

Federal Court



Cour fédérale

Date: 20121130

Docket: IMM-4241-12

Citation: 2012 FC 1401

Vancouver, British Columbia, November 30, 2012

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

FARID KAAKER

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The Applicant is an Afghan citizen seeking judicial review of a decision of the Refugee Protection Division [RPD] of the Immigration and Refugee Board wherein he was found not to be a Convention refugee or a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. According to the Applicant, the RPD was unreasonable in: (i) finding that a document he submitted was not credible; (ii) determining that

he was not a Convention refugee on the political opinion grounds due to his former employment; and (iii) applying the generalized risk exception.

II. Judicial Procedure

[2] This is an application under subsection 72(1) of the *IRPA* for judicial review of the RPD's decision dated February 6, 2012.

III. Background

[3] The Applicant, Mr. Farid Kaaker, is an Afghan citizen who, since 1989, has worked with non-government organizations [NGOs] to provide aid and humanitarian assistance.

[4] In 1998, the Applicant began work with an NGO named Sanayee Institute of Education and Learning [SIEAL] in Pakistan and Harat, Afghanistan.

[5] In 2001, Taliban authorities interrogated, threatened and beat the Applicant ordering that SIEAL cease activities. The Applicant was secretly airlifted out of Pakistan.

[6] In March 2002, the Applicant and his family returned to Afghanistan where he worked for SIEAL to deliver programs for the new government.

[7] In 2007, the Applicant helped create and maintain a microloan program that was controversial because many considered it contrary the Islamic prohibition on interest.

[8] On August 14, 2008, the Applicant resigned from his position due to this controversy and a dispute over wages paid to cleaning staff and attempted to run a small business.

[9] In December 2009, the Applicant began to receive threatening phone calls accusing him of working with foreigners and violating the Islamic prohibition on interest.

[10] On January 8, 2010, the Applicant's vehicle was shot at and a passenger, his brother-in-law's son, was killed.

[11] On January 18, 2010, the claimant alleges that he received a shabnameh [night-letter] warning him that he would be killed for charging interest and spreading Christianity.

[12] On February 25, 2010, the Applicant arrived in Canada claiming refugee protection.

IV. Decision under Review

[13] The RDP determined that: (i) the Applicant was not a Convention refugee because the night-letter was not credible and because his status as a former employee of an NGO was distinguishable from that of a current employee; and, (ii) his business ownership and perceived wealth did not show a personalized risk under section 97 of the *IRPA*.

[14] The RPD accepted that the Applicant was an Afghan citizen who worked for SIEAL and its successors from February 1999 to August 2008, he received threatening phone calls in December 2009, and his brother-in-law's son was killed on January 8, 2010.

[15] The RPD did not accept that the Applicant was a Convention refugee on the basis of political opinion under section 96 of the *IRPA*. Nor could he establish that his profile as a former NGO employee was a Convention ground. While the RPD accepted that persons currently working for NGOs were at risk in Afghanistan, his situation was distinguishable because he had formerly worked for an NGO. The RPD did not find that he had been targeted by the Taliban for participating in SIEAL's microloan program. The RPD reasoned that the threats against him began in December 2009, over a year after he left SIEAL, and that he had not experienced threats from the Taliban while working on the microloan program. The night-letter did not link the threats to his employment because the RPD did not consider it to be credible. The RPD also noted documentary evidence that night-letters generally aim to compel NGO employees to resign from their positions and that, since the Applicant had already resigned from SIEAL, it was less likely that he would receive a night-letter.

[16] The RPD doubted the credibility of the night-letter because notes by the Canada Border Services Agency [CBSA] Officer who interviewed the Applicant upon arrival [initial interviews] did not show that the Applicant referred to the night-letter or identified the Taliban as his agent of persecution. The RPD considered these omissions to be serious.

[17] The RPD summarized the course of the initial interviews thus: (i) on February 25, 2010, the Applicant stated that he faced dangers like all Afghans; (ii) on February 26, 2010, he stated that he did not know who had targeted him but mentioned the death and funeral of his nephew; (iii) on February 27, 2010, he stated that he did not know who targeted him but speculated that it was the government or the Taliban.

