Federal Court  Cour fédérale

Date: 20101209

Docket: IMM-171-10

Citation: 2010 FC 1257

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, December 9, 2010

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

FAKHERA TANVEER WARAICH
SAHRASH TANVEER WARAICH
ADEEL TANVEER WARAICH
ANZA TANVEER WARAICH

Applicants

and

MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] According to case law, the Minister may adduce evidence at the vacation hearing to establish that a claimant made misrepresentations at his or her refugee hearing. Similarly, a claimant may adduce new evidence at the vacation hearing in an attempt to persuade the Immigration and Refugee Board (IRB) that he or she did not make the misrepresentations alleged (*Coomaraswamy v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 153, [2002] 4 F.C. 501, at paras. 16-17; *Chahil v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1214, 162 A.C.W.S. (3d) 299; C*anada (Minister of Public Safety and Emergency Preparedness) v. Gunasingam*, 2008 FC 181, 164 A.C.W.S. (3d) 847; C*anada (Minister of Citizenship and Immigration) v. Wahab*, 2006 FC 1554, 305 F.T.R. 288; Ca*nada (Minister of Citizenship and Immigration) v. Yaqoob*, 2005 FC 1017, 141 A.C.W.S. (3d) 103).

II. Judicial proceeding

[2] This is an application for judicial review of a decision by the Refugee Protection Division (RPD) of the IRB, dated December 22, 2009, allowing the application to vacate the decision to allow the applicants' claim for refugee protection, filed by the Minister under section 109 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA).

III. Facts

[3] The applicants, namely, the principal applicant, Fakhera Tanveer Waraich, and her three minor children, are citizens of Pakistan, who arrived in Canada on June 10, 2002.

[4] On March 8, 2004, the first RPD panel allowed the applicants' refugee claim in a decision signed on April 1, 2004. In support of her refugee claim, the principal applicant submitted two First Information Reports and arrest warrants for her and her husband.

[5] On April 22, 2004, the Canada Border Services Agency disclosed the results of an assessment of the First Information Reports submitted by the principal applicant indicating that the documents were not related to the principal applicant or her husband and, consequently, were fraudulent. Moreover, since the corresponding arrest warrants referred directly to the fraudulent First Information Reports, these were also false.

[6] On February 21, 2006, the Minister's representative filed an application to vacate the decision to allow the claim for refugee protection, on the grounds that the decision was obtained as a result of misrepresenting material facts relating to a matter relevant to the claim, in accordance with section 109 of the IRPA and section 57 of the *Refugee Protection Division Rules*, SOR/2002-228 (RPDR).

[7] On June 30, 2008, the RPD rejected the Minister's application to vacate under subsection 109(1) of the IRPA.

[8] On July 29, 2008, the Minister filed an application for leave to commence an application for judicial review of the decision dated June 30, 2008 (IMM-3352-08).

[9] On February 12, 2009, the Court allowed the application for judicial review made by the Minister. The Court set aside the RPD's June 30, 2008, decision and returned the matter to the IRB for redetermination by a different member.

[10] On December 22, 2009, a second RPD panel allowed the Minister's application and vacated the refugee status granted to the applicants on March 8, 2004. The applicants are challenging that decision in this application for judicial review.

IV. The impugned decision

[11] The IRB found that the first part of the test in subsection 109(1) of the IRPA had been met because of the misrepresentations made by the principal applicant before she obtained her refugee status in March 2004.

[12] The IRB then continued its analysis under subsection 109(2) of the IRPA and found that the remaining evidence was insufficient to justify the refugee status first granted.

V. Issue

[13] Did the IRB make a reviewable error in allowing the Minister's application to vacate?

VI. Analysis

[14] There was no error on the IRB's part. The Court agrees entirely with the respondent's position.

Legislation and applicable standard of review

[15] Section 109 of the IRPA permits the Minister to request the vacation of a decision having granted refugee status to a person if it appears that the decision was based on misrepresentations of material facts and that there is no evidence to justify refugee protection.

109. (1) The Refugee Protection Division may, on application by the Minister, vacate a decision to allow a claim for refugee protection, if it finds that the decision was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter.	**109.** (1) La Section de la protection des réfugiés peut, sur demande du ministre, annuler la décision ayant accueilli la demande d'asile résultant, directement ou indirectement, de présentations erronées sur un fait important quant à un objet pertinent, ou de réticence sur ce fait.
(2) The Refugee Protection Division may reject the application if it is satisfied that other sufficient evidence was considered at the time of the first determination to justify refugee protection.	(2) Elle peut rejeter la demande si elle estime qu'il reste suffisamment d'éléments de preuve, parmi ceux pris en compte lors de la décision initiale, pour justifier l'asile.
(3) If the application is allowed, the claim of the person is deemed to be rejected and the decision that led to the conferral of refugee protection is nullified.	(3) La décision portant annulation est assimilée au rejet de la demande d'asile, la décision initiale étant dès lors nulle.

