

Federal Court



Cour fédérale

Date: 20130910

Docket: IMM-10190-12

Citation: 2013 FC 943

Ottawa, Ontario, September 10, 2013

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

**NABIL HANA AYAD NASHED
(A.K.A. NABIL AYAD NASH HANA)**

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[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 of the Refugee Protection Division [RPD], dated September 5, 2012 denying the Applicant refugee protection.

I. Facts

[2] The Applicant is a citizen of Egypt who fears Muslim extremists and the police, as he is believed to be a Coptic Christian who encouraged Muslims to convert to Christianity. He claims that his life has been at risk since 2003.

[3] Furthermore, having been convicted of “Breach of Trust” in Cairo, Egypt, in the amount of 10,000 and 20,000 Egyptian pounds on June 26, 2003, he was sentenced to one year imprisonment with work. Upon appeal, he paid 10,000 Egyptian pounds, or 2,000 Canadian dollars, to the Court pertaining to the 10,000 Egyptian pounds “Breach of Trust” conviction.

[4] The second “Breach of Trust” conviction results from the fact that the Applicant stole 20,000 Egyptian pounds, or 4,000 Canadian dollars. His one-year imprisonment sentence was reduced to six months on appeal. As a result of this, the Respondent sought exclusion on the basis of Article 1F(b) of the Convention.

II. Decision under review

[5] The RPD was not satisfied that there are reasonable grounds to believe that the Applicant committed a serious non-political crime, which can be equated in Canada whereby a sentence of 10 years or more could be imposed, and therefore should be excluded from consideration as a Convention refugee.

[6] The RPD considered the Applicant's explanation that he was tortured by Muslim extremists and police officers in February 2003, which seems to have been the result of him being accused by Muslim extremists of converting Muslims to Christianity, given that he is a Coptic Christian. He stated that if he wished to be released he had to sign blank cheques, which he did. Out of the 20 to 25 blank cheques he signed, two were cashed in the amount of 10,000 and 20,000 Egyptian pounds.

[7] The Applicant was charged with the offences in March 2003 and processed in Court. He was represented by a lawyer, whom he told about the circumstances of his demise and that he had been tortured by Muslim extremists and the police. The Applicant, however, stated that he is not sure whether this information was conveyed to the Court, as he assumed his lawyer believed it had nothing to do with the case, and that he did not tell his lawyer that he was detained, beaten and tortured by police for allegedly converting Muslims to Christianity. These affirmations were deemed not credible by the RPD. Also, the RPD determined that if the information is true, it should have been disclosed to the Court in Cairo, and it appears that it was not.

[8] Therefore, the RPD concluded that, in the absence of credible and trustworthy evidence, the Minister has not provided credible arguments that the Applicant should be excluded pursuant to the exclusion grounds enumerated in Article 1F(b), given that the Minister bears the onus of proving that he should be excluded from protection.

[9] As for inclusion, the RPD considered that the determinative issues are credibility and delay in leaving Egypt.

[10] The Applicant realized his life was at risk towards the end of 2002. However, he did not leave Egypt until September 22, 2009, over six years later although he claims that he fears Muslim extremists due to allegedly converting Muslims to Christianity. Moreover, the RPD found that it would be reasonable to expect that the Applicant would have taken serious measures or steps to leave Egypt or at the very least to leave Cairo for another location in Egypt. However, he remained in Cairo, where he lived a relatively normal life and maintained his employment as an accountant and manager from 1987 until September 15, 2009 before his departure for Canada, except for a period of 12 months, where there was no recorded employment from February 2007 to March 2008, and for his incarceration from January 2009 to April 2009. The RPD noted the Applicant's explanation that he could not afford to leave, but deemed it to be an insufficient response and made a negative credibility finding.

[11] The RPD further noted that, if the Applicant's life was at risk from Muslim extremists, it is not credible that he would have been able to avoid any attacks on his life or that there would not have been a conscious effort to take his life, given that he remained in Cairo for over six years. The RPD concluded that this negatively affects the Applicant's credibility.

[12] The RPD also noted that the Applicant worked for a friend as an accountant when he was released from jail but that the Islamic group and the police put pressure on his employer and that he was later dismissed. The RPD determined that, whether or not this is true, it has difficulty believing the evidence, as nothing happened after his release other than threatening letters that were sent to his home advising him that he should convert to Islam. The RPD, therefore, concluded that it is not

convinced, based on the lack of credibility of the Applicant, that the Applicant's life was ever at risk in early 2003 or at any other time thereafter.

[13] The RPD also considered the Applicant's claims that no action was taken against his family, including his mother, who died in 2011, and his brothers who reside in Cairo, because the police and Muslim extremists do not know where they are. The RPD did not believe the Applicant because, had the problems happened as stated, it is likely that his family would have been located and suffered repercussions.

