Federal Court  Cour fédérale

Date: 20100914

Docket: IMM-5414-09

Citation: 2010 FC 913

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, September 14, 2010

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

MOHAMMED SERKHANE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] ...My decision to allow this application for judicial review is based solely on the panel's failure to explain the reasons that led it to disbelieve the parents' testimony concerning the incidents in question. It was not sufficient to rely on the documentary evidence from the country concerning the validity of the refugee claim without dealing specifically with the applicants' evidence.

For these reasons, the panel's decision is set aside and the matter is referred back to a new panel of the Convention Refugee Determination Division for rehearing on the basis of these reasons.

(As specified by Chief Justice Allan Lutfy in *Roudatchenko v. Canada (Minister of Citizenship and Immigration)* (1997), 83 A.C.W.S. (3d) 663, [1997] F.C.J. No. 1231 (QL)).

[2] [9] According to *Dunsmuir* (at paragraph 47): "In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" [emphasis added].

…

[18] As noted hereinabove, I find that the principle set out in *Hilo* applies to the Panel's decision in this case. In addition, some of the findings of the Panel are clearly incompatible with the evidence submitted before it, or at the very least, the Panel did not address why such evidence was disregarded.

(As rendered by Justice Robert Mainville in *Zilani v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 357, [2010] F.C.J. No. 433 (QL)).

II. Judicial procedure

[3] This is an application for judicial review of a decision of the Refugee Protection Division (RPD) dated October 13, 2009, that the applicant is neither a "Convention refugee" nor a "person in need of protection".

[4] In this case, the RPD based its decision on reasoning related to the lack of fear, inconsistencies in the evidence, state protection and the existence of an internal flight alternative (IFA).

III. Facts

[5] The applicant, Mohammed Serkhane, is a citizen of Algeria, a Berber from Tizi-Ouzou.

[6] He alleges that he fears a terrorist by the name of Chenoui, who targeted him for having helped Chenoui's spouse escape from a situation of domestic violence.

[7] The applicant alleges this fear even though Chenoui took refuge in the mountains and the police are trying to arrest him.

[8] After taking refuge for approximately two months in the country's capital without incident, the applicant left for the United Kingdom, where he spent 15 days before leaving for Canada using a false French passport.

IV. Issue

[9] Was the RPD's decision unreasonable?

V. Analysis

[10] The Court accepts and is in agreement with some of the applicant's arguments.

[11] Because the questions are of fact or of mixed fact and law, the applicant must show that the RPD's decision was unreasonable. (For the general principle, see: *Jean-Baptiste v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1261, [2009] F.C.J. No. 1590 (QL) at para. 13;

for the question of credibility, see: *Auguste v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1099, [2009] F.C.J. No. 1317 (QL) at para. 6; for the question of state protection, see: *Ghotra v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 764, [2009] F.C.J. No. 924 (QL) at paras. 15-16; for the question of the IFA, see: *Singh v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1304, [2009] F.C.J. No. 1679 (QL) at para. 11).

[12] The applicant first tried to argue that the RPD ignored evidence corroborating Chenoui's attempt to take his life, evidence that also concerns state protection and the IFA. The applicant mentioned, among other things, the power of the *Groupe Salafiste pour la Prédication et le Combat Ouzou* (GSPC) and the weakness of the state.

[13] According to the applicant, despite the fact that the applicant's general documentary evidence shows that serious efforts have been made in Algeria to make the country safe and fight terrorists, there are cases where the government cannot protect some elements of the population in circumstances such as those described in the documentary evidence (see, for example, the articles on p. 129 of the Applicant's Record).

[14] The case law confirms that state protection need not be perfect. If the state controls its territory and makes serious efforts to protect its citizens, the fact that there are weaknesses in that protection is not enough to rebut the presumption of state protection unless the evidence shows the contrary in a particular case such as this one (*Canada (Minister of Employment and Immigration) v.*

Villafranca (1992), 150 N.R. 232, 37 A.C.W.S. (3d) 1259 (F.C.A.); *Burgos v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1537, 160 A.C.W.S. (3d) 696 at para. 36).

[15] The foregoing shows that there is a significant difference of opinion between the applicant and the RPD and, therefore, the decision is unreasonable in view of the situation described below.

[16] The RPD is also required to give reasons for rejecting evidence produced by the applicant: *Hilo v. Canada (Minister of Citizenship and Immigration)* (1991), 130 N.R. 236, 26 A.C.W.S. (3d) 104; *Badurdeen v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 355, 121 A.C.W.S. (3d) 1131; *Mui v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1020, 125 A.C.W.S. (3d) 691).

[17] In fact, the RPD made a negative decision without taking into consideration important elements of the applicant's account, even though the RPD specified that "the claimant answered directly all questions from his counsel and from the panel" (Decision at p. 4, para. 17).

[18] In *Voyvodov v. Canada (Minister of Citizenship and Immigration)* (1999), 175 F.T.R. 299, 91 A.C.W.S. (3d) 636, Chief Justice Lutfy specified that an administrative tribunal must state in clear and unmistakable terms its reasons for rejecting an applicant's testimony. The RPD did not do this.

