Date: 20090526

Docket: IMM-4890-08

Citation: 2009 FC 539

Ottawa, Ontario, May 26, 2009

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

ISLAM SID AHMED MOUALEK

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The Court considers that a trier of facts is entitled to make reasonable findings founded on implausibilities, common sense, rationality and inherent logic based on knowledge of a subject, and may reject testimony if it does not accord with the probabilities affecting the case as a whole (*Singh v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 62, 159 A.C.W.S. (3d) 568; *Aguebor v. Canada (Minister of Employment and Immigration)* (1993), 160 N.R. 315, 42 A.C.W.S. (3d) 886 (F.C.A.); *Alizadeh v. Canada (Minister of Employment and Immigration)* (1993), 38 A.C.W.S. (3d) 361, [1993] F.C.J. No. 11 (QL) (F.C.A.); *Shahamati v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 415 (QL) (F.C.A.)).

[2] The Board found that the delay in claiming refugee protection was one element among others that undermined the credibility of the applicant's account and the presence of a subjective fear.

[3] The delay in seeking protection from the Canadian authorities, although not determinative in itself, may be taken into consideration in the assessment of the overall credibility of a refugee claim. The Board did not err in making this finding (*Sainnéus v. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2007 CF 249, [2007] A.C.F. No. 321 (QL); *Huerta v. Canada (Minister of Employment and Immigration)* (1993), 157 N.R. 225, 40 A.C.W.S. (3d) 487 (F.C.A.); *Singh*, above).

[4] The same may be said for the long delay in leaving his country even though the applicant claimed that he had feared being recruited into the military since 2003 (*Yala v. Canada (Minister of Citizenship and Immigration)* (1999), 89 A.C.W.S. (3d) 338, [1999] F.C.J. No. 384 (QL)).

II. Judicial procedure

[5] This is an application for judicial review of a decision dated October 14, 2008, by the Refugee Protection Division of the Immigration and Refugee Board (Board) that the applicant is not a Convention refugee or a person in need of protection under section 96 and paragraphs 97(1)(*a)* and (*b)* of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA).

III. Facts

[6] The applicant, Islam Sid Ahmed Moualek, was born on October 27, 1985. He is single and his entire family lives in the city of Oran, Algeria. Mr. Moualek studied at the lycée and also studied building electricity and indicated that he worked in a fish shop from January 2005 to September 2006.

[7] Mr. Moualek explained that he did not want to do his national service and feared threats from terrorists roaming everywhere in Algeria; he alleged that two of his cousins had serious problems when they were doing their military service.

[8] Mr. Moualek emphasized that he made the decision to leave his country in September 2005. With the help of his brother, he was able to falsify academic documents so that he could present them to the Canadian authorities to obtain a visa.

[9] His visa for Canada was issued on September 1, 2006, and his passport was issued by the Algerian authorities on February 21, 2005, and is valid for ten years.

[10] Mr. Moualek left Algeria on September 21, 2006, transited through the city of Casablanca, Morocco, and arrived in Canada the same day.

[11] Mr. Moualek claimed protection from the Canadian authorities only on October 12, 2006. With respect to his fear of return, Mr. Moualek mentioned at the beginning of the hearing that he has feared being forced to do his military service since 2003.

IV. Impugned decision

[12] The Board found that the risks alleged by Mr. Moualek, namely, those stemming from terrorism, are common to all Algerian citizens (Decision at page 2, paragraph 6).

[13] The Board also found that Mr. Moualek's conduct was inconsistent with the presence of a subjective fear.

V. Issue

[14] Is the Board's decision to dismiss the application for judicial review reasonable?

VI. Analysis

[15] The failure to comply with a law of general application cannot be categorized as a source of persecution.

[16] This Court has indicated that failing to carry out one's military service is akin to failing to comply with a law of general application and that this cannot be categorized as a source of persecution or risk under section 96 or 97 of the IRPA (*Zolfagharkhani v. Canada (Minister of Employment and Immigration)*, [1993] 3 F.C. 540, 41 A.C.W.S. (3d) 387; *Chelleli v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1705 (QL); *Usta v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1525, 134 A.C.W.S. (3d) 1070; *Ozunal v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 560, 291 F.T.R. 305; *Mohilov v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1292, [2008] F.C.J. No. 1645 (QL)).