[14] The RPD also noted the vague answer provided by the Applicant as to whether he knows if someone is looking for him in Egypt. The RPD found that, given that the Applicant is not sure whether someone would be looking for him upon return and that he remained there for six years after he realized his life was at risk, there is little reason to believe that he would be persecuted, should he return to Egypt.

[15] Then, in order to verify if the Applicant, as a Coptic Christian in Egypt, would face persecution in a forward looking perspective, the RPD reviewed the documentary evidence and stated that there is violence directed at religious minorities in Egypt. However, the RPD concluded that there is insufficient evidence to establish that the Applicant ever had or would ever have difficulty practicing his faith. The RPD found that there was not enough evidence to come to the conclusion that the change of government would result in the Applicant's impossibility to practice his religion freely.

[16] Finally, the RPD examined the Applicant's claim in light of subsection 97(1) of the IRPA and concluded that the Applicant did not establish the facts of his case on a balance of probabilities, and it found that it has not been demonstrated that it is more likely than not that he would be tortured or subjected to other cruel or other degrading treatments.

III. Applicant's submissions

[17] Of course, the finding on exclusion is not being questioned by the Applicant, but the one on inclusion is. The RPD's conclusion that, had the Applicant realized that his life was in danger since 2003 he would have taken serious measures or steps to leave Egypt or steps to leave Cairo for another location, contradicts the evidence in the file. The Applicant states in his narrative that he initiated the appeal in process, which spanned from 2003 to 2006. When the second appeal was concluded and jail time and fine sentences were upheld, the Applicant started to take serious measures in protecting his life. He hid from March 2006 until 2009, as shown by the letters submitted by those who sheltered him. To the contrary of the RPD's finding, he did not stay in Cairo. He was travelling from Cairo to Alexandria or to Alminia whenever he felt any kind of risk, staying with his friends, and he stopped going to his regular church in 2006.

[18] The RPD erred in rejecting the Applicant's credibility based on supposed contradictions, inconsistencies or inherent possibilities in the evidence that are unsupported. Moreover, the Applicant was not confronted with the alleged contradictions and not given an opportunity to respond. The RPD made credibility findings on mere speculation and plausibility and rejected the claim on the basis of its own understanding regarding the Applicant's persecutors' logic.

[19] The RPD erred in rejecting the claim based on its beliefs that the agent of persecution would have done more to harm the Applicant if his story was true. The RPD does not have the authority to read the agent of persecution's mind, and the fact that the agent of persecution failed to harm the Applicant does not indicate a lack of future risk to the Applicant.

[20] The Applicant submits that the RPD failed to support any allegations regarding the possible actions of the agent of persecution. The RPD's assumption that the Applicant would not be able to avoid attacks on his life is unsupported by evidence, which shows that the RPD relied on its specialized knowledge regarding the Muslim extremists' *modus operandi*. Before using any information that is within its specialized knowledge, the RPD must notify the claimant and give him a chance to make representations on the reliability of the information used and to give evidence in support of his representations, and it failed to do so.

[21] The Applicant submits that the RPD failed to observe the principle that sworn evidence should be presumed true unless specifically disbelieved on adequate grounds.

[22] The Applicant submits that plausibility findings should only be made in the clearest of cases, where the facts as presented are either so far outside the realm of what could reasonably be expected that the trier of fact can reasonably find that it could not possibly have happened.

[23] Doubts as to the credibility of all or some of the Applicant's testimony do not relieve the RPD of the responsibility of determining whether the Applicant is a refugee based on all the evidence. Even if the Applicant's testimony is entirely disbelieved, the RPD is still obligated to

consider whether the Applicant is at risk, taking into account the aspects of his profile that have been accepted by the RPD. In addition to his testimony, the Applicant submitted objective documents supporting his claim such as police certificates regarding the convictions and imprisonment as well as medical reports confirming injury to his shoulder from torture. Moreover, the Applicant submitted a letter from his defense counsel in Egypt in which he attests as to the Applicant's conviction in misdemeanor and sentence to imprisonment "in spite of not receiving any money and the falsity and fabrication of the incident." The Applicant also submitted a letter from St. George Church confirming that he had stopped being a member of the Church as of 2006 and letters from the persons who provided him with shelter while he was hiding between 2006 and 2009.

[24] Therefore, the RPD erred in concluding that the Applicant remained in Cairo, lived a relatively normal life, maintained employment as an accountant and manager from February 1987 until September 15, 2009 before his departure, except for a period of 12 months where there was no recorded employment, and for his incarceration.

[25] Finally, contrary to the RPD's statement that no one is interested in harming the Applicant in Egypt, the declaration of the Applicant's brother that threatening notes, which requested of him to accept Islam or die, continued to be delivered to the Applicant's apartment for the last two years. The last known note was dated July 2011, which means that it was received two years after the Applicant's departure from Egypt.

