Federal Court  Cour fédérale

Date: 20110322

Docket: IMM-3907-10

Citation: 2011 FC 354

Montréal, Quebec, March 22, 2011

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

TAQI HASSAN SHAH BOKHARI
SYED ALI HASSAN BOKHARI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] It is well established in our law that in order to be a refugee, one must be at risk throughout his country, not simply in the region in which he lives. The concept of a viable internal flight alternative (IFA) is inherent in the determination of whether a person is a refugee within the meaning of the United Nations *Convention Relating to the Status of Refugees* or otherwise in need of Canada's protection (sections 96 and 97 of the *Immigration and Refugee Protection Act*; *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 (FCA), [1991]

FCJ No 1256 (QL); *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589 (FCA), [1993] FCJ No 1172 (QL)).

[2] The presiding member of the Refugee Protection Division of the Immigration and Refugee Board of Canada (IRB) found the applicants, father and son, to be at risk where they lived in the Punjab, but held that they were not Convention refugees and not in need of protection as there was a viable IFA available to them in Pakistan, in the city of Karachi. This is the judicial review of that decision.

THE FACTS

[3] Although the member had some concern with the applicants' story, he found on the balance of probabilities that they were speaking the truth. Credibility was not put in issue before me.

[4] Young Syed was sexually abused by the vice-principal at his school. When his father found out about it, he protested loudly, putting in issue the vice-principal's integrity and sexuality. Unfortunately, as so often happens, the predator blamed the victim. The vice-principal said that Syed was gay and that he was merely giving him "moral instruction."

[5] The vice-principal's brother was a Sunni Mulvi, *i.e.* a religious cleric. He persuaded the local Mufti to issue a fatwa against the applicants. The Mufti is an authority on Islamic law and tradition and a fatwa has been described as an "advisory opinion" which could extend so far as to a suggestion that the subject of the fatwa be killed.

[6] The vice-principal and his brother complained to the police. Various incidents adversely affected the applicants. Fearing for their lives, they fled to Canada.

STANDARD OF REVIEW

[7] The IFA is a finding of fact, only to be set aside on judicial review if unreasonable. The applicants submit that the record clearly reveals that the member's premise was based on misinterpretation of a key issue, which was the status of the police investigation against the applicants. As a result, he erroneously concluded that the local police were not taking the vice-principal's complaint seriously, so that there was no serious possibility that the applicants would be pursued in Karachi.

[8] More importantly, however, the applicants allege procedural unfairness. When it comes to matters of natural justice, including procedural unfairness, this Court owes no deference to the Tribunal whose decision is under review. Indeed, the standard of review is not applicable at all, although some might say that the standard is correctness (*Canadian Union of Public Employees (CUPE) v Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 SCR 29, at paragraphs 99 and 100).

ANALYSIS

[9] A cornerstone of the decision was the finding, based on documentary evidence, which was not cited, that "verbal edicts by local clerics only have a local influence." Furthermore, although the Mulvi was alleged to be a member of a terrorist organization, the member found that that organization was less active than other Jihadi organizations and the level of threat from it was low.

In reaching that conclusion, the member relied upon a United Kingdom Country of Origin Report which was not in the National Documentation Package, and which was not put before the applicants in order to give them an opportunity to respond.

[10] Moreover, there is no transcript for part of the proceedings. The matter was heard in March 2009 and in May 2010. Part of the March 2009 hearing was, undoubtedly due to an administrative error, not recorded, and so could not be transcribed. This only came to light after leave to proceed to a judicial review was granted by Mr. Justice Martineau. This led Syed, in an affidavit signed in January of this year, to say that during the portion of the first hearing which was not taped his father testified that the Mulvi was not a member of one, but rather two terrorist organizations.

[11] The member correctly set out the pre-requisites to a finding that a claimant has an IFA. There must be no serious possibility of the claimant being persecuted or, on the balance of probabilities, at risk of harm or cruel or unusual punishment or torture, in that part of the country where the IFA exists. Secondly, the conditions in that area must be such that it would not be objectively unreasonable for the claimant to seek refuge there (*Rasaratnam*, above).

[12] As enunciated in *Rasaratnam*, and many other cases, the burden rests with the claimant.

