Federal Court  Cour fédérale

Date: 20120321

Docket: IMM-2086-11

Citation: 2012 FC 335

Ottawa, Ontario, March 21, 2012

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

ALMASOOD QURESHI
SAUDA LIYA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants seek to set aside a decision of an immigration officer refusing Almasood Qureshi's application for permanent residence under the family class, because there were reasonable grounds to believe that he was inadmissible pursuant to the *Immigration and Refugee Protection Act*, SC 2001, c 27.

Background

[2] Mr. Qureshi is a citizen of India. He made a refugee claim in March 1994, based on his membership in Hizbul Mujahideen. He stated at the refugee hearing that he supported that group by attending rallies and meetings, and by providing money and a place for members to hide. His refugee claim was denied by a two member panel of the Convention Refugee Determination Division of the Immigration and Refugee Board (CRDD) in February 1996. One member of the CRDD found Mr. Qureshi's claim to be a member of the Hizbul Mujahideen not to be credible. Finding that he was not a member of the Hizbul Mujahideen, he was not at risk in India. The second member found Mr. Qureshi and his claim to be a member of the Hizbul Mujahideen to be credible. Finding that he was a member of the Hizbul Mujahideen, he was excluded from the Convention under Article 1F(a) for his complicity in crimes against humanity. As a result, both members determined that Mr. Qureshi was not a Convention refugee; however, they did so for very different reasons.

[3] On May 13, 1996, Mr. Qureshi married Patricia Mathew Lewis and applied for permanent residence under the family class. That application was refused on January 20, 2003, based on a finding that the marriage was not genuine. Mr. Qureshi now admits that the marriage was not genuine; he attempted to perpetrate a fraud on the Canadian immigration system.

[4] On July 21, 2002, Mr. Qureshi had an engagement ceremony with Sauda Liya. He divorced Ms. Lewis in January 2003 and married Ms. Liya, his sponsor, a few days thereafter.

[5] On March 10, 2003, Mr. Qureshi was removed from Canada. He and his sponsor then made a family class application on March 29, 2003, coupled with humanitarian and compassionate considerations. That application was refused; however, upon filing an application for judicial review, the Minister consented to an order referring the matter back for reconsideration.

[6] After the application was sent back, the sponsor withdrew the application. Mr. Qureshi says that this first sponsorship application was withdrawn because it was subject to section 40 of the Act, which imposes a two-year ban on applications following the discovery of a misrepresentation. The application was withdrawn so that a second one could be filed that then fell outside the scope of section 40 of the Act given the passage of time.

[7] The officer assigned to the application had concerns which are reflected in the CAIPS notes under date of December 16, 2009, and which read, in part, as follows:

> The applicant is still inadmissible under paragraphs 34(1)(c) – 43(1)(f) and 35(1)(a) of IRPA for having been a member of a Pakistan-based terrorist organisation called Hizbul Mujahideen. Apparently the applicant never renounced his membership in that organisation & in fact actively supported it through collection of funds, providing shelter to its members and direct support through the attendance of meetings, public demonstrations and truning [*sic*] a blind eye to crimes and acts of terror committed by that organisation.
> …
> Because of refusing this application I will convoke the applicant to a B interview … [emphasis added].

[8] The officer found reasonable grounds to believe that Mr. Qureshi was a member of the inadmissible class of persons under sections 34(1)(c), 34(1)(f), and 35(1)(a) of the Act.

I have information relating to the refugee claim that you filed in Canada in March of 1994. During your hearing you declared being a member of an organisation called the Hizbul Mujahideen which you used as a basis for seeking refugee status in Canada. The Hizbul Mujahideen is an Islamic terrorist organisation which has been fighting the Indian security forces in the Kashmir and which is responsible for numerous acts of terrorism that resulted in numerous civilian and military casualties. At the time of your refugee hearing you did not renounce your membership in that organisation and in fact you declared having provided material support to that organisation and its members through funds raising [*sic*], providing shelter to its militants, and the attendance of meetings, rallies and public demonstrations in its favour. As well you did not express any contrition over the crimes and acts of terror committed by that organisation. As a result your refugee claim was rejected in 1997 and you were found to be a member of an inadmissible class of immigrant under the previous Immigration Act and a removal order was issued against you and executed in March 2003.

