

Federal Court



Cour fédérale

Date: 20111220

Docket: IMM-2111-11

Citation: 2011 FC 1493

Ottawa, Ontario, December 20, 2011

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

MOHAMMAD ESSA

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of the decision rendered by the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated February 24, 2011, which refused the applicant's refugee claim to be deemed a convention refugee or a person in need of protection under sections 96 and 97 of the Act.

[2] The applicant seeks an order setting aside the decision and remitting the matter for redetermination by a differently constituted panel of the Board.

Factual Background

[3] The applicant is a twenty-five (25) year old citizen of Jordan. The applicant seeks protection in Canada as he alleges a fear of persecution as a member of a particular social group – that of homosexuals – if he were to return to Jordan.

[4] On July 27, 1993, the applicant was granted permanent resident status in Canada as a dependant of his father who was admitted as an immigrant in the entrepreneur category. However, due to the fact that the applicant's father did not comply with the terms and conditions pertaining to permanent residence in Canada, the applicant later lost his status and a removal order was issued against him by the Immigration Division on February 5, 2008. His appeal of this decision was then dismissed by the Immigration Appeal Division on June 15, 2009. The details of these events are explained in more depth in *Essa v Canada (Public Safety and Emergency Preparedness)*, [2009] IADD No 1565 (IRB).

[5] In the case at hand, the applicant alleges that during a visit to his family members in Jordan in the summer of 2005, he met and began a relationship with an individual named Mr. Maher Awmy.

[6] The applicant claims that he later returned to Jordan in 2006. During this visit, the applicant alleges that he was discovered by his uncle in a residence owned by his family in a compromising situation with Mr. Awmy.

[7] The applicant maintains that his uncle proceeded to attack and beat him, which injured his back and which has caused him continuing problems to this day. As well, he contends that his uncle, after having learned of his nephew's sexual orientation, sought a fatwa from a religious leader in Jordan in order to have the applicant killed.

[8] After being discovered, the applicant claims that he hid at a friend's house and then left for Canada, where he claimed refugee status on February 2, 2008.

[9] The applicant's claim was heard by the Refugee Protection Division of the Immigration and Refugee Board on December 9, 2010 and January 13, 2011. The Board rendered its decision on February 24, 2011.

Decision under Review

[10] The Board found that the applicant was not a Convention refugee or a person in need of protection under the Act as he had not met his burden of establishing that he would face a risk to his life if he were to return to Jordan. Though the Board determined that the applicant's identity had been established, the Board explained that it had reservations concerning his credibility.

[11] Essentially, the Board noted that the applicant had not been truthful in his past immigration proceedings. As well, the Board observed that the applicant's testimony was not credible and that there existed numerous contradictions and inconsistencies in his refugee claim.

Issues

[12] The issues are as follows:

1. *Was the Board's conclusion regarding the applicant's credibility unreasonable?*
2. *Did the Board breach the principles of natural justice by demonstrating an apprehension of bias?*

Statutory Provisions

[13] The following provisions of the *Immigration and Refugee Protection Act* are applicable in these proceedings:

REFUGEE PROTECTION,
CONVENTION REFUGEES
AND PERSONS IN NEED OF
PROTECTION

Convention refugee

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that

NOTIONS D'ASILE, DE
REFUGIE ET DE PERSONNE
À PROTEGER

Définition de « réfugié »

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette

fear, unwilling to avail themselves of the protection of each of those countries; or
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

crainte, ne veut se réclamer de la protection de chacun de ces pays;
b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Person in need of protection

Personne à protéger

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

- (i)* the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,
- (ii)* the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,
- (iii)* the risk is not inherent or incidental to lawful sanctions, unless imposed in

- (i)* elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
- (ii)* elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
- (iii)* la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles

disregard of accepted international standards, and	infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
Person in need of protection	Personne à protéger
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

Standard of Review

[14] With respect to the Board's findings of fact, including its conclusions on the applicant's credibility, the appropriate standard of review is reasonableness (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190; *Houshan v Canada (Minister of Citizenship and Immigration)*, 2010 FC 650, [2010] FCJ No 790). Regarding the second issue at hand, questions of procedural fairness and bias are reviewable on the standard of correctness (see *Ellis-Don Ltd. v Ontario (Labour Relations Board)*, 2001 SCC 4, [2001] 1 SCR 221; *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village)*, 2004 SCC 48, [2004] 2 SCR 650).

