

Federal Court



Cour fédérale

Date: 20101231

Docket: IMM-2246-10

Citation: 2010 FC 1340

Ottawa, Ontario, December 31, 2010

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

KHALEGH KHODABAKHSH

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction and background

[1] The Refugee Protection Division (the tribunal) rejected on April 1, 2010 the claim for asylum made by the Applicant, now 88 years of age, and a citizen of Iran. He sought the protection of this country while he and his wife were visiting their two daughters in Canada. While visiting, their daughter Farah, the Applicant received a telephone call from another daughter, Mahnaz who lives in Tehran. She informed her father she had received a visit from the Iranian authorities who

ordered her to tell her father, when he returned to Iran, he must bring Farah with him, but did not say why nor did the Iranian authorities inform Mahnaz what would happen to him should he return without her. During that telephone conversation, Mahnaz would have also informed her father the authorities were in his home twice had been asking his neighbours where he was.

[2] The couple made a refugee claim in June 2007 but, unfortunately, the Applicant's wife died of cancer in Germany before their joint claim was heard. At the Applicant's asylum hearing both the Applicant and Farah testified but with Farah excluded when her father was giving his testimony. He was present during Farah's testimony.

[3] The tribunal found that neither the father nor his daughter were credible. His story was not believed. The tribunal did not believe the substance of the Applicant's fear which centered on the fact that Farah had converted to the Baha'i faith before Farah left Iran in the 1980's, conversion contrary to Iranian law, and because of this, he feared arrest, detention and interrogation. Farah's evidence also centered her assertion that before she left Iran in the 1980's she had rented an apartment to an Iranian Baha'i leader who had recently been arrested with six others in Tehran on February 2009 and were currently on trial for espionage. That fact fuelled the Applicant's fear of what would happen to him if he did not return to Iran with Farah.

II. The tribunal's decision

[4] After setting out the Applicant's fear, the tribunal began its analysis by stating:

[11] The main issue raised in this claim is that of the credibility of the claimant. I find that there is reason to doubt the claimant's truthfulness. In particular, I noted contradictions, inconsistencies

and/or omissions in the claimant's evidence. The explanations provided by the claimant were not satisfactory in resolving these.

[12] There were significant discrepancies between the testimony of the claimant and that of his Baha'i daughter, Farah, which gave me reason to doubt the truthfulness of this claimant's claim.
[Emphasis added]

[5] The tribunal noted three inconsistencies between the Applicant's testimony and that of his daughter:

- a. On the issue of when Farah converted, the Applicant stated she converted one year before she left Iran in the 1980's. He testified his neighbours knew of the conversion and "they would confront him with disgust". Farah, on the other hand, said she did not convert until 1989 when in Canada.
- b. On the issue of when the Applicant's wife was struck with cancer, the Applicant testified the illness was diagnosed in Iran before they came to Canada but Farah said her mother was diagnosed with cancer 6 to 7 weeks after her arrival here.
- c. On the issue of when the Applicant and Farah received the telephone call from Mahnaz, the Applicant indicated that phone call came after his wife left for Germany while his daughter said it came within a few weeks of their coming here and before she left for Germany.

[6] The tribunal ruled:

[18] Taken collectively, these differences would not be determinative of the credibility issue. Taken together, these discrepancies are significant and concern a substantial aspect of the basis upon which the claimant has based his claim. The significance of these discrepancies are particularly important in light of the fact that the critical parts of the evidence concerning 2009 events, which allegedly created the claimant's claim, are completely reliant upon

the testimony of the claimant as to what the other daughter in Iran had told them on one occasion about events which are otherwise wholly uncorroborated by any other source, documentary or otherwise. [Emphasis added]

[7] Before making this finding the tribunal had noted, although it was not mentioned in the PIF, Farah had testified it may have come to the attention of the Iranian authorities that before she left Iran many years ago, she had rented an apartment to an Iranian Baha'i leader who had been recently arrested with six others in Tehran in February 2009 and that she was wanted by the authorities on this account.

[8] During the hearing, counsel for the Applicant raised the issue that the differences between the testimonies were on account of his age. The tribunal said it was alert to this fact ruling his age was not a factor since “after over an hour of asking questions, it was clear to me that the claimant was especially alert for his age and, as his counsel put it later, “sharp”.

