

Federal Court



Cour fédérale

Date: 20100106

Docket: IMM-1556-09

Citation: 2010 FC 15

Ottawa, Ontario, this 6th day of January 2010

Before: The Honourable Mr. Justice Pinard

BETWEEN:

Mohammed Shabir WAZEEN

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*, S.C. 2001, c. 27, (the “Act”) of a decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada (the “Board”) dated March 6, 2009, wherein Board Member Michal Mivasair found the applicant to be neither a “Convention refugee” nor a “person in need of protection” pursuant to section 96 and subsection 97(1) of the Act.

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[2] Mr. Mohammed Shabir Wazeen (the “applicant”) is a twenty-seven year old citizen of Afghanistan who came to Canada from Afghanistan via Pakistan and then the United States of America (the “U.S.”).

[3] He was born in 1981 in a village in Kunduz province. Most of the alleged facts on which the applicant bases his claim for refugee protection were not accepted by the Board.

[4] The applicant alleged that in 1990 he and his family fled Afghanistan for Pakistan. They returned in early 2002 after the fall of the Taliban. In March 2002, the applicant met and fell in love with Yasamin Hashmi. They became romantically involved and planned to eventually marry. However, before their respective families could be approached about the arrangement, Yasamin’s family arranged to have her marry another man. Fearing that Yasamin would be killed by her husband when he found out that she was no longer a virgin, the applicant and Yasamin ran away together. They were found and attacked by unknown assailants, likely members of Yasamin’s family. The applicant escaped to his uncle’s house in Kabul but Yasamin did not. He learned that police and armed men had forced their way into his family home that day and taken away his brothers.

[5] Thus, a consequence of the failed attempt by Yasamin and the applicant to run away together was that the applicant’s family became targeted by Yasamin’s family. Yasamin’s relatives include Abul Rauf, the most powerful Uzbek commander in Kunduz and his brother Amir Latif, the

current Provincial Governor in Faryab and the former Provincial Governor of Kunduz. As retribution for dishonouring Yasamin, the applicant's uncle negotiated for the release of the applicant's two brothers. One brother remains missing to this day. The applicant's family eventually fled their village fearing further more deadly targeting from Yasamin's family.

[6] The applicant fled from Afghanistan to Pakistan where arrangements were made to further distance himself from Yasamin's family. His family arranged to have him marry his U.S. cousin. He used the passport of his deceased cousin, Adel Qayoumi, to obtain a U.S. fiancé visa. The processing took some time and he claims he was in hiding from late 2003 and most of 2004. Implicitly, the applicant alleges that Yasamin's family had the power and the intent to threaten the applicant's life even while in Pakistan.

[7] In October 2004 the applicant arrived in the U.S. His marriage to his cousin was short lived; they separated in June 2005 and divorced in 2006. Ultimately, he did not obtain his green card and was advised by lawyers that he would never obtain a regularized status as a refugee because of the short duration of the marriage and the fact that he had used an alias since his arrival.

[8] The claimant decided to come to Canada through the assistance of an agent. He arrived on July 4, 2006 and filed for refugee protection on July 7, 2006.

[9] The applicant claims to have no knowledge of Yasamin's whereabouts today although she may be living near Tajikistan. The applicant claims to fear the family members of Yasamin, in particular the two brothers mentioned above.

[10] The applicant's first interview by a Canadian Immigration Officer was August 4, 2006 in Montréal, Quebec. At some point his identity was questioned and investigations were conducted by the U.S. Immigration authorities as well as by the Canada Border Services Agency ("CBSA"). He was detained at the Laval Detention Centre for over a month. A number of interviews were conducted and he signed a statement on August 21, 2006 confirming that he had made previous false declarations to the U.S. and Canadian authorities regarding his identity.

[11] On September 13, 2006, Immigration and Refugee Board Member Michel Beauchamp rendered a decision that the applicant remain in the detention centre in Laval, Quebec. At some point thereafter, the applicant's identity was confirmed and he was released.

[12] A hearing to determine whether the applicant was eligible for refugee protection was held on February 26, 2009 in Edmonton, Alberta.

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[13] The Board found that the applicant was not a Convention refugee because he did not sufficiently demonstrate a well-founded fear of persecution. Further, the Board found that the applicant was not a person in need of protection as there were no grounds to believe that his removal to Afghanistan would subject him to cruel and unusual punishment.

[14] Neither the applicant's identity nor his citizenship status was doubted by the Board.

[15] However, the Board did not believe the applicant's testimony because his demeanour was "flat and irritable" and it could not tell if the applicant was sad when speaking of Yasamin and his missing brother who was "most likely murdered by her family." Furthermore, the applicant seemed to resent and was annoyed for being asked questions about his life. The Board member opined that: "I was not in the presence of someone who wanted me to understand his claim."

[16] The Board rejected the applicant's submission that he be found credible on the basis that he had not contradicted himself during his testimony. More important for the Board was the applicant's admitted pattern of lying in the past. The Board concluded that this pattern of lying to the U.S. authorities, to the Immigration Officer when he landed in Canada, and to CBSA at the detention centre convinced the Board that it was not in a position to determine whether inconsistencies or omissions from the applicant's Personal Information Form ("PIF") as well as explanations provided during the testimony were truthful or further lies: "I find that the claimant lies whenever he finds it convenient."

[17] The Board also appears to have made a finding against credibility because the applicant was willing to use his deceased cousin's passport to enter the U.S. This demonstrated that the applicant was willing to perpetrate fraud.

[18] There are two aspects of the applicant's story that the Board found unreasonable for a person who claims to have a subjective fear for his life. The first aspect of the claimant's unreasonableness, according to the Board, was his assertion he could have married Yasamin and

that both families would have accepted the marriage. It was objectively an implausible arrangement according to the Board.

