

Date: 20060328

Docket: IMM-3514-05

Citation: 2006 FC 390

Ottawa, Ontario, March 28, 2006

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

MOHAMMAD FAROOQ CHOCHAN

Applicant(s)

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent(s)

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, Mohammad Chohan, seeks to set aside an unfavourable decision of the Immigration and Refugee Board delivered on May 13, 2005 whereby his refugee claim was denied.

[2] The primary challenge to the Board decision concerns its treatment of a request by the Applicant's counsel for a six week adjournment of the hearing to allow for the gathering of further evidence. That request was denied by the Board and the hearing proceeded on March 15, 2005. The

Applicant contends that this refusal to grant an adjournment constitutes a breach of the rules of natural justice because it prevented him from effectively prosecuting his claim.

Procedural Background

[3] On May 26, 2004 the Applicant's then counsel submitted a number of documents to the Board in support of his client's refugee claim. At that point the hearing was scheduled for June 17, 2004. Included in that material was a Pakistani police report, commonly referred to as a First Information Report (FIR). That document was dated January 12, 2002. The other key document submitted by the Applicant was an arrest warrant dated April 13, 2002. As well, Muslim League membership cards were submitted. These documents were intended to corroborate the Applicant's testimony about the risk of persecution he faced from the authorities in Pakistan.

[4] The Board hearing did not proceed on June 17, 2004 for administrative reasons, although the Applicant attended that day with his counsel and was ready to proceed. The case was put over for hearing to October 7, 2004. When the Applicant attended before the Board on October 7, 2004 the Board advised that it was postponing the hearing to January 25, 2005 to allow it to verify the authenticity of some of the documents the Applicant had submitted, notably the FIR and the arrest warrant. The record discloses that the official request by the Board for the verification of these documents was sent to Canadian High Commission in Islamabad on October 15, 2004.

[5] When the Applicant attended for hearing on January 25, 2005 the Board advised that the matter would again have to be postponed because the document verification report had not yet been received from the Canadian High Commission. The case was then put over to March 15, 2005.

[6] On February 11, 2005 the document verification report was received by the Board and it indicated that the FIR was “fake”. The report suggests, as well, that the arrest warrant was “fake”. This report was sent to the Applicant’s counsel on or about February 21, 2005.

[7] It appears from the record that the Applicant’s counsel wrote to the Board on March 10, 2005 to request an adjournment of the hearing to allow him to make enquiries about the document authenticity issue. The letter stated that the Applicant had begun the process of making the necessary enquiries but that the process had not been completed.

[8] When the Board hearing commenced on March 15, 2005 it referred to a decision from the day before denying the Applicant’s adjournment request. The transcript offers the following history:

I believe your client was requesting some time to put forth his own investigation. Yesterday I denied that request, however, we did say that you would like ... you should bring forth your request and we’ll have it on the record.

[9] Unfortunately, there is nothing in the record to document the decision which is referred to in the above passage. However, counsel for the Applicant put on the record his request for the adjournment stating that he needed the time for “a further enquiry with respect to the documents”. He also said that he would likely need about six weeks. The Board responded with the following comments:

Mr. McCrie, with all due respect to you as a lawyer, I just feel that we must proceed today. I agree that suggesting that the Canadian Mission is not an independent body, they’d have no vested interest in not getting the best information that they would know how.

However, I would suggest that we ask some questions in this regard, how the claimant obtained the documents, how well he knows the person who obtained the documents and give him every opportunity, under oath, to explain to the best of his ability and having clearly, he is now subsequently called the individual so he must have received some further information from this individual as to exactly how that individual obtained those documents. And whether that individual provided him with any suggestions as to why or how they could have been deemed fraudulent when the Canadian embassy investigated this issue.

I would say one more thing, that I will see how the hearing does proceed and in terms if we felt it absolutely necessary to wait for the verification of the Muslim League membership card then would adjourn and reserve a decision in that. But at this point in time I would say that while it is germane in once (sic) sense, in other sense just mere membership doesn't necessarily have anything to do with the story that the claimant has told and the arrests and the torture.

So I feel that we should proceed Mr. McCrie.

[10] The Board's decision denying the Applicant's refugee claim turned on its adverse assessment of his credibility and central to that determination was its finding that the FIR and arrest warrant were fraudulent. With respect to these matters the Board held as follows:

At the beginning of the hearing, counsel for the claimant requested a postponement of six weeks for the claimant to contact a lawyer in Pakistan to make further enquiries as to how the FIR was determined to be fraudulent. The panel denied the request on the basis that the claimant had had three weeks to make his own enquiries. The claimant was made aware of the findings February 21, 2005 and was aware of his hearing scheduled for March 15, 2005. The panel prefers the evidence provided by the Canadian High Commission and accepts their findings that the FIR and warrant are fraudulent.

Issue

Did the Board's handling of the Applicant's request for an adjournment constitute a breach of the rules of natural justice?

Analysis

[11] A refusal to grant an adjournment, where fairness demands it, constitutes a breach of the rules of natural justice. According to Mullan in *Administrative Law* (3rd edition) at para. 170, a breach of this duty occurs where the adjournment is reasonably required for a party seeking an opportunity to meet a new issue or to review crucial evidence introduced at the hearing. The authority cited for this proposition is *Pal v. Canada (Minister of Employment and Immigration)* [1993] F.C.J. No. 1301.

[12] The stated rationale for declining the Applicant's adjournment request in this instance was the fact that he had had the benefit of three weeks to carry out his own investigation with respect to the impugned documents. Apparently the Board felt that he or his counsel had been somewhat dilatory in pursuing this investigation and therefore he was not entitled to any further indulgence. There is another possible inference to be drawn from the Board's decision which is that it felt that any further investigation of this issue was nothing more than a waste of its time because the Consulate report was unimpeachable.

[13] The Board had an obligation to deal with the request for an adjournment in a principled way. It had granted to itself the benefit of almost 8 months to carry out its own document assessment and adjourned the hearing twice to obtain those results. In these circumstances the authenticity of the tendered documents was fundamental to the Applicant's case and was a critical aspect of the Board's decision. To have denied the Applicant the benefit of a short adjournment was manifestly unfair and contravened the requirement of s.170 of the *Immigration and Refugee Protection Act* (IRPA) that the Applicant be given a reasonable opportunity to present evidence.

[14] The Board's reasons for denying the adjournment request also failed to address the factors required by s. 48 of the *Refugee Protection Division Rules* for the exercise of the adjournment discretion and, in particular, factors 4(e), 4(h), 4(i), 4(j) and 4(k). Had these factors been considered and applied the adjournment would also certainly have been granted. It was an error of law for the Board to have failed to consider those points in the exercise of its discretion. Because this error is one involving the content of the duty of procedural fairness the standard of review is one of simple correctness and does not require a pragmatic and functional approach: see *Ha v. Canada (Minister of Citizenship and Immigration)* 2004 F.C.A. 49, [2004] 3 F.C.R. 195, [2004] F.C.J. No. 174 (F.C.A.).

[15] In the result, it is unnecessary for me to consider the other arguments advanced by the Applicants and the decision of the Board is set aside. The matter shall be remitted for reconsideration by a differently constituted Board.

JUDGMENT

THIS COURT ORDERS that this application is allowed with the matter to be remitted to a differently constituted Board for reconsideration.

“ R. L. Barnes ”
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-3514-05

STYLE OF CAUSE: MOHAMMAD FAROOQ CHOCHAN
v.
THE MINISTER OF CITIZENSHIP AND
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REASONS FOR : BARNES J.

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