

**Date: 20080502**

**Docket: IMM-4566-07**

**Citation: 2008 FC 567**

**Ottawa, Ontario, May 2, 2008**

**Present: The Honourable Mr. Justice Beaudry**

**BETWEEN:**

**ABU JAFAR SAYEED  
BIBI AMINA SAMAN  
MOHAMMAD SAYEED**

**Applicants**

**and**

**MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) of the decision by the Refugee Protection Division of the Immigration and Refugee Board (the panel) dated October 11, 2007. The panel determined that the applicants are not Convention refugees or persons in need of protection under sections 96 and 97 of the Act.

## **ISSUES**

[2] Although the parties did not propose any issues for determination, in my view, the application raises the following issues:

- (a) Did the panel err in making a decision that breaches a principle of natural justice or procedural fairness?
- (b) Did the panel err in determining that the minor applicant is a citizen of Bangladesh and Mauritius?
- (c) Did the panel err in finding that the applicants failed to establish an objective fear of persecution, a risk of torture, cruel and unusual treatment or punishment or a risk to their lives?
- (d) Did the panel err in determining that there was an internal flight alternative available in Bangladesh?
- (e) Did the panel err in finding that the applicants' behaviour was inconsistent with a subjective fear of persecution?

## **FACTS**

[3] The male applicant, Abu Jafar Sayeed, is a citizen of Bangladesh; the female applicant is a citizen of Mauritius.

[4] Both applicants applied for refugee status in Canada because they feared persecution in their respective countries. The principal applicants met in 1987 in Italy where they both had permanent

resident status. They lived together for two years before marrying. Mr. Sayeed wanted to marry in his homeland, Bangladesh, but was unable to go there until April 1991.

[5] When the applicants arrived in Bangladesh, Mr. Sayeed's father, a Muslim fundamentalist, opposed the marriage. Mr. Sayeed says that his father threatened to kill him if he went ahead with the wedding.

[6] The applicants hid in the home of Mr. Sayeed's maternal grandmother who helped them organize a wedding ceremony in secret. In the meantime, practising Muslims in the village obtained a fatwa, an order of a religious arbitration panel, sentencing both applicants to be flogged and executed. To prevent this torture, the grandmother sent both applicants to live with Mr. Sayeed's sister in Dhaka.

[7] On May 14, 1991, the applicants fled Bangladesh and returned to Italy.

[8] In March 1992, Mrs. Saman travelled to Mauritius to visit her family and to try to convince them to accept her marriage. She learned that her family had promised her to another man, and after she told them of her marriage, the family threatened to harm her. She stayed in a hotel pending her return to Italy.

[9] A son was born to the applicants in Italy on October 9, 1993.

[10] In May 1994, the applicants entered the United States on a visitor visa. They lived there without status until May 2003 when they applied for refugee protection in Canada.

### **IMPUGNED DECISION**

[11] This case was the subject of three hearings before the panel. The first took place on July 15, 2004, before Mr. Arvanitakis. That hearing was adjourned because the panel had erroneously reviewed documentary evidence relating to Mauritania, not Mauritius. The second hearing occurred on September 20, 2005. This time, the presiding member adjourned the hearing because there was no interpreter present who could communicate with Mrs. Sayeed in Creole. That member stated that he believed that his colleague, Mr. Arvanitakis, was seized of the case. Finally, the hearing proceeded in its entirety before Ms. Paule Robitaille on August 14, 2007.

[12] The panel's negative finding is based on the absence of objective fear, the possibility of an internal flight alternative and the absence of subjective fear.

[13] The panel determined that the narrative did not reveal a serious fear:

- (a) The panel found that there was no objective fear on the part of Mrs. Saman because her family made the threats more than 16 years earlier. During her 1992 visit, her father did not act on his threats, even though she was easy to find and vulnerable because she was alone. The panel stated that there was no evidence that Mrs. Saman had a well-founded fear of persecution should she return to Mauritius.

- (b) The panel analyzed the documentary evidence and noted the lack of violence on the part of families when women do not obey their wishes.
- (c) With respect to Mr. Sayeed, the panel also found no objective fear. It noted that his father, who had made threats during the visit in April 1991, had died and that the alleged risk had therefore disappeared. The panel stated that Mr. Sayeed raised a new allegation at the hearing, claiming that his life would be at risk because of his brothers who would want to protect their inheritance. The panel did not believe the inheritance story. It pointed out that Mr. Sayeed also indicated that his father had excluded him from his will and that the brothers had divided the money and properties between them.
- (d) Nor did the panel believe that the fundamentalist Muslims in Mr. Sayeed's area would still be targeting him sixteen years later.

