Federal Court Cour fédérale

Date: 20150206

Docket: IMM-8260-13

Citation: 2015 FC 158

Ottawa, Ontario, February 06, 2015

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

RAFI ALEKOZAI

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant seeks to set aside a decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada (the Board), dated December 4, 2013, which found that he was neither a Convention refugee nor a person in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*). For the reasons that follow, the application is granted.

I. Facts

[2] The applicant, Rafi Alekozai, is a 32 year old citizen of Afghanistan. From 2002 to 2005 he worked as an interpreter for US Aid, and from October 2005 until November 2011 as an interpreter and project manager for an American non-profit organization called American Voices. In August 2011 he received two telephone calls from an unknown man claiming to be from the Taliban, accusing the applicant of working for the Americans and of being a spy. The caller told the applicant that if he did not cooperate he would be killed. In September 2011, the applicant received six more calls. The last call occurred on or about September 20, 2011.

[3] After receiving the last call, and at the advice of his father, the applicant hid at a friend's house. On September 21, 2011, five armed Taliban went to the applicant's family home and beat his brother Arif. The applicant did not seek help from the police or the army because he believed they would be unable to protect him from the Taliban. The applicant left Afghanistan and spent about two months in the USA prior to making his way to Canada at the Niagara Falls crossing, where he claimed refugee protection.

[4] The Board denied the applicant's claim for refugee protection. The Board found the determinative issue was credibility. It concluded that the applicant was not credible based on a variety of factors. First, it made a negative credibility inference based on discrepancies in the applicant's narratives. Specifically, the applicant failed to remember the dates of the phone calls he received in September, 2011. He testified that the last call he received was on September 21, 2011; however he previously stated in his Personal Information Form (PIF) that the last call occurred on September 20, 2011.

[5] The Board also drew a negative inference based on a letter provided in support of the applicant from John Ferguson, Executive Director of American Voices. The letter states that the applicant received threats and anonymous calls in "early 2011", whereas the applicant testified the calls took place in August and September of 2011. The Board also placed considerable emphasis on the applicant's two-month delay in seeking protection while in the United States, particularly as the applicant assisted American organizations in Afghanistan. The Board reasoned that as he travelled on a US visa, and had a history of working for US organizations, it was reasonable to claim in the US. The Board also noted that there was a lack of corroborating evidence in regards to the six threatening calls from the Taliban, and no documentation regarding the attack on his brother.

[6] Finally, the Board considered whether the applicant's profile was one that required protection in Canada. The Board accepted that, based on the country condition reports, individuals working with American organizations in Afghanistan would be targeted by the Taliban. The Board concluded, however, that given the extended period of time the applicant had had the profile associated with his work with the aid organization, if he had not been attacked or threatened by the Taliban before his departure, there was not a serious possibility that he would be in future.

[7] Questions of credibility are reviewable on a standard of reasonableness. When reviewing the reasonableness of a decision the analysis is concerned with "the existence of justification, transparency and intelligibility within the decision-making process": *Dunsmuir v New*

Brunswick, 2008 SCC 9, [2008] 1 SCR 190, at para 47. In my view, the reasons in this case do not meet this criteria.

[8] First, the discrepancies in testimony relied on to support a finding that the applicant lacked credibility were trivial and did not form a sufficient foundation upon which the applicant's overall credibility could be impugned: *Fatih v Canada (Citizenship and Immigration)*, 2012 FC 857. For example, the difference of one day in the call from the Taliban is equally consistent with an honest or mistaken recollection. Moreover, the discrepancy is between the applicant's Port of Entry (POE) and his evidence. Minor discrepancies between oral testimony and the POE notes are, in the main, not of great evidentiary value given the circumstances under which the documents are prepared and their purpose. Here, the applicant also gave an explanation for the discrepancy of one day, which the Board did not consider.

[9] In the same vein, the Board summarily dismissed the letter from the aid agency on the basis that the letter placed the threats from the Taliban to be in "early 2011". The Board did not address the substance of that letter on the basis that it did not specify precisely the time that the threats were received. This may go to the weight to be given to the letter, but it is not, standing alone and without further analysis, a ground upon which an otherwise relevant and compelling document, consistent with the applicant's evidence, can be dismissed.

[10] I turn to the Board's consideration of the absence of corroborating documents concerning the attack on the applicant's brother and threatening phone calls. The absence of corroborative documentation is not, in and of itself, a negative determination of credibility; rather the absence

of a reasonable explanation for a lack of corroborative documentation which might reasonably be expected to exist may lead to a negative inference: *Giraldo Cortes v Canada (Citizenship and Immigration)*, 2011 FC 329. How a threatening telephone call from the Taliban can be corroborated remains an open question.

[11] While the failure to report the calls to the police is noteworthy, the Board gave no attention to the applicant's explanation that he did not consider the police effective or trustworthy. There was documentary evidence before the Board which gave an objective foundation to the applicant's concern, which the Board was required to consider and did not. A state protection analysis was required and none was conducted: *Melgares v Canada (Citizenship and Immigration)*, 2013 FC 1162; *Majoros v Canada (Citizenship and Immigration)*, 2013 FC 421.

[12] The Board gave considerable weight to the failure of the applicant to claim in the United States. The delay in claiming refugee status was short – two months. The applicant testified that he never considered claiming in the United States because he intended, from the outset, to make Canada his country of refuge. His sisters reside in Burlington and Montréal. I note, as well, that while the United States is a safe third country, one of the exceptions to the application of the safe third country rule is transit through a safe country to claim in a country where the applicant has close family members. The applicant also explained that in order to make a claim in Canada after transiting through the United States, he was required to have a relative present in Canada at the time of making the claim. He explained that he waited in the United States until his sister returned to Canada from a trip overseas. Attempted reunification with family is a valid reason

for failing to claim protection at the first opportunity; *Gopalarasa v Canada (Citizenship and Immigration)*, 2014 FC 1138.

[13] The Board did not consider the applicant's explanations in this regard, but rather concluded that he ought to have made his claim in the United States simply because he travelled on a US visa and had worked for a US aid organization.

[14] I turn to the third ground on which the application is granted. In certain cases the Board has an obligation to assess country conditions, regardless of its credibility assessment. In this case, the applicant was an interpreter and had worked for a US employer for a number of years. The country condition reports indicate that he had the profile of an individual who would be at risk.

[15] The Board had little to say about country conditions, other than to acknowledge persons like the applicant can be targeted by the Taliban. However, the Board speculated that the applicant would not be attacked in the future – the Board both hypothesized and reached a conclusion that was in direct conflict with the documentary evidence from reliable sources that indicates otherwise.

[16] The Board also reasoned that because his subjective fear of persecution at the hands of the Taliban was ill-founded, the applicant would not be at risk. This conclusion misses the point. It is how the applicant would be perceived by the persecutors that matters. In *Saifee v Canada (Minister of Citizenship and Immigration)*, 2010 FC 589, Justice Robert Mainville wrote: "that if

it can be showed [sic] that the officer made a decision without knowledge of country conditions, this in itself could constitute a valid reason to overturn the decision in judicial review." Here, the Board reasoned that given the passage of time, the Taliban would no longer be interested in the applicant. There was nothing in the country condition reports which supported the Board's conclusions in this regard.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted.

There is no question for certification.

"Donald J. Rennie"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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