

Federal Court



Cour fédérale

Date: 20120925

Docket: IMM-2287-12

Citation: 2012 FC 1124

Ottawa, Ontario, September 25, 2012

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

**LAMER KHAN, BIBI KHAMIDA,
SAEED LAMIR KHAN, AMIR KHAN
(A.K.A. AMIR LAMIR KHAN)**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] This proceeding is an application for judicial review of the negative decision of the Refugee Protection Division of the Immigration and Refugee Board [the Board] made on February 21, 2012, wherein the Board determined that the applicants were not Convention Refugees pursuant to Section 96 of the *Immigration and Refugee Protection Act*, [IRPA, the Act] nor persons in need of protection pursuant to Section 97 of the Act.

[2] The applicants seek an Order that the Board's decision be set aside and the matter be referred back to a differently constituted panel for a re-determination of the applicants' refugee claim.

1. Factual Background

[3] The applicants, Lamer Khan, his wife, Bibi Khan and two sons, Amir Khan and Saeed Khan, entered Canada on December 27, 2010 and claimed refugee protection from Afghanistan based on fear of persecution from the Taliban.

[4] The principal applicant, Lamer Khan, is an Afghan citizen who fled that country around 1980 to Pakistan. In Pakistan he married Bibi Khan, also from Afghanistan. In 1988, the principal applicant relocated to the United Arab Emirates [UAE] with a work visa and a fraudulent Pakistani passport. His wife and children joined him a few years later, also with fraudulent Pakistani passports. The fraudulent passports were subsequently renewed over the years because the family's information had been entered in the citizenship database in Pakistan. Several more children were born while the family resided in the UAE. As children of Afghan citizens, they are all Afghan citizens, although they obtained Pakistani passports. There are now 11 children in the family. Only two of the children accompanied their father and mother to Canada. The principal applicant indicated that he had sought visas for all family members but only four were issued. The remaining children, ranging in age from approximately 10 to 25, are in the UAE. One of the older sons is married and has three children of his own and is working in the UAE.

[5] The principal applicant was notified in November 2010 that his work permit in the UAE would not be renewed due to his age. This would result in the family not being able to remain in the UAE. Faced with the prospect of returning to Pakistan or Afghanistan, the four family members, who are the current applicants, sought refugee protection in Canada. The applicants' intention or goal was to be granted refugee status or found to be persons in need of protection and to then seek permanent resident status and to ultimately bring the other family members to Canada.

[6] The applicants used their Pakistani passports and the visas issued in the UAE to travel to Canada. At the first interview with immigration officials, however, they provided false names and indicated that they were smuggled into Canada and had no identification. They further indicated that they were originally from Afghanistan where they had a farm and that in around 2005 some of their children had been sent to Pakistan to be educated and that this resulted in threats from the Taliban to return the family to Afghanistan. Rather than do so, the family fled to Pakistan where they lived until making arrangements to come to Canada.

[7] Upon further inquiries, immigration officers noted that a family of the same description, with different names, but with the same birthdates, had arrived in Toronto on December 27, 2010 with Pakistani passports and visas issued in the UAE. After the immigration officers questioned the applicants about this similarity, the applicants provided different information which forms the basis of their claim for refugee status. The account provided at the first interview on January 6, 2011 and at the second interview on January 11, 2011 is recorded in detail in the Point of Entry [POE] notes.

[8] The information provided by the applicants, set out in each original Personal Information Form [PIF] in February 2011 and in their amended PIF in December 2011, and which was fully considered by the Board, alleges that while in the UAE, around 1996, the principal applicant began to receive calls from the Taliban demanding money. Similar threats were communicated via the principal applicant's uncle who remained in Afghanistan, including a letter sent around 2008, (a scanned copy of which was provided), threatening that the family should return to Afghanistan and join the jihad or be beheaded.

[9] The principal applicant had indicated in his first PIF that he began receiving threats from the Taliban in 1996. When further questioned about the dates he began to receive the threats, he indicated that in 1996 he did not receive threats directly, but was told from other people that the Taliban knew where he was and did not want him to educate his children. At the hearing before the Board, he indicated that in around 2006 he began receiving direct demands for financial support from the Taliban and death threats to the family, claiming the daughters should be burned because they were educated and the sons were American agents because they could speak English.

[10] The applicants did not advise authorities in the UAE of these threats, offering the explanation that they continued to feel safe as long as they could remain in the UAE and that they did not wish to draw attention to the fact that they were in the UAE with fraudulent Pakistani passports.