During your interview on the 7th of December 2010 you declared to me that you had concocted the story about being a member of the Hizbul Mujahideen as a ploy to obtain refugee status in 1994. You stated that after entering Canada illegally you went to a public library in Toronto and read abundant written material, books and magazines (whose titles you were unable to recall) about the conflict in the Kashmir and that you picked at random the name of an organisation - namely Hizbul Mujahideen - in order to present a credible story of persecution to your upcoming refugee hearing. You told me that you did not realise that the group - whose membership you had claimed - was a terrorist organisation until your second refugee hearing.

However, I do not find your current recantation credible. You told me that you had read abundant material on the conflict in Kashmir yet you picked at random a group without verifying what it stood for as a basis for a refugee claim. When I confronted you with the fact that at the time of your hearing you never renounced your membership in that group nor did you disassociate yourself from its goals and violent methods you told me that you stuck by your story to make it more credible. In fact I have every reason to question your credibility as you admitted using and paying the services of a smuggler([*sic*] whose name you could not recall nor the amount that you paid him) to enter Canada illegally and subsequently entering into a marriage of convenience to remain in Canada should you [*sic*] attempt at gaining refugee status fail.

> I gave you the opportunity to refute my arguments or provide a satisfactory answer but your retort was that you had a pilot licence and a security clearance as proof that you are not or were not really member of a terrorist organisation do not find these arguments to be convincing or sufficient [*sic*]. As a result I believe that you are still a member of an inadmissible category or [*sic*] person under 34(1)(c), 34(1)(f) and 35(1) of the Immigration and Refugee Protection Act.

[9] The officer went on to consider whether there were sufficient humanitarian and compassionate grounds for exempting Mr. Qureshi from the requirements of the Act, and found that there were not:

> I assessed whether there were overwhelming or compelling Humanitarian and Compassionate grounds in your application. However, I found none existing. You are gainfully employed as an airline pilot in India with well above average income. You, your wife and child are all living together in India, in good health and in a very comfortable situation.

[10] The application was therefore refused.

Issues

[11] Two issues are raised by the applicants:

1. Was the officer's conclusion regarding admissibility reasonable?
2. Was the officer's conclusion regarding humanitarian and compassionate grounds reasonable?

[12] The applicants accept that the question of whether a foreign national is inadmissible pursuant to sections 34 and 35 of the Act is a question of mixed fact and law, and is therefore to

be reviewed on a standard of reasonableness: *Motehaver v Canada (Minister of Citizenship and Immigration)*, 2009 FC 141. The assessment of humanitarian and compassionate grounds is also to be assessed on the reasonableness standard.

Analysis

1. Was the officer's conclusion regarding admissibility reasonable?

[13] The principal applicant submits that while both members of the panel rejected his refugee claim, the presiding member explicitly found that the applicant was not excluded because of membership in Hizbul Mujahideen, and further found that he was never actually a member of that organization. That member relied on the fact that the applicant had no knowledge of the organization's activities or its objectives. Only the second member found that the applicant was a member of Hizbul Mujahideen.

[14] The applicants submit that the officer erred by accepting the second member's findings as conclusive. They emphasize the following paragraph of the officer's decision:

> I have information relating to the refugee claim that you filed in Canada in March of 1994. During your hearing you declared being a member of an organisation called the Hizbul Mujahideen which you used as a basis for seeking refugee status in Canada…As a result your refugee claim was rejected in 1997 and you were found to be a member of an inadmissible class of immigrant under the previous Immigration Act and a removal order was issued against you and executed in March 2003 [emphasis added].

