Federal Court  Cour fédérale

Date: 20141119

Docket: IMM-4522-13

Citation: 2014 FC 1093

Toronto, Ontario, November 19, 2014

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

MUSTAFA AJELAL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for the judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board [RPD, Board], made pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act* [*IRPA*], wherein the Board determined that the Applicant is neither a Convention refugee nor a person in need of protection.

[2] In short, the Applicant submits that the Board took too many shortcuts before coming to the conclusion above. The Board failed to properly analyze the underlying issues with respect to an internal flight alternative [IFA] in the Applicant's native country of Libya. This Court agrees that there were gaps in the analysis which require the matter to be sent back to the Board for reconsideration.

II. **Facts**

[3] The Applicant is a 33-year-old citizen of Libya, from Tripoli.

[4] When the civil war broke out in Libya in February 2011, he was living and studying in Montreal, having previously obtained a student visa.

[5] Due to the political and security developments in his home country, the Applicant became afraid to return to that country, fearful that he would be targeted as a result of his Amazigh ethnicity and the inter-factional violence. He made a claim for refugee protection in Canada on August 22, 2011. On October 6, 2011, he filed his Personal Information Form [PIF] with the RPD.

[6] The situation in Libya deteriorated in the period between October 2011 and March 2013, when the claim was heard by the RPD.

[7] In this period, the Applicant had become the object of death threats because he expressed his opinions in internet forums about the rights of his people, the Amazigh, and about the importance of the new government being secular and civilian.

[8] On February 18, 2013, the Applicant filed amendments to his PIF, describing these developments, and setting out his concerns based on his activities while in Canada. Specifically, his submissions cited: the deteriorating situation in Libya; the fact that he had spoken out publicly against the government in Libya (i.e. in support of a civilian/secular government); personal threats he had received via email; and the breakdown of the Libya's ability to protect him.

III. **Decision**

[9] The Board did not raise the Applicant's credibility as an issue, and accepted his identity as a member of the Amazigh minority.

[10] While taking note of the documentary evidence concerning improvements for the Amazigh community in the post-Gaddafi era, the Board did not determine whether or not the Applicant would face persecution on the basis of his ethnicity if he were to return to his home in Tripoli.

[11] The sole determinative finding by the Board was that the Applicant could benefit from a reasonable IFA in either the Jabel Nefoussa region of Libya or in the town of Zouara, Libya, and that he was not therefore entitled to international protection.

[12] The Board neither assessed the risk of persecution on the basis of political opinion or ethnic heritage pursuant to s. 96 of *IRPA*, nor did it assess the risks pursuant to s. 97 of *IRPA*.

IV. **Analysis**

[13] The Board had both documentary and oral evidence regarding the Applicant's ethnicity and his political opinions, upon which it had a duty to consider whether the Applicant faced persecution under s. 96, or risks under s. 97.

[14] The Applicant produced a variety of documentary evidence outlining the deterioration of conditions in Libya after the ouster and death of Colonel Ghaddafi, evidencing his objective fear of persecution and the attendant lack of state protection at the time.

[15] The Applicant also produced evidence outlining personal threats against him due to the political opinions he espoused while in Canada.

[16] Furthermore, when questioned by the Board, he explained the difficulties he would face in Libya should he return to that country, including personal threats against him, both in Tripoli and beyond (Certified Tribunal Record, pp. 316, 318-324).

[17] All of this evidence was consistent with the evidence provided in both the original PIF, as well as the amended PIF.

[18] The Board, as mentioned above, made no credibility findings with respect to either the objective or subjective testimony. Rather, the RPD found that the Applicant could find a safe haven in the two areas of Libya mentioned above in paragraph 11. The Applicant, however, testified and provided documentary evidence demonstrating fear was throughout Libya, rather than solely in Tripoli, given the deterioration of governance and protection available in the country.

[19] The first error made in this matter, therefore, is that the Board failed to consider all grounds made in the claim, under either s. 96 or s. 97.

[20] This fundamental pillar of refugee law dates back to the seminal case of *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 at pages 745 and 746, where the Court confirmed that the Board must consider all of the relevant grounds for making a claim for refugee status.

[21] Justice Rennie wrote about this error of procedural fairness in *Varga v Canada (Citizenship and Immigration)*, 2013 FC 494:

> [5] Refugee claims involve fundamental human rights. Accordingly, it is critical that the Board consider any ground raised by the evidence even if not specifically identified by the claimant: *Canada (Attorney General) v Ward*, [1993] 2 SCR 689; *Viafara v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1526, para 13. It is, in most circumstances, a serious and potentially fatal error to ignore part of a refugee claim: *Mersini v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1088, para 6.
>
> [6] The failure of the Board to address a ground of persecution, raised on the face of the record, is a breach of procedural fairness, reviewable on a correctness standard, Reasonableness and

> deference can have no role when there is no assessment of the evidence.

[22] In the present case, the Board did not consider the underlying basis of the Refugee claim, on any of the enumerated grounds in s. 96. It is not for this Court to analyze and adjudicate the refugee claim; that is the role of the Board, which it did not undertake in this case.

[23] The same comments can be made with respect to the risks faced under s. 97.

[24] As Justice Rennie stated in *Ballestro Romero v Canada (Citizenship and Immigration)*, 2012 FC 709:

> [7] The Board failed to determine whether the discrimination the applicant would face … amounts to persecution, which in turn was relevant to its conclusions regarding state protection and IFA. This error renders the Board's conclusion unreasonable and the application therefore must be granted.

[25] The error may not have necessarily been fatal if the Applicant's credibility was impugned, because the factual basis of the claim could have been said to be unsupported by the testimony: see *Emamgongo v Canada (Citizenship and Immigration)*, 2010 FC 208; and *Ozuak v. Canada (Citizenship and Immigration)*, 2003 FCT 580. In this case, however, there was nothing which supported the failure to consider the Applicant's s. 96 and s. 97 claims for protection.

[26] Finally, even if I am wrong on the above, such that there was no denial of procedural fairness for failure to consider the underlying elements of the claim, then the IFA finding falls because the Board was unreasonable in its IFA analysis.

[27] The leading case on IFA is *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FCR 589, where the Court of Appeal held at paras 13 and 14:

> […] the question to be answered is, would it be unduly harsh to expect this person, who is being persecuted in one part of his country, to move to another less hostile part of the country before seeking refugee status abroad?
>
> An IFA cannot be speculative or theoretical only; it must be a realistic, attainable option. Essentially, this means that the alternative place of safety must be realistically accessible to the claimant. Any barriers to getting there should be reasonably surmountable. The claimant cannot be required to encounter great physical danger or to undergo undue hardship in travelling there or in staying there. For example, claimants should not be required to cross battle lines where fighting is going on at great risk to their lives in order to reach a place of safety.

[28] There was evidence before the Board, by way of an email threat, addressed directly and solely to the Applicant, that he would be killed should he come through Tripoli airport. If the Board wanted him to reach either of the two IFAs, it failed to state how he would avoid going through Tripoli airport, or alternate routes to attend the places of supposed safe haven.

[29] Furthermore, the Board failed to address the evidence of the Applicant in which he said that the threat against him extended beyond Tripoli to other areas of the country. This evidence directly contradicted the Board's finding that the Applicant would not face persecution in the purported IFAs.

[30] In this case, given the Board's emphasis on IFAs and the absence of any other substantive analysis, the evidence contrary to its conclusions should have been addressed. The Court of Appeal held in *Cepeda-Gutierrez v Canada (Citizenship and Immigration)*, [1998] FCJ No 1425:

> [27] Finally, I must consider whether the Refugee division made this erroneous finding of fact "without regard for the material before it." In my view, the evidence was so important to the applicant's case that it can be inferred from the Refugee Division's failure to mention it in its reasons that the finding of fact was made without regard to it. This inference is made easier to draw because the Board's reasons dealt with other items of evidence indicating that a return would not be unduly harsh. The inclusion of the "boilerplate" assertion that the Board considered all the evidence before it is not sufficient to prevent this inference from being drawn, given the importance of the evidence to the applicant's claim.

[31] The Federal Court has followed a similar approach on numerous occasions: See for instance, *Vassey v Canada (Citizenship and Immigration)*, 2011 FC 899 at para 76; *Vigueras Avila v Canada (Citizenship and Immigration)*¸ 2006 FC 359 at para 36. I see no reason that the Court should take any different approach in this matter.

V. **Conclusion**

[32] The decision, for all the reasons above, will be sent back for reconsideration. The parties sought no questions for certification, nor did they raise any cost award requests.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed. The matter will be sent back to the Board for redetermination. No questions will be certified and there is no order for costs.

"Alan Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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