[26] The RPD needs not to refer to every piece of evidence presented, but the more a piece of evidence is important, the more likely it is that a failure to make reference to it will result in a finding that the decision is unreasonable, especially when it appears to contradict a finding by the RPD. The RPD failed to explain why it ignored evidence that corroborates the Applicant's allegations.

IV. Respondent's submissions

[27] The Respondent submits that the RPD clearly outlined its reasons as to why it did not find the Applicant to be credible. It correctly relied on this finding to conclude that the Applicant neither had a subjective fear of persecution, nor was faced with a serious risk to his life, or of cruel or unusual punishment or treatment or a danger of torture, should he return to Egypt.

[28] The RPD's finding with respect to delay in leaving Cairo is reasonable. The RPD considered that the Applicant delayed in leaving Egypt for six years after he first perceived his life was at risk, and it found that this suggested that he did not have a genuine subjective fear of persecution on the ground of religion and would not be faced with one of the serious harms enunciated under section 97 of the IRPA.

[29] The Applicant argues that, at the end of 2002, he was tortured and forced to sign what amounts to blank cheques and that two of these cheques were used in 2003 to extort him and to put him at risk of criminal sanctions. This made him realize his life was in danger. However, despite this fear, he stayed in Egypt for six years, during which time he did not relocate from Cairo. The RPD, therefore, reasonably concluded that the Applicant failed to prove that he had a subjective fear

of persecution. Moreover, he failed to provide an adequate explanation for his delay in leaving Egypt, which negatively impacts his credibility.

[30] As for the Applicant's explanation that his ongoing legal proceedings prevented him from leaving, the Respondent submits that the Applicant made no mention at the hearing of the delay flowing from a desire to resolve his legal matters, stating only that he could not afford to leave. Second, the Applicant actually avoided the resolution of his legal matters, hiding from the police from 2006 to 2009. Third, if the Applicant is to be believed, by 2006, he had blank cheques used against him twice and yet he still delayed a further three years before leaving Egypt. Furthermore, he never permanently relocated outside Cairo, despite feeling in serious danger. The Applicant's explanation provided for his delay in leaving Egypt is contradicted on the evidence, and the finding that this delay diminished the credibility of the Applicant is entirely reasonable.

[31] The Respondent submits that the RPD's finding with respect to the credibility of the Applicant is equally determinative in this application. The RPD rightly noted that absent "independent and credible documentary evidence in the record capable of supporting a positive disposition of the claim," a negative credibility finding will be dispositive of the claim.

[32] The RPD's finding regarding implausibility is also reasonable. It found that greater harm had not befallen the Applicant or his family given his own evidence and given the serious nature of the allegations against him. As an example, he testified that he was being "monitored" by Muslim extremist groups and that if they found a chance to kill him they wouldn't wait. However, he was never attacked in the six years following the alleged torture incident, despite the fact that extremists

knew where he worked and that he never permanently relocated outside of Cairo. Moreover, he maintained religious practice and largely steady employment.

[33] The Applicant stated that the Muslim extremists can track down anybody but he, however, testified that his family members were never located or bothered. The RPD's conclusion that this evidence diminished the Applicant's credibility is reasonable.

[34] The Respondent submits that the RPD struggled with other implausible elements in the Applicant's testimony. The Applicant stated that he fears Muslim extremists will use blank cheques he signed under torture to extort him or cause him to be imprisoned if he returns to Egypt, that such cheques were the cause of previous extortion and imprisonment and that he greatly fears their future use. However, the Applicant never explained to his lawyer that he had been tortured, and he never conveyed to the judge that the documents were obtained as a result of torture. The Applicant was unclear as to what exactly he told his lawyer and why he withheld information. The RPD's credibility findings are, therefore, reasonable.

[35] The Respondent disagrees with the Applicant's submission that the RPD wrongly relied on specialized knowledge and resorted to speculation, as the record does not support these assertions, and that the RPD's implausibility findings were reasonable when considered in the context of the whole evidence before the Member.

[36] As a final argument, the Respondent indicates that the Respondent reasonably examined the Applicant's risk by considering the situation of Coptic Christians in Egypt. To do so, it reviewed

documentary evidence that shows that Coptic Christians may face discrimination but found that, in the case of the Applicant, there was insufficient evidence to show that he would face persecution if he returned.

V. Applicant's reply

[37] The Applicant argues that the Respondent's submission regarding delay fails to consider that he clearly explained that he started fearing for his life in 2009, when he was released from prison.

[38] The Applicant also submits that the Respondent may not rely on grounds that are not in the reasons to evaluate the reasonability of the RPD's decision.

[39] The Applicant states that the reasons provided, having regard to the record before the RPD, must allow the reviewing court to understand why the RPD made its decision and not whether the conclusion is within the range of acceptable outcomes.

