

Federal Court



Cour fédérale

Date: 20120113

Docket: IMM-27-11

Citation: 2012 FC 51

Ottawa, Ontario, January 13, 2012

PRESENT: THE CHIEF JUSTICE

BETWEEN:

MOHAMED HAMDY ABDOU ELFAR

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Elfar is a citizen of Egypt. After allegedly being beaten and tortured by Egyptian security officers on a number of occasions, he managed to obtain a student visa from the Canadian Embassy in Cairo and immediately fled to Canada. Shortly after arriving here in September 2008, he applied for refugee protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (“IRPA”).

[2] In November 2010, a member of the Refugee Protection Division of the Immigration and Refugee Board (the “Board”) rejected his application.

[3] Mr. Elfar seeks to have the Board’s decision set aside on the basis that it erred by, among other things:

- i. breaching his procedural fairness rights; and
- ii. basing its decision on numerous erroneous findings of fact that it made in a perverse or capricious manner and without regard to the documentary evidence.

[4] This case is troubling because Mr. Elfar has not always been truthful in his dealings with immigration authorities in this country and perhaps elsewhere. In such cases, the Court must be particularly cautious in second-guessing the Board’s adverse credibility findings. I cannot accept the suggestion by Mr. Elfar’s counsel that the credibility of refugee claimants who are not truthful in their dealings with immigration authorities in respect of their request for a visa should not be questioned when they subsequently seek refugee protection. In my view, once it has been established that such a person has not been truthful in his prior dealings with immigration authorities, the presumption that the claims made by such a person in support of his application for refugee protection are true (*Maldonado v Minister of Employment and Immigration*, [1980] 2 FC 302, at para 5) no longer applies. In short, in such circumstances, an applicant for refugee protection can no longer be presumed to be truthful, and it is entirely appropriate for the Board to seek corroboration for the applicant’s claims. The integrity of this country’s immigration system depends heavily upon the truthfulness of applicants for visas, permanent residence, refugee protection and citizenship (*Cao v Canada (Minister of Citizenship and Immigration)*, 2010 FC 450 at para 28.)

Those who are not truthful in some of their dealings with immigration authorities cannot be presumed to be truthful when it comes to their other dealings, even when such other dealings are in respect of a different type of application.

[5] Nevertheless, for the reasons that follow, I have determined that the Board's treatment or lack of treatment of certain evidence, when considered cumulatively, was unreasonable and that it would not be in the interests of justice for its decision to stand. Accordingly, this application is granted.

I. Background

[6] Mr. Elfar was born in Egypt in 1973. In 1999, he traveled to the United States on a visitor's visa. He married his first wife there in 2001. She filed an application to sponsor him for permanent residence, but their relationship deteriorated during the lengthy sponsorship process and the couple eventually separated.

[7] When Mr. Elfar's application for permanent residence was denied, he was sent a notice to appear for a removal hearing. He alleges that he did not receive that notice due to his separation from his wife. When he failed to appear for his removal hearing, a removal order was issued against him. He claims that he was unaware of the existence of that order until 2007.

[8] In the meantime, Mr. Elfar met his second wife, Marwa Ahmed, a naturalized United States citizen who was born in Egypt. In February 2007, subsequent to his divorce from his first wife, he married Ms. Ahmed. Ms. Ahmed then submitted a second application to sponsor him for permanent residence.

[9] However, on July 20, 2007, Mr. Elfar was deported to Egypt. To facilitate his removal, the United States Department of Homeland Security obtained a temporary travel document from the Egyptian consulate in New York. That document was required because Mr. Elfar's Egyptian passport had expired and had been returned by him when he applied for a new passport.

[10] Upon his arrival in Egypt, Mr. Elfar was questioned at length regarding his identity, his absence from Egypt, his nationality, the reasons for his detention in the United States and his deportation from that country. He was detained for seven days and allegedly beaten. Among other things, he claims that the beatings he endured caused wounds from a hemorrhoids operation he had undergone two months in the United States, to reopen and bleed.

[11] Mr. Elfar further claims that Egyptian security officers continued to force him to attend for interrogations and that during some of those interrogations he was beaten and tortured again. He also asserts that he was detained for approximately 2 months in early 2008, during which he was held in solitary confinement and subjected to sleep deprivation. Upon his release in March 2008, Egyptian security officers allegedly continued to force him to submit to interrogations on a regular basis.

[12] As a result of the foregoing, Mr. Elfar states that he began to desperately attempt to obtain a visa from another country in order to leave Egypt. Shortly after being issued a student visa by the Canadian Embassy in Cairo on August 18, 2008, he fled Egypt and arrived in Canada on September 4, 2008.

