

Federal Court



Cour fédérale

Date: 20120402

Docket: IMM-4348-11

Citation: 2012 FC 386

Ottawa, Ontario, April 2, 2012

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

ANWAR ISMAIL SHALTAF

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] Mr. Anwar Ismail Shaltaf left Palestine and, in 2008, claimed refugee protection in Canada based on his fear of persecution by the Israeli army. He maintains that he was mistreated over the course of many years because of his status as a Palestinian male, and that this mistreatment, taken cumulatively, amounts to persecution.

[2] A panel of the Immigration and Refugee Board considered Mr. Shaltaf's claim and concluded that his conduct was not consistent with a subjective fear of persecution, and that the various incidents he described amounted to discrimination, not persecution. Mr. Shaltaf argues that the Board erred by not considering the full range of his experiences and by concluding that his behaviour was inconsistent with a subjective fear of persecution in Palestine. Mr. Shaltaf also contends that the Board failed to consider the objective documentary evidence supporting his claim. He asks me to quash the Board's decision and order another panel of the Board to reconsider his claim.

[3] In my view, the Board did consider whether the events recounted by Mr. Shaltaf amounted cumulatively to persecution. In addition, its conclusion that Mr. Shaltaf had not shown that his conduct was consistent with a subjective fear of persecution was supported by the evidence.

[4] However, I agree with Mr. Shaltaf that, in the circumstances, the Board should have considered the documentary evidence. I will, therefore, allow this application for judicial review, in part.

[5] The issues are:

- a. Did the Board err in finding that Mr. Shaltaf's treatment did not amount to persecution?
- b. Did the Board err in failing to consider the documentary evidence?

II. Factual Background

[6] Mr. Shaltaf grew up in a refugee camp in the West Bank near Jerusalem. The camp was frequently attacked by the Israeli army. Some of those attacks resulted in Mr. Shaltaf being personally assaulted and arrested. In 1988, he went to university in India. On a return visit to Palestine, he was accused of being a member of Fatah. He was not allowed to return to India to continue his studies.

[7] Mr. Shaltaf started working as a truck driver, but his job became difficult because travel was limited between cities. In 1996, he was travelling in his truck with a cousin when they encountered a confrontation between Palestinians and Israeli soldiers. A bullet struck and killed his cousin.

[8] Mr. Shaltaf was often stopped at check points. Sometimes he was beaten or detained for several hours. Once, he encountered a large explosion which injured many people. In 2002, Israeli soldiers entered the refugee camp and asked all men between the ages of 15 and 55 to assemble. They were detained and interrogated. Later that year, soldiers shot at Mr. Shaltaf and others who were gathering spring water.

[9] In 2003, he attempted to travel with his mother to Mecca, but the Israeli military prohibited males under age 35 from crossing the border. However, after a few days, Mr. Shaltaf was allowed to proceed to Mecca. On his return, he sold his truck because of the difficulties he was having travelling around the region.

[10] In 2005, Israeli soldiers entered his home. Later that year, he obtained a visa to travel to the United States for tourism and business reasons. He returned to Palestine soon thereafter to get a visa for his son.

[11] In 2006, while in Palestine, Mr. Shaltaf was driving near Bethlehem when he was stopped at a check point. At gunpoint, he was ordered to bark like a dog at every passing car for an hour. He decided to leave Palestine for the US, with the ultimate goal of claiming refugee protection in Canada. He arrived in Canada in the fall of 2008.

III. The Board's Decision

[12] The Board noted that the reason Mr. Shaltaf gave for his mistreatment in 2006 was that he was on a "no depart list". However, he made no mention of that allegation either in his original or his amended written narrative. The Board drew an adverse inference about Mr. Shaltaf's credibility from this omission. In addition, the Board noted that Mr. Shaltaf had actually been allowed to leave Palestine on numerous occasions. There was also no evidence that this was the reason he was sometimes detained at the border.

[13] The Board also noted that Mr. Shaltaf lived safely in the US for over two years from 2006 to 2008. At that point, he returned to Palestine. The Board found his return to be inconsistent with his claim that he would be seriously harmed in Palestine. Further, Mr. Shaltaf could have made a refugee claim in the US, but did not. He declared that his reason for going to the US was for

business and tourism. Again, the Board found that Mr. Shaltaf's refugee claim was not supported by credible evidence of a well-founded fear of persecution.

[14] As for cumulative evidence of persecution, the Board weighed the positive and negative factors. Mr. Shaltaf had received an education in Palestine and had obtained employment there. He had a residence. He had also experienced difficult circumstances, but he had not been personally targeted.

