Date: 20070502

Docket: IMM-5630-06

Citation: 2007 FC 473

Ottawa, Ontario, May 2, 2007

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

GHULAM MOIN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

INTRODUCTION

[1] Ghulam Moin has applied for judicial review of a decision by the Immigration and Refugee Board's Refugee Protection Division (the Board), dated October 5, 2006. The Board rejected his refugee claim mainly on the basis of poor credibility.

[2] Mr. Moin is arguing the Board violated procedural fairness and natural justice. While I do not agree with the way he has characterized some of the issues in this case, I would nevertheless allow his application.

FACTS

[3] Mr. Moin was born January 1, 1934. He is a citizen of Pakistan. After a thirty-year career as a police officer, he was appointed Inspector General of Police for the province of Sindh in 1990. He retired in 1993, but he says the work he did in the early 1990s is the impetus for his claim.

[4] In November 1991, a woman named Farana, or Veena, Hayat was raped by a number of masked men. She claimed Irfanullah Marwat, a senior politician, orchestrated the attack. Ms. Hayat came from a political family, and alleged the attack was designed to make her sign statements incriminating Mr. Marwat's enemies. The case became a major scandal, and Mr. Moin says he was placed in charge of investigating the file.

[5] Despite several police officers confessing to the rape and admitting they had been advised to rape Ms. Hayat by Mr. Marwat, Mr. Moin claims Mr. Marwat's political connections interfered with the investigation. Mr. Marwat apparently managed to get a judge to conduct a parallel inquiry, at the end of which it was decided there was insufficient evidence against him.

[6] As a result, Mr. Moin was instructed to take a leave of absence and go on vacation, to salvage his career and avoid becoming the subject of a criminal investigation himself. He was posted in Islamabad by the then Prime Minister Sharif, of whom he was a supporter.

[7] The government of Sindh thereafter started an inquiry into Ms. Hayat's rape, which Mr. Moin says was intended as retribution against the officers who investigated the case. Mr. Moin was told he would go to prison, and authorities seized several pieces of his land. Afraid for his safety and his family's, Mr. Moin moved to Lahore. As a result of political changes, the investigation against Mr. Moin was closed and he was eventually cleared of all charges. He retired in December 1993.

[8] However, after some more political shifts, Mr. Moin learned his name was on a list of people who were not allowed to leave Pakistan. He escaped secretly to the U.S., and claimed refugee status there in 1996. The situation subsequently calmed down in Pakistan, and Mr. Moin decided to return home and abandon his asylum claim in the U.S.

[9] In 2002, Mr. Marwat – the politician who had once been the subject of Mr. Moin's investigation - pledged his support to Pervez Musharraf, who had seized power of Pakistan in a 1999 military coup. Mr. Marwat was appointed Education Minister in Mr. Musharraf's government, and was therefore once again able to pursue revenge against Mr. Moin.

[10] In March 2002, Mr. Moin and his wife left Pakistan for an extended visit to see their three children living in the U.S. and Canada. When his wife returned home in March 2003, she was told by the servants that two jeeps full of armed military personnel had come shortly before to enquire about him. When opening the family's mail, she found a letter from Pakistan's National Accountability Bureau (NAB). The letter said the NAB had opened an inquiry against Mr. Moin, and instructed him to report to them in Karachi. Mr. Moin claims it was virtually the same notice he was sent in October 1992, when the government had opened a criminal investigation against him as revenge for pursuing Mr. Marwat as a suspect.

[11] Mr. Moin's wife and daughter were threatened and interrogated by NAB officials in April 2003. Once questioned, they were only released after surrendering their National Identity cards. Several weeks later, his wife received another notice

from the NAB, instructing her to provide details about the family's property and assets. Mr. Moin claimed refugee status in Canada on May 27, 2003.

THE IMPUGNED DECISION

[12] The Board decided much of Mr. Moin's testimony was not credible. It found no objective basis for his claim, and found it implausible that Mr. Marwat, 15 years after the fact and 12 years after Mr. Moin's retirement, would risk bringing the rape story back into the public eye by arranging a false investigation against Mr. Moin. As a result, the Board determined that any investigation into Mr. Moin by the NAB was not motivated by his role as a police officer in the rape investigation, and that such an association was made in an effort to embellish his claim. It also found that someone in Mr. Moin's senior position would have taken legal action to defend himself if wrongfully accused by the NAB. As such, the Board concluded he failed to rebut the presumption of state protection in Pakistan.

[13] The Canadian High Commission had originally looked into Mr. Moin's case to see if there was any basis to exclude him from Convention refugee status under Article 1F(b) as a result of the NAB's charges against him for corruption and misuse of public office. But since the NAB was apparently no longer investigating Mr. Moin, the Minister decided not to pursue that avenue.

[14] In large part, the Board's credibility findings stemmed from its suspicion regarding some letters Mr. Moin had submitted into evidence. He said they were from the NAB, but the Board questioned the fact that they were not on official letterhead. In any event, the Board wrote, the legitimacy of these documents was not the determinative issue in the claim, because the Canadian High Commission had already determined Mr. Moin was no longer subject to an NAB investigation.

[15] The Board also responded to Mr. Moin's allegations of bias, based on the following comment the Board member made during the hearing. While asking counsel about the veracity of Mr. Moin's NAB documents, she said: "Well, the question that I have is asked with all documents that we get from Pakistan. Almost 99% of them, when we get them, are fraudulent. That's a given" (Tribunal Record, page 808).

[16] Mr. Moin's lawyer discussed the issue with the Board member. The Board decided to adjourn the hearing so it could compare Mr. Moin's letters with other NAB letters, to see if the letterhead (or lack thereof) on Mr. Moin's documents was a sign of fraud. In reply to an inquiry from Mr. Moin's counsel regarding the basis of this comment, the Refugee Protection Officer (RPO) replied in a letter dated April 21, 2006 (while the case was still adjourned):

> The Presiding Member has also directed me to advise you that any comments she may have made with regard to the authenticity and integrity of the documents from Pakistan would have been based on documentary evidence, particularly Response to Information Request PAK42535.E dated 18 June 2004 and PAK34163.EX

> dated 30 June 2000, and that you may address this issue in your submissions.

[17] On May 16, 2006, the RPO communicated his observations to the Board member and counsel for Mr. Moin, writing the following about the authenticity of the alleged NAB documents:

> It appeared that the Panel had some concern with regard to the authenticity of the NAB documents, because they were not on an official letterhead. Claimant stated the stationary depended on the rank of the officer signing the document. There is no evidence before the panel to indicate what type of stationery was used by NAB. There are other official documents provided by the claimant that are too typed on ordinary sheets of paper. The Panel may not reject these documents merely because the type of stationary used.
>
> Applicant's Record, Tab "G"

[18] In his written submissions to the Board dated June 6, 2006, counsel for Mr. Moin made the following observation:

> 11. It is lastly submitted that a reasonable apprehension of bias has been raised by the Board Member's statements at the hearing that 99% of documents from Pakistan are fraudulent. The context of this statement is significant in that the Board Member, towards the conclusion of the hearing, questioned the integrity of the summons from the NAB to the Claimant requesting his attendance at the NAB office. The Board Member noted that the documents did not have any official NAB letterhead. The Claimant testified that such documents do not have official NAB letterhead since they were generated by a lower ranking officer and that only senior officers use official letterhead. Counsel for the Claimant inquired if the Board Member had any official NAB letterhead against which to compare the Claimant's documents. The Board Member stated that she was not aware of NAB letterhead but that 99% of documents from Pakistan were fraudulent. It is respectfully submitted that statement that 99% of documents from Pakistan demonstrates a reasonable apprehension of bias and a presumption that the documents presented must be fraudulent. Given the significant nature of the documents in question and the centrality that they play in the foundation for the Claimant's claim for refugee protection, it is

> respectfully submitted that a reasonable apprehension of bias has been raised.
>
> Applicant's Record, Tab "H"

[19] The Board Member addressed this allegation of bias in her reasons. She wrote, at pages 5 and 6 of her decision:

> Counsel states in his submissions that "a presumption that these documents are fraudulent undermines the foundation of the claimant's need to seek protection and raises an apprehension of bias regarding the adjudication of his claim". The panel determines that an adjudicator seeking an opportunity for a comparative review of any document does not constitute an absolute presumption that the document is fraudulent. On the contrary, it allows, on a balance of probabilities, the opportunity for the document to be deemed legitimate.

[20] As a result, the Board concluded, the evidence had not established a reasonable chance or serious possibility that Mr. Moin would be persecuted for a Convention refugee ground, that he would be in danger of torture, or that he would be subjected to a risk of cruel and unusual treatment or punishment should he return to Pakistan.

ISSUES

[21] Counsel for Mr. Moin has raised four issues in his written and oral arguments. First of all, Mr. Moin claims the Board breached procedural fairness and s. 18 of the *Refugee Protection Division Rules* (the Rules), by relying on "specialized knowledge" to question the integrity of his NAB summons without giving him a chance to respond.

[22] Secondly, Mr. Moin claims the Board violated the principles of natural justice by ignoring an entire argument in his refugee claim. Specifically, Mr. Moin had submitted he was a refugee *sur place* because Canadian officials had breached confidentiality by contacting the NAB, the very agent of persecution Mr. Moin allegedly fears. Yet, the Board did not address this argument in its reasons.

[23] The third argument relates to the reasonable apprehension of bias that would arise as a result of the Board member's comment that 99% of documents from Pakistan are fraudulent. At issue is whether that comment does indeed give rise to a reasonable apprehension of bias, and whether Mr. Moin has waived his right to raise that argument because he did not raise it at the first opportunity.

[24] Finally, Mr. Moin claims the Board's findings of implausibility are patently unreasonable. He submits the presumption that he should have sought legal counsel in Pakistan is based on Western assumptions about democratic legal systems.

ANALYSIS

[25] Neither party has made extensive submissions on standard of review. This is understandable, however, considering the way they have characterized the issues. Since most of the Board's alleged errors have been cast as going to the fairness of the process, they do not attract a standard of review analysis: *Canada (Attorney General) v. Sketchley*, 2005 FCA 404.

[26] As I shall try to demonstrate, however, it seems to me that the Board member's comment about the prevalence of false documents in Pakistan is better analyzed as a question of fact related to the Board's interpretation of country condition reports. As such, I would review the Board's findings on the NAB documents against the standard of patent unreasonableness. The same is true for the Board's findings of implausibility: *Aguebor v. Minister of Employment and Immigration* (1993), 160 N.R. 315 (F.C.A.).

[27] Turning now to the first argument raised by counsel for Mr. Moin, it was argued the Board violated the principles of procedural fairness and breached section 18 of the Rules by disclosing the evidence on which it based its special knowledge for the first time in its final decision. That provision reads as follows:

18. Before using any information or opinion that is within its specialized knowledge, the Division must notify the claimant or protected person, and the Minister if the Minister is present at the hearing, and give them a chance to:	**18.** Avant d'utiliser un renseignement ou une opinion qui est du ressort de sa spécialisation, la Section en avise le demandeur d'asile ou la personne protégée et le ministre — si celui-ci est présent à l'audience — et leur donne la possibilité de :
(*a*) make representations on the reliability and use of the information or opinion; and	*a*) faire des observations sur la fiabilité et l'utilisation du renseignement ou de l'opinion;
(*b*) give evidence in support of their representations.	*b*) fournir des éléments de preuve à l'appui de leurs observations.

[28] I do not agree with Mr. Moin's submissions, essentially for two reasons. First of all, they seem to overlook the Federal Court of Appeal's decision in *Hassan v. Minister of Employment and Immigration* (1993), 151 N.R. 215. In that case, the Court held that section 68 of the former *Immigration Act*, which authorized the Board to take notice of "any other generally recognized facts and any information or opinion that is within its specialized knowledge", clearly extended to standard country file

information. The same provision is now reflected in s. 170(i) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the IRPA).