Arguments

Position of the Applicant

[15] On the first issue concerning the Board's credibility findings, the applicant alleges that the Board's conclusions were made arbitrarily, capriciously and without regard to the evidence.

[16] The applicant maintains that the Board was overzealous in discrediting his testimony and evidence. The applicant submits that the Board was entirely ignorant of his culture and religion (*Valtchev v Canada (Minister of Citizenship & Immigration)*, 2001 FCT 776, [2001] FCJ No 1131).

[17] On the second issue concerning the possibility of an apprehension of bias, the applicant submits that the Board made stereotypical comments and did not mention important and relevant witnesses that corroborated the applicant's allegations regarding his sexual orientation.

[18] The applicant stresses that during the first hearing of December 9, 2010, the Board stated that it did not have to hear the testimony of the applicant's witness, Mr. Riyad Hassan (a Palestinian from Lebanon who claimed refugee status in Canada due to his sexual orientation), as it had no issue with the fact that the applicant is a homosexual. Mr. Hassan was therefore dismissed and left the hearing. During the course of the hearing, the applicant testified that he did not go to gay bars or hung out in Montreal's gay village since he was a private individual who was discreet about his sexuality. However, after a fifteen (15) minute break, the Board reversed its position and stated that it no longer accepted the fact that the applicant was a homosexual due to "the reticence on the part of claimant to explore behaviour that is often characteristic of the gay community". The applicant states that his attorney explained that this was a problem since the applicant's witness had been dismissed. The applicant's attorney also requested a motion for the Board member to recuse himself

due to possible bias (Tribunal Record, pp. 223 and following). The applicant states that the Board then declared another short break and sought advice from the Immigration and Refugee Board's legal department. After the break, the applicant alleges that the Board dismissed the applicant's motion "stating that he has to do research on this issue of homosexual behaviour". At the request of the applicant's attorney, the Board then postponed the case in order for the applicant's witness to be present.

[19] The applicant contends that during the second hearing of January 13, 2011, Mr. Hassan could not attend and therefore the applicant invited another witness, Mr. Imad Khattadi, who is Muslim and bisexual. Mr. Khattadi testified on behalf of the applicant. However, the applicant submits that the Board never questioned Mr. Khattadi and failed to refer to his testimony in its decision.

[20] In light of the case of *Herrera v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1233, [2005] FCJ No 1499 [*Herrera*], the applicant propounds that the Board demonstrated a clear apprehension of bias and therefore breached the principles of natural justice.

Position of the Respondent

[21] With regards to the first issue, the applicant's credibility, the respondent reviews and highlights the contradictions and inconsistencies noted by the Board in its decision. The respondent affirms that the Board was justified to draw the negative conclusions on the applicant's credibility that it did in light of these apparent contradictions (*Cienfuegos v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1262, [2009] FCJ No 1591; *Soto v Canada (Minister of Citizenship and*

Immigration), 2011 FC 360, [2011] FCJ No 446; *Lawal v Canada (Minister of Citizenship and Immigration)*, 2010 FC 558, [2010] FCJ No 673). Moreover, the respondent notes that the Board was entitled to make an adverse finding regarding the applicant's credibility on the basis of the implausibility of his testimony alone. As well, the respondent observes that the explanations provided by the applicant fail to demonstrate that the Board's conclusions were unreasonable (*Onofre v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1219, [2010] FCJ No 1516).

[22] On the issue of the alleged apprehension of bias, the respondent provides a summary of the applicable principles that have been established by the case law. The respondent submits that the applicant must rebut the presumption of impartiality if he wishes to establish an apprehension of bias (*Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 39, [2005] 2 RCS 91).

[23] As such, the respondent contends that the threshold for proving bias is quite high as mere suspicion is not enough. The respondent recalls that the test for a reasonable apprehension of bias is whether or not an informed person, viewing the matter realistically and practically having thought the matter through, would think it more likely than not that the decision-maker would unconsciously or consciously decide an issue unfairly.

