

Federal Court



Cour fédérale

Date: 20181011

Docket: IMM-772-18

Citation: 2018 FC 1019

Toronto, Ontario, October 11, 2018

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

BEHZAD POOYA

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant seeks judicial review of the January 30, 2018 decision [Decision] of the Refugee Protection Division [RPD, Board] under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] rejecting his claim for Convention refugee or protected status. I will allow this application for the reasons that follow.

II. Background

[2] The Applicant, a 30-year old citizen of Afghanistan, travelled to Canada using another person's permanent resident [PR] card and a fake passport, arriving in August 2012. He based his claim on being targeted due to his work with women and on women's issues in Afghanistan.

[3] According to the claim, he and several other students at the Social Education University in Kabul formed an organization called the Education Scientific Research Organization [ESRO]. After his graduation in 2011, the Applicant continued working with the ESRO, which focused on women's rights, and completing a project that involved spreading awareness of women's health issues through brochures and workshops. The Applicant states that he also assisted ESRO in making proposals for other projects relating to women's rights.

[4] In early August 2012, his parents called, warning him not to come back to the house because men had come looking for him, assaulted his parents, and said that they did not want to see the Applicant around. The Applicant thinks they were Taliban, who believe he violated Islamic tradition by working with women who are not his relatives. The Applicant never returned home, making his way to Canada.

III. Decision under review

[5] The Board held that the Applicant had not proven on a balance of probabilities that he was a Convention Refugee or a person in need of protection because he had not established his profile as a man who worked with women to promote women's rights. The Board found

insufficient credible evidence to establish the role in the ESRO he claimed to have, despite finding him to have provided “generally straightforward testimony”.

[6] The Board discounted a number of the Applicant’s documentary materials, including a copy of ESRO’s licence, the certificate for its first project completion, photographs, and a supporting letter, finding they did not explicitly link the Applicant to a specific role within ESRO. The Board considered the documents’ failure to name the Applicant to be significant, because the Applicant “relied on them heavily”. The tribunal concluded that it would have been reasonable for the Applicant to provide other documents to prove his role.

[7] The Board also found an overall lack of credibility due to (i) the Applicant’s description of how he acquired a Canadian PR card, and (ii) the Applicant inaccurately denying having family or friends in Canada when he presented himself at the Port of Entry.

[8] On the first point, the Applicant’s wrote in his Personal Information Form [PIF] that before the threatening phone call, he had noticed that his cousin, who was visiting Afghanistan from Canada, had another person’s PR card. The Applicant claimed that he used that card to enter Canada.

[9] Later, at his refugee hearing, the Applicant first stated (consistent with the story in his PIF) that he had noticed the PR card in his cousin’s pocket. He then responded to further questions about the card by saying that he noticed it when his cousin went to buy groceries, and

took out his wallet to pay. The panel found that his story evolved over time to address its initial implausibility.

[10] The panel also raised credibility concerns because the Applicant told the Port of Entry official that he had no relatives in Canada. However, the cousin who allegedly provided him with the PR card was in fact also a PR of Canada.

IV. Issues and Standard of Review

[11] While the Applicant raised several issues, the following two are determinative of the outcome:

- A. Did the Board draw an unreasonable adverse credibility finding against the Applicant on the basis of collateral details (i.e. the PR card, no family in Canada)?
- B. Did the Board make an unreasonable plausibility finding against the Applicant for failing to provide “corroborative evidence” regarding his role in ESRO, and otherwise fail to properly consider the evidence presented?

[12] The parties agree that the standard of review for the decision is reasonableness. Negative credibility findings by the RPD are reviewed by this Court on a reasonableness standard (*Thevarajah v Canada (Citizenship and Immigration)*, 2018 FC 458 at para 7).

V. Analysis

- A. *Did the Board draw an unreasonable adverse credibility finding against the Applicant on the basis of collateral details (i.e. the PR card, no family in Canada)?*

[13] The Applicant submits that the Board unreasonably impugned his credibility by its focus on peripheral details – his acquisition of the PR card for travel to Canada, and denial of having relatives in Canada at the border.

[14] The Applicant argues on the first point that the supposed discrepancy in his testimony was actually an elaboration of his initial explanation of how he noticed that his cousin possessed another person's PR card, namely, that it was in his cousin's pocket. He submits that adverse findings based on omissions should only be made when the omissions are central to a claim, not collateral details such as failing to mention details of how he noticed that the cousin's card was in his pocket once he removed his wallet in the grocery store.

