

Federal Court



Cour fédérale

**Date: 20141022**

**Docket: IMM-5492-13**

**Citation: 2014 FC 1007**

**Toronto, Ontario, October 22, 2014**

**PRESENT: The Honourable Mr. Justice Diner**

**BETWEEN:**

**HEKMAT HOSINI**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. OVERVIEW**

[1] Hekmat Hosini [the Applicant] is a citizen of Afghanistan applying for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada [RPD, Board], which determined that he is not a Convention refugee or person in need of protection according to the criteria specified in sections 96 and 97 of the *Immigration and*

*Refugee Protection Act* (SC 2001, c 27) [IRPA]. The Application was commenced pursuant to section 72(1) of IRPA.

[2] Mr. Hosini fled Afghanistan in December 2011 due to a land dispute with powerful warlords from Herat province, known as the Siyawooshan brothers [Brothers]. He claimed refugee protection in Canada. At his hearing before the RPD, the Applicant explained that he was not safe in Afghanistan because the Brothers had influence and power not only in Herat, but throughout the country. He also noted the Brothers' connections to other national insurgent groups in Afghanistan, as well as to the federal judiciary. These assertions were corroborated by the documentary evidence before the Board.

[3] No credibility concerns were raised with either the documentary or oral evidence. However, the Board ultimately rejected the Applicant's claim on the sole basis of internal flight alternative [IFA]. In its written reasons [Decision], the Board felt that the Brothers only have power and influence in Herat, and that they would unlikely pursue the Applicant should he move to Kabul.

## II. FACTS

[4] The Applicant's family owned lands in the village of Siyawooshan, in Herat province. Around 1979 these lands were confiscated by a powerful warlord, Ghulam Yahya Akbari [Yahya].

[5] Yahya and his family come from Siyawooshan (which is why he and his followers are known collectively as the Siyawooshan Brothers). Yahya was killed in 2009 after a long pursuit by Afghani Government forces and the U.S. military. The Brothers have exercised significant power and influence over the civilian population in Herat, and exert wider influence through broader ties to insurgent movements in Afghanistan. They have had ties with several radicalized Islamic groups including the Mujahedeen, the Taliban, Hezb-e-Islami, Al Qaeda, and even the Afghan government of former President Karzai over the years of strife in the country.

[6] Although Yahya was killed in a targeted strike by US forces in October 2009, his progeny, the remaining Brothers, continue to carry out his goals.

[7] After the Brothers confiscated the Applicant's family's land in 1979, the Applicant's father filed a court complaint. This complaint was ignored during the ensuing decades of civil war and Taliban rule. However, after Yahya was killed, the Applicant's father sought to reopen his complaint with the assistance of a family friend, Commander Aziz.

[8] The Applicant's father collected the deeds to the disputed land, and presented them to the court in Herat in January 2011. A judge in Herat transferred the file to a Kabul court.

[9] The Brothers subsequently discovered that the Applicant's father had reopened his complaint. They also learned that the complaint had reached the court in Kabul. The Brothers told the Applicant's father that they would return his land if he withdrew the court complaint.

[10] The Applicant's father accordingly withdrew his complaint. However, in June 2011 the Applicant's father and two brothers went to show the Brothers proof of the withdrawn complaint, and they went missing when travelling to Siyawooshan. They have not been heard from or found since, and are presumed to have been murdered by the Brothers.

[11] The Applicant now retains legal title to the disputed land as the sole remaining male in his family.

[12] The Applicant reported the disappearance of his father and brothers to the police, but his report was ignored. He returned to complain with his mother, and the police agreed to investigate. Some police officers travelled to Siyawooshan and reported that there was no sign of the Applicant's father and brothers.

[13] Dissatisfied with the police response, the Applicant contacted the family's friend Commander Aziz to help locate his father and brothers. Commander Aziz learned that a Siyawooshan brother had been arrested in relation to the disappearances, but was released after denying any knowledge of the Applicant's family.

[14] Later, on September 10, 2011, the Applicant's clothing store was robbed. He suspected that the Brothers were attempting to steal his money and the deeds to the disputed land. When he reported this incident to the police he was told that they could not help him.

