Federal Court  Cour fédérale

Date: 20190710

Docket: IMM-787-18

Citation: 2019 FC 908

Ottawa, Ontario, July 10, 2019

PRESENT: Mr. Justice Norris

BETWEEN:

ALI ZAITER

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant, Ali Zaiter, is a citizen of Lebanon. He is a Shia Muslim. He claimed refugee protection in Canada on the basis of a well-founded fear of persecution at the hands of Hezbollah, an armed group based in Lebanon that Canada (and many other countries) considers to be a terrorist organization.

[2] The applicant was born in Baalbek, a Shia Muslim district in the Bekaa Valley in Southern Lebanon, in January 1992. He alleges that he fled to Canada in 2016 following unsuccessful efforts by members of Hezbollah to force him to join the organization. The applicant claimed that he had to quit university because of undue influence by Hezbollah at the school where he was studying; that after he moved to Beirut to avoid harassment by Hezbollah, members of the organization broke into his parents' home asking for him and threatening him; that he received threatening phone calls while he was living in Beirut; and that he was attacked by members of Hezbollah in his Beirut home, leaving him injured and unconscious. The applicant also alleged that he had a cousin who was killed in Syria after being forcibly recruited by Hezbollah.

[3] The applicant sought refugee protection immediately upon arriving in Canada. His claim was rejected by the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada [IRB] on credibility grounds. The applicant appealed this decision to the Refugee Appeal Division [RAD] of the IRB. In a decision dated January 22, 2018, the RAD dismissed the appeal and confirmed the determination of the RPD. The applicant now applies for judicial review of this decision under section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[4] For the reasons that follow, this application will be allowed and the matter returned to the RAD for redetermination.

[5] There is no dispute concerning the legal principles governing this application. The RAD's determinations of factual issues and issues of mixed fact and law are reviewed on a reasonableness standard (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35). This includes the RAD's credibility determinations (*Chen v Canada (Citizenship and Immigration)*, 2017 FC 539 at para 19). On judicial review under this standard, it is not the role of the Court to reweigh the evidence or to substitute its own view of a preferable outcome (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61). Rather, the Court should examine the decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determine "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[6] The deferential reasonableness standard of review presupposes that the decision-maker has applied the correct legal test. A decision will not be rational or defensible if the decision-maker has failed to carry out the proper analysis (*Lake v Canada (Minister of Justice)*, 2008 SCC 23 at para 41; *Németh v Canada (Justice)*, 2010 SCC 56 at para 10).

[7] The determinative issue is whether the RAD unreasonably determined that the applicant was not credible because his claim that Hezbollah had tried to recruit him by force is implausible. The RAD member reasonably found that the preponderance of evidence in the record before her concerning the organization's recruiting practices "does not support the fact that Hezbollah engages in forced recruitment." Rather, the evidence indicated that Hezbollah was able to draw members who shared its ideology while also providing financial incentives to

them such as generous salaries for service in the organization or small business loans. But does the evidence reasonably support the conclusion that it is implausible that Hezbollah would have tried to recruit the applicant forcibly and, therefore, that the applicant's claim that it did so is not credible?

[8] Adverse credibility determinations can be drawn from the implausibility of a claimant's account but the law is clear that such inferences are inherently dangerous and caution is required before they are drawn. The need for caution is obvious. Implausibility determinations based on common sense or common experience can be entirely erroneous when that "common sense" or "common experience" is grounded in social or cultural norms that may have no application to the case at hand (*Leung v Minister of Employment and Immigration* (1994), 81 FTR 303 at 307 (TD); *Bains v Minister of Employment and Immigration* (1993), 63 FTR 312 at 314 (TD); *Santos v Canada (Citizenship and Immigration)*, 2004 FC 937 at para 15). As well, when an inference is drawn from past experience, it must be presumed that the likelihood of the event in question can be determined from the frequency of similar events in the past. Whether this yields an accurate result will depend on many factors including the representativeness of the sample and whether conditions may have changed. Moreover, the mere fact that an event is unlikely given past experience does not entail that it did not (or could not) occur. Thus, in *Valtchev v Canada (Citizenship and Immigration)*, 2001 FCT 776 [*Valtchev*], Justice Muldoon suggested in oft-cited remarks (at para 7) that an adverse credibility finding based on the implausibility of the claimant's account "should be made only in the clearest of cases, i.e. if the facts as presented <u>are outside the realm of what could reasonably be expected</u>, or where the documentary evidence demonstrates that the events <u>could not have happened</u> in the manner asserted by the claimant"

(emphasis added). As Justice Gleason put the same point in *Zacarias v Canada (Citizenship and Immigration)*, 2012 FC 1155 at para 10 [*Zacarias*], "this Court has often cautioned that such determinations are best limited to situations where events are clearly unlikely to have occurred in the manner asserted, based on common sense or the evidentiary record" (emphasis added). Thus, an allegation may be found to be implausible "when it does not make sense in light of the evidence before the Board" (*Zacarias* at para 11).

