Date: 20060613

Docket: IMM-4952-05

Citation: 2006 FC 746

Ottawa, Ontario, June 13, 2006

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

YAWAR ABBAS and MONA FATIMA

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

Background

[1] On July 18, 2005, the Refugee Division of the Immigration and Refugee Board (the tribunal) rejected the refugee claims of Yawar Abbas and Mona Fatima (the applicants) a married couple, citizens of Pakistan and Shia Muslims to be Convention Refugees or persons in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act* (the Act).

[2] Yawar Abbas, who is thirty-two years of age and an Information Technologist, is the principal claimant; Mona Fatima relies on his narrative.

[3] The basis of his fears are anti-Shia organizations in Pakistan composed of Sunni Muslim extremists namely Sipah-e-Sahaba (SSP). He joined three Shia organizations between 1988 and 1994. The first organization was a Shia Boy Scouts Group, (IBS) the second in 1994 was a Shia social group (KPSIAJ) and the third, that same year, a Shia International Business Association (JIBA).

[4] In 1995, the President and nine members on the management committee of KPSIAJ were killed and in May 2000, the Vice-President of that organization and two of his friends were also killed. The violence was traced to Sunni extremists.

The Tribunal's Decision

[5] The couple left Pakistan in January of 2002 arriving that same month in the United States where the principal claimant obtained a work permit visa. However, in June 2002, he lost his job and could no longer renew his work permit. The couple remained in the United States from July 2002 until March 2003 without status. That month, they came to Canada immediately making refugee claims.

[6] The tribunal rejected the claims of the couple for a number of reasons:

> 1. Basing itself on documentary evidence related to Shia victims in Pakistan, the tribunal found Mr. Abbas did not have a high enough profile to attract persecution from the Sunni extremists since: (1) the organizations which he was a member of were not involved in religious events, preaching or similar activities or with

policy; (2) he has never been arrested due to his involvement in the three organizations and (3) according to his own testimony he has never been attacked by any of the Sunni extremist organizations he fears although he testified he received some threats over the phone which were never acted upon.

2. There was an inconsistency as to when his problems began; 1989 when he was in high school or 1998-1999. This inconsistency led the tribunal to impune his credibility about receiving threats over the telephone, some people throwing stones at his group and writing slogans on the wall of the house occupied by the Shia organization he belonged. The tribunal concluded the principal claimant had failed to establish these incidents occurred or that they would have, singly or cumulatively amounted to serious harm, including persecution or a threat to life.

3. The applicants filed a letter from a Mr. Hudda, a Minister of Religion who stated the claimants were in significant danger should they return to Pakistan. The principal claimant testified Mr. Hudda was from Uganda. The tribunal gave no weight to the letter because Mr. Abbas could not remember when Mr. Hudda had come to preach in Pakistan and had not established his expertise on country conditions for Shia in that country.

4. State protection was available in Pakistan because major anti-Shia groups had been banned and the principal claimant had not provided documentary evidence police were involved in any anti-Shia action. He had never personally asked for

> protection from the police and the tribunal discredited the one instance alleged by him of asking the police for help during his involvement with the Boy Scouts.
>
> 5 The couple's behaviour in the United States, in the eyes of the tribunal, undermined their fear of returning to Pakistan after being told by their U.S. lawyer in April 2002 their chances of making a successful refugee claim there was not very high and after 9/11 they risked being jailed and deported to Pakistan. The tribunal was critical that they took no steps to regularize their status in the United States or leave for a safe third country after receiving their lawyer's advice.

[7] I think it is fair to conclude, in rejecting the refugee claim, the tribunal did not make a general finding of credibility against the principal applicant.

Analysis

[8] The principal argument advanced by counsel for the applicants was a reasonable apprehension of bias. The applicants argue the tribunal's decision should be quashed because its sole presiding member asked so many irrelevant questions over a substantial part of the hearing of their claim that a reasonable person would conclude its conduct raised a reasonable apprehension of bias the tribunal could not render an impartial decision.

[9] I note, at the hearing, the tribunal did not have the benefit of a Refugee Protection Officer to assist her. On the other hand, the applicants were represented by legal counsel.

[10] The test which must be met to make out a claim of reasonable apprehension of bias on the part of an administrative tribunal is well-known. I quote the often cited passage written by Justice de Grandpré in *Committee for Justice and Liberty* v. *Canada (National Energy Board)*, [1978] 1.S.C.R. 369:

> …the apprehension of bias must be a reasonable one held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information.
>
> ...that test is "what would an informed person, viewing the matter realistically and practically-and having thought the matter through- conclude. Would he think that it was more likely than not that [the tribunal] would consciously or unconsciously, not decide fairly."

[11] From a review of the hearing transcript, it is apparent the tribunal substantially intervened principally into two areas: (1) the tribunal probed into how the principal applicant's sister made a refugee claim in Canada and what was the nature of that claim; (2) the tribunal inquired into the principal applicant's opinions regarding the verdicts of some Ayatollahs, the meaning and consequences of fatwas, whether Shias' condemned violence and how the principal applicant beat himself observing a major Shia holiday.

[12] Counsel for the Minister conceded the tribunal's questioning about his sister's refugee claim in Canada was meandering particularly on the point of how her lawyer had been retained and whether that lawyer was the same person as the principal applicant's lawyer. However, she argued the inquiry into his sister's claim was relevant because of section 49 of the *Refugee Protection Division Rules* concerning the automatic joining of, *inter alia*, brother and sister claims.

[13] Counsel for the Minister also acknowledged the tribunal's questioning on the Iranian Ayatollhas views of fatwas' and the principal applicant's opinion on obeying them was irrelevant. She also stated the tribunal's other inquiries on how the principal applicant observed his religion was out of line. She argued no reasonable apprehension of bias had been shown because the irrelevant inquiry had not been used against the applicants and it could not be said the questioning revealed the tribunal's mind was tainted to the extent the tribunal could not make an independent and fair decision.

[14] As *indicia* the tribunal could not make an impartial decision in this case, counsel for the applicants took me to transcript pointing out the following:

- At page 584 of the Certified Tribunal Record (CTR) when the principal claimant provided two versions of his sister's lawyer's name, the tribunal indicated his credibility may be affected;
- At page 586 of the CTR, the tribunal expressed its frustration about not knowing the nature of his sister's claim for refugee status in Canada;
- At page 590 of the CTR, when his counsel began questioning the principal claimant about why his profile was different than other Shia living in Pakistan, the tribunal stated she really did not need to hear that evidence and she could read the documentary evidence;
- At page 593, the tribunal embarked upon a completely irrelevant line of questioning which had nothing to do with the claim.

[15] After reading the transcript in its entirely, I have reached the conclusion the applicants have not convinced me the tribunal did not render an impartial decision in respect of their claims notwithstanding the irrelevant lines of questioning the tribunal embarked upon. I do so for a number of reasons.

[16] First, it is clear from the transcript, the principal applicant was a difficult witness in the answers he gave thus contributing largely and necessarily to several follow-up questions of

clarification posed not only by the tribunal itself but by his own counsel (see CTR pages 571 to 574, 597, 601, and 602).

[17] Applicants' counsel before the tribunal (who was different than their counsel appearing before the Court) pursued many lines of irrelevant areas because he felt the principal applicant had provided confusing answers which needed to be clarified because, left untouched, might have represented a contradiction or otherwise affected the principal applicant's credibility (see CTR pages 571 to 577, 581 to 584, 585 and 595).

[18] Third, while the tribunal said she did not need to hear certain evidence, she allowed their counsel to fully pursue the issue of the principal claimant's profile (see CTR pages 591, 592, 604 to 623).

[19] Fourth, while the tribunal indicates the applicant's credibility might be affected in an answer he gave, the tribunal did not make a general credibility finding against the principal applicant.

[20] Counsel for the applicants also challenges the tribunal's findings concerning the principal applicant's profile and the one purported inconsistency.

[21] The standard of review in respect of these findings is set out in section 18.1(4)(d) of the *Federal Courts Act, 1998* which provides that the Court may grant relief if a tribunal "based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner

or without regard to the material before it", a standard of review equivalent to patent unreasonableness.

[22] I agree with counsel for the applicants, the tribunal's finding there was an inconsistency in his testimony as to when his problems began cannot stand. The transcript indicates the principal applicant clarified his answer. With that clarification, which the tribunal did not take into account, there is not inconsistency (see CTR pages 564 and 565).

[23] I cannot agree, however, with the submission by counsel for the applicants the tribunal made an arbitrary or perverse finding concerning the principal applicant's profile. In particular, counsel pointed out to photos where he received an award in 1994 from the President of KPSIAJ killed in 1995. He stated, in terms of the Vice President of that organization who was killed in 2000, a doctor, he was a volunteer at his clinic. Essentially, on this point, what I am asked to do is to re-weigh the evidence before the tribunal which is something which I cannot do. There was evidence before the tribunal to support the finding it made.

[24] Finally, despite the fact counsel for the applicants had not raised before the hearing the issue of adequate State protection, I find no merit in his submission the tribunal selectively picked from the documentary evidence supporting the tribunal's views. Counsel for the applicants also referred me to an extract from the U.S. DOS Report on Pakistan for 2003.

[25] Taking that element into account, it is not sufficient and does not meet the applicants' burden to provide clear and convincing evidence adequate State protection for Shias was not available in Pakistan.

ORDER

THIS COURT ORDERS that this judicial review application is dismissed. No certified question was proposed.

"Francois Lemieux"

Judge

FEDERAL COURT
NAME OF COUNSEL AND SOLICITORS OF RECORD

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