Federal Court  Cour fédérale

Date: 20130705

Docket: IMM-7571-12

Citation: 2013 FC 753

Ottawa, Ontario, July 5, 2013

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

MOHAMAD RASHID YOUSIF

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application for judicial review, pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], of a decision rendered by the Immigration and Refugee Board, Refugee Protection Division (the Board) on June 28, 2012, determining that Mr. Mohamad Rashid Yousif (the Applicant) is not a Convention Refugee nor a person in need of

protection under sections 96 and 97 of the *IRPA*. The determinative issue for the Board was credibility.

[2] For the reasons that follow, the application is allowed.

II. Facts

[3] The Applicant is a Syrian citizen of Kurdish descent.

[4] In his Personal Information Form [PIF], the Applicant claims that one of his older brothers, Seyed Ahmed, has been involved in Kurdish folkloric activities and was arrested by Syrian authorities while participating in Newroz festivities in or around 1990. He was detained for approximately two months and then expelled from high school. The brother later joined the *peshmerga* (Kurdish resistance) and was killed in combat in 1993.

[5] The Applicant also claims that another one of his brothers, Mohamad Fayek, was arrested by military security while he was serving in the Syrian army further to an argument with an officer. He was allegedly beaten, abused and sent to Al Tadmour prison where he was imprisoned and tortured for fourteen months. Once released from prison, the Applicant's family purportedly received a letter from Mohamad Fayek indicating that he too had joined the *peshmerga*. The Applicant explains that it was Mohamad Fayek that informed the family of Seyed Ahmed's death. The Applicant and his family have had no contact with Mohamad Fayek since they received his letter.

[6] The Applicant alleges that the *mukhabarat* (Syrian Intelligence) seemed to know of Mohamad Fayek's involvement with the *peshmerga* and on several occasions took his father and older brother, Mohamad Khaled, away for questioning. The two were allegedly beaten and abused throughout.

[7] The Applicant took Kurdish lessons with an Iraqi Kurd. In the winter of 1995, the house where the Applicant took his lessons was raided by the *mukhabarat*. The Applicant was detained for three months during which time he was beaten and doused with cold water.

[8] The Applicant served in the Syrian army from September 2000 to March 2003. After completing his military service, the Applicant became interested in the Yekiti party, a banned political group which promotes Kurdish rights. The Applicant's father was concerned about his son's involvement with that party and urged him to leave Syria. In January 2005, the Applicant fled to Greece, crossing illegally into the country through Turkey.

[9] The Applicant indicates that he applied for refugee status in Greece and was allowed to remain in the country on a temporary basis so long as he renewed his status every six months. The Applicant's status in Greece did not permit him to work. The Applicant claims that *mukhabarat* questioned his family about his whereabouts while he was in Greece.

[10] After two years in Greece, the Applicant wanted to return to Syria. Before he returned, his brother paid to receive information as to whether the Applicant was officially wanted by the

mukhabarat. Despite the encouraging news, the Applicant nevertheless decided to re-enter Syria surreptitiously.

[11] Upon arriving home, the Applicant pursued his interest in the Kurdish cause, obtained Yekiti literature, attended meetings in various houses and also donated money to the Yekiti party.

[12] On September 15, 2008, the *mukhabarat* conducted a search of the Applicant's home and found some of his books on Kurdish history and language. They arrested and detained him until November 2, 2008. While in detention, the Applicant was beaten and abused.

[13] On December 24, 2008, the Applicant was arrested yet again after being found in possession of a Yekiti brochure. The Applicant was interrogated, insulted and badly abused. The Applicant's brother was able to secure his release on February 26, 2009 after paying a bribe. The Applicant was released on condition that he report to the *mukhabarat* when required and inform them of any change of address.

[14] The Applicant was afraid of having to report to the *mukhabarat* as he had heard of others in a similar situation being jailed for years. In order to lower his profile, the Applicant moved and began farming work. After a few months had passed, the *mukhabarat* came to the Applicant's house searching for him. They apparently wanted him to sign a document acknowledging an upcoming court date. Upon hearing this, the Applicant decided to leave Syria.