[18] The RPD found the initial interviews notes to be inconsistent with the Applicant's Personal Information Form [PIF] and the night-letter, both of which clearly identified the Taliban as the targeting party. His frustration at the initial interviews did not satisfactorily explain the inconsistency; nor did his ignorance as to the specific names of the people targeting him explain why he did not identify the Taliban in the initial interviews. Notwithstanding his stress at the initial interviews, it "d[id] not make sense that [he] would make no mention of the most recent contact from [his alleged] aggressors, particularly if [it] precipitated his flight" (RPD Decision at para 21). The night-letter's credibility was also impugned because the Applicant mentioned the December 2009 phone calls at the initial interviews but not the night-letter.

[19] The RPD rejected arguments that: (i) the initial interview notes were not necessarily a complete record of the initial interviews; and, (ii) a negative inference should not be drawn from failing to describe the night-letter in the initial interviews when the Applicant gave detailed information about it in his PIF statement shortly thereafter. On the first argument, the RPD found that the initial interview notes appeared comprehensive; that these notes mentioned the December 2009 phone calls but not the night-letter further suggested that the Applicant had not mentioned the night-letter in the initial interviews. In response to the second argument, the RPD reasoned that the PIF statement was made almost two months after the initial interviews.

[20] The RPD did not give weight to the alleged night-letter submitted to the RPD because there was documentary evidence that false night-letters can be purchased in Kabul and that the letter appeared to be a photocopy.

[21] The RPD found that the Applicant could not show that he was a person in need of protection for the purpose of section 97 of the *IRPA* because he faced a generalized risk. Citing *Guifarro v Canada (Minister of Citizenship and Immigration)*, 2011 FC 182, the RPD determined that the application for refugee protection by an individual who has been specifically targeted may be rejected if that individual faces a risk that “is shared by a sub-group of the population that is sufficiently large that the risk can reasonably be characterized as being widespread or prevalent” (at para 32).

[22] Applying *Guifarro*, the RPD found that the Applicant was a victim of extortion and kidnapping due to his perceived wealth. According to the RPD, extortion was the likely motivation for the December 2009 phone calls and the Applicant “faces a risk to life as a result of this targeting” (Decision at para 29). The RPD noted that the Applicant had stated at the initial interviews and in oral testimony that he was the victim of extortion given his perceived wealth.

V. Issues

- [23] (1) Was the RPD unreasonable in applying the generalized risk exception to the Applicant?
- (2) Was the RPD unreasonable in finding that the Applicant was not a Convention refugee on the grounds of political opinion due to his former employment by an NGO?
- (3) Did the RPD make an unreasonable credibility finding on the night-letter?

VI. Relevant Legislative Provisions

[24] The following legislative provisions of the *IRPA* are relevant:

Convention refugee

Définition de « réfugié »

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

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) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(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,

(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) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

Person in need of protection

(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.

Personne à protéger

(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.

VII. Position of the Parties

[25] The Applicant states that he is a person in need of protection under section 97 of the *IRPA* and that the generalized risk exception does not apply to him.

[26] The Applicant claims that a claimant who has been specifically targeted is not within the generalized risk exception, even if he or she faces risks experienced generally by a subgroup. The Applicant, citing *Guerrero v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1210, argues that the RPD should have asked the following in applying the generalized risk exception: (i) What, expressly, is the claimant's risk?; (ii) Is that risk a risk to life or a risk of cruel and unusual treatment or punishment?; and, (iii) What is the basis for the risk? In assessing a claimant's individualized risk, one must not "conflate the reason for the risk with the risk itself" (at para 28-29).

[27] The Applicant submits that the RPD failed to assess his individualized risk because it focused on the reason that the Applicant was persecuted, extortion, and not his specific risk itself, the December 2009 phone calls and armed attack on his car.

[28] The Applicant also submits that he is a Convention refugee on the grounds of political opinion and that the RPD should not have distinguished current and former employees of NGOs in deciding if he was a Convention refugee on this ground.

