

Date: 20080327

Docket: IMM-3745-07

Citation: 2008 FC 389

Montréal, Quebec, March 27, 2008

PRESENT: The Honourable Maurice E. Lagacé

BETWEEN:

**MUHAMMAD KHURRAM SALEEM
A.K.A. FAISAL JAVED**

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated August 15, 2007 concluding that the applicant is not a Convention refugee nor a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act).

FACTS

[2] Citizen of Pakistan, the applicant arrived in Canada in February 2006. His refugee claim is premised on a fear that his uncle is trying to have him killed.

[3] The applicant states that his problems began in 1999 when his uncle killed his father for refusing to support the Muslim League political party. The applicant states that his uncle now wishes to kill him in order to obtain family property in the applicant's name; property that is alleged to be worth "millions of dollars." The applicant claims to have been targeted by his uncle's "goons" since August 2000.

[4] On account of this fear, the applicant left Pakistan for the United States in June 2001 under the false identity of Faisal Javed. He returned voluntarily to his hometown of Lahore 28 days later. In October 2002, the applicant travelled to the United States a second time, again using a passport issued in the name of Faisal Javed. He was later deported when American authorities discovered he entered the United States under a false name.

[5] On February 7, 2006, the applicant entered Canada with a Canadian visitor visa issued to him under the identity of Faisal Javed. On April 7, 2006, the applicant presented a claim for refugee protection under the name of Muhammad Khurram Saleem stating this name as being his true identity. The applicant's claim was heard before the Board on April 2, 2007.

Decision under review

[6] On August 15, 2007, the Board concludes that the applicant is neither a Convention refugee nor a person in need of protection. The determinative issue before the Board was the applicant's

identity, which the Board found was not successfully established. As the Board stated at page 2 of its decision:

But unfortunately, after considering the claimant's testimony, his documents and the documentary evidence in Pakistan, I came to the conclusion that the claimant did not successfully demonstrate that his real identity is the one of Muhammad Khurram Saleem.

[7] In its decision, the Board notes that while the applicant possessed two genuine passports, one in the name of Faisal Javed and the other in the name of Muhammad Khurram Saleem, there was insufficient evidence to establish which of the two passports reflected the applicant's true identity. The Board held at page 6 of its decision:

After reviewing the testimony of the claimant, the different identity documents and the documentary evidence, doubts remains as to the identity of the claimant. The fact that the claimant used a passport under a false name to go in and out of Pakistan for a period of four years, the fact that the claimant was able to renew that same passport in 2005, the fact that he obtained numerous visas under that false name, the weak explanations regarding why he had to leave three times the country under a different name than his, the fact that the passport under his alleged real name bares a different place of birth than what it is written in his PIF, the fact that this passport is handwritten without many security features, the fact that he never allegedly updated his old identity card under his alleged real name between 2002 and 2005, all these elements lead me to conclude that the claimant has not establish his identity on a balance of probabilities.

[8] Accordingly, having found that the applicant failed to sufficiently establish his identity as Muhammad Khurram Saleem, the Board concludes at page 7 of its decision:

Because the claimant has not established his identity on a balance of probabilities, I conclude to the general lack of credibility of the

claimant and find that there is no credible basis based on paragraph 107(2) of the Act.

[9] On September 12, 2007, the applicant files this application for leave and judicial review of the Board's decision.

Issues

[10] This application raises two issues for consideration:

1. Did the Board breach the rules of fairness in failing to grant the applicant sufficient opportunity to establish his identity as Muhammad Khurram Saleem; and
2. Did the Board err in concluding that there was a lack of probative evidence to establish the applicant's identity as Muhammad Khurram Saleem?

STANDARD OF REVIEW

[11] The first issue concerns matters of natural justice and procedural fairness, which are questions of law subject to the standard of correctness. In such cases, the Court must examine the specific circumstances of the case and determine whether the decision maker adhered to the rules of natural justice and procedural fairness (*Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 16, [2006] 3 F.C.R. 168 at paragraph 15). In the event that a breach is found, no deference is due and the decision will be set aside (*Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2006] 3 F.C.R. 392).

[12] The second issue concerns whether there was sufficient documentation establishing the applicant's identity. In light of the recent Supreme Court of Canada decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9 (QL), it is clear that the standard of patent unreasonableness has now been abandoned, and that courts conducting a standard of review analysis must now focus on two standards, those of correctness and reasonableness.