[19] The second aspect of the applicant's claim that the Board found to be unreasonable was his decision not to pursue additional avenues to regularize his status in the U.S.: "Anyone who believed that his death was certain if he were to return to Afghanistan would not have been cavalier with his legal status in the United States." For instance, the Board suggests that the applicant should not have been so willing to accept a divorce from his wife since he knew it would put his residency status in jeopardy. The Board further found the applicant unreasonable for not calling a lawyer as soon as he received his divorce papers from his wife. This is because the applicant knew of the negative consequences of a divorce to his status in the U.S.

[20] The Board explained that the applicant should have been looking for ways to remain in the U.S. from the time he and his wife separated, before they were officially divorced in February 2006.

The Board states at paragraph 32:

. . . What exactly was the claimant doing for thirteen months after he split up with his wife? How could he *not* be solely focused on finding a plan for staying away from Afghanistan, the place he would allegedly face certain death, even if it took Yasamin's extended family "50 years" to find him in some dusty corner of Afghanistan. .

..

[21] This failure to act was further problematic for the Board member because of the applicant's fluency in English and his alleged bachelor degree in physics. His level of education was the basis for the Board's expectation that the applicant should have researched the process of claiming

refugee status in the U.S. and potential other countries like Canada. This expectation would not be placed on “the average person, thrust into a foreign culture”.

[22] The applicant filed two sets of amendments to his PIF and made some changes at the outset of the hearing. However, he appears to have omitted to mention on his PIF that his mother and brother still live in fear of the alleged agent of persecution. The PIF includes the fact that the applicant’s family left Kundiz but it does not mention that, as the Board characterized, his mother and brothers live in Afghanistan in “an ongoing migratory existence due to their fear of Yasamin’s family”.

[23] Thus, the Board member found that there was no credible or trustworthy evidence presented in support of the applicant’s claim for refugee protection pursuant to section 96 or 97 of the Act.

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[24] The basis of the Board’s decision to refuse the applicant’s refugee claim is credibility. The applicant merely challenges the Board’s findings of credibility and in so doing, acknowledges that such findings are entitled to a high level of deference and that the standard of review is reasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190).

[25] The applicant first submits that the Board made erroneous findings with respect to his credibility by an inaccurate and otherwise skewed analysis of his demeanour. The applicant asserts that he was not asked how he felt about the loss of his brother and Yasamin yet the Board made a

finding against his credibility on the basis that he did not seem to have a sad demeanour. The Board is entitled to make such an observation.

[26] Overall, the applicant alleges that the Board made capricious findings with regard to the applicant's demeanour because his emotion did not match the stereotype of a refugee expected by the Board. The respondent rightly points out that there is no allegation of an apprehension of bias on the part of the Board. Demeanour is clearly a factor that the Board is entitled to consider when evaluating the credibility of an applicant's overall testimony (*Zheng v. Minister of Citizenship and Immigration*, 2007 FC 673, at paragraph 17). Certainly, the Board is in the best position to gauge the quality of the *viva voce* evidence presented during the hearing (*Takhar v. Canada*, [1999] F.C.J. No. 240 (QL) (T.D.)).

[27] Interestingly, the applicant suggests that his irritated demeanour stems from the way in which the hearing was conducted rather than the substance of the questions. This Court must defer to the tribunal on this point. It is not in a position to evaluate this claim.

[28] The applicant further submits that the Board belittled the role of the consistency of the applicant's testimony and erroneously found that the applicant simply reiterated the allegations in his PIF. In fact, upon review of the transcript it is clear that the applicant testified at length on a wide variety of issues not limited to what was in his PIF. Ultimately, consistency is, along with demeanour, one of the various factors that a Board may consider when determining credibility. In my opinion, it was not unreasonable to state that the consistency of testimony is not sufficient to find the applicant credible.

[29] The applicant's further submissions are targeted towards the Board's findings of misapprehension of the evidence, omission from the PIF, patterned lying and implausible relationship with Yasamin. In spite of the applicant's counsel able presentation, I am not satisfied, upon reviewing the evidence, that the inferences drawn by the Board are so unreasonable as to warrant the intervention of the Court. In *Aguebor v. Canada (M.E.I.)* (1993), 160 N.R. 315, the Federal Court of Appeal found that with regard to plausibility of a claimant's testimony, the unreasonableness of a decision may be more palpable:

[4] There is no longer any doubt that the Refugee Division, which is a specialized tribunal, has complete jurisdiction to determine the plausibility of testimony: who is in a better position than the Refugee Division to gauge the credibility of an account and to draw the necessary inferences? As long as the inferences drawn by the tribunal are not so unreasonable as to warrant our intervention, its findings are not open to judicial review. . . .

[30] Furthermore, it is trite law that this Court ought not substitute its own appreciation of the facts to that made by an administrative tribunal when, like in the present case, the Court cannot conclude, without minutely dissecting the reasons provided by the Board, which would be inappropriate, that the latter based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it (*Federal Courts Act*, paragraph 18.1(4)(d)).

[31] In conclusion, without necessarily endorsing the Board's analysis of the facts in its entirety, I am of the opinion that the above demeanour, inconsistencies, implausibilities and omissions, taken as a whole, could allow the Board to conclude as it did.

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[32] For all the above reasons, the intervention of the Court is not warranted and the application for judicial review is dismissed.

JUDGMENT

The application for judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada dated March 6, 2009 is dismissed.

“Yvon Pinard”

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-1556-09

STYLE OF CAUSE: Mohammed Shabir WAZEEN v. THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: November 26, 2009

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

DATED: January 6, 2010

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