[29] First, the Applicant argues that the distinction leads to an absurd result because a current NGO employee who claims refugee protection in Canada but returns without being employed by an NGO in the interim is also a former employee of an NGO.

[30] Second, the distinction also requires documentary evidence on a highly specific fact matrix, the targeting of former employees of NGOs in Afghanistan. Citing *Khodabakhsh v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1340, 382 FTR 105 and *King v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1120, 240 FTR 8, the Applicant asserts that this imposes the unreasonable and excessive burden of adducing documentary evidence corresponding exactly to his own situation.

[31] Third, the Applicant argues that the distinction assumes that the Taliban only persecutes employees of NGOs to compel them to cease working for NGOs. The RPD should instead have asked if a political opinion (aligning the Applicant with the current regime and international community and/or against Islamic practices) could be imputed to him, given his work history. The Applicant contends that assuming that the Taliban only persecutes employees of NGOs to compel them to cease work presumes that the Taliban always acts in a rational manner. Citing *Yoosuff v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1116, the Applicant argues that the RPD was unreasonable to ascribe rationality to a terrorist group like the Taliban.

[32] Finally, the Applicant argues that the RPD's negative credibility finding on the night-letter is unreasonable because the initial interview notes are not trustworthy. The night-letter's credibility was impugned not due to an internal inconsistency in his testimony but due to an external

inconsistency with other evidence (the initial interview notes). Citing *Cooper v Canada (Minister of Citizenship and Immigration)*, 2012 FC 118, the Applicant argues that external inconsistencies must be “predicated [on] trustworthy [evidence] (at para 4).

[33] The Applicant submits that the notes from the initial interviews are not trustworthy because: (i) refugee claimants (as this Court has acknowledged in *Cooper*) generally distrust authorities on first arrival and may not be candid; (ii) the Applicant repeatedly expressed discomfort at the initial interviews; (iii) there is no audio record for the initial interviews to demonstrate the accuracy of the notes; (iv) an interpreter was used at the initial interviews and the absence of an audio record makes it difficult to audit the interpretation; (v) the initial interviews occurred two years before the Applicant’s hearing before the RPD where he testified that he did not remember if he discussed the night-letter; (vi) the statutory declaration in which the notes to the initial interview are posed does not comply with formalities required for sworn oaths.

[34] Finally, the Applicant argues it was unreasonable for the RPD to find that the night-letter was not credible on the basis of evidence that similar documents could be purchased in Afghanistan. The Applicant cites *Leon v Canada (Minister of Citizenship and Immigration)*, 2009 FC 290 for the proposition that the RPD may not make a negative credibility finding on documents merely on the basis of evidence that fraudulent documents were readily available in a claimant’s country of citizenship.

[35] The Respondent submits that the RPD was reasonable to apply the generalized risk exception. Citing *Guifarro*, above, *Prophète v Canada (Minister of Citizenship and Immigration)*,

2008 FC 331, aff'd 2009 FCA 31; *Sanchez v Canada (Minister of Citizenship and Immigration)*, 2011 FC 993, *Mancia v Canada (Minister of Citizenship and Immigration)*, 2011 FC 949, and other jurisprudence by this Court, the Respondent argues that a claimant previously targeted and fearing future targeting has a generalized risk if a subgroup experiences that risk generally.

[36] According to the Respondent, *Guerrero*, above, is distinguishable because the decision-maker in that case failed to accurately and specifically identify the alleged risk before finding that it was generalized. The Respondent submits that the RPD's decision is consistent with the general thrust of *Guerrero* because it conducted an individualized analysis, identifying the risk as one of extortion and threats of kidnapping that was a risk to his life and based on his perceived wealth.

[37] The Respondent also submits that the RPD was reasonable to distinguish current and former employees of NGOs in determining if the Applicant was a Convention refugee. The RPD did not place too high a burden on the Applicant in requiring evidence on the targeting of former employees of NGOs: (i) it is the Applicant who has the onus of establishing persecution; and, (ii) the RPD is not required to speculate on this issue. The Respondent distinguishes *Khodabakhsh*, above, because the decision-maker in that case required evidence of greater specificity than that required in this case and *King*, above, on the basis that the decision-maker in that case required corroboration of otherwise presumptively credible evidence.