[13] The jurisprudence is clear in stating that the Board's credibility analysis is central to its role as trier of facts and that, accordingly, its findings in this regard should be given significant deference. The grant of deference supports a reasonableness standard of review and implies, as the Court held at paragraph 49 of *Dunsmuir*, that courts will give "due consideration to the determinations of decision makers" when reaching a conclusion. Accordingly, the second issue will be reviewed on the standard of reasonableness.

ANALYSIS

Did the Board breach the rules of fairness in failing to grant the applicant sufficient opportunity to establish his identity as Muhammad Khurram Saleem?

[14] On March 30, 2007, the Minister of Public Safety and Emergency Preparedness (the Minister) sent notice to the Board that it wished to intervene due to the existence of a "serious identity issue in this case."

[15] As the hearing was scheduled for April 2, 2007, the Minister's notice did not comply with subsection 25(4) of the *Refugee Protection Division Rules*, S.O.R./2002-228 (the Rules), which requires that notice of intervention be received by the Board and the claimant "no later than 20 days before the hearing" as required under section 25(4). Section 25 of the Rules in its entirety states:

25. (1) To intervene in a claim, the Minister must provide

- (a) to the claimant, a copy of a written notice of the Minister's intention to intervene; and
- (b) to the Division, the original of that notice and a written statement of how and when a copy was provided to the claimant.

(2) In the notice, the Minister must state how the Minister will intervene and give the Minister's counsel's contact information.

(3) If the Minister believes that section E or F of Article 1 of the Refugee Convention may apply to the claim, the Minister must also state in the notice the facts and law on which the Minister relies.

(4) Documents provided under this rule must be received by the Division and the claimant no later than 20 days before the hearing.

25. (1) Pour intervenir dans une demande d'asile, le ministre transmet :

- a) au demandeur d'asile, une copie de l'avis d'intention d'intervenir;
- b) à la Section, l'original de cet avis ainsi qu'une déclaration écrite indiquant à quel moment et de quelle façon une copie de l'avis a été transmise au demandeur d'asile.

(2) Le ministre indique dans l'avis la façon dont il interviendra et fournit les coordonnées de son conseil.

(3) S'il croit que les sections E ou F de l'article premier de la Convention sur les réfugiés pourraient s'appliquer à la demande d'asile, le ministre énonce également dans l'avis les faits et les règles de droit sur lesquels il s'appuie.

(4) Les documents transmis selon la présente règle doivent être reçus par leurs destinataires au plus tard vingt jours avant l'audience.

[16] In its decision, the Board addresses the Minister's late notice and concludes that rather than postpone the hearing, it would provide the applicant with additional time after the hearing to submit further documentation supporting his identity. The Board's rationale for such a finding was addressed at pages 1-2 of its decision:

(...) I realized it was less than the 20 days required by RPD rules but I decided not to postpone the hearing and gave the claimant a month to submit more identity documents. The fact that the claimant came to Canada under one name and claimed protection under another was known by all the parties and was raised already in April 2006 when an immigration officer asked the Minister's representative to intervene. The fact that the issue of identity would probably be raised at that hearing should not have come as a surprise for the claimant and his counsel.

[17] The applicant's primary concern with the Board's decision to proceed with the hearing is that the amount of time allocated to him to provide additional documentation was "extremely unclear, confusing and very difficult to understand." In support, the applicant cites varying references in the Board's decision, which affords him, respectively, with an additional "month" and an additional "20 open days" to submit further documentation. Further, at the hearing itself, the Board initially held that the applicant was to be given "three weeks" to provide the documentation. Later, however, the Board member made the following statement:

But anyway, three weeks. We are the 2nd of April, so I'll give you until the week of the 23rd, **until the 28th of April, to provide me with these originals** or anything that you would think that could satisfy the Board.

[Emphasis added]

[18] The transcript shows that the applicant's counsel agreed on the date of the 28th of April as the deadline to provide more original evidence on the issue of identity.

[19] Having reviewed the record, the Court finds that the key question is whether the Board provided the applicant with adequate additional time to submit further original documentation

supporting his identity, and whether the timeline of when that documentation was due was made known to the applicant at the hearing.

[20] Accordingly, while the Board's decision could have been clearer in addressing when it expected the applicant's further submissions, it is what was outlined to the applicant at the hearing, and not within the decision, that is relevant with respect to a determination of whether the Board's decision was fair in the circumstances of this case.

[21] Having reviewed the hearing transcript, the Court finds that the Board's decision sufficiently addressed the issues of fairness facing the applicant and that, accordingly, no error was committed. Again, while the Board could have been clearer in stating an exact date as to when the applicant's additional information was expected, he was given, at the very least, 21 days between the hearing date and April 23 to submit the original documentation. Whether he was in fact given until April 23 or April 28 is inconsequential, as the Court finds either to be sufficient time for the applicant to obtain and forward additional original documentation supporting his identity.

[22] Further, the Court agrees with the Board that the applicant was already on notice that his identity would be an issue the same way it was questioned years ago when he was deported by the American authorities after they discovered that he had entered the United States under a false name. He certainly was aware at the time of entering Canada with false documents that his identity might raise some questions that would require a satisfactory answer from him as to his true identity.

[23] Consequently the Minister's intervention and concerns, although not timely, should not have come as an undue surprise, considering that the applicant himself mentioned he had two passports and that one was false.

[24] Finally, it must be noted that the applicant was represented by counsel at the hearing before the Board, and he did not object to the delayed Minister's intervention although he had ample opportunity to do so or to clarify not only the Board's decision to continue with the hearing, but also the exact date when it expected to receive the additional original documentation.

[25] Accordingly, the Court finds that the Board's decision did not breach the rules of fairness owed to the applicant as he was able to make his case and respond to the intervention with respect to his identity, and therefore concludes that there is no valid reason to set aside the decision on those grounds.

[26] Did the Board err in concluding that there was a lack of probative evidence to establish the applicant's identity as Muhammad Khurram Saleem?

[27] Section 106 of the Act states that a relevant consideration in assessing a refugee claimant's credibility is whether that individual possesses and provides acceptable documentation establishing his/her identity. The possession of such documentation has been seen by this Court as crucial to the success of an individual's refugee claim in *Us Saqib Najam v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 516, at paragraph 16:

16 The proof of a claimant's identity is of central importance to his or her claim. I agree with the Respondent that if the identity of the claimant is not proven, the claim must fail; that means the Board need not pursue an analysis of the evidence in relation to other aspects of the claim. As Joyal J. states at paragraph 13 of the *Husein, supra* decision:

[...] In my respectful view, once the Board had concluded that identity had not been established or that the main applicant had not proven who she allegedly is, it was not necessary for the Board to analyze the evidence any further. Identity was central to the case. The main applicant's failure to prove that she belonged to a persecuted clan effectively undermined any claim of a well-founded fear of persecution.

[Emphasis added]

[28] In the case at bar, the applicant argues the Board erred in concluding that he failed to provide sufficient evidence of his identity, especially in light of the fact that the passport he used in his refugee claim was found to be genuine by the Minister. However, as noted above, the applicant was in the possession of two "genuine" Pakistani passports, one in the name of Muhammad Khurram Saleem, which the applicant used in his Canadian refugee claim and alleges is his true identity, and one in the name of Faisal Javed, which the applicant used twice in travelling to the United States in 2001 and 2002, and which he successfully renewed in August 2005. Even the dates of birth indicated in these two passports are not the same.

[29] The Court agrees with the respondent that the Minister's finding that the passport in the name of Muhammad Khurram Saleem was genuine did not prevent the Board from concluding that the applicant had not succeeded in establishing his identity. The question before the Board was the

applicant's true identity. The genuineness of the passport used in his refugee claim did not provide a definitive answer to this question. Further, the presence of another genuine passport, which the applicant used in international travel over the course of five years, called into question his true identity, and this question was not sufficiently addressed by the genuineness of either documents.

[30] The applicant further argues the Board erred in setting aside the genuineness of the passport in the name of Muhammad Khurram Saleem, which was used in his refugee claim. The applicant's argument is based on the Board's finding that because the passport is handwritten and does not bear the same security features as the one in the name of Faisal Javed, then "it is a type of passport obviously easier to falsify than the more recent one."

[31] In making such a finding, the Board did not set aside the genuineness of either passport, but rather simply concluded that the handwritten nature of the Saleem passport raises further questions as to how and for what purpose such a document was obtained. It is entirely within the Board's expertise as trier of fact to weigh the evidence before it in determining the issue of the applicant's identity. Such a finding was within this expertise and will not be set aside as unreasonable.

