



Date: 20120529

Docket: IMM-8192-11

Citation: 2012 FC 657

Toronto, Ontario, May 29, 2012

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

MAZIN TOUMA

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] There was and is no denial that the Applicant was (as per the Pre-Removal Risk Assessment [PRRA]) and still is inadmissible to Canada due to his sixty-nine criminal convictions; however, as a Christian in Iraq, would it be more likely than not that he would be persecuted?

[2] Reliable evidentiary reports compete in their statements as to the level of risks to Christians in Iraq. The following excerpts bear reflection in assessing the matter (quoting from diverse reliable

sources cited in the International Religious Freedom Report, 2010 from the U.S. Department of State, issued on November 17, 2010 for the year 2011):

... Very few of the perpetrators of violence committed against Christians and other religious minorities in the country were punished; arrests following a murder or other crimes were rare.

(Third to last para of p 5 of 13).

... Christian leaders inside and outside the country reported that members of their communities received threatening letters demanding that Christians leave or be killed.

(At the bottom of the 2nd para at p 5 of 13).

II. Judicial Procedure

[3] This is an application for judicial review, under subsection 72(1) of the *Immigration and Refugee Protection Act, SC 2001, c 27 [IRPA]*, of a decision, dated October 18, 2011, dismissing the Applicant's application for a PRRA.

III. Background

[4] In Canada for more than thirty years, the Applicant, Mr. Mazin Touma, was born on November 20, 1969; and, is a citizen of Iraq. He is a Chaldean Roman Catholic, of Assyrian ethnicity.

[5] The Applicant came to Canada at the age of eleven and became a permanent resident of Canada on July 22, 1981 with his parents, his brothers and sisters.

[6] The Applicant's father passed away when he was thirteen years of age, two years after arriving in Canada. Subsequently, the Applicant was placed in the custody of the Catholic

Children's Aid Society [CCAS] because he had not been attending school regularly. The Applicant explains that, during his years in foster care, he was pulled into drug trafficking and developed a drug addiction.

[7] The Applicant has compiled more than sixty-nine convictions in Canada relating to property crimes, weapons, narcotics, failure to comply and violence. He was convicted of a number of offences between 1994 and 2002 for breaking and entering, theft and possession of narcotics.

[8] The Applicant has been arrested numerous times by the Canada Border Services Agency for failing to comply with reporting requirements. He has been in detention since June 28, 2011.

[9] On February 5, 1996, the Applicant was found inadmissible under subparagraph 27(1)(d)(ii) of the former *Immigration Act*, RSC 1985, c I-2. The Immigration Appeal Division dismissed his appeal of the removal order. This Court denied leave to appeal on June 10, 1999.

[10] The Applicant filed a PRRA application in which he alleged a fear of persecution as a Catholic in Iraq.

IV. Decision under Review

[11] The officer found that the Applicant's inadmissibility under subparagraph 27(1)(d)(ii) of the former *Immigration Act* was equivalent to inadmissibility under paragraph 36(1)(a) of the *IRPA*.

[12] The officer noted that the current prohibition on removals to Iraq does not apply to persons who were found to be inadmissible.

[13] The officer concluded that the Applicant's fear of persecution based on his religion was justified; nevertheless, after a detailed analysis of the country conditions documentation before him, the officer found that the general security situation and the religious violence situation in Iraq is improving because of the government's efforts. Consequently, the Applicant did not rebut the presumption of state protection.

[14] The officer concluded that the Applicant had not provided evidence with respect to the risk he alleged and questioned his understanding of Iraq's situation. The Applicant did not demonstrate having specific enemies. The officer found that the fact the Applicant does not speak Arabic did not justify a positive decision. The officer also concluded that the Applicant would have an Internal Flight Alternative [IFA].

V. Issue

[15] Is the PRRA decision reasonable?