[9] It is important to remember that the ultimate question for the decision-maker is not whether the events in question occurred but whether the claimant is to be believed when he or she says that they did. Adverse credibility determinations based on implausibility should not be made simply on the basis that is it unlikely that things happened as the claimant contends. Individual experiences need not always follow the norm. Unlikely events can still happen. Something more is required before a claimant may be found not to be credible on the basis of implausibility alone. Importantly, this restriction on this type of fact-finding helps mitigate the risk of error if a claimant's account is rejected.

[10] In my view, the RAD failed to heed this requirement for something more than a mere unlikelihood before a claimant's account is rejected as not credible because it is implausible. Indeed, this error may be traced to the member's own summary of the legal principles on plausibility findings, where she states the following: "It is open to a Member to find that a claimant's testimony is not plausible where the documentary evidence demonstrates that the events are unlikely to have happened in the manner asserted by the claimant [footnote omitted]." Although the member cites both *Valtchev* and *Zacarias* in support of this statement, as

formulated by the member it fails to capture the high threshold set by those cases before a claimant's account may be rejected as not credible on the basis of implausibility.

[11] In the present case, the evidence reasonably supports the conclusion that it is unlikely that Hezbollah would engage in forced recruitment. On this basis, the member found the applicant's account not to be credible. However, the member never addresses whether the evidence supports the conclusion that forced recruitment by Hezbollah was "clearly unlikely," that it was "outside the realm of what could reasonably be expected," that it did not make sense, or that it "could not have happened." There is a serious question as to whether the evidence reasonably supports such conclusions. Even if Hezbollah did not usually engage in forced recruiting in the past, it does not necessarily follow that the applicant must not be telling the truth when he claimed that it attempted to recruit him by force. Perhaps his experience is evidence of a change in the terrorist group's recruitment techniques. Or perhaps the applicant was simply unlucky. The evidence of Hezbollah's usual recruitment techniques is insufficient to establish that the applicant must not be telling the truth about how it had tried to recruit him (cf. *Sadeora v Canada (Citizenship and Immigration)*, 2007 FC 430 at para 16). By watering the test down as she did, the member failed to carry out the correct analysis and reached an unreasonable result.

[12] This conclusion is reinforced by what I also find to be the member's erroneous assessment of evidence in the record that could support the applicant's position.

[13] The applicant had contended that even if, as the evidence suggested, Hezbollah had once been able to meet its manpower needs simply by drawing individuals who shared its ideology

with the added bonus of financial incentives, recent events – especially Hezbollah's engagement in the conflict in Syria – had placed significant new strains on it and, as a result, it needed to broaden its recruitment strategies.

[14] In support of this contention, the applicant pointed to the following statements in an October 29, 2015, Response to Information Request prepared by the IRB's Research Directorate:

> In correspondence with the Research Directorate, a professor of international history at the London School of Economics and Political Science, who researches armed conflict in the Middle East, stated that there is "anecdotal evidence" that Hezbollah "has started forcibly recruiting since it has become more involved in the Syrian conflict" (Professor in international history 22 Oct. 2015). The same source noted that many Lebanese Shi'a "feel Lebanese and not Syrian" and are therefore reluctant to join Hezbollah "to fight for Asad" (ibid.). According to the Professor of international history, forced recruitment occurs mainly in rural areas where Hezbollah has strong influence such as southern Lebanon and the Beqaa valley (ibid.). The source also indicated that there are "talks of disappearances" of those individuals who refuse to join Hezbollah but that to the source's knowledge, no reports have arisen in which family members of said individuals have been subject to harassment (ibid.). Corroborating information could not be found among the sources consulted by the Research Directorate within the time constraints of this Response.

[15] The RPD had dismissed this information on the basis that it was less probative than other information that Hezbollah does not engage in forced recruiting "given that it is not necessarily true, hence why it is termed 'anecdotal' evidence, and therefore less reliable." The applicant challenged this conclusion in his appeal to the RAD. The RAD member agreed with the RPD, stating that the professor's use of the term "anecdotal" suggested "that the professor giving this information also did not consider the information to be verifiable or reliable."

[16] In my view, it was unreasonable for the RAD to conclude that this was what the professor meant by describing the reports as "anecdotal." There is no basis in the record for concluding that the professor meant that the information was not verifiable or reliable as opposed to meaning that it was "based on or consisting of incidental observations or reports rather than systematic research" (*The Canadian Oxford Dictionary* (Toronto: Oxford University Press, 1998), *sub verbo* "anecdotal"). Anecdotal evidence may be less reliable as an indicator of broader trends or patterns than evidence obtained through systematic study but this does not mean that it has not been verified or is inherently unreliable. The fact that the professor was prepared to share this information with the IRB Research Directorate and provided additional details (i.e. that the forced recruiting occurred in areas where Hezbollah has a strