

Date: 20051219

Docket: IMM-3238-05

Citation: 2005 FC 1711

Ottawa, Ontario, December 19, 2005

PRESENT: The Honourable Mr. Justice Blanchard

BETWEEN:

ASHIQ HUSSAIN SHAH

Applicant

and

THE MINISTER OF CITIZENSHIP

AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

1. Introduction

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated May 6, 2005, wherein the Board found the Applicant to be neither a Convention refugee nor a person in need of protection.

[2] The Applicant seeks an order setting aside the decision of the Board and remitting the matter back to the Board for re-determination by a differently constituted panel.

2. Factual Background

[3] The Applicant, Ashiq Hussain Shah, is a citizen of Pakistan. He was born in Malaysia and lived there with his parents; he moved to Pakistan in 1971 (when he was around 14 years of age) after his parents died. The Applicant states that his father was a convert from the Sunni to the Shia faith and that his father helped the Shia community in his area and did general work for the local Imam Bargah. The Applicant states that he converted to the Shia faith and continued his father's tradition of hard work for the faith. As a result, he alleges that he was targeted by the Sipa-i-Sahaba (the SSP), an extremist Sunni organization.

[4] The Applicant alleges that he was beaten along with his family members by the SSP, and that the SSP looted his house, destroyed his household items and issued threats on several occasions. The Applicant claims his brothers were attacked in March 2000 by the SSP because of the Applicant's work for his faith. The Applicant claims several other incidents of violence by the SSP against him occurred on December 25, 2000, and January 31, 2001, and in February 2001. He states that when he reported the incidents to the police, the police did nothing.

[5] The Applicant left Pakistan for the United States in March 27, 2001, on a three-month visa. After his visa expired, he remained in the United States without status. He arrived in Canada on March 23, 2003, and claimed refugee status at the Fort Erie border crossing.

[6] The Applicant's claim for refugee protection was heard on November 1, 2004. The Board rendered its decision on May 6, 2005, dismissing the Applicant's claim.

3. Impugned Decision

[7] The Applicant claimed protection under section 96 and section 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the IRPA).

[8] In addition to the Applicant's testimony, the evidence before the Board included: the Applicant's Personal Information Form (the PIF) and amended PIF narrative, the port of entry notes, the Applicant's national identity card and his passport, and the Refugee Protection Division's (the RPD) documentary package on Pakistan.

[9] The Board found the Applicant's fear of persecution and serious harm from the SSP not to be well founded because he did not fit the profile of a Shia person targeted by the SSP. In consequence, the Board found that the Applicant had not demonstrated that he would face a reasonable chance of persecution in Pakistan. Alternatively, the Board determined that the Applicant had failed to provide clear and convincing evidence of inadequate state protection in Pakistan. As a result of these findings the Board concluded that the Applicant was not a Convention refugee or person in need of protection.

[10] The Board relied on the Applicant's testimony that he was not a religious person and that he was an ordinary worker in Imam Bargah. The Board also relied on documentary evidence indicating that Shias targeted by the SSP have a "higher profile" than that of the Applicant, including Shia professionals - doctors and lawyers - who were not politically active or involved with sectarian groups.

[11] Based on omissions and inconsistencies in his evidence and implausible explanations in respect to important elements of his claim, the Applicant was found to be generally not credible. The Board relied on the following determinations in finding the Applicant generally not credible:

1. the Board found that the Applicant lacked credibility in his evidence in respect to his religious faith, particularly about his conversion to Shiism; his

father's involvement in the Shia community; and his claim to be an "Ahmedi Muslim" in his first handwritten PIF and his subsequent assertion that he was a "Shia Muslim" from a very religious family, in his second PIF narrative;

2. the Board found that the Applicant's ignorance of the existence of the "zakat exemption" to be significant;

3. the Board rejected the Applicant's evidence in respect to his circumstances in the United States and found his failure to seek asylum there to be inconsistent with that of a person with a genuine fear of persecution.