[15] The Respondent counters that the Court owes deference to the Board's credibility determination based on the evolving story of the PR card, which the Board had good reason to question due to its transformation from the PIF through to the Applicant's ultimate responses at the hearing. The Respondent submits that the Board thus properly relied on inconsistencies and omissions in the applicant's narrative in coming to its credibility determination.

[16] I am persuaded by the Applicant's position: the Board placed undue importance on the collateral details of how he made his way to Canada and the omission of details in his PIF. Starting with the PIF, the instructions on the version of the refugee application form which existed at the time of this 'legacy' claim of September 2012 stated:

On the following 2 pages, set out in chronological order all the significant events and reasons that have led you to claim refugee protection in Canada. Indicate the measures taken against you and members of your family, as well as against similarly situated

persons, and by whom these measures were taken. Include dates wherever possible.

[17] None of the other instructions that follow this lead instruction required details as to how exactly the person obtained the documents that enabled them to exit their country or enter Canada. The Applicant devoted three full paragraphs of his PIF narrative to how he obtained his cousin's roommate's PR card and travelled to Canada with it.

[18] The law is clear that contradictions and omissions in a claimant's evidence can reasonably lead to negative credibility findings (*Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 at para 43). However, the RPD should be concerned by material, not collateral, details or omissions from a claimant's PIF (*Feradov v Canada (Citizenship and Immigration) [Feradov]*, 2007 FC 101 at para 18). As Justice Barnes wrote in *Feradov*, while "the failure to mention material or key allegations of persecution in one's PIF is a reasonable basis for concern, the omission of peripheral detail is not". Thus, the reasonability of the Board's adverse credibility finding in this case turns in part on the significance of the identified inconsistencies.

[19] The Applicant's added description at the hearing, was additional detail as to how he travelled to Canada, after having been asked to expand on his PR card explanation, first by the Board member, and then by counsel. That the PR card had been in his cousin's pocket which he saw when his cousin took out his wallet to pay for groceries, is, in my view, a peripheral detail not related to the basis of claim relating to the Applicant's involvement with women's education in Afghanistan.

[20] It was accordingly unreasonable to fault the Applicant for not providing these collateral details up-front in the PIF, the instructions for which neither requested nor required them. The Board member thus, in my view, drew an unreasonable credibility finding based on responses to questions asked at the hearing to elicit more details regarding the PR card and how the Applicant came to be aware of it being in his cousin's pocket.

[21] Second, the Board impugned the Applicant's credibility in his response to officials at the Port of Entry that he did not have friends or family in Canada. However, he later conceded that he had a cousin in Canada. Similar to the PR card issue, this is also a collateral point to the refugee determination. When asked by the Board why he failed to provide a truthful response, the Applicant pointed out that he was anxious about entry and did not want to "create any problem" for his cousin. The Board, however, must be cautious of adverse credibility findings with respect to apprehension at the port of entry. As Justice Martineau stated in *Lubana v Canada (Minister of Citizenship & Immigration)*, 2003 FCT 116:

11. However, not every kind of inconsistency or implausibility in the applicant's evidence will reasonably support the Board's negative findings on overall credibility. It would not be proper for the Board to base its findings on extensive "microscopic" examination of issues irrelevant or peripheral to the applicant's claim: see *Attakora v. Canada (Minister of Employment & Immigration)* (1989), 99 N.R. 168 (Fed. C.A.) at para. 9 ("Attakora"); and *Owusu-Ansah v. Canada (Minister of Employment & Immigration)*, [1989] F.C.J. No. 442 (Fed. C.A.) ("*Owusu-Ansah*"). In particular, where a claimant travels on false documents, destroys travel documents or lies about them upon arrival following an agent's instructions, it has been held to be peripheral and of very limited value to a determination of general credibility: see *Attakora*, supra; and *Takhar v. Canada (Minister of Citizenship & Immigration)*, [1999] F.C.J. No. 240 (Fed. T.D.) at para. 14 ("*Takhar*").

...

13. In evaluating the applicant's first encounters with Canadian immigration authorities or referring to the applicant's Port of Entry Statements, the Board should also be mindful of the fact that "most refugees have lived experiences in their country of origin which give them good reason to distrust persons in authority": see Prof. James C. Hathaway, *The Law of Refugee Status*, (Toronto: Butterworth, 1991) at 84-85; *Attakora*, supra; and *Takhar*, supra.

[22] In sum, I find that the Board erred in unreasonably finding the Applicant not to be credible due to explanations that related to collateral matters regarding entry to Canada, which he later explained. These credibility findings were central to the refusal, tainting the entirety of the Applicant's testimony, and do not sit comfortably with the Board's comment that the Applicant was straightforward in his testimony.