[15] In October 2011, someone tried to break into the Applicant's house. In November 2011 the Applicant's store was set on fire. The Applicant began to receive threatening messages from the Brothers, warning him that he would be killed if he did not give them the property documents.

[16] Upon reporting the fire to the police, the Applicant was told that the police could not do anything to help because of the Brothers' power. Commander Aziz confirmed that he also could not ensure the Applicant's protection. The Applicant fled Afghanistan on December 12, 2011 and after a brief period obtaining travel documents in Pakistan, he flew to Canada on December 20, 2011, claiming refugee protection two days later.

[17] At his hearing before the RPD, the Board questioned the Applicant about the land dispute, the disappearance of his father and brothers, the Brothers, and the threats endured in Afghanistan. The Applicant explained that the Brothers perceive him as a threat to their power because he retains legal title to the disputed land as the last remaining male member of the family.

[18] The Board also questioned the Applicant about whether he could leave Herat and safely move to Kabul. The Applicant responded that the Brothers are powerful and influential not only in Herat, but throughout the country. He also explained that the Brothers have connections to many powerful insurgent groups in Afghanistan, as well as influence within the judiciary. Documentary evidence before the Board confirmed that the Brothers exercise great control in Herat, and on a broader basis through connections with various insurgent groups operating across

Afghanistan. Other reports explained that powerful warlords in Afghanistan often act with impunity, and enjoy influence that extends beyond apparent geographical boundaries.

### III. DECISION

[19] In written reasons dated August 1, 2013, the RPD did not question the credibility of the Applicant's personal history in Afghanistan, including the key elements regarding the land ownership and disputes, missing family members, ongoing threats, and inability to obtain protection or remain in Herat.

[20] However, the Board determined that the Applicant would be able to avoid the risk posed by the Brothers by relocating to Kabul and therefore has an IFA. The Board found the evidence to be insufficient that the Brothers would have enough interest in the Applicant, given the fact that he was not a "high profile" person. The Board also found that the Brothers did not exert influence beyond Herat such that they would pose a serious risk in Kabul based on a subjective and objective analysis. For this determination, the RPD relied on the Applicant's oral testimony, as well as two key reports in the country documentation package. The flaws in the Board's reasoning on both elements are explained below.

[21] While the Applicant testified that the Brothers have influence not only in Herat, the Board found (mistakenly) that the Applicant had said that the Brothers' influence extended only throughout Herat.

[22] The Board conducted its IFA analysis with specific reference to two key documents among the many in evidence: (i) the 2012 *Danish Immigration Service's Fact Finding Mission to Kabul* [the Danish report], and (ii) the United Nations High Commissioner for Refugees *Eligibility Guidelines for Assessing the International Protection Needs for Asylum Seekers from Afghanistan* [UNHCR Guidelines] *December 17, 2010*.

[23] The Danish report cites the opinions of various civil society sources operating in Afghanistan. The Board notes that one such source, the Cooperation for Peace and Unity, believes it to be improbable that one party to a land dispute would track down the other party throughout Afghanistan. None of the other sources from the Danish fact-finding report are mentioned in the Board's reasons. The Board also selectively quoted from the UNHCR Guidelines, finding that the Applicant did not fall into one of eleven UNHCR identified risk profiles.

[24] In finding that Kabul is "relatively safe" and that the Brothers are unlikely to have any interest in the Applicant, the Board found an IFA in Kabul.

#### IV. ISSUE

[25] The sole issue raised in this judicial review is whether the IFA conclusion was a reasonable one.

## V. ARGUMENTS

[26] The Applicant submitted that the Board committed three fatal errors in rendering its decision unreasonable: misapprehending the Applicant's (i) risk profile, (ii) oral testimony and (iii) documentary sources, including overlooking key evidence, and that these three errors render the IFA analysis unreasonable.

[27] The Respondent, on the other hand, urged the Court to uphold the decision on the basis that it was supported by the evidence, and even if one might come to different conclusion, the conclusion reached in this case was a reasonable one.

