

Federal Court



Cour fédérale

Date : 20130208

Docket: IMM-4391-12

Citation: 2013 FC 146

Ottawa, Ontario, February 8, 2013

**PRESENT:** The Honourable Mr. Justice Simon Noël

**BETWEEN:**

**MOHAMMAD YOSUF SAEEDI**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUGMENT**

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [“IRPA”] of a decision by the Refugee Protection Division [“RPD”] that the Applicant, a citizen of Afghanistan, was neither a “refugee” within the meaning of section 96 of the IRPA nor a “person in need of protection” under section 97 of the IRPA.

**I. Facts**

[2] The Applicant is a 25-year-old citizen of Afghanistan. His claim is based on an allegation that he has been targeted by the Taliban. He was accepted at the National Military Academy [“NMA”] and was trained to become a helicopter pilot. The Applicant is aware of cases of people who were threatened with being killed if they did not leave the military.

[3] The Applicant explained that he would always be careful when he returned home because the Taliban could target him. Moreover, he believed that the Taliban might have secured a graduation list or seen him on television during the NMA graduation or in videos of training available on the Internet.

[4] After graduating, the Applicant undertook a program known as “Thunder Lab,” which was an English immersion training process as a first stage towards further training in the United States targeted at elite individuals. This is related to the process of creating an Afghan air force.

[5] In November 2010, around the time the Applicant was sent to the United States, his family in Imam Sahib began to receive threats. In February 2011, the Taliban went to his home to threaten family members, including his brother, Mr. Basir Saeedi.

[6] The Applicant alleged that when he was made aware of the threats faced by his family, he became less focused in his flight training, which took place at Fort Rucker, Alabama. He failed his first attempt and was given either a second opportunity to pass the program or an opening in a school where training is provided to individuals who want to become aviation mechanics.

[7] The Applicant fears returning to Afghanistan and he will eventually be forced to leave the United States. He alleged in his Personal Information Form [“PIF”] that given the fact that he was in the United States for a specific purpose, the training, he did not believe that he would be allowed to claim refugee protection. He, therefore, left Alabama on June 17, 2011 and entered Canada by clandestine means. He claimed refugee protection on June 21, 2011.

## **II. Decision under review**

[8] The RPD concluded that the Applicant is neither a refugee nor a “person in need of protection.” The RPD considered that the Applicant is not being fully truthful and that his allegations lack plausibility.

[9] The Applicant’s claim is based on his political opinion, specifically his opposition to the re-establishment of the Taliban controlled Islamic Emirate of Afghanistan and explained that his village, Imam Sahib, is a Taliban stronghold and that even the police does not enter the village. However, the RPD noted that his testimony is not consistent with the documentation.

[10] First, Imam Sahib is adjacent to Maimana City, located in the province of Faryab and the documentation reports that there have been bombings in this area but the majority of the documentation, however, confirms that the Taliban is not active in this area of the country.

[11] The documentary evidence also indicates that prior to the incidents, night letters had been distributed urging the local population to support a group of Islamic fighters opposed to Jihad with a

note that refusal to do so might carry consequences. However, the RPD noted that these Islamic fighters are not necessarily Taliban as other Islamic groups are active in this area, such as the Jamiat, dominated by Tajiks or the Junbesh dominated by Uzbeks.

[12] The RPD considered the documentary evidence and concluded that the Taliban are not active in the area. It also examined an article written by a journalist where it is stated that the province of Faryab is at night under the regime of the Taliban but, however, concluded that it presents a simplistic analysis of the situation. The RPD also referred to a report that states that the Chief of Faryab Police seeks to avoid involvement in Ghormach, a district of the Badghis province which is adjacent to Faryab, and that he concentrates his efforts in Maimana. The RPD also considered that the document established that the Taliban are active in the eastern parts of Faryad and in Ghormach, located in the province of Badghis and which is under Faryab responsibility.

[13] The RPD found implausible that the Pashtun Taliban can move freely in this area mainly inhabited by Uzbeks and Tajiks. Moreover, he finds the Applicant not credible as he indicated that his village is a "Taliban stronghold."

[14] The RPD also examined a letter by the Applicant's brother in which he states that after the Taliban came for the first time to their house in November 2010, they would stop him on the street and torture him. The RPD found such allegation not credible as the Afghan National Police are predominantly Tajik and Uzbek and that when they are deployed to the Pashtun belt, they tend to "beat up" local residents.

[15] The RPD also considered that Maimana City, which is adjacent to Imam Sahib, is home to a great number of United Nation agencies and NGO offices and that there is an airport in the city. The RPD determined that it is not plausible that the Applicant's family is targeted in such an environment, especially considering the fact that the Applicant was educated in Kabul from 2005, before entering the NMA in 2006.

[16] As for the Applicant's allegation that the Taliban may have seen him doing trainings in videos available on the Internet or graduating, the RPD concluded that the Applicant is not high profile enough to be searched by the Taliban and that, considering that this area is rural and poor, it is implausible that the Taliban are attentive to the media.

[17] The RPD finally considered that while all of the Applicant's brothers now live in Mazari Sharif, where German coalition forces are based, most of the women in his family remain in Imam Sahib, which point to a lack of credibility of the Applicant's story. The RPD rejected the Applicant's explanation that moving is expensive because the Applicant's family appears relatively prosperous and because many male family members are now in Mazari Sharif.

[18] The RPD also considered that the fact that the Applicant did not come to Canada immediately on hearing about the attacks on his home points to a lack of subjective fear.

### **III. Applicant's submissions**

[19] First, the Applicant submits that the RPD's finding of implausibility did not meet the standard established by the Federal Court, which is that implausibility findings should only be made

in “the clearest of cases.” Indeed, the present situation is not one where considering the documentary evidence, it is implausible that Taliban threatened family members of the Applicant.

[20] Moreover, the Applicant argues that insufficient consideration was given to the fact that as a member of the Afghan National Army [“ANA”], he is at risk as he is perceived as a supporter of the government.

[21] The documentary evidence establishes that the Taliban exert a great deal of control in the Faryab province and that security forces are unable to deter the attacks. Such documentation was ignored by the RPD. This is even more important in the context of an implausibility finding. Moreover, it is to be noted that the RPD did not find inconsistencies in the Applicant’s testimony.

[22] Second, the RPD’s inference that the Applicant does not have a subjective fear as he did not claim refugee protection in Canada as soon as he heard about the threats, disregards the Applicant’s personal situation. The RPD should have considered the fact that the Applicant had trained for years to become a pilot.

[23] Finally, the Applicant submits that the RPD rejected the Applicant’s claim on the basis of credibility under sections 96 and 97 of the IRPA. The RPD committed an error as it did not consider the evidence establishing that individuals fitting the Applicant’s profile are at risk and did not conduct a proper analysis under section 97 of the IRPA.

**IV. Respondent's submissions**

[24] The Applicant submits that the RPD's conclusion that the Applicant is not credible is reasonable. First, the evidence demonstrates that the Taliban are not active in the Applicant's village. Moreover, according to the documentary evidence, other Islamic fighters operate in the region. The RPD is entitled to rely on the evidence it prefers and it is presumed to have taken into consideration all the evidence submitted.

[25] The evidence demonstrates that female members of his family remain in Imam Sahib. If there was a real danger, they would have moved to Mazari Sharif with the Applicant's brothers.

[26] As for the Applicant's argument that no proper assessment under section 97 of the IRPA was conducted, the Respondent submits that as the Applicant's story was found implausible, there was no need for the RPD to conduct a separate section 97 analysis.

[27] The Respondent also submits that the Applicant does not have a subjective fear. First, he did not come to Canada to claim protection immediately on hearing about the attacks on his home. His delay in claiming refugee protection is not consistent with someone truly fearing for his life.

**V. Issues**

[28] The present judicial review raises the following issues:

1. Are the RPD's implausibility findings made according to law?
2. Did the RPD fail to analyze the Applicant's risk under section 97 of the IRPA?

## VI. Standard of review

[29] The first issue is to be reviewed under the standard of reasonableness as it is a question of fact and the same standard of review applies to the RPD's analysis of the Applicant's claim under section 97 of the IRPA, which is a question of mixed fact and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190).