VI. Relevant Legislative Provisions

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

Consideration of application

113. Consideration of an application for protection shall be as follows:

Examen de la demande

113. Il est disposé de la demande comme il suit :

(a) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection;

(b) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;

(c) in the case of an applicant not described in subsection 112(3), consideration shall be on the basis of sections 96 to 98;

(d) in the case of an applicant described in subsection 112(3), consideration shall be on the basis of the factors set out in section 97 and

(i) in the case of an applicant for protection who is inadmissible on grounds of serious criminality, whether they are a danger to the public in Canada, or

(ii) in the case of any other applicant, whether the application should be refused because of the nature and severity of acts

a) le demandeur d'asile débouté ne peut présenter que des éléments de preuve survenus depuis le rejet ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'il n'était pas raisonnable, dans les circonstances, de s'attendre à ce qu'il les ait présentés au moment du rejet;

b) une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires;

c) s'agissant du demandeur non visé au paragraphe 112(3), sur la base des articles 96 à 98;

d) s'agissant du demandeur visé au paragraphe 112(3), sur la base des éléments mentionnés à l'article 97 et, d'autre part :

(i) soit du fait que le demandeur interdit de territoire pour grande criminalité constitue un danger pour le public au Canada,

(ii) soit, dans le cas de tout autre demandeur, du fait que la demande devrait être rejetée en raison de la nature et de la gravité de

committed by the applicant or because of the danger that the applicant constitutes to the security of Canada.

ses actes passés ou du danger qu'il constitue pour la sécurité du Canada.

VII. Position of the Parties

[17] The Applicant submits that the officer applied the wrong legal test in this case; he applied the wrong standard of proof. Given the officer's finding that the Applicant's religious fear was "plausible", the standard of proof was met and justified a positive decision.

[18] The Applicant contends that the officer did not analyze the fact that he could easily be identified as a Christian because he does not speak Arabic, he is not Muslim and he is a westerner.

[19] The Applicant submits that the officer also erred in assessing state protection.

[20] The Respondent submits that the officer took into account the Applicant's Christian identity in his analysis. The Respondent argues that the officer carefully weighed all the evidence submitted. With respect to the availability of state protection, the Respondent argues that the officer analyzed and cited country conditions documentation in order to support his finding.

VIII. Analysis

[21] It is trite-law that the PRRA decision should be given deference since it rests on assessments of the facts. The appropriate standard of review is reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190; *Canada (Minister Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339). Recently, the Supreme Court of Canada in *Newfoundland and*

Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board), 2011 SCC 62, [2011] 3

SCR 708, made the following statement on reasonableness:

[15] In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show “respect for the decision-making process of adjudicative bodies with regard to both the facts and the law” (*Dunsmuir*, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.

[22] In the present case, the officer has unequivocally concluded that the Applicant has a well-founded fear of persecution:

Nevertheless, he clearly has a plausible fear of religious violence. There are numerous examples of serious violence directed at persons of different faiths, at one time and place or another.

(PRRA Decision at p 11).

[23] This Court notes that it is difficult to find the officer’s reasoning intelligible when he did not detail the facts he relied upon and made contradictory statements. Nonetheless, in light of his finding, the Applicant had a plausible fear of religious violence; it appears that the officer did accept that the Applicant was Christian. Again, the officer did not cite any evidence; instead, he made general assertions without justifying them:

It is not clear to me that Mr. Touma is a regular church goer or a practicing Roman Catholic. It is not clear to me what would mark him, in Iraq, as a Christian to be victimized. On the one hand, this might lower any risk. On the other hand, in a particular neighbourhood at a particular time an extremist might target anyone of a different faith or sect. It is certainly possible for Mr. Touma to be caught up in this sort of targeting and subsequent violence.

(PRRA Decision at p 11).

[24] The officer's negative finding is essentially grounded on the country conditions documentation that he reviewed which demonstrated, to him, that state protection is available for the Applicant. This finding is contrary to his analysis of the documentary evidence that he cited:

... "It is the government's policy to protect the rights of all religious groups to gather and worship freely; however, in practice ongoing violence and instability impeded citizens' ability to exercise this right in some parts of the country."

...

"Despite the apparent increase in sectarian integration, numerous incidents of sectarian violence occurred during the reporting period. Very few of the perpetrators of violence committed against Christians and other religious minorities in the country were punished; arrests following a murder or other crimes were rare." [Emphasis added].

(PRRA Decision at pp 7 and 9).