[16] A reading of subsection 109(1) of the IRPA shows that the burden of proof is on the Minister: to have the refugee status already granted to the applicants vacated, the Minister must satisfy the IRB, on a balance of probabilities, that the applicants misrepresented or withheld some facts in their original claims for protection (*Nur v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 636, 150 A.C.W.S. (3d) 455, at para. 21).

[17] Then, in accordance with subsection 109(2) of the IRPA, the IRB must assess whether other sufficient evidence was considered at the time of the first determination to justify refugee protection.

[18] In *Sethi v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1178, 142 A.C.W.S. (3d) 310, at paragraphs 14 to 20, the Court determined that the IRB's findings under subsections 109(1) and (2) of the IRPA were reviewable on different standards of review, that of patent unreasonableness and that of reasonableness *simpliciter*.

[19] Since the Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, this Court has determined that the standard of review applicable to findings under subsection 109(1) of the IRPA is that of reasonableness (*Canada (Minister of Citizenship and Immigration) v. Chery*, 2008 CF 1001, 334 F.T.R. 148, at para. 22).

[20] The IRB's findings under subsection 109(2) of the IRPA are also reviewable on the reasonableness standard since the IRB exercises a discretion to which the Court owes deference (*Chery*, above, at para. 23; *Wahab*, above, at para. 24).

Misrepresentations (subsection 109(1) of the IRPA)

[21] The false documents submitted by the applicants, namely the two First Information Reports and the corresponding arrest warrants, were **central to their claim**. The documents were submitted in order to corroborate the principal applicant's allegation that she feared returning to

Pakistan since both she and her husband were sought by the police because of false accusations registered against them by their political opponents.

[22] It appears from the reasons for decision that the RPD invited the principal applicant to submit explanations for the fraudulent First Information Reports she submitted to the first panel.

[23] The RPD duly considered and weighed these explanations, but attached more probative value to the evidence submitted by the Minister.

[24] In order to decide whether misrepresentations were made, the RPD considered the new evidence. The new evidence showed that despite the principal applicant's allegation that she was sought by authorities in Pakistan, **which the fraudulent First Information Reports and arrest warrants were intended to establish**, she has returned to Pakistan on two occasions since 2004, with her children. They returned to Pakistan to see their grandfather, despite the alleged risk to their lives.

[25] The principal applicant was again confronted with this behaviour which totally contradicted her allegation that if the applicants had to return to their country, they would be killed. The RPD found that the explanations provided by the principal applicant were unsatisfactory.

[26] The applicants submit in their memorandum that the RPD could not consider the fact that the applicants returned to Pakistan after their refugee claim was granted in 2004. It appears from the reasons for decision that they also argued this point at the hearing.

[27] As the RPD pointed out, the RPD considered this new evidence in order to decide whether the applicants had made misrepresentations, the first part of the section 109 analysis. It was from this perspective, that is, in order to assess and weigh the principal applicant's explanations concerning the fraudulent First Information Reports, that the new evidence was considered.

[28] According to case law, the Minister may adduce evidence at the vacation hearing to establish that an applicant made misrepresentations at his or her refugee hearing. Similarly, an applicant may adduce new evidence at the vacation hearing in an attempt to persuade the IRB that he or she did not make the alleged misrepresentations (*Coomaraswamy*, above; *Chahil*, above; *Gunasingam*, above; *Wahab*, above; *Yaqoob*, above).

[29] Thus, contrary to the applicants' arguments, the RPD could consider the new evidence as it did.

[30] The RPD scrutinized the first panel's decision in light of the misrepresentations and found that the principal applicant's claim that she was sought by the authorities formed the basis of her claim. A reading of the narrative in the principal applicant's Personal Information Form (PIF), which I will analyze below, also supports the RPD's findings.

[31] The RPD also found that the personal documentary evidence, including the fraudulent First Information Reports, had a definite impact on the first panel, since that panel referred to the corroborating documentary evidence and also some concerns about the principal applicant's credibility (Decision at pp. 10-12, paras. 24-29).

[32] In light of the results of the examination of the First Information Reports, the principal applicant's unsatisfactory explanations when confronted with the fact that she had submitted false documents and that the applicants had later returned to Pakistan twice without being bothered by the authorities, the RPD could reasonably conclude that the decision to grant the applicants refugee status was the direct result of the misrepresentation or withholding of material facts relating to a relevant matter.

[33] The applicants have not shown that the RPD erred in concluding as it did.

Is there other sufficient evidence? (subsection 109(2) of the IRPA)

[34] The original panel that granted the refugee claim on March 8, 2004, based its decision on the principal applicant's testimony and the fact that her narrative was corroborated by the general documentary evidence on the conditions in the country **and** the personal documentary evidence submitted by the applicants.

[35] Since the principal applicant's allegations that she and her husband were sought by police because of false accusations registered against them by their political opponents can no longer be

considered credible in light of the fraudulent First Information Reports and arrest warrants submitted by the applicants, other evidence is consequently also tainted by the misrepresentations.