[9] The tribunal then stated:

[20] With this background of discrepancy, I must assess the reliability of the evidence about what had been alleged had happened in Iran in early 2009, events unobserved directly by either of the witnesses before me, based on hearsay from a daughter in Iran concerning one alleged meeting she had with Iranian authorities, uncorroborated by either telephone witness testimony from that daughter or any affidavit, statutory declaration, or letter from her confirming the allegations. Moreover, even the hearing of evidence of the daughter in Iran does not include any statement alleged to have been made by the Iranian authorities as to why they wanted the claimant to return with Farah or what would happen to him if he did not. Based on the entirety of the testimony, I find that the evidence of the claimant and his daughter is not credible or trustworthy. [Emphasis added]

[10] The tribunal embarked on the next step of its analysis stating “in addition to assessing the credibility of the subjective evidence of the claimant and Farah “I must also consider the objective evidence as represented by country reports”.

[11] The tribunal said counsel for the Applicant (who was different than counsel before me) was explicitly asked by it to refer the tribunal to:

Any objective evidence that would indicate any comparable situation as the situation which she posited as a lifelong Muslim, threatened by the Iranian authorities because of his daughter who had not been in Iran for over 20 years, had converted to the Baha’i faith in 1989 and a citizen in this country in 1992 and had been informed by his daughter in Iran the authorities ordered her to tell her father when he returned to Iran to bring with him Farah without saying what could happen to him if he failed to do so.
[Emphasis added]

[12] The tribunal noted counsel could not do so and “that she had tried hard” and added:

When asked if she could point to any example where a relative of an Iranian who had converted to Baha’i outside of Iran, never to return to that country, had ever been subjected to the persecution, risk or danger alleged by this claimant and she could not.

[13] The tribunal then made reference to the US DOS 2009 International Religious Freedom Report for Iran, official Baha’i sources and other leading human rights organisations report that more than 200 Baha’is had been killed since 1979 (when the Shah was deposed) and 15 had disappeared and were presumed dead. The report also said “at the end of 2009 at least 20 to 30 Baha’is remained in detention because of their religious beliefs”. The tribunal also noted this report indicated that “between 300,000 to 350,000 Baha’is live in Iran”. It concluded:

[25] While the report notes the unfortunate persecution of Baha’is, it (as do other country reports found in the National Document Package) does give a context of the limited occasions of the more

severe forms of persecution of Baha'is in Iran. If accepted as factual, over the last more than 30 years, less than 10 Baha'is per year have been killed. Only 20-30 of 300,000 to 350,000 are now in prison. These are actual adherents of the faith who live in Iran. The balance of the country reports contained in Exhibit 4.2 indicate that it is the leaders of the Baha'i in Iran that are most at risk.
[My emphasis]

[14] The tribunal next referred to Farah's testimony about the impact of her having rented an apartment to a Baha'i leader in the 1980's which had not being mentioned in the Applicant's PIF because according to her she Farah only recently found out the man had been arrested in February 2009. The tribunal ruled:

[...] Once again, there is nothing in the objective evidence to indicate that the Iranian authorities have ever pursued any person in any sort of similar situation who had provided anything so mundane as access to an apartment to a Baha'I leader over 25 years ago. I find that it is not probable that that is the case either with respect to Farah or the claimant. [Emphasis added]

[15] The tribunal's ultimate conclusion is expressed in these terms:

I cannot take from the objective evidence or the subjective testimony the conclusion that it is probable that the government of Iran has any serious interest in people such as Farah, much less any interest at all in punishing her 88-year old Muslim father for any reason whatsoever. I, therefore, reject the hearsay evidence and find that the claimant has failed to establish on the basis of credible and trustworthy evidence, that the Iranian authorities have made an order that he must force or entice Farah to return to the country with him and that, if he does not, he faces persecution, risks or danger. I, therefore, conclude that there is no serious possibility that persecution or, a balance of probabilities, section 97 risks or danger would befall the claimant should he return to Iran without his daughter.
[My emphasis]

III. The issues

[16] Counsel for the Applicant challenged the tribunal's decision on three basis in the context of the tribunal's decision not to recognized his age was a factor in the testimony he gave:

