

Date: 20050531

Docket: IMM-8239-04

Citation: 2005 FC 768

Ottawa, Ontario, May 31, 2005

PRESENT: THE HONOURABLE MR. JUSTICE BLANCHARD

BETWEEN:

IMRAN MOHAMMAD ASGHAR

Applicant

- and -

THE MINISTER OF CITIZENSHIP

AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

INTRODUCTION

[1] The applicant, Imran Mohammad Asghar, is a 22-year-old Pakistani citizen. As a family member of a police officer involved in the war on terrorism, the applicant claims he has a well-founded fear of persecution by reason of membership in a social group. He is applying for judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated September 1, 2004, that he is not a Convention refugee or a person in need of protection under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act).

[2] In terms of relief, he is asking this Court to issue a writ of *certiorari* setting aside the Board's decision and ordering a redetermination of his claim.

BACKGROUND FACTS

[3] In 1999, the applicant's father arrested some men who were members of criminal and terrorist groups for the murder of the senior police superintendent (superintendent) in Gujranwala. The detainees were released pending their trial. In the days following their release, they tried to kidnap the applicant, threatened his father and killed his uncle. These incidents were reported to the police.

[4] In 2000, the applicant's father took early retirement. In February 2001, the applicant left Pakistan for the United States on a passport with a multi-entry visa. He studied and worked in New York City until February 2003. When the new American registration law came into force, the applicant left the US because he was afraid of being deported. He came to Canada and claimed refugee status.

[5] In March 2003, the applicant's father testified at the trial of the detainees he had arrested six years earlier. An attempt was made on his life. No arrests were made. After this incident, the applicant's father and brother moved to Abu Dhabi and are still living there.

[6] The Board rejected the applicant's claim for refugee protection on September 1, 2004. An application for leave to file this application for judicial review was allowed on January 26, 2005.

IMPUGNED DECISION

[7] First, the Board found that the applicant did not establish a connection between his claim and the persecution grounds described in section 96 of the Act. The Board decided that there was no nexus between the applicant's claim that he is afraid of being persecuted by criminals who are seeking revenge against his father and one of the grounds described in section 96 of the Act.

[8] In addition, with respect to the determination under section 96, the Board found that the applicant could not base his claim on his membership in an identifiable social group, the family, because a connection with one of the persecution grounds in section 96 cannot be established in the absence of an underlying ground for the refugee claim: *Serrano v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 570, online: QL.

[9] The Board also found that subsection 97(1) of the Act did not apply to the facts in this case. The Board felt that the applicant was not credible with respect to central elements of his claim.

[10] Finally, the Board determined on the basis of the record that state protection is available in Pakistan. The Board ruled that the applicant did not provide clear and convincing evidence that Pakistan is unable to protect him. Consequently, the applicant's claim for refugee protection was rejected.

ISSUES

[11] The following issues were raised as part of this judicial review:

1) Did the Board err in finding that the applicant was not a Convention refugee within the meaning of section 96 of the Act?

2) Did the Board err in its assessment of the evidence and in finding that the applicant was not a person in need of protection under subsection 97(1) of the Act?

3) Did the Board err in finding that Pakistan is able to protect its citizens and, more specifically, the applicant?

ANALYSIS

1) Did the Board err in finding that the applicant was not a Convention refugee within the meaning of section 96 of the Act?

[12] Although opinion in case law of this Court is divided on the standard of review that should be applied to decisions concerning a nexus with persecution grounds, which involves questions of mixed fact and law, I recently ruled in *La Hoz v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 762, that the appropriate standard is reasonableness *simpliciter*. I will follow the same reasoning in this case and apply the reasonableness *simpliciter* standard.

[13] The Board ruled that the applicant could not base his claim on membership of the family as a particular social group for lack of a ground under section 96 of the Act serving as a basis for the refugee claim. The Board found that the persecution alleged in this case was a personal vendetta against the applicant's father, which consisted in intimidation and attacks against his family.

[14] The notion of particular social group must be assessed while keeping in mind that it is part of the "general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative": *Ward v. Canada (Attorney General)*, [1993] 2 S.C.R. 689. The Supreme Court of Canada identified three potential categories of social groups in *Ward, supra*:

- (1) Groups defined by an innate, unchangeable characteristic;
- (2) Groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association;
- (3) Groups associated by a former voluntary status, unalterable due to its historical permanence.

[15] The applicant argues that the Board erred in concluding that there was no nexus between his claim and the persecution grounds described in section 96 of the Act. He maintains that there is a connection between his claim and section 96 because:

(a) He was persecuted for reasons of membership in a particular social group, namely, children of Pakistani police officers;

(b) He was persecuted for reasons of membership in a particular social group, namely, his family, because:

(i) His father was persecuted for reasons of membership in a particular social group, the Pakistani police;

(ii) His father was persecuted for reasons of political opinion.

(a) Was the applicant persecuted for reasons of membership in a particular social group, namely, children of Pakistani police officers?

[16] First, the applicant alleges that the Board erred in law in failing to consider that he belongs to a particular social group, because his father was a Pakistani police officer. The applicant argues that, in its guidelines, the Board has incorporated a ruling of this Court in *Badran v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 437, online: QL, recognizing that children of police officers-as such labelled as anti-terrorism supporters-are members of a particular social group.

[17] While it is true that the guideline the applicant is referring to provides an example of a recognized particular social group, children of police officers, who are labelled as anti-terrorism supporters, I must stress that this guideline is based on a decision of this Court in *Badran, supra*, dealing with the issue of state protection, and there was evidence that the authorities indeed were unable to protect the children of Egyptian police officers. In this case, however, the applicant did not provide any evidence showing that children of Pakistani police officers are members of a particular social group that is threatened by terrorists. Furthermore, as the guideline is not law, it need not be followed when the circumstances are such that a different analysis is appropriate: *Narvaez v. Canada (Minister of Citizenship and Immigration)*, [1995] 2 F.C. 55.

(b) Was the applicant persecuted for reasons of membership in a particular social group, namely, his family?

[18] Second, the applicant argues that the Board erred in finding that he is not a member of a particular social group, the family, within the meaning of section 96 of the Act. He maintains that he was persecuted because of his family connections. As a police officer, the applicant's father arrested suspects with ties to terrorist groups and testified at their trial, which put him in danger and made the applicant a victim of persecution. According to the applicant, his father was persecuted because of his membership in a particular social group, the Pakistani police, and his political opinion.

[19] For a family to be considered a social group under section 96 of the Act, the persecution suffered by a person must be attributable directly to the fact that he is a member of that family: *Casetellanos v. Canada (Solicitor General)*, [1995] 2 F.C. 190. There has to be a clear nexus between the persecution that is being levelled against one of the family members and that which is taking place against the others: *Al-Busaidy v. Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 226, online: QL.

[20] Case law has clearly established that a claim for refugee protection cannot be based solely on family membership; it must be supported by an underlying ground for persecution that is recognized by the Convention: *Serrano, supra*.

The applicant is asking me to hold that everyone who fears persecution solely because of a family connection may be entitled to the protection of the Convention. I think that would stretch the category of "particular social group" far beyond its proper

limits. I do not accept that family connection is an attribute requiring Convention protection, in the absence of an underlying Convention ground for the claimed persecution. I conclude that in the context of the facts of this case, the respondent's position is a better reflection of the objectives of the Convention than the applicants' position.

[21] I find that the Board did not err in relying on this principle. I therefore have to determine whether it erred in finding that the underlying ground for the applicant's claim, which is related to his family connections, was not persecution within the meaning of section 96 of the Act. As indicated above, there must be a connection between persecution against a family member, the applicant's father, and the persecution levelled against other members of the family unit, that is, the applicant: *Casetellanos, supra*.

[22] The applicant claims that his father was persecuted because of his membership in a particular social group, the Pakistani police, and perceived political opinion, since he was a police officer who was involved in the war against terrorism.

(i) Was the applicant's father persecuted for reasons of membership in a particular social group, namely, the Pakistani police?