[15] The applicants submit that, contrary to this passage, the official determination of the panel was that Mr. Qureshi was not inadmissible. They note that, pursuant to section 69.1(10) of the *Immigration Act*, RSC 1985, c I-2, which was in force at the time of the applicant's refugee

claim, any disagreement between panel members is resolved in favour of the claimant. That section read, in part: "in the event of a split decision, the decision favourable to the person who claims to be a Convention refugee shall be deemed to be the decision of the Refugee Division."

[16] The applicants submit therefore that the finding of the second panel member cannot be treated as conclusive for the purposes of finding the applicant inadmissible. By basing his inadmissibility conclusion on this error, the officer's decision was unreasonable.

[17] The applicants also submit that the officer's comments in the CAIPS notes give rise to a reasonable apprehension of bias. They emphasize the following passage in particular, dated December 16, 2009, which they say shows that the officer did not have an open mind:

> The applicant is still inadmissible under paragraphs 34 (1) (c) - 34(1) (f) and 35(1) (a) of IRPA for having been a member of a Pakistan-based terrorist organization called Hizbul Mujahideen.Apparently [*sic*] the applicant never renounced his membership in that organisation & in fact actively supported it through collection of funds, providing shelter to its members and direct support through the attendance of meetings, public demonstrations and truning [*sic*] a blind eye to crimes and acts of terror committed by that organisation.
>
> There is no statute of limitation insofar as A 34 and 35 inadmissibility is concerned. Thus PA is still inadmissible. The fact that he has a daughter in Canada does not change that fact either. In fact PA amd [*sic*] wife may have conceived a child to give more weight to this sponsorship and try to sway our decision-making.
>
> In addition because of his removal from Canada PA needs an ARC.I [*sic*] am under no obligation to request one.
>
> Because refusing this application I will convoke the applicant to a B interview scheduled for March 2010.

[18] The respondent agrees that the finding of one member of the refugee panel cannot be relied on as a conclusive finding of fact. However, it is submitted that the officer conducted his own independent assessment of the evidence, and reached an independent conclusion that Mr. Qureshi was inadmissible and that this conclusion was reasonably open to the officer.

[19] It is submitted that the officer relied on the following facts in reaching his conclusion:

1. The applicant voluntarily declared his membership in Hizbul Mujahideen;
2. He maintained this allegation through two refugee hearings, and did not recant until December 2010;
3. The applicant knew at the time of second hearing that the organization was violent, but still maintained he was a member;
4. The applicant claimed to have read extensively about the Kashmir conflict, yet picked an organization at random, allegedly knowing nothing about its violent activities;
5. The applicant's only evidence that he was not a member of Hizbul Mujahideen was that he had obtained a pilot license and security clearance from India.

[20] The respondent says that the officer reasonably found that Mr. Qureshi lacked credibility, because he had demonstrated a willingness to break the law to enter Canada (by hiring a smuggler and by entering a marriage of convenience). Further, it is submitted that the officer was entitled to view with skepticism the subsequent retraction of Mr. Qureshi's statements, once he became aware of the risk of inadmissibility.

[21] Regarding the allegation of bias, the respondent notes that the threshold for a finding of bias is high. It is submitted that the officer had concerns after reviewing the file, and convoked an interview as a result; this does not mean the officer's mind was closed. The respondent says that the officer's conclusions were based primarily on the answers Mr. Qureshi gave at his interview and this demonstrates that the officer entered the interview with an open mind. The respondent submits that no reasonable person viewing the matter realistically and having thought the matter through would conclude that the officer was biased or had closed his mind before interviewing Mr. Qureshi: *Committee for Justice and Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369.

[22] I agree with the applicant that the officer incorrectly stated that the applicant was found inadmissible by the refugee panel. However, I also agree with the respondent that the officer's decision was not based solely on its erroneous belief that the refugee panel found the applicant inadmissible; rather, the officer conducted his own assessment of the evidence.

[23] The officer considered Mr. Qureshi's claim that he had fabricated the story of belonging to Hizbul Mujahideen; however, the officer did not find it believable that he could have researched the Kashmir conflict so extensively and yet had no idea what kind of organization Hizbul Mujahideen was when he selected it. The officer's rejection of the explanation was reasonable, and his conclusion does not fall outside the range of acceptable outcomes based on the facts and the law.

