

Federal Court



Cour fédérale

Date: 20120321

Docket: IMM-5444-11

Citation: 2012 FC 340

Montréal, Quebec, March 21, 2012

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

MOMIN WALIULLAH

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision of the Immigration and Refugee Board (the Board) pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) whereby the applicant's claim for refugee protection under sections 96 and 97 of the Act was denied.

FACTS

[2] The applicant is a citizen of Afghanistan. He claims to have a well-founded fear of persecution under section 96 of the Act based on his religion and membership in a particular social

and political group, in addition to a need of protection under subsection 97(1) of the Act due to a danger of torture and a risk to his life, and a risk of cruel and unusual treatment or punishment. Specifically, the applicant fears his father's three half brothers over a property dispute and fears the Taliban due to his past work for an American Non-Governmental Organization (NGO), the Afghan Development Association (the ADA), an organization targeted by the Taliban.

[3] The applicant states that his troubles began in October 2008, when his father told his half brothers that they were to separate a piece of land they co-owned. However, the half brothers refused, attacking the applicant's father, resulting in his hospitalization. Consequently, the applicant's family left their home.

[4] The applicant claims that his father's half brothers are on the hunt for him, having passed out the applicant's picture, targeting him due to his association with the ADA. On December 1, 2008, his father would have been approached by a stranger who stated that his son would be killed due to his involvement with the ADA. Thus, the applicant was forced into hiding, living with one of his father's friends.

[5] On January 21, 2009, with the help of an agent, the applicant managed to leave Afghanistan and ultimately arrived in Canada on February 10, 2009, claiming refugee status. The applicant then later amended his Personal Information Form (PIF) to include an attack by the Taliban on his brother on November 14, 2010, his brother having been shot. The Board rendered its negative decision on July 19, 2011, concluding that the applicant was not a Convention refugee, nor person in need of protection under the Act.

DECISION UNDER REVIEW

[6] The Board did not believe the applicant's story, finding he lacked credibility due to significant contradictions and omissions. Firstly, the Board found that the applicant's fear of the Taliban was not credible, this fear being based on his step-uncles' ties with the group.

[7] The applicant did not give consistent answers with regards to his step-uncles' ties with the Taliban. In the applicant's revised PIF of March 6, 2009 and February 22, 2011, the applicant stated that his step-uncles were members of the Taliban. However, in his original PIF and testimony, the applicant had stated that they were merely connected to the Taliban, not knowing for certain whether they were actually members. Thereby, the Board draws a negative inference from this inconsistency, rejecting the applicant's explanation that to him membership and connection are synonymous. In the Board's opinion, the applicant cannot now claim the terms are synonymous, having previously given them distinct meaning in his testimony. Therefore, the applicant did not provide a satisfactory explanation as to why he contradicted himself as to his step-uncles' involvement with the Taliban, diminishing his credibility as to his fear of persecution and his family's alleged association with the Taliban.

[8] Moreover, the Board also found that the applicant contradicted himself with regards to his explanation of how he knew his step-uncles were tied to the Taliban. Initially, the applicant had testified that he knew his step-uncles were members of the Taliban because of the way they were dressed when they visited his father. Afterwards, in a separate testimony, he stated that it was because they were armed. When questioned as to why he did not initially state they were armed, the

applicant responded that they were only armed occasionally. The Board rejected this explanation, concluding that such a distinguishing feature as a weapon would have been mentioned at the outset.

[9] Similarly, when the applicant was asked how he knew the individual who made a threat to his father was from the Taliban, the applicant asserted that the individual identified himself as such. However, subsequently, the applicant stated that his father assumed the man making the threat was a member of the Taliban. In addition, it was not mentioned in the applicant's PIF that the man who made the threat was a member of the Taliban. Given this omission, these contradictory statements, and the lack of a valid explanation, the Board found the applicant's credibility with regards to his alleged fear to be further diminished. Thus, the Board did not believe the applicant's step-uncles were connected to the Taliban, nor that the applicant was wanted by the Taliban due to the above-mentioned property dispute or his employment with the ADA. Nonetheless, the Board went on to consider whether the applicant qualified for refugee protection due to an imputed political opinion by reason of his past employment with the ADA.

[10] Referring to specific documentary evidence and acknowledging the targeting of NGO employees by the Taliban in Afghanistan, the Board noted that the applicant no longer worked for the ADA and that the latter had not demonstrated that as a past janitor and computer technician for the NGO, he would still be linked to the organization two and a half years later. Consequently, the Board concluded that the applicant would no longer be associated with the ADA should he return to Afghanistan.

[11] The applicant takes issue with the Board's findings as to his credibility and the risk he faces in Afghanistan for having previously worked for an NGO.

STANDARD OF REVIEW

[12] The Board's conclusions on credibility and insufficient evidence of risk of persecution are reviewed based on a standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 46 [*Khosa*]; *Dong v Canada (Minister of Citizenship and Immigration)*, 2010 FC 55, [2010] FCJ No 54 at para 17 [*Dong*]; *Pinon v Canada (Minister of Citizenship and Immigration)*, 2010 FC 413, [2010] FCJ No 500 at para 10; *Aguebor v Canada (Minister of Employment and Immigration)* (1993), 160 NR 315, [1993] FCJ No 732 at para 4). Thus, deference is owed (*Khosa*, above at para 59, *Dong*, above at para 17, *Solis v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 372, 87 ACWS (3d) 532). Thereby this Court cannot substitute its own views for that of the Board's, but rather, this Court must determine whether the Board's findings and decision fall within the "range of possible, acceptable outcomes which are defensible in respect of the facts and the law" (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] SCJ No 9 at para 47 [*Dunsmuir*]).

ANALYSIS

[13] The applicant argues that the Board erred in its assessment of the applicant's credibility. Firstly, the Board's reliance on the distinction between the notions of "membership" and "connections" was unreasonable, being purely based on semantics and a microscopic analysis. The evidence made it clear that notions dealing with membership in the Taliban are fluid and ambiguous. Consequently, the Board once again ignored the evidence before it. The Board also

ignored the applicant's explanations: counsel for the applicant had asked that the latter amend his PIF and refer to his step-uncles as "members" without the assistance of an interpreter. In fact, both PIFs were filled out without the aid of a translator. Applicant's counsel at the time took the blame entirely for the inconsistent use of the terms "membership" and "connections", stating that she told the applicant to use the word membership. Furthermore, it was unreasonable for the Board to conclude that being armed was a distinguishing feature of the Taliban. It was also unreasonable for the Board to conclude that the applicant's testimony was inconsistent as to the identification of the man with his photo being a member of the Taliban. There was no discrepancy: the applicant's father thought he was a member of the Taliban and he identified himself as such. Rather, the Board ignored the social context in Afghanistan with regard to the Taliban and conducted a microscopic analysis.

[14] The Respondent argues that the Board identified inconsistencies in the applicant's testimony with regards to membership and connections with the Taliban, put its concerns to the applicant, and explained why it rejected the applicant's explanation for these discrepancies. The applicant's step-uncles' link to the Taliban was central to proving his alleged risk, this burden being on the applicant. However, the applicant's answers to fundamental questions going to the heart of his supposed fear were inconsistent, as explained by the Board in its decision: the applicant contradicted himself as to the family's link to the Taliban (membership/connection); and his PIF did not state that the man who showed his picture to his father was a member of the Taliban. Thus, it was reasonable for the Board to rely on these omissions in the applicant's PIF to support its credibility finding, all important facts having to be included in it (*Basseghi v Canada (Minister of Citizenship and Immigration)*, [1994] FCJ No 1867).

[15] Having reviewed the transcription of the hearing and considered both parties' representations, I agree with the applicant: the Board erred in its assessment of the applicant's credibility.

[16] At the beginning of the portion of its decision dealing with credibility, the Board stated that it relied on "significant contradictions and omissions" related to the applicant's step-uncles' ties to the Taliban, enumerating various supposed inconsistencies and contradictions (see para 10 of the Board's decision). However, a reading of the transcription reveals that the Board grounded its conclusion on insignificant inconsistencies or details, heavily focusing on the notions of membership and connections (*Dong*, above at paragraphs 27-28; *Attakora v Canada (Minister of Employment and Immigration)*, [1989 FCJ No 444, 99 NR 168]). While the applicant does inconsistently use the terms, the notions themselves are ambiguous, as stated in the documentary evidence. We are not talking about elected political parties with membership cards, but rather a relatively loose organizational structure responsible for the killings of civilians. Thus, nothing clearly delineates nor enables someone to know whether an individual is a member of the Taliban or is merely connected to the organization. The notions are fluid.

[17] The applicant explained why he stated at times his step-uncles were connected as opposed to members. At the beginning of the hearing, the applicant stated that his PIF and subsequent amendments were never translated to him and repeated that a proper translator/interpreter was not present when the question was explicitly put to him by the Board. Counsel for the applicant then put the question to the Board, asking it to explain the difference between membership and connection,

in order for the applicant to understand its questions. However, the Board did not explain the distinction, but rather incessantly asked the applicant to explain why at one point he stated his step-uncles were members and then merely connected, even though the applicant had already stated it was because of a translation issue (see the transcription of the hearing at p 449 of the Tribunal Record). The applicant even stated that he did not understand the difference between connection and membership.

[18] The Board also found the applicant's testimony inconsistent as to what enabled him to identify his step-uncles as members of the Taliban, stating at one point it was the way they were dressed, but then stating it was because they were armed. However, a reading of the transcription reveals that the applicant's answers were not inconsistent. The applicant stated that it was because of the way they dressed and acted that he knew his step-uncles were associated with the Taliban.

When asked by the Board to clarify, he added that:

[t]he way the Taliban behave and the way they (inaudible) and asking many specific people, and then the Taliban asking people to do—asking our uncles to donate money in order to support. My uncles was supporting (inaudible), and the people coming was heavily armed, staying in the house (inaudible). (see transcription of the hearing at p 451 of the Tribunal Record).

[19] As illustrated by the above-quoted passage, the applicant never contradicted himself, nor did he state that being armed was a distinguishing feature of the Taliban, contrary to the Board's findings.

[20] The Board's decision does not accurately take into account the applicant's explanations, warranting this Court's intervention. While great deference is owed, due to the Board's reliance on insignificant details and its failure to properly consider the applicant's explanations, its conclusion as to the applicant's credibility is unreasonable. These errors are sufficient for me to allow the present application for judicial review and it is not necessary for me to determine whether the Board erred in its assessment of the applicant's risk of persecution due to his past association with the ADA: the Board's decision is unreasonable.

[21] For the reasons above, the present application for judicial review is allowed.

JUDGMENT

THIS COURT’S JUDGMENT is that

1. The application for judicial review is granted.
2. The matter is referred back for redetermination by a different Board in accordance with the reasons given in this Judgment.
3. No question of general importance is certified.

“Danièle Tremblay-Lamer”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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STYLE OF CAUSE: MOMIN WALIULLAH and MCI

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: March 19, 2012

**REASONS FOR JUDGMENT
AND JUDGMENT:** TREMBLAY-LAMER J.

DATED: March 21, 2012

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