[11] Although the principal applicant had travelled to the United Kingdom in 2003 and to Canada in 2006, he offered the explanation that he did not claim refugee protection at that time

because he had status in the UAE and he held the hope that the Taliban would be defeated in Afghanistan and he could eventually return there safely.

2. The Decision Under Review

[12] The Board found that the claimants are not Convention refugees under Section 96 as they do not have a well founded fear of persecution in Afghanistan on any of the five Convention grounds. The Panel also found that the claimants are not persons in need of protection under Section 97 as, on a balance of probabilities, their removal to Afghanistan would not subject them personally to a risk to life or to a risk of cruel and unusual treatment or punishment, or to a danger of torture.

[13] In summary, the Board found that the claimants were not credible and, as a result, there was insufficient credible evidence to support their claim for refugee protection. The Board clearly stated that it found the claimants untruthful when they alleged that they were threatened by the Taliban in the UAE.

[14] The Board also assessed whether the applicants were persons in need of protection pursuant to Section 97 and did so without regard to the credibility findings which resulted in the Board's negative determination pursuant to Section 96 of the Act. The Board considered whether the profiles of the applicants would subject them to harm in Afghanistan. The Panel found that there was "not even a serious possibility that such would be the case".

[15] The Board noted that they regretted that the negative finding meant that the applicants' other family members could not join them in Canada, although, as Afghan citizens, the four applicants

would be able to stay in Canada indefinitely since removal is suspended for that country. The Board indicated that if it had humanitarian and compassionate jurisdiction, it would no doubt have exercised that discretion but, in the words of the Board, “its hands are tied”.

[16] It should also be noted that the Board made findings with respect to the citizenship of the applicants which the applicants submitted were illogical. The Board found that the applicants were citizens of Afghanistan by birth and that since coming to Canada had been issued new Afghan passports. However, the Board also noted that, based on the information included in the citizenship database of Pakistan, the applicants were citizens of Pakistan. While such comments appear inconsistent, and the Board clearly acknowledged that the applicants disagreed with this finding, it clearly stated that the claims had been decided on the basis of whether the claimants would be at risk in Afghanistan. The findings with respect to citizenship had no bearing on the Board’s assessment of the claim with respect to Section 96 or 97.

3. Standard of Review

[17] The Supreme Court of Canada, in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at para. 57, held that a standard of review analysis need not be conducted in every instance. Where the standard of review applicable to the particular question before the court is well settled by past jurisprudence, the reviewing court may adopt that standard of review.

[18] The jurisprudence post-*Dunsmuir* confirms that the appropriate standard of review applicable to credibility and plausibility assessments is that of reasonableness: *Saleem v Canada (Minister of Citizenship and Immigration)*, 2008 FC 389 at para. 13; *Malveda v Canada (Minister of*

Citizenship and Immigration), 2008 FC 447 at paras. 17-20; *Khokhar v Canada (Minister of Citizenship and Immigration)* 2008 FC 449 at paras. 17-20), *Lin v. Canada (Minister of Citizenship and Immigration)* 2008 FC 1052 at paras. 13-14 [*Lin*].

[19] The Board's analysis of credibility and plausibility is central to its role as trier of fact and that the Board's findings should be given significant deference: *Lin* at para. 13.

[20] As noted by O'Keefe J. in *Fatih v Canada (Minister of Citizenship and Immigration)*, 2012 FC 857 at para. 65 [*Fatih*], "It is well established that credibility findings demand a high level of judicial deference and should only be overturned in the clearest of cases (*see Khan v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1330, [2011] FCJ No 1633 at paragraph 30). As such, the Court should generally not substitute its opinion unless it finds that the decision was based on erroneous findings of fact made in either a perverse or capricious manner or without regard for the material before it (*see Bobic v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1488, [2004] FCJ No 1869 at paragraph 3)."

[21] The role of the court in judicial review where the standard of reasonableness applies is not to substitute any decision it would have made but, rather, to determine whether the decision of the Board "falls within 'a range of possible, acceptable outcomes which are defensible in respect of the facts and law' (*Dunsmuir* at para. 47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.": *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12.

4. Analysis

[22] The applicants submitted that the credibility findings were not reasonable in that the Board placed too much emphasis on the initial lie which then influenced its determinations of credibility with respect to all other matters.

[23] The applicants submitted that their explanations for the amendments to the PIF were not inconsistencies, rather additional information, and that the Board misapprehended the responses with respect to the letter sent by the Taliban to the principal applicant's uncle allegedly in 2008. Although the uncle indicated he received the letter in 2008, the applicants were not necessarily aware of it in 2008 and therefore any inferences drawn by the Board about why this letter was not mentioned in the amended PIF are not appropriate and should not impact on credibility.