[14] With respect to an internal flight alternative, the panel was of the view that Dhaka or Rangpur were two places where the applicants could escape the risks posed by the fundamentalist villagers.

[15] The panel gave three reasons why the applicants' behaviour was inconsistent with a serious fear of persecution:

- (a) They married in Bangladesh and lived there for a month before returning to Italy.
- (b) They risked losing their permanent resident status in Italy by living in the United States for almost ten years.

(c) They stayed there without status but could have returned to Italy at any time.

## **ANALYSIS**

### *Standard of review*

[16] The appropriate standard of review in this case is reasonableness. The Court should treat findings of fact, particularly credibility findings, with great deference (*Aguebor v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 732 (F.C.A.); *Dunsmuir v. New Brunswick*, 2008 SCC 9, at paragraphs 55, 57, 62, and 64).

[17] According to the Supreme Court, the factors to be considered are justification for the decision, its transparency and intelligibility. The outcomes must be defensible in respect of the facts and the law (*Dunsmuir*, at paragraph 47).

### *Did the panel err in making a decision that breaches a principle of natural justice or procedural fairness?*

[18] The applicants allege that the panel lacked jurisdiction because the hearing was held before three different members. In my view, the question should be restated as an issue of procedural fairness or natural justice. If the applicants were prejudiced, the Court should return the matter for reconsideration.

[19] The applicants rely on the comments by the member who presided at the second hearing on September 20, 2005:

But, my primary issue is that a case, when a case is seized it's either a *de novo* case and identified as such or it's... and Mr. Aranatakis (phonetic) has made no... he was the sitting member before, made no mention that he was withdrawing from [sic] the claim or that he did not intend to proceed. Basically he was saying that we have to adjourn because Mauritius got confused with Mauritania. And the documents were not properly filed.

...

So I am in a difficult situation, you know. I think it's fairly (inaudible) cases. My colleague has heard the evidence, has certified the signature, has confirmed the contents of the PIF. That's evidence. So I don't think I have much choice but to adjourn it and also I will adjourn with the notation that you may be requesting a separate interpreter for Madame.

[20] The applicants herein submit that Mr. Arvanitakis heard the evidence on July 15, 2004, in particular, the evidence as to the minor applicant's citizenship, which is in dispute. This is an excerpt from the transcript:

BY PRESIDING MEMBER (to Claimant, Mr. Sayeed)

Q. And your son is a citizen of which country?

A. Because presently he is a citizen of both my country and my wife's because I have registered his name in the embassy with my passport and so did my wife.

Q. And they... Bangladesh accepts dual citizenship?

A. Yes. Yes, they have put it in my passport.

BY PRESIDING MEMBER (to Claimant, Mrs. Saman)

Q. And Mauritius too, they accept dual citizenship, Madame?

A. Yes.

Q. Okay all right. So we have established the country.

[21] In my view, the applicants' right to procedural fairness was not breached in any way by the change in members conducting the hearing. Contrary to what Mr. Lang said (September 20, 2005), Mr. Arvanitakis did indeed discuss the fact that he would probably not be reassigned to this case after the adjournment:

You will be notified in writing of the next hearing. At the next sitting you do not have to bring your son. We are satisfied that he is your son and he is here, unless, though... unless there is another panel. I am not sure I will be... For caution sake you better bring him, yes. I am sorry for that. There is a possibility I will be the panel, but in case... but I might not be the panel.

[22] The hearing on August 14, 2007, was a *de novo* hearing. Evidence as to the minor applicant's citizenship was led before Ms. Paule Robitaille. Therefore, the Court cannot accept the applicants' argument.

[23] There is another reason to dismiss this argument. The applicants were represented by counsel throughout and this issue was never raised at the hearings, which amounts to an implied waiver: *Kamara v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 448, at paragraph 26, [2007] F.C.J. No. 598:

... The jurisprudence of the Court is clear; such issues dealing with procedural fairness must be raised at the earliest opportunity. Here, no complaint was ever made. Her failure to object at the hearing amounts to an implied waiver of any perceived breach of procedural fairness or natural justice that may have occurred. See *Restrepo Benitez et al. v. M.C.I.* 2006 FC 461 at paras. 220-221, 232 and 236, and *Shimokawa v. M.C.I.*, 2006 FC 445 at paras. 31-32 citing *Geza v. M.C.I.* 2006 FCA 124 at para. 66.



