

Date: 20080118

Docket: IMM-1345-07

Citation: 2008 FC 68

Ottawa, Ontario, January 18, 2008

PRESENT: The Honourable Mr. Justice Blanchard

BETWEEN:

RIZAYEV Aziz

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The Applicant, Rizayev Aziz, is a citizen of Turkmenistan who arrived in Canada on October 22, 2004. He claimed protection as a refugee for fear that he would be at risk if returned to his country of citizenship by reason of two encounters he had with KNB agents, formerly the KGB, in 1994 and 1995, and by reason of his anti regime activities while in the United States.

[2] The Applicant left Turkmenistan in April 1997 and filed his claim for asylum in the United States on November 4, 1997. He failed to appear at his refugee hearing in that country and his claim was subsequently rejected. He remained in the United States for the following six years without status. Following a failed attempt to have his case re-opened in the United States, an American Judge ordered him removed.

[3] In a decision dated March 2, 2007, a panel of the Immigration and Refugee board, Refugee Protection division (the Board) rejected the Applicant's claim, finding that he was neither a "Convention refugee" nor "a person in need of protection" on the basis that the Applicant's claim "lacks any credible basis".

[4] The Applicant seeks judicial review of this decision.

II. Issues

[5] The only issue to be addressed is whether the Board erred in making its credibility findings.

III. Standard of review

[6] Assessments of credibility are "quintessentially findings of fact" and the Refugee Division, as a specialized tribunal, should be afforded a high degree of deference because it enjoys a relative advantage of hearing the *viva voce* evidence and consequently is in the best position to gauge the credibility of an applicant: *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226 at para. 38. It is settled law that the appropriate standard

for reviewing the Board's credibility findings is patent unreasonableness: *Aguebor v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 732 (F.C.A.) (QL) at para. 4; (*Chowdhury v. Minister of Citizenship and Immigration*, 2006 FC 139 at para. 12; and *Rahman v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 974 at para. 27.

IV. Analysis

[7] The Applicant acknowledges both in his written and oral submissions that there were irregularities with certain aspects of his evidence in respect to his claim. He nevertheless challenges the Board's credibility findings, arguing that it failed to consider all of his explanations and that it was at times overzealous in looking for inconsistencies. The Applicant particularly challenges that aspect of the Board's reasons relating to his activities while he was in the United States. He argues that the Board failed to expressly consider the evidence of Mr. Leonid Komarovskiy who testified that while imprisoned in Turkmenistan, he was specifically interrogated about the Applicant. The Applicant contends that the Board erred by not giving any probative value to Mr. Komarovskiy's evidence.

[8] The Respondent contends that the Board did not ignore or misconstrue the evidence before it and that its credibility findings were not patently unreasonable. The Respondent further submits that the Board's general finding of a lack of credibility on the part of the Applicant may extend to all relevant evidence emanating from his testimony. In support of this contention the Respondent relies on *Sheikh v. Canada*, [1990] F.C.J. 604 (QL). In the Respondent's submission, it therefore follows that the Board did not err in affording no probative value to the testimony of the witness, Mr. Komarovskiy.

[9] The Board's findings are based on numerous contradictions, omissions and inconsistencies in the Applicant's evidence. The Board found that the Applicant was unable to satisfactorily explain discrepancies and omissions between his Canadian and American narratives. These discrepancies and omissions concerned evidence relating to his divorce date, his conversion to Christianity and baptism date, the attempted rape of his ex-wife and his encounter with the KNB. Further, the Board found that the Applicant could not explain why he omitted to mention in his Canadian narrative his relationship with "Serdar" a good friend of the family, whose father was the leader of the opposition party in exile. In the Applicant's own evidence it was because of Serdar's killing that he wrote articles in the United States under an alias. These important facts were reported in the Applicant's American narrative but omitted in his Canadian narrative.

[10] The Board determined that the Applicant invented a story in order to get a status in Canada and consequently found him "not credible at all".

[11] The Board dealt with the documentary evidence submitted by the Applicant and the evidence of Mr. Konarovsky in the following manner:

Not having believed his story and problems, we do not give any probative value to the following documents: P-34 (different articles), P-35 (first page of letter), R-35 (a) (two pages of a letter from the Republican Party of Turkmenistan), P-36 (divorce documents), P-37 (certificate of baptism) and P-38 (copy of electronic mail correspondence. Given all the credibility problems found in this case, we also do not give probative value to the testimony of the witness Mr. Komarovsky, who is a friend of the claimant.