[24] The respondent also contends that the Board in no way demonstrated bias as it "kept an open mind" and agreed to postpone the hearing in order for the applicant to present his witnesses. Finally, the respondent argues that the case at hand can be distinguished from the case of *Herrera*, above, as the Board did not state in its reasons that it found the applicant not to be credible because

he did not fit a particular stereotypical profile. Rather, the respondent affirms that the present case resembles that of *Lawal v Canada (Minister of Citizenship and Immigration)*, 2008 FC 861, 173 CRR (2d) 309, where the allegation of bias was unfounded.

Analysis

[25] The Court will begin its analysis by examining the Board's conclusions on the applicant's credibility.

[26] Upon review of the Board's decision, the Court finds that the Board made adverse findings as to the applicant's credibility based on a number of highlighted contradictions and inconsistencies. Among the contradictions and implausibilities observed by the Board were the following remarks at paras 12 and 13 of the decision:

[12] In testimony, the claimant himself was found to be extremely discreet and exposed a very private lifestyle. The claimant states that you never know who might see you and there is a danger if the "word gets around" to people who knew him in the Muslim world. This discretion was manifest in testimony in that the claimant was very unfamiliar with the common knowledge, well known bars and landmarks of Montreal's gay community. The claimant testifies that he chooses not to involve himself in this more open lifestyle.

[13] The claimant was asked given that he was so discreet in Canada, how did it come to pass that he acted indiscreetly in Jordan by striking up a relationship with Mr. Awmy in an Irish Pub? The claimant's responded that his life in the west had made him less guarded. The panel does not find this reasonable because the claimant appears very private in Montreal which would imply that he would be even more guarded in Jordan.

[Emphasis added]

[27] As well, the Court notes that at pages 28 and 29 of the hearing transcript dated December 9, 2010, the following exchange is recorded:

Q: Okay. So if I were to ask you some questions about the gay village in hopes of establishing your sexual orientation and how you have manifested that in Montreal would you be able to answer some questions?

A: I never lived in it to be honest with you. I've been there a couple of times, different occasions.

Q: And by going there a couple of times on what occasions did you go there?

A: Partying, it was mainly partying to be honest with you.

Q: And where do you party?

A: I went to 182, it's a strip club and ---

Q: What is the address of 182?

A: I'm not sure.

Q: Can you locate it on what street?

A: If you tell me any address of any club I can't tell you. I know it's on St. Catherine and like it's on a side street but if you tell me the address of any club I can't tell you.

Q: What is it close to?

A: There's different restaurants and bars close to it, restaurant, there's ---

Q: Okay. What else have you gone to?

A: I don't hang out in the gay village to be honest with you.

Q: Why not?

A: Because I don't live there.

Q: A lot of people who don't live there go there because of their sexual orientation.

A: I know, it doesn't mean that I'm gay that I have to go to the gay village, I'm sorry but it doesn't mean that I have to go there.

Q: Have you been to gay pride?

A: I practice my sexuality on my, like it's my private life, I don't just go and expose and say I'm gay. It's a private thing for me, just so you know.

Q: I'm trying to give you an opportunity, sir, to establish your sexual orientation.

A: I totally understand. However if you're going to start asking me about the gay village I'm telling you, I'm telling you the honest truth, I don't hang out there.

...

[Emphasis added]

[28] Page 30 of the transcript, dated December 9, 2010, reveals the following exchange after Mr. Hassan had been dismissed and after the line of questioning on the applicant's homosexuality:

Q: Okay, we're back and the recorder is going again. And there's an issue I would like to bring up on the record and that is given some of the testimony I've heard I would like to reintroduce the question of credibility with respect to the homosexuality issue on the basis that it wasn't introduced at the initial claim. And also there seems to be some equivocation about his behaviour with respect to gay village and those kind of questions.

So just to draw your attention to the fact that I'm going to revisit that issue.

A: Well you do understand, Mr. Chairperson, that I will want my witness then.

Q: Yes, I understand. We'll have to ---

...