[23] I will start with the applicant's submission that his father was persecuted because of his membership in a particular social group, the Pakistani police. In the course of his work, he arrested suspects with ties to terrorist groups. They threatened him and his family because he was called to testify at their trial.

[24] There is evidence in the record that people who are called to testify at trials in Pakistan are often victims of criminal acts perpetrated by members of terrorist groups who try to prevent them from appearing as witnesses. In my view, however, this evidence specifically indicates that these individuals are targeted by criminals who try to eliminate or silence them. As the Board concluded, and as the respondent submits, these are acts of vengeance, not persecution within the meaning of section 96 of the Act. The motives of these persecutors are criminal and are not covered by the Convention.

[25] Case law from this Court has consistently established that the fear of reprisals motivated by vengeance and being a victim of a criminal act are not equivalent to a persecution ground under section 96: *Rawji v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 1773, online: QL; *Mason v. Canada (Secretary of State)*, [1995] F.C.J. No. 815, online: QL; *Mousavi-Samani v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 1267, online: QL; *Montchak v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 111, online: QL; *Klinko v. Canada (Minister of Citizenship and Immigration)*, [2000] 3 F.C. 327. Victims of criminal acts therefore do not belong to a particular social group.

[26] In light of the categories identifying social groups in *Ward, supra*, I disagree with the applicant and do not find that the Board erred in deciding that his father, a Pakistani police officer who was called to testify as a prosecution witness, was not persecuted within the meaning of section 96 of the Act, since he was not a member of an identifiable social group.

(ii) Was the applicant's father persecuted for reasons of political opinion?

[27] I cannot conclude either that, because of his job as a police officer involved in the war on terrorism, the applicant's father was persecuted because of his political opinion. A broad interpretation of the term "political opinion" should be adopted: *Klinko, supra*; *Zhu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 F.C. 379. In *Ward, supra*, the state was not an accomplice to Mr. Ward's alleged persecutors. Mr. Ward was afraid of being persecuted by the Irish National Liberation Army, not the state, for helping the hostages he was guarding to escape. According to the Supreme Court, a political opinion related to the proper limits to means used for the achievement of political change can be imputed from this act. An individual can be considered to be a threat by a group that opposes the government because of his perceived political opinion. Moreover, the Court found in *Klinko, supra*, that widespread government corruption, which the claimant denounced, is a "matter in which the machinery of state, government, and policy may be engaged".

[28] In light of the evidence in the record, I nevertheless feel that the applicant's father's acts of arresting criminals and testifying against them do not equate to expressing a political opinion that engages the machinery of state within the meaning of *Ward, supra*. In the case at bar, the persecutors were members of criminal and terrorist groups and were not remotely linked to the machinery of state. In my view, the Board correctly found that the criminal groups were not persecuting the father because of imputed political opinion, but, rather, because they wanted to eliminate him to prevent him from testifying against them. The applicant's father was carrying out his police duties, and there is no evidence that could have led the Board to find he was motivated by a political opinion that could have been ascribed to him. As a result, the Board did not err in finding there were no grounds described in section 96 of the Act (e.g., political opinion) underlying the allegations of persecution with respect to the applicant's father.

[29] In light of the foregoing, I feel that the Board did not err in concluding that the applicant's father was not persecuted within the meaning of section 96 of the Act and that the applicant could therefore not base his claim on his membership in the

family as a particular social group, since there are no underlying grounds within the meaning of section 96 of the Act for the claim for refugee protection.

[30] According to Dawson J. in *Gonzalez v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 345, when the primary victim of persecution does not come within the Convention refugee definition, any derivative Convention refugee claim based on family group cannot be sustained. To find otherwise would result in an anomalous situation.

To find otherwise would be to conclude that persecutory treatment directed to family members in no way related to discrimination or fundamental human rights would attract the protection of the Convention. For example, if children were the victims of persecutory conduct as a result of a parent's failure to forego a commercial opportunity or to cheat in a sporting event, I do not believe that it is intended that the Convention should be engaged to protect the children. That does not mean that protection ought not to be afforded, or that it would not be afforded, but simply that the source of the protection ought not to be the Convention.

This interpretation of "particular social group" also avoids the anomaly that Ms. Gonzalez's parents, as the victims of crime, can not claim the protection of the Convention, but Ms. Gonzalez could, solely because of the relationship with her parents.

[31] These statements are especially relevant in this case. The applicant did not meet the burden of proving that the principal victim, his father, meets the definition of Convention refugee. The applicant's derivative claim therefore cannot be granted for lack of nexus with the persecution grounds described in section 96 of the Act. As a result, the Board's decision—that the applicant's father was not the victim of persecution within the meaning of section 96 of the Act and that, consequently, the applicant's fear of persecution because of his family connections was unfounded—is not based on an error that warrants the Court's review.

(2) Did the Board err in its assessment of the evidence and in finding that the applicant was not a person in need of protection under subsection 97(1) of the Act?

[32] The applicant is also contesting the Board's decision that he was not credible because of inconsistencies between his testimony and the documentary evidence adduced.

[33] In judicial review, findings of fact and credibility and evidentiary assessments by the Board are reviewed in accordance with the criteria established in paragraph 18.1(4)(d) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, 2002, c. 8:

18. Grounds of review

(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

18. Motifs

(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :

d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;

[34] This standard has been identified as being equivalent to the standard of patent unreasonableness: *Canadian Pasta Manufacturers' Association v. Aurora Importing & Distributing Limited*, [1997] F.C.J. No. 115, online: QL.

[35] The Board indicated it had serious misgivings about the applicant's credibility given the discrepancies between his testimony and documentary evidence relating to central points of his claim, such as his attempted kidnapping, the murder of his uncle, his father's testimony at the trial for the superintendent's murder and the attempted murder of his father.

[36] The Board also had doubts about the applicant's credibility regarding his explanations for not claiming refugee status in the United States. It found that the applicant delayed claiming refugee status. Furthermore, it did not believe that an academic adviser suggested to the applicant that he stay in the US even if his visa was expired.

[37] The applicant is contesting this finding and challenging the Board's determination that he was not credible with respect to the following:

- The time of his attempted kidnapping;
- Whom-his parents or his uncle-the college headmaster called after the attempted kidnapping;
- The fact that his uncle's murder was an attempt against his father;
- The reliability of the medical certificates;
- Time spent in the US before claiming refugee status and advice given by his academic adviser.

[38] The applicant argues that the Board must assess all evidence corroborating his story, and it would commit an error if it relied selectively on other documentary evidence: *Tung v. Canada (Minister of Employment and Immigration)*, [1991] F.C.J. No. 292, online: QL. He also argues that the Board should not come to negative finding because there is no documentary evidence corroborating his testimony: *Attakora v. Canada (Minister of Employment and Immigration)*, [1989] F.C.J. No. 444, online: QL. Finally, the applicant holds that the Board must respect his testimony and not distort it: *Maruthapillai v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 761, online: QL.

[39] As the respondent points out, it is settled law that the Board is in a better position than this Court to assess credibility issues. Nevertheless, in my view, the Board's finding that the applicant was not credible is patently unreasonable. It dismissed the applicant's reasonable and corroborated answers to the Board's questions without justification.

[40] The Board preferred to rely on the Immigration officer's notes, which report that the attempted kidnapping of the applicant took place in the evening, at around 6 p.m., rather than on the applicant's testimony and the official police report, both of which indicate that the incident took place at around 4 p.m. The fact that the Board challenged the applicant's credibility on one detail, without explaining why it gave preference to the officer's notes rather than to the applicant's testimony, which was corroborated by the official police report, is patently unreasonable.

[41] It was also patently unreasonable of the Board to find that the applicant was not credible with respect to the issue of determining who, his parents or his uncle, had been contacted by the college headmaster following the attempted kidnapping. The applicant explained that the college headmaster could not reach his parents and contacted his uncle instead, since the headmaster had the latter's telephone number. The Board did not explain why it did not accept this explanation, preferring simply to find that the applicant was not credible on the basis of minor discrepancies in the documentary evidence for which the applicant provided reasonable explanations when he testified.

