

Federal Court



Cour fédérale

Date: 20130412

Docket: IMM-5229-12

Citation: 2013 FC 373

Ottawa, Ontario, April 12, 2013

PRESENT: The Honourable Madam Justice Gleason

BETWEEN:

**AMEERI, JASIM GHULAM REDHA, NAZARI-
NAFOUTI, NAJARES AND AMEERI,
MARYAM JASIM GHULAM REDHA**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, Jasim Ameer, is a citizen of Bahrain and his wife, Najares Nazari-Nafouti, is a citizen of Iran. Their daughter, Maryam, is five years old and is a Bahraini citizen. The family are Shia Muslims and for several years lived in Bahrain, where Mr. Ameer ran a business, importing pistachios from Iran. They fled the country for Canada in 2011, following the alleged murder of two of their friends by government security forces and an apparent upsurge in violence against Shia

Muslims that accompanied general civil unrest. Upon arriving in Canada, the applicants claimed refugee protection.

[2] The applicants claimed that they were at risk due to the turbulent situation in Bahrain and, more specifically, that Mr. Ameerri would be harmed by Mr. Adel Flaifel, the former Bahraini head of state security, if Mr. Ameerri were to return to Bahrain. The applicants also claimed they would be permanently separated if removed from Canada because they asserted Ms. Nazari-Nafouti could not return to Bahrain as an Iranian citizen and Mr. Ameerri and Maryam, as Bahraini citizens, could not live in Iran.

[3] In a decision dated April 30, 2012, the Refugee Protection Division of the Immigration and Refugee Board [RPD or the Board] rejected the applicants' claims for refugee protection on several bases. First, the Board did not believe that Mr. Ameerri faced a threat from Mr. Flaifel. Next, the Board reasoned that Ms. Nazari-Nafouti, while perhaps unable to return to Bahrain with her family, could nonetheless return to Iran and would not be exposed to risk there within the meaning of section 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA or the Act]. The Board also concluded that the possibility that she would be separated from her family did constitute persecution and that, more importantly, there was no evidence that Mr. Ameerri and Maryam could not return to Iran. On this point, the Board noted that Mr. Ameerri was of Iranian ethnicity and that he did not appear to have attempted to obtain the right to live permanently in Iran with his wife. Thus, the applicants had not demonstrated that permanent family separation was inevitable.

[4] In this application for judicial review, the applicants seek to set aside the Board's decision, arguing that:

1. The Board Member breached their rights to procedural fairness at the hearing by interrupting them and their counsel and preventing them from fully explaining the basis for their claims;
2. The Board failed to assess Maryam's claim that permanent separation from her mother constitutes "persecution" within the meaning of section 96 of the IRPA or "cruel and unusual treatment" within the meaning of section 97 of the Act;
3. The Board failed to address the risk that Mr. Ameer and Maryam face as Shia Muslims if returned to Bahrain and in limiting its risk analysis to that from Mr. Flaifel. The applicants argue in this regard that even if the Board did not believe that Mr. Ameer was threatened by Mr. Flaifel, it was nonetheless under an obligation to assess the risk that Mr. Ameer and his daughter might face as Shia Muslims of Iranian descent, if returned to Bahrain, as there was substantial evidence before the Board that indicated that Shia Muslims are being persecuted in Bahrain;
4. The Board erred in rejecting Ms. Nazari-Nafouti's claim that permanent separation from her husband and child constitutes "persecution" within the meaning of section 96 of the IRPA; and

5. The Board erred in rejecting Ms. Nazari-Nafouti's claim that being returned to Iran would contravene her rights under section 96 and 97 of the IRPA by exposing her to the requirement to wear a hijab and preventing her from attending parties or engaging in other activities that she would be prevented from as a woman in that country.

[5] For the reasons set out below, I have determined that the RPD erred in failing to consider and assess the risk that Mr. Ameerri and Maryam might face as Shia Muslims of Iranian descent if returned to Bahrain. None of the other alleged errors warrants intervention in light of the facts of this case and the positions taken by the adult applicants before the Board. Many of these other arguments were not made to the Board and there is no evidentiary basis for them.

