Date: 20080624

Docket: IMM-5106-07

Citation: 2008 FC 772

Ottawa, Ontario, June 24, 2008

PRESENT: The Honourable Max M. Teitelbaum

BETWEEN:

NAHID SAHIL
RITA SAHIL
MILAD SAHIL

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application made pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001 c. 27 ("Act") for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board ("the Board") dated November 8, 2007 ("the Decision") in which Nahid Sahil ("the Principal Applicant") and her two minor children, Rita Sahil and Milad Sahil ("the minor Applicants") were determined not to be Convention refugees or persons in need of protection.

BACKGROUND

[2] The Applicants are citizens of Afghanistan. The Principal Applicant claims that in 2004 her father-in-law arranged for her thirteen year old daughter, Rita Sahil ("the minor female Applicant"), to marry his thirty-five year old cousin. The Principal Applicant's husband did not agree with his father's plans for his daughter and rejected the idea. A long dispute ensued and, in March 2005, the Principal Applicant's husband disappeared. She claims to have contacted the police on several occasions regarding his whereabouts but he is apparently still missing and has not been heard from since the dispute with his father.

[3] On May 6, 2006 the older male cousin went to the Applicants' family home to marry the minor female Applicant ("the incident"), albeit the fact that she was opposed to the marriage. As a reaction, the minor female Applicant attempted to set fire to herself and, during the incident, she was also grabbed by the hair and thrown by her grandfather. In the course of the incident, her body struck a knife that was lying on the kitchen counter from which she sustained injuries. The older male cousin was outraged that she would not wed him and he opened fire in the home with his gun. A family member was hit in the leg by a bullet. The minor female Applicant spent nine days in the hospital as a result of her injuries. The uncle-in-law offered to help the Applicants leave Afghanistan for Peshawar, Pakistan following which, with the help of an agent, they would leave for Canada.

[4] The Applicants left Afghanistan on August 17, 2006 and arrived in Canada on September 1, 2006. Four days later, they filed a claim for refugee status in Canada. The Refugee claim was based

on the allegations that the minor female Applicant's grandfather had arranged for her to marry his older male cousin; that the Principal Applicant's husband had gone missing following the dispute with his father regarding the marriage; and because the Principal Applicant fears her father-in-law as a result of her not obeying Afghani traditions.

DECISION UNDER REVIEW

[5] The determinative issue in this claim was credibility. The Board found that the Principal Applicant and the minor Applicants were not Convention Refugees or persons in need of protection because they lacked a well-founded fear of persecution. Essentially the Board rejected the claims made by the Applicants on the basis that they were not credible with regard to the material elements of their claim. In its decision, the Board made several implausibility findings; namely, that medical documents presented by the Principal Applicant contradicted her testimony and were created "to put forth a refugee claim". Consequently, the Principal Applicant failed to establish that the incident giving rise to her claim actually occurred.

[6] The Board noted a number of implausibilities from the Principal Applicant's testimony, such as the fact that the older male cousin did not pursue the minor female Applicant after the incident. The Board also found it implausible that the Applicants did not have copies of their birth or marriage certificates and that the Principal Applicant did not have a copy of the police reports she filed with regard to her missing husband. Finally, the Board found it implausible that the Applicants would not have any means of contacting the uncle-in-law that arranged for their travels to Canada, at least in order to find out the whereabouts of the Principal Applicant's husband.

[7] Lastly, the Board addressed the conditions in Afghanistan and it was noted that people do in fact leave that country and seek refugee protection elsewhere for a variety of reasons, notably due to armed conflict. However, the refugee claim was not based on the armed conflict, but rather on the alleged forced marriage of the minor female Applicant.

RELEVANT LEGISLATION

Immigration and Refugee Protection Act, S.C. 2001, c. 27

Convention refugee	Définition de « réfugié »
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	**96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	*a*) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	*b*) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
Person in need of protection	Personne à protéger
97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	**97.** (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

Person in need of protection

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

Exclusion — Refugee Convention

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

Personne à protéger

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

Exclusion par application de la Convention sur les réfugiés

ISSUES

[8] In their submissions, the Applicants raised a series of issues. These issues can be summarized as follows:

1. Was the Board Member biased in her assessment of the Applicants claim for Refugee Status?
2. Did the Board err in finding that the Applicant was not credible by drawing unreasonable inferences with regard to the Applicants' evidence?

STANDARD OF REVIEW

[9] The Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick*, 2009 SCC 8, established that *correctness* and *reasonableness* are the two standards to be applied on judicial review, collapsing reasonableness *simpliciter* and patent unreasonableness into one standard, that being reasonableness. However, *Dunsmuir* did not address the question of the application of paragraph 18.1(4)(*d*) of the *Federal Courts Act*, R.S.C., 1985, c. F-7, as it did not arise in that case.

[10] There has been general consensus that this Court may provide relief on judicial review if it finds that the Board's findings of fact with regard to credibility or plausibility were made in a perverse or capricious manner, or without regard to the material before it (*Soto v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 354). In particular, findings of fact related to an objective or subjective basis of fear of persecution or serious harm due to a lack of credibility in pivotal areas of an applicant's testimony along with a lack of credible documentary evidence, are issues that ought to be examined against a standard such as that of paragraph 18.1(4)(*d*) of the

Federal Courts Act, above, since it turns entirely on a review of the Board's weighing of the evidence before it, in which the Board has considerable expertise (*Miheret Teku Jego v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 441).

[2] Therefore this Court will not interfere with the Board's findings of fact unless they were found to be made in a perverse or capricious manner without regard to the evidence.

ANALYSIS

1. Was the Board Member biased in her assessment of the Applicants claim for Refugee Status?

[11] The Applicants allege that the Board Member who heard their case has rejected 100% of the Afghan refugee claims she heard in 2006 and 2007 – that is to say twelve claims all represented by the same counsel, Paul Dineen – whereas the National acceptance rate of Afghan refugees claimants in 2006 was 94% and in 2007 was 79%. The Applicants submit that any informed person would think that it is unlikely that he or she would receive a fair hearing before this particular Board Member and thus, there is a reasonable apprehension of bias.

[12] The Respondent submits that the Applicants failed to raise the issue of reasonable apprehension of bias during the hearing and that the failure to do so forecloses the possibility of raising the issue before this Court (*Darabos et al v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 484). Given that Mr. Dineen had appeared before this Board Member numerous times and in each of those instances his Afghan claimants were unsuccessful, there was a reasonable expectation for him to raise the issue of bias at the outset of the hearing. He did not do

so. However, should the Applicants be allowed to make the argument at this stage, the Respondent notes that the burden is clearly on the Applicants to establish that the Board Member refused their claim and the other cases represented by their counsel due to a reasonable apprehension of bias (*Darabos*, above at para.16).

[13] In *Bulut v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1627, a similar allegation with regard to a reasonable apprehension of bias was made based on a Board Member's acceptance and rejection rate of Turkish refugee claims. In that case, the Applicant made an access to information and privacy request and submitted the documents he received as evidence of a reasonable apprehension of bias. In *Bulut*, Justice Hughes dismissed the application for judicial review and held the following at paragraph 10:

> The numbers alone as presented by the Applicants are meaningless without an informed analysis as to what they mean and whether a reasonable conclusion can, as a result, be drawn from them. Here there was no attempt to provide an analysis as to what lay behind the numbers and what reasonable inferences and conclusions can be drawn. It would be reasonable to expect, especially upon judicial review, to find expert evidence to be filed in this regard. There was none.

[14] In the case at bar, the Applicants have not pointed to any actual instances of bias on the part of the Board Member and thus rely solely on the acceptance and rejection percentages to base their claim that there is a reasonable apprehension of bias. There is no evidence that the Board Member acted in a biased manner. Further, in the present case as in *Bulut*, above, the Applicants have not made any attempt to break down and analyze the figures they seek to rely on to support their allegation of a reasonable apprehension of bias. I am satisfied that without any such analysis or breakdown of the percentages and statistics, the Applicants have failed to meet their burden and

consequently, this Court cannot conclude that there was a reasonable apprehension of bias on the part of the Board Member toward the Applicants in her assessment of the claim.

2. Did the Board err in finding that the Applicant was not credible by drawing unreasonable inferences with regard to the Applicants' evidence?

[15] The Applicants argue that the Board made a reviewable error when it determined the Principal Applicant and the evidence put before the Board was not credible. The Applicant notes that when an applicant swears to tell the truth, there is a presumption that those allegations are true unless there is reason to doubt them (*Maldonado v. M.E.I.*, [1980] 2 F.C. 302 (F.C.A.)).

[16] To the contrary, the Respondent suggests that the Board's credibility findings were entirely open to it because the evidence presented by the Applicants was inconsistent with the Principal Applicant's testimony. The Respondent specifically highlights the medical letter that stated that the minor female Applicant was born in 2006 whereas the Principal Applicant testified that she was born in 1991. Further, the name of the hospital on the letter and the name given by the Principal Applicant in her testimony were inconsistent. Lastly, the Board noted that the description of the injuries suffered by the minor female Applicant was not in "medical terms" and that the medical letter was given to the Applicants by an agent in Canada upon their arrival. It is not a document they brought with them from Afghanistan.

[17] The law with regard to the weighing of evidence before a tribunal such as the Board has long been settled. This Court may only interfere in the weighing of the evidence if the tribunal based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or

without regard for the material that was before it (*Bielecki v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 442 at para. 22; *Aguebor v. Ministre de l'Emploi et de l'Immigration* (1993), 160 N.R. 315 (F.C.A.)).

[18] As was highlighted in the Respondent's Further Memorandum of Fact and Law, Justice Noël, in *Ogiriki v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 342 at paragraph 11, quoted the words of Justice Nadon in *Hamid v. Canada*, [1995] F.C.J. No.1293 at para. 21, wherein Justice Nadon held:

> Once a Board, as the present Board did, comes to the conclusion that an applicant is not credible, in most cases, it will necessarily follow that the Board will not give that applicant's documents much probative value, unless the applicant has been able to prove satisfactorily that the documents in question are truly genuine. In the present case, the Board was not satisfied with the applicant's proof and refused to give the documents at issue any probative value. Put another way, where the Board is of the view, like here, that the applicant is not credible, it will not be sufficient for the applicant to file a document and affirm that it is genuine and that the information contained therein is true. Some form of corroboration or independent proof will be required to "offset" the Board's negative conclusion on credibility.

[19] Essentially the Applicants' claims in the case at bar have been discredited by a number of internal contradictions and inconsistencies both by their lack of corroborating evidence and the Principal Applicant's testimony. Given that the Principal Applicant's only piece of corroborating evidence was the medical letter that contained a number of contradictions, it was not unreasonable for the Board to find it not credible.

[20] The Board then turned to the fact that the Applicants did not possess any other documentation to support their claim. Given that the Board did not find the claim to be credible, it was open to the Board to ask for corroborating evidence if the evidence would have reasonably been

expected to be available to the Applicants (*Reyes v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 418 at para. 22). No such evidence was provided; in fact it was precisely the lack of evidence that lead the Board to its conclusion.

[21] Consequently, against a standard of reasonableness, I do not find that the Board's credibility findings were made in a perverse or capricious manner without regard to the evidence before it. Rather the Applicants have failed to adduce evidence to suggest that the Board erred in its assessment of their claim.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed. No question was submitted for certification.

"Max M. Teitelbaum"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

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