[15] With the help of a smuggler, the Applicant fled the country on May 17, 2010 and headed to Greece. Because of his previous experiences living in Greece, the Applicant made his way to Canada and arrived on June 24, 2010.

III. Legislation

[16] Sections 96 and 97 of the *IRPA* provide as follows:

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,	**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 son nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	*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*) 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.	*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.

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

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

(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,

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

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

(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) 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	**Personne à protéger**
(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.	**(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.

IV. Issues and standard of review

A. Issues

1. ***Was there a breach of procedural fairness as a result of the interpretation issues during the hearing?***
2. ***Did the Board err in making its credibility finding?***
3. ***Did the Board err in assessing the objective, documentary evidence?***

B. Standard of review

[17] In *Zaree v Canada (Minister of Citizenship and Immigration)*, 2011 FC 889 at para 7 [*Zaree*], Justice Martineau held that "it is … necessary for the refugee claimant to be heard and for his account to be understood by the panel in the first place. Therefore, the quality of the translation

before the panel on its own can raise an issue of procedural fairness, and it is the standard of correctness that applies in such cases".

[18] The standard of review applicable to the Board's credibility findings is reasonableness (*Wu v Canada (Minister of Citizenship and Immigration)*, 2009 FC 929 at para 18; *Elmi v Canada (Minister of Citizenship and Immigration)*, 2008 FC 773, at para 21; *Aguebor v Canada (Minister of Citizenship and Immigration)*, [1993] FCJ No 732 (FCA)).

[19] The third issue relates to the Board's assessment of the facts and is therefore to be reviewed on the standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 53; *Muhari v Canada (Minister of Citizenship and Immigration)*, 2011 FC 27).

V. Parties' submissions

A. Applicant's submissions

[20] The Applicant submits that there was breach of his right to procedural fairness as a result of serious problems with the quality of interpretation during his hearing. The Federal Court of Appeal in *Mohammadian v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 191 [*Mohammadian*] held that refugee claimants appearing before the Board are entitled to interpretation that is "continuous, precise, competent, impartial and contemporaneous" and that applicants are not required to prove that they've been prejudiced in order to demonstrate a breach of

that right (*Mohammadian*, at para 4). However, as this Court found in *Xu v Canada (Minister of Citizenship and Immigration)*, 2007 FC 274 at para 12:

> "As important as this right is, the burden on a person raising interpretation issues is significant. Such a claim must overcome the presumption that a translator, who has taken an oath to provide faithful translation, has acted in a manner contrary to the oath. Simply alleging mistranslation will not be sufficient – the burden is to show that on a balance of probabilities mis−translation occurred."

[21] The Applicant submits that he and Mr. Huseyin Sertkaya (a certified interpreter in Kurdish and Turkish at the Board) have provided Affidavits asserting serious mistakes and discrepancies in the interpreter's work.

[22] Although the Applicant contends he need not establish that he was prejudiced as a result of the poor interpretation, he notes that he did suffer a prejudice in this case. The Applicant points out that the Board's negative credibility findings were based on his "evasiveness", "non-responsiveness", "poor demeanour" and the fact that the Applicant had to be asked the same question several times before he answered. The Applicant contends that all of these issues were the result of poor interpretation. Given that the Board's decision was based solely on credibility, the Applicant argues that he suffered a significant prejudice as a result of the poor quality of the interpretation.

[23] The Applicant acknowledges that the Federal Court of Appeal, in *Mohammadian*, cited above, held that an Applicant will be found to have waived his rights to competent interpretation if they do not object to its poor quality at the first opportunity during the hearing. At paragraph 18, the Court stated as follows:

> "As Pelletier J. observed, if the appellant's argument is correct a claimant experiencing difficulty with the quality of the interpretation at a hearing could do nothing throughout the entire hearing and yet be able to successfully attack the determination at some later date. Indeed, where a claimant choses [*sic*] to do nothing despite his or her concern with the quality of the interpretation, the Refugee Division would itself have no way of knowing that the interpretation was in any respect deficient. The claimant is always in the best position to know whether the interpretation is accurate and to make any concern with respect to accuracy known to the Refugee Division during the course of the hearing, unless there are exceptional circumstances for not doing so" [Applicant's emphasis].