[15] Cumulatively, the Board found that Mr. Shaltaf, while enduring discrimination, had not been subjected to persecution. Further, if he had genuinely believed he had been persecuted, he would not have returned to Palestine after going to the US. The only incident that followed his return to Palestine was the barking episode, and that incident, while humiliating, did not amount to persecution.

IV. Issue One - Did the Board wrongly conclude that the treatment Mr. Shaltaf received did not amount to persecution?

[16] Mr. Shaltaf argues that the Board failed to consider whether the various problems he encountered in Palestine constituted, as a whole, persecution. He also maintains that the Board should have considered documentary evidence showing a pattern of mistreatment of Palestinian males.

[17] In fact, the Board did address the question of the cumulative effect of Mr. Shaltaf's treatment in Palestine. It considered his most serious allegations of mistreatment, but concluded that his own conduct, his return to Palestine in 2005, indicated that he did not regard his treatment to that point as persecution. Thereafter, the most serious incident was being forced to bark like a dog but that, too, while humiliating, did not amount to persecution.

[18] I cannot see any error in the Board's treatment of this evidence. While the Board has an obligation to consider whether isolated incidents of discrimination amount, cumulatively, to evidence of persecution, Mr. Shaltaf's re-availment suggested an absence of subjective fear of persecution up to 2005. There was insufficient evidence, including in the documentary evidence, of persecution thereafter.

VI. Issue Two – Did the Board err in failing to consider the documentary evidence?

[19] The Board did not refer to any documentary evidence. That evidence was not particularly relevant to the issue of persecution given that the Board found an absence of subjective fear on Mr. Shaltaf's part. Documentary evidence would not have furthered his claim under s 96 of the *Immigration and Refugee Protection Act, SC 2001, c 27, [IRPA]* (see Annex for statutory references).

[20] However, that evidence would have been relevant to Mr. Shaltaf's s 97 claim. The Board did not carry out a s 97 analysis. It felt that, because Mr. Shaltaf could not meet the burden of proof under s 96, he could not meet the higher burden under s 97.

[21] While it is often the case that a s 97 analysis is pointless when a claimant has failed to make out a s 96 claim (*e.g.*, where the claimant is found not to be credible), that was not true here. Mr. Shaltaf's failure under s 96 was due in large part to the Board's finding that he lacked subjective fear. That finding did not dispose of the s 97 argument since the inquiry under s 97 is objective. Therefore, the objective documentary evidence could have nourished Mr. Shaltaf's s 97 claim. The Board should have conducted an analysis of that evidence, along with Mr. Shaltaf's testimony, to determine whether the standard of proof under s 97 had been met.

VI. Conclusion and Disposition

[22] The Board's decision regarding Mr. Shaltaf's claim of persecution under s 96 of IRPA was intelligible and transparent, and represented a defensible outcome based on the facts and the law. Therefore, it was not unreasonable. However, in the circumstances, the Board should have considered whether the documentary evidence supported Mr. Shaltaf's claim under s 97. I must, therefore, allow this application for judicial review in respect of s 97. Neither party proposed a question of general importance for me to certify, and none is stated.

JUDGMENT

THIS COURT’S JUDGMENT is that:

1. The application for judicial review is allowed in part;
2. The matter is referred back to a different panel of the Board to consider Mr. Shaltaf’s claim under s 97 of IRPA.
3. No question of general importance is stated.

“James W. O’Reilly”

Judge

Annex

Immigration and Refugee Protection Act, SC 2001, c 27

Loi sur l'immigration et la protection des réfugiés, LC 2001, ch 27

Convention refugee

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

- (a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or
- (b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

Person in need of protection

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

- (a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or
- (b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if
 - (i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,
 - (ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,
 - (iii) the risk is not inherent or

Définition de « réfugié »

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques:

- a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
- b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Personne à protéger

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

- a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
- b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
 - (i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
 - (ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
 - (iii) la menace ou le risque ne résulte

incidental to lawful sanctions,
unless imposed in disregard of
accepted international standards,
and
(iv) the risk is not caused by the
inability of that country to provide
adequate health or medical care.

(2) A person in Canada who is a member of a
class of persons prescribed by the regulations as
being in need of protection is also a person in
need of protection.

pas de sanctions légitimes — sauf
celles infligées au mépris des
normes internationales — et
inhérents à celles-ci ou occasionnés
par elles,
(iv) la menace ou le risque ne résulte
pas de l'incapacité du pays de
fournir des soins médicaux ou de
santé adéquats.

(2) A également qualité de personne à protéger
la personne qui se trouve au Canada et fait partie
d'une catégorie de personnes auxquelles est
reconnu par règlement le besoin de protection.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4348-11

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v
MCI

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**REASONS FOR JUDGMENT
AND JUDGMENT:** O'REILLY J.

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