Date: 20070219

Docket: IMM-2528-06

Citation: 2007 FC 185

Ottawa, Ontario, the 19th day of February, 2007

Present: The Honourable Mr. Justice Blanchard

BETWEEN:

Javad MOHAJERY
Maryam DAMBASTEH
Mahdi MOHAJERY

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

1. Introduction

[1] This is an application for judicial review filed under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the IRPA), of a decision of the Immigration and Refugee Protection Board, Refugee Protection Division (the Board), dated April 13, 2006. The

applicants were refused status as refugees and persons in need of protection within the meaning of sections 96 and 97 of the IRPA.

[2] The applicant is asking this Court to set aside the Board's decision and refer the matter back to a differently constituted panel.

2. Facts

[3] On October 19, 2005, an application for refugee protection was submitted to the Board by Javad Mohajery, the principal applicant; Maryam Dambasteh, his wife; and their son, Mahdi Mohajery, all citizens of Iran. They are claiming refugee protection because they fear persecution by reason of their religion and their status as persons in need of protection.

[4] The principal applicant claims to have been spiritually converted to Christianity in 1997 under the influence of his younger brother, who converted in 1995.

[5] He married the female applicant on March 24, 1999. It is alleged that she too was spiritually converted to Christianity.

[6] Because of the inherent danger, the applicants were not baptized while they were living in Iran. The evidence on record mentions nothing about the situation of their son.

[7] The religious activities of the applicants in Iran involved reading the Bible, having discussions with the principal applicant's brother and his friends, and celebrating religious holidays. The principal applicant also went to a Christian church on two occasions.

[8] The applicants claim that their having to keep their religious beliefs secret did not cause them inconvenience to the point of wanting to leave Iran, where they wanted to remain because of their family ties.

[9] The events which led to their flight began on October 26, 2004 when the applicant's brother went to see him at home to warn him that the Iranian authorities had learned about his conversion and to ask him to help him hide.

[10] Meanwhile, the authorities arrived and proceeded to arrest the applicant and his brother.

[11] The applicant alleges that he was interrogated and beaten for several hours before he was released, and that police advised him that his activities would be conducted.

[12] The applicant's brother was detained for two months before being released in January as a result of the efforts of one of his lawyer friends, Hassan. The applicant alleges that when his brother was released from jail, he was very weak, disoriented and feared that the authorities would try to kill him.

[13] On April 4, 2005, the applicant was advised that his brother had committed suicide by drug overdose. However, he alleges having noted obvious signs of violence on his brother's body when he identified it. At that time, he allegedly openly accused the authorities of having murdered his brother.

[14] Two weeks later, the Iranian authorities interrogated the applicant about what he had said at the coroner's office. They advised him that he was currently under investigation and that they would deal with him shortly.

[15] The applicant then asked Hassan to find out what he could about the information the authorities had about him. In June 2005, Hassan told him that he could be killed at any moment, because just like his brother, he was suspected of having converted to Christianity. The applicants decided to leave the country on the basis of this information.

[16] The applicants arrived in Canada on August 13, 2005, and claimed refugee protection on the same day. Since September 2005, they have attended the Snowdon Baptist Church. They were also baptized on December 4, 2005, and attend religious courses weekly.

[17] The documentary evidence shows that conversion from Islam to Christianity (apostasy) is a very serious crime, punishable by death. This documentation shows that people are arrested, beaten, tortured and even murdered because they converted to Christianity.

3. Impugned decision

[18] On April 13, 2006, the Board determined that the applicants were not refugees or persons in need of protection.

[19] The evidence before the Board essentially consisted of the testimony of the applicants, the Personal Information Forms (PIF), personal documents, documents about religious activities of the applicants in Canada and documents concerning conditions in Iran, particularly regarding the treatment of former Muslims who have converted to Christianity.

[20] The Board found the applicants not to be credible and even concluded that their account was pure invention. This conclusion was based on the contradictions, inconsistencies and implausibilities that the Board identified in the applicants' testimony.

[21] Accordingly, the Board did not believe that the principal applicant had actually converted to Christianity. In support of this determination, it noted the following points:

- the principal applicant's allegations about the circumstances surrounding his conversion and that of his brother were vague and imprecise;
- it is implausible that the applicant never asked his brother about the circumstances in which he had been baptized;
- the explanations given by the spouse of the principal applicant regarding the circumstances of her conversion were insufficient;
- the form filled out by the applicants when they arrived in Canada stated that they were Catholic, whereas they were been baptized in a Baptist church;

- the applicant did not remember the name of the pastor who allegedly baptized him and his spouse and signed the baptismal certificates;
- The baptismal certificates and other documents concerning their religious activities in Canada were mere documents of convenience and therefore did not have any probative value.

