Federal Court  Cour fédérale

Date: 20110816

Docket: IMM-6451-10

Citation: 2011 FC 998

Ottawa, Ontario, August 16, 2011

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

YOUSF ALASSOULI
(A.K.A. YOUSF AHMAD ABD ALASSOULI)

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an application for judicial review of a decision of the Refugee Protection Division ("RPD" or "Board") of the Immigration and Refugee Board dated September 17, 2010. The RPD refused the applicant's claim for protection, finding that he was not a Convention refugee nor a person in need of protection.

[2] For the reasons that follow, I have concluded that the decision of the Board must be quashed. The Board made critical errors in assessing the evidence, and these errors had an impact not only on its assessment of the applicant's credibility, but also on its finding that the applicant did not rebut the presumption that Jordan was willing and able to offer him adequate state protection as he failed to exhaust reasonable remedies.

Facts

[3] The applicant, a citizen of Jordan, alleged that he rented business premises from his brother to run a grocery store. His cousin, Omar, also rented premises from him in the same building. One of the customers of the applicant's grocery store was a woman named Amal Mohammed Salim, a woman from the Algiza tribe, a different tribe than the applicant's. Amal accused the applicant's cousin Omar of harassing her and told her husband the same story. Enraged by what he had heard, Amal's husband, Abdalla, shot and killed the applicant's cousin Omar.

[4] Abdalla is from the same tribe or clan as the applicant, the Alassouli tribe, although he appears to be from a different tribe of the applicant's cousin Omar.

[5] Tribal customs and traditions are dominant in Jordan, including the concept of honour killings, retribution and feuding. It is a serious matter when a person from one tribe kills a person from another tribe, as was the case with Abdalla and the claimant's cousin Omar. Retribution is often sought. To head off a violent exchange as a result of Omar's murder, the police called for a cooling-off period and separated the two feuding groups. Abdalla and his family were moved to the city of Irbid, in the northern part of Jordan.

[6] A trial was held to investigate Abdalla's role in Omar's killing. Abdalla's wife Amal testified in favour of her husband, to the effect that Abdalla had killed Omar to protect her honour. The applicant contends that an honour killing would have been more acceptable to the court than a murder based on another motive.

[7] When the applicant testified at the same trial, he offered a different motive for the killing. He explained that the enmity between Omar and Abdalla's family predated the supposed harassment, and originated from a water dispute between his cousin and Abdalla's father, both of whom owned tracts of land in close proximity to one another. After the applicant left Jordan for Canada, the accused Abdalla was convicted and sentenced to 15 years in prison.

[8] The applicant alleges that Abdalla's family, including his brother Abdulrahim, was angry at the applicant for offering this incriminating testimony. They harassed him with threats of violence and murder. Amal's family also threatened the applicant, as they were angry with him for having contradicted Amal with his testimony and thus making her appear dishonest.

[9] Seeking protection, the applicant went to the police, who ensured that Abdulrahim signed an undertaking promising to keep the peace. However, the harassment continued. Without returning to the police a second time, he sought refuge in Canada.

The impugned decision

[10] The RPD rejected the applicant's claim on the basis of credibility and state protection. The RPD first noted that there was no nexus to the Convention definition of a refugee on the basis of the applicant's membership in a family group, since vendetta and revenge threats have no nexus to the Convention definition, citing *Bojaj v Canada (MCI)* (2000), 194 FTR 315.

[11] Thus, the RPD considered whether the applicant personally, and individually, would be at risk if returned to Jordan and concluded that he would not. Rather, the RPD found that the evidence suggested that it was more likely that the applicant's entire family was at risk, since, to use the applicant's language, that is normally the case in "tribal" disputes such as this one. Thus, the applicant's allegation that he alone was at risk was disregarded, as it was not credible.

[12] Furthermore, the Board found that on a balance of probabilities, security forces in Jordan would maintain a "security truce" until the conflict between the two families is resolved. Since the police had assisted the applicant in compelling Abdulrahim to sign an undertaking to keep the peace, they likely would have assisted him further, had he returned to the police to report the continued harassment by Adbulrahim or the threats made by Amal's family. Since he failed to do so, he did not rebut the presumption of state protection.

[13] The Board drew two conclusions concerning a letter submitted by the applicant from the Mayor of the Al Ananbeh clan, which affirmed that the applicant would be in danger in Jordan until the reconciliation between the families was achieved. First, it concluded on a balance of probabilities that the Mayor believes reconciliation will be achieved. Second, it also found improbable that a mayor would indicate his country's inability to protect one of its citizens, given

that he also expects reconciliation ceremonies, and accordingly gave this letter no weight with respect to the applicant's claim.

[14] Finally, the RPD found that one of the police reports filed by the applicant was a false document, which was submitted to mislead the panel because of a contradiction between that report and the applicant's testimony. According to that document, Mr. Alassouli had reported that Mr. Abdulrahim Mohamed Alassouli, the brother of the accused, had been searching and inquiring about the applicant's whereabouts in order to catch and harm him. However, according to the Board, the applicant had stated in his narrative that the accused, Abdalla Salim, was the one accused of shooting Omar and, according to the applicant, was from a different tribe. Therefore, the Board found that, on a balance of probabilities, Abdulrahim could not have the same last name as the applicant, that is Alassouli, as indicated in the police report, which in turn would mean that this report was a false document.

Issues

[15] This application for judicial review raises three issues:

a. What is the applicable standard of review?

b. Did the Board err in its assessment of the applicant's credibility?

c. Did the Board err in coming to the conclusion that the applicant had failed to rebut the presumption of state protection, and in evaluating the Mayor's letter?

Analysis

a) The standard of review

[16] The RPD's determination of the existence of state protection and its evaluation of the evidence attract a standard of reasonableness. Accordingly, the Board's factual findings on these issues will be upheld so long as they fall within a range of possible and acceptable outcomes: see *Dunsmuir v New Brunswick*, 2008 SCC 9, at paras. 47-48 and 51; *Muszynski v Canada (MCI)*, 2005 FC 1075, at paras. 7-8.

[17] With respect to issues of procedural fairness, the reviewing Court must determine whether the decision-maker's process satisfied the level of fairness required. This is a question of law and it must be adjudged on a correctness standard: see *Sketchley v Canada (Attorney General)*, 2005 FCA 404, [2006] 3 F.C.R. 392, at paras. 54-55.

b) The assessment of the applicant's credibility

[18] As previously mentioned, the Board rejected the police report in which the applicant mentioned that Mr. Abdulrahim Mohamed Alassouli, the brother of the accused, had been searching and inquiring about the applicant's whereabouts to catch and harm him, on the basis that it must have been fraudulent. This document was central to the RPD's rejection of the applicant's credibility; indeed, the RPD decided that the document called into question the entirety of the applicant's credibility. The Board arrived at that conclusion because the surname of the brother of the accused on the report appears to be different from the name given by the applicant to the accused in his Personal Identification Form ("PIF") narrative. The RPD states:

> [12] The claimant tendered a police report which stated, in part, that Mr. Alassouli has reported that Mr. Abdulrahim Mohamed Alassouli, the brother of the accused, has been searching and inquiring about the claimant whereabouts in order to catch and harm him. However, in the claimant's narrative, he stated that the accused, Abdalla Salim, was the one accused of shooting Omar and, according to the

> claimant, was from a different tribe. Therefore, on a balance of probabilities, I find Abdulrahim could not have the same last name as the claimant, that is Alassouli, as indicated in this letter. Therefore, on a balance of probabilities, I find the claimant has tendered a false document to the Board in a deliberate attempt to mislead the panel. The Federal Court has held that when a claimant impeaches his own credibility by tendering a false document, it calls into question the entirety of the claimant's credibility. Therefore, on a balance of probabilities, I find the claimant not to be a credible or a trustworthy witness and did not suffer the harm alleged.
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> Applicant Record, p. 11.

[19] It is unclear why the Board believed that Abdalla's family name was Salim as the applicant's PIF only refers to him as Abdalla. The RPD appears to have derived this conclusion by referring to the accused's wife's surname, Salim. However, this is only a guess as the RPD does not say how it chose the surname of Salim for the accused. Interestingly, the Board asked the applicant at the hearing whether Abdalla's family name was Salim, and the applicant replied that it was not. Moreover, other evidence on the record, such as another police report and the Mayor's letter, also shows Abdalla as sharing the applicant's family name. It appears, therefore, that the RPD has misread and misunderstood the evidence before it.

[20] The conclusion that the police report was fraudulent was a crucial finding, yet the applicant was not apprised by the RPD of its concerns in this regard, nor provided an opportunity to respond to this concern. The applicant could not anticipate such a finding by the Board, and should have been given fair notice that he was suspected of having engaged in seriously disreputable conduct. As this Court stated in *Sheikh v Canada*, [2008] FCJ no. 219, at para.10, "[N]atural justice requires that one be informed of specific concerns and be given an opportunity to meet them". See also: *Milushev v Canada*, [2007] FCJ No. 248, at para. 46.

[21] Counsel for the respondent retorted that this finding with respect to the police report being fraudulent is not determinative regarding state protection, as even if the applicant did go to the police initially, he was found not to have followed up with the further threats from Abdulrahim. There is however no way to know whether the Board would have come to its conclusion that the applicant had not rebutted the presumption of state protection, if it had not erred in its assessment of the applicant's credibility.

[22] Nor is it the only mistake made by the Board in considering the evidence before it. The Board also suggests that the applicant failed to report the threats made by Amal's family (at para. 10 of its reasons). Again, this appears to be an error, as the applicant testified that he did report the threats made by Amal's family (A.R., p. 223). This is in fact corroborated by the police report found at p. 56 of the Applicant Record. When combined with the problematic interpretation given to the Mayor's letter, of which I shall say more in the next section of these reasons, it is far from obvious that these errors were of no import in the Board's finding with respect to state protection.

[23] The Board also found that the applicant was not credible when he stated that he was the only one at risk, as documentary evidence shows that tribes do not single out one person for revenge. If, as the applicant alleges, the confrontation between his cousin and Abdalla had its origins in a tribal conflict over water rights, the whole family should have been at risk.

[24] I agree with the RPD that there was no nexus to a Convention ground in this case. The fact that the applicant was a member of a family where family killings had occurred, did not make him a

member of a particular social group where the killings were essentially criminal revenge vendettas. The fact that there was a history of encounters between family members due to a water dispute one year before the murder of the applicant's cousin and due to allegations of arson between the families, does not convert a criminal vendetta into a Convention refugee claim: see, for example, *Gonzales v Canada (MCI)*, 2002 FCT 345, at paras. 14-16; *Zefi v Canada (MCI)*, 2003 FCT 636, at paras. 40-41; *Hamaisa v Canada (MCI)*, 2009 FC 997, at paras. 11-15.

[25] As for the applicant's claim as a protected person, I believe the Board's finding is questionable. First of all, the applicant himself never testified explicitly that he was the only one at risk. More importantly, the Board never discussed the possibility that he could be the primary target of tribal revenge because he appeared as a witness in Abdalla's murder trial. Instead of considering the applicant's particular role as a witness in the murder trial (which may well have provided a basis for his being singled out), the Board appears to base its decision on previously unmentioned factors, such as the general practice of road closures to control riots and the cooperation of "the people of goodness and wisdom in the Burma area" with a previously unmentioned "governor". Indeed, when making the determination that the applicant is most likely not alone in his risk, the Board focused on the fact that the documentary evidence does not mention individuals as being the target of blood feuds. In so doing, the Board failed to acknowledge the applicant's particular circumstances.

[26] In light of the above, I am of the view that the Board could not reasonably impugn the applicant's credibility on the basis of the reasons provided. Once the errors mentioned in the

previous paragraphs are accounted for, there remains very little on the record to arrive at a finding of non credibility.

c) Did the Board err in making its state protection finding?

[27] The Supreme Court of Canada and the Federal Court of Appeal have conclusively determined the test for evaluating the existence of state protection. The state is presumed to be capable of protecting its own citizens. This presumption can only be displaced upon clear and convincing confirmation of the state's inability to protect a claimant: *Canada (Attorney General) v Ward*, [1993] 2 S.C.R. 689, at p. 724; *Canada (Minister of Employment and Immigration) v Villafranca* (1992), 150 N.R. 232, at p. 235 (FCA).

[28] More recently, the Federal Court of Appeal confirmed that a person who claims inadequate state protection bears both an evidentiary burden and a legal burden; the applicant must first introduce evidence of inadequate state protection, and must then convince the trier of fact that the evidence adduced establishes that the state protection is inadequate: see *Canada (MCI) v Flores Carrillo*, 2008 FCA 94, at paras. 17-19.

[29] As such, in the present case it is clear that the onus to rebut the presumption of state protection lay upon the applicant. To do so, he was required to show that he made adequate efforts to seek protection from the state, and that he gave the authorities sufficient opportunity to respond to his request for assistance: see *Romero v Canada (Minister of Citizenship and Immigration)*, 2008 FC 977, at para. 25.

[30] The narrative that he recounted in his testimony did not convince the Board that he had complied with this requirement. The Board noted that the Jordanian police had shown a willingness to intervene in order to protect the applicant: upon receipt of his complaint, they compelled Abdulrahim to sign an undertaking to keep the peace. Though this undertaking did not successfully bring an end to the harassment suffered by the applicant, it nevertheless shows that the police were engaged in the matter and took active steps to help him. The Board reasoned that in order to rebut the presumption of state protection, the applicant needed to give the authorities sufficient opportunity to help him, and ought to have returned to the police regarding the continued harassment by the accused's family and filed a complaint to the police regarding the accused's wife's family.

[31] There are several flaws with this reasoning. As already mentioned, the applicant did file a complaint to the police regarding the accused's wife's family. More importantly, the applicant also tendered a letter from the Mayor of the Al Ananbeh clan, one of the clans called to mediate the dispute. The translation of that letter reads as follows:

> We, the Mayor and the Elected Committee of Kufranjeh City, hereby certify that Mr. Yousf Ahmad Abdelrahim Al Assouli is from Kufranjeh and is one of its residents. He is well known to us as being one of the witnesses in the case No. of the deceased, Omar Obedellah Al Assouli by the accused Abdullay Mohammad Abdelraheem Al Assouli. They are his cousins. He has been asked to testify from time to time. His presence inside the country threatens his life at the hands of the parties in the case.
>
> According to what has been mentioned, he wants to leave the country until the completion of the reconciliation ceremonies and ending the case.
>
> Upon his request this certificate has been granted.

Applicant Record, p. 59.

[32] The RPD decided that on a balance of probabilities, the above letter was evidence that reconciliation will be achieved. At the same time, the RPD did not accept that the Mayor would indicate his country's inability to protect one of its own citizens. The RPD finally concludes that the letter is to be given little weight.

[33] The above letter from the Mayor is an important piece of evidence refuting the presumption of state protection. Given the importance of the content of the letter, the correctness of the RPD decision to give it no weight is critical to the overall decision on state protection.

[34] The Board's decision to reject it is dubious for a number of reasons. First of all, the Board appears to have completely misinterpreted the letter and took only the part that was in conformity with its conclusion. The letter clearly states that the applicant is in danger at the hands of the parties, but the Board focused instead on whether the Mayor believes that reconciliation will one day occur. In so doing, the Board fails to address the fact that the Mayor explained that until the reconciliation occurs, the applicant is not safe within the country. Contrary to the Board's finding, what matters is not whether reconciliation would eventually occur in the opinion of the Mayor, but whether the applicant would be in danger if he were to return home at the time of the RPD determination.

[35] The reason why the Board gave no weight to the Mayor's statement that the applicant would not be safe in his country was its belief that it was implausible for a mayor to indicate that his

country is unable to protect one of its own citizens. Yet, such a belief is not based on any evidence, is not explained and appears to be based on a purely speculative guess at what a mayor in Jordan would or would not say. This is clearly insufficient. When deciding an issue of implausibility, the RPD must articulate why the evidence is outside the realm of what could be reasonably expected in the specific circumstances of the case.

[36] The RPD has not indicated whether it believes the letter from the Mayor to be a forgery or to be genuine but from a person not telling the truth. Further, the RPD has failed to relate this plausibility finding to any evidence supporting its speculative decision on what a mayor in Jordan would or would not say. This is clearly an error.

[37] Because the Mayor's letter was a key element in assessing the presumption of state protection and whether the applicant had succeeded in rebutting it, I am of the view that the Board's decision cannot stand. It is simply not possible to say that notwithstanding the Mayor's letter, a similar determination on state protection would have been made. The applicant had reported to the police and still faced threats. The Mayor confirmed that he remained at risk, despite the reconciliation process and police involvement. If the Mayor's evidence had been accepted, and if the Board had not erred in assessing the applicant's credibility, it may well have found that the presumption of state protection had been rebutted.

[38] Before bringing these reasons to a close, I wish to take this opportunity to address a matter discussed by the parties in their submissions, relating to the significance of the democratic nature of a state in determining the robustness of the presumption of state protection. Counsel for the

applicant argues that Jordan is a kingdom whose "law does not provide citizens the right to change their monarchy or government". He goes on to submit that Jordan is therefore at the lowest end of democratic values, and that the applicant is therefore only required to demonstrate a minimal effort at seeking remedies to obtain state protection.

[39] With respect to the applicant, I cannot accept this argument. It is true that a claimant from a country with a full complement of strong democratic institutions must show serious efforts at obtaining protection. There is no doubt what this Court meant when it stated in *Kadenko v Canada (MCI)*, [1996] F.C.J. No. 1376, 143 D.L.R.(4th) 532 that "…the more democratic the state's institutions, the more the applicant must have done to exhaust all the courses of action open to him or her".

[40] But the reverse is not necessarily true in every case. It is quite possible that states which lack a democratic election process for choosing their leaders, such as monarchies, may nevertheless enjoy effective mechanisms of state protection, at least to repress common criminality and anti-social behaviour. Therefore, in assessing the availability of state protection, it is only logical that regardless of the manner in which a state chooses its leaders, tribunal members must examine the actual level of state protection available in that country, having regard to the particular circumstances of the applicant. When its authority is not threatened, it may well be that a state will be willing and able to provide a fair level of protection to its citizens, even if it does not conform with our ideal of democracy.

[41] Indeed, Justice Rennie recently spoke to this issue in *Sow v Canada (MCI)*, 2011 FC 646. He emphasized that the presence or absence of fair elections is not the only indicator of democracy that is relevant in determining what is necessary for a claimant to rebut the presumption of state protection. Rather, he urges tribunal members to consider the availability of protection itself:

> [11] Democracy alone does not ensure effective state protection. The Board must consider the quality of the institutions providing that protection. As well, the Board must look at the adequacy of state protection at an operational level and consider persons similarly situated to the applicant and their treatment by the state: *Zaatreh v Canada (Citizenship and Immigration)*, 2010 FC 211 at para. 55

[42] In other words, democracy should not be used as a proxy for state protection. There is obviously a strong relationship between the citizens' participation in the institutions of the state on the one hand, and the effectiveness and fairness of the state's apparatus to protect them. There is no automatic equation between the two, and an assessment of state protection must always rest on a more nuanced analysis, taking into account the particular circumstances of a claimant, as well as the state involved.

[43] For all of the above reasons, this application for judicial review is granted, and the matter shall be returned to the RPD to be heard by a different member. No question for certification has been proposed, and none will be certified.

ORDER

THIS COURT ORDERS that this application for judicial review is granted. There is no certified question.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	YOUSF ALASSOULI (A.K.A. YOUSF AHMAD ABD ALASSOULI) v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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