## VI. ANALYSIS

### A. *The Standard of Review*

[28] An IFA finding is reviewed on a standard of reasonableness: see *Roy v Canada (Minister of Citizenship and Immigration)*, 2013 FC 768 at para 16; *Singh v Canada (Minister of Citizenship and Immigration)*, 2011 FC 342 at para 17. This Court will only interfere with the decision if it cannot be supported by the facts and law: *Dunsmuir v New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9. In other words, to send the matter back for reconsideration, the Board's reasons must lack justifiability, transparency and intelligibility. They do in this case.

### B. *IFA*



[29] The test to be applied in determining whether there is a legitimate IFA is two-pronged: (i) there is no serious possibility, on a balance of probabilities, of the claimant being subjected to persecution or to a risk to life or of cruel and unusual treatment or punishment in the proposed IFA area, and (ii) conditions in the IFA area must be such that it would not be unreasonable, in all the circumstances, for the claimant to seek refuge there: *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589 (FCA) at paras 12-13.

[30] In coming to the conclusion that the Applicant would not be at risk if he moved to Kabul, the Board found:

- The Applicant does not have a significant risk profile.
- There is insufficient evidence that the Brothers continue to have any interest the Applicant,
- There is also insufficient evidence to indicate that the Brothers have any influence beyond Herat, and specifically in Kabul.

[31] There are three fundamental errors which led the Board to its unreasonable conclusion.

[32] First, the Board listed eleven risk profiles, relying on the UNHCR Guidelines, and concluded that the Applicant does not fall into any of them. However, risk #11, as enumerated by the Board and supported by the UNHCR, is “persons at risk of becoming victims of blood

feuds.” Blood feuds, elsewhere described in the same UNHCR document, are defined to *include* land disputes as follows:

### **11. Blood Feuds**

The well-established practice of blood feuds is rooted in traditional Afghan culture. Blood feuds are conflicts between opposing families, tribes and armed factions, and are often initiated in reaction to perceived violations to the honour of women, **property rights**, and **land or water issues**.

According to the practice, individuals associated with the family or tribe of the individual seen as the wrongdoer are targeted by the victim’s tribe or family members. Revenge is sought through killing, physically injuring or publicly shaming the perpetrator or individuals related by family or tribe.

Blood feuds can be long-running conflicts, lasting for generations, with a cycle of retaliatory violence between parties. Solving a dispute through a formal justice mechanism does not normally put an end to a blood feud.

[pages 32-33, emphasis added]

[33] There was also further documentary evidence before the Board that found subjects of land feuds were at risk. The uncontested evidence showed the land dispute in this case dated back to 1979 and directly impacted the Applicant when his father and brothers disappeared while addressing the issue in 2011. Being the sole remaining male member of his family meant that he alone retained legal title to the disputed land, and he continued to be targeted and receive death threats until he fled.

[34] Given the acknowledged and uncontroverted land dispute, the Board erred in coming to the opposite conclusion than that revealed by the documentary evidence.

[35] Second, the Board misapprehended the Applicant's oral testimony.

[36] At the hearing the Applicant stated that the Brothers would be a threat throughout Afghanistan: "...not only have connections within Herat"...but "wherever we go." He also stated that "...Siyawooshan is connected with Al Qaeda, Islami and Hekmatyar, and Al Qaeda network.": *Application Record, Tab 3: Exhibit "G", page 225*

[37] In response to questions about his safety in Kabul and the judicial complaint that his family had made, the Applicant answered:

... This is an indication that they have people infiltrated with the judicial and justice system... So therefore they had this person, like their eyes and ears, saying these people made a complaint against you and the Ministry and judicial should get the complaint back... Because of that, I was well known and I couldn't go anywhere else...

*Application Record, Tab 3: Exhibit "G", page 226*

[38] The Board's conclusion reflects the opposite understanding of this testimony, in that it found that the Applicant stated that the Brothers' influence was only in Herat.

[39] A misapprehension of subjective evidence can be fatal to a decision, and was in this case: see *Shaheen v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1485 and *Gur v Canada (Minister of Citizenship and Immigration)*, 2012 FC 992.