[22] The Board also considered the possibility that the applicants might have a reasonable fear of persecution based on the Iranian authorities' belief that they had converted to Christianity before they left Iran. However, it dismissed this idea, finding that the principal applicant's testimony was not credible and was insufficient for the following reasons:

- the applicant testified that he had been dismissed from his employment because of his religious beliefs but stated that his employer had not made any comment supporting that idea;
- the applicant had been unable to give an acceptable explanation for his failure to mention in his Personal Information Form (PIF) that he had lost his employment because of his religious convictions;
- the applicant was also unable to explain to the Board how Hassan managed to have his brother released from jail;
- it is implausible that the applicant did not try to find out from Hassan what type of information the authorities had against him; and
- it is implausible that Hassan refused to forward any supporting documentation to the applicant.

[23] The Board also disbelieved the testimony of the principal applicant about his itinerary for the following reasons:

- he initially stated to the immigration officer that he had arrived from France;
- he then stated that he might have travelled on a Greek passport but was unsure;
- he changed his version of the facts later on, stating that he went from Iran to Turkey and then continued on to Moscow and Havana before finally arriving in Canada;
- the documentary evidence established that on the day the applicants arrived, there were no flights arriving from Havana.

[24] The Board concluded its decision by stating that nothing in the evidence submitted to it showed that the applicants would be in danger of persecution if they returned to Iran.

4. Issues

[25] The main issue in this case may be summed up as follows:

A. Did the Board err in failing to address and rule on the *sur place* refugee claim?

5. Standard of review

[26] The issue which the Court must deal with is whether the Board erred in failing to rule on the matter of a *sur place* refugee claim. The issue concerns the Board's failure to deal with part of the applicants' claim, namely, whether their activities in Canada would have significant consequences for them in their country of origin. Such an omission by the Board involves an error of law reviewable on the standard of correctness.

6. Analysis

A. Did the Board err in failing to address and rule on the *sur place* refugee claim?

[27] First of all, I would like to note that in this case the parties agree that the Board did not examine the issue of a *sur place* refugee claim in its decision. I also note on reading the reasons given by the Board that its analysis dealt entirely with the claim based on events which took place in Iran, and that the Board did not examine the impact of the applicants' religious activities in Canada should they return to Iran.

[28] The respondent submits that the applicants never invoked a *sur place* refugee claim before the Board. According to the respondent, the applicants therefore cannot blame the Board for not having dealt with an issue they never invoked. Although the case law of this Court has often acknowledged the principle to the effect that an issue not raised before an administrative tribunal cannot be examined in judicial review proceedings before the Court, there is an exception to the absolute application of this principle, at least in the context of a *sur place* refugee issue. In *Pierre-Louis v. Canada (MEI)* [1993] F.C.J. No. 420 (QL) (F.C.A.), Décary J.A. wrote the following:

> In this case, we do not believe that the Refugee Division can be faulted for not deciding an issue that had not been argued and that did not emerge perceptibly from the evidence presented as a whole. [Emphasis added]

[29] This issue was dealt with by Madam Justice Danièle Tremblay-Lamer in *Mbokoso v. Canada (M.C.I.)*, [1999] F.C.J. No. 1806 (F.C.J.) (QL). She determined that the issue of a *sur place* refugee claim must be examined if evidence of activities in Canada "emerged perceptibly" from the record.

[30] In *Mbokoso*, the panel had evidence in the record regarding activities in Canada which emerged perceptibly, in particular, a letter written by the UDPS, Montréal-East cell, indicating that the plaintiff was an active member of their party and took part in demonstrations. In these circumstances, the learned justice determined that the panel should have examined the impact of the applicant's membership in UDPS-Canada to determine whether the applicant had a reasonable fear of persecution on account of his activities in Canada.

[31] Accordingly, I am of the opinion that the issue of a *sur place* refugee claim must be examined insofar as it perceptibly emerges from evidence on the record that the activities liable to entail negative consequences in case of a return, took place in Canada. This must be done even though the applicants did not specifically ask the Board to proceed with such an analysis.

[32] It should be mentioned that this analysis must be done even if the applicant's narrative on the whole or in the part concerning his activities in his country of origin was not believed, insofar as trustworthy evidence establishes activities in Canada in support of the *sur place* refugee claim. On this point, see the following decisions: *Ghasemian v. M.C.I.*, 2003 FC 1266, *Sadeghi v. M.C.I.*, [2002] F.C.J. No. 1435 (QL), *Mokoso v. M.C.I.*, [1999] F.C.J. No. 1806 (QL), *Meta v. M.C.I.*, [1999] F.C.J. No. 1472 (QL), *Ngongo v. M.C.I.*, [1999] F.C.J. No. 1627 (QL), *Manzila v.*

M.C.I., [1998] F.C.J. No. 1364 (QL), *Nejad v. M.C.I.*, [1997] F.C.J. No. 1168 (QL), *Chen v. Canada*, [1993] F.C.J. No. 779 (QL).

[33] My decision in *Ghribi v. M.C.I.*, [2003] F.C.J. No. 1502 (QL), was also to this effect. In this case, the Board found the claimant not to be credible. However, the *sur place* claim for refugee protection was based on his testimony in which a public statement made by the Minister of Citizenship and Immigration Canada was cited. In his statement, the Minister had stated that that 150 Tunisians had entered Canada and were then lost or claimed refugee status, and that the Canadian authorities had co-operated with Tunisian authorities in an effort to identify and find those Tunisians. The applicant in that case testified that he was part of this group of Tunisians and that following the steps taken by Canadian authorities, the Tunisian authorities knew that he had claimed refugee protection in Canada. The applicant's testimony was found not to be credible, and there was no other evidence in support of a *sur place* refugee claim. Accordingly, I agree with the respondent's argument to the effect that the Board is not required to examine the issue of a *sur place* refugee claim where there is no credible evidence supporting that claim.

[34] In the case at bar, the applicants allege that they have been attending the Snowdon Baptist Church since the month of September 2005. They have been taking religious courses at home since the month of October 2005 and were baptized in December 2005. To establish their religious activities in Canada, the applicants submitted baptismal certificates, a letter dated September 18, 2005, from the Snowdon Baptist Church and a letter from the pastor who gave them religious courses at home. The letter dated September 18 is essentially a letter welcoming them to the church and confirming the appointment of a church deacon to take charge of their

spiritual development and maintain regular contact with them. In addition, the letter stipulates that the applicants must participate in the activities and meetings of the religious congregation. The uncontradicted documentary evidence shows that the applicants were baptized in a Christian church in Canada and openly participate in church activities. In my opinion, this is evidence of a conversion and of religious activities in Canada which emerged perceptibly from the record.

[35] The Board did not attach any probative value to the documentary evidence of the applicants' activities in Canada and determined that these were merely documents of convenience. In its reasons, the Board wrote the following:

> In view of the claimants' explanations about their conversion in Iran and that of his brother, the tribunal does not believe that they did convert and that the documents submitted by the Baptist Church are in this instance, documents of convenience and therefore have no probative value.

[36] In reaching this conclusion, the Board determined that this evidence did not support the applicant's allegations to the effect that he and his brother had converted to Christianity in Iran. In my opinion, the Board was entitled to disregard this documentary evidence as corroboration of the applicants' narrative of their activities in Iran. However, this assessment of the documentary evidence by the Board did not take into consideration the risks relating to the applicants' activities in Canada should they have to return to Iran.

[37] I am of the opinion that the Board was obliged to consider this documentary evidence, regardless of the issue of the applicants' credibility, in the context of a *sur place* claim for refugee protection. While it does not establish the sincerity of the applicants' conversion, this

documentary evidence does at least show that they have engaged in religious activities in Canada. I am of the view that this evidence is sufficient for the Board to be required to analyze the issue of a *sur place* claim for refugee protection insofar as the documentary evidence establishes that a conversion from Islam to Christianity is a very serious crime punishable by death in Iran. The Board had to assess the risks in connection with these activities in Canada in case the applicants returned to Iran, which it failed to do in this case. Accordingly, in these circumstances, by failing to address and rule on the issue of a *sur place* refugee claim, the Board committed an error of law warranting intervention by this Court.

[38] The case law is clearly to the effect that the failure to examine an applicant's claim is a reviewable error (*Manzila v. Canada (M.C.I.)*, [1998] F.C.J. No.1364 (C.F.) (QL); *Meta v. Canada (M.C.I.)*, [1999] F.C.J. No. 1472 (C.F.) (QL)).

[39] Therefore, the application for judicial review should be allowed.

[40] The parties did not propose a serious question of general importance for certification, as provided for under paragraph 74(*d*) of the IRPA. I am satisfied that no such question is raised in this case. Therefore, no question will be certified.

ORDER

THE COURT ORDERS that:

1. The application for judicial review be allowed.

2. The decision of the Board dated April 13, 2006, rejecting the claims for status as refugees and persons in need of protection be set aside.

3. The matter be referred back to a differently constituted panel for rehearing in accordance with the reasons for this order.

4. No serious question of general importance is certified.

"Edmond P. Blanchard"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**IMM**-2528-06
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