[12] In respect to the Applicant's evidence about his religious faith, the Board noted inconsistencies. In his first handwritten PIF, the Applicant indicated he was an "Ahmedi Muslim (Shia)." In his amended PIF narrative, the Applicant stated that he is a Shia Muslim from a very religious family. The Board rejected the Applicant's explanation that the errors in the initial PIF were the result of a misunderstanding between himself and the consultant who assisted him in preparing the PIF. The Board noted that the Applicant provided different reasons for the error during his oral testimony, at first stating that the consultant wrote the PIF and then saying that he wrote the PIF himself with the consultant dictating to him.

[13] The Board did not find credible the Applicant's testimony about his conversion to the Shia faith, noting that his father was already a Shia Muslim. Further, the Board found that the Applicant's ignorance of the existence of the "zakat exemption" to be significant. (Sunni Muslims are subject to the "zakat," a religious tax of 2.5 percent of their income; however, Shia Muslims and other religious minorities are exempt. *Source*: U.S. Department of State Report, 2003.) His confused testimony in respect to the exemption fuelled the Board's belief that he did not have the religious profile that would make him the target of extremists. Further, the Board found, in any event, that the Applicant had not provided any information that would bring him to the attention of any group targeting converts to the Shia faith. As a result, the Board found that the claimant "is without any profile that would place him at reasonable chance of serious harm."

[14] Because the Board found the Applicant to be generally not credible, it held that the alleged attacks by members of the SSP did not occur. The Board further noted that the Applicant had not provided any corroborating evidence of the alleged incidents of persecution or of his reporting these incidents to the police.

[15] In respect to the Applicant's sojourn to the United States, the Board found the Applicant's failure to claim in the United States, his delay in doing so, and the lack of danger faced by his family members led the Board to conclude that the Applicant does not have a subjective fear of serious harm.

[16] The Board rejected the Applicant's explanation in respect to his failure to seek asylum in the United States. The Applicant had testified he was afraid of arrest after the events of September 11, 2001, and stayed at home most of the time. The Board noted that, according to his PIF, the Applicant was working at a gas station for one-and-a-half years after September 11, 2001. The Board found that the Applicant was living openly in the United States despite the danger of deportation. As a result,

the Board held that the Applicant's conduct was not consistent with a person who has a genuine fear of harm if returned to Pakistan.

[17] The Board also did not find credible the Applicant's testimony that someone attempted to kidnap his child three or four months before the Applicant's refugee hearing. When asked why he had not amended his PIF, the Applicant stated he was not aware he could do so. The Board rejected this explanation and found there was no evidence that the Applicant's close family members - his wife and children - were at risk in Pakistan.

[18] With regard to state protection, the Board found that the Applicant failed to provide clear and convincing evidence that Pakistan could not provide him state protection. In finding that adequate state protection was available to the Applicant, the Board adopted the reasoning and findings of the panel in *I.X.N. (Re)*, [2004] R.P.D.D. No. 34, No. TA2-20483 (QL), stating that the facts and evidence regarding country conditions in the Applicant's claim were sufficiently close to those before the panel in *I.X.N. (Re)*. In addition, the Board relied on evidence in the Board's documentary package referring to specific steps taken by the Musharraf government regarding the SSP, as well as the U.S. Department of State Country Report on Human Rights Practices (in Pakistan) - 2003, released February 25, 2004, referring to the arrests of hundreds of members of religious extremist groups, including the SSP.

[19] The Board concluded by finding that, on a balance of probabilities, the Applicant does not have the profile of a Shia Muslim who would face a reasonable chance of serious harm at the hands of extremist groups including the SSP, that Pakistan would provide adequate protection to the Applicant if he returned, and that he and his family's behaviour is not consistent with a subjective fear of serious harm in Pakistan.

4. Issues

[20] In my view the following issues are raised in this application:

Did the Board err in concluding that the Applicant:

1. lacked the profile of someone who would be targeted by the SSP;
2. lacked subjective fear of persecution;
3. failed to provide clear and convincing evidence rebutting the presumption of state protection?

5. Standard of Review

[21] The Federal Court of Appeal has established that the Board, as a specialized tribunal, has complete jurisdiction to determine the credibility of testimony, as well as the risk of persecution: *Aguebor v. Canada (Minister of Employment & Immigration)*, [1993] F.C.J. No. 732 (QL). The Court will only intervene if the Board bases its decision on an erroneous finding of fact made in a

perverse and capricious manner or without regard to the material before it: *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18.1(4)(d).

[22] As a result, for findings of fact and credibility, the appropriate standard of review is patent unreasonableness. Decisions of the Board as to the adequacy of state protection are findings of fact and as such are reviewed against the standard of patent unreasonableness: *Sajid Ali et al. v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1449.

6. Analysis

A. *Did the Board err in finding that the Applicant lacked the profile of someone who would be targeted by the SSP?*

[23] The Applicant alleges that the Board erred in finding that he did not fit the profile of someone who would be targeted by the SSP. The Applicant points to an excerpt in the Pakistan Country Report, April 2004, cited by the Board which states that: "Many of the victims [of sectarian killings] were Shi'a professionals - doctors and lawyers - who were not politically active or involved with sectarian groups." The Applicant contends that this evidence shows that Shias at large are being targeted, irrespective of individual profiles and attributes and therefore, it was patently unreasonable for the Board to find that only Shia professionals have a reasonable chance of being persecuted. Further, the Applicant asserts that, like these Shia victims, he was neither politically active nor involved with sectarian groups and therefore has a reasonable chance of being targeted. The Applicant cites an excerpt from the Pakistan Country Report, April 2004 which states that: "The worst religious violence was directed against the country's Shi'a minority, who continued disproportionately to be victims of individual and mass killings." By ignoring this evidence, the Applicant argues that the Board failed to consider the totality of the evidence and as such committed a reviewable error.

[24] Finally, the Applicant argues that the Board's general negative credibility finding is erroneous since it is based on a number of patently unreasonable findings in respect to inconsistencies, omissions and implausibilities found in the following evidence, namely (a) claiming to be an "Ahmedi Muslim" in his first handwritten PIF and subsequently stating, he was a Shia Muslim from a very religious family, in his second PIF narrative; (b) his testimony about his conversion to Shiism and his father's involvement in the community; (c) his knowledge about the "zakat exemption" and failing to take into consideration that he corrected himself.

[25] The Board's decision turns significantly on its credibility findings, particularly in respect to its central finding regarding the Applicant's religious profile. It is because the Applicant was found to be generally not credible that the Board did not believe that the alleged attacks and other incidents of persecution actually took place. I will therefore consider the Applicant's arguments in respect to each of the above credibility findings in turn. Before doing so, I will consider the Applicant's contention that the Board erred in finding that he did not fit the profile of someone who would be targeted by the SSP.

[26] The documentary evidence establishes that religious violence is directed against the country's Shia minority who disproportionately continue to be victimized. The documentary evidence also disclosed that those Shias who have a reasonable chance of persecution in Pakistan have a "higher profile". The Board's finding that Shias with a "higher profile" have a reasonable chance to be persecuted is therefore supported in the evidence. Further, there is nothing in the record to support the contention that this finding was made without regard to the totality of the evidence. A review of the documentary evidence does not allow for such an inference to be drawn.

[27] I am also of the view that the Board's finding that the Applicant does not fit such a "higher profile" finds support in the evidence. The Applicant's own testimony supports the view that he did not have the "higher profile" discussed in the documentary evidence. He testified he was not a religious person and that he was an ordinary worker for Imam Bargah. Contrary to the Applicant's submission, the Board did not find that only professionals were targeted by religious extremists; rather, in my view, the Board cited the passage in its reasons in support of its finding that the extremists often targeted particular groups of persons with higher profiles than that of the Applicant, such as "doctors, business executives, teachers and worshippers." Ultimately, the Board found that the Applicant did not fit such a profile. This finding was open to the Board.

On my assessment of the evidence, the Board's determination that the Applicant would not face a reasonable risk of persecution should he return to Pakistan, based on his personal profile, was not patently unreasonable. I will now deal with the Board's credibility findings referred to above.

[28] The Applicant testified that his parents died in 1970 and 1971 in Malaysia, whereas in his amended PIF narrative he indicated that his father helped the community, supported Shi'as and performed general work for Imam Bargah. The Applicant contends that he reasonably explained the discrepancy. The Applicant claims that the Board erred in failing to state in its reasons why it rejected the Applicant's explanation about his father's work for the faith. I disagree. The Board in its reasons did consider the Applicants explanation. At page 5 of its reasons the Board wrote:

In the amended PIF narrative (Exhibit C-1, line 7), the claimant talks about his father helping the community and supported Shia people. His father did general work for Imam Bargahs. He arranged religious meetings and functions in their house and local Imam Bargah. When it was brought to the claimant's attention that he never lived with his father in Pakistan, he testified that his father was sending money to build Imam Bargahs. He also testified that he never saw his father arranging religious meetings, but was told this by elders in that area and he had made a mistake in that he did not explain this correctly in his second amended PIF narrative.

While not determinative of the claim, I note that the claimant was not straightforward or consistent in describing his father's profile as a Shia Muslim.

[29] The discrepancy was put to the Applicant at the hearing. I reproduce the pertinent part of the transcript beginning at page 331:

RPO: So you and your parents never lived, when they were alive, in Pakistan?

Claimant: My father visited couple of times, so I came with him once.

RPO: So, when you're saying my father helped the community a lot, my father did his best to support Shia people in the area, in your narrative, "My father also did general work for Iman Bargah. He arranged religious meetings and functions in our house, and local Iman Bargah. My father and I badly suffered at the hands of the SSP. I continued my father's tradition for hard work of my faith." Your father and you were never in Pakistan together. You were born in '57, and lived until '70 there, and then your father died. You said you visited once there with your father. Why do you say these things in your narrative?

Claimant: I didn't mention about Sipa Sahaba with reference to my father. That's my personal. For the first time when my father visited, actually he was sending money right from there to his community Shia people. This was told by those people who had contacts with my father. I didn't mention about my father regarding Sipa Sahaba, because he died in 1970.

Presiding

Member: Sir, I am reading from your own narrative. I'm not making these things up. You are, in page one of your narrative, the typed one, you say, "My father", line seven, eight, nine, ten, 11. "My father was a police officer. My father helped the community a lot. My father did his best to support Shia people in the area. My father did general work for the Iman Bargah. He arranged religious meetings and functions in our house and local Iman Bargah." Your father never was with you in Pakistan. You've never seen him in Pakistan except for once that you said you went for a trip.

Claimant: My father sent money when he was living in Malaysia, and these people still remember him that actually we constructed that Iman Bargah, and they still remember.

Presiding

Member: Okay. Continue, Madam RPO. Sorry I interrupted.

RPO: So, when you were in Malaysia, your parents became Shias, but you remained Sunni?

Claimant: I was young at that time, and I was just with my father.

RPO: Okay. But, listen to my question. When you were in Malaysia and your parents converted to Shia, did you remain Sunni?

Claimant: No, I followed the sect of my father.

RPO: So, you are not a convert?

Claimant: By conversion being that when in 1971 I came to my uncle's. We were brought up by them, and after nine or ten days the people in that area introduced that your father was that time, that he worked for the welfare of the community, the Shia community. So, I seek refugee status (inaudible). That's why I wrote down that word that I converted from Sunni to Shia. But, actually, I was a Shia since my parents were.

RPO: I need just a couple of minutes to re-read some of this, because ---

Presiding

Member: Okay. So, when you say your father arranged religious meetings and functions in your house and local Iman Bargah, is that true?

Claimant: I was told by those people that when my father visited Pakistan a couple of times before my birth and after my birth.

RPO: Shall I go ahead, or are you ---

Presiding

Member: That won't be - why don't you say that? Why don't you say that you were told by people? You hear it, make it sound that you weren't there. You say, "In our house was arranged"" "I continued my father's tradition for hard work for my faith." You make it sound that you were there. "My father helped the community a lot", you say. Why don't you say you heard all these stories and you never say it?

Claimant: First of all, this is my mistake that I wrote it that way. I was told by the elders of that area.

Presiding

Member: Why don't you say so?

Claimant: I said that that's my mistake that I didn't write it down that way.

[30] Given the above evidence, it was open to the Board to conclude the Applicant was not straightforward or consistent in his evidence regarding his father. Further, the contradictions in his PIFs as to his declared faith, Ahmedi Muslim or Shia, the conflicting testimony of the Applicant in respect to his father's activities, and his tenuous explanation regarding his conversion to the Shia faith, all serve to impugn the Applicant's credibility in respect to his evidence regarding his religious profile, a key element in his claim. In my view, it was open to the Board on the evidence to find the Applicant generally not credible. In doing so the Board committed no reviewable error.

[31] I have reviewed the record and have considered the arguments advanced by the parties in respect to the Board's finding regarding the significance of the Applicant's lack of knowledge about the "zakat exemption". On the whole I find the evidence unclear on this issue. A review of the transcript of the hearing leads me to conclude that it was not open to the Board to impugn the Applicant's credibility on this basis. However, given my above determination in respect to the Board's general credibility finding being properly founded in the evidence and open to the Board, this error cannot be determinative of the application.

B. *Did the Board err in finding that the Applicant lacked subjective fear?*

[32] The Applicant submits that the Board erred in finding that he lacked subjective fear on the basis that he did not make a refugee claim in the United States. The Applicant argues that the Board ignored his explanation in his first PIF narrative for his failure to do so, namely, that due to different rumours since 9-11, he was afraid that American immigration authorities would send him to jail or deport him back to Pakistan. The Applicant submits that the Federal Court has determined that fear of deportation back to country of nationality is valid basis for failing to claim asylum in United States and cited *Raveendran v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 49, in support of his contention.

[33] The Applicant also contends that the Board erred by impugning his credibility on basis of contradiction between his PIF where he stated that he worked as a Manager in a convenience and gas station and his oral testimony where he stated that he mostly stayed at home. The Applicant contends that the Board did not consider his explanation for this inconsistency.

[34] Further, the Applicant submits that the Board erred in finding that there was no evidence that his close family members are at risk in Pakistan. The Applicant again cites the Pakistan Country Report, April 2004 stating that "the worst religious violence was directed against the country's Shia minority..." The Applicant argues that, as a consequence, all Shia families have good grounds for fearing they are at risk.

[35] The Applicant also argues that the Refugee Protection Division breached the principles of natural justice by failing to specifically notify the Applicant that delay would be an issue at the hearing, in the File Screening Form. In my view, the argument is without merit. The Screening Form stated that failure to claim asylum in another country was an issue in the Applicant's case and this was also brought to the attention of the Applicant by the Board at the hearing. Though the Board questioned the Applicant about the delay, it made no specific adverse finding on that basis. The focus was on the failure to claim asylum in the United States.

[36] In my opinion, the Board's findings with respect to the Applicant's subjective fear of persecution were not patently unreasonable. The Board was entitled to consider the failure of the Applicant to claim refugee status in the United States. *Raveendran* does not stand for a blanket proposition that a fear of deportation to persecution is a valid reason in every case for not claiming asylum in the United States. Such an argument will be decided on the circumstances of each case. In the instant case, the Applicant does not dispute the Board's finding that he worked openly

in the United States, only that the Board should have put the inconsistency to him. There is no evidence to support the Applicant's argument that the Board failed to consider his explanation about the discrepancy in his evidence. At page 8 of its reasons, the Board wrote:

In light of the fact that he was working I find that the claimant was living openly in the USA, working illegally there and chose to remain there under these circumstances in danger of deportation to a country where he allegedly feared persecution for 1 ½ years after the terrorist attacks in the USA.

[37] On the evidence, it was open to the Board to find the Applicant's conduct while in the United States was not consistent with that of a person fearing persecution. The Board's finding is founded in the evidence and is not patently unreasonable. The Board committed no reviewable error in so finding.

[38] Further, I am of the view that the Board's finding that the Applicant's family is not at risk is not patently unreasonable. The documentary evidence on country conditions including the passage cited by the Applicant in his Memorandum indicate that there is a generalized danger faced by Shia Muslims in Pakistan. The Applicant does not point to any evidence suggesting his family members are at particular risk.

[39] In the result, there is no basis for holding that the Board erred in finding that the Applicant lacked a subjective fear of persecution.