## VII. Analysis

### A. *Are the RPD's implausibility findings made according to law?*

[30] The RPD's conclusion that the Applicant's allegations lack plausibility is unreasonable for the following reasons. The duty to provide reasons for negative credibility findings becomes particularly important when non-credibility determinations are based on perceived implausibilities in the Applicant's story. As stated by this Court in *Santos v Canada (Minister of Citizenship and Immigration)*, 2004 FC 937 at para 15, 37 Imm LR (3d) 241, the RPD is required to clearly explain the rationales behind its implausibility findings and they should be based on the evidence before it:

[15] It is clear that plausibility findings are subject to the same deference as credibility findings, that being patent unreasonableness: see *Aguebor v. Canada (Minister of Employment and Immigration)* (1993), 160 N.R. 315 (F.C.A.). However, as stressed in *Valtchev, supra*, plausibility findings involve a distinct reasoning process from findings of credibility and can be influenced by cultural assumptions or misunderstandings. Therefore, implausibility determinations must be based on clear evidence, as well as a clear rationalization process supporting the Board's inferences, and should refer to relevant evidence which could potentially refute such conclusions. The cautions set out in both *Valtchev, supra*, and *Leung v. Canada (Minister of Employment and Immigration)*, (1994), 81 F.T.R. 303 are worth keeping in mind in the Court's review of plausibility conclusions.

[31] In the present case, the most recent evidence is to the effect that the province of Faryad is now struggling with the Taliban and that the police force is insufficient to eradicate the problem which is inconsistent with the RPD's implausibility finding that the Taliban could not move freely with impunity across the province of Faryad. Indeed, the evidence indicates that although the Taliban are more present in the southern part of the country, they are present in the Faryad province. The RPD failed to consider the most recent documentary evidence pointing to a growing presence of Taliban in the area of Maimana and restricted its analysis to evidence that does not reflect the current situation. Therefore, its finding that it is implausible that the Taliban were present in the Applicant's village is unreasonable as it is not consistent with the evidence.

[32] Moreover, there is documentary evidence to the effect that family members of the ANA do receive threats from the Taliban. In such circumstances, the RPD's conclusion as to the implausibility of the Applicant's allegation that his family suffered threats is found unreasonable as it is not inconsistent with the evidence. Therefore, the Applicant's submission that his family was threatened cannot be found to be implausible when assessed in light of the relevant evidence. Such documentary evidence refutes the RPD's conclusion that it is implausible that the Applicant's family was threatened in Maimana and it should have been examined by the RPD as it is under a duty to consider evidence that contradicts its conclusions, especially in cases of implausibility findings.

[33] Moreover, it is a well-established principle that when examining the merits of a case, the need to refer and analyze a specific piece of evidence increases with its importance (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35 at para 17, 1998

CarswellNat 1981). The RPD should have acknowledged the evidence pertaining to the risks faced by members of the security forces. The evidence reveals that members of the security forces are targeted by the Taliban, even officials of low rank, as they are perceived as supportive of the government. The RPD should have indicated in its reasons the impact of this evidence on the claim. Nowhere in the decision does the RPD discuss this evidence although it contradicts its finding that the Applicant's allegation is implausible as he does not have a high profile. The RPD's conclusion disregards the evidence to the effect that officials of any level can be targeted and that there is evidence pertaining to the threats made against family members of security forces.

*B. Did the RPD fail to analyze the Applicant's risk under section 97 of the IRPA?*

[34] As the RPD's conclusion as to the implausibility of the Applicant's story is unreasonable and considering that the Applicant's claim under section 97 of the IRPA was mainly rejected on that basis, the RPD's finding that the Applicant does not face a risk of being subjected to cruel or unusual treatment or punishment is based on an erroneous conclusion by the RPD and cannot be maintained.

[35] A new analysis of the risks faced by the Applicant is required in the present case. The decision-maker did not conduct a proper analysis under section 97 of the IRPA to determine whether the Applicant would face a risk to his life or a risk of cruel and unusual treatment or punishment.

[36] The parties were invited to submit a question for certification but they declined to do so.

**JUDGMENT**

**THIS COURT’S JUDGMENT is that** the application for judicial review is granted and the matter is referred to a new panel. No question is certified.

“Simon Noël”

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Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** IMM-4391-12

**STYLE OF CAUSE:** MOHAMMAD YOSUF SAEEDI v  
THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION

**PLACE OF HEARING:** Montreal, Quebec

**DATE OF HEARING:** January 23, 2013

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

**DATED:** February 8, 2013

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