[24] In the present case, the Applicant's counsel objected to the assigned interpreter before the hearing because he knew that particular interpreter to have poor English language skills. The Board attempted to find another interpreter but failed to do so. The Board then indicated that the assigned interpreter was accredited and that they would proceed with him.

[25] Because the Applicant's English is limited, he was unable to assess whether the interpreter was translating his testimony in a continuous, precise, competent, impartial and contemporaneous manner. He only realized how poor it was when he reviewed the decision of the Panel and then reviewed the audio recording of the hearing. Although the Applicant's friend was present as an observer and informed the Applicant's counsel that he noticed some errors, the Applicant's counsel told him that there was nothing that he could do, having already objected before the hearing and been told that the interpreter was accredited and that the hearing would proceed with that interpreter. The Applicant alleges that, being unaware of the seriousness of the errors in interpretation and that his counsel objected prior to the commencement of the hearing, the Court should not find that he waived his right to object to the quality of the interpretation.

[26] The Applicant's next claim is that the Board erred in making its credibility finding. The Board drew an adverse inference from the Applicant's failure to indicate in his PIF narrative that he had received medical attention for the injuries he suffered during his third detention. The Applicant submits that the fact he adduced a medical note after the hearing to support his allegation that he was mistreated should dismiss the Board's adverse finding.

[27] The medical note in question was written by Dr. Jamal Al Hussein. In it, he indicates that the Applicant "had signs of torture on his body and traces on the skin". The Board's decision to assign this little weight and to draw a negative inference because of the Applicant's failure to mention his visit with the doctor in his PIF is unreasonable according to the Applicant as the Board did not question the authenticity of the doctor's note. He further argues that it constitutes a corroborative document that supports his claim that he was abused by the Syrian authorities.

[28] Regarding the Board's negative credibility finding based on the Applicant's failure to indicate at the Port of Entry that he had been detained in 1995, the Applicant submits that the Board failed to address his counsel's statement that the omission was of little relevance to the Applicant's fears in 2010, as it was the Applicant's last two detentions in 2008 that prompted him to fear for his safety and flee Syria.

[29] The Applicant's final contention is that the Board erred in law by failing to assess whether he satisfied the subjective and objective components of the test for refugee status even though it had found him not credible.

[30] The Applicant contends that a finding that an applicant is not credible is not determinative of the question of whether or not he is a Convention refugee. Rather, even if the Board finds an applicant not credible, it must still assess whether he meets the subjective or objective components of a Convention refugee definition based on the objective documentary evidence adduced.

[31] In the case at bar, the evidence before the Board was that the Applicant's two brothers had allegedly joined the Kurdish *peshmerga* in order to fight for Kurdistan and the Kurdish people. Moreover, the evidence was that if the Applicant's case was refused and he was returned to Syria, he would be returning to that country as a failed asylum seeker.

[32] Although the Board assessed whether the Applicant would be at risk on the basis of his Kurdish ethnicity, it failed to assess whether the objective documentary evidence established that the Applicant would be at risk in Syria as a result of his membership in a particular social group, being his family and a failed asylum seeker.

[33] The documentary evidence before the Board indicated that family members of politically active Kurds in Syria face interrogation, harassment, detention, pressure and intimidation from the Syrian authorities. Moreover, the evidence indicated that failed asylum seekers face detention and interrogation, including a danger of torture, upon return to Syria. This evidence should have been addressed by the Board in its assessment of the Applicant's claim. By failing to do so, the Board has erred in law.

B. Respondent's submissions

[34] Before responding to the Applicant's arguments, the Respondent provided the following summary of the elements the Board based its credibility findings on:

> "(a) In his PIF and oral testimony, the Applicant alleged that in 1995, when he was 14 years-old, he was detained and physically abused for three months. However, he was unable to corroborate this alleged detention with any documentation. The Board also noted that the Applicant failed to mention this detention in Question 37 of his IMM 5611. The Applicant was unable to adequately explain this omission.
>
> (b) The Applicant alleged that in 2005 he fled Syria and sought asylum in Greece. While he was likely not accepted as a refugee neither was he asked to leave Greece. Nonetheless, the Applicant voluntarily re-availed to Syria, evading border controls as he believed it was still perilous for him there. The Applicant was unable to adequately explain why he would voluntarily return to a country that allegedly detained and abused him for three months.
>
> (c) The Applicant was unable to corroborate, with any form of documentation, that he ever made donations to the Yekiti Party or that he was detained in 2008.
>
> (d) The Applicant testified that he sought medical attention for injuries he allegedly suffered during his detentions of 2008. However, the Board noted that the Applicant failed to mention seeking such medical attention in his PIF, as Question 31 specifically enjoined the Applicant to do.
>
> (e) At the hearing the Applicant amended paragraph 15 of his PIF narrative to state that his last alleged detention in Syria took place from December 24, 2008 to February 26, 2009, rather than January 24, 2009. The Board noted that this amendment doubled the length of his alleged detention and allowed his narrative to retroactively comport with the answer he gave in his IMM5611. While the Applicant alleged that the error was the result of a poor translator the Board found that explanation to be lacking." (Respondent's further memorandum of arguments, pages 3 and 4)

[35] As to the first issue, the Respondent submits that the errors of interpretation that occurred during the hearing were immaterial to the Board's decision and, as a result, the Court should not

intervene. The Respondent relies on the following passage from *Marma v Canada (Minister of Citizenship and Immigration)*, 2012 FC 777 [*Marma*] at para 30:

> "I have reviewed each of the alleged errors and failures in translation and am of the view that none impacted the Board's understanding of the testimonies or the basis for its specific credibility findings. Since the errors were not material to the ultimate finding, this Court should not intervene: *Fu v Canada (Minister of Citizenship and Immigration)*, 2011 FC 155 (CanLII), 2011 FC 155 at para 10."

[36] Even if the Applicant establishes that the errors were material to the Board's decision, the Respondent contends that the Applicant waived his right to raise the issue before this Court by failing to object to the poor interpretation at the first opportunity during the hearing.

[37] Regarding the Applicant's claim that his former counsel objected to the interpreter before the hearing began, the Respondent argues that such an objection does not meet the test which is to object to the quality of the interpretation at the earliest opportunity. Such an objection must necessarily occur *during* the hearing (i.e. when the interpretation errors are actual as opposed to theoretical).

[38] As for the Applicant's assertion that his responsibility to object during the hearing was vitiated by his former counsel's advice to the contrary, the Respondent submits that such a claim lacks merit. For one, if the Applicant's former counsel was advised during the hearing that the interpretation was poor, he had an ethical responsibility to object regardless of any pre-hearing discussion. Second, if the Applicant is asserting that he would have objected but for his former counsel's advice, than what he is really asserting is that his right to procedural fairness was breached due to his counsel's incompetence.

[39] The Respondent underlines that this Court has held that "[a] litigant cannot validly cite a professional fault on the part of his former counsel without supplying the latter's explanations regarding the error complained of and with no evidence that the matter has been presented to the Bar of which the lawyer is a member for investigation" (*Gonzalez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1274 at para 24). The Respondent points to the lack of evidence that the Applicant ever attempted to do either in this case. The Respondent consequently concludes that the Applicant is barred from raising the issue of counsel's incompetence and that he has also waived his right to raise the issue of poor interpretation by failing to object at the very first opportunity.

[40] As for the Applicant's argument that the Board unreasonably drew a negative inference from the fact that he failed to mention, in his PIF, having received medical treatment further to his final detention, the Respondent insists that such an inference falls within a range of possible outcomes.

[41] The Respondent submits that the negative inference is reasonable in light of 1) the instructions under Question 31 of the PIF which reads: ". . . [s]tate whether you have received any medical or psychological treatment or assessments in Canada or elsewhere relating to your claim"; and 2) when the Board asked the Applicant to explain the omission during the hearing, his response was "just wrote down what happened in jail", which was not an adequate explanation in light of the PIF's specific instructions.

[42] On the third issue, the Respondent argues that the Applicant's contention that the Board failed to adequately assess whether he would be at risk in Syria due to his family's affiliation with Kurdish activists is without merit for two reasons. First, the Board cannot be said to have failed to assess this risk when, at paragraph 39 of its reasons, it stated that it has "rejected the allegations that the claimant would be targeted because of his affiliation with his family, which allegedly included Kurd activists and fighters". Second, the Applicant himself acknowledges that his evidence showed only that his brothers, "*allegedly* joined the *peshmerga*"; accordingly, the Applicant cannot argue that he has established the alleged risk to his family and thus cannot extrapolate that risk to himself.

[43] Finally, the Respondent argues that the Applicant's claim that the Board erred in failing to assess his risk, as a failed refugee claimant, is also without merit because neither the Applicant nor his former counsel raised this risk in his PIF or post-hearing submissions. Where a claimant fails to raise an allegation of risk, the Board is not required to canvas the documentary evidence for risk factors on the claimant's behalf. The Respondent cites the following passage from *Gabor v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1162 in support of this assertion:

> [14] The applicant submits that a "long line of decisions" (Sivalingam v. Canada (Minister of Citizenship and Immigration), 2006 FC 773 (CanLII), 2006 FC 773; Balasubramaniam v. Canada (Minister of Citizenship and Immigration), [2003] F.C.J. No. 1438 (F.C.); Satkunarajah v. Canada (Minister of Citizenship and Immigration), [2004] F.C.J. No. 28 (F.C.); and Mylvaganam v. Canada (Minister of Citizenship and Immigration), [2000] F.C.J. No. 1195 (T.D.)) from the Federal Court have held that once the Board accepts that a claimant is who they claim to be, the Board has an obligation to canvass objective country condition materials notwithstanding a negative credibility finding. The applicant says that since the Board accepted that he was of Roma ethnicity, it was an error not to consider country condition evidence.
>
> [15] The applicant's submission must fail in light of the decision of the Federal Court of Appeal in Sellan v. Canada

> (Minister of Citizenship and Immigration), 2008 FCA 381 (CanLII), 2008 FCA 381, wherein, in answering a certified question, the Court stated:
>
> > [W]here the Board makes a general finding that the claimant lacks credibility, that determination is sufficient to dispose of the claim unless there is independent and credible documentary evidence in the record capable of supporting a positive disposition of the claim. The claimant bears the onus of demonstrating there was such evidence.
>
> [16] The applicant did not present any "independent and credible documentary evidence" to the Board, and as the onus rested upon him, the Board had no duty to canvass country condition evidence.

VI. Analysis

1. Was there a breach of procedural fairness as a result of the interpretation issues during the hearing?

[44] The first issue that needs to be addressed is whether the Applicant needs to show that the interpretation failings had a direct influence on the Board's decision. Relying on the judgment in *Mohammadian*, cited above, the Applicant argues that he doesn't. Citing this Court's decision in *Marma*, cited above, the Respondent submits the opposite.

[45] While there is no need to establish a prejudice in order to prove a breach of procedural fairness based on inadequate interpretation (see *Mohammadian* cited above), the Applicant *is* required to demonstrate that the breach of procedural fairness was material to the Board's decision in order for this Court to intervene (see *Patel v Canada (Minister of Citizenship and Immigration)*,

2002 FCA 55 at para 12; *Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board,* [1994] 1 SCR 202 at paras 52-53).

[46] The Applicant argues that the difficulties encountered with the interpretation at the hearing were material to the Board's decision. More specifically, the Applicant submits that the Board's determinative credibility finding was based on his "evasiveness", "non-responsiveness" and "poor demeanour" which in turn resulted from the poor quality of interpretation.

[47] The Court disagrees. The Board specifically mentions on more than one occasion in its decision that it will not make a negative inference as to credibility from the claimant's poor demeanour or his non-responsiveness (cf. Reasons at paragraphs 15 and 33). The Board's negative credibility finding stems in great part from the lack of corroborative evidence adduced by the Applicant (see paragraphs 18, 20 and 29) and the fact that he omitted significant parts of his story in his PIF (see paragraphs 23,27, 30 and 31). The Applicant has, therefore, failed to demonstrate that the errors in the interpretation were material to the Board's determinative credibility finding.

[48] Having concluded that the quality of the translation was not determinative in the present case, the question as to whether the Applicant waived his right to raise the issue becomes academic. The Court would nonetheless underline that to properly protect the Applicant's right to raise the issue of inadequate translation, the Applicant's former counsel should, as a minimum, have insisted that the objection he raised about the interpreter's qualifications before the hearing commenced, be recorded when the hearing began.

2. Did the Board err in making its credibility finding?

[49] The Applicant's claim was denied because of the Board's negative credibility finding. The Applicant argues that the Board's negative credibility inferences are based on his failure to indicate in his PIF narrative that he visited a doctor after his detentions in 2008/2009. He submits that such a conclusion was unreasonable. After the hearing before the Board, the Applicant adduced a note from the doctor who treated him, Dr. Jamal Al Hussein. That evidence corroborated his story of being detained and abused by the Syrian authorities. The Applicant contends that the Board acted unreasonably in assigning less weight to the note than it normally would have simply because the Applicant provided an inadequate explanation for his failure to mention it in his PIF narrative. The exchange in question went as follows:

> **"PRESIDING MEMBER**: Thank you. Sir, why did you not mention this medical attention in your narrative, as is required in the instructions to the narrative?
>
> **CLAIMANT**: I just write down what happened with me in the jail, how I be like, you know." (Hearing's transcript, page 289 of the Applicant's Record)

[50] Both parties acknowledge that the authenticity of the doctor's note was not questioned by the Board. The Respondent contends that assigning less weight to the note due to the Applicant's failure to mention his visit to the doctor and his non-responsive explanation for not doing so was reasonable. This Court disagrees. While the note does not constitute conclusive evidence *per se* that the Applicant's story is true (i.e. that he was detained and abused by Syrian authorities in 2008/2009), it is nonetheless a significant piece of corroborative evidence. Its impact should not have been diminished for such insubstantial reasons.

[51] As the note's authenticity was not questioned, then its weight should not have been affected by the Applicant's failure to mention his visit to the doctor in his PIF or his inadequate explanation for not doing so. The Court finds that the Board's minimization of the weight assigned to the doctor's note was capricious and, therefore, unreasonable. While the Board did raise other credibility concerns, it is impossible for the Court to determine what the outcome would have been had the Board properly assessed the doctor's note. As Justice Dawson explained in *Khan v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1351 at para 9:

> [9] I have considered the submissions of the Minister that the panel's decision should not be set aside in light of other credibility findings made by the panel. I am not prepared to speculate, however, on what the outcome would have been had the panel not committed a reviewable error with respect to the central element of Mr. Khan's claim.

[52] The Board committed a reviewable error by assigning little weight to a crucial piece of corroborative evidence that went to the very heart of the Applicant's claim without reasonable justification. For that reason, this application is allowed, the decision of the Refugee Protection Division of the Immigration and Refugee Board dated June 28, 2012 is set aside and the application is remitted for re-determination before a differently constituted panel of the Refugee Protection Division.

[53] Given the Court's conclusion on this second issue there is no need to address the other issues raised by the Applicant.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. This application for judicial review is allowed and the decision of the Refugee Protection Division of the Immigration and Refugee Board dated June 28, 2012 is hereby set aside;

2. The decision is remitted for re-determination before a differently constituted panel of the Refugee Protection Division; and

3. There is no question of general interest for certification.

"André F.J. Scott"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Clarisa Waldman	FOR THE APPLICANT
Christopher Crighton	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Waldman & Associates Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT