

Date: 20050809

8779-04

Docket: IMM-

1080

Citation: 2005 FC

Ottawa, Ontario, this 9th day of August 2005

PRESENT: THE HONOURABLE MR. JUSTICE MARTINEAU

BETWEEN:

SYED TABISH RAZA ZAIDI

NUZHAT FATIMAH TEHZEEB

SAKINA TABISH ZAIDI

ants

Applic

and

THE MINISTER OF CITIZENSHIP

AND IMMIGRATION

ent

Respond

REASONS FOR ORDER AND ORDER

[1] This is an application for judicial review under section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) of a decision of the Refugee Division of the Immigration and Refugee Board (the Board) dated August 31, 2004 wherein the Applicants were found not to be "Convention refugees" or "persons in need of protection" pursuant to sections 96 and 97 of the Act.

[2] Essentially, the Board determined that the Applicants are not credible. The Applicants are Pakistani nationals who claim that they have been singled out by the Sunni Muslim extremist group, Sipah-e-Samba (SSP). The Applicants are Shia Muslim by religion. The female Applicant relied on the narrative of the male Applicant.

[3] The present application must fail despite the able presentation of Applicants' counsel. The Applicants have failed to satisfy this Court that the Board's findings of fact are arbitrary or capricious, that the Board ignored relevant evidence, or that it otherwise erred in law in dismissing the Applicants' claims for protection. In this regard, I accept all the arguments that have been made by the Respondent in his memorandum of argument. I will therefore limit myself to the following succinct observations.

[4] First, the error made by the Board with respect to its finding that the female Applicant re-availed on numerous occasions to Pakistan (which is clearly wrong) is not determinative in this case. When the primary victim of persecution does not come within the definition of a Convention refugee, any derivative refugee claims based on family group cannot be sustained (*Rodriguez v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 1246 (F.C.T.D.) (QL)). On another note, the "unfairness" argument raised by the Applicants' counsel at the hearing before this Court, and resulting from the female Applicant's expectation to receive a distinct decision from the Board is not made in the Applicants' memorandum of argument and cannot be considered. In any event, based on the evidence on record, the conclusion that the female Applicant is not a "Convention refugee" or a person in need of protection is not patently unreasonable.

[5] Second, the Board was allowed to conclude that the Applicants had failed to provide credible or trustworthy testimony or alternate evidence to establish the material aspects of their claim that is, that they would be persecuted upon their return to Pakistan on the basis of being Shia Muslims. In this regard, based on the evidence on record, the Board could reasonably conclude that the Applicants did not have a rational subjective fear (*Vairamuthu v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1913 (F.C.T.D.) (QL); *Gamassi v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1841 (F.C.T.D.) (QL); *Bellov. Canada (Minister of Citizenship and Immigration)* [1997] F.C.J. No. 446 (F.C.T.D.) (QL)).

[6] Third, delay is an important factor in the assessment of a refugee claim because it addresses the existence of a subjective fear of persecution which is an essential element of a Convention refugee claim (*Cruz v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 1247 (F.C.T.D.) (QL)). In this regard, the Applicants' assertion that the Board erred in its analysis of the delay is unsupported by the principles set out in the case law (*Ayob v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1411; [2004] F.C.J. No. 1707 (F.C.) (QL)). Moreover, it was reasonably open to the Board to take a dim view of the male Applicant's numerous re-availments to Pakistan. In both instances, the failure to accept the male Applicant's explanations for delay or re-availment is based on the evidence, and this Court should not substitute its opinion in this regard.

[7] Four, I have also considered the arguments made by the Applicants with respect to other challenged parts of the impugned decision (ie. the "fire incident" and the lack of reasons with respect to the assessment of the documentary evidence). Considering the Applicants' lack of subjective fear, and the fact that the evidence linking the fire with the extremists is not conclusive, the Board's decision must be allowed to stand in the circumstances.

[8] Finally, I have considered the following question posed for certification by the Applicants' counsel:

Is delay an issue where the Applicant has been pursuing another legal remedy that would allow him to remain in the country?

[9] In my opinion, absent of a proper record, this question is not determinative. Moreover, in my view of its factual nature, it does not raise a question of general importance.

ORDER

THIS COURT ORDERS that the present application for judicial review be dismissed. No question is certified.

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FEDERAL COURT

Names of Counsel and Solicitors of Record

DOCKET: IMM-8779-04

STYLE OF CAUSE: *Syed Tabish Raza Zaidi et al. v. The Minister of Citizenship and Immigration*

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: August 3, 2005

REASONS FOR ORDER BY: MARTINEAU J.

DATED: August 9, 2005

APPEARANCES BY:

Mr. Joseph Kary For the Applicant

Ms. Angela Marinos For the Respondent

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