[13] There is no need for me to analyze the alleged errors with respect to the significance of the complaint laid with the police. I am satisfied that the decision resulted from procedural unfairness in that the member relied on extrinsic evidence which was not put before the claimants and that there is a serious possibility that the evidence before the member was that the Mulvi was a member of

two terrorist organizations. The more important a fact is to a claimant's case, the greater the need for the member to refer to it in his reasons (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35, [1998] FCJ No 1425 (QL)).

[14] The applicants are Shia Muslims, while the vast majority of Pakistanis, including the vice-principal, and his brother, the Mulvi, are Sunni. Some Sunni organizations have great animosity against Shias.

[15] It may well be that if they chose, the vice-principal and his brother, could track the applicants down in Karachi. However, the issue is whether they, with connections to terrorist organizations, have the will to do so. The member was of the view that once the applicants left their local community in the Punjab there would be no interest in pursuing them in Karachi.

[16] One of the bases of this decision was that the Mufti who issued the fatwa did so orally. The member said "according to the documentary evidence, verbal edicts by local clerics only have a local influence." The applicants complain that no authority was stated for that proposition. However, and while it might have been better to cite authority, that statement is justified by the record. According to the IRB's Responses to Information Requests, PAK40294.E and PAK102658.E issued in 2002 and 2007, literally thousands of fatwas are issued on a daily basis. If the fatwa is given by an unknown local Mufti, in a mosque, no one outside will know. However, if the Mufti is a radical or militant leader, people will know about it and the fatwa may be publicized. The more the Mufti is politicized, the greater the danger for the named individuals. The influence of

the fatwa depends on the stature of the person who issues it, and in this case the status of the Mulvi who induced him to act.

[17] The applicants do not know the name of the Mufti who issued the fatwa. However, this is understandable in that he is a Sunni, and the Bokharis, as Shias, did not attend his mosque.

[18] Nevertheless, the member accepted the applicants' testimony that the Mufti was a member of a Jihadi organization (Harkat-ul-Mujahideen (HuM)), formed in 1985 and previously known as Harkat-ul-Ansar. It was officially banned by the United States in 2001 due to its links to al-Qaeda. He concluded, however, that it was "less active than other Jihadi organizations and the level of threat from HuM itself is low." The member justified that statement by referring to the National Documentation Package for Pakistan, U.K. Country of Origin Information Report – Pakistan, Annex C, Terrorist Organizations, page 213, dated 18 January 2010.

[19] The Minister acknowledges that such a report exists, but it was not in the National Documentation Package at the time of the hearing, it is not in the package to this very day, and it was not put before me.

[20] Counsel for the Minister speculates that this reference may simply have been a clerical error in that the same information appears in Annex C of the U.K. July 2009 Report which states in Annex 3:

> **HARKAT-UL-MUJAHIDEEN (HuM) (Formerly Harkat-ul-Ansar (HuA))**
> Formed in 1985 and previously known as the Harkat-ul-Ansar (HuA). Officially banned by the US in 2001 due to its links with al-

> Qaeda. **[61a]** Less active than other jihadi organisations and the level of threats from HuM itself is low. However former members have joined other more dangerous groups, or operate in different guises. **[36]**

[21] The applicants put in the November 2008 Report, in its entirety. The entry is somewhat different. It reads:

> **HARKAT-UL-MUJAHIDEEN (HuM) (Formerly Harkat-ul-Ansar (HuA))**
> Formed in 1985 and previous known as the Harkat-ul-Ansar (HuA). Officially banned by the US in 2001 due to its links with Al-[Q]aeda.

[22] Not only do I not have the 2010 report before me, but the text relating to the HuM in the 2009 report contains two footnotes which also are not before me. Annex C is found at page 213 of the 2010 version, page 190 of the 2009 version and page 160 of the 2008 version. Obviously new material has been added. I can only conclude that the member relied on a document which was not in the available documentation package, and which is not before me. We can only speculate as to what might be in the report. The only report before me in its entirety, the 2008 version, makes no mention, at least in its index, of any terrorist organization except the Taliban.

[23] I find that the decision was tainted with procedural unfairness. In *Mancia v Canada (Minister of Citizenship and Immigration)*, [1998] 3 FC 461 (FCA), [1998] FCJ No 565 (QL), Mr. Justice Décary pointed out that if a board is to rely on extrinsic evidence not brought forth by the applicant himself, an opportunity must be given to respond thereto. At paragraph 16, he quoted from a speech of Lord Loreburn in *Board of Education v Rice*, [1911] AC 179 (HL), at page 182:

> They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy

> for correcting or contradicting any relevant statements prejudicial to their view […].