[23] Furthermore, these negative credibility findings appear to also have infected the other finding upon which the Board rejected the claim, namely the failure to provide corroborative evidence tying him to ESRO, as will be explained next.

B. *Did the Board make an unreasonable credibility finding against the Applicant for failing to provide corroborative evidence?*

[24] The Board found a lack of corroborative evidence, in that neither the ESRO licence, nor its certificate, established his membership or role in that organization, because the documents do not name him. The Board also placed little weight on a supporting letter from the Applicant's ESRO colleague, because it was vague on details of the role that the Applicant played in ESRO. Finally, the Board discounted photographs he presented of an ESRO workshop.

[25] The Applicant argues that evidence must be addressed for what it says and portrays, not dismissed for what it does not. The Respondent disputes this argument, saying the Board made an appropriate sufficiency of evidence finding.

[26] Going back to first principles, refugee claimants are not required to provide corroborative evidence unless there are valid reasons to question a claimant's credibility. This is because when a refugee claimant swears the truth of certain allegations, there is a presumption that those allegations are true, unless there is reason to doubt their truthfulness (*Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 at para 5, [1979] FCJ No 248 (QL) (CA) [*Maldonado*]).

[27] The *Maldonado* presumption of truthfulness can thus be rebutted by contradictory evidence or findings that the testimony lacks credibility or plausibility (see for instance: *Ismaili v Canada (Citizenship and Immigration)*, 2014 FC 84 at para 36). Otherwise stated, there is no general requirement for corroboration and a panel cannot make a credibility finding based on the absence of corroborative evidence alone (*Ndjavera v Canada (Citizenship and Immigration)*, 2013 FC 452 at para 6).

[28] Here, because of the Decision's unreasonable credibility findings based on collateral considerations (see Issue A above), the Board's findings of insufficient corroborative evidence of the Applicant's role in ESRO are infected from the outset. I will nonetheless point out weaknesses of the Board's findings about lack of corroborative evidence, independent of Issue A and the *Maldonado* presumption.

[29] First, I agree that it was unreasonable for the Board to draw a negative inference because the Applicant was not named in the ESRO license or certificate presented. These documents related to ESRO funding and projects, and there was no reason that they should have specifically mentioned the Applicant's name, as they concerned the organization itself.

[30] Second, the Board also dismissed a photograph of the Applicant which had been provided as support for the Applicant's involvement in ESRO. While the photograph, as the Board observed in its Decision, only depicts the Applicant, it appears to have been taken at the same time and place as a series of photographs that showed a group of women being instructed in a classroom setting. Specifically, the photograph of the Applicant has simultaneous time and date stamps, and the same backdrop, as the others, i.e. depicting a whiteboard and banner with the logo of the organization that sponsored ESRO, which also appears in the ESRO certificate. The Board concluded that:

...with regard to the photograph where the claimant is pointing to a wall chart, the panel notes that the claimant appears to be the only person in the room. Thus, it cannot be inferred from this photograph that he was addressing the group of women, or indeed, anyone at all. Accordingly, the photograph does not support a finding that the claimant had the role in the organization he alleged.

[31] While entirely correct that the photograph only shows the Applicant, the Board should have at least addressed the similarities with the other photographs of the women at a workshop, and explained why those other photographs, and their apparent connection to ESRO, bore no relevance to him. Had the Board, for instance, doubted the validity of the other photographs, or otherwise believed the Applicant's photograph was not genuine, it should have provided an explanation.

[32] The law is clear that failure to analyze the relevant contrary aspects of such evidence may constitute an error (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), [1998] FCJ No 1425 (QL), 157 FTR 35 at para 17). It is insufficient for the Board to simply mention contrary evidence. Here, the Board made an error in unreasonably failing to analyze contradictory evidence, which may well have resulted from the fact that the collateral findings regarding the PR card and cousin, infected the remainder of the evidence.

VI. Conclusion

[33] Reasonableness requires a decision to demonstrate justification, transparency, and intelligibility, and fall within the range of possible, acceptable outcomes defensible in fact and law. I do not feel the Board met that mark in this case. Without making a finding on the Applicant's relationship to the ESRO, I find that the Board erred in its credibility findings by focusing on collateral details, which then affected its finding regarding corroborative evidence. The Board also failed to address certain contradictory evidence. The application will accordingly be granted. No questions for certification arise.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted.
2. The matter is remitted to the Board for redetermination by a different panel.
3. No questions for certification were argued, and none arose.
4. There is no award as to costs.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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