[24] The applicants submitted that the Board unreasonably chose to accept some of the information provided while rejecting other information as not credible. They submitted that, where credibility is an issue, the Board has a basic obligation to make a clear and unmistakable finding that the claimant is or is not credible and give real reasons for its finding. The applicants further submitted that doubts about the credibility of some or all of the applicants' testimony do not relieve the Board from the responsibility of determining, based on all the evidence, whether the applicants are refugees.

[25] With respect to the Section 97 claim, the principal applicant emphasised that he claimed that his family would be at risk if returned to Afghanistan, not that he would be at personal risk, and that

the family would indeed be a displaced family, given that the children had never lived in Afghanistan, and could be singled out because they had been well educated (including the daughters) and spoke English.

[26] The applicants also submitted that the Board's finding that they were not persons in need of protection was illogical given the Board's observation that the applicants would not likely be removed from Canada to Afghanistan due to overall risk.

[27] The respondent submitted that the decision of the Board was reasonable. The Board had the full opportunity to assess the quality of the evidence and the credibility of the applicants in the written material and at the oral hearing and concluded, based on several factors, that the applicants were not credible.

[28] The respondent noted that the Board outlined its credibility findings in clear and unmistakable terms and provided many examples of where it found that the applicants were not credible, including the fraudulently obtained Pakistani passports, the change in the timeframe with respect to the undocumented threatening calls from the Taliban from 1996 to 2006, the changing justifications for not making refugee claims during the past trips to the United Kingdom and Canada in 2003 and 2006 respectively, the failure to report the alleged threats to the UAE government even though this government was itself opposed to the Taliban, the late mention and production of an unverifiable copy of an alleged threatening letter from the Taliban received by an uncle in Pakistan around 2008, and the failure to mention allegations relating to the education of the daughters in the original and amended PIF.

[29] Based on the totality of evidence, the respondent submitted that it was reasonable for the Board to conclude that the applicants had not met the burden of providing credible evidence to support their claim for refugee protection – i.e. that they had been threatened by the Taliban - or providing a reasonable explanation for the absence of such documents.

[30] With respect to the Section 97 claim, the respondent submitted that the Board put aside the credibility issues and objectively assessed whether the applicants were persons in need of protection and reasonably concluded they were not.

[31] In my view, the Board made clear and unmistakable findings with respect to the credibility of the applicants.

[32] With respect to the amendments made to the PIF, the jurisprudence has established that a Board may draw negative credibility inferences where important events or information is omitted and revealed only later and a reasonable explanation is not provided for their earlier inclusion: *Fatih* at para 66; *Adewoyin v Canada (Minister of Citizenship and Immigration)*, 2004 FC 905, [2004] FCJ No 1112 at para 18; and, *Guzun v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1324, [2011] FCJ No 1615 at para 18.

[33] In this case the Board found that the explanations for the principal applicant's failure to indicate why he did not make a refugee claim in 2003 or 2006, the inconsistencies in the dates and the nature of the threats, and his very late mention of the threats by the Taliban directed toward his

children, which he only raised at the oral hearing, were not satisfactory. The Board also found that the explanation offered by the principal applicant about why he provided a completely fabricated and “systemic lie” upon entering Canada given his stated desperation to flee to Canada to secure freedom and protection for his family to be “markedly unsatisfactory”. The principal applicant had indicated that he was advised by persons in the UAE to provide the false story.

[34] The Board is entitled to take into account omissions, differences and inconsistencies in the PIFs, Point of Entry [POE] notes and the oral testimony and to draw negative credibility findings: (*Lin* at para. 17).

[35] This Court has stated on several occasions that over reliance on POE notes in considering a claimant’s credibility may constitute a reviewable error: *Cetinkaya v Canada (Minister of Citizenship and Immigration)*, 2012 FC 8 at para. 51; *Wu v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1102 at para. 16. The POE notes are not intended to contain all the details of the claim. In this case, the Board relied on all the evidence, including the POE notes, which set out the first account by the applicants and which the board found to be totally fabricated. While the Board did not base its determination on the POE notes, the information provided was a consideration for the Board in assessing credibility which the Board fully acknowledged.

[36] With respect to the Section 97 claim, adverse credibility findings, which may be determinative of a claim pursuant to Section 96, are not necessarily conclusive of the Section 97 claim. The assessment under Section 97 requires the Board to consider objectively whether the applicants’ removal would subject them personally to a risk to their life or to cruel and unusual

treatment or punishment: *Jarada v Canada (Minister of Citizenship and Immigration)*, 2005 FC 409 at para. 26).