[38] The Respondent argues that the RPD was reasonable to conclude that the documentary evidence showed that the Taliban targeted employees of NGOs to compel them to cease working and that the Applicant (having already ceased to work for an NGO) consequently did not fall within

the risk profile of an employee of an NGO. According to the Respondent, the Applicant's argument that terrorist groups should not always be presumed to act rationally does not speak to whether a former employee falls within the same risk profile as a current employee of an NGO.

[39] The Respondent submits that it was reasonable to conclude that the night-letter was not a credible document because, according to the initial interview notes, the Applicant did not mention the night-letter at the initial interviews and did not identify the Taliban as his persecutors. Citing *Chen v Canada (Minister of Citizenship and Immigration)*, 2005 FC 767 and *Moscol v Canada (Minister of Citizenship and Immigration)*, 2008 FC 657, the Respondent argues that the RPD may come to a non-credibility finding on the basis of an inconsistency between an applicant's testimony and his or her statements on arrival in Canada. The Respondent distinguishes *Leon*, above, because the decision-maker in that case rejected the fraudulent documents solely on the basis of evidence that it was easy to obtain false documents in the claimant's home country. By contrast, the RPD considered additional factors.

[40] The Respondent also characterizes the Applicant's challenge to the RPD's findings on the night-letter as purely a disagreement with the weight the [RPD] gave to the night letter.

[41] The Applicant replies that the RDP stated that the night-letter lacked credibility, predicating its conclusion on the omission of the night-letter in the initial interviews notes and documentary evidence that such letters could be purchased in Afghanistan. The Applicant contends that *Leon*, above, is not distinguishable because the decision-maker in that case also made a non-credibility

finding based on an inconsistency between the claimant's testimony and statements on arrival in Canada.

VIII. Analysis

Standard of Review

[42] Whether the RPD unreasonably applied the generalized risk exception is a question of mixed fact and law reviewable on the standard of reasonableness (*Olvera v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1048. This standard also applies to whether the Applicant was a Convention refugee on the grounds of political opinion (*Beltran (Litigation Guardian of) v Canada (Minister of Citizenship and Immigration)*, 2012 FC 275 and the RPD's negative credibility assessment (*Masango v Canada (Minister of Citizenship and Immigration)*, 2011 FC 563).

[43] Since the standard of reasonableness applies, the Court may only intervene if the Board's reasons are not "justified, transparent or intelligible". To satisfy this standard, the decision must also fall in the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

(1) Was the RPD unreasonable in applying the generalized risk exception to the Applicant?

[44] The Applicant claims that he is a person in need of protection under section 97 of the *IRPA*. Consequently, he must show, on a balance of probabilities, that removing him to Afghanistan would subject him personally, in every part of Afghanistan, to a risk to his life or cruel and unusual treatment. Under the generalized risk exception, section 97 of the *IRPA* will not apply to the Applicant if he faces a risk that is faced generally by other individuals in or from Afghanistan.

[45] The jurisprudence of this Court is consistent on the point that a risk may still be general, even if felt disproportionately by a large subgroup of a population (*Prophète*, above, at para 3 and 10). The RPD was reasonable in taking the position that an individual can be a member of a subgroup that generally experiences extortion and threats of kidnapping at an elevated level due to his/her perceived wealth or business ownership (*Prophète*, above, at para 13).

[46] *Olvera*, above, however, observes that the jurisprudence of this Court is “less settled” on whether a person who has already been personally targeted for extortion faces a generalized risk (at para 37). *Olvera* observes that one branch of the jurisprudence has found that a claimant who has been specifically targeted may nonetheless face a generalized risk if he belongs to a subgroup that experiences that risk generally at a heightened level (*Acosta v Canada (Minister of Citizenship and Immigration)*, 2009 FC 213). By contrast, another branch has found that it would be unreasonable to accept that a claimant has been specifically targeted “and in the same breath surmise” that such a claimant would not be exposed to a personal risk (*Pineda v Canada (Minister of Citizenship and Immigration)*, 2007 FC 365 at para 15).