- a. The tribunal's credibility finding is flawed because the inconsistencies it relied on where irrelevant to the case (a) the date of Farah's conversion is irrelevant because the tribunal accepted she had converted to the Baha'i faith (b) the time and place of the cancer diagnosis is irrelevant and, in any event, the Applicant's version is likely incorrect and there was evidence of a hospital admission in Vancouver (see also page 72 of the Certified Tribunal Record where she states "I have now been diagnosed with cancer (April 2009)) and (c) on the issue whether the phone call from Tehran came before or after his wife left for Germany, he argues that the Applicant's testimony is clearly incorrect because his wife was included in his original claim which was made as a result of the phone call and therefore could have only come before she left for Germany. The daughter's testimony is correct.
- b. The Applicant argues the tribunal was unreasonable in finding the Applicant's claim for future potential prosecution was improbable; and
- c. The Applicant was denied procedural fairness by not having the opportunity to respond to the inconsistencies between his and his daughter's testimonies.

IV. Analysis and Conclusions

A. *The standard of Review*

[17] It is settled jurisprudence that credibility findings are findings of fact which attract significant deference to the fact-finder's determinations. See *Canada (Citizenship and Immigration)*

v. Khosa, 2009 SCC 12 where Justice Binnie for the majority pointed in the case of federal tribunals to paragraph 18.1(4)(d) of the *Federal Courts Act* which provides that this Court may quash a decision based on a finding of fact which is reached in a capricious or arbitrary manner or without regard to evidence before it. Paragraph 18.1(4)(d) is a legislative indicator how Parliament intended judicial review of fact-finding by tribunals to operate (See *Khosa* at paragraphs 4, 45 and 46).

[18] I have carefully reviewed the transcript of the hearing. I am very conscious that I am not to reweight the evidence before the tribunal and, in this case, must find a palpable and overriding error of fact which is determinative of the case before me. The burden on the Applicant is a heavy one except in the case of denial of procedural fairness where the Court's intervention is reduced to the gauge of correctness.

B. *Discussion and Conclusion*

[19] In my view, this Court's intervention is warranted for the following reasons.

[20] Counsel for the respondent is correct in saying that the crux of this case turns on what was the basis for the tribunal's credibility finding: was it based on contradictions inconsistencies and omissions or was the credibility finding based on an overall assessment by the tribunal of the implausibility of the entire story.

[21] Counsel for the respondent argued the basis of the tribunal's credibility finding was the overall implausibility of the applicant's story including a finding that the phone call from Mahnaz

was implausible although Counsel admits the tribunal never drew an implausibility but an inference could be made it did.

[22] With respect I must disagree. The tribunal never made a finding that the applicant's story was implausible. The tribunal based its credibility finding on contradictions, inconsistencies and omissions buttressed by the fact the story was uncorroborated because Mahnaz never testified by telephone, never sent a letter confirming her conversation with her father and her sister nor did she provide an affidavit to which may be added its finding that the objective evidence never indicated a similar situation leading to its conclusion, it was not probable that the Iranian government would be interested in the applicant.

[23] This conclusion that the heart of the tribunal's credibility findings rests on contradictions and omissions leads to the tribunal making the following errors:

1. Breaching procedural fairness by not providing the applicant or his daughter an opportunity to respond to these inconsistencies (see *Sarker v. Canada (Minister of Citizenship and Immigration)* [1998] F.C.J. No. 987 at paragraphs 13 and 14 (*Sarker*)).
2. The tribunal omitted to consider the explanation given for lack of corroboration by Mahnaz (see the Certified Tribunal Record 300 and 301 and *Sarker*, above, at paragraph 67).
3. Failed to explain why Farah's testimony was found to be lacking credibility when the evidence show her testimony on the three contradictions raised was the correct response and it was the applicant whose testimony was off.

4. Insisting that the document evidence reveal an exactly identical similar situated case was unreasonable (see paragraph 11 of these reasons).
5. The inconsistencies raised were largely irrelevant.

[24] For these reasons, this judgment review application is granted.

JUDGMENT

THIS COURT'S JUDGMENT is that this judicial review application is allowed, the tribunal's decision is quashed and the applicant's refugee claim is remitted for redetermination by a differently constituted tribunal. No question of general importance was raised.

“François Lemieux”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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