[25] The officer's conclusion reads as follows:

According to the evidence, the general security situation is improving as the government increases its capacity. There is a clear intent by the government to reduce or eliminate sectarian violence. It is clearly taking effective steps to publicly support Christian communities and to protect them by various measures.

...

My conclusion is that Christians do benefit from state protection in Iraq. It is far from perfect but it is improving, both with respect to general security and with respect to religious violence.

(PRRA Decision at p 12).

[26] The case law is clear that a decision-maker must focus on the availability of (present) state protection (on the ground) rather than the good-will (or intentions as to what it might become in the theoretical speculative future) of the state (*Aguirre v Canada (Minister of Citizenship and Immigration)*, 2010 FC 916; *Wisdom-Hall v Canada (Minister of Citizenship and Immigration)*),

2008 FC 685). The officer made statements in respect of current intentions; however, the recent situation on the ground includes a dispatch from "Agence France Presse" by a Christian Archbishop who has stated that "Christians are the target of liquidation". The Responses to Information Requests (RIRs) IRQ102990.E - 15 January 2009, which the officer had before him, describe the situation of Christians in Iraq:

Christians in Iraq

According to the Office of the United Nations High Commissioner for Refugees (UNHCR), the Iraqi census of 1987 showed 1,400,000 Christians living in Iraq, but in 2006 it was estimated that there were fewer than 1,000,000 Christians living in Iraq (UN Aug. 2007, 59). The United States (US) *International Religious Freedom Report 2008* estimates the Christian population as 550,000 to 800,000 people out of Iraq's 28.2 million, down from 800,000 to 1,200,000 in 2003 (US 19 Sept. 2008, Sec. 1). Similarly, Radio Free Europe/Radio Liberty (RFE/RL) reports that there are 500,000 to 700,000 Christians in Iraq (RFE/RL 17 Apr. 2008). Sources estimate that Iraqi Christians account for three percent of Iraq's overall population (IWPR 17 May 2006; *The Chicago Tribune* 24 Nov. 2008). Iraqi Christians are members of several sects including the Chaldeans (an eastern sect of the Catholic Church), Assyrians (Church of the East), Syriacs (Eastern Orthodox), Armenian Catholics, Armenian Orthodox (UN Aug. 2007, 59-60; US 19 Sept. 2008, Sec. 1), Syriac Catholics and Roman Catholics (UN Aug. 2007, 59-60). The Christian communities are primarily located in Baghdad and in northern regions such as Mosul, Erbil, Dohuk, Kirkuk (UN Aug. 2007, 60; US 19 Sept. 2008, Sec. 1) and Sulaymaniyah (UN Aug. 2007, 60).

Security of Christians

Since the US-led invasion of Iraq in 2003, Christians have been targets of violence, which sources primarily attribute to Islamic extremists, including al-Qaida in Iraq, or criminal gangs (IWPR 7 Aug. 2007; UN Aug. 2007, 60, 65). The UNHCR reports that the "security environment and political climate has steadily worsened for religious minorities in Iraq since the 2003 toppling of the former regime" (UN Aug. 2007, 61). The Institute for War and Peace Reporting (IWPR), a not-for-profit international network promoting free and fair media (IWPR n.d.), notes that while millions of Iraqi citizens live in fear, Christians are "especially vulnerable" because of their religion (IWPR 7 Aug. 2007). Media sources quote the Chaldean Archbishop of Kirkuk as stating that Christians are the "target of a campaign of liquidation" (AFP 10 Oct. 2008) and that Christians in Mosul are fleeing "ethnic-religious cleansing" (RFE/RL 15 Oct. 2008). The director of the Hudson Institute's Center for Religious Freedom, an international policy research organization based in the US (Hudson Institute n.d.), similarly states that Christians

and other minorities in Iraq "are being targeted in a ruthless cleansing campaign" (*Charlotte Observer* 20 Aug. 2007).

Minority Rights Group International (MRG), the UNHCR and Radio Free Europe/Radio Liberty (RFE/RL) report that Christians have been the targets of killings, kidnappings, attacks, harassment and intimidation in Iraq (MRG 2007, 10-11; UN Aug. 2007, 61; RFE/RL 17 Apr. 2008). Multiple sources provide details on incidents where Iraqi Christians have received death threats urging them to leave their homes or risk being killed (US 11 Mar. 2008, Sec. 2c; UN 30 June 2007, Para. 30; HRWF 18 Apr. 2007). According to MRG and media sources, businesses such as liquor stores, owned by non-Muslims, have been bombed or forcibly closed down and their owners have faced threats, attacks and killings from extremists (MRG 2007, 8; *Houston Chronicle* 11 Nov. 2007; *The Miami Herald* 6 July 2008). MRG notes that other traditionally Christian-owned businesses such as gymnasiums, beauty parlours, music shops and recording studios are also targets (MRG 2007, 8). Human rights groups, the UNHCR and the US *International Religious Freedom Report 2008* report that many women, including Christians, comply with Islamic dress codes to avoid threats, harassment and the risk of being raped, abducted or killed (US 19 Sept. 2008, Sec. 2; MRG 2007, 11, 23; UN Aug. 2007, 65; AI Mar. 2008, 2).

Christian churches, schools and convents have been attacked (MRG 2007, 9; UN Aug. 2007, 61; *The Washington Post* 22 Apr. 2008). Human Rights Without Frontiers (HRWF) lists over forty churches or convents in Iraq that were bombed or attacked between 26 June 2004 and 4 June 2007 (HRWF 8 Jan. 2008). The majority of these attacks were in Baghdad; there were also a large number in Mosul and a few in Kirkuk (*ibid.*). The US *International Religious Freedom Report 2008* gives details on many attacks, including ten reported bomb attacks of Iraqi churches and convents that occurred in January 2008 in Baghdad, Mosul and Kirkuk (US 19 Sept. 2008, Sec. 2). A number of churches in Iraq have closed because of these threats (US 19 Sept. 2008, Sec. 2; IWPR 7 Aug. 2007).

(TR at pp 95-96).

Specific details as to the violence throughout Iraq targeting Christians (in regard to the above) are specified in significant depth in the remainder of the Responses to Information Requests which were also before the officer; and, are thus part of the record.

[27] Thus, in the present case, the officer did not adequately address the availability of state protection to the Applicant. Moreover, his conclusion on the availability of state protection is not

supported by recent past evidence. Occasional exceptions, hopes and intentions are not a barometer for a true climate of religious tolerance from one of religious persecution. Thus, the decision is unreasonable.

[28] Given that the officer's Internal Flight Alternative finding is linked to the availability of state protection, it is not necessary to analyze the IFA finding as to whether this finding was reasonable. (A simple reading of the Responses to Information Requests of January 15, 2009, under the title, Violence in Northern Iraq, where presumably an IFA would have been considered, demonstrates an actual recent past (on the ground), in and around the city of Mosul, as one of peril to Christians, pp 95, 96 and 97 in particular.)

IX. Conclusion

[29] For all of the above reasons, the Applicant's application for judicial review is granted and the matter is referred to another officer for redetermination.

[30] It is important to note that the PRRA decision is only set aside because of the deficient analysis on the present availability of state protection in respect of Christians in Iraq. This does not mean that any subsequent decision will necessarily be other than that presently analyzed if viewed only from the perspective of the criminality finding. The particular context recognizes the fact that the Applicant is inadmissible for serious criminality and is therefore removable to his country of origin despite the current prohibition on removals to Iraq; however, this case is a case unto itself due to its specific fact pattern. The Applicant does not speak the language. He does not know the culture

and customs. It appears from the evidence that he would be a stranger in a strange land in dire danger.

[31] In conclusion, it is necessary for the PRRA officer to assess the availability of state protection for the Applicant in Iraq in light of all the recent actual past evidence as a comprehensive whole rather than what may occur in a well-intentioned, speculative theoretical future. State protection cannot be based on good-will that has, thus far, led but to occasional exceptions, hopes and possibilities rather than a stark past reality and thus far an unknown eventual outcome.

JUDGMENT

THIS COURT ORDERS that the Applicant's application for judicial review be granted and the matter be referred to another officer for redetermination. No question of general importance for certification.

“Michel M. J. Shore”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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