[17] Mr. Moualek indicated that were it not for the terrorist threat, he would be quite willing to do his military service (Applicant's Record (AR), Record of Proceedings (RP) at page 34).

[18] The basis of Mr. Moualek's fear does not justify granting protection under the IRPA.

Enlisting with the Algerian army

[19] Mr. Moualek was twenty-two years old on the day of the decision. The evidence shows that he never enlisted with the Algerian armed forces at the age of eighteen, as required by Algerian law (Decision at page 3, paragraph 8).

[20] Questioned on this subject, Mr. Moualek said he was unaware of this obligation.

[21] The Board noted that Exhibit DZA100225.FE of June 7, 2005, which is reproduced as Exhibit A of Hélène Jarry's affidavit, specifies that any Algerian male must enlist in the army at eighteen years of age (therefore, in 2003 for Mr. Moualek) and that announcements to this effect are broadcast on the radio, the television and in newspapers to remind men of their national duty.

[22] These announcements are not confined to a single year and nothing indicates that they would have stopped in 2005. These announcements were of interest to Mr. Moualek from the moment he was of age to enlist in the army, that is, in 2003 when he turned eighteen. The Board's opinion is based on the reliable documentary evidence and this factual finding has merit.

[23] It is surprising that Mr. Moualek, who based his refugee claim on his fear of being required to join the army, was unaware of every provision on the subject that was broadcast and known in Algeria for several years.

[24] By his failure to act, Mr. Moualek has already been in violation of Algerian law for five years; however, he has not received anything from the Algerian authorities and is not being sought by them.

[25] It is speculative to find, as Mr. Moualek proposes, that he could have received written notice from the army, but that his parents chose not to inform him of this interest on the part of the military authorities.

[26] The evidence instead shows that this irregularity did not prevent Mr. Moualek from leaving his country with a valid passport issued in February 2005 by the Algerian authorities.

[27] His failure to enlist with the military authorities is not a source of persecution or risk in this case.

Regularizing the applicant's status

[28] Since the early 2000s, the Algerian authorities introduced procedures to regularize the status of young men who dodge military service. In this regard, the Board referred to Exhibit DZA43563.FE (Decision at page 4, paragraph 10).

[29] Mr. Moualek said he was completely unaware of the existence of such measures to regularize the situation of young men who had not complied with the law in this area.

[30] As indicated, this ignorance is curious in that the refugee claim is founded on a desire to avoid military service. Certainly, it can be expected that a person would have at least some knowledge of the context regarding which he or she is claiming protection from Canada (Decision at page 4, paragraph 10).

[31] In its reasons, the Board referred to the possibility of regularization for draft dodgers who did not complete their military service. This policy has existed for several years, as indicated in the answer to information request DZA43563.FE of May 25, 2005, cited at paragraph 9 of the decision.

[32] It appears that this regularization movement is ongoing. Even though this matter was discussed at length during the hearing, Mr. Moualek did not demonstrate that the regularization movement ended after 2005 in Algeria.

[33] Mr. Moualek claims that the Board allegedly used one or more documents that were not in evidence to come to the conclusion that regularization measures continued in 2007 and 2008.

[34] What is apparent in the decision, at paragraph 9, is that regularization measures have been in place since the beginning of the 2000s in Algeria (Exhibit DZA43563.FE of the package on Algeria) and that the Board member knew that these measures have been ongoing, having heard

cases involving Algerian refugee claimants for several years. Moreover, Mr. Moualek did not deny that the regularization procedure for draft dodgers is ongoing.

[35] Moreover, the Board noted that the Algerian authorities cannot take all eighteen-year-old men who must enlist in the army. The intake capacity is around 75,000 people a year while several hundred thousand Algerian men turn eighteen every year.

[36] Added to this is the willingness of the Algerian government and President Bouteflika to have a professional army rather than an army of young conscripts; these individuals evidently are not necessarily interested in going into combat in the security forces.