[32] Moreover, nowhere does the applicant address the compelling fact that the passport upon which he seeks to establish his identity (the Saleem passport) lists a different place of birth from that which the applicant testified to in both his Personal Information Form (PIF) and in oral evidence before the Board. As noted by the Board in its decision, while the applicant testified to having been born in Lahore, his passport used in his refugee claim states that he was born in Karachi.

[33] When confronted with this conflicting evidence, the applicant stated that he had requested that officials alter his place of birth on the passport so as to hide it from his uncle who might have prevented him from leaving Pakistan. The Board rejected the applicant's explanation as implausible, since if the passport was legitimate, then it would be unlikely that officials would have acquiesced to the applicant's request. This finding is not challenged by the applicant. The Court agrees with the Board's rationale and finds this to be compelling evidence further calling into question the applicant's real identity.

[34] The applicant also argues that the Board erred in its assessment of the documents produced at the hearing; documents the applicant suggests provide further evidence supporting his identity as Muhammad Khurram Saleem. One of those documents was a National Identity Card for Overseas Pakistanis (NICOP) and was issued in the name of Muhammad Khurram Saleem in April 2007, right after the hearing before the Board. Rather than forwarding the original NICOP to the Board for consideration as requested, the applicant submitted a photocopy as support to his claim. In relation to the copy, the Board stated at page 5 of its decision:

Document #2 (sent after the hearing) is a copy of a recently issued National Identity Card for Overseas Pakistanis (NICOP). The original of that document was not sent. This puts into question the authenticity of that document. ... The claimant does not provide any explanation as to why he did not send the original document although he sent all the original of the other documents sent after the hearing.

Accordingly, the Board gave no probative weight to the copy as evidence of the applicant's identity.

[35] The applicant argues the Board erred in giving the NICOP no weight, since such cards have significant security features and the documentary evidence recognizes them as being “conclusive proof” of an individual’s identity and nationality. However, the applicant’s argument fails to address the fact that the Board expressly stated at the hearing that the applicant was to forward all original documentation supporting his identity.

[36] By failing to follow the Board’s request that all additional documentation filed be original, the applicant opened the door to a finding that the copy did not carry the same probative weight and was, accordingly, insufficient to establish his identity as Muhammad Khurram Saleem. While the documentary evidence provides that such cards contain significant security features, it is impossible to assess the presence or absence of these features when not provided with the genuine article. Accordingly, it was reasonable for the Board to question the weight to be accorded to the NICOP in light of the fact that the applicant only provided a photocopy. This is especially so given that the Board had explicitly requested originals and that the applicant had admittedly previously used false passports to enter Canada and also the United States.

[37] Finally, the applicant argues the Board erred in dismissing all of the additional documents as having no probative value while only mentioning three documents in the decision itself. However, it is clear from the jurisprudence that the Board need not address every single piece of evidence where it has found that the applicant’s underlying claim lacks credibility. Further, the Board was entitled to take note of and give no weight to the documents it found to contain alterations and those that “appeared to be tampered with.” It is within the Board’s expertise to assess the weight to be given to

the documentation before it. Where an alteration appears on the face of the evidence, the Board is entitled to give no weight to the document and need not seek further expertise before doing so.

[38] Accordingly, for the reasons outlined above, the applicant's application will be dismissed. The Board's conclusion that the applicant failed to establish his identity as Muhammad Khurram Saleem was reasonable on the evidence and will not be interfered with by this Court.

[39] The parties were invited to present questions of importance for certification but declined.

JUDGMENT

For these reasons, the **COURT:**

DISMISSES this application for judicial review.

“Maurice E. Lagacé”

Deputy Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3745-07

STYLE OF CAUSE: Muhammad Khurram Saleem (Faisal Javed)
v. M.C.I.

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: March 18, 2008

**REASONS FOR JUDGMENT
AND JUDGMENT:** LAGACÉ D.J.

DATED: March 27, 2008

APPEARANCES:

Michael Dorey FOR THE APPLICANT

Sylviane Roy FOR THE RESPONDENT

SOLICITORS OF RECORD:

Michael Dorey & Associates FOR THE APPLICANT
Montréal, Quebec

John H. Sims, Q.C. FOR THE RESPONDENT
Deputy Attorney General of Canada
Montréal, Quebec