v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1153; [2008] F.C.J. No. 1433 (QL) at para. 4. This is the standard that I will apply herein.

[9] According to *Dunsmuir* (at paragraph 47): "In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" [emphasis added].

Analysis

[10] The Panel first stated that the record was replete with non-answers to direct questions put to the Applicant, who was said to have used as an introductory phrase, the words "I was under risk" as

a response to most questions. Yet, when read carefully, the transcript of the hearing shows clearly that the words “I was under risk” were not used by the Applicant as an introductory phrase and were in fact not used at all by the Applicant. Further, the transcript also shows that the Applicant answered directly almost every question put to him during the hearing.

[11] The Panel further found that, in the light of the influence of the Applicant’s uncle, it was not credible that the police would not respond to the complaint lodged by the Applicant against the Sunni fundamentalists who were attempting to extort money from him. Yet, again, a careful review of the record shows that the Applicant asserted that his uncle was well-off, but never asserted that he was influential. Indeed, the Applicant rather asserted that his uncle recommended to him that he leave Bangladesh since law enforcement in that country left a lot to be desired and he had become the target of Sunni fundamentalists.

[12] The Panel found it not to be credible that the Applicant would marry his wife after an internet relationship, particularly since she was underage. Yet the record shows that a form of marriage certificate confirming the wedding was submitted to the Panel by the Applicant. Moreover, the record also shows that the Immigration and Refugee Board’s own documentation concerning arranged, forced and early marriages in Bangladesh notes that “the rate of early marriage in Bangladesh is among the highest in the world”, and that “[u]nderage marriages are, however, still considered legally valid … and are permitted under religious personal laws of the country” (Immigration and Refugee Board of Canada, Research Directorate, BGD101507.E “Arranged, forced, and early marriage; the matching process and role of the matchmaker; consequences for

refusing to participate (2003-2006)" 08 August 2006). The Panel does not explain why it ignored the marriage certificate and country conditions documentation concerning underage marriages in Bangladesh.

[13] While the Panel does note that the documentary evidence indicates that tensions do exist between Shias and Sunnis in Bangladesh, it found that "there is only the merest of possibilities that he [the Applicant] would be persecuted, particularly by the balance of his family who are Sunnis." Yet the Applicant never claimed that he was being persecuted by his Sunni family members, but rather by Sunni fundamentalists who were seeking to convert him and his Shia family members through the threat of extortion. Moreover, the inference that the Applicant would somehow be immune from these conversion attempts because part of his family was Sunni is in itself unreasonable. On the contrary, it could have as easily been inferred that Sunni fundamentalists would precisely target families of mixed religious backgrounds as these may be perceived as being easier to convince to convert.

[14] Finally, the Panel found that since the Applicant returned twice to Bangladesh, that showed his alleged fear to be neither genuine, nor objectively reasonable. First, the record shows the Applicant only returned once to Bangladesh after the thugs had allegedly threatened him. Indeed, it was during his trip to Bangladesh in June of 2006, that the Applicant, according to his claim, was personally subjected to acts of extortion on the part of Sunni fundamentalist. However, he did return once after these threats had occurred. The Applicant explained that he returned only for four days in November of 2006 to visit his sick father who had been hospitalized, but he claimed that he then

took great precaution and care for his personally safety: he stayed in hiding with a friend and went to the hospital by night.

[15] It is true that a would-be refugee may no longer claim refugee status if he avails himself anew of the protection of his country of origin. However, in this case, the claimant submitted that he did not avail himself of the protection of Bangladesh, but only returned there in secret for a very short period in order to visit his ailing father. The Panel did not address these facts in its decision, and it did not explain why it gave them no weight.

[16] Furthermore, the Applicant submitted a sworn statement from the Chairman of the Husaini Trust in Dhaka confirming the Applicant's claims, as well as a news article reporting that his father's home had been attacked by Sunni fundamentalist thugs searching for him and seeking to extort money from his family. The Panel did not explain in its decision why it did not consider these documents, or if it did, why it did not give them any weight. As I noted in my decision in *Ren v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 973, [2009] F.C.J. No. 1181 (QL) at paras. 25 to 29, the Immigration and Refugee Board need not provide in its decisions explanations as to each piece of evidence and each document submitted to it, in particular where it has serious credibility concerns with respect to a claimant. Comments made by the Federal Court of Appeal in *Sellan v. Canada (Minister of Citizenship and Immigration*, 2008 FCA 381, 384 N.R. 163 are to the same effect. However, the finding as to credibility must have been properly articulated and be consistent with the evidence submitted. Such is not the case here.

[17] In *Hilo v. Canada (Minister of Employment and Immigration)* (1991), 130 N.R. 236, 15 Imm. L. R. (2d) 199, [1991] F.CJ. No. 228 (QL) (F.C.A.) (*"Hilo")*, the Federal Court of Appeal noted that, in assessing credibility, "the Board was under a duty to give reasons for casting doubt upon the appellant's credibility in clear and unmistakable terms. The Board's credibility assessment quoted *supra* is defective because it is couched in vague and general terms." I note that *Hilo* has been consistently followed by this court, indeed quite recently in *L.Y.B. v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1167, [2009] F.C.J. No. 1470 (QL) at para. 21.

[18] As noted hereinabove, I find that the principle set out in *Hilo* applies to the Panel's decision in this case. In addition, some of the findings of the Panel are clearly incompatible with the evidence submitted before it, or at the very least, the Panel did not address why such evidence was disregarded.

[19] For the foregoing reasons, I rule that the decision does not meet the standard of reasonableness, and consequently the application for judicial review is allowed.

[20] The Applicant may or may not be credible, and his story may or may not be have been made up for the purposes of seeking permanent residence in Canada. That is not an issue for this Court to decide or to comment upon. Consequently, the matter will be returned to the Immigration and Refuge Board for determination by another panel.

[21] This case raises no important question justifying certification under paragraph 74(d) of the *Immigration and Refugee Protection Act*, and consequently no such question shall be certified.

JUDGMENT

THIS COURT ORDERS AND DECIDES that:

1. The application for judicial review is allowed; and

2. The matter is returned for a new hearing and a new determination before a different panel of the Refugee Protection Division of the Immigration and Refugee Board.

"Robert M. Mainville"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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