

Federal Court



Cour fédérale

Date: 20140923

Docket: IMM-242-14

Citation: 2014 FC 907

Montréal, Quebec, September 23, 2014

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

MOHAMED BADR DABAA

Applicant

and

**MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant seeks a judicial review of a decision by the Refugee Protection Division of the Immigration and Refugee Board [RPD], dated December 13, 2013, wherein, it was determined that he was not a Convention refugee under section 96 nor a person in need of protection under section 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] The RPD found that the Applicant lacked overall credibility based on significant omissions, which undermine both the subjective and objective basis of the Applicant's alleged fear of persecution.

II. Background

[3] The Applicant, Mr. Mohamed Badr Dabaa, is a 47-year-old musician from Aleppo, Syria. The Applicant claims that he is from a region that is particularly affected by the confrontations between the rebels and the government, in the context of the ongoing civil war in Syria.

[4] Before the Applicant's arrival to Canada, the Free Syrian Army [FSA] approached the Applicant on different occasions, in an effort to recruit him.

[5] The Applicant claims that the FSA threatens to kill those who refuse to join its ranks.

[6] In August 2012, the FSA intercepted the Applicant outside of his home whereby, out of fear, he promised that he would join it.

[7] In September 2012, the Applicant came to Canada on a contract to perform with the Syrian singer, Shadi Gamil.

[8] On October 16, 2012, the Applicant claimed Canadian refugee protection in Canada.

[9] After his arrival in Canada, the Applicant's wife informed him by way of a letter that the FSA was still looking for him and that it was killing those who did not join its ranks.

[10] The Applicant's wife and children fled to Jordan and are now living in a refugee camp.

III. Decision under Review

[11] On December 13, 2013, the RPD found Mr. Dabaa to be neither a Convention refugee for the reason of imputed political opinion nor a person in need of protection due to a danger of torture or a risk of cruel and unusual treatment or punishment, pursuant to sections 96 and 97 of the IRPA.

[12] The Tribunal concluded that "on a balance of probabilities, the claimant's allegations are not credible as far as being persecuted or targeted by the Free Syrian Army in Syria".

[13] The RPD based its decision on finding "a number of crucial omissions" in his Personal Information Form [PIF] and initial testimony, which were only revealed by the Applicant at the hearing. The RPD found that particular incidents involving the Applicant's close family members should have been mentioned at the outset of the hearing.

[14] These significant omissions include:

- A. The fact that the Applicant's son, as well as the Applicant's brother, have been threatened on different occasions by the FSA;

- B. The fact that the Applicant's brother-in-law and nephew were kidnapped and threatened by the FSA;
- C. The fact that the FSA personally identified the Applicant by his name when it intercepted him in August 2012.

[15] At the hearing, when the RPD asked the Applicant why he had omitted this information from his PIF, the Applicant answered that he thought he had to tell his own story (not that of his family members) and that if he had to explain everything, he would need more than five pages. The Tribunal found this explanation unsatisfactory.

[16] In the RPD's view, the most significant omission was the Applicant's failure to mention that his own son had been threatened by the FSA. The RPD deemed it reasonable that the Applicant should have mentioned this incident in his initial testimony, given that his son is allegedly being targeted because of the Applicant's own problems with the FSA.

[17] The RPD also rejected the Applicant's wife's letter, which was submitted to corroborate his allegations. In the RPD's view, this short letter, which is considered "self-serving", should be given no probative value given the Applicant's overall lack of credibility.

[18] The RPD found there to be a lack of an objective basis to the Applicant's alleged fear and that the Applicant's "circumstances are essentially similar to other young male members of his family in Syria".

[19] The RPD also found that the Applicant demonstrated a lack of subjective fear and made a negative inference from the Applicant's action of hiding in his own residence from April to September 2012, given that his residence is located in an area which is allegedly "far more dangerous" than other regions of Syria and where the FSA was actively looking for him. The RPD concluded that "the claimant cannot effectively hide where his alleged agent of persecution knows where to find him".

[20] Finally, the RPD held that the Applicant's circumstances are essentially similar to other young males in Syria. Also, the fact that none of his family members have had any incidents with the FSA since January 2013 further undermines the objective basis to the Applicant's alleged fear of the FSA.

