

Date: 20080728

Docket: IMM-2796-07

Citation: 2008 FC 921

Ottawa, Ontario, July 28, 2008

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

MOHAMED FAZIL MOHIDEEN OSMAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mohamed Fazil Mohideen Osman (the Applicant) seeks Judicial Review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) of a decision of the Immigration and Refugee Board (the Board), Refugee Protection Division dated June 26, 2007 wherein, based on negative credibility findings, it determined the Applicant not to be a Convention refugee and not a person in need of protection (the Decision).

BACKGROUND

[2] The Applicant was born in Sri Lanka in August 1986 and grew up in Colombo. He attended St. Petersburg State Agrarian University in Russia in 2004 and, in March 2005, he returned to Colombo after completing an advanced diploma in business management.

[3] The Applicant's evidence was that prior to March 2005, he and his parents never had any difficulties with the police or the army in Sri Lanka. At that time, the security situation in Colombo was relatively calm.

[4] The Applicant alleged that in March 2005 his parents, who are Tamil speaking Muslims, rented a portion of their house at an attractive above-market rent to a Tamil couple from Northern Sri Lanka (the Tenants). They had employed a broker to find them rental accommodation.

[5] Shortly thereafter in May 2005, the police arrested the Tenants and warned the Applicant's father that if he had Tamil tenants, he would have problems with the police. The Tenants were released a day later after being beaten and forced to pay bribes. However, the Applicant's father did not heed the police and continued to rent to the Tenants.

[6] There was no further difficulty until August 2005 when the Foreign Minister of Sri Lanka was assassinated. The Applicant said that, in response to that event, police and army personnel

searched the Applicant's home on August 20, 2005. The police arrested the Tenants, the Applicant and his father.

[7] The Applicant testified that he and his father were beaten but were released after the Applicant's mother paid a bribe of 100,000 Sri Lankan rupees (approximately \$1,200 Canadian).

[8] The Applicant's father, on the advice of the police, asked the Tenants to move out by the end of August, which they did.

[9] In mid-September 2005, police and army personnel again searched the Applicant's home demanding to know the whereabouts of the Tenants. At that time, he and his father were arrested and detained for about six months (the Detention). The Applicant said that he was beaten about six times during this period and that the authorities tried to make him sign a blank statement. On one occasion, he was hung upside down, tied by his ankles and beaten. During the detention, the Applicant's asthma became worse because he was not receiving his regular treatments.

[10] The Applicant's mother unsuccessfully offered bribes on a number of occasions and retained legal counsel.

[11] The Applicant and his father were finally released in March 2006 after the Applicant's mother paid a bribe of 500,000 Sri Lankan rupees (approximately \$5,676 Canadian). The Applicant and his father were photographed and finger-printed.

[12] In April 2006, the Applicant's father complained to higher-ranking police authorities about the Detention and abuse. Thereafter, in late April 2006, a white van without licence plates arrived at the Applicant's home. A group of unknown men arrived, blindfolded the Applicant's father and took him away. He has not been seen since then (the Disappearance).

[13] In May 2006, the Applicant began making arrangements to flee Sri Lanka. He hired an agent who helped him obtain a student visa for Canada using false documents.

[14] On September 18, 2006, the Applicant was issued the visa and on September 23, 2006, he arrived in Canada and claimed refugee status.

THE DECISION

[15] The Board accepted that the Applicant was a national of Sri Lanka but decided that he was not credible. It drew adverse inferences from the fact that he did not have corroborating documentary evidence which demonstrated that his parents had in fact been renting part of their house to the Tenants. The Applicant explained that there had been no lease and that the rent had been paid in cash but the Board felt that these facts did not preclude corroborating evidence.

[16] The Board concluded that because the Applicant had spent nearly five months preparing to leave the country and because he had retained an agent to help him, he should have been able to produce additional documents to prove the existence of the Tenants.

[17] Moreover, the Board found it implausible that the Applicant's parents would rent part of their home to a Tamil couple from Northern Sri Lanka given the security situation and the risk of reprisals.

[18] The Board also drew adverse inferences from the fact that the supporting documents provided by the Applicant, which the Applicant's mother had obtained from friends of the family in positions of authority, did not mention the Detention or the Disappearance.

[19] At the Port of Entry, the Applicant stated that his family occupied the ground and first floors of the house. However, at the hearing, he testified that his family occupied only the ground floor. The Applicant acknowledged this inconsistency at the hearing and explained that it was due to the fact that he had been tired.

[20] Finally, the Board found that the Applicant's fear of returning to Sri Lanka was not warranted. It said:

I find that if he were to return to Sri Lanka, it would not be the first time the [Applicant] has left the country and returned to Sri Lanka, since, according to the [Applicant], he went to Russia in January 2004, and returned to Sri Lanka in March 2005. According to the [Applicant] upon return to Sri Lanka, he did not have any problems.

His only alleged problem is the alleged renting to Tamil couple by his parents.

DOCUMENTS SUBMITTED BY THE APPLICANT

[21] The Applicant submitted the following five letters (collectively, the Letters) in support of his claim. They were all obtained by his mother for the purpose of supporting his refugee claim.

[22] The first, dated March 12, 2007, is from Pearl Hospital (the Doctor's Letter). It does not mention that the Applicant's treatment lapse was due to his Detention. It reads:

This is to certify that Mr. Mohideen Osman Mohamed Faazil of No. 107 Dawalasingarama Mawatha, Colombo 15, has been treated here every month for bronchial asthma from his young age. He has not obtained treatment from Sept. 2005 to March 2006. When he came for treatment after that, he was weak and was suffering from frequent attacks of wheezing. He was treated for this condition from April 2006.

[23] The second letter (the JP's Letter), also dated March 12, 2007, is from N.R. Liyanage, a Justice of the Peace (all Island). He had known the Applicant's father for many years, yet he didn't mention the Disappearance or the fact that the Tenants had been arrested twice and were under continuing suspicion. The JP's Letter reads:

This is to certify that Mr. Mohideen Osman Mohamed Faazil holder of National Identity Card bearing No. 862341880 V is well known to me for a considerable period and is a permanent resident of No. 107 Dhawalasingarama Mawatha, Colombo 15.

Mr. & Mrs. Sivakumar were lived at the Upper Floor of the above house and Mr. Mohideen Osmand Mohamed Faazil has faced many problems due to the occupation of the above Mr. & Mrs Sivakumar.

[24] The third letter, also dated March 12, 2007, is from a Grama Seva Officer and certifies that the Applicant was a permanent resident at the Colombo address described in the other letters.

[25] The fourth letter, dated March 12, 2007, is from Deputy Mayor of the Colombo Municipal Council (the Deputy Mayor's Letter). Although he was also a long-time friend of the Applicant's father, the letter is silent about the Disappearance and says nothing about the Tenants. It reads:

This is to certify that bearer Mr. Mohideen Osman Mohamed Mohamed Faazil (ID No 862341880) of No 107, Dawalasingharama Road, Colombo 15 is known to be for a considerable period of time.

He comes from a respectable family as bears a good moral character. He is honest trustworthy and hard working person.

I have great pleasure to recommended him to any who require his services.

I wish him all success.

[26] The fifth letter is undated but was written after the Applicant arrived in Canada because it shows his Canadian address. Its author is P. Selvarajah, Attorney-at-Law and Notary Public. He identifies the Applicant as his client and states that the Applicant was arrested on September 16, 2005 and was detained and beaten until March 22, 2006. The letter mentions the Disappearance but not the Tenants (the Lawyer's Letter).

THE ISSUES

[27] The issues are:

1. Did the Board err in requiring corroborative evidence of the existence of the Tenants?
2. Did the Board err in concluding that the JP's and Deputy Mayor's Letters had no probative value?
3. Did the Board err in drawing an adverse inference from the material omissions in the Letters?
4. Did the Board err in concluding that the Applicant gave inconsistent evidence about the occupation of his family home?

STANDARD OF REVIEW

[28] Issues 1, 2 and 4 relate to how much evidence is needed and the weighing of that evidence. As such, they are questions of mixed fact and law for which the standard of review is reasonableness *simpliciter*. Issue 3 is a question about what findings can be drawn from an absence of facts and is hence a question of law alone. However, as the Board has expertise on drawing such findings, this issue meets the criteria set out in paragraph 55 of *Dunsmuir v. New Brunswick*, 2008 SCC 9 for a standard of review of reasonableness *simpliciter*.

DISCUSSION

Issue 1 Existence of the Tenants

[29] The Applicant's entire claim depended on the existence of the Tenants. For this reason and because he gave inconsistent evidence about what floors of the family home were occupied and by whom, it was open to the Board to look for evidence confirming the Tenants lived in the house. In my view, it was incumbent on the Applicant to explore every reasonable means of obtaining independent verification that the Tenants lived in his family home. The Applicant made no such efforts. He simply said that there was no written lease. He could have attempted through his mother to produce, for example, documents showing rent was paid, letters from neighbours or friends who visited the house and had seen the Tenants or a letter from the broker who accompanied the Tenants to the house and arrange their tenancy, to name just a few possibilities.

Issue 2 The JP's and Deputy Mayor's Letters

[30] The Applicant says that the JP's Letter should have been treated as corroboration of the Tenants' existence. However, since the JP did not indicate that he had any first hand knowledge of their presence, it is my view that it was open to the Board to assign no weight to his letter as it related to the Tenants. The situation would have been very different if the JP had said, for example, that he was dining at the Applicant's home, saw the Tenants arrive and go upstairs for the evening.

[31] The Deputy Mayor's Letter on its face corroborates none of the Applicant's story other than his address (which is not in dispute). Regardless of what weight is put on that letter, it is not probative in terms of the existence of the Tenants or the Detention and Disappearance.

