**Federal Court Reports**
Rahaman v. Canada (Minister of Citizenship and Immigration) (C.A.) [2002] 3 F.C. 537

**Date: 20020301**

**Docket: A-711-00**

**Neutral citation: 2002 FCA 89**

**CORAM: STONE J.A.**

**EVANS J.A.**

**MALONE J.A.**

**BETWEEN:**

**MIZANUR RAHAMAN**

**Appellant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

**Heard at Montreal, Québec, on January 23, 2002.**

**Judgment delivered at Ottawa, Ontario, on March 1, 2002.**

**REASONS FOR JUDGMENT BY:**
**EVANS J.A.**

**CONCURRED IN BY:**
**STONE J.A.**

**MALONE J.A.**

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**REASONS FOR JUDGMENT**

**EVANS J.A.**

## *A. INTRODUCTION*

[1] On February 18, 1999, Mizanur Rahaman, a 26 year-old citizen of Bangladesh, was refused refugee status by the Convention Refugee Determination Division of the Immigration and Refugee Board. The Board also concluded that the claim had no credible basis within the meaning of subsection 69.1(9.1) of the *Immigration Act*, R.S.C. 1985, c. I-2.

[2] The principal effects of a "no credible basis" finding are that the unsuccessful claimant for refugee status has no right to apply to remain as a member of the Post-Determination Refugee Claimants in Canada ("PDRCC") class and is liable to be removed from Canada seven days after the removal order is effective.

[3] This is an appeal by Mr. Rahaman from a decision dated November 2, 2001 dismissing an application for judicial review of the Board's rejection of his refugee claim and of the "no credible basis" finding. The principal issue to be decided is contained in the question that the Application Judge, Teitelbaum J., certified under subsection 83(1):

Is a simple finding that a refugee claimant is not a credible witness sufficient to trigger the application of subsection 69.1 (9.1) of the *Immigration Act* ?

Counsel for Mr. Rahaman has limited the appeal to the Board's "no credible basis" finding; the dismissal of the application to set aside the Board's rejection of the refugee claim itself is not being appealed.

## *B. THE BOARD'S DECISION*

[4] In his submissions to the Board, Mr. Rahaman claimed that, as a result of his membership of and activities in the youth wing ("JJD") of the Bangladesh National Party ("BNP"), he had a well-founded fear of persecution in Bangladesh on account of his political opinions.

[5] More particularly, he alleged that, when participating in protest marches or election campaigns between 1990 and 1996, he had been beaten on several occasions by supporters of the Awami League and of the Jatiya Party, political rivals of the BNP. Awami League supporters, he said, were also responsible for bombing the office of the JJD in the appellant's electoral district and for vandalising a kiosk from which he was selling watches. Further, Mr. Rahaman stated that the police had provided little or nothing by way of protection against these attacks on him and had demanded bribes before being prepared to take any action. Having learned that his name was on a police list of suspected terrorists, and fearing for his life, Mr. Rahaman fled to Canada to claim asylum as a refugee.

[6] The Board was concerned by inconsistencies and implausibilities in Mr. Rahaman's testimony which he could not explain satisfactorily. For instance, the Board found it odd that Mr. Rahaman alleged that he was attacked and denied police protection at a time when the party to which he was affiliated, the BNP, was in power. Further, he could provide the Board with no adequate explanation of how he came to know that he was on a list of suspected terrorists or why, in a letter submitted in evidence to the Board, the local JJD branch of which Mr. Rahaman was an executive member made no mention of problems that its members had had with the police. Moreover, when faced by the Board with documentary evidence of violent clashes between JJD supporters and their rivals, the appellant retracted his testimony denying that such clashes had occurred. The Board also found that the credibility of Mr. Rahaman's evidence was further undermined by the fact that he was apparently willing to remain in Bangladesh during the years of his alleged persecution, when the party for which he worked was in power, but decided to leave when it was defeated, on the ground that his opponents would then seek revenge against him.

[7] Having considered all the evidence and the submissions, the Board concluded that the claimant was not a Convention refugee. It summarized its conclusion as follows:

The panel found a problem with the claimant's general credibility and particularly with his level of implication as he tried to demonstrate in his PIF [*scil.* Personal Information Form] and testimony.

