

Federal Court



Cour fédérale

Date: 20151118

Docket: IMM-1426-15

Citation: 2015 FC 1288

Ottawa, Ontario, November 18, 2015

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Applicant

and

MAQBOOL AHMED

Respondent

JUDGMENT AND REASONS

[1] After a long career with a paramilitary organization known as the Pakistan Rangers, Maqbool Ahmed came to Canada seeking refugee protection, claiming to have a well-founded fear of persecution in Pakistan because of his Ahmadi Muslim faith. The Board accepted his refugee claim, and the Minister now seeks judicial review of the Board's decision, asserting that the Board erred by failing to inquire into whether Mr. Ahmed should be excluded from the protection of the *Refugee Convention* for having committed human rights abuses against Pakistani civilians.

[2] At issue in this application is whether the information that was before the Board relating to Mr. Ahmed's paramilitary career was sufficient to trigger an obligation on the part of the Board to inquire into whether he was excluded from the refugee definition under Article 1F(a) of the *Refugee Convention*. Also at issue is whether the Board treated the Minister unfairly by failing to provide him with notice of the exclusion issue prior to deciding that Mr. Ahmed was a Convention refugee.

[3] For the reasons that follow, I have concluded that the Board erred by failing to provide the Minister with notice of the potential exclusion issue, and by failing to inquire into the exclusion question. Consequently, the application will be granted.

I. Background

[4] The documents provided to the Board in connection with Mr. Ahmed's refugee claim disclosed that Mr. Ahmed joined the Sindh branch of the Pakistan Rangers in April of 1993. After his basic training, he became a Sub-Inspector with the Rangers, a position he held from August of 1993 to July of 1996, and then an Inspector from July of 1996 to September of 2003. In both positions Mr. Ahmed performed law-enforcement duties for the Rangers, and, as an Inspector, he supervised three Sub-Inspectors. In September of 2003, Mr. Ahmed became a Deputy Superintendent of the Pakistan Rangers. In that position he supervised three Inspectors and nine Sub-Inspectors. He also served as a Basic Training Instructor, but never participated in active combat.

[5] The Board found that Mr. Ahmed and his family were Ahmadi Muslims, and that their claims to have been subjected to discrimination and abuse because of their religion were credible. The Board further found that there was ample documentary evidence supporting the

proposition that Ahmadi Muslims suffer persecution in Pakistan. As a result, the Board found that Mr. Ahmed and his family were Convention refugees.

[6] The Board did not refer to Mr. Ahmed's service in the Pakistan Rangers in its decision, nor did it ask Mr. Ahmed any questions regarding his time in the organization during the hearing. The National Documentation Package that was available to the Board also did not contain any information about the Pakistan Rangers' alleged involvement in crimes against humanity.

II. Standard of Review

[7] The Minister submits that in failing to inquire into whether Mr. Ahmed was excluded from the refugee definition under section 98 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 and Article 1F of the *Refugee Convention*, the Board failed to exercise its jurisdiction. The Board also acted unfairly by failing to provide the Minister with notice of the potential exclusion issue as required by Rule 26 of the *Refugee Protection Division Rules*, SOR/2012-256. Given that these are issues of jurisdiction and procedural fairness, the Minister submits that the standard of review to be applied in relation to both issues is that of correctness.

[8] While I am not persuaded that the Minister's first issue is a "true question of jurisdiction" that would attract the correctness standard of review, I agree that the question of procedural fairness is one that is to be decided on the correctness standard: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at para. 43, [2009] 1 S.C.R. 339.

III. Analysis

[9] The purpose of the exclusion provisions under Article 1F of the Refugee Convention is to ensure that refugee protection is not accorded to those responsible for the persecution of others:

Ezokola v. Canada (Minister of Citizenship and Immigration), 2013 SCC 40 at para. 34, [2013] 2 S.C.R. 678.

[10] It is the responsibility of the Board to ensure that Canada meets its obligations under the *Refugee Convention* by not providing refuge to individuals for whom there are serious reasons for considering that they have committed crimes against humanity or are guilty of acts contrary to the purposes and principles of the United Nations: *Canada (Minister of Citizenship and Immigration) v. Nwobi*, [2014] F.C.J. No. 544 at para. 19, 456 F.T.R. 30.

[11] The RPD is an inquisitorial body: *Chairperson's Guideline 7 Concerning Preparation and Conduct of a Hearing in the Refugee Protection Division*. As such, it is required to determine whether section 98 of *IRPA* applies to the applicant before it: *Velasquez v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 273 at para. 15, 429 F.T.R. 143. This obligation exists whether or not the Minister elects to intervene in a given case: *Velasquez*, above at paras. 2 and 15.

[12] Pakistan is a refugee-producing country. While the primary focus of the country condition information in the Certified Tribunal Record was on the oppression of religious minorities in Pakistan (including Ahmadi Muslims), there was also evidence in the record indicating that the State of Pakistan and Pakistani police are involved in human rights abuses.