II. The decision under review

[13] The Board identified Mr. Elfar's credibility as being the determinative issue in its decision and confined its assessment to that issue. The Board began its assessment by finding that Mr. Elfar's claim that he was interrogated at length regarding his identity did not make sense and was therefore not credible. The Board also disbelieved his explanation as to why the authorities in Egypt may have believed that he had "said bad or inappropriate things to the Americans about Egypt." In addition, the Board not only discounted, but drew negative credibility inferences from, various letters that he adduced in support of his application. The Board drew similar inferences from (i) a part of Mr. Elfar's testimony which it believed he had embellished, (ii) its perception that he had struggled to answer one of its questions, and (iii) his failure to amend his Personal Information Form (PIF) to note that Egyptian authorities visited his home to look for him, after he had arrived in Canada and filed his application for refugee protection.

[14] Based on the foregoing, the Board rejected Mr. Elfar's application.

III. The standard of review

[15] The procedural fairness issues raised by Mr. Elfar are reviewable on a standard of correctness (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at paras 55, 90; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339, at para 43).

[16] The issues that have been raised by Mr. Elfar regarding the Board's factual findings and treatment of his evidence are reviewable on a standard of reasonableness (*Dunsmuir*, above, at paras 53-54; and *Khosa*, above, at paras 45-46). In assessing the reasonableness of the Board's

treatment of the evidence, the Court's focus must be on the evidence that was before the Board at the time it reached its decision.

IV. Analysis

A. *Did the Board breach Mr. Elfar's procedural fairness rights?*

[17] Mr. Elfar submits that the Board breached his rights to procedural fairness by:

- i. refusing to adjourn its hearing pending the arrival of his file (the "U.S. File") from the U.S. Department of Homeland Security and making determinations related to issues upon which the documents (in the U.S. File) would be directly relevant; and
- ii. basing its decision on erroneous "information" or plausibility findings that the U.S. File has now proven to be false.

[18] I disagree.

[19] Mr. Elfar's counsel requested the U.S. File in September 2010, prior to his hearing before the Board. She made that request after she received a copy of the Board's screening form which identified the issues it considered to be central to Mr. Elfar's claim and instructed her to provide a copy of the U.S. File.

[20] It is not contested that the Board requested the U.S. File for the purpose of ascertaining Mr. Elfar's status in the U.S. and the reasons for his removal in 2007. In addition, the Board sought his U.S. police and prosecution records.

[21] At no time prior to his appearance at the hearing before the Board did Mr. Elfar or his counsel (i) indicate in any way that there was anything in the U.S. File that they might wish to rely

upon to support his claims, or (ii) request an adjournment to give them more time to obtain the U.S. File. Indeed, it bears underscoring that his counsel only sought to obtain the U.S. File after it was requested by the Board.

[22] At the outset of the hearing, Mr. Elfar's counsel noted that she had not yet received a copy of the U.S. File. After asking the Board how it felt about that, she added: "I don't know exactly when I'm going to receive it, um if it's not essential to your decision or going to be in any way determinative I don't know how we proceed without it." The Board replied that it would not "hold up the hearing because the documents from the United States aren't here." It added that there were other ways in which it could "find out about what happened in the United States" and that this could be canvassed during the hearing. It then thanked counsel for following up on its request for the U.S. File and for disclosing that the file had not yet been received.

[23] It is clear from the foregoing exchange that, at the time of the hearing, Mr. Elfar's counsel was only interested in the U.S. File because it had been requested by the Board. At no time during the remainder of the Board's hearing did Mr. Elfar or his counsel raise the issue of a possible adjournment or state that there was anything in the U.S. File that could potentially support his claims.

[24] In my view, the Board's failure to adjourn its hearing to provide Mr. Elfar with a further opportunity to obtain documents that the Board itself requested, and was prepared to proceed without, does not constitute a breach of any of his procedural fairness rights.

[25] Mr. Elfar was well aware, long before he received the Board's screening form in September 2010, of the potential relevance of the travel document that was confiscated from him by Egyptian

authorities upon his arrival in Egypt on July 20, 2007. In the course of describing, in his PIF, his initial interrogation upon landing in Egypt, he stated:

I soon realized that the officers might have been suspicious of me because I was deported to Egypt without an Egyptian passport with only a travel document. My expired Egyptian passport was still at the consulate in New York City and I never received a new/renewed Egyptian passport. I was also escorted on the flight to Egypt and the travel document used to deport me from USA was confiscated at the Cairo airport.

[26] However, notwithstanding that he was represented by competent counsel at all times, he never took any steps to obtain a copy of that travel document prior to receiving the Board's request for a copy of the U.S. File.