[37] The Board noted that Mr. Moualek is almost twenty-three and has been of age to do his military service for five years. He never enlisted in the army, was never called up by the army, never sought to regularize his status with the army and had no difficulty in obtaining a passport two years after turning eighteen. In view of these facts, the Board found that Mr. Moualek would not be subjected to enforcement of the national service law.

Fear of terrorists

[38] Mr. Moualek said that he feared terrorists who, according to him, attack young men called up to serve in the army. More precisely, he feared being killed in a confrontation (Decision at page 5, paragraph 12).

[39] For its part, the Board acknowledged in Mr. Moualek's testimony that terrorists try to commit acts in places where there are large numbers of Algerian citizens. Moreover, Mr. Moualek cited markets, the post office and roads as likely places for terrorist activity.

[40] The Board found that the situation described by Mr. Moualek could arise anywhere in the country and that this situation is generalized in the entire country of Algeria. Thus, the fear raised by Mr. Moualek does not give rise to the granting of protection under sections 96 and 97 of the IRPA.

Subjective fear of the applicant

[41] Mr. Moualek first indicated, at the beginning of the hearing, that he had made the decision to leave Algeria in September 2005. Confronted with the fact that he had obtained his Algerian passport seven months earlier, in February 2005, Mr. Moualek indicated that he had been thinking of leaving since the end of 2004 (RP at page 35).

[42] The Board noted that even though Mr. Moualek had wanted to leave his country for several years, he did not think it was appropriate to claim refugee protection upon his arrival in Canada on September 21, 2006. Instead, it was twenty-one days later, on October 12, 2006, that he sought protection from the Canadian authorities.

[43] When asked to explain this delay, Mr. Moualek indicated that he had needed time to rest, get his bearings and find his place in Canada (RP at page 36).

[44] At paragraph 18 of his memorandum, Mr. Moualek indicates that this finding is not consistent with his testimony and cites an excerpt of the hearing found at page 37 of his record.

[45] The Court is of the opinion that this question was given a specific answer at page 36 of the record and the Board's factual finding is reasonable and based on the evidence:

> SH: [TRANSLATION] Mr. Moualek, please, I have not yet asked any questions! So, about three weeks after your arrival in Canada. Why the three-week delay?
>
> SAM: [TRANSLATION] Just time to rest, find my place and bounce back. It took me about three weeks to claim protection.
>
> SH: [TRANSLATION] What do you mean by finding your bearings?
>
> SAM: [TRANSLATION] Because for the first while, I was not stable, I was not familiar with anything, I was not familiar with my surroundings, everything was new. I started to become a little more familiar with my surroundings; it took about three weeks.

[46] The Board was entitled to accept this part of Mr. Moualek's testimony as part of its analysis.

[47] The Board found that the delay in claiming protection was one element among others that undermined the credibility of his account and the existence of a subjective fear.

[48] The delay in seeking protection from the Canadian authorities, although not determinative in itself, may be taken into consideration in the assessment of the overall credibility of a refugee claim. The Board did not err whatsoever in making this finding (*Sainnéus*, above; *Huerta*, above; *Singh*, above).

[49] The same may be said for the long delay in leaving Algeria even though the applicant claimed that he had feared being recruited into the military since 2003 (*Yala*, above).

The applicant's arguments based on breaches of natural justice

[50] At paragraph 5 of his memorandum, Mr. Moualek alleges that the Board committed two breaches of natural justice.

[51] First, Mr. Moualek indicates that the Board intervened [TRANSLATION] "57 times" during the examination by his counsel, and this, according to him, constitutes a breach of natural justice.

[52] After reading the transcript, the Court finds that the Board asked certain questions in an attempt to clarify the nature of Mr. Moualek's refugee claim (Decision at page 3, paragraph 7).

[53] It should be noted that Mr. Moualek's counsel specified, on two occasions, that he did not have any other questions for Mr. Moualek. Certainly, nothing indicates that Mr. Moualek was hampered in presenting his evidence in any way (RP at page 51).

[54] In any event, the Court emphasizes that the Board was entitled to question Mr. Moualek to clarify evidence—this does not constitute a breach of natural justice.

[55] The comments of Justice Yves de Montigny in *Chamo v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1219, 142 A.C.W.S. (3d) 309, apply in this proceeding:

> [12] It is not sufficient to look at the words of which the Applicant complains; these words must be set in context, in the overall view of the proceedings

> (*Mihajlovics v. Canada (M.C.I.)*, [2004] F.C.J. No. 248, at para. 15). It is true that the Presiding member interjected often and asked a number of questions. But energetic questioning by a Board member and frequent interruptions will not necessarily give rise to a reasonable apprehension of bias, especially if the intervention is to clarify a claimant's or witness' testimony (*Ithibu v. Canada (M.C.I.)*, [2001] F.C.J. No. 499; *Mahendran v. Canada (M.E.I.)*, supra; *Quiora v. Canada (M.C.I.)*, [2005] F.C.J. No. 338).

[56] Mr. Moualek's counsel did not object to the Board's interventions during the hearing. The failure to raise questions of natural justice in a timely manner amounts to a waiver of this argument (*Hernandez v. Canada (Minister of Citizenship and Immigration)* (1999), 91 A.C.W.S. (3d) 811, [1999] F.C.J. No. 607 (QL); *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892; 24 A.C.W.S. (3d) 311; *Huyck v. Musqueam Indian Band* (2000), 189 F.T.R. 1, 97 A.C.W.S. (3d) 381; *Del Moral v. Canada (Minister of Citizenship and Immigration)* (1998), 46 Imm. L.R. (3d) 98; 81 A.C.W.S. (3d) 689; *Nartey v. Canada (Minister of Employment and Immigration)* (1994), 74 F.T.R. 74, 46 A.C.W.S. (3d) 727; *Abdalrithah v. Canada (Minister of Employment and Immigration)* (1988), 40 F.T.R. 306, [1988] F.C.J. No. 117 (QL)).

[57] Second, Mr. Moualek claims that the Board suggested that his counsel would be prepared to fabricate evidence.

[58] The relevant exchanges between the Board member, Mr. Moualek and his counsel can be found at pages 27 to 29 of the applicant's record. There is a discussion of the false record Mr. Moualek fabricated to obtain a Canadian visa. The Board member indicated, at page 29, that he could not establish that Mr. Moualek's academic documents had been doctored because he did not have the original that would allow him to note the changes made:

> BM: [TRANSLATION] I understand, but I do not see that the document has been doctored; when I look at the transcript and as I don't have the original, I cannot see if there is white-out on his name because what I have is a photocopy. It is only afterwards that we know that he obtained a Canadian visa to study under false pretence.
>
> SH: [TRANSLATION] Obviously and if that were not the case, it would have been easy for him to take the information contained in the visa file and prepare his personal information form.
>
> BM: [TRANSLATION] With your help, of course. You would like to add something Mr. Handfield. Go ahead.

[59] Thus, it is on the basis of this excerpt that Mr. Moualek's counsel alleges that the Board member suggested that he would fabricate false evidence. He adds that such comments were completely unacceptable.

[60] The respondent denies Mr. Moualek's inference.

[61] First, if Mr. Moualek's counsel had interpreted the Board member's remark as an attack directed at his professional integrity, it is reasonable to believe that he would have reacted immediately. However, the transcript indicates that the hearing continued normally.

[62] Second, Mr. Moualek's counsel's intervention ended with the words [TRANSLATION] "[. . .] prepare his personal information form". It is reasonable to believe that the Board member's remark, [TRANSLATION] "with your help", indicated that counsel helped or would help his client prepare his Personal Information Form (PIF), according to the information (the facts) the client gave him.

[63] Of course, it is completely normal for a lawyer to play a role in preparing a refugee claimant's PIF. Thus, the Board member's comment is not an attack on Mr. Moualek's counsel.

VII. Conclusion

[64] For all of the above reasons, the application for judicial review is dismissed.

JUDGMENT

THE COURT ORDERS that

1. The application for judicial review be dismissed;

2. No serious question of general importance be certified.

"Michel M.J. Shore"
Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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