[37] The Board engaged in a separate and objective assessment of the Section 97 claim, without regard to the credibility concerns, and came to its conclusion based on the information considered that there was not even a reasonable possibility that the applicants, given their profile, would face a risk of harm from the Taliban if hypothetically returned to Afghanistan more than any other Afghans would face.

5. Conclusion

[38] As noted above, credibility findings of the Board are to be given a high degree of deference. It is not the role of the Court to substitute its view of the outcome.

[39] The decision of the Board is reasonable in that it falls within “a range of possible, acceptable outcomes which are defensible in respect of the facts and law: *Dunsmuir* at para. 47. The decision reached with respect to the Section 96 claim was based on credibility findings which were justified, transparent and intelligible.

[40] The Board made significant findings with respect to credibility which were set out in the clearest of terms. The Board noted that the various inconsistencies and omissions on their own may not have led to a finding that the principal applicant was not credible, but the fact that he had told a “totally fabricated” version of his story upon first arriving in Canada “was one huge lie which made such a finding not difficult.” The applicant “chose to make his first significant act in Canada a

systematic lie to the Government of Canada” and his explanation that he had been advised to do so to improve his chances of remaining in Canada and bringing his remaining family to Canada was “markedly unsatisfactory”.

[41] The Board noted that “because the claimant lied about so many things, the Panel cannot accept that he is telling the truth about the critical issue, that is, whether he was being threatened by the Taliban in the UAE as he said. He had very little persuasive corroborative evidence to back up his claims, but there were many credibility concerns which served to give reason to doubt his claims. Thus, the Panel simply does not believe the claimant was threatened as alleged.”

[42] With respect to the Section 97 claim, the Board assessed this objectively, without regard to the credibility concerns, and concluded that there was not even a reasonable possibility that the applicants, given their profile, would face a risk of harm from the Taliban if they were returned to Afghanistan, more than the risk of harm faced by other Afghans.

[43] While Counsel for the applicant suggested that such a finding is illogical given the Board’s observation that the applicants would not likely be removed to Afghanistan due to overall risk, the Board’s role was to determine the Section 97 claim, which it did, based on all the information considered.

[44] The Board noted that the documentation reviewed did not indicate that an ability on the part of the son to speak English would subject him or the family to persecution by the Taliban. The Board noted that the family would not be perceived as aligned with the West given that they had

lived in the UAE, which was an Islamic country. Nor would they be perceived as wealthy, despite having lived in the UAE, because the evidence was that the principal applicant was a truck driver with a modest income and a large family to support.

[45] The Board found that it was hypothetically possible that the Taliban could target anyone in Afghanistan, but that no persuasive evidence had been adduced that would show the applicant to be more of a hypothetical target than any other Afghan. The applicant had not expressed any public opposition to the Taliban. The Board found that he had not been threatened by the Taliban for refusing to support them while in the UAE and therefore that the Taliban would not likely remember his refusal and exact reprisals. While it was hypothetically possible that his sons could be forced into Madrasas (Islamic schools) or his daughters could be barred from school, no evidence had been presented that this was occurring to all or even most Afghan families and there was no evidence that it was “even a reasonable possibility” for the applicant’s family if they were to return to Afghanistan.

[46] The Board’s determination was based on the claim made by the principal applicant and his wife and two sons. However, the Board fully appreciated the impact of its negative decision on the whole family. The Board acknowledged that if the current applicants were not removed to Afghanistan, which the Board suggested would be the case regardless of its decision to deny the applicants’ claim for refugee protection, the family would not be easily reunited and there would be an impact on the remaining children in the UAE. The Board clearly understood that its decision would impact all family members – those still in the UAE who were not applicants and the four current applicants. The Board indicated that it regretted the outcome and that it did not have

humanitarian and compassionate discretion. It appears that the Board understood the sincere desire and motivation of the applicants to seek refugee status in Canada, but despite this understanding the Board could not ignore the several significant credibility concerns it had which resulted in its findings that there was no credible evidence to support their claim for refugee protection, nor could the Board find evidence to support that the applicants would face a risk to their life or of cruel or unusual punishment if returned to Afghanistan. The Board's findings demand a high level of deference and should only be overturned in the clearest of cases. This is not one of those cases. The Board's decision falls within a range of possible outcomes which are defensible in light of the facts and the law.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed; and
2. No serious question of general importance is certified.

"Catherine M. Kane"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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**REASONS FOR JUDGMENT
AND JUDGMENT:** KANEJ.

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