Without further reasons the Board also found that Mr. Rahaman's refugee claim had no credible basis within the meaning of subsection 69.1(9.1) of the *Immigration Act*.

### *C. THE TRIAL DIVISION'S DECISION*

[8] On Mr. Rahaman's application for judicial review to have the Board's decision set aside, submissions were made on his behalf in an attempt to undermine the Board's finding that his evidence was not credible. However, after carefully considering the Board's findings in light of the oral and documentary evidence before it, and of the submissions made to him, Teitelbaum J. concluded that it was not unreasonable for the Board to find that the applicant's claim was not credible. He specifically noted the deference afforded by reviewing courts to credibility findings made by the triers of fact, and that documentary evidence before the Board contradicted in significant respects Mr. Rahaman's testimony.

[9] Teitelbaum J. also found that the Board had based its "no credible basis" finding primarily on Mr. Rahaman's lack of credibility. In addition, it had relied on the absence of documentary evidence to support his claim to be at risk of persecution and on the fact that some of the documentary evidence contradicted his account of the situation in Bangladesh at the relevant time.

### *D. LEGISLATIVE FRAMEWORK*

[10] The following provisions of the *Immigration Act* are relevant to this appeal.

***Immigration Act,* R.S.C. 1985, c. I-2**

| | |
|---|---|
| 49. (1) Subject to subsection (1.1), the execution of a removal order made against a person is stayed | 49. (1) Sauf dans les cas mentionnés au paragraphe (1.1), il est sursis à l'exécution d'une mesure de renvoi : |
| ... | ... |
| (c) subject to paragraphs (d) and (f), in any case where a person has been determined by the Refugee Division not to be a Convention refugee or a person's appeal from the order has been dismissed by the Appeal Division, | c) sous réserve des alinéas d) et f), dans le cas d'une personne qui s'est vu refuser le statut de réfugié au sens de la Convention par la section du statut ou don't l'appel a été rejeté par la section d'appel : |
| (i) where the person against whom the order was made files an application for leave to commence a judicial review proceeding under the Federal Court Act or signifies in writing to an immigration officer an intention to file such an application, until the application for leave | (i) si l'intéressé présente une demande d'autorisation relative à la présentation d'une demande de contrôle judiciaire aux termes de la Loi sur la Cour fédérale ou notifie par écrit à un agent d'immigration son intention de le faire, jusqu'au prononcé du jugement sur la demande d'autorisation ou la demande de contrôle judiciaire, ou |

has been heard and disposed of or the time normally limited for filing an application for leave has elapsed and, where leave is granted, until the judicial review proceeding has been heard and disposed of,

...

(f) in any case where a person has been determined pursuant to subsection 69.1(9.1) not to have a credible basis for the claim to be a Convention refugee, until seven days have elapsed from the time the order became effective, unless the person agrees that the removal order may be executed before the expiration of that seven day period

69.1(9.1) If each member of the Refugee Division hearing a claim is of the opinion that the person making the claim is not a Convention refugee and

is of the opinion that there was no credible or trustworthy evidence on which that member could have determined that the person was a Convention refugee, the decision on the claim shall state that there was no credible basis for the claim.

l'expiration du délai normal de demande d'autorisation, selon le cas,

...

f) dans le cas où la section du statut a décidé conformément au paragraphe 69.1(9.1) que la revendication n'a pas un minimum de fondement, pendant sept jours à compter du moment où la mesure est devenue exécutoire, à moins que l'intéressé ne consente à l'exécution avant l'expiration de cette période.

69.1(9.1) La décision doit faire état de l'absence de minimum de fondement, lorsque chacun des membres de la section du statut ayant entendu la

revendication conclut que l'intéressé n'est pas un réfugié au sens de la Convention et estime qu'il n'a été présenté à l'audience aucun élément de preuve crédible ou digne de foi sur lequel il aurait pu se fonder pour reconnaître à l'intéressé ce statut.

[11] The relevant provisions of the Regulations respecting the PDRCC class follow.

***Immigration Regulations, 1978,* SOR/78-172**

2.(1) "member of the post- determination refugee claimants in Canada class" means an immigrant in Canada

(a) who the Refugee Division has determined on or after February 1, 1993 is not a Convention refugee, other than an immigrant

...

(iii) whom the Refugee Division has determined does not have a credible

2.(1) « demandeur non reconnu du statut de réfugié au Canada » Immigrant au Canada :

a) à l'égard duquel la section du statut a décidé, le 1er février 1993 ou après cette date, de ne pas reconnaître le statut de réfugié au sens de la Convention, à l'exclusion d'un immigrant, selon le cas :

...

(iii) à l'égard duquel la section du statut a déterminé, en vertu du paragraphe 69.1(9.1)

| | |
|---|---|
| basis for the claim, pursuant to subsection 69.1(9.1) of the Act, | de la Loi, que sa revendication n'a pas un minimum de fondement, |
| ... | ... |
| (c) who if removed to a country to which the immigrant could be removed would be subjected to an objectively identifiable risk, which risk would apply in every part of that country and would not be faced generally by other individuals in or from that country, | c) don't le renvoi vers un pays dans lequel il peut être renvoyé l'expose personnellement, en tout lieu de ce pays, à l'un des risques suivants, objectivement identifiable, auquel ne sont pas généralement exposés d'autres individus provenant de ce pays ou s'y trouvant : |
| (i) to the immigrant's life, other than a risk to the immigrant's life that is caused by the inability of that country to provide adequate health or medical care, | (i) sa vie est menacée pour des raisons autres que l'incapacité de ce pays de fournir des soins médicaux ou de santé adéquats, |
| (ii) of extreme sanctions against the immigrant, or | (ii) des sanctions excessives peuvent être exercées contre lui, |
| (iii) of inhumane treatment of the immigrant; | (iii) un traitement inhumain peut lui être infligé. |

[12] Subsection 11.4(1) of the Regulations also provides that, subject to certain limitations, persons found to be members of the PDRCC class, and their dependants, are to be granted permanent residence status in Canada.

## *E. ANALYSIS*

[13] Counsel for the appellant has argued that in the past this Court has interpreted too broadly the "no credible basis" provision in subsection 69.1(9.1). She has invited us to reconsider settled case law and to adopt a narrower interpretation which, she contends, would be more consistent with the scheme of the Act and would bring Canada into line with international norms. More precisely, it is submitted that a person's refugee claim is not supported by "no credible or trustworthy evidence" simply because the Board finds that the claimant is not a credible witness and hence concludes that there is no evidence linking the claimant to the alleged persecution on which the claim is based.

[14] The original statutory function of the "no credible basis" test was to determine whether a refugee claim could be eliminated at the preliminary stage of a two-stage determination process: subsection 46.01(6), added by *Immigration Act*, R.S.C. 1985 (4th Supp.), c. 28, s. 14. This process was designed to enable the Board to deal expeditiously with the large numbers of unfounded refugee claims that were anticipated.

[15] However, since "no credible basis" established a threshold so low that most claimants were able to cross it, the process proved cumbersome, and did not assist the Board to handle its case load in an efficient and expeditious manner. Accordingly, it was abandoned in February 1993 when subsection 46.01(6), was repealed by R.S.C. 1992, c. 49. As a result, inland refugee claimants no longer had to prove that their claims had a credible basis before gaining access to a full determination by the Board. The amendments that came into effect in 1993 also added the present subsection 69.1(9.1), thereby conferring on the "no credible basis" test a new function in the statutory scheme, namely to restrict the post-determination rights of unsuccessful claimants whose claims were found to be supported by no credible evidence.

[16] *Sheikh v. Canada (Minister of Employment and Immigration),* [1990] 3 F.C. 238 (C.A.) contains the most authoritative exposition of the "no credible basis" test when it performed the function of screening out claims at the preliminary stage of the determination process. Writing for the Court, MacGuigan J.A. concluded (at page 244) that Parliament had intended subsection 46.01(6) to screen out more than clearly "bogus claims":

The concept of "credible evidence" is not, of course, the same as that of the credibility of the applicant, but it is obvious that where the only evidence before a tribunal linking the applicant to his claim is that of the applicant himself (in addition, perhaps, to "country reports" from which nothing about the applicant's claim can be directly deduced), a tribunal's perception that he is not a credible witness effectively amounts to a finding that there is no credible evidence on which the second-level tribunal could allow his claim.

I would add that in my view, even without disbelieving every word an applicant has uttered, a first-level panel may reasonably find him so lacking in credibility that it concludes there is no credible evidence relevant to his claim on which a second-level panel could uphold that claim. In other words, a general finding of a lack of credibility on the part of the applicant may conceivably extend to all relevant evidence emanating from his testimony. Of course, since an applicant has to establish that all the elements of the definition of Convention refugee are verified in his case, a first-level panel's conclusion that there is no credible basis for any element of his claim is sufficient.

[17] Subsequently, the phrase "no credible basis" as it appears in subsection 69.1(9.1) has been interpreted in accordance with *Sheikh, supra.* Thus, in *Mathiyabaranam v. Canada (Minister of Citizenship and Immigration)* (1997), 41 Imm. L.R. (2d) 197, at paragraph 12 (F.C.A.), Linden J.A. cited *Sheikh, supra,* for the proposition that, "while credible basis and credibility are not identical, they are clearly connected". At the very least, *Mathiyabaranam, supra,* is an implicit endorsement of the applicability of *Sheikh, supra,* in the context of subsection 69.1(9.1).

[18] Judges of the Trial Division have expressly held that *Sheikh, supra,* is the applicable approach to the words "no credible basis" in subsection 69.1(9.1): see, for example, *Hernandez v. Canada (Minister of Citizenship and Immigration),* [1999] F.C.J. No. 607 (T.D.); *Nizeyimana v. Canada (Minister of Citizenship and*

*Immigration)*, 2001 FCT 259; *Geng v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 275.

[19] Some Judges have noted, however, that because of the change in statutory context *Sheikh, supra*, should not be read broadly so as to relieve the Board of the duty to base a "no credible basis" finding on the totality of the evidence before it. This caution was well articulated in *Foyet v. Canada (Minister of Citizenship and Immigration)* (2000), 187 F.T.R. 181, on which counsel for the appellant placed considerable weight. In this case (*supra*, at paragraph 19), Denault J. summarised his understanding of the law as follows:

In my view, what *Sheikh*, tells us is that when the only evidence linking the applicant to the harm he or she alleges is found in the claimant's own testimony and the claimant is found to be not credible, the Refugee Division may, after examining the documentary evidence make a general finding that there is no credible basis for the claim. In cases where there is independent and credible documentary evidence, however, the panel may not make a no credible basis finding.

In my view, this is an accurate statement of the law as it has been understood to date, subject to one qualification: in order to preclude a "no credible basis" finding, the "independent and credible documentary evidence" to which Denault J. refers must have been capable of supporting a positive determination of the refugee claim.

[20] The case law to date would therefore seem to be solidly against the position taken on behalf of Mr. Rahaman in this appeal, namely that the Board may not make a "no credible basis" finding if a claim is based on a Convention ground and there is evidence that persecution of the kind alleged has in fact occurred in the country in question.

[21] Nonetheless, counsel submits that we should reconsider the existing jurisprudence on subsection 69.1(9.1) because it is not consistent with Parliament's intention in enacting it. Instead, she argues, a claim should only be found to lack a credible basis if it would be characterised as "manifestly unfounded", the test used in international instruments for identifying both claims that may be rejected through a more summary determination procedure than that normally applicable to refugee claims and claimants whose post-determination rights may be truncated in order to expedite their removal. Counsel puts her argument in two ways.

**(a) The statutory coherence argument**

[22] Counsel argues that, to apply the interpretation of the "no credible basis" test in *Sheikh, supra*, to subsection 69.1(9.1) subverts the intention of Parliament by converting into the normal what was intended to be exceptional. The argument is that the statutory scheme established by the *Immigration Act* contemplates that, in the normal course, an unsuccessful refugee claimant will be entitled to apply to be recognized as a member of the PDRCC class, and to remain in Canada until the final determination of that application and the disposition of any legal proceedings arising either from that application or from the rejection of the refugee claim. A finding of "no credible basis", which deprives an unsuccessful claimant of these rights, is

intended only for the unusual case where the claim is so devoid of merit as to constitute an abuse of the refugee determination system.

[23] However, it is argued, most refugee claims fail because the Board does not believe the claimant's testimony. Therefore, if a "no credible basis" finding can be made when the Board does not find the claimant credible, most unsuccessful refugee claimants will not have the right either to make a PDRCC claim, or to remain in Canada pending the final disposition of an application for judicial review of the Board's dismissal of their refugee claim. The result is that most unsuccessful claimants will not have the benefit of the rights that Parliament intended. Despite the absence of evidence in the record before us on the percentage of refugee claims that are rejected because the claimant is not found to be credible, I am prepared to assume for the purpose of this appeal that they constitute a significant percentage of all unsuccessful refugee claims.

[24] I do not, of course, take issue with that regularly approved principle of statutory interpretation formulated by E.A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths Ltd., 1983), at page 87, that "... the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." Nonetheless, in my opinion, counsel's argument cannot succeed.

[25] First, a word or phrase is presumed to have the same meaning when used more than once in the same statute: R. Sullivan ed., *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths Ltd., 1994), at pages 163-64. This presumption is particularly persuasive when, as here, the phrase is part of a longer text, and both phrase and text appear in different provisions of the statute. In my view, the presumption is not significantly weakened by the fact that the phrase "no credible basis" did not appear in provisions of the *Immigration Act* that were in force at the same time. As I have already noted, the former subsection 46.01(6) was repealed at the same time that subsection 69.1(9.1) was added to the Act.

[26] Second, I cannot ignore the fact that in *Mathiyabaranam, supra,* this Court treated the interpretation in *Sheikh, supra,* of "no credible basis" in subsection 46.01(6) as equally applicable to the same words in subsection 69.1(9.1), a view consistently taken in the Trial Division. Only in exceptional circumstances should a well established interpretation of a statutory provision be abandoned.

[27] Third, I do not accept counsel's submission that *Sheikh, supra,* equates "no credible basis" with a finding that the claimant's testimony is not credible. In particular, it is expressly stated in that decision that the Board is to have regard to all the evidence before it: the claimant's oral submissions and any documentary evidence or other oral testimony. See, for example, *Nizeyimana, supra*; *Barua v. Canada (Minister of Citizenship and Immigration),* [2000] F.C.J. No. 1744 (T.D.); *Tingombay v. Canada (Minister of Citizenship and Immigration),* 2001 FCT 752.

[28] Moreover, the wording of subsection 69.1(9.1) provides that a "no credible basis" finding may only be made if there was no credible or trustworthy evidence on which the Board member *could* have upheld the claim. In other words, the Board member may not make a "no credible basis" finding if there is credible or

trustworthy evidence before it that is capable of enabling the Board to uphold the claim, even if, taking the evidence as a whole, the Board decides that the claim is not established.

[29] However, as MacGuigan J.A. acknowledged in *Sheikh, supra*, in fact the claimant's oral testimony will often be the only evidence linking the claimant to the alleged persecution and, in such cases, if the claimant is not found to be credible, there will be no credible or trustworthy evidence to support the claim. Because they are not claimant-specific, country reports alone are normally not a sufficient basis on which the Board can uphold a claim.

[30] On the other hand, the existence of *some* credible or trustworthy evidence will not preclude a "no credible basis" finding if that evidence is insufficient in law to sustain a positive determination of the claim. Indeed, in the case at bar, Teitelbaum J. upheld the "no credible basis" finding, even though he concluded that, contrary to the Board's finding, the claimant's testimony concerning the intermittent availability of police protection was credible in light of the documentary evidence. However, the claimant's evidence on this issue was not central to the Board's rejection of his claim.

[31] Fourth, while the adverse consequences of a "no credible basis" finding under subsection 69.1(9.1) are undoubtedly significant for the person concerned, they need to be considered in context. Thus, although those against whom a "no credible basis" finding is made do not have a statutory right to an automatic stay of their removal while they exhaust their legal and administrative recourse, if they seek leave to apply for judicial review of the Board's dismissal of their refugee claim, they may ask the Court for a stay pending the Court's disposition of their application.

[32] Further, although not permitted to apply for exemption from removal as a member of the PDRCC class, an unsuccessful refugee claimant whose claim has been found to have no credible basis may apply to remain in Canada on humanitarian and compassionate grounds in the exercise of the Minister's discretion under subsection 114(2). The existence of an objectively identifiable risk facing the applicant, if returned, is a recognized ground for a positive exercise of discretion: Immigration Canada, *Immigration Manual: Inland Processing.* looseleaf (Immigration Information Centre; 1991), chapter 5, section 8.8. However, a removal will generally not be stayed pending the completion of a subsection 114(2) application, although a person whose application is based on a risk of persecution in his or her country of origin will normally not be removed if the claimant is found likely to be at serious risk.

[33] In other words, while a "no credible basis" finding undoubtedly exposes the person concerned to a relatively expeditious removal, removal in fact may be delayed. Legal and administrative safeguards against the removal of those likely to face persecution on their *refoulement* do exist, even though they are not as favourable as those available to unsuccessful refugee claimants in respect of whom each member of the Board has not made a "no credible basis" finding under subsection 69.1(9.1).

**(b) The international law argument**

[34] Counsel for Mr. Rahaman argues that compliance with international norms requires that unsuccessful refugee claimants not be subject to *refoulement*

pending the disposition of legal proceedings brought to review the rejection of their refugee claims, unless their claims are manifestly unfounded. For the Court to interpret subsection 69.1(9.1) to include claims that cannot be said to be manifestly unfounded would put Canada out of line with international legal norms. Only when faced with completely unequivocal statutory language should the Court conclude that an Act of Parliament derogates from international norms respecting the protection of human rights. *Sheikh, supra*, is silent on this point, perhaps because the judicial recognition of the importance of international norms in the interpretation of statutory powers, and the review of their exercise, is a relatively recent phenomenon in Canada.

***(i) statutory interpretation: the international context***

[35] Nowadays, there is no doubt that, even when not incorporated by Act of Parliament into Canadian law, international norms are part of the context within which domestic statutes are to be interpreted: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paragraph 70. Similarly, in *Suresh v. Canada*, 2002 SCC 1, at paragraph 59, when referring to the *Immigration Act* the Supreme Court of Canada stated: "A complete understanding of the Act ... requires consideration of the international perspective." It was also said in *Suresh, supra,* at paragraph 60, that the reason for examining the international dimension is not to determine if Canada is in breach of its international legal obligations as such, but to use prevailing international norms to inform the interpretation of a provision of domestic law, in that case section 7 of the *Canadian Charter of Rights and Freedoms*.

[36] Of course, the weight to be afforded to international norms that have not been incorporated by statute into Canadian law will depend on all the circumstances of the case, including the legal authoritativeness of their legal source, their specificity and, in the case of customary international law, the uniformity of state practice. Moreover, although subject to the restraints imposed by the *Constitution Acts 1867 to 1982*, including the Charter, Parliament is the ultimate source of law in our system of law and government. Hence, effect cannot be given to unincorporated international norms that are inconsistent with the clear provisions of an Act of Parliament. Were it otherwise, the principle that treaties and other international norms only become part of the domestic law of Canada if enacted by Parliament would be undermined.

[37] The question before us is whether the interpretation of subsection 69.1(9.1) in *Sheikh, supra*, authorizes the removal of unsuccessful refugee claimants contrary to international norms. This will occur if a claim supported by "no credible or trustworthy evidence" is not also "manifestly unfounded" as that phrase is understood in the international community.

***(ii) a right to remain pending an appeal?***

[38] The first step to answering the above question is to ask if international norms require states to ensure that an unsuccessful refugee claimant is not returned to the country of alleged persecution pending the final disposition of a legal challenge to the dismissal of the refugee claim. This question is not expressly addressed in the *1951 Convention Relating to the Status of Refugees,* 28 July 1951, 189 U.N.T.S. 150

(the Geneva Convention), or in the *1967 Protocol Relating to the Status of Refugees*, 31 January 1967, 606 U.N.T.S. 267, which are the most authoritative legal texts that define the status of refugee and establish the key principles of protection, including non-*refoulement*.

[39] However, in Article 35 of the Geneva Convention the signatory states undertake to co-operate with the Office of the United Nations High Commissioner for Refugees (UNHCR) in the performance of its functions and, in particular, to facilitate the discharge of its duty of supervising the application of the Convention. Accordingly, considerable weight should be given to recommendations of the Executive Committee of the High Commissioner's Programme on issues relating to refugee determination and protection that are designed to go some way to fill the procedural void in the Convention itself.

[40] The Executive Committee has recommended that unsuccessful refugee claimants be given a reasonable opportunity to appeal from a refusal to recognize their claim, and be permitted to remain in the country of refuge pending appeal, before they are returned to their home country where they may be subject to identifiable risk: see UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva: 1998), UN GA, 32 Sess., UN. Doc A/32/12/Add.1 (1977). Similarly, in 1995 the Council of the European Union adopted the *Resolution on Minimum Guarantees for Asylum Procedures* ("EU Council Resolution"), which provides in paragraph 17 that as a general rule asylum seekers should be permitted to remain in the territory of the Member State where protection is being sought until the refusal of the claim has been taken on appeal. See also James C. Hathaway and Anne K. Cusick, "Refugee Rights Are Not Negotiable" (2000), Georgetown Imm. L.J. 481, at page 496.

[41] In my opinion, this material indicates the existence of an international norm that signatory states to the Geneva Convention should normally permit refugee claimants to remain in their territory until they have exhausted any right of appeal or review. This is what paragraph 49(1)(*c*) of the *Immigration Act* provides.

[42] However, it is also recognized in international instruments that states may derogate from the normal rule by providing more limited review and appeal rights to unsuccessful claimants whose claims have been held to be "manifestly unfounded". Thus, the Executive Committee has indicated a consensus on the problem created by the increase in applicants who "clearly have no valid claim" or whose claims are "manifestly unfounded", and that states must create separate national procedures to address this problem: *Conclusion No. 28* (XXXIII) 1982, UN UNHCR, 32$^{d}$ Sess., UN Doc. EC/SCP/22/Rev.1 (1982), *Conclusion No.30* (XXXIV) 1983, UN Doc., *Report on the 34$^{th}$ Session of The Executive Committee of the High Commissioner's Programme*, UN GAOR, 34$^{th}$ Sess., A/AC.96/631 (1993), *Conclusion No. 87* (L) 1999, at paragraph (k).

[43] Consequently, the Executive Committee has recommended (*Conclusion No. 30, supra,* at paragraph (e)(iii)) that, while refugee claimants must be given an opportunity to have a negative decision reviewed before their forcible removal, "this

review possibility can be more simplified than that available in the case of rejected applications which are not considered manifestly unfounded or abusive." See also *UN Global Consultations on International Protection*, 2d Meeting, UN Doc. EC/GC/01/12 (2001) ("Global Consultations"), at paragraph 32. The EU Council Resolution provides that a person whose claim is held to be manifestly unfounded should at least be entitled to request the body reviewing the refusal of the claim to stay the claimant's removal until the review is complete.

[44] In my opinion, the restricted post-determination rights afforded by the *Immigration Act* to those whose claims are found to have no credible basis are not inconsistent with international norms as evidenced by the above instruments. "No credible basis" claimants may apply for judicial review and request the Court to grant a stay pending the disposition of the application, and those found to be at serious risk in their country of origin will not be removed. A problem arises, however, if a claim can fall within this category, but is not "manifestly unfounded" as that term is commonly understood in the international community. As I have already noted, a person whose claim is not "manifestly unfounded" should be permitted to remain pending the disposition of the appeal or review.

***(iii) "manifestly unfounded or clearly abusive"***

[45] There is no doubt that some international instruments appear to give a very restricted meaning to the term "manifestly unfounded". For example, paragraph (d) of *Conclusion 30, supra*, defines claims that are "manifestly unfounded" as "those which are clearly fraudulent or not related to the criteria for the granting of refugee status laid down in the 1951 ... Convention ... nor to any other criteria justifying the granting of asylum".

[46] More recent pronouncements, however, are less categorical, no doubt in response to a growing number of genuine and bogus refugee claims. For example, Article 28 of the EU Council Resolution, *supra*, provides a longer list of the grounds on which a Member State may dismiss a refuge claim as manifestly unfounded, although the absence of credible evidence supporting the claim is not among them. However, the inclusion of two grounds on which a claim *must not* be considered as manifestly unfounded suggests that the longer list of what makes a claim manifestly unfounded is not intended to be exhaustive.

[47] In addition, the recent report arising from the Global Consultations process of the United Nations canvasses the various approaches adopted by states to the definition of "manifestly unfounded": *supra*, at paragraphs 28-31. In particular, it says that some states have "factored credibility, or the absence thereof, into the original assessment of manifest unfoundedness", while others have taken the position that a claim may be manifestly unfounded if made with the intention of misleading the national authorities. Evidence that there is as yet no international consensus on the scope of the term, "manifestly unfounded" is provided by paragraph 26 of this document, which states:

There is a need, in UNHCR's assessment, to promote a more common understanding of the types of claim which would merit the presumption that they are manifestly

unfounded or clearly abusive, and which could be examined under the accelerated procedure.

[48] Further evidence of state practices that widen the categories of manifestly unfounded claims to include those that are supported by no credible evidence is supplied by G. Goodwin-Gill, *The Refugee in International Law*, 2nd ed. (Oxford: Clarendon Press, 1996), at pages 344-47.

[49] On the basis of the material considered above it is not possible in my opinion to conclude that a comprehensive international norm has emerged defining a manifestly unfounded or abusive application that would exclude a claim that has "no credible basis", as interpreted in *Sheikh, supra*. I would also note in this regard that under Canadian law all eligible inland claimants have a right to a full adjudicative hearing before an independent administrative tribunal, and that a finding of "no credible basis" is only made on the basis of this process.

## *F. CONCLUSIONS*

[50] In view of my conclusion on the indeterminate state of international law on whether any claim that has no credible basis within the meaning of subsection 69.1(9.1) is also manifestly unfounded, it is unnecessary to consider whether that provision should be interpreted to include only claims that are manifestly unfounded or clearly abusive. I would only note that, although "manifestly unfounded or clearly abusive" is the phrase used in international instruments, Parliament has retained the term "no credible basis" in the Act.

[51] Finally, while I have not been able to accept the position advanced by counsel for Mr. Rahaman in this appeal, I would agree that the Board should not routinely state that a claim has "no credible basis" whenever it concludes that the claimant is not a credible witness. As I have attempted to demonstrate, subsection 69.1(9.1) requires the Board to examine all the evidence and to conclude that the claim has no credible basis only when there is no trustworthy or credible evidence that could support a recognition of the claim.

[52] For these reasons, I agree with Teitelbaum J. that, having considered the oral and documentary evidence before it, the Board committed no reviewable error in stating that Mr. Rahaman's claim lacked a credible basis. Accordingly, I would dismiss the appeal and answer the certified question as follows:

Whether a finding that a refugee claimant is not a credible witness triggers the application of subsection 69.1(9.1) depends on an assessment of all the evidence in the case, both oral and documentary. In the absence of any credible or trustworthy evidence on which each Board member could have determined that the claimant was a Convention refugee, a finding that the claimant was not a credible witness will justify the conclusion that the claim lacks any credible basis.

[53] Counsel for the Minister requested costs. However, rule 22 of the *Federal Court Immigration Rules, 1993*, SOR/93-235, provides that costs are not awarded in

respect of an application or an appeal under the Rules, "unless the Court, for special reasons, so orders." In my opinion no special reasons exist here. Given the limited authority from this Court on the interpretation of subsection 69.1(9.1), and the newly emerging importance of international human rights norms for the interpretation of domestic legislation, I cannot regard this appeal as in any way improper or inappropriately brought, a view obviously shared by the Application Judge when he certified a question for appeal.

"John M. Evans"

J.A.

"I agree

A.J. Stone J.A."

"I agree

B. Malone J.A."