[6] There is no standard of review applicable to the assessment of whether the Board violated the principles of procedural fairness as the matter is one for the Court to determine (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *CUPE v Ontario (Minister of Labour)*, 2003 SCC 29 at para 100, [2003] 1 SCR 539; *Amri v Canada (Minister of Citizenship and Immigration)*, 2012 FC 713 at para 7). The other issues the applicant puts forward are reviewable on the reasonableness standard as they involve questions of fact or mixed fact and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 51; *Kulasingham v Canada (Minister of Citizenship and Immigration)*, 2012 FC 543 at paras 22-25).

Was there a denial of procedural fairness?

[7] Turning, first, to the alleged denial of procedural fairness, the applicants point to three exchanges with the Board Member, where they allege they were prevented from putting forward their case.

[8] In the first exchange, set out at page 323 of the Certified Tribunal Record [CTR], the Member attempted to focus the claimant on why he alleged Mr. Flaifel would be likely to locate and harm him if he were returned to Bahrain. The Member's exchange with Mr. Ameeri was as follows:

CLAIMANT (MR. AMEERI): This guy, Adel Falafal, he was asking me I have to pay him a certain amount of money. I told him, "Okay, you know what? I can't do that." That's why I skipped and I went back to Iran.

MEMBER: Why was he after you? That's what I'm trying to find out.

CLAIMANT (MR. AMEERI): It wasn't only me. You know, other people also, if they were businessmen, and if they know that, they were aware that they had money, they were after them as – because they wanted to ask them about some money. It wasn't only me.

MEMBER: All right. This hearing is about you, your wife and your daughter, no one else. So, when I ask you questions, it's specific about any one of you. You're sitting in the witness chair now and I'm asking you questions about your situation that you've described in your personal information form. So, why were the State Security officials interested in you? I don't want to hear anything about anybody else. And what happened at the end of their interest in you? So, first is to why they wanted to speak to you.

[9] The second exchange, set out at pages 355 to 356 of the CTR, concerned Ms. Nazari-Nafouti's claim that she would be denied a residency permit in Bahrain because she was an Iranian citizen. The relevant portions of that exchange provide as follows:

COUNSEL FOR CLAIMANT: What makes you think that if you go back, it wouldn't be renewed again?

CLAIMANT (MS. NAZARI-NAFOOTI): You know what? Actually generally that's the situation. Right now, right now, Iranian people and Iranian government, actually Iranian people, they have big problem with Bahrain government.

MEMBER: What makes you think it won't be renewed by the Bahraini officials? Specific to the question, please.

CLAIMANT (MS. NAZARI-NAFOOTI): Because I have – actually I know many people and some of my friends even, when they left Bahrain, they couldn't be able to come back again to Bahrain, and even, even, even, you know, that was it Nowruz or New Year, Iranian New Year. I was just scared. I was worried. If I leave Bahrain and go back to Iran due to New Year to visit my parents, I can't be able to go back again to Bahrain because of that situation. Bahrain people, they won't allow whoever leave the Bahrain – actually they come back again to Bahrain.

MEMBER: How do you know this? Have you gone to the officials for a renewal of this residence permit? And if so, what was the result?

CLAIMANT (MS. NAZARI-NAFOOTI): At that time, I wasn't in Bahrain.

COUNSEL FOR CLAIMANT: So, let's focus about your friends.

MEMBER: No, I want to focus on the Claimant, why the Claimant, the female Claimant, believes her resident permit, no one else, would not be renewed by the Bahrainian authorities.

COUNSEL FOR CLAIMANT: Yeah, but –

MEMBER: There's no one else part of this hearing, except the Claimants, the male, female Claimant, adult Claimants and the minor child.

CLAIMANT (MS. NAZARI-NAFOOTI): (not interpreted) ---

MEMBER: Hold on. Hold on.