[12] With respect to the evidence of Mr. Konarovsky the Board, in its reasons, stated: “At the beginning of the first hearing, we listened carefully to the testimony of Mr. Leonid Komarovsky, a journalist and citizen of the United States of America. He told us he was a friend of the Claimant.” At the beginning of its analysis the Board had this to say about the testimony of this witness:

First of all, Mr. Komarovsky came to give his testimony. He corroborated the fact that the claimant would have used an alias when writing his articles. He told us that the relationship with the claimant would have first been a professional one, then it would have changed into a “friendly relationship”. He told us he had known the claimant for about five years. However, Mr. Komarovsky was unable to tell us about the nationality of the claimant, saying: “He’s from Caucase, but I was never interested in this”. Invited to tell us if the claimant ever told him he was persecuted because of his nationality, he said: “I don’t remember if we discussed precisely of that but all people who are not Turkmen 100% are persecuted”. He himself told us that he was accepted as a refugee in 1995 in USA based on his ethnicity, i.e. the fact he was Jewish. We believe that if the claimant had problems in Turkmenistan because of his nationality, Mr. Komarovsky would have been aware of that since they were friends and discussed about the problems the claimant had in Turkemnistan.

[13] Nowhere in its reasons did the Board make a general finding about Mr. Komarovsky’s credibility. As indicated above, his evidence was given no probative value essentially because the Board found the Applicant not to be credible; it did not believe his story. The Respondent argues that it was open to the Board to do so and cites *Sheikh*, above, as authority in support of the Board’s finding.

[14] In *Sheikh*, Mr. Justice MacGuigan, writing for the Federal Court of Appeal, set out his views in the following terms at paragraphs 7 and 8 of his reasons:

7 The concept of “credible evidence” is not, of course the same as that of the credibility of the applicant, but it is obvious that where the only evidence before a tribunal linking the applicant to his claim is that of the applicant himself (in addition, perhaps, to “country reports” from which nothing about the applicant’s claim can be directly deduced), a tribunal’s perception that he is not a credible witness effectively amounts to a finding that there is no credible evidence on which the second-level tribunal could allow his claim.

8 I would add that in my view, even without disbelieving every word an applicant has uttered, a first-level panel may reasonably find him so lacking in credibility that it concludes there is no credible evidence relevant to his claim on which a second-level panel could uphold that claim. In other words, a general finding of a lack of credibility on the part of the applicant may conceivably extend to all relevant evidence emanating from his testimony. Of course, since an applicant has to establish that all the elements of the definition of Convention refugee are verified in his case, a first-level panel’s conclusion that there is no credible basis for any element of his claim is sufficient. [My emphasis.]

[15] The Federal Court of Appeal had occasion to apply *Sheikh* in *Rahaman v. Canada (Minister of Citizenship and Immigration)* [2002] 3 F.C. 537. The Court found that *Sheikh* does not equate “no credible basis” with a finding that the claimant’s testimony was not credible. The Board may not make a “no credible basis” finding if there is credible or trustworthy evidence before it that is capable of enabling it to uphold the claim, even if, taking the evidence as a whole, it decides that the claim is not established. Further, it expressly stated that the Board is to have regard to all the evidence before it.

[16] The legal proposition enunciated by Justice MacGuigan in *Sheikh* was clearly intended to extend to all evidence “emanating from the applicant’s testimony” and in circumstances where “the only evidence” before the Board is that of the Applicant himself. In the instant case, the evidence of Mr. Komarovsky, arguably does not emanate from the testimony of the Applicant and the Board made no finding regarding its credibility. In such circumstances, other legal principles must be considered. First, as indicated above, a tribunal must have regard to the totality of the evidence before it in assessing credibility. See *Owusu-Ansah v. Canada (MEI)*, (1998), 8 Imm. L. R. (2nd) 106 (F.C.A.). This principle is consistent with the principles and methods for establishing facts set out in the Handbook on Procedures and Criteria for Determining Refugee Status, issued by the office of the United Nations High Commissioner for Refugees. Paragraph 199 of the Handbook states in part: “Untrue statements by themselves are not a reason for refusal of refugee status and it is the examiner’s responsibility to evaluate such statements in the light of all the circumstances of the case”.

[17] Second, the more important the evidence that is not mentioned specifically and analyzed in a tribunal’s reasons, the more willing a Court may be to infer from the silence that the agency made an erroneous finding of fact “without regard to the evidence”. Put differently, a tribunal’s burden of explanation increases with the relevance of the evidence in question to the disputed facts. See *Cepada-Guitierrez v. Canada (MEI)*, [1998] F.C.J. No 1425 (F.C.T.D.) (QL).

[18] It is useful to review the evidence of Mr. Komarovsky which was before the Board. The witness testified that he met the Applicant approximately five years earlier when they were introduced by a friend. The witness approached the Applicant to seek his help in securing a

satellite internet provider for Turkmenistan, an area in which the Applicant had expertise. The witness had explained that the President of Turkmenistan had forbidden the use of internet in the country. Mr. Komarovsky subsequently succeeded in accessing the service for himself and other members of the opposition residing in the USA.

[19] The witness testified that the Applicant subsequently passed on relevant information critical of the Turkmen government that he used in his own articles which appeared on three opposition internet sites. The witness also explained that the Applicant wrote several articles which appeared on the said sites under different pseudonyms and confirmed that the Applicant was the author of the articles submitted as Exhibit P-34.

[20] Mr. Komarovsky further explained that when in 2002 he was arrested while in Turkmenistan and imprisoned for five months, he was specifically interrogated about the Applicant. I reproduce below relevant passages of his testimony from the transcripts of the proceedings:

BY COUNSEL (to witness)

Q. Were you ever interrogated about your involvement in the opposition?

A. Almost permanently that was exactly what they were doing.

Q. And during these interrogations did they ask you about anyone in particular?

A. Yes, of course, they asked those question almost every time. And first of all, they wanted that I would decode for them those surnames that would be signed those articles. Gundagar and other sites. They was telling me dozens of family names, dozens photos

were shown to me that they wanted me to recognize one or another person.

- Q. Did you recognize any of the names or photos that they may have shown you?
- A. No, I said I didn't know anyone and I had nothing to do with those people. Actually I had to say that I was safe because I didn't admit anything. Even if I admitted anything, I wouldn't be sitting here today. All others they got sentenced for twenty, twenty-five years in prison, even life in prison. And the people like such people like more than one-thousand.
- Q. So do I understand, in fact, did you in reality know some of the people whose names they showed you or you simply lied to them?
- A. Of course, I knew many of them.
- Q. And was Mr. Rizayev one of those individuals?
- A. Yes.
- Q. And what did they ask to know about Mr. Rizayev?
- A. Yes. The specific was is there such a person who live in United States and we don't know that he have regular meetings with Turkmen people. Also he's damaging the reputation of the Turkmenistan. Also he had some specials or articles against the president of Turkmenistan. So such things they were asking about him.
- Q. Did they ever explain how they came about this information?
- A. Actually those people they never give any explanation. They actually try to get explanation from you. But it wasn't difficult to guess. I believe that among those people who met Aziz and provided him with the information probably there were some people who used to work for the secret service from KGB and they actually informed about his doing in United States. But again, it's just my guess. Actually their attitude very suspicious to anyone who lives abroad. And the Turkmenistan is one of the few countries who still exist the meaning of the traitor and also the ... that's all traitor, homeland traitor.

[21] Mr. Komarovsky's evidence, if believed, corroborates significant elements of the Applicant's story. In particular, the evidence establishes that Turkmen authorities are aware of the Applicant's activities in the United States and suspected him of damaging the country's reputation and of having written articles against the President of Turkmenistan. The testimony of Mr. Komarovsky goes to the heart of the Applicant's claim, namely that he would be at risk if he returned to Turkmenistan, due, in part, to his political activities against the regime while in the United States. This evidence squarely contradicts the Board's finding.

[22] In its reasons, the Board fails to deal with Mr. Komarovsky's evidence as it relates to his questioning by Turkmen authorities while imprisoned and the Board makes no reference to the Applicant's involvement in securing an internet provider and equipment or in providing Mr. Komarovsky with information obtained from his sources which were then used in articles he published. All of this evidence would serve to corroborate the Applicant's claim and point to the opposite conclusion than that reached by the Board. The Board rejected Mr. Komarovsky's evidence because "of all the credibility problems found in this case". However, the Board made no express finding regarding Mr. Komarovsky's credibility. In my view, his testimony was properly before the Board and should have been expressly dealt with in assessing the Applicant's credibility. Given the Board's silence on this evidence in its reasons, and its detailed consideration of other evidence supporting its finding, I am left to conclude that the Board's general credibility finding was made without regard to the totality of the evidence. See *Cepeda-Gutierrez*, above, at paragraph 17.

[23] It may well be open to the Board to conclude as it did, but before doing so it must consider the totality of the evidence before it; and in the circumstances of this case, it had an obligation to explain with cogent reasons why it rejected Komarovsky's evidence. By failing to do so, it committed a reviewable error.

V. Conclusion

[24] For the above reasons the within application for judicial review will be allowed.

VI. Certified Question

[25] The parties have had the opportunity to raise a serious question of general importance as contemplated by paragraph 74(d) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, 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.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is allowed;
2. The March 2, 2007 decision of the Board is set aside and the matter is returned to be reconsidered by a differently constituted panel of the Board in accordance with these reasons; and
3. No question of general importance is certified.

“Edmond P. Blanchard”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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