[47] In *Olvera*, this Court agreed with *Portillo v Canada (Minister of Citizenship and Immigration)*, 2012 FC 678, where Justice Mary Gleason held that it was unreasonable for the RPD to find that a refugee claimant who had been personally threatened by a criminal gang faced a risk of general criminality simply because criminal violence was rampant in the applicant’s country of citizenship. In *Portillo*, Justice Gleason stated that “[i]t is simply untenable” for the RPD to accept that a claimant has been personally targeted and to simultaneously take the position that that claimant’s risk is not personal, concluding that “if an individual is subject to a *personal* risk to

his life or risks cruel and unusual treatment or punishment, then that risk is no longer general”
(at para 36).

[48] In *Portillo*, Justice Gleason proposed the following test for determining if a refugee claimant faces a personal or general risk. First, the decision-maker must ask if the claimant “faces an ongoing or future risk ... what the risk is, whether such risk is one of cruel and unusual treatment or punishment and the basis for the risk”. Second, the risk must be compared to “that faced by a significant group in the country to determine whether the risks are of the same nature and degree”
(at para 40-41).

[49] In continuing to follow the approach taken in *Portillo*, this Court adopts the rationale for this approach given in *Olvera*, above:

[40] ... Firstly, it is problematic to accept that a person who has been specifically targeted faces a risk that is faced generally by other individuals. The risk of an individual who is being targeted is qualitatively different from the risk of an individual who has a strong likelihood of being targeted. As such, the former cannot be faced generally. Secondly, the approach taken by the Board seems to empty section 97 of the IRPA of any application in the criminal context. As this Court has written in *Lovato v Canada (Minister of Citizenship and Immigration)*, 2012 FC 143, "section 97 must not be interpreted in a manner that strips it of any content or meaning. If any risk created by 'criminal activity' is always considered a general risk, it is hard to fathom a scenario in which the requirements of section 97 would ever be met" (at para 14).

[50] In the present case, the RPD accepted that the Applicant “faces a risk to life” because he was targeted for extortion (Decision at para 10). The RPD accepted that the Applicant received telephone calls in December 2009 “stating that he had gained a lot of money and that he could be kidnapped” and that “he was rich and that they would get money from him” (at para 29). Finally,

the RPD accepted that the Applicant's car was attacked while he was driving and that this attack resulted in the death of his brother-in-law's son.

[51] The RPD was unreasonable in applying the generalized risk exception to the Applicant when it had accepted that the Applicant had been personally targeted for extortion and kidnapping. The RPD cannot reasonably determine that a claimant faces a risk to his life and simultaneously find that his risk was generalized because criminal extortion and kidnapping is rampant in Afghanistan.

(2) Was the RPD unreasonable in finding that the Applicant was not a Convention refugee on the grounds of political opinion due to his former employment by an NGO?

[52] Since this Court has decided this matter under section 97 of the *IRPA*, it is not necessary to consider whether the RPD was unreasonable in finding that the Applicant was not a Convention refugee under section 96 of the *IRPA* on the grounds of political opinion due to his former employment by an NGO.

(3) Did the RPD make an unreasonable credibility finding on the night-letter?

[53] The RPD only challenged the Applicant's credibility on the night-letter. The night-letter is probative of the question of whether the Applicant was a Convention refugee on the grounds of political opinion. Although it might have had some bearing on whether the Applicant was a person in need of protection under section 97 of the *IRPA*, the RPD unequivocally accepted that the Applicant faced a risk to his life. Consequently, it is not necessary to assess the reasonability of the RPD's credibility finding on the night-letter to dispose of this matter under section 97 of the *IRPA*.

IX. Conclusion

[54] For all of the above reasons, the Applicant's application for judicial review is granted and the matter is returned for determination anew (*de novo*) before a different decision-maker.

JUDGMENT

THIS COURT ORDERS that the Applicant's application for judicial review be granted and that the matter be returned for determination anew (*de novo*) before a different decision-maker. No question for certification.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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