COUNSEL FOR CLAIMANT: Just one second. Just one second.

MEMBER: Hold on, hold on, hold on.

COUNSEL FOR CLAIMANT: She's describing ---

MEMBER: Wait. Wait.

COUNSEL FOR CLAIMANT: --- similarly situated people.

MEMBER: Mr. – what? We cannot have people speaking over anyone. The Claimants need to know what's being said.

COUNSEL FOR CLAIMANT: Sure.

MEMBER: And I'm explaining what I want.

CLAIMANT (MS. NAZARI-NAFOOTI): (not interpreted) ---

MEMBER: And hold on. Wait.

CLAIMANT: (MS. NARJES)/INTERPRETER: Okay. Just a second.

MEMBER: I'm not asking for the situation of others. I'm asking about your situation.

CLAIMANT (MS. NAZARI-NAFOOTI)(in English): I know, but (inaudible) ---

MEMBER: Wait. Wait. Wait, wait, wait.

INTERPRETER: She means that when ---

MEMBER: Madam In – no, hold on, hold on. Madam Interpreter, I need you to explain that, please, what I just said, from English to Farsi. I want to make sure everyone understands. It's important to me.

INTERPRETER: Okay. Perfect. Can you rephrase it again?

COUNSEL FOR CLAIMANT: Okay. Do you let me – let me take over.

MEMBER: No, no, Mr. Interp – Mr. Youssefi. Listen. I want the Claimant to be specific.

Madam Interpreter.

I would like to know how do you know the Bahraini officials would not renew your residency permit. I'm not concerned about others. I'm concerned about you.

CLAIMANT (MS. NAZARI-NAFOUTI): I mean that when?

MEMBER: It's expired. Your residency permit expired the 19th of January 2012. So, since it's expired and if you made a request for renewal of this document, how do you know it will not be issued?

CLAIMANT (MS. NAZARI-NAFOUTI): (not interpreted) ---

[10] Finally, counsel for applicants points to an exchange he had with the Board Member, on page 357 of the CTR, where he requested permission to "elicit information about those people [Ms. Nazari-Nafouti knew] that were fearful leaving Bahrain or were returning to Bahrain were not allowed in." In response to this request, the Member indicated that he did not wish to hear this evidence because he wanted the hearing focused on the applicants' situation.

[11] In my view, none of the foregoing exchanges amounts to a denial of procedural fairness. In terms of the first exchange between Mr. Ameerri and Board Member, the transcript demonstrates that Mr. Ameerri's testimony was hard to follow and that he wandered in answering questions. Thus, intervention by the Board Member was both required and reasonable in order to focus Mr. Ameerri's answers. In the impugned passage, the Board Member did nothing more than attempt to provide such focus and did not limit the applicant's testimony. Accordingly, this exchange does not demonstrate a denial of procedural fairness.

[12] The second two exchanges centered on Ms. Nazari-Nafouti's claim that she could not return to Bahrain. The Board accepted that this was the case in its decision. Accordingly, these alleged

denials of procedural fairness do not provide the basis for intervention as the Board accepted the applicants' evidence on this point. Thus, there was no violation of procedural fairness in this case.

Did the Board err in failing to find that Maryam and Ms. Nazari-Nafouti would be subject to persecution or "cruel and unusual treatment" by reason of their permanent separation?

[13] The applicants secondly argue that the RPD erred in failing to conduct an independent assessment of Maryam's claim and erred in failing to find that permanent separation of Maryam and her mother would constitute persecution, within the meaning of section 96 of the IRPA or, in Maryam's case, also cruel and unusual treatment, within the meaning of section 97 of the Act.

[14] As the respondent rightly notes, there is no evidentiary basis for this argument as the applicants failed to lead any credible evidence to establish that they were likely to be permanently separated. The only evidence somewhat related to this point in the record before the Board was a statement in the United States Department of State Report on Iran that "[w]omen cannot directly transmit citizenship to their children or to a non-Iranian spouse." This falls woefully short of establishing that Mr. Ameer and Maryam could not return to Iran. Thus, there was no evidence before the Board to show that the family would be permanently separated. As the RPD noted at para 12 of the decision, "[Mr. Ameer] is of Iranian ethnicity and there is no indication that the [applicants] have made contact with the appropriate authorities with a view of obtaining the appropriate documentation so the family can live legally and as normal as possible together in Iran."

[15] In the absence of any proof that the family would be permanently separated, the Board's failure to consider whether such possibility might amount to persecution or to cruel treatment is not

unreasonable. Simply put, there is no need for the RPD to consider theoretical issues that do not arise on the facts of the case before it.

Did the Board err in rejecting Ms. Nazari-Nafouti's claim that being returned to Iran would contravene her rights under section 96 and 97 of the IRPA due to restrictions placed on women in that country?

[16] The same may be said of the applicant's next argument. While it might be possible in an appropriate case for a female refugee claimant to successfully argue that being returned to a country where there is forced adherence to strict Islamic codes not espoused by the claimant constitutes "persecution" within the meaning of section 96 of the IRPA or "cruel treatment" within the meaning of section 97 of the Act (see e.g. *Saim v Canada (Minister of Citizenship and Immigration)* (1998), 148 FTR 219), this is not such a case. Here, the only real basis advanced by Ms. Nazari-Nafouti for refugee protection surrounded her claim that being returned to Iran would result in permanent separation from her husband and daughter. She had lived in Iran for a number of years and adhered to the cultural norms there, without complaint. The following excerpt from the transcript demonstrates that the basis for her claim centred on the belief that she would be permanently separated from her family:

MEMBER: When did you last live in Iran?

INTERPRETER: Last live?

MEMBER: Yeah. When was the last time you resided in Iran permanently?

CLAIMANT (MS. NAZARI-NAFOOTI): What do you mean? It means that I went for visit or I was living?

MEMBER: No, I just said, when was the last time you permanently lived in Iran?

CLAIMANT (MS. NAZARI-NAFOOTI): I believe it was 2006. I was pregnant at that time.

MEMBER: All right. And after 2006, did you ever return to Iran to visit?

CLAIMANT (MS. NAZARI-NAFOOTI): Yes.

MEMBER: How many times?

CLAIMANT (MS. NAZARI-NAFOOTI): I think it was two times, two or three times.

MEMBER: And the last time you went back for a visit was when?

CLAIMANT (MS. NAZARI-NAFOOTI): I believe it was November, around November or December 2010.

MEMBER: Okay. And when you were last there, when you last lived there permanently about 2006, why do you think, if you were required to return today, that your life would be at risk?

CLAIMANT (MS. NAZARI-NAFOOTI): Actually it's not like that, you know. I wasn't, you know, Iranian authorities, they weren't after me. It doesn't mean that if I go to Iran and I arrived to Iran airport, they going to arrest me. But, if I can't even do anything in Iran, I can't go to party, I can't – you know, always the are watching me and they are supervising me. The main, main risk for me is this thing. If I go back to Iran, I can't go with my daughter and my husband. I have to go by myself. And it's the big risk for me, you know. I can't.

[17] Once again, in the absence of evidence supporting the argument, the RPD was not required to consider a theoretical issue that did not arise on the facts of this case. Thus, on this point as well, its decision is reasonable.

Did the RPD err in failing to address the risk that Mr. Ameeri and Maryam face as Shia Muslims if returned to Bahrain?

[18] Turning, finally, to the basis for setting this decision aside, as noted, the RPD analysed only the risk to Mr. Ameeri posed by Mr. Flaifel and found there to be no such risk as it did not believe that Mr. Flaifel had threatened Mr. Ameeri in the past. However, the Board did not go on to assess whether there was an independent risk to Mr. Ameeri and, through him, to Maryam by reason of their profiles as Shia Muslims of Iranian descent.

[19] There was substantial evidence before the Board regarding the risk to Shias in Bahrain, and the country documentation reveals a picture of religious tensions which have intensified recently. The country's ruling monarchy is Sunni and historically there has been discrimination against the majority Shia population. However, that discrimination has increased in severity since the Arab Spring. While activists and journalists appear to be the greatest risk, the country documentation contains numerous references to the arbitrary arrest, detention and torture of male Shia as well, apparently motivated simply by their ethnicity and religious beliefs. The Board failed to analyze this risk and in so doing committed a reviewable error.

[20] The RPD has a duty to fully assess risks raised by an applicant's profile or circumstances (*Adan v Canada (Minister of Citizenship and Immigration)*, 2011 FC 655 at para 39; *Viafara v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1526 at para 6). This was noted the Supreme Court of Canada in *Ward v Canada (Minister of Employment and Immigration)*, [1993] 2 SCR 689 at 745-6, relying on the statement in the United Nations High Commissioner for Refugees' *Handbook on Procedures and Criteria/or Determining Refugee Status* that, "[I]t is not the duty of a claimant to identify the reasons for the persecution. It is for the examiner to decide

whether the Convention definition is met; usually there will be more than one ground”. The RPD failed to discharge that duty in this case.

[21] Thus, the Board’s failure to consider the risks facing Mr. Ameer and Maryam in Bahrain as a result of their ethnicity is a reviewable error which must result in the decision being set aside as a decision is unreasonable if it fails to address an issue that must be addressed (see e.g. *Cunningham v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 636 at para 19).

What is the appropriate remedy?

[22] Although I have treated each risk raised by the applicants separately, they were presented in an interdependent fashion by the applicants. As such, given that I have found an error was committed in assessing one of the risks, I find the most appropriate remedy to be that the claims for protection of all of the applicants be reconsidered by the Board. For this reason, the claims of all applicants will be remitted to the Board for reconsideration.

[23] The applicant requested that the following two questions be certified as serious issues of general importance, within the meaning of section 74 of the Act:

1. Whether or not a child’s refugee claim, although joined with her parent or parents, must be assessed separately by the IRB, and the IRB document, the “*Guideline 3: Child Refugee Claimants, Procedural and Evidentiary Issues*” [*Child Guidelines*] must be applied to the child, even though the child’s designated representative has not submitted [a] separate narrative in the child’s Personal Information Form?
2. Whether the RPD, when hearing the evidence of the parents, is obligated to consider the best interest of the child, including the potential separation of the child from the mother or father upon removal from Canada?

[24] To be appropriately certified under section 74, a question must be serious, of general importance – that is, of importance beyond the case in question – and dispositive of the case (*Kunkel v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 347 at para 8; *Canada (Minister of Citizenship and Immigration) v Zazai*, 2004 FCA 89 at para 11). With this threshold in mind, I decline to certify the proposed questions as they are not dispositive in this case in light of my finding that there is no evidentiary basis for the claim that the family would be permanently separated.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted;
2. The Board's decision is set aside;
3. The applicants' refugee claims are remitted to the Board for re-determination by a differently constituted panel of the Board;
4. No question of general importance is certified; and
5. There is no order as to costs.

"Mary J.L. Gleason"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-5229-12

STYLE OF CAUSE: *Ameeri, Jasim Ghulam Redha et al. v The Minister of
Citizenship and Immigration*

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: January 9, 2013

**REASONS FOR JUDGMENT
AND JUDGMENT:** GLEASON J.

DATED: April 12, 2013

APPEARANCES:

Mehran Youssefi FOR THE APPLICANTS

Alison Engel-Yan FOR THE RESPONDENT

SOLICITORS OF RECORD:

Mehran Youssefi, FOR THE APPLICANTS
Barrister and Solicitor
Toronto, Ontario

William F. Pentney, FOR THE RESPONDENT
Attorney General of Canada
Toronto, Ontario