[29] In order to fairly use this information, the Board must provide adequate notice to claimants. Much like Rule 18, s. 68(5) of the former *Immigration Act* articulated that requirement. In *Hassan*, above, the Federal Court of Appeal concluded that by making the published information on country conditions publicly available and by referring to the then current Country Index at the outset of the hearing, the Board had adequately complied with the notice requirements of s. 68(5).

[30] This is precisely what was done in the present case, and as such, it appears the Board complied with Rule 18. At the hearing, Mr. Moin's counsel argued the *Hassan* decision should be revisited. Counsel submitted that since evolving communication technology makes virtually everything publicly available, the notion of "specialized knowledge" would be practically limitless.

[31] It is no doubt true that the extent of the Board's specialized knowledge has been vastly expanded by the ease with which all sorts of documents and information can be obtained, especially with the advent of the Internet. That does not relieve the Board from having to comply with the requirements of procedural fairness as laid out in Rule 18. The information upon which the Board intends to rely, however vast its specialized knowledge may be, must still be put to the applicant. As a result, I see no need to diverge from the Court's reasoning in *Hassan*, above.

[32] Moreover, the RPO did identify the documents that gave rise to the Board member's conclusion in the letter dated April 21, 2006. At that point, the hearing had been adjourned but was not over. Mr. Moin therefore had a chance to make representations on that issue, which he did by way of written submissions before the Board member made her decision. Thus, not only did the Board notify Mr. Moin of the information within its specialized knowledge, but it told him where the information came from and gave him the chance to respond in written submissions before the hearing was completed. Whether or not the Board erred in its assessment of this documentary evidence is a separate issue, which I shall address below. But it cannot be said the Board breached Mr. Moin's right to procedural fairness by acting the way it did.

[33] Mr. Moin's second argument involves his *sur place* refugee claim and the Board's failure to deal with this argument in its reasons. In his written submissions to the Board, counsel for Mr. Moin submitted that by communicating directly with the alleged agents of persecution, the Canadian government has likely heightened the probability of harm to Mr. Moin if he returns to Pakistan. Yet, there is not even an allusion to this argument in the Board's reasons. According to Mr. Moin, this would constitute another breach of natural justice.

[34] Once again, I am unable to agree with this submission. S.8 of the *Privacy Act*, R.S.C. 1985, c. P-21, reads in part as follows:

8. (1) Personal information under the control of a	**8.** (1) Les renseignements personnels qui relèvent d'une

government institution shall not, without the consent of the individual to whom it relates, be disclosed by the institution except in accordance with this section.	institution fédérale ne peuvent être communiqués, à défaut du consentement de l'individu qu'ils concernent, que conformément au présent article.
(2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed	(2) Sous réserve d'autres lois fédérales, la communication des renseignements personnels qui relèvent d'une institution fédérale est autorisée dans les cas suivants :
(*a*) for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose;	*a*) communication aux fins auxquelles ils ont été recueillis ou préparés par l'institution ou pour les usages qui sont compatibles avec ces fins;

[35] According to s. 8(1) of the *Privacy Act*, the person who provides the government with personal information must consent for the government to subsequently disclose the information. S. 8(2) then lists exceptions to that general rule. One of those exceptions, at paragraph 8(2)(a), allows the government to disclose information so long as the act of disclosure is for the same purpose, or one consistent with, the purpose of originally collecting the information.

[36] In the present case, the purpose for which Mr. Moin's personal information was collected may be expressed as general immigration purposes or, more specifically, as admissibility and refugee determination purposes. Under either interpretation, using the information to determine whether Mr. Moin might be excluded from Convention refugee status was a reflection of the same purpose or, in the alternative, a purpose consistent with that which originally justified the collection: *Rahman v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 2041 (F.C.T.D.) (QL).

[37] Mr. Moin indicated in his refugee intake interview that he was charged with corruption and misuse of public office, thereby raising the possibility of exclusion under Article 1(F)(b) of the Convention. Appropriate inquiries were made to determine whether he was excluded from the refugee definition. There is no evidence that authorities in Pakistan were advised Mr. Moin had made a claim for asylum. In any event, the disclosure was essential to determine if he fell within Article 1(F). I believe the following paragraph taken from the decision reached by Justice Donna McGillis in *Igbinosun v. Canada (Minister of Citizenship and Immigration)*, [1994] F.C.J. No. 1705 (F.C.T.D.) (QL), is a complete answer to Mr. Moin's argument:

> 6. In the present case, the evidence establishes that the identity of the applicant was disclosed to Nigerian police officials to determine whether he had been charged with the offence of murder. There is no evidence to indicate that any confidential information given by the applicant in his personal information form was disclosed. The objection to the admissibility of the telex on the basis that the *Privacy Act* was violated has been advanced in the absence of a proper evidentiary framework and, as a result, must be rejected. Alternatively, even if Canadian officials did provide confidential information from the applicant to the Nigerian police, the disclosure was made for the purpose of permitting the Minister to formulate an opinion as to whether the claim of the applicant raised a matter within the exclusionary provision in subsection F(b) of Article 1 of the Convention. [See subparagraph 69.1(5)(a)(ii) of the *Immigration Act*.] Since the applicant provided the information for immigration purposes, its use, if any, by the Minister or his representatives was clearly "for a use consistent with that purpose" within the meaning of paragraph 8(2)(a) of the *Privacy Act*.

[38] In light of the foregoing, I agree with the Minister that the Board was not required to address Mr. Moin's arguments concerning his refugee *sur place* claim. A tribunal is not required to address such an argument where the applicant has been judged not to have presented any credible evidence substantiating his claim: *Barry v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 203; *Ghribi v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1191; *Lai v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 179.

[39] The applicant's next argument relates to the Board member's "99% probability of fraud" comment. Mr. Moin is of the view that such a comment raised a reasonable apprehension of bias, in light of the fact that it was made before the Board had even inspected the documents. As a preliminary issue, the Minister counters that Mr. Moin has waived his right to raise this issue, as it was not raised at the first opportunity - that is, during the hearing.

[40] In the context of this case, I am not prepared to hold that Mr. Moin waived his right to argue bias by failing to make a motion for refusal at the hearing. Unlike most Board hearings, this one was adjourned so the Board member could find official NAB documentation and compare it with the letters in Mr. Moin's record. In a letter to the Board dated January 25, 2006, a few days after the hearing, counsel for the applicant wrote:

> Further to our discussions regarding the integrity of the NAB Inquiry documents that the claimant submitted, I would appreciate if you could provide any and all information you receive regarding the appropriate

> letterhead for such documents. The issue arose during the hearing that the NAB Inquiry documents did not have any letterhead. The Board Member advised me of her concern about the authenticity and integrity of the document and stated that 99% of documents received from Pakistan are fraudulent. I would also appreciate if you could provide the information or documentation regarding the Board Member's conclusion that 99% of documents from Pakistan are fraudulent. I believe this would be highly beneficial to the claimant in seeking to rebut the statements that 99% of documents from Pakistan are fraudulent. I fear that such a statement, absent independent evidence of such a statistic, could raise an apprehension of bias regarding the applicant's credibility and evidence. Independent evidence of this statistic would lay all fears to rest.

[41] It is well established that for a litigant to raise an issue of bias, it must be done at the first reasonable opportunity. The reasons for this rule are obvious. First of all, it is consistent with the seriousness of the allegation to require that it be raised almost immediately. Secondly, it is meant to ensure the *bona fides* of the claim by preventing the litigant from raising it after having received a negative decision. Thirdly, it allows the decision maker against whom the allegation is made to address it in a timely fashion. In the case at bar, none of these rationales militates against letting Mr. Moin argue an apprehension of bias.

[42] Be that as it may, I am not convinced Mr. Moin's grievance is best characterized as an issue of bias. The Board member's comment does not so much evince a closed mind but rather a misapprehension of the evidence. While she is absolutely right in stating that it is acceptable to compare the applicant's NAB letters with other NAB documents, this is not the issue here. Had the Board been able to find NAB documents against which to compare Mr. Moin's, her concerns could have been substantiated or put to rest. However, in the absence of anything specific regarding what NAB documentation looks like, it was not appropriate to rely exclusively on general documentary evidence to conclude the letters were forged.