IV. Issues

[21] The central issue to be determined by this application for judicial review is: Did the RPD commit a reviewable error in its determination that the Applicant lacked overall credibility?

V. Relevant Legislative Provisions

[22] The following are the relevant legislative provisions:

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 sa 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 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.

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.

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 themselves of the protection of that country,

(ii) the risk would be faced by the person in

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

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

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

(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.

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

(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.

VI. Position of the parties

The Applicant's position:

[23] The Applicant submits that the RPD has committed reviewable errors in its determination of:

- A. The lack of credibility due to omissions in the Applicant's PIF and the Applicant's responses at the hearing;
- B. The lack of subjective credibility in regards to the Applicant hiding from the FSA in his own residence;

- C. The lack of objective basis to the Applicant's claim;
- D. The absence of probative value given to the Applicant's wife's letter.

[24] The Applicant argues that the RPD committed an error by finding that he lacked subjective fear because he hid from the FSA in his own residence. The Applicant submits that the RPD failed to consider his cultural background and wrongfully analyzed his choice of hiding in his own residence from its own perspective rather than from the perspective of the Applicant.

[25] The Applicant submits that the RPD erred in finding that the Applicant failed to demonstrate an objective basis to his claim. According to the Applicant, the RPD has incorrectly made a negative inference from the fact that the Applicant and his family members have had no incidents of persecution during a certain period of time.

[26] The Applicant submits that this is an error in law because the applicable test to determine the objective basis to a claim is one of a fear of persecution. Physical harm or mistreatment is not necessary to establish past persecution (*Amayo v Canada (Minister of Employment and Immigration)*, [1982] 1 FC 520).

[27] The Applicant argues that the RPD failed to consider the abundant documentary evidence confirming the ongoing "armed and violent struggle between the Syrian government and the FSA, the human rights abuses committed by the FSA, the lack of state protection from FSA threats and the absence of any internal flight alternative".

[28] Finally, in respect of the Applicant's wife's letter corroborating the risk of persecution faced by the Applicant, the Applicant submits that it was given no probative value. Thus, the unjustified rejection of the wife's letter constitutes a reviewable error.

The Respondent's Position:

[29] The Respondent submits that the only issue before this Court is whether it was reasonable for the RPD to conclude that the Applicant's story was not credible.

[30] The Respondent submits that when reviewing conclusions of the RPD regarding the credibility of refugee claimants, the applicable standard of review is that of reasonableness. Thus, the RPD's conclusions were reasonable given the Applicant's significant omissions, which undermine his credibility.

[31] The Respondent further submits that the Applicant's behavior (i.e. hiding in his own house, and staying in a neighborhood which allegedly is under attack) is not compatible with that of a person who feels that his life is in danger. These elements undermine the Applicant's credibility.

[32] It was therefore reasonable for the RPD to conclude that rather than being specifically targeted by the FSA, the Applicant faces a generalized risk, which does not justify granting refugee protection.

[33] The Respondent argues that the fact that the Applicant's own son and brother were threatened by the FSA and that the Applicant's brother-in-law and nephew were both kidnapped by the FSA are important omissions, which should have appeared in his written narrative.

[34] The Respondent submits that the Applicant gave no reasonable explanation to justify the omissions.

[35] Finally, the Respondent submits that the Applicant's wife's letter and the documentary evidence submitted by the Applicant were in fact considered by the RPD; however, the letter was not given much probative value, given the "many problems that arose from the Applicant's difficult testimony".

VII. Standard of Review

[36] The standard of review in regards to findings of credibility is that of reasonableness. In *Gutierrez v Canada (Minister of Citizenship and Immigration)*, 2009 FC 487, Justice Beaudry stated:

[7] Assessing credibility and weighing the evidence fall within the jurisdiction of the administrative tribunal called upon to assess the allegation of a subjective fear by a refugee claimant (*Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* 1998 CanLII 8667 (FC), (1998), 157 F.T.R. 35(F.C.T.D.), 83 A.C.W.S. (3d) 264 at paragraph 14). [...]

[14] The panel is in the best position to assess the explanations provided by the applicant with respect to the perceived contradictions and implausibilities. It is not up to the Court to substitute its judgment for the findings of fact drawn by the panel concerning the applicant's credibility (*Singh v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 181 (CanLII), 2006 FC 181, 146 A.C.W.S. (3d) 325 at paragraph 36; *Mavi v. Canada*

(Minister of Citizenship and Immigration), [2001] F.C.J. No. 1 (F.C.T.D.) (QL).

[37] In *Perez v Canada (Citizenship and Immigration)*, 2010 FC 345, in assessing credibility, the Court stated the applicable standard of review :

[26] [...] The Court will only intervene if the Board based its decision on an erroneous finding of fact made in a perverse or capricious manner or if it made its decision without regard to the material before it (*Aguebor v. Canada (Minister of Employment and Immigration)*, (1993), 160 N.R. 315, 42 A.C.W.S. (3d) 886 (F.C.A.)). Since *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), 2008 SCC 9, [2008] 1 S.C.R. 190, the applicable standard of review is reasonableness.

VIII. Analysis

[38] The Court is of the view that three core issues are relevant:

- A. Did the Applicant demonstrate an objective basis to his claim?
- B. Did the Applicant demonstrate a subjective fear of persecution?
- C. What probative value is to be given to the Applicant's wife's letter?

Did the Applicant demonstrate an objective basis to his claim?

[39] The Federal Court of Appeal has determined that a refugee claimant's fear of persecution must have both a subjective and an objective basis to it. Also, evidence of past persecution is one of the most persuasive means for demonstrating that a fear of future persecution is objectively well-founded (*Rajudeen v Canada (Minister of Employment and Immigration)*, (1984) 55 NR 129 (FCA)).

[40] In respect of the consequences of an Applicant returning to his or her country of origin, the Federal Court of Appeal has repeatedly emphasized that it is the well-foundedness of a fear of future persecution that is tested in its determinations (*Fernandopulle v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 91).

[41] Applicants who face a generalized risk, such as those in situations of indiscriminate war, are generally not protected under section 97(1)(b)(ii) of the IRPA. This issue was addressed by this Court in *De Parada v Canada (Minister of Citizenship and Immigration)*, 2009 FC 845. In this decision, the Court found that the RPD had not erred in its determination that the risk faced by the Applicants was a generalized risk:

[22] I agree with my colleagues that an increased risk experienced by a subcategory of the population is not personalized where that same risk is experienced by the whole population generally, albeit at a reduced frequency. I further am of the view that where the subgroup is of a size that one can say that the risk posed to those persons is wide-spread or prevalent then that is a generalized risk.

[23] That is precisely what the Board found in this case. The subgroup of the population of El Salvador that the Applicants were found to belong to was described by the Board as "business people" whom it stated were those who "operate a business, work for a business or own and operate transportation units in El Salvador." That is a very large subgroup, encompassing almost all in the country who legitimately work for a living. That determination, based on the evidence was not unreasonable; neither was the finding of generalized risk.

[42] Furthermore, it is well established in the jurisprudence that PIF omissions and inconsistencies may constitute a basis for an adverse credibility finding (*Garcia v Canada (Minister of Citizenship and Immigration)*, 2006 FC 611 at para 10). At the hearing, the RPD asked the Applicant if, after he had left Syria, any incidents had occurred in respect of other male

members of his family, to which the Applicant answered no. Only when asked by the RPD Member if incidents had taken place between the FSA and his son did the Applicant mention that his son had been threatened. This significant omission in the Applicant's PIF and even in the relating of his narrative prior to probing questions undermines the Applicant's credibility.

[43] It is the Court's view that the Applicant failed to demonstrate how his particular circumstances differ from those of the general Syrian population. It appears that the Applicant faces a generalized risk, given the civil war in Syria and in particular to the Applicant, in the Aleppo region. The RPD considered the documentary evidence before it and its decision rejecting the Applicant's claim on the basis of a lack of credibility is reasonable.

Did the Applicant demonstrate a subjective fear of persecution?

[44] At paragraph 27 of *Gurung v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1097, Justice Zinn found that:

[27] [...] A finding that a claimant's subjective fear is not objectively well-founded is fatal to a refugee claim: *Canada (Attorney General) v. Ward*, 1993 CanLII 105 (SCC), [1993] 2 S.C.R. 689. The law is clear that this is a separate element required to establish persecution under s. 96 of the Act; accordingly, errors with respect to discrete elements of a refugee claim will not invalidate a decision as a whole where the Board reaches an independent determination of lack of objective fear [...].

[45] At the hearing, the RPD raised its concern in respect of the lack of subjective fear, given that the Applicant hid in his own house between April 2012 and September 2012, despite allegations that the FSA was looking for him.

[46] The implausibility raised by the RPD in this respect is not, in and of itself, sufficient to dismiss the Applicant's subjective fear; however when considered in the context of the Applicant's omissions and overall lack of credibility, it further undermines his credibility.

[47] Also, in respect of the RPD's negative finding of credibility regarding the Applicant's allegation that the FSA approached him personally and knew his name, the Court finds that the RPD's conclusion is reasonable, given that this had not been mentioned by the Applicant prior to the hearing and the RPD's finding that the Applicant's claim lacked overall credibility.

What probative value is to be given to the Applicant's wife's letter?

[48] The RPD dismissed the Applicant's wife's letter for issues of credibility and for being "self-serving". The Applicant submits that the RPD erred in not giving any probative value to the Applicant's wife's letter and that the letter must not be discredited solely because it was written by a person interested in the Applicant's claim.

[49] In *Taborda v Canada (Minister of Citizenship and Immigration)*, 2013 FC 957, the probative value of a letter submitted by a family member was discussed by this Court:

[27] As noted by Justice O'Keefe in (*S M D v Canada (Minister of Citizenship and Immigration)*, 2010 FC 319 at para 37) "it would seem to me that any letter written to support the applicant's claim would be, by the Board's reasoning, self-serving. This cannot be the case. An applicant has to be able to establish their case."

[28] [...]

[28] In light of this jurisprudence, and under the circumstances, I do not believe it was reasonable for the Officer to award this evidence low probative

value simply because it came from the Applicants' family members. Presumably, the Officer would have preferred letters written by individuals who had no ties to the Applicants and who were not invested in the Applicants' well-being. However, it is not reasonable to expect that anyone unconnected to the Applicants would have been able to furnish this kind of evidence regarding what had happened to the Applicants in Mexico. The Applicants' family members were the individuals who observed their alleged persecution, so these family members are the people best-positioned to give evidence relating to those events. In addition, since the family members were themselves targeted after the Applicants' departure, it is appropriate that they offer first-hand descriptions of the events that they experienced. Therefore, it was unreasonable of the Officer to distrust this evidence simply because it came from individuals connected to the Applicants.

[50] This Court finds that the RPD explicitly considered the evidentiary value of the letter and decided not to give it any probative value. In its reasons, the RPD explained that this was not due to the wife's interest to the claim, but rather to the overall lack of credibility in the Applicant's claim.

IX. Conclusion

[51] The RPD considered the evidence submitted by the Applicant and denied him refugee status under sections 96 and 97 of the IRPA.

[52] The Applicant's evidence is replete with significant omissions, which undermine the Applicant's credibility.

[53] The most significant omissions are:

- A. No mention is made in the Applicant's PIF that his son had been threatened by the FSA, coupled with a lack of corroborative evidence to support this allegation;
- B. No mention is made in the Applicant's PIF that he had been personally recognized by members of the FSA;
- C. No mention is made by the Applicant in his PIF of serious incidents involving the FSA and members of his family. The Applicant's explanation that he thought that he only had to explain "his own story" in the narrative does not lend itself to credibility. The PIF clearly states: "Indicate the measures taken against you and members of your family, as well as similarly situated persons, and by whom these measures were taken". Thus, the RPD considered the additional testimony of the Applicant as an embellishment.

[54] At the hearing, the RPD Member gave the Applicant a number of opportunities to provide further explanations for these obvious and significant omissions. The RPD was reasonably not satisfied with the explanations given by the Applicant.

[55] Therefore, for all of the above reasons, the application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review be dismissed;
2. No serious question of general importance be certified.

“Michel M.J. Shore”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-242-14

STYLE OF CAUSE: MOHAMED BADR DABAA v MINISTER OF
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