C. *Did the Board err in finding the availability of state protection?*

[40] The onus is on the applicant to provide clear and convincing confirmation of the state's inability or unwillingness to protect her or him; otherwise, the presumption of state protection prevails. As the Supreme Court of Canada held in *Canada(Attorney General) v. Ward*, [1993] 2 S.C.R. 689 at page 725:

...Absent some evidence, the claim should fail, as nations should be presumed capable of protecting their citizens. Security of nationals is, after all, the essence of sovereignty. Absent a situation of complete breakdown of state apparatus, such as that recognized in Lebanon in *Zalzali*, it should be assumed that the state is capable of protecting a claimant.

[41] Further, as the Board noted in its decision, the criteria for adequate state protection does not require that protection be provided to all of a state's citizens all of the time, nor is perfect protection required: *Canada (Minister of Citizenship and Immigration) v. Villanfranca*, (1992) 18 Imm L.R. (2d) 130 (F.C.A.); *Zalzali v. Canada(Minister of Citizenship and Immigration)*, [1991] 3 F.C. 605 (F.C.A.).

[42] The Applicant submits that there is clear and convincing evidence that Pakistan cannot protect Shia Muslims. The Applicant argues that the Board erred by being selective in its use of documentary evidence and that it ignored evidence that indicates that the government has been ineffective in reducing sectarian violence. The Applicant points to evidence in the RPD's information package on country conditions in Pakistan, in particular document PAK42530.E dated April 1, 2004. As well, the

Applicant refers to documentary evidence that indicates that "the worst religious violence was directed against the country's Shi'a minority...." (Pakistan Country Report, April 2004) and notes incidents of sectarian violence (Amnesty International Report 2004).

[43] The Respondent asserts that the Board took into account evidence that Pakistan is not always effective in combating sectarian violence. The Respondent notes that the decision in *I.X.N (Re)* cited by the Board weighs the documentary evidence on the various efforts by the Musharraf government to protect its citizens from terrorist activity. The Respondent contends that the evidence before the Board supports its finding of adequate state protection and further, the Federal Court has upheld decisions of the Board on the very issue of availability of state protection in Pakistan for Shia Muslims.

[44] In my opinion, the Board's finding that the Applicant failed to provide clear and convincing evidence of the state's inability to protect him against the SSP is not patently unreasonable. Evidence that indicates violence towards Shia Muslims in general is continuing is not sufficient to rebut the presumption of state protection. In addition to the evidence cited by the Board, I note that the documentary evidence states that sectarian violence is also committed by Shias against Sunnis and that the Pakistani government has banned a number of religious extremist groups, including the SSP.

[45] Further, as the Respondent notes, in *Khan v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 984 (QL), Justice O'Keefe held that the Board did not err in concluding that adequate state protection was available to the claimant - a convert from the Sunni to the Shia faith, who was active in his community and was a lawyer - against the banned SSP. In his decision, Justice O'Keefe also referenced several other applications for judicial review where the Court upheld the Board's finding of state protection for Shia Muslims in Pakistan: *Javaid v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 205; *Sultan v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1399; *Razzaq v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 864; *Ali v. Canada (Minister of Citizenship and Immigration)* 2003 FCT 242; and *Akhtar v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 541.

[46] Considering the totality of the documentary evidence, it was open to the Board to determine that the Applicant had failed to present clear and convincing evidence that the State of Pakistan would not provide adequate protection for him should he return to Pakistan. It was open to the Board to conclude that his fear of harm from the SSP extremists is therefore not well-founded. There is no reason for this Court to intervene.

7. Conclusion

[47] For the above reasons this application for judicial review will be dismissed.

8. Certified Question

[48] The parties have had the opportunity to raise a serious question of general importance as contemplated by paragraph 74(*d*) of the IRPA, 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 is dismissed;
2. No question of general importance will be certified.

"Edmond P. Blanchard"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

Mr. Loftus J. Cuddy FOR THE APPLICANT

Ms. Kristina Dragaitis FOR THE RESPONDENT

SOLICITORS OF RECORD:

Mr. Loftus J. Cuddy FOR THE APPLICANT

Robert Gertler and Associates

Etobicoke, Ontario

John H. Sims, Q.C. FOR THE RESPONDENT

Deputy Attorney General of Canada

Toronto, Ontario