[43] The Minister has relied on a number of decisions where this Court held it was open to the Board to consider documentary evidence to the effect that fraudulent documents are "widespread", "rampant" and "can easily be obtained" in Pakistan. But in all of these cases, the Board had already found other inconsistencies or credibility flaws in the claimant's story. This is not the case here. Nor is it a case where the Board was able to look at other examples of similar documentation, and compare it to the documents submitted by the claimant. That was the situation in *Uddin v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 451, on which the Minister relies.

[44] Here, in contrast, the Board had nothing on which to base its conclusion other than general evidence discussing the prevalence of fraudulent documents from Pakistan. Mr. Moin's testimony was extremely detailed, and generally consistent. He had extensive documentary evidence to support various aspects of his claim, including

his professional experience, and his role in the rape investigation targeting Mr. Marwat. His explanations for leaving and returning to Pakistan in the 1990s were perfectly logical, and consistent with the documentary evidence. And the Board was unable to find other documents emanating from the NAB which could have been compared to those submitted by Mr. Moin.

[45] General documentary evidence about fraudulent documentation cannot be interpreted in a vacuum. The Board member was obliged to consider the evidence of fraudulent documents in the context of this case. In the absence of other indicia that could lead the Board to question Mr. Moin's credibility, it could not discard two documents that were key parts of his claim simply because there is some documentary evidence which says it is easy to forge official documents in Pakistan.

[46] It might be reasonable to conclude a piece of evidence is not genuine if an applicant's story is generally not plausible, or where specific evidence demonstrates the document is not accurate. But here, the Board essentially rejected the NAB documents because the odds of their legitimacy were against Mr. Moin. Such reasoning would in effect make it virtually impossible for refugees of some countries to substantiate their claims with personal documentary evidence. In my opinion, such a finding is patently unreasonable.

[47] Finally, Mr. Moin challenged the Board's assumption that he could have sought legal counsel in defending against the NAB's allegations. Mr. Moin's entire claim is based on the risk of persecution at the hands of the NAB. This is a government institution, and as such, the state is the alleged agent of persecution in this case. Accordingly, I do not think Mr. Moin is under the same burden as an ordinary claimant to displace the presumption of state protection. As Justice Danièle Tremblay-Lamer concluded in *Chaves v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 193 at paragraph 15:

> In my view, however, *Ward*, *supra*, and *Kadenko*, *supra*, cannot be interpreted to suggest that an individual will be required to exhaust all avenues before the presumption of state protection can be rebutted (see *Sanchez v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 536 (T.D.)(QL) and *Peralta v. Canada (Minister of Citizenship and Immigration)* (1996), 123 F.T.R. 153 (F.C.T.D.)). Rather, where agents of the state are themselves the source of the persecution in question, and where the applicant's credibility is not undermined, the applicant can successfully rebut the presumption of state protection without exhausting every conceivable recourse in the country. The very fact that the agents of the state are the alleged perpetrators of persecution undercuts the apparent democratic nature of the state's institutions, and correspondingly, the burden of proof. As I explained in *Molnar v. Canada (Minister of Citizenship and Immigration)*, [2003] 2 F.C. 339 (T.D.), *Kadenko*, *supra*, has little application when the "[…]

> police not only refused to protect the applicants, but were also the perpetrators of the acts of violence"; *Molnar*, *supra*, at para. 19.

[48] For all of these reasons, I would allow Mr. Moin's application for judicial review, quash the Board's decision, and remit the matter to a different officer for redetermination. Both the applicant and the respondent proposed a question for certification, the first having to do with the appropriate timing to raise an issue of bias and the second related to the issue of specialized knowledge. Considering that the applicable principles on both of these questions are well known and that the final disposition of this case does not turn on either of these questions, I do not think it is appropriate to certify any of these questions.

ORDER

THIS COURT ORDERS that the application for judicial review is allowed. There are no questions for certification.

"Yves de Montigny"

Judge