[40] The third and final error concerns the objective documentary evidence. Documents, including those cited by the Board, confirmed that the Brothers have connections to the Taliban,

Al Qaeda, Hezb-e-Eslami, and the central and provincial Afghan governments: *Application Record, Tab 3: Exhibit "C", Country Conditions Package, pages 121-122, 124, 129, 131-132.*

[41] In failing to reasonably consider key documentary evidence concerning the viability of the proposed IFA, the Board made an erroneous findings of fact without regard to evidence which contradicted its findings: *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] 157 FTR 35, (FC) at para 17.

[42] Indeed, the two key documents that the Board cited – the Danish and UNHCR Guidelines – both contained crucial passages that the Board failed to mention which contradicted those passages the Board relied upon.

[43] For instance, the Danish report is a compendium of commentary received from various international organizations. The Board cited a passage from one organization. Examples of contradictory passages from different organizations in the UNHCR Report read as follows:

AAWU [All Afghan Women Union] stated that land disputes belong to the most controversial subjects in Afghanistan. According to AAWU, if someone has a land dispute with an influential person such as a commander, he will probably face the risk of being assaulted or even killed. Besides, land courts as well as the shuras/jirgas are usually under the influence of influential and powerful persons, and the governmental institutions are corrupted, for which reason the case cannot be settled through these channels...

...Even if the family agrees and does not claim their land back immediately, they may still be a target because there is a risk that they will claim back their land at a later stage. This is particularly the case where male members of the family (heirs) are alive who could claim the land back. This kind of (blood) feud which could extend to the whole family or tribe with an active risk of revenge

was a characteristic of the Pashtuns but it has now touched all the other ethnic groups in Afghanistan, according to UNHCR.

Asked if it would be possible to find protection in Kabul or other cities (Mazar and Herat), LUA (Lawyers Union of Afghanistan) stated that the problem would still exist. LUA explained that the person who has caused the conflict and who has gained ownership of the land might want to eliminate the other party in order to make sure that he will not claim the land back. Unless the threatened person has personal relations to the authorities or to the National Security, he would always have to live with this threat.

*Application Record, Tab 3: Exhibit "C", Country Conditions Package, pages 114-117.*

[44] This evidence in the Danish Report was not "buried" in the documentary evidence.

Rather, Applicant's counsel quoted this evidence to the Board in oral submissions. However, the Board chose to select only one passage from the Danish Report that contradicted the preponderance of its evidence.

[45] In the second document relied on by the Board, the UNHCR Report, one key passage omitted by the Board, states that powerful militias, such as the Brothers, "have links or are closely associated with influential actors in the local and central administration. As a result, they largely operate with impunity and their reach may extend beyond the area of their immediate (de facto) control." *UNHCR Guidelines, Application Record, Tab 3: Exhibit "E" National Documentation Package, pages 178-179.*

[46] Finally and directly speaking to the central issue of IFA raised in this Application, the UNHCR Guidelines state:

30.06 "It is not difficult to track people down in Afghanistan, although it might take time. Neighbours and landlords will check backgrounds, because everyone thinks in terms of security, and so

they would want to check a newcomer's background in their home area. Further, messages are sent across the country via chains of communications based on personal contacts, and it would be natural to investigate where someone was from in order to see what role they could play in such a network. The postal service is unreliable and only delivers to the district centres, not to the villages, so that travellers are often used to deliver messages and goods to relatives and friends." (Dr. Antonio Giustozzi, Afghanistan Notes, 28 June 2006).

## VII. CONCLUSION

[47] The Board unreasonably erred when it arrived at the conclusion that the Applicant could seek protection in Kabul. The evidence regarding the Applicant's (i) risk profile, (ii) personal situation, and (iii) objective country evidence, all contradict the Board's findings. The Application will be allowed. Counsel raised no questions for certification.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that:**

1. The Application will be allowed and the matter remitted to a differently constituted panel for re-determination in accordance with the law.
2. There are no questions for certification.

"Alan Diner"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

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