*Did the panel err in determining that the minor applicant is a citizen of Bangladesh and Mauritius?*

[24] The applicants submit that the panel erred in determining that the minor applicant is a citizen of Bangladesh and Mauritius. They claim that the minor applicant is stateless. They cite *Pachkov v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 29 (F.C.T.D.), at paragraph 28:

[28] By finding that the applicant was a Latvian citizen, the Board made an unreasonable error in the assessment of the facts, which cannot be justified in light of the evidence in the record and which led it to impose on the applicant the burden of rebutting a presumption of Latvian State protection although he is not a citizen of that country. In my view, that error, whether it is termed an error of fact or of law, warrants the Court's intervention. On one hand, the decision is based on that premise and, on the other hand, that error may have influenced the assessment of the record and the applicant's credibility. I am therefore not satisfied that were it not for that error, the decision would have been the same.

[25] The facts in this case differ from those in the case cited above. At paragraph 19, Mr. Justice Teitelbaum wrote:

[19] On the facts in the case at bar, the applicant's PIF states that he is not a Latvian citizen, and his testimony shows that he is not a citizen of Latvia. Furthermore, the applicant put in evidence a document issued by the Latvian authorities certifying that Mr. Pachkov is not a Latvian citizen (applicant's record, page 98).

[26] In the case before us, there is no evidence that the minor applicant is stateless. On the contrary, the applicants maintained throughout the process that he was a citizen of Bangladesh and Mauritius. At the hearing on August 14, 2007, the questions about the minor applicant's citizenship

were intended to establish whether he held dual citizenship in Bangladesh and Mauritius, and that he was not an Italian citizen.

[27] Furthermore, regardless of the minor applicant's citizenship, the panel did not err in finding as follows:

As for the principal claimant's son, Mohammad SAYEED, citizen of both Bangladesh and Mauritius, since he bases his claim on his parents' claims and there was no evidence presented related to his fear in particular, I have arrived at the same conclusion for him too.

*Did the panel err in finding that the applicants failed to establish an objective fear of persecution, a risk of torture, cruel and unusual treatment or punishment or a risk to their lives?*

[28] The applicants challenge the panel's findings about the existence of an objective fear relative to Mrs. Saman's claim in Mauritius. They allege that the panel did not consider the evidence in the amended PIF to the effect that the applicant's father had threatened her with death.

[29] The panel considered this issue, and I do not believe that the intervention of this Court is warranted. At page 2, the panel wrote as follows:

... [Mrs. Saman] alleged in an amended PIF that her father threatened her of death in 1993 after the birth of her son. She fears that this threat is still alive today.

Based on what Mrs. Saman told the tribunal, I cannot conclude that her life and the one of her son or husband (if he were to accompany her) would be seriously at risk in Mauritius today.

[30] The applicants also submit that the panel erred in determining that it was their marriage that had prompted the persecution. The applicants maintain that it was the fact that they had lived

together before marriage that led to the threats and the fatwa. However, after reading the decision in its entirety, the Court notes that this allegation was considered.

*Did the panel err in determining that there was an internal flight alternative available in Bangladesh?*

[31] Claimants bear the onus of establishing that there is no internal flight alternative available in their country. Applicants must also prove that conditions exist that would prevent them from relocating elsewhere in their country (*Chorny v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 999, [2003] F.C.J. No. 1263, at paragraph 8).

[32] The applicants herein are asking that the evidence be re-assessed. With respect, the Court does not agree with them that an intervention is necessary.

*Did the panel err in finding that the applicants' behaviour was inconsistent with a subjective fear of persecution?*

[33] On this point, the applicants claim that the panel assessed their behaviour retroactively, without considering their intentions and state of mind at the time they made the decision. They submit that they did not take any risks by leaving Italy for the United States because they provided a reasonable explanation. The fact that the panel rejected this explanation and made an inference is not unreasonable, and it was open to the panel to do so.

[34] It is common ground that the panel can draw inferences from applicants' behaviour (*Mejia v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1087, [2006] F.C.J. No. 1365; *Manokeran v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 111, [2006] F.C.J.

No. 146; *Munoz v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1273; [2006] F.C.J.

No. 1591).

[35] The parties did not submit a question for certification, and there is none in the docket.

**JUDGMENT**

**THE COURT ORDERS** that the application for judicial review is dismissed. There is no question to be certified.

“Michel Beaudry”

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Judge

Certified true translation  
Mary Jo Egan, LLB

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-4566-07

**STYLE OF CAUSE:** **ABU JAFAR SAYEED**  
**BIBI AMINA SAMAN**  
**MOHAMMAD SAYEED and**  
**MINISTER OF CITIZENSHIP AND**  
**IMMIGRATION**

**PLACE OF HEARING:** Montréal, Quebec

**DATE OF HEARING:** April 30, 2008

**REASONS FOR JUDGMENT**  
**AND JUDGMENT BY:** The Honourable Mr. Justice Beaudry

**DATED:** May 2, 2008

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