[24] It is noted that the standard for inadmissibility on security grounds is relatively low—the officer must have reasonable grounds to believe that the applicant belonged to Hizbul Mujahideen. Based on the facts before him, it was open to the officer to conclude that reasonable grounds existed in this case, and the Court therefore has no basis to intervene.

[25] Regarding the allegation of reasonable apprehension of bias, the Court acknowledges that some of the comments in the CAIPS notes are troubling: particularly, the officer's unfounded statement that the applicants may have conceived their daughter to improve their chances of success. However, the Court does not find that this comment rises to the level of creating a reasonable apprehension of bias. The Court agrees with the respondent that the officer considered the answers given at the interview, but was not convinced by them. I therefore find no reasonable apprehension of bias.

2. Was the conclusion regarding humanitarian and compassionate grounds reasonable?

[26] The applicants submit that the officer erred by applying an inappropriately high standard to the humanitarian and compassionate application. The officer stated that there were "no overwhelming H &C grounds" which the applicant submits is the incorrect test.

[27] The applicants further submit that the officer ignored evidence when he concluded that Mr. Qureshi "and his wife and child are in good health, live a very comfortable life in India with well above average income." They say that this conclusion ignored the evidence presented by the couple of the hardships of living in India including: stress and frustration; the children not getting the nutrients they require; concerns about food safety; problems with the water supply;

filth; dangerous roadways; children's chronic dust allergies; unreliable medicine supplies; poor quality schools; and corporal punishment at school.

[28] They further submit that the officer made a finding without regard to the evidence when he stated in the CAIPS notes: "His wife, though a Canadian citizen, is of Indian extraction and fits linguistically and culturally in India." The applicant submits that, on the contrary, the sponsor was born in Zambia, came to Canada many years ago, and has never before lived in India.

[29] They say that, similar to the inadmissibility issue, the officer placed undue weight on the findings of one panel member regarding the applicant's membership in Hizbul Mujahideen and that the officer erroneously referred to the withdrawal of the sponsorship application as a negative factor when it was withdrawn for tactical reasons and there was no basis to draw any adverse conclusion regarding the *bona fides* of the applicants' marriage.

[30] The granting of an exemption for humanitarian and compassionate reasons is exceptional and highly discretionary; thus deserving of considerable deference by the Court: *Za'Rour v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1281. Where there has been a finding of inadmissibility, any humanitarian and compassionate factors must be balanced against the public interest in excluding inadmissible persons from Canada.

[31] I agree with the respondent that it was reasonably open to the officer to conclude that the applicants had not presented sufficient evidence that they would face undue hardship if the

application was refused. The applicants have a high income, a large home and domestic staff, and the hardship they allege amounts to nothing more than the general living conditions in India.

[32] The officer does appear to consider the sponsorship withdrawal relevant to the humanitarian and compassionate application, as evidenced by this statement in the CAIPS notes dated January 7, 2011:

> There are no overwhelming H &C grounds to seek relief under H &C he and his wife and child are in good helath [sic], live a very comfortable life in India with well above average income.I [sic] also note that his sponsor withdrew her previous sponsorship.

However, I am unable to find that the consideration of this factor or the misstatement as to the spouse's ethnic background renders the officer's decision unreasonable when one considers all of the evidence before the officer as contained in the record.

[33] Lastly, I am not persuaded that the officer in stating that there were "no overwhelming H&C grounds" committed a reviewable error. I am satisfied from a review of the decision as a whole that the officer knew and applied the correct test. This turn of phrase, in my view, was a short-hand way of reflecting that the H&C considerations had to be significant when balanced against the reasons for the inadmissibility of Mr. Qureshi. That is appropriate and proper.

[34] Neither party proposed a question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is dismissed and no question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Gregory James	FOR THE APPLICANTS
Alexis Singer	FOR THE RESPONDENT

SOLICITORS OF RECORD:

GREGORY JAMES Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANTS
MYLES J. KIRVAN Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT