Date: 20070122

Docket: IMM-2931-06

Citation: 2007 FC 58

Ottawa, Ontario, January 22, 2007

PRESENT: The Honourable Mr. Justice Blanchard

BETWEEN:

BAHAEDIEN ABDALLA KARSOUA

Applicant

and

THE MINISTER OF

CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

1. Introduction

[1] The Applicant, Mr. Bahaedien Karsoua, seeks judicial review of a decision of the Immigration and Refugee Board (IRB) dated April 20, 2006, rejecting the Applicant's request for asylum as a Convention Refugee and as a person in need of protection.

2. Facts

[2] The Applicant is a 20 year-old stateless Palestinian. The Applicant was born in Abu Dhabi, United Arab Emirates (UAE), where he completed 13 years of schooling in private schools. His parents are both stateless Palestinians. They continue to reside in Abu Dhabi along with seven of the claimant's eight siblings. One bother presently resides in the United States.

[3] The claimant's father has been a long-time employee of the state-run oil company. His father was born in Yafo, Palestine, in 1948, and lived in the West Bank thereafter. These areas eventually became part of the state of Israel. In 1967 the Applicant's father moved to Jordan, where he was not allowed to attend university as he was not a citizen. In 1968 he obtained a two-year Jordanian passport, however, this gave him no status in Jordan. In August 1977 the Applicant's father moved to the UAE where he has lived and worked ever since.

[4] The Applicant's mother is also a stateless Palestinian, who was also able to obtain a two-year Jordanian passport.

[5] The Applicant alleged that he suffered taunts and discrimination as a result of being Palestinian and a non-citizen of the UAE at the private school he attended. After receiving a cut on his head, the Applicant was

refused service at the private hospital because he was not an Emirati, and had to wait two hours to receive treatment at the public hospital

[6] In May 2003 the Applicant obtained a two-year passport from Jordan. Using this passport, he applied for and obtained a Canadian student visa on August 18, 2003. Included in the Applicant's Jordanian passport, is a resident's permit from the UAE which would have expired upon the Applicant being absent from the UAE for a period of six months or at the latest in 2006.

[7] The Applicant came to Canada to begin his studies in September 2003. In May 2004, the claimant returned to the UAE to visit his family for a period of three months. He then returned to Canada to continue his studies in August 2004. He claimed refugee status on January 28, 2005, in Halifax, N.S. The hearing took place on February 15, 2006 and the IRB issued its negative decision on April 20, 2006.

3. The Impugned Decision

[8] The IRB found that the Applicant had not provided "credible or trustworthy evidence" and as a result determined that he is neither a "Convention Refugee" nor "a person in need of protection" by reason of a risk to life or a risk of cruel and unusual treatment or punishment or danger of torture as defined in subsection 97(1) of the *Immigration and Refugee Protection Act*, 2001, c. 27, (the Act) (see Appendix).

[9] The IRB found the Applicant to be a stateless Palestinian. Although born in the UAE, he is not a citizen of that country. While the Applicant did travel to Canada and obtained a student visa on the basis of a two-year Jordanian passport, which did not confer citizenship or a right of return to Jordan. That passport has since expired. His resident's permit for the UAE expired when the Applicant was absent from the UAE for 6 months, which was the case at the time of the IRB decision, on April 20, 2006.

[10] The IRB found the UAE to be the Applicant's country of habitual residence. He was born there in 1977, he was schooled there and with the exception of a brief visit to Jordan and the West Bank, he has spent his entire life there,.

[11] The IRB did not believe that the Applicant provided credible evidence of a fear of persecution or serious harm in his last country of habitual residence, namely, the UAE.

[12] The IRB found that the taunts and discrimination suffered by the Applicant as well as the incident at the private hospital did not amount to persecution or risk of serious harm.

[13] The Board accepted that the expiry of the Applicant's UAE resident's permit would mean he would no longer be permitted to return to the UAE, and that he had no valid travel documents as his two-year Jordanian passport had also expired.

[14] The IRB drew a negative inference from the Applicant's re-availment to the UAE on one occasion in early 2004 to visit his family. As a result, the IRB did not believe the Applicant's behaviour was consistent with that of a person fleeing persecution or serious harm.

[15] The IRB found that the Applicant's denial of right of return to UAE does not constitute persecution. It IRB cited the decision of *Altawil v. Canada (M.E.I.)*, (1996) F.C.J. No. 986 (QL), where the Court found that a denial of a right of return does not amount to persecution if done pursuant to a law of general application. The IRB found this to be the Applicant's situation.

4. Issues

[16] The Applicant raises the following issues:

A. Did the IRB err in making its adverse credibility findings and in particular by finding that the cumulative effect of the harassment and discrimination faced by the Applicant in the UAE did not amount to persecution?

B. Did the IRB err in failing to specifically analyze the s.97 claim or in considering the Applicant's subjective fear in its analysis?

C. Did the Board err in concluding that a denial of a right of return does not constitute persecution?

5. Analysis

A. *Did the IRB err in making its adverse credibility findings and in particular by finding that the cumulative effect of the harassment and discrimination faced by the Applicant in the UAE did not amount to persecution?*

[17] It is widely accepted that credibility finding by the IRB are reviewed on the standard of patent unreasonableness (*Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100 at para. 38, 2005 SCC 40). The first issue deals with a question requiring the IRB to consider whether the evidence of harassment and discrimination amounts to persecution in the circumstances of this case. In order to determine the applicable standard of review to this question, it is necessary to conduct a pragmatic and functional analysis (*Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2006] F.C.R. 392.)

[18] The analysis requires consideration of the four contextual factors first set out in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, namely:

(1) the presence or absence of a privative clause or a statutory right of appeal;

(2) the relative expertise of the tribunal;

(3) the purpose of the statute and the provision in question; and

(4) the nature of the question.

(1) *The presence or absence of a privative or a statutory right of appeal.*

[19] The presence of a full privative clause is compelling evidence that the Court ought to show deference to a Tribunal's decision. A provision permitting appeals, on the other hand, suggests a more searching standard of review. Here, the Act does not contain a privative clause nor does it provide a statutory right of appeal. Although a party may apply to the Federal Court to judicially review the IRB's decision pursuant to sections 18 and 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, the availability of a judicial review does not necessarily decrease the level of deference owed to the IRB. As the Supreme Court of Canada stated in *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722, the jurisdiction of a court on appeal is much broader than the jurisdiction of a court on judicial review. At paragraph 31, the Court stated that: "In principle, a court is entitled, on appeal, to disagree with the reasoning of the lower tribunal".

[20] As a consequence of there being no statutory right of appeal or privative clause, I am of the view that the impact on the level of deference owed to the IRB in respect to this factor is neutral.

(2) *The relative expertise of the IRB*

[21] In evaluating this second factor, the Court must consider the "three dimensions" of relative expertise, stated in *Pushpanathan*, above, at paragraph 33:

(1) the IRB's expertise;

(2) the Court's own expertise relative to that of the IRB; and

(3) the nature of the specific issue before the IRB relative to the Court's expertise.

[22] The Supreme Court of Canada elaborated on the relationship between expertise and curial deference in *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226. At paragraph 28, citing *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, the Court stated that:

> Greater deference will be called for only where the decision –making body is, in some way, more expert than the courts, and the question under consideration falls within the scope of this greater expertise.

[23] The question under review involves considering whether the facts of discrimination and harassment amount to "persecution" in the sense intended under the Act.

[24] The IRB as an expert tribunal on refugee matters certainly has a recognized expertise in assessing those factors required in order to obtain refugee status. However, where only 10% of board members are required by law to be legally trained (subsection 153(4) of the Act), they are consequently not recognized as experts on questions of law. It follows, therefore, that on questions of law the court would have greater expertise than the IRB.

[25] The question here is one of mixed flaw and fact and requires an analysis with a significant factual component. Given the expertise of the Court on questions of law and the Tribunal's recognized expertise in assessing facts in the context of a refugee claim, I am of the view that while this factor does not militate in favour of a high level of deference, a certain level of curial deference is warranted.

(3) *The purpose of the statute and the provision in question.*

[26] The objectives of the Act with respect to refugees is set out in subsection 3(2) and is to provide a safe haven for refugees while providing a fair and efficient procedure to achieve that end. Ultimately, the refugee provisions of the Act are intended to meet Canada's legal obligations with respect to refugees under international law.

[27] The Supreme Court in *Pushpanathan* above, at paragraph 48 commented on the role of the IRB under the Act:

> Nor can the Board be characterized as performing a "managing" or "supervisory" function, as was found in *Southam* and *National Corn Growers*. The Board itself is not responsible for policy evolution. The purpose of the Convention – and particularly that of the exclusions contained in Article 1F – is clearly not the management of flows of people, but rather the conferral of minimum human rights' protection. The context in which the adjudicative function takes place is not a "polycentric" one of give-and-take between different groups, but rather the vindication of a set of relatively static human rights, and ensuring that those who fall within the prescribed categories are protected.

[28] The context in which the IRB must conduct its assessment of the evidence and decide the claim is not a "polycentric" one as that term is understood in the above jurisprudence. Rather, the question must be determined in the context of the vindication of a specific claimant's human rights. This factor therefore militates towards a less deferential standard of review.

(4) *The nature of the question*

[29] The question under consideration is one of mixed fact and law. The IRB must decide if the Applicant's factual circumstances are sufficient to establish that he has suffered "persecution" in the sense intended under the Act. It is not a question where factual findings can be easily divorced from the legal definition of "persecution". In my view, the factual component of the question remains an important element in the analysis. Since findings of facts are within the purview of the IRB, this last factor militates towards a certain level of deference to the IRB by a reviewing court.

[30] Considering all the contextual factors above, in my view, the appropriate standard for reviewing the IRB's decision regarding whether discrimination and harassment amounts to persecution is reasonableness *simpliciter*. This conclusion is consistent with the findings of my colleagues in the following cases: *Canada (Minister of Citizenship and Immigration) v. Hamdan*, 2006 FC 290 at paragraph 17; *Al-Mahamud v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 334, 218 F.T.R. 205. The standard of reasonableness basically involves asking: "After a somewhat proving examination, can the reasons given by the Commission, when taken as a whole, support the Commission's decision?" At paragraph 56 of *Canada (Director of Investigation and Research) v. Southam*, [1997] 1 S.C.R. 748, the Supreme Court of Canada described the standard of reasonableness *simpliciter* as follows:

> An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it.

[31] The Applicant argues that the IRB failed to clearly articulate reasons for finding that he failed to provide credible evidence of a well-founded fear of persecution or that he is a person in need of protection. In so doing, the Applicant contends that the IRB erred in making its credibility findings. The Applicant further contends that the IRB failed to consider the cumulative effect of the numerous incidents of harassment and discrimination in

determining that the incidents did not amount to persecution. The Applicant further contends that the IRB's approach constitutes a selective and limited assessment of the evidence. The Applicant also argues that the IRB erred in relying only on one event to determine the Applicant's lack of credibility, namely the Applicant's return to the UAE in 2004 to visit his family.

[32] In my view the IRB did not reject the Applicant's evidence in respect to the incidents of harassment and discrimination as alleged. In its reasons the IRB wrote, "Even if the panel were to accept these assertions this does not, in the panel's mind, constitute persecution or a risk of serious harm." The IRB made no negative credibility findings regarding these incidents; it simply found that they did not amount to persecution. A careful review of the record and particularly the transcript of the testimony of the hearing before the IRB, establishes that the IRB did consider the evidence before it. In its reasons it explicitly considered the discrimination suffered by the Applicant in private school and at the hospital, and also acknowledged that he was a victim of taunts and discrimination. I note that none of the incidents of harassment and discrimination complained of by the Applicant involved violence or warranted police intervention. None of the incidents were reported to the authorities. The IRB also considered the Applicant's stateless status and associated implications of this status on his refugee claim. I reject the Applicant's contention that the IRB was limited and selective in its consideration of the evidence. Upon considering the evidence cumulatively, I am of the view that it was reasonably open to the IRB to determine that the Applicant failed to provide credible evidence of a well-founded fear of persecution. In concluding as it did on this issue, the IRB committed no reviewable error.

B. *Did the IRB err in failing to specifically analyze the s.97 claim or in considering the Applicant's subjective fear in its analysis?*

[33] The issue of whether the Applicant is a "person in need of protection" is a mixed question of fact and law. Such decisions, when considered "globally and as a whole" are reviewable on the reasonableness *simpliciter* standard. See *Demirovic v. Canada (Minister of Citizenship and Immigration)* 2005 FC 1284, at paragraph 23, *Kim v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 437, paragraphs 8-22; *Herrada et al. v. Canada (M.C.I.)*, 2006 CF 1004, paragraph 24; *Yousef v.Canada (M.C.I.)*, 2006 FC 864, paragraph 17**.**

[34] The Applicant maintains that the IRB failed to differentiate the tests required by sections 96 and 97 of the Act, in that it considered the Applicant's subjective fear in the determination of his section 97 claim. He further contends that the IRB erred by failing to canvass, comment upon or discuss his submissions as to the objective risk to life and risk of cruel and unusual punishment.

[35] A claim under section 97 of the Act requires that the Board determine whether a claimant's removal would subject him personally to the dangers and risks stipulated in paragraph 97(1)(*a*) and (*b*) of the Act. The onus is on the Applicant to establish on a balance of probabilities that his removal would subject him personally to the risks stipulated in paragraph 97(1)(*a*) and (*b*) of the Act. Here, the IRB made a clear finding that the Applicant had failed to do so. The Applicant has failed to point to any evidence that would expose him personally to the risk or danger stipulated in paragraphs 97(1)(*a*) and (*b*) of the Act. A review of the documentary evidence on country conditions in the UAE reveals little that would find application to the Applicant's circumstances. In my view the IRB committed no reviewable error in its treatment of the Applicant's section 97 claim. Its determination, that the Applicant was not a person in need of protection was reasonably open to it on the evidence.

C. *Did the Board err in concluding that a denial of a right of return does not constitute persecution?*

[36] The Applicant argues that the denial of his right to return to UAE does constitute persecution under these circumstances. In support of his claim, he cites *Altawil v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 986 (QL), where Justice Sandra Simpson states, at paragraph 11: "While it is clear that a denial of a right of return may, in itself, constitute an act of persecution by a state, it seems to me that there must be something in the real circumstances which suggests persecutorial intent or conduct". The Applicant also cites the following reasoning from the Federal Court of Appeal in *Thabet v. Canada (Minister of Citizenship and Immigration)* (C.A.), [1998] 4 F.C. 21, at paragraph 32: "To ensure that a claimant properly qualifies for Convention refugee status, the Board is compelled to ask itself why the applicant is being denied entry to a country of former habitual residence because the reason for the denial may, in certain circumstances, constitute an act of persecution by the state".

[37] The Applicant argues that the circumstances of the denial of his right to return amounts to persecution. He concedes that the UAE system of work permits is a law of general application; however, he submits that the law adversely affects and creates a pattern of persecution for the Applicant on the basis of his nationality. He maintains that whereas other groups have the option of returning to their country of origin if they are unable to remain in, or return to, the UAE, the Applicant cannot because he is stateless. The Applicant further submits that the adverse effects of this law are limited to the Applicant and those in his situation, and are obvious to the UAE

authorities who enacted the law. The Applicant submits that application of this law by the authorities, in light of their knowledge of the adverse effects, is persecutorial.

[38] The above arguments are essentially the same as those advanced by the Applicant in *Altawil* and dismissed by Justice Simpson. Here it is conceded that the impugned law requiring work permits is a law of general application. The Applicant has failed to point to any evidence indicating real persecutorial intent or conduct which would result from the impugned law. Absent such evidence, in the circumstances, I am left to conclude, as did Justice Simpson in *Altawil*, that the IRB did not err in determining that the denial of a right of return does not constitute persecution. As noted by Justice Simpson in the penultimate paragraph in her reasons for decision in *Altawil*, "…not all stateless persons are refugees. They must be outside the country of their former habitual residence for the reasons indicated in the definition. Where these reasons do not exist, the stateless person is not a refugee."

6. Conclusion

[39] Having found that the IRB committed no reviewable error in disposing of the Applicant's claim as it did, the application for judicial review will be dismissed.

[40] The parties have had the opportunity to raise a serious question of general importance as contemplated by paragraph 74(*d*) of the Act and have not done so. I am satisfied that no serious question of general importance arises on this record. I do not propose to certify a question.

ORDER

THIS COURT ORDERS that:

1. The application for judicial review of the Immigration and Refugee Board dated April 20, 2006, is dismissed.

2. No serious question of general importance is certified.

"Edmond P. Blanchard"

Judge