[13] Mr. Ahmed provided details regarding his paramilitary service with the Pakistan Rangers in the Basis of Claim form that was provided to the Board. Amongst other things, he noted that he worked in the Rangers' "Field Security Wing", that he was involved in maintaining law and order, and that his duties included assisting the police.

[14] In my view, this information, coupled with the evidence regarding human rights abuses committed by the State of Pakistan and the Pakistani police, should have alerted the Board to the possibility that Mr. Ahmed might be excluded from the refugee definition under Article 1F of the *Refugee Convention*, so as to trigger the Board's obligation to inquire into the question. Its failure to do so makes the decision granting refugee protection to Mr. Ahmed unreasonable.

[15] It is true that there was no information in the National Documentation Package for Pakistan specifically addressing the conduct of the Pakistan Rangers. As noted, however, there was information in the record regarding the abuses of other elements of the Pakistani security apparatus, and it was open to the Board to seek additional information regarding the Pakistan Rangers from the Immigration and Refugee Board's Research Directorate in order to determine whether that organization had also been suspected of any conduct that could have led to Mr. Ahmed's exclusion: *Chairperson's Guideline 7*, above at section 1.3.

[16] I am also satisfied that it was unfair of the Board to proceed with the hearing into the inclusion aspects of Mr. Ahmed's refugee claim without first providing notice of the possible exclusion to the Minister in accordance with Rule 26 of the *Refugee Protection Division Rules*.

[17] Rule 26(1) provides that where the RPD becomes aware in advance of a hearing that there is a possibility that Article 1F of the *Refugee Convention* applies to the claim, it must notify the Minister in writing without delay, and provide the Minister with any relevant information in its possession. Rule 26(2) imposes a similar obligation on the Board when a concern with respect to exclusion arises in the course of a hearing.

[18] Mr. Ahmed submits that in the course of processing his application for refugee protection, the Minister was provided with all of the information that the Minister now says triggered the obligation on the Board to inquire into the exclusion issue. Not only was the claim referred to the Board for a hearing, it was also open to the Minister to intervene in the case if he deemed it appropriate to do so. Having failed to do so, Mr. Ahmed says that the Minister should not now be able to come before the Court with information regarding the Pakistan Rangers that it failed to provide to the Board during his refugee hearing.

[19] I am not, however, reviewing the decision of the Minister to intervene or not intervene in this case. I am reviewing the failure of the Board to provide notice to the Minister as required by Rule 26(1). Given my finding that the information that was before the Board was sufficient to trigger the Board's obligation to notify the Minister of the potential exclusion issue, I am satisfied that it was unfair for the Board to proceed to a hearing into the merits of Mr. Ahmed's refugee claim without having first provided the Minister with the requisite notice.

[20] The Minister has provided an affidavit in support of his application for judicial review that includes new evidence relevant to the issue of exclusion. This is a Human Rights Watch report that details the human rights abuses that have allegedly been carried out by the Pakistan Rangers. Mr. Ahmed objects to the admission of this evidence on this application on the basis that it was not before the Board when it made the decision in question. He argues that the Board cannot be faulted for failing to act on evidence that was not before it when it made the decision under review, submitting that it is not open to the Minister to now try to get evidence in through the back door that he had neglected to introduce through the front door.

[21] It is true that applications for judicial review are ordinarily considered on the basis of the record that was before the original decision-maker. Additional evidence may, however, be admitted in limited circumstances where, for example, there is an issue of procedural fairness or jurisdiction: see *Ontario Assn. of Architects v. Assn. of Architectural Technologists of Ontario*, 2002 FCA 218, at para. 30, [2003] 1 F.C. 331. Such is the case here.

[22] Not every procedural deficiency will, however, require a new hearing. The production of evidence that could have changed the outcome of the hearing will assist in deciding whether the denial of procedural fairness in a given case was sufficiently serious as to require a new hearing: *Lin v. Canada (Minister of Citizenship and Immigration)* (1999), 171 F.T.R. 289 at para. 23, [1999] F.C.J. No. 1148.

[23] In this case, the Human Rights Watch report attributes very serious human rights abuses to the Pakistan Rangers. It does not follow from this that Mr. Ahmed would necessarily be excluded from the protection of the *Refugee Convention*. It is, however, incumbent on the Board to inquire into the nature of Mr. Ahmed's activities with the Pakistan Rangers in order for it to be able to determine whether he had voluntarily made "a significant and knowing contribution" to the crimes or criminal purposes of the organization so as to exclude him from the refugee definition: *Ezokola*, above at para. 84.

IV. Conclusion

[24] For these reasons, the application for judicial review is granted and the matter is remitted to a differently constituted panel for re-determination in accordance with these reasons. This case does not raise exceptional circumstances that would entitle the respondent to his costs. I agree with the parties that the case is fact-specific, and does not raise a question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, and the matter is remitted to a differently constituted panel for re-determination in accordance with these reasons.

"Anne L. Mactavish"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1426-15

STYLE OF CAUSE: THE MINISTER OF CITIZENSHIP AND
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