[27] Mr. Elfar was informed well before his hearing before the Board of the issues that the Board considered to be central to his claim. He was also accorded a full opportunity to "put his best foot forward" by providing written representations in relation to those issues. He was then afforded an oral hearing during which he was represented by competent counsel and was given every opportunity to support his application and to address the matters in respect of which the Board ultimately based its adverse finding of credibility. He was also provided with the opportunity to make post-hearing written submissions. This satisfied his procedural fairness rights in respect of his application under sections 96 and 97 of the IRPA.

[28] The Board did not breach any of Mr. Elfar's procedural fairness rights by rejecting the credibility of an important aspect of his claim that later turned out to have been corroborated by the above-mentioned travel document, the contents of which were not known to either the Board or Mr. Elfar until approximately one month after the Board issued its decision rejecting his application.

[29] The cases relied upon by Mr. Elfar are all distinguishable, on the basis that they involved situations in which (i) the party whose procedural fairness rights were found to have been violated was not afforded an opportunity to be heard, (ii) the Board ignored or misapprehended important evidence that corroborated the applicant's claims, or (iii) the decision being reviewed involved a refusal to reopen a claim for refugee protection after a police officer recanted evidence that was central to the Board's rejection of the applicant's claim.

B. Did the Board err by basing its decision on erroneous findings of fact that it made in a perverse or capricious manner and without regard to the documentary evidence?

[30] Mr. Elfar submits that the Board erred by, among other things, making erroneous credibility findings based on pure speculation, making numerous perverse and capricious findings of fact, misconstruing his testimony and failing to have regard to certain evidence.

[31] I agree.

[32] At the outset of its assessment of Mr. Elfar's credibility, the Board addressed his claim that he was questioned at length with respect to his identity upon his arrival in Egypt. Based on the fact that he was issued an Egyptian travel document by the Egyptian consulate in New York prior to his removal from the United States, the Board concluded that it was not credible and did not make sense that the authorities in Egypt would detain and question him for seven days due to concerns regarding his identity. On the contrary, the Board concluded that it was likely that the Egyptian authorities in the United States would have ensured his identity first prior to issuing a travel document to him in connection with his removal to Egypt. However, this was pure speculation on the Board's part. The Board did not cite any evidence whatsoever to support this inference. As it turned out, this inference turned out to be wrong.

[33] The travel document in question explicitly stated the following in bold underlined font (in Arabic and English):

TEMPORARY TRAVEL DOCUMENT
VALID ONLY TO RETURN TO EGYPT
NOT VALID FOR ID

[34] During its hearing, the Board asked Mr. Elfar why the persons who interrogated him sought proof that he was Egyptian, given that he was issued a travel document by the Egyptian Embassy in New York. Mr. Elfar replied: “They said that you have been deport [*sic*] from the [United] States according to travel document from the Embassy, and this is not full proof that you are Egyptian.”

[35] In itself, the subsequent discovery that the Board’s inference on this important point was wrong does not render the Board’s decision unreasonable. However, the cumulative impact of this incorrect inference and the additional errors made by the Board and discussed below is such that its decision regarding Mr. Elfar’s credibility is so tainted as to be unreasonable. In the interests of justice, that decision cannot be permitted to stand.

[36] The Board then noted that the only explanation offered by Mr. Elfar for why he was beaten by Egyptian authorities is that “they believed that he had said bad things about Egypt in the United States given that he was in that country for eight years.” After noting that it had no credible information with respect to his immigration history in the United States, the Board baldly rejected this explanation as being not credible. The Board observed that Mr. Elfar’s explanation was “speculation at best.” However, the Board itself was speculating that the explanation was not valid.

[37] The Board proceeded to observe that there was “little corroborating evidence that the authorities in Egypt are remotely interested in [Mr. Elfar] to the point that he would be detained and

beaten for seven days after his arrival from the United States in [*sic*] July 20, 2007 and his alleged second detention in Egypt between January 2008-March 2008.” Without discussing or even referring to the various letters from persons in Egypt who corroborated this aspect of his claims, the Board simply stated that it did not believe “this portion of his evidence.”

[38] The Board then addressed a medical certificate issued by the Wezera Specialist Hospital on July 27, 2007, the day that Mr. Elfar was released from his initial detention. Among other things, that certificate states that Mr. Elfar was “admitted to this hospital suffering from anal bleeding (bleeding from previous hemorrhoids operation) and many bruises and scratching in the back and on right shoulder.” After noting that the certificate did not corroborate Mr. Elfar’s claim that his injuries were sustained as a consequence of being detained and beaten by Egyptian authorities, the Board stated that it gave “little weight” to the certificate. The Board added that the certificate “negatively impacts on the claimant’s story as alleged.”

[39] Given the date of the certificate and the fact that the Board did not question its authenticity, the Board’s conclusion that it merited little weight is questionable. Its conclusion that the certificate impacted negatively on Mr. Elfar’s claims is just plain wrong. This error was compounded by the Board’s failure to address Mr. Elfar’s testimony that, (i) prior to being beaten by Egyptian authorities, he had almost recovered from his hemorrhoid surgery, and (ii) he did not start to bleed until after the authorities began to beat him.

[40] The Board then addressed a letter from Mr. Elfar’s father. Among other things, that letter stated that upon Mr. Elfar’s release from detention, “[h]is clothes were dirty and the signs of beating and blood were visible.” The letter then explained that Mr. Elfar’s father took Mr. Elfar to a doctor for examination and that after the examination “we found out that he was beaten and he was

suffering from bleeding where he had hemorrhoids surgery and bruises on his right shoulder.” After noting that Mr. Elfar’s treatment extended for two months, he added that Egyptian authorities “repeatedly bothered him by summoning him and holding him for hours in their offices. Some times [sic], he would come home the next day exhausted and tired with signs of beating.”

[41] The Board decided to give little weight to this letter. After noting that copies of prescriptions that Mr. Elfar adduced were not in English and did not explain what was prescribed, the Board once again made a baseless and erroneous “negative credibility finding” based on these documents. This error was compounded when the Board made the following observation: “Given that the claimant alleges he was beaten by the Egyptian authorities for 7 days, it is not credible that the claimant was not in need of medical attention while detained.” Taken together with its earlier criticism of the medical certificate, this suggested that the Board expected Mr. Elfar’s alleged torturers to not only provide medical treatment for the injuries that they inflicted upon him, but also to document the cause of those injuries.

[42] The Board then proceeded to address Mr. Elfar’s claim that Egyptian authorities had visited his parents’ home looking for him after he fled to Canada. After observing that there was no credible reason why this was not mentioned in his PIF, the Board stated that it considered this aspect of his story to have been an embellishment. It based this conclusion on its view that he had testified that “the authorities **might** have gone to his house after leaving for Canada ...” (emphasis in original). Once again, the Board added that “[t]his negatively impacts on the credibility of his claim as put forward in this regard.”

[43] However, an examination of the transcript of the Board’s hearing reveals that the Board misconstrued this aspect of Mr. Elfar’s testimony. Contrary to the Board’s view, Mr. Elfar did not

struggle to give an answer to the question that it posed with respect to this issue. Mr. Elfar clearly stated that the Egyptian authorities had in fact gone to his house at least once after he departed for Canada. Mr. Elfar's use of the word "might" was made in responding to the Board's question with respect to the reason why the authorities continue to search for him after he fled the country. In this regard, Mr. Elfar simply responded as follows: "It might be a routine work they are doing every month or two months to come to my house and look for me and they didn't know I'd already left or they didn't know that and if I don't –."

[44] Ultimately, the Board rejected Mr. Elfar's claims on credibility grounds and "based on the totality of the evidence in this case."

[45] However, in the course of reaching its conclusion, it did not mention several documents to which Mr. Elfar specifically referred in his post-hearing written submissions, which reported on the widespread practice of arbitrary detention and use of torture by the security forces in Egypt. Although it mentioned one such document published by Amnesty International, and acknowledged that torture and abuse in Egypt "is clearly a concern, particularly given the allegations raised by the claimant," it stated that it was not "remotely satisfied" that Mr. Elfar had been abused and beaten by Egyptian authorities. It supported this statement by referring to "the credibility concerns that are being addressed in this decision."

[46] I am satisfied that the Board's treatment or lack of treatment of the evidence discussed above, when considered cumulatively, was unreasonable and fatally tainted its assessment of the totality of the evidence that it considered.

[47] I acknowledge that the Board “is entitled, in assessing credibility, to rely on criteria such as rationality and common sense” (*Shahamati v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 415, at para 2 (CA)). However, it is only entitled to do so as long as the inferences it draws “are not so unreasonable as to warrant [the Court’s] intervention” (*Aguebor v Canada (Minister of Employment and Immigration)* (1993), 160 NR 315, at para 4 (FCA)). In my view, the inferences drawn by the Board and discussed above, taken together, were unreasonable and warrant this Court’s intervention.

[48] In short, the Board’s decision on the determinative issue of Mr. Elfar’s credibility was not within “a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir*, above, at para 47).

V. Conclusion

[49] This application for judicial review is granted.

JUDGMENT

THIS COURT ORDERS AND ADJUGES THAT the Board's decision, dated November 30, 2010, in which it rejected the Applicant's claims under sections 96 and 97 of the IRPA, is set aside and remitted to a differently constituted panel of the Board for reconsideration in accordance with these reasons.

There is no question for certification.

"Paul S. Crampton"

Chief Justice

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-27-11

STYLE OF CAUSE: MOHAMED HAMDY ABDOU ELFAR v
THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: August 11, 2011

**REASONS FOR JUDGMENT
AND JUDGMENT:** The Chief Justice

DATED: January 13, 2012

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