Federal Court  Cour fédérale

Date: 20101126

Docket: IMM-1091-10

Citation: 2010 FC 1196

Ottawa, Ontario, November 26, 2010

PRESENT: The Honourable Mr. Justice Crampton

BETWEEN:

AREF MEMARI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Aref Memari is a citizen of Iran. He is of Sunni Kurdish ethnicity. He claims to have fled Iran to escape torture and persecution that he experienced at the hands of the Iranian government because of his political beliefs and activities. He arrived in Canada in May 2007 and claimed refugee protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA).

[2] In February 2010, the Refugee Protection Division of the Immigration and Refugee Board (the "Board") rejected his claim for refugee protection.

[3] The Applicant seeks to have the decision set aside on the basis that:

i. the principles of natural justice were breached as a result of his former counsel's incompetence;

ii. comments made by the Board subsequent to its decision gave rise to a reasonable apprehension of bias; and

iii. the Board's analysis of the evidence was unreasonable.

[4] For the reasons that follow, this application is allowed.

I. Background

[5] In an addendum to the personal information form (PIF) filed in support of his application for refugee status, the Applicant states that he was politically involved with a clandestine student group that defended Kurdish rights and advocated an end to the discrimination and persecution of Kurds. In 1996, after students and local teachers at the University of Sanandaj were humiliated and persecuted for being Kurds and Sunnis, he became seriously involved with that group. Among other things, the group distributed flyers, held meetings on a clandestine basis and held peaceful rallies. The Applicant also was a supporter of the leftist Hekmatiye political movement.

[6] After an Iranian Kurd was arrested and killed by Iranian security forces in 2005, the Applicant participated in a peaceful protest. He claims that this protest was raided and that he was arrested. He further claims that he was then detained, beaten, lashed on numerous occasions and interrogated for 15 days, before being released five days later.

[7] He claims that he did not return to his political activity until after the Nowrooz (Iranian New Year) holiday in 2006, when he was asked by one of the members of the student group to attend a meeting and speak about his experience. He renewed his involvement with the group and began photocopying flyers that were distributed by other members of the group.

[8] The Applicant claims that he was then arrested a second time, on January 15, 2007. He states that he was again beaten, seriously tortured and interrogated about his activities. After being detained for over two weeks, he was forced to sign an undertaking stating that he would not tell anyone about his detention and was threatened with death if he violated this undertaking.

[9] The Applicant claims that a few weeks later, on February 4, 2007, he was taken to the outskirts of the city and left there. He states that he immediately went into hiding for three nights until he could meet with a smuggler. He spent five days hiding with the smuggler before departing for Turkey on February 11, 2007. He stayed in Turkey until he departed for Canada, where he arrived on May 22, 2007.

[10] Since fleeing Iran, the Applicant claims that his house has been raided and that his parents, brother, wife and neighbours have been interrogated. In addition, his wife was dismissed from her job, was forced to sign an undertaking stating that she would report the Applicant, and has been required to report to the Sepah (a branch of Iran's military) every other month.

[11] In his PIF, the Applicant added that that his family was opposed to the revolution in Iran, that their home was raided and searched, and that his father was arrested and detained in an

undisclosed location for four months, where he was severely tortured. He was finally released when the Applicant's mother posted the deed to her property as bond. Due to the injuries he suffered as a result of his torture, he has been unable to work since that time. In addition, he was dismissed from the military and is prohibited from leaving the country.

II. The Decision under Review

[12] At the outset of its decision, the Board identified the Applicant's credibility as the determinative issue in its decision.

[13] Before addressing the substance of the Applicant's claim, and after acknowledging that the Applicant's counsel at the time, Ms. Anita Leggett, was known to the Board as a capable and conscientious refugee lawyer, the Board noted that there were "issues with her performance." The Board noted that the hearing was originally scheduled for November 24, 2009, but was adjourned to January 27, 2010 because Ms. Leggett submitted a revised narrative on the morning of the hearing. The Board noted that the document was dated March 2009. It also noted that Ms. Leggett took responsibility for this late submission, "citing both illness and simply not getting around to it."