[42] The Board essentially relied on details in finding that the applicant was not credible. It did not take into account reasonable explanations the applicant provided when he testified, nor did it justify why it dismissed them. In spite of the fact that this Court must show great deference to the Board's findings related to credibility, I feel that the intervention of this Court is required in this case because of the Board's patently unreasonable conclusions.

3) Did the Board err in finding that Pakistan is able to protect its citizens and, more specifically, the applicant?

[43] Since an objective of the refugee scheme is to protect people from countries that are unable to protect their citizens, determining whether a state can protect a refugee claimant is a key question. If a refugee claimant's country of origin is able to protect him, the claim is rejected.

[44] The presumption in this matter is that the state is able to protect its citizens unless there is a breakdown of the state apparatus: *Ward, supra*. A refugee claimant must consequently provide clear and convincing evidence that the state is unable to protect him or her. It is insufficient for the applicant to show that the government has sometimes been ineffective in protecting people in his or her situation: *Atakurolo v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 463, online: QL.

[45] In *Chaves v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 193, Tremblay-Lamer J. applied a pragmatic and functional approach, deciding that the notion of state protection is a question of mixed fact and law, and consequently the appropriate standard is reasonableness *simpliciter*. I feel that this is the appropriate standard of review in this case.

[46] In the case at bar, the Board ruled that, even if it could be assumed that the applicant was credible with respect to fundamental elements of his claim, there was sufficient evidence in the record to find that Pakistan provides state protection. In the Board's view, the applicant declared that the police intervened in his attempted kidnapping, that two police officers were assigned to protect his family from December 1999 to March 2000 and that all the incidents in this case were reported to the police.

[47] Furthermore, subsection 21(3) of Pakistan's *Anti-Terrorism Act, 1997*, revised and expanded in 2002, stipulates that the government provides judges, attorneys and witnesses with protection in investigations, legal proceedings initiated under the Act and thereafter if deemed necessary.

[48] While it is true, as the applicant pointed out, that the Board recognized that some police officers or other officials in the Pakistani judicial system have been victims of attacks, I cannot conclude that the Board erred in finding it had not been proven that Pakistan was unable to protect the applicant. In my view, it ruled in keeping with the evidence in the record, which indicates that the applicant and his family asked for the state's protection and that measures were taken. The police's failure to prevent the attacks is not an indication of a lack of state protection. Basically, the applicant did not provide clear and convincing evidence to disprove the presumption of state protection. The Board's decision on this issue is reasonable.

CONCLUSION

[49] In spite of the fact that the Board's finding with respect to the applicant's credibility is patently unreasonable, this application for judicial review must be dismissed, as the Board handed down a reasonable decision on the issue of state protection. The application for judicial review is therefore dismissed.

[50] The applicant submitted a question for certification that has already been certified in *Gonzalez, supra*. He formulated it as follows: Can a refugee claim succeed on the basis of a well-founded fear of persecution for reason of membership in a particular social group that is a family, if the family member who is the principal target of the persecution is not subject to persecution for a Convention reason?

[51] The respondent argues that a question should be certified when the judge feels it transcends the interests of the immediate parties to the litigation and contemplates issues of broad significance or general application, but it must also be one that is determinative of the appeal: *Liyanagamage v. Canada (Minister of Citizenship and Immigration)*, [1994] F.C.J. No. 1637, online: QL. According to the respondent, the question in this case does not meet these criteria.

[52] In my view, certifying this question has no impact on the outcome of this case. The Board handed down a reasonable decision with respect to state protection in Pakistan, which resulted in the rejection of the refugee claim. In contrast, *Gonzalez, supra*, is silent on the issues of internal flight alternative and state protection, which are determinative of the issue of refugee protection.

[53] For these reasons, no serious question of general importance will be certified.

ORDER

THE COURT ORDERS THAT:

1. The application for judicial review is dismissed.
2. No serious question of general importance is certified.

"Edmond P. Blanchard"

Judge

Certified true translation

Jason Oettel

FEDERAL COURT

SOLICITORS OF RECORD

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