Issue 3 The Failure to Mention the Detention or Disappearance

[32] The Applicant says that, even though both the JP and Deputy Mayor were his father's long-time friends, the Board erred when it inferred that because they did not mention his Detention and Disappearance, these events had not in fact occurred. The Applicant testified that the omissions, in the case of the Deputy Mayor, were explained by the fact that he was also a Tamil and feared repercussions.

[33] However, the Applicant did not testify that the JP, who was Sinhalese, had any such concerns.

[34] The Board also found it implausible that the Doctor's Letter did not explain that the Applicant's asthma treatment had lapsed because of the Detention. Since the hospital had treated him since he was young, it was probable in the Board's view that the doctor would have asked why his condition had deteriorated and would have included the explanation in the Doctor's Letter. It is important to recall that the Doctor's Letter was written at the request of the Applicant's mother to support the Applicant's refugee claim. There was no suggestion that the hospital or the doctor would have faced reprisals if they mentioned the Detention.

[35] The Applicant relied on Mr. Justice James Russell's decision in *Mui v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1020, 31 Imm. L.R. (3d) 91. The Board reached a negative conclusion about the applicant's credibility because her mother and her husband's mother, who were friends and played an important part in her marriage, had not been called as witnesses. However, the Court concluded at paragraph 35 of the decision that adverse credibility findings cannot be based on a lack of evidence.

[36] In so concluding, Russell J. relied on a decision made by Mr. Justice Douglas Campbell in the case of *Mahmud v. Canada (Minister of Citizenship and Immigration)* (1999), 167 F.T.R. 309. In that case, the issue was not a complete absence of evidence as in *Mui* but rather a situation like that in the present in which letters submitted by the Applicant contradicted his evidence not because of what they said but because of what they omitted. In deciding *Mahmud*, Justice Campbell relied on *Maldonado v. Canada (Minister of Employment and Immigration)*, [1980] 2 F.C. 302 (C.A.) and *Ahortor v. Canada (Minister of Employment and Immigration)* (1993), 65 F.T.R. 137 (T.D.).

[37] However, in my view, the decisions in *Maldonado* and *Ahortor* were not exactly on point. *Maldonado* stands for the proposition that an applicant's allegations are presumed true unless there are reasons to doubt their truthfulness and, in *Ahortor*, Justice Max Teitelbaum held that a failure to produce corroborating documents cannot support a finding that an applicant lacks credibility without having regard to the evidence about why such evidence is not available.

[38] In this case, the Applicant offered only a limited explanation about why only one of the Letters made no mention of the Detention or Disappearance. No explanation was offered about the other four letters' failure to mention the Detention or the Disappearance.

[39] In my view, where there is no reasonable explanation for such material omissions, they can be the basis of an adverse inference and impugn an applicant's credibility. Given the facts, the Board was entitled to conclude that the corroborating evidence was deficient and that, without it, the Applicant was not credible.

Issue 4 The Inconsistent Testimony about the Family Home

[40] The Applicant had initially claimed at the Port of Entry that his family "occupied the ground and first floor" and that the Tenants occupied the second floor. However, at the hearing, he testified that his family only occupied the ground floor, the Tenants occupied the first floor and that the second floor was vacant.

[41] The Applicant argues the inconsistency was actually a misunderstanding between floors. The ground floor was the first level, the first floor was the second level and the second floor was the third level of a three story home. The Applicant says that he consistently stated that the Tenants lived on the floor above his family.

[42] The problem is not an inconsistency about which the floor the Tenants occupied but an inconsistency about where the Applicant's family lived. The Applicant clearly stated at the Port of Entry that his family occupied two floors of the house. At the hearing, the Applicant testified that his family only occupied one floor.

[43] The Board considered the Applicant's explanation for this inconsistency and rejected it. It was open to the Board to conclude that being tired did not explain why the Applicant could not correctly provide the basic fact of where he and his family lived. As such, it was entitled to draw an adverse inference to the Applicant's credibility.

JUDGMENT

UPON reviewing the material filed and hearing the submissions of counsel for both parties in Toronto on Tuesday, February 26, 2008;

AND UPON being advised that no questions are posed for certification;

NOW THEREFORE THIS COURT ORDERS AND ADJUDGES that for the reasons given above the Application is dismissed.

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2796-07

STYLE OF CAUSE: MOHAMED FAZIL MOHIDEEN OSMAN v.
THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: FEBRUARY 26, 2008

REASONS FOR JUDGMENT: SIMPSON J.

DATED: JULY 28, 2008

APPEARANCES:

Krassina Kostadinov

FOR THE APPLICANT

Amina Riaz

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Waldman & Associates
Barristers & Solicitors
Toronto, ON

FOR THE APPLICANT

John H. Sims, Q.C.
Deputy Attorney General of Canada

FOR THE RESPONDENT