[14] The Board then observed that, at the hearing on January 27, 2010, Ms. Leggett indicated that she was ill and had not been feeling well. The Board also noted that she submitted at that time a detailed psychological report that she claimed to have just received.

[15] The Board then noted that once the hearing commenced and an issue arose about the Applicant's claimed dates of detention in Iran, Ms. Leggett approached the Panel and showed the Panel her copy of the PIF, on which she had marked some different dates than what appeared in the

document. At that time, she claimed that she had intended to amend the PIF before the hearing, but forgot, due to her illness.

[16] The Board further noted that Ms. Leggett subsequently volunteered that she had not provided adequate representation for the Applicant, and that she had apologized. The Board stated that the Applicant would not be penalized for any alleged errors made by Ms. Leggett. It added that it had been very careful to fairly consider the implications of such alleged errors. However, it maintained that there was still insufficient credible evidence to justify a positive determination.

[17] The Board then addressed various inconsistencies that it found in the Applicant's evidence. It stated that, cumulatively, those inconsistencies and one significant implausibility led it to conclude that the Applicant's evidence, on the whole, was not credible.

[18] The first inconsistency identified by the Board concerned the number of times the Applicant claimed to have been detained. The Board noted that in his PIF and in his testimony, the Applicant stated that he had been detained twice. However, the Board noted that in a Declaration that he signed at his port of entry, he only mentioned one detention. The Board did not accept the Applicant's explanations that (i) he was told by the immigration officer at the port of entry to keep his story short, and (ii) the proximate cause of his departure from Iran was his second detention. Instead, it concluded that his claim to having been detained on another occasion was an embellishment. It therefore made a negative inference as to his credibility.

[19] The second inconsistency identified by the Board related to the difficulties that the Applicant claimed to have had with the interpreter during his point of entry interview. The

Applicant alleged at the hearing that he had difficulties understanding the interpreter on several occasions because (i) the interpreter was Afghani, who speaks Dari (which is similar to Farsi) and Iranians (who speak Farsi) don't understand much of the terminology used by Afganis, and (ii) the interpreter was interpreting over a speaker telephone that did not transmit clearly. The Applicant further claimed to have requested a Kurdish interpreter, but was told that none was available, and claimed to have requested that various questions posed during the interview be repeated several times.

[20] The Board rejected the Applicant's claims after noting that:

- the Officer told the Applicant to let him know if a question was unclear or if he did not understand, and the Applicant did not do so;

- there was no record in the interview notes of the Applicant having complained about the interpretation, having requested that questions be repeated, or having requested a Kurdish interpreter;

- at the end of his Declaration, the Applicant thanked immigration personnel for their help and did not express any complaints about the interview process;

- the Applicant signed the written record of the interview, to confirm that what was contained therein was true;

- the interpreter had signed a declaration stating that he had interpreted the contents of that record to the Applicant and the Applicant had informed him that he had he understood that record;

- the Applicant indicated at the hearing that he is just as fluent in Farsi as he is in Kurdish, and requested a Farsi, rather than a Kurdish, interpreter;

- the Applicant's Declaration was done free-hand with no interpretation, and was done in Farsi; and

- as a university graduate, the Applicant would not have simply signed a form because he was told to do so, and an immigration officer would not have requested him to sign something that he knew or ought to have known not to be true, since there is a presumption that CIC deals fairly that was not rebutted.

[21] The third inconsistency was identified as involving the dates of the Applicant's first detention. The Board noted that there were differences between the Applicant's testimony and his PIF on this matter. In his testimony, the Board stated that he identified those dates to be August 3, 2005 to August 24, 2005, and that when he was asked if he was sure about those dates, he replied in the affirmative. However, in his PIF, the Board stated that the dates of his first detention were identified as being from September 3, 2005 to October 3, 2005.

[22] The Board observed that, at the beginning of the hearing, he had sworn to the accuracy of his PIF, yet he alleged later in the hearing that it was not accurate in this respect. It then noted that he suggested that the interpreter at Ms. Leggett's office may have copied the dates from the interview record. The Board did not accept this explanation because there was nothing in the interview record indicating that he had been detained on the dates set forth in his PIF (September 3, 2005 to October 3, 2005), and thus the interpreter at Ms. Leggett's office could not have copied the dates wrong.

[23] The Board also noted that Ms. Leggett had showed the Panel her copy of the PIF, which appeared to indicate some changes in pen or pencil. The Board observed that Ms. Leggett had indicated that this was evidence that she had intended to change that section of the PIF before the Applicant swore to it at the hearing, but she forgot to do so due to her illness. The Board acknowledged that Ms. Leggett correctly indicated that the revised narrative set forth in the addendum to the Applicant's PIF indicated that the Applicant was arrested on August 3, 2005.

[24] However, the Board found that the fact that the Applicant, apparently incorrectly, blamed this on the interpreter and also, apparently incorrectly, indicated that the interpreter had taken the wrong information from the interview record, would tend to indicate that his explanations should not be accepted. The Board therefore made a negative inference as to credibility, although it noted that this was partially mitigated by Ms. Leggett's explanation.

[25] The fourth inconsistency concerned the dates of the Applicant's alleged second detention. The Board noted that the dates set forth in the interview record and the Applicant's PIF were different. In the interview record, the dates were stated to be October 25, 2006 to November 15,

2006. However, in his PIF, the Applicant stated that he was released from custody, and escaped from Iran, in February 2007.

[26] When asked to explain the apparent inconsistency, the Applicant claimed that they resulted from errors made by the interpreter in converting the Persian calendar to the Gregorian calendar. Since the Board did not accept the Applicant's allegations regarding poor interpretation at the interview, the Board did not accept this explanation.

[27] The fifth "inconsistency" concerned the Applicant's response to a question regarding the location where Mansour Hekmat, the head of the party the Applicant claimed to support, died. The Applicant stated that he died in Iran or Iraq. It was only after the Applicant was asked how the leader of an anti-regime party would be allowed to live in Iran that the Applicant corrected himself and stated that he died in London. The Board found that this indicated that the Applicant had little knowledge of the party he claimed to support. It therefore made a further negative inference regarding the Applicant's credibility.

[28] Finally, the Board found a significant implausibility in the Applicant's claim. The Applicant indicated that although his wife has been interrogated frequently since he left, she had not disclosed to the authorities that he had fled to Canada. The Board found it implausible that the Applicant's wife would not have been forced to reveal this fact, particularly if the regime were targeting the Applicant to the extent that he claimed.

[29] Based on the foregoing, the Board concluded that the Applicant's evidence was, on the whole, not credible. Accordingly, it found that he would not face a risk contemplated by sections 96 or 97 of the IRPA.

III. Standard of review

[30] The issues of procedural fairness and natural justice raised by the Applicant are reviewable on a standard of correctness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paras. 55, 60 and 79; *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 43).

[31] The issue regarding the Board's analysis of the evidence is reviewable on a standard of reasonableness (*Dunsmuir*, above, at paras. 51-56).

IV. Analysis

A. *Were the principles of natural justice breached as a result of his former counsel's incompetence?*

[32] The Applicant submits that the principles of natural justice were breached as a result of Ms. Leggett's incompetence in representing him. I agree.

[33] In *R. v. G.D.B.*, 2000 SCC 22, [2000] 1 S.C.R. 520, at para. 26, the Supreme Court of Canada stated that for this ground of challenge to succeed, "it must be established, first, that counsel's acts or omissions constituted incompetence and second, that a miscarriage of justice resulted." The Court elaborated as follows:

> **27** Incompetence is determined by a reasonableness standard. The analysis proceeds upon a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. The onus is on the appellant to establish the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The wisdom of hindsight has no place in this assessment.
>
> **28** Miscarriages of justice may take many forms in this context. In some instances, counsel's performance may have resulted in procedural unfairness. In others, the reliability of the trial's result may have been compromised.
>
> **29** In those cases where it is apparent that no prejudice has occurred, it will usually be undesirable for appellate courts to consider the performance component of the analysis. The object of an ineffectiveness claim is not to grade counsel's performance or professional conduct. The latter is left to the profession's self governing body […]

[34] Although *G.D.B.* was a criminal case and the Supreme Court's analysis of the issue of the right to effective counsel was focused on persons charged with a felony, this Court has recognized this right in the refugee context (see, for example, *Gulishvili v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 1667, 2002 FCT 1200; *Shirwa v. Canada (Minister of Employment and Immigration)*, [1994] 2 F.C. 51 at 60-64 (T.D.)).

[35] It may also be noted that subsection 167(1) of the IRPA provides a statutory right to be represented by counsel, to persons who are the subject of Board proceedings.

[36] However, in proceedings under the IRPA, the incompetence of counsel will only constitute a breach of natural justice in "extraordinary circumstances" (*Huynh v. Minister of Employment and Immigration* (1993), 65 F.T.R. 11 at 15 (T.D.)). With respect to the performance component, at a minimum, "the incompetence or negligence of the applicant's representative [must be] sufficiently

specific and clearly supported by the evidence" (*Shirwa*, above, at 60). With respect to the prejudice component, the Court must be satisfied that a miscarriage of justice resulted. Consistent with the extraordinary nature of this ground of challenge, the performance component must be exceptional and the miscarriage of justice component must be manifested in procedural unfairness, the reliability of the trial result having been compromised, or another readily apparent form.

(i) ***The performance component***

[37] As noted in Part II above, the Board acknowledged in its decision that there were "issues with [Ms. Leggett's] performance." In this regard, the Board mentioned that:

- the hearing originally scheduled for November 24, 2009 was adjourned to January 27, 2010 after Ms. Leggett submitted a revised narrative, dated March 2009, on the morning of the hearing;

- when issues arose during the hearing on January 27, 2010 regarding the Applicant's claimed dates of detention in Iran, Ms. Leggett approached the Panel and displayed a marked-up copy of the Applicant's PIF and claimed that she had intended to amend the PIF prior to the hearing, but forgot, due to her illness; and

- Ms. Leggett had volunteered that she had not provided adequate representation for the Applicant, and apologized for her shortcomings.

[38] The Applicant submits that Ms. Leggett's incompetence was not confined to his hearing before the Board, but was evident throughout her representation of him. In addition to the foregoing, additional examples identified by the Applicant include her failure to:

- cross-examine the port of entry interpreter and immigration officer;
- notice and correct errors of the interpreter;
- adduce evidence regarding the conversion of the Persian calendar to the Gregorian calendar;
- obtain a medical report to confirm that the scars on his body were consistent with his having been tortured; and
- withdraw from the record given the severity of her health condition.

[39] The Applicant also claims that Ms. Leggett was responsible for his poorly prepared PIF narrative.

[40] In addition to acknowledging and apologizing for her shortcomings before the Board, Ms. Leggett swore an affidavit in support of this application. In that affidavit, she stated that it was very clear to her that the Afghani interpreter who assisted with the Applicant's port-of-entry interview had incorrectly translated the dates provided by the Applicant with respect to his second detention. She added that "due to illness," only a brief PIF narrative was submitted, that she intended to

expand on this narrative before the hearing, and that in the rush to get the PIF submitted on time, the interpreter she used made some mistakes in converting calendar dates from the Persian calendar to the Gregorian calendar.

[41] In her affidavit, Ms. Leggett also stated the following:

> 8. Just prior to the hearing, I did provide an addendum to the PIF narrative. The refugee claim was originally scheduled to be heard in November, 2009. At the time, I had become seriously ill with a medical condition that was initially misdiagnosed by medical practitioners. On the morning of the hearing, I was feeling very dizzy and unwell. When I arrived at the hearing, I learned that the presiding Board Member – Michael Sterlin – had not received the revised PIF narrative. Because I was also feeling sick, the hearing was postponed. While the postponement was in no way the fault of Mr. Memari, the member set the next hearing date as peremptory.
>
> 9. As it turned out, I had contracted a serious virus and the drugs that were prescribed to me made the situation worse. I have permanently lost hearing in one ear and the medication seriously impeded by mental faculties.
>
> 10. While I was still seriously ill, I nevertheless went to the resumption of Mr. Memari's hearing on January 27, 2010 because I knew that it would go ahead regardless of my condition. I told the member at the beginning of the hearing that I was not feeling well and that I had lost hearing in my right ear. I told him that I was on medication which was making me very sick, and did not permit me to think or reason, and at times understand what was being said. Nevertheless, the member insisted that the hearing proceed.

[42] The foregoing is consistent with the following extract from the first page of Ms. Leggett's written submissions to Board member Michael Sterlin, dated January 31, 2010, a few days after the Board's hearing in this matter, and after Ms. Leggett claims to have ceased taking her medication:

> On the sitting of November 24, 2009, I wanted to request a postponement, as I was not feeling well, was feeling dizzy, and mentioned it to you at the beginning of the hearing. As you mentioned, you felt sorry I was not feeling well, but you would have proceeded if all the material submitted had been on time.
>
> You adjourned the matter as the extensive addendum to the narrative was filed on November 23, 2009, despite the fact that the letter I wrote and the addendum were written on March 1, 2009. The addendum came to your attention on the day of the hearing. You did not have time to read it.
>
> You insisted on making the next sitting, January 27, 2010, peremptory, irrespective of any illness of counsel.
>
> Since November 24, 2009, I have been quite unwell, as I mentioned to you at the sitting of January 27, 2010, with a condition that was misdiagnosed by the medical professional, with serious and maybe permanent consequences. As I mentioned to you on January 27, 2010, I was not well: - I was under the influence of some strong medication, and it was very difficult for me to function. Despite that, we did proceed.
>
> You also had not received the psychiatric report which was filed on the Monday, January 25, 2010, as the psychiatrist did not have time to see the claimant prior to January 11, 2010, despite the fact that I made the referral immediately after the November 23, 2009 adjournment. I did not receive the psychiatric report until the Thursday prior, on January 21, 2010, and there was no one at the office to file the report on Friday, January 22, 2010.
>
> At the conclusion of the hearing on January 27, 2010, you asked me if I wanted to make submissions. I did not understand your question. Then I indicated that I did want to make submissions, and I made them orally, despite the fact that I could hardly function due to the medication I was on, and the medical condition I have. I also felt you had made up your mind irrespective of my submissions.

[43] The foregoing is also consistent with the complaint that the Applicant filed with The Law Society of Upper Canada. In that complaint, the Applicant elaborated as follows with respect to the

various ways in which Ms. Leggett's illness and inattention to his file adversely impacted upon his case before the Board:

> Ms. Leggett prepared my initial refugee claim forms poorly, partly because she was ill and partly because she was out of the country. The forms were prepared in haste, and were inaccurate. After the forms were sent in, I tried to contact her on numerous occasions, at least ten times. On every occasion, I was told that there was no need to come in to see her, that everything was OK and that there was nothing to be done. I later found out that this was wrong. I was only able to meet up with her a matter of days before my hearing was scheduled to take place. At that point over two years had passed since I first retained Ms. Leggett's services. At that time, it became clear to me, that substantial changes were needed to be done to the papers (known as the Personal Information Form). We made the changes, but Ms. Leggett only sent them to the Refugee Board a day before the hearing. The Board Member had not received these changes on the day of the hearing, so it had to be adjourned. It also had to be adjourned because Ms. Leggett was sick. The next hearing date was made peremptory even though I wasn't at fault for the postponement. At the next hearing, despite the fact that I told Ms. Leggett that there were other corrections that needed to be made, she forgot to inform the Board Member of the amendments. This led the Member to disbelieve my story. I attach to this complaint a copy of the Refugee Board decision that discusses the problems that my lawyer had. I learned at the second hearing that she was still very sick, and was not feeling lucid. She was not competent during the hearing. I am sympathetic that she was sick, but she should never have come to the hearing. She should have told me and withdrawn from the record if she was not able to represent me competently. I honestly feel that my life is at stake, and I feel that she did not represent me adequately, despite what might have been her good intentions. In addition, her interpreter made numerous errors, which I was told not to worry about and could be fixed later. These mistakes were never corrected.

[44] In summary, the Board itself recognized and devoted five paragraphs of it decision to discussing Ms. Leggett's shortcomings. Ms. Leggett herself volunteered to the Board that she had not provided adequate representation for the Applicant and then apologized to the Board. She

subsequently elaborated upon these shortcomings in her written submissions to the Board and in an affidavit sworn in support of this Application. The Applicant has also made a detailed complaint to The Law Society of Upper Canada. This evidence is all internally consistent. It is also consistent with the balance of the record.

[45] I am satisfied that the particular claims of incompetence set forth above are sufficiently specific, exceptional and clearly supported by the evidence to meet the performance component established in the jurisprudence discussed above.

(ii) *The prejudice component*

[46] In its decision, the Board stated that the Applicant would not be penalized for any alleged errors made by Ms. Leggett. However, after considering the implications of the alleged errors, it concluded that there was still insufficient credible evidence to justify a positive determination.

[47] In my view, it is readily apparent that the reliability of this conclusion by the Board was compromised by Ms. Leggett's representation of the Applicant, and that therefore there has been a miscarriage of justice.

[48] The Board dismissed the Applicant's claim for refugee protection on the basis that his evidence, "on the whole, was not credible." As discussed in Part II above, the Board identified five "inconsistencies" which, cumulatively, and together with one implausibility finding, led the Board to conclude that the Applicant was not credible. In my view, Ms. Leggett's representation of the Applicant adversely impacted on three of those alleged "inconsistencies."

[49] With respect to the other two inconsistencies, one was relatively minor. It occurred when the Applicant quickly corrected himself regarding the place where the leader of the anti-regime party he supported died. The negative inference for the Applicant's credibility that was drawn from this inconsistency was explicitly made having regard to "the other concerns regarding the claimant's credibility." Similarly, the implausibility finding also appears to have been minor, in relation to the other concerns identified by the Board. The remaining inconsistency involved the Applicant's failure to disclose, in his port-of-entry interview and in his port-of-entry declaration that he had been detained twice. He was not represented by counsel at that time.

[50] There is no question that that the cumulative impact of these latter two inconsistencies and the implausibility finding is significantly less than the cumulative impact of all five of the inconsistencies and the implausibility finding that provided the basis for the Board's rejection of the Applicant's claim for refugee protection.

[51] The other three inconsistencies involved interpretation issues, the most important of which concerned the dates of the Applicant's two alleged detentions and beatings. These inconsistencies appear to have played a central role in the Board's finding that the Applicant's evidence was, "on the whole, not credible."

[52] With respect to the dates of his first detention, the Board noted in its decision that there was a "very significant" inconsistency between the dates he provided in his initial PIF narrative and the dates he provided to the Board during its hearing. At the hearing, and in the more detailed PIF statement that he filed as an addendum, he stated that the dates were from August 3, 2005 to August

24, 2005. However, in his initial PIF, the dates were stated to be from September 3, 2005 to October 3, 2005. The Applicant attributed this inconsistency to the interpreter retained by Ms. Leggett.

[53] As previously noted, Ms. Leggett acknowledged during the hearing that she had meant to change this, but forgot due to her illness.

[54] Another one of the inconsistencies identified by the Board as having been "very significant" involved the dates of the Applicant's second detention. The port-of-entry interview record indicated that he stated that he had been detained from October 25, 2006 to November 15, 2006. However, in his PIF, he stated that he escaped from Iran upon his release from detention, in February 2007. Once again, the Applicant attributed the inconsistency to poor interpretation, this time on the part of the interpreter who assisted with his port-of-entry interview. The Board rejected this explanation.

[55] The nature of the Applicant's problems with the translation of the dates from the Persian calendar to the Gregorian calendar is revealed in the transcript of his hearing with the Board (at page 30). His exchange with the Board member regarding the dates of his second detention, as set forth in the port-of-entry interview record, went as follows:

> **CLAIMANT:** That's not a complete document. I stated on the 15th of 11 month and they, the Interpreter thought the 11 month is the – according to Western calendar.
>
> **MEMBER:** M'hm.
>
> **CLAIMANT:** But 11 month in the Persian calendar is sometime in February.
>
> **MEMBER:** Okay. So, you're telling me that –

COUNSEL: So, I detected that and I can always refer to the Persian version of my declaration.

MEMBER: Okay. Let me see that – so, let me see that declaration, please. Let me get it back. Okay.

CLAIMANT: Thanks.

MEMBER: Yeah. Okay. So, you're saying this is right? It's February, not November?

CLAIMANT: In our calendar, it's the 11th month. I left, fled from Sanandaj.

MEMBER: I see it. It's 11th. It's 11 Persian month and it came out with the 11th Gregorian month, November. I see what you're saying (emphasis added).

CLAIMANT: Exactly. And that's what I detected as well.

MEMBER: What do you mean you detected it?

CLAIMANT: Because – because there – the same mistake was made in another place.

MEMBER: So, if you detected it, why didn't you have him correct the error, then?

CLAIMANT: Later, after I left the airport, later, I found out.

[56] Notwithstanding that the Board member seemed to understand the Applicant's explanation, he nevertheless made a negative inference regarding the Applicant's credibility. As with the inconsistency regarding the dates of his first detention, the Applicant was clearly prejudiced by this unfortunate error, which Ms. Leggett failed to draw to the Board's attention back in March 2009, when she first learned of it. During the hearing, when the Board asked for an explanation of why there was so much time between when the initial PIF was filed and when the more detailed PIF addendum was filed, Ms. Leggett replied that she thought it had been filed previously. She added: "But when I opened the file, I found that it had not been, just before the hearing" (transcript, p. 34).

[57] Elsewhere during the hearing, the Board identified additional inconsistencies in the record that involved dates. For example, at page 31 of the transcript, the following exchange took place:

> **MEMBER:** Okay. So, I'm looking at your PIF, not the narrative. PIF, section 7, it says you worked, okay, 'til January 2007. That would make – right. Section 11 of your PIF says you lived in Sanandaj until May '07. How can that be?
>
> **CLAIMANT:** It's not possible at all. In 2007 I was already in Canada.
>
> **MEMBER:** So, why did you put it?
>
> **CLAIMANT:** I didn't put it there.
>
> **MEMBER:** Who did?
>
> **CLAIMANT:** My interpreter put it there.
>
> **MEMBER:** Okay. You said the PIF was read back to you and you understood it.
>
> **CLAIMANT:** Yes, when it was read to me in Persian, in Farsi, I understood what I – the statements I made in Farsi, I understand, because the interpreter, my interpreter, interpreted everything in Farsi for me.

[58] Once again, the Applicant was prejudiced by errors made by the interpreter retained by Ms. Leggett, who failed to review the English version of the Applicant's PIF with him before it was filed by her.

[59] The Applicant appears to have been consistent from the outset with respect to the dates, according to the Persian calendar, of his detentions and his escape from Iran. However, he was unable to read the English translation of those dates into the Gregorian calendar, or to verify the accuracy of the translated dates as they were interpreted to him at the port-of-entry and in his

counsel's office. He therefore had to rely on Ms. Leggett in that regard. He was clearly prejudiced by her failure to adequately represent him in relation to those critical aspects of his claims.

[60] In addition to the foregoing, the Applicant also may have been prejudiced by Ms. Leggett's failure to obtain a medical report to corroborate his claims of torture. Had she obtained such a report, it may very well have buttressed the Applicant's credibility in the eyes of the Board. During the hearing before the Board, Member Sterlin expressed, on four occasions, his displeasure with the fact that a medical report had not been provided with respect to the injuries the Applicant claimed to have suffered from having been tortured (transcript, at pp. 9 and 22). He also expressed unhappiness with Ms. Leggett's failure to submit a psychiatric report before the date of the rescheduled hearing, on January 27, 2010 (transcript, at pp. 10-11).

[61] I have little doubt that the Board may very well have reached a different overall conclusion with respect to the Applicant's credibility, had he not been prejudiced by Ms. Leggett's inadequate representation. Indeed, the Board also may have been more positively predisposed to accept the explanation that he provided with respect to the only other significant inconsistency that it identified in its decision, namely, his failure to mention his initial detention during his port-of-entry interview, before he retained Ms. Leggett.

[62] I am also satisfied that the Applicant was further prejudiced by Ms. Leggett's illness in the weeks leading up to the hearing, and in the hearing itself, when it appears that she was medicated and not lucid. For example, at the initial hearing on November 24, 2009, Ms. Leggett acknowledged that she had not been feeling well for the past four to five weeks, and had to cancel meetings that had been scheduled with the Applicant "practically every day." In addition, it is clear that her failure

to submit, prior to the day before the initially scheduled hearing date, the Applicant's revised narrative, which had been prepared in March of that year, led the Panel to adjourn the hearing to January 27, 2010 and to inform the Applicant that it intended to proceed with the hearing on the latter date whether or not Ms. Leggett was able to proceed on that date. This left the Applicant in the very difficult position of having to retain new counsel on short notice or stay with Ms. Leggett. While the choice to stay with Ms. Leggett was his, he could not have anticipated that she would arrive for the rescheduled hearing in a state where, according to her own subsequent submission to the Board: "I could hardly function due to the medication I was on, and the medical condition I have."

[63] Moreover, Ms. Leggett's failure to withdraw from the matter well before the initially scheduled hearing date deprived the Applicant of the opportunity to retain competent counsel in time to properly prepare for his hearing.

[64] In my view, on the particular facts of this case, the cumulative impact of the prejudice suffered by the Applicant as a result of Ms. Leggett's inadequate representation of him was sufficiently serious to compromise the reliability of the Board's decision. Taken in isolation, each of the individual actions and omissions on the part of Ms. Leggett addressed above would not have satisfied the prejudice component of the jurisprudence set forth above. However, I am satisfied that the combined effect of these actions and omissions was sufficient to result in a miscarriage of justice. Taken as a whole, Ms. Leggett's representation of the Applicant was not adequate or reasonable.

[65] The particular facts of this case differ significantly from the typical case in which "the various omissions alleged against the applicant's former counsel are not such that they would undermine the confidence of a reasonably informed objective person regarding the outcome of the applicant's appeal" (*Dukuzumuremyi v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 278, at para. 20).

[66] Accordingly, this application will be granted.

[67] Given my conclusion on this issue, it is not necessary to address the remaining issues that have been raised by the Applicant.

V. Conclusion

[68] The application for judicial review is allowed. The Board's decision is set aside, and the matter is referred back to the Board for redetermination by a differently constituted panel.

[69] There is no question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUGES that this application for judicial review is allowed.

"Paul S. Crampton"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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