

Federal Court



Cour fédérale

Date: 20121220

Docket: IMM-2213-12

Citation: 2012 FC 1509

Ottawa, Ontario, December 20, 2012

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

CLOUD WARDI

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant brings judicial review to set aside a decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada (the Board), dated February 8, 2012. The Board found that the applicant was neither a Convention refugee nor a person in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act, SC 2001, c 27 (IRPA)*. For the reasons that follow this application is granted.

Facts

[2] The applicant is a citizen of Syria. Before the Board he claimed to have been targeted by the Syrian government after discussing the need for political reform with customers at his restaurant. He alleges that he was arrested in October 2009 under the pretext of drug charges. While detained, he claims to have been interrogated and tortured with beatings, sleep deprivation, trauma to his feet, suspension and electric shocks. He claims that his right hand was broken as well as some of his teeth.

[3] On January 17, 2010, a Syrian judge ordered the release of the applicant. He was still required to report to the state security and security officers would regularly come to his restaurants to steal meals and harass his customers. Using a previously issued passport, he traveled to Canada on August 8, 2010 and claimed refugee protection.

Decision Under Review

[4] The Board rejected the applicant's claim, having determined that the applicant lacked credibility. The Board cited the following inconsistencies:

- i. Assault on his father – At the hearing, the applicant testified that the police assaulted his father while arresting him. This detail was not included in his Personal Information Form (PIF).
- ii. Timing of the drug test - In his PIF, the applicant wrote that he was tested for drugs before being taken to an underground cell. At the hearing, he testified that he was taken to the underground cell first.

- iii. Timing of his broken teeth - In his PIF, the applicant wrote that his teeth were broken during torture. At the hearing, he stated that his teeth were broken during the arrest.
- iv. Timing of the drug allegations - In his PIF, the applicant stated that the police alleged he used drugs while arresting him. At the hearing, he stated that he did not learn about drug charges until he was in detention.
- v. Treatment for his broken hand - The applicant testified that his doctor said a splint would cause nerve damage. However, he provided a doctor's note which specifically referred to a splint. When challenged on the inconsistency the applicant explained that the doctor would not break his hand and reset the bone with a splint.
- vi. Frequency of reporting - In his PIF, the applicant alleged that he reported to the state security every week after being released. At the hearing he stated that he had to report every couple months. The applicant then explained that the security officers came to his work every week but he only had to report every two months.
- vii. Plight of his parents - The applicant testified that his parents fled to Lebanon to escape the authorities. However, in his PIF he wrote that they lived in Syria. When faced with this discrepancy he explained that he did not know about their departure when writing his PIF.

[5] The Board did not accept the applicant's explanations for the discrepancies: that he gave more details at the hearing out of excitement, that there may have been translation problems with his PIF and that he had memory problems as a result of torture. The Board noted that the applicant spoke English "fluently" at the hearing. Additionally, the applicant did not provide medical evidence to substantiate any memory problems.

[6] The Board also noted that the applicant had been able to leave Syria using his true passport even though Syria prevents anti-regime activists from leaving the country. The Board considered it to be implausible that the applicant could have left Syria if he was considered to be opposed to government.

[7] The applicant provided submissions from his Syrian lawyer, police forms and medical statements. However, the Board stated that this evidence did not establish the cause of his injuries or that he was targeted for political beliefs, as opposed to drug allegations. The Board faulted the applicant for not obtaining an additional letter from his Syrian lawyer and a letter from a priest who assisted him in obtaining legal representation.

[8] Finally, the Board considered whether the applicant would be in need of protection as a failed refugee claimant. The documentary evidence showed that those who are known to the Syrian security services will be detained upon return. The Board reasoned that the applicant was accused of a relatively minor drug offence acquitted of all charges and left Syria legally. Therefore, the Board decided that there was only a mere possibility that the applicant would face harm as a failed refugee claimant.

Issue

[9] The issues for this judicial review are whether the applicant was denied procedural fairness and whether the Board's credibility findings were reasonable: *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190.

Analysis

Procedural fairness

[10] Guideline 8 on Procedures with Respect to Vulnerable Persons Appearing Before the IRB (the Guideline) provides that torture victims may require special accommodation for their hearings before the Board. It is designed to ensure that members are alert to the fact that the testimony of victims of torture may not be of the same quality and consistency as other witnesses.

[11] In this case, the Board's failure to consider Guideline 8 goes to the reasonableness of the decision, not procedural fairness. The applicant has not specified any accommodation which ought to have been in place for his hearing. As he does not claim any problem with the procedure followed, he has not established a breach of procedural fairness.

[12] The respondent correctly notes that the Guideline requires refugee claimants to request consideration as a vulnerable person. I note that the Guideline also places an obligation on the Board to make inquiries on this issue. This ensures that claimants receive consistent treatment. As the applicant's PIF disclosed allegations of torture I would have expected the Board to raise the issue of whether the applicant is a vulnerable person. Nonetheless, there is, in the circumstances of this case, no breach of procedural fairness.