[36] In fact, a number of misrepresentations can be noted in the two-page narrative in the principal applicant's PIF (Applicants' Record (AR), Narrative of Fakhera Tanveer Waraich, p. 20, paras. 19-20 and 23-24).

[37] For example, at paragraph 19 of her narrative, the principal applicant states that she held a women's meeting on April 26, 2002, to support the Pakistan Muslim League (PML). It is because of and after that meeting that the First Information Reports, which turned out to be fraudulent, were registered against her. Consequently, there are serious reasons to doubt that this meeting, a central element of the claim, actually took place.

[38] At paragraph 20 of her narrative, the principal applicant falsely alleges that a First Information Report was registered against her for anti-government activities after she held the women's meeting to support the PML that she described at paragraph 19 of her narrative.

[39] At paragraph 23 of her narrative, she alleges that a false charge was registered against her husband.

[40] At paragraph 24 of her narrative, the principal applicant concludes by summarizing her fear of returning to Pakistan as follows:

> Army and police in Pakistan are looking for me. Mian Zafar Iqbal Gujar and his goons are very powerful because of the support of his Uncle SSP Sajad Ahmad and colonel Imtiaz Ahmad. I could be either killed or under the false case [sic] false case registered against me. My life in Pakistan is not safe I request you to give me protection. (Emphasis added.)

[41] The RPD found that the misrepresentation made by the principal applicant greatly undermined the credibility of the claim and the other evidence. The RPD essentially determined that there was no other evidence to justify refugee protection. It did not believe the principal applicant's version of the facts concerning her alleged persecution in Pakistan and the fact that she was wanted.

[42] It is up to the RPD to assess the credibility of remaining evidence. Consequently, it was not unreasonable for the RPD to conclude that the principal applicant's lack of credibility affected the weight of the other evidence submitted, as it was to a large extent based on her testimony (*Oukacine v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1376, 159 A.C.W.S. (3d) 569, at para. 32).

[43] It is clear from the decision that the RPD found that the principal applicant's credibility, with regard to her political involvement, was tainted because of her misrepresentations. The RDP therefore found that the original panel would, if it had not found the principal applicant's persecution allegations to be credible, also have dismissed the evidence for her political involvement (Decision at p. 8, paras. 27-30).

[44] In fact, the RPD had the following to say about the impact of the misrepresentations on the principal applicant's other allegations:

> [29] Therefore, I am of the opinion that, had he known the results of the expertise on the *First Information Reports*, his evaluation of the principal respondent's overall credibility, including conclusions on the probative value to give to other documents produced in her file (many of the other documents related to problems suffered by the claimant and family members because of their political involvement and two major documents are the *Arrest Warrants* against the principal respondent and her husband) would have been different in that they would not have been found credible with respect to their allegations of past problems, including their problem with the police. (Emphasis added.)

(See also para. 30 of the Decision.)

[45] If the allegations of the principal applicant's problems with the police **because of her political involvement** are rejected, the credibility of the alleged involvement, the basis of the allegations of persecution, is logically also affected.

[46] The RPD considered the documentary evidence submitted before the original panel to correctly conclude that mere membership in PML-N (Nawaz group) could not have allowed the original panel to conclude that there was a well-founded fear of persecution.

[47] In response to the applicants' arguments in their memorandum (paras. 44 and following), under subsection 109(2) of the IRPA, the existence of documentary evidence regarding the general situation of a country is not in itself sufficient to justify a person's refugee protection (*Annalingam v. Canada (Minister of Citizenship and Immigration)* (C.A.), 2002 FCA 281, [2003] 1 F.C. 586; C*oomaraswamy*, above, application for leave to appeal dismissed by the Supreme Court of Canada on January 9, 2003, (29274); S*elvakumaran v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1445, 127 A.C.W.S. (3d) 723; C*anada (Minister of Citizenship and Immigration) v. Fouodji*, 2005 FC 1327, 149 A.C.W.S. (3d) 478.

[48] The applicants must connect their situation and the documentary evidence, which they failed to do. They had to prove personalized risk (*Canada (Minister of Public Safety and Emergency Preparedness) v. Waraich*, 2009 FC 139, [2009] F.C.J. No. 188 (QL)).

[49] Moreover, the applicants did not deem it appropriate to submit the documentary evidence on which they base their arguments (Appellants' Memorandum, paras. 51 and following).

[50] The evidence allowed the RPD to draw this conclusion.

[51] The applicants failed to show that the RPD erred in finding that there remained insufficient other evidence among what had been considered in the initial decision to justify refugee protection.

VII. Conclusion

[52] In view of the foregoing, the applicants' arguments are not such as to persuade this Court that the IRB erred. The IRB's decision is fully justified.

[53] For all of the above reasons, the applicants' application for judicial review is dismissed.

JUDGMENT

THE COURT ORDERS THAT the application for judicial review be dismissed; no serious question of general importance is certified.

"Michel M.J. Shore"
Judge

Certified true translation
Johanna Kratz, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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