[Emphasis added]

[29] The Board continued on page 35 to 37 of the transcript, dated December 9, 2010, with the following set of comments:

Q: Okay. So if somebody were to ask you where does he rank on the list what would you say?

A: Rank on the list in terms of what?

Q: Is he like an A lister, a B lister, a C lister, are you aware of the list that is used?

A: That's what they use here I know that.

Q: Mm-hmm.

A: But it's really different there, so.

Q: Given what you know about how the list is used here how would you describe Mahar?

A: To be honest with you the way I'm living my life here is not the way that the gay community here is, like I don't go, as I said before, like I don't want to open the subject again but I'm gay just because of the fact that I sleep with other men, okay? I mean there is other gay people that they dress like girls or they look gay, I'm not like that. I'm just gay by the fact that I sleep with other men.

Q: Yeah.

A: And that's how I'm actually gay, that I sleep with other men.

Q: So explain this to me, how can you make a link between your religion, your sexual orientation and your reticence to display your sexuality in Canada? Do you understand where I'm coming from?

A: No.

(To the interpreter)

Q: Perhaps, Mrs. Razuk, you can explain that to him?

A: The link between your?

Q: Between your sexual orientation and ---

BY THE TRIBUNAL OFFICER (to the person concerned)

Q: Because how do you make the link between being a Muslim man and ---

A: Because I am a Muslim.

Q: You're a Muslim.

A: Because I am a Muslim, ma'am.

Q: Tell us why in Canada you're not likely to go out and exhibit your sexual orientation?

A: Because until now I don't have a status. Like until now I'm not ---

Q: Okay, you are not understanding me. Okay, you like to sleep with others, with other men.

A: Yeah, yeah.

Q: You've been living in Canada since 2008, how do you find – explain to us how you're sleeping with other men.

A: Until now, I mean even though I was still living here since 2008 it's not easy for me to come out and to the public and live life as a (inaudible) gay because ---

Q: Okay. Is there a link between your inability to come up and live your life as being gay?

A: Yes of course, because there is a fear of me going back, absolutely, because of the fear of me going back because I mean until now it's stable for me, until now I can't live my life normally. And that's my main fear.

...

[Emphasis added]

[30] These above-mentioned excerpts by the Board are perplexing. The Court is of the opinion that the Board's statement amounts to more than an "unfortunate statement". Indeed, the Board's insistence that an individual needs to go to the gay village to be gay is not reasonable. To this effect, a witness provided evidence to the contrary in testifying that he has knowledge of a couple "who have been together for a long time and never go to the Village and do not attend the Gay Parade" (Tribunal Record, p. 263). This evidence is not referred to by the Board in its decision.

[31] While the Court is cognizant that the Board is owed great deference in its findings of fact – including its conclusions on credibility – this Court finds that the comments made by the Board are stereotypical and thus unreasonable.

[32] Moreover, the Board erred in merely ignoring pertinent evidence provided by witnesses corroborating the applicant's testimony. For instance, Mr. Khattadi testified that the applicant was a homosexual (Tribunal Record, p. 249). Mr. Khattadi also affirmed that he had met the applicant in a club in Montreal and that he had sexual relations with the applicant between seven (7) and eight (8) times (Tribunal Record, pp. 250-251). Also, Mr. Beausoleil, a retired psychologist and expert witness who was involved in the gay rights movement in Montréal, testified that there are many stages regarding the context of openness or ability for an individual to refer to his homosexuality openly. The Court therefore finds that the Board also erred when it based its conclusions on the applicant's credibility without regard to the testimony provided by the applicant's witness and expert witness. In these circumstances, the Court's intervention is thus warranted.

[33] Given the Court's conclusion, there is no need for this Court to address the bias issue.

[34] For all of these reasons, the Court concludes that the Board's decision must be set aside. As neither party has proposed a question for certification, none will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that

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

“Richard Boivin”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2111-11

STYLE OF CAUSE: **MOHAMMAD ESSA**
v. MCI

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: December 7, 2011

REASONS FOR ORDER: The Honourable Mr. Justice Boivin

DATED: December 20, 2011

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