Reasonableness

[13] While the Board's failure to consider the applicant's special vulnerability did not breach procedural fairness, the findings with respect to credibility lead to an unreasonable decision.

[14] In addition to Guideline 8, the Board has a Training Manual on Victims of Torture (the Manual). While policies do not have the force of law, they are an important aid for assessing the evidence: *Borisovna Abbasova v Canada (Citizenship and Immigration)*, 2011 FC 43, para 53.

[15] Both policy documents emphasize that torture victims may have difficulty with memory, consistency and coherence. Additionally, the policies note that torture victims may be fearful of persons in authority. The Manual explains that claimants will often have difficulty testifying without outwardly exhibiting any problems. It urges Board members to “[r]emember that problems with testifying do not mean the story is false – we would expect the legitimate victim of torture to have difficulties testifying”.

[16] At the hearing, the applicant testified that he was “a little frightened” and confused about dates. He said, “Really I’m a sick person. I suffer a memory loss because of that beating; obviously it was severe and brutal.” The Board should have considered whether this affected the consistency of his testimony. It did not.

[17] The Manual provides detailed explanations about how torture may affect memory. For example, the Manual notes that traumatic memory is dissociated and initially stored as sensory fragments, rather than in coherent sequence.

[18] In this context, it is noteworthy that the applicant testified: “... I don’t have this arranged in sequence; in chronological sequence - when I recount the details at full length what happened, the scene is visiting me in my memory as if I am living it again, another time, as if it is real.”

Therefore, it was unreasonable for the Board to have fixated on the exact chronology of events, many of which were closely interrelated and occurred over a short timeframe, rather than the overall truthfulness of the applicant's recollection.

[19] The Manual cautions against dwelling on credibility concerns relating to peripheral details of a traumatic event. The Board should not have inflated expectations in terms of accuracy and consistency of recall. Most of the "inconsistencies" at issue are peripheral details. For example, the applicant was inconsistent on when exactly the authorities tested his blood for drugs. The test is said to have occurred at the time of arrest and detention. It was one of the most minor events that the applicant experienced while detained.

[20] Given the frailties of a witness' memory, the Manual urges Board members to look to the surrounding evidence that supports or refutes a claimant's story. Here, the applicant provided the written submissions of his Syrian lawyer, which described that the applicant was detained and tortured in relation to drug charges. The Board incorrectly stated that the submissions did not support "key elements" of the claim. Being detained and tortured are the most critical components of the applicant's allegations. Additionally, while the medical evidence did not specify the cause of his injuries it did corroborate his claim to have a broken hand and teeth. There was no question as to the authenticity of these documents or the contents.

[21] The Manual also notes that a claimant may be fabricating aspects of a story but still fulfill the criteria for refugee protection. False allegations exist on a spectrum, from a slightly distorted report to a complete fabrication. Accordingly, the Board was obliged to carefully consider what

aspects of a story could be corroborated with supporting evidence. In this case, there was evidence which corroborated the allegations of being arrested, detained and tortured. It was summarily discounted.

[22] There are other errors in the Board's reasoning. The Board considered it significant that Syria permitted the applicant to leave using his existing passport, even though it has prevented approximately 400 critics of the regime from leaving. However, the evidence states that human rights activists, political reformers and civil society leaders are targeted for exit controls. The applicant was not an activist, politician or civic leader.

[23] The Board gave inadequate consideration to whether the applicant would face risks as a failed refugee claimant. There was evidence before the Board to the effect that making a refugee claim is perceived by the Syrian government as manifesting opposition to the regime. For example, the Austrian Red Cross report found that failed asylum seekers "would generally face detention and investigation upon return."

[24] The Board concluded that, even if the applicant's evidence showing his arrest were believed, the applicant would not face risks because he was not known to the security services. As the applicant states, this reasoning is contradictory. If the applicant was arrested, then he is known to security services. He may now be listed as a wanted person for failing to report. The chain of reasoning in this regard does not meet the requisite standard of transparency. Nor was it clear how the Board concluded that drug charges were considered relatively minor in Syria. The evidence before the Board was to the opposite effect.

[25] This Court is not the trier of fact, and does not have the benefit of observing the witnesses. It is not its role to re-assess findings of credibility. Indeed, the standard of review requires the Court to uphold otherwise legally sustainable decisions, even if it might have come to a different conclusion. Here, however, the cumulative effect of a number of errors in the assessment of the evidence renders the decision unsound. In conclusion, this result would have been reached regardless of Guideline 8 or the Manual. The root of the error lies in the general principles governing the assessment of evidence, and not in the deviation from the policies.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted. The matter is referred back to the Immigration Refugee Board for reconsideration before a different member of the Board's Refugee Protection Division. There is no question for certification.

"Donald J. Rennie"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-2213-12

STYLE OF CAUSE: **CLOUD WARDI v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION**

PLACE OF HEARING: Toronto, ON

DATE OF HEARING: November 22, 2012

**REASONS FOR JUDGMENT
AND JUDGMENT:** RENNIE J.

DATED: December 20, 2012

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