[19] The Court is of the view that while certain documents are not of general scope, they are original documents, some of which came directly from the Algerian authorities involved in the fight against terrorism, their authenticity has never been contested by the RPD and they are not mentioned anywhere in its analysis. This Court therefore needs to discuss certain documents:

(a) **P-4** is an attestation dated June 1, 2009, signed by Touzene Hachimi, Secretary General, confirming that the applicant, Serkhane Mohammed, has been a member of the Association Amusnaw since August 15, 2002, along with the organization's report, signed by the association's president, confirming his risks of returning to Algeria in view of the attempted kidnapping of the applicant and giving the background of his problems with his agent of persecution in the GSPC, Chenoui Madjid.

(b) **P-5** (legal opinion dated July 13, 2009, by his Algerian counsel, Daoui Malika), which confirmed that it was impossible for the applicant to obtain adequate preventive protection from the Algerian authorities grappling with the GSPC's terrorist activities, given that even the Algerian state has difficulty protecting itself effectively from the GSPC's terrorist activities, as confirmed by the legal opinion of the Algerian counsel, and which was not analyzed in any way in the RPD's decision and which was not even mentioned.

(c) **P-6.1**, the medical certificate dated April 16, 2008, from the Tizi-Ouzou university hospital centre, concerning the assault on the applicant when the GDSPC tried to kidnap him on March 16, 2007.

(d) **P-7**, the official summons by Algerian authorities of the individual, that is, the applicant, to report on May 20, 2007, at 8:30 a.m. concerning his kidnapping and death threats.

(e) **P-8,** the court proceedings record, together with the investigative proceedings conducted by officers of the Algerian squad, with an information for intentional assault (kidnapping) and death threats against Chenoui Madjid, residing in the city of Cadi Tizi-Ouzou, confirming that on March 17, 2008, at 4:30 a.m., one Serkhane Mohammed, aged twenty-eight, appeared to report that the applicant had received a telephone call from one of his friends, Driss Hayat, asking him to help Chenoui Anissa Zalzli (Chenoui Madjid's spouse) and her son Mourad, who were being assaulted and violently beaten by her spouse Chenoui Madjid, who had been a member of a terrorist organization since 1995 and subsequently granted amnesty under the Peace and National Reconciliation Charter pursuant to order 01/05 dated 27/02/2005.

(f) **P-17-2**, the translation into French of the Algerian police report dated May 22, 2007, and the original of the document in Arabic (under 16.1 in Arabic), together with the statement of arrested terrorist Kamar Sayed Ali, confirming the truthfulness of the kidnapping and assassination attempt on the applicant on March 16, 2007, by members of the GSPC, one of whom had been arrested by the Algerian authorities, which terrorist acknowledged in his examination that the applicant's kidnapping had been ordered by an agent of persecution in the GSPC, Chenoui Madjid, with the intent to kill the applicant in a situation where the arrested terrorist had acknowledged that his agent of persecution, Chenoui Madjid, was looking for him.

[20] As specified in *Bokayi v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 22, 119 A.C.W.S. (3d) 817:

> [9] The applicant submits that the Board erred in law by assigning no weight to the documentary evidence submitted by his counsel. A tribunal is presumed to have considered the entirety of the evidence before it (*Hassan v. M.E.I.* (1992), 147 N.R. 317 (F.C.A.)). It is only necessary for a tribunal to refer to evidence directly relevant to the issue being addressed, and which would appear to be in conflict with its conclusion; the requirement for explanation of a rejection of evidence increases with the relevance of the evidence in question to the disputed facts (*Cepeda-Gutierrez et al. v. Canada (M.C.I.)* (1998), 157 F.T.R. 35).
>
> [10] In this case, the Board included excerpts from two documents in its reasons: Response to Information Request IRN33937.FE and Response to Information Request IRN37446.E. The first document makes no reference to Javid Iran. Although the Board has, again, failed to explain why it included this document, it seems to have been as proof that monarchist movements are no longer organized and active in Iran, and that most monarchists are now of advanced years. The applicant had provided a document which directly contradicts the evidence relied upon by the Board, in the form of a CNN article describing a protest by hundreds of anti-government demonstrators, mostly pro-monarchists. The Board erred in not addressing this relevant piece of evidence and explaining its rejection of it.
>
> [11] Consequently, because the Board made what amounts to a general finding of lack of credibility without clearly and comprehensibly explaining its reasons for doing so, and because the Board failed to mention a relevant piece of evidence in dismissing the applicant's claim, the application for judicial review is granted and the matter is referred back for rehearing and reconsideration by a differently constituted tribunal.

VI. Conclusion

[21] It follows that the RPD did not take into account deficiencies in the key evidence, and did not give reasons for doing so, and consequently this case should be reconsidered.

[22] The Court finds that the RPD’s decision does not fall within a range of possible, acceptable outcomes based on *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190.

[23] In view of the foregoing, the application for judicial review is therefore allowed.

JUDGMENT

THE COURT ORDERS that

1. The application for judicial review be allowed and the matter be referred back to the RPD for reconsideration by a different panel;

2. No serious question of general importance be certified.

"Michel M.J. Shore"
Judge

Certified true translation
Susan Deichert, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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