[24] One cannot say that the U.K. 2010 report was merely an update without novel and significant information as per paragraph 22 of *Mancia*.

[25] Syed also testified that during that part of the first day of hearing, which was not recorded, his father stated that the Mulvi was also a member of Lashkar-E-Jhangvi (LEJ). In both the 2008 and 2009 annex C before me, that group is described as a Sunni extremist breakaway group of the Sipah-E-Hahaba Pakistan (SSP), formed in 1996.

[26] Syed was not cross-examined. The Minister takes the position that his evidence was hearsay and not admissible on a final hearing in accordance with rule 81 of the *Federal Courts Rules*, and that in any event he was contradicted by the transcript of the second hearing which related only to the HuM. In my view, Syed's evidence was not hearsay. He was present at the hearing and was in as good a position as his father to swear as to what was said. It would be quite different if Syed had not been in the room and said in his affidavit that his father told him what he had said at the hearing. The issue is not whether the Mulvi is a member of the LEJ but rather whether, as a matter of fact, it was stated at the hearing that he was (see Bryant, Lederman and Fuerst, *The Law of Evidence in Canada*, 3d ed. (Markam, Ont: LexisNexis, 2009), at 229 and following).

[27] Furthermore, although the Minister does not take the position that Syed is lying, he concludes that he must be mistaken given the fact that only one terrorist organization was referred to at the second hearing. I believe the principle set out in *Browne v Dunn* (1893), 6 R 67 (HL), is

applicable. If a party wishes to undermine the credibility of a witness by introducing contrary or inconsistent evidence that party should bring the evidence to the witness' attention during cross examination. As Lord Herschell LC stated:

> [I]t seems to me to be absolutely essential to the proper conduct of a case, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is possible for him to explain, as perhaps he might be able to do if some questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that his is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is still in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses. [My Emphasis.]

[28] This possible contradiction should have been put to Syed in cross-examination.

[29] In any event, the Minister emphasizes, quite correctly, that the burden was on the applicants to establish that either of these terrorist organizations had outreach into Karachi. However, it is always difficult to know in advance what level of proof will satisfy a decision maker. All I need to say in this case is that the record does not establish how the member concluded that HuM was local in nature, and there is nothing in the record with respect to LEJ other than it is a Sunni extremist group. Given that homosexuality is a serious crime in Pakistan, and given that there may well have been testimony that the Mulvi was a member of an extremist Sunni group, consideration had to be given by the member as to the likelihood of two Shias being pursued in Karachi.

CERTIFIED QUESTIONS

[30] At the close of the hearing, counsel for the applicants stated that he would propose one or more serious questions of general importance which could be certified in order to support an appeal. He was given a delay to reduce those questions to writing, and counsel for the Minister was given a further delay to reply.

[31] The applicants proposed two questions:

a. Can the Immigration and Refugee Board, Refugee Protection Division, in the context of a refugee claim, legitimately use extrinsic evidence to question credibility?

b. Must the Immigration and Refugee Board, Refugee Protection Division Member, render a decision and reasons for each co-applicant, despite the fact that co-applicants share the same narrative, when each co-applicant has a distinct fear of persecution?

[32] The short answer is that, among other things, the question must be determinative of the appeal (*Liyanagamage v Canada (Minister of Citizenship and Immigration)* (1994), 176 NR 4 (FCA), [1994] FCJ No 1637 (QL)). Since the applicants have succeeded in their judicial review, and since the Minister posed no questions for certification, my decision is final.

[33] In any event I do not consider that the member used extrinsic evidence to question credibility. The jurisprudence is quite clear as to when extrinsic evidence may be used. Furthermore, counsel for the Minister submits rule 29 (2) of the *Refugee Protection Division Rules* which provides:

29. Disclosure of documents by the Division - (2) If the Division wants to use a document at a hearing, the Division must provide a copy to each party.	29. Communication de documents par la Section - (2) Pour utiliser un document à l'audience, la Section en transmet une copie aux parties.

[34] Furthermore I do not consider the second question to be a serious question of general importance. Although the claims were joined, an application to sever could have been made (see *Gilbert v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1186, [2010] FCJ No 1484 (QL)).

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that:

1. The judicial review is allowed.
2. The matter is referred back to another member of the Refugee Protection Division of the Immigration and Refugee Board for re-determination.
3. There is no serious question of general importance to certify.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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