VI. Issue

1. Did the RPD err in concluding that the Applicant is not credible?

VII. Standard of review

[40] The standard of reasonableness applies to the RPD's credibility findings (*Dunsmuir v New Brunswick*), 2008 SCC 9 at para 47, [2008] 1 SCR 190).

VIII. Analysis

[41] The RPD reasonably concluded that it was unacceptable of the Applicant to have waited six years before leaving Egypt after having been tortured at the end of 2002 because of his involvement in converting Muslims to Christianity. It is at that time that he was forced to sign documents which were then used to falsely accuse him of “Breach of Trust” on two occasions in 2003. During his oral testimony, the only reason given for not leaving earlier than 2009 was that he did not have the money to do so. Contrary to what counsel for the Applicant wrote in her submissions and argued orally, the Applicant never testified that it was because of the ongoing “Breach of Trust” procedures.

[42] The Applicant submitted that he was hiding from the police from 2006 to 2009 and that this explains further why he did not leave earlier. This is contradicted by his own Personal Information Form [“PIF”], which shows that he was working until 2007 and then again in 2008 and that his employer’s place of location was in Cairo, the city where he resided for the most part of the six-year period. The RPD had the supportive evidence to show that his behavior during that period indicates that he was not acting as if he were a person hiding from the police.

[43] It is manifest that the RPD did not believe the evidence showing that the Applicant was hiding. This finding clearly impacts the credibility of the Applicant's story. Indeed, the jurisprudence of our Court recognizes that findings of credibility combined with undue delay can give the RPD's findings an aura of reasonableness (see *Calderon Garcia v Canada (Minister of Citizenship and Immigration)*, 2012 FC 412 at paras 17-26). Such is the situation in the present judicial review.

[44] As for the implausibility finding concerning the fact that no harm was done to the Applicant or his family, it is to be noted that he wrote in his own PIF that the Muslim extremists “have spies and they can reach anybody, anywhere inside the country” and that during his testimony he said that “if they found a chance to kill (him), they would not wait.” The Applicant himself submitted that threatening notes from these extremists were left at his home. If that is the case, why is it that he was never attacked by them during this six-year period, despite the fact that they knew where he lived. It was certainly open to the RPD to make an implausibility finding on these facts.

[45] It is also surprising to say the least that the Applicant did not take the means to see that the Court that dealt with the “Breach of Trust” accusations knew that the documents in question were signed under torture. Furthermore, the testimony on what exactly he told his lawyer about all of this also shows, at a minimum, inconsistency and even plain contradictions. This certainly permits the RPD to make proper credibility findings.

[46] The Applicant also suggests that the Board relied on specialized knowledge to make findings of implausibility. A close reading of the RPD's decision shows a different appreciation. The findings made relied on the evidence presented by the Applicant. This evidence was the basis on which the credibility findings were made. The RPD did not resort to specialized knowledge to make these findings but rather used the Applicant's own written and oral account. This approach is supported by the jurisprudence (see *Aguebor v Canada (Minister of Employment and Immigration)* (1993), 160 NR 315 (FCA)).

[47] Finally, although not obligated to do so considering the credibility findings it made, the RPD examined the situation of religious minorities such as Coptic Christians in Egypt. It reviewed some documentary evidence on the matter to see if the Applicant would have difficulty practicing his religion in a forward looking perspective that would raise an issue of persecution.

[48] Noting that there is a real problem for religious minorities to practice their respective faith, the RPD found that there was no sufficient evidence to show that with the government, there would be persecution. In this situation, such a conclusion was open to the RPD and there is no valid reason to question it.

[49] That being said, this Court notes that the RPD's reasons, at paragraph 37, indicate in no uncertain terms that he was not believed:

“The fact remains is that the panel does not remotely believe that the claimant encountered problems from the Muslim Extremists or state police and as a result, they would be interested in locating the claimant due to his alleged act of converting Muslims to Christianity in Egypt. [*sic*]”

The Applicant did not present supported arguments that would render this decision and this conclusion unreasonable. It was he who had the burden to present evidence to support his claim. He failed and, thus, there is no need for this Court to intervene.

[50] The parties were invited to submit questions for certification but none were proposed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed and no question is certified.

“Simon Noël”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-10190-12

STYLE OF CAUSE: NASHED v THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: August 29, 2013

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

DATED: September 10, 2013

APPEARANCES:

Debora Brubacher FOR THE APPLICANT
(for Michael Loebach)

Jeannine Plamondon FOR THE RESPONDENT

SOLICITORS OF RECORD:

Michael Loebach FOR THE APPLICANT
Barrister & Solicitor
London, Ontario

William F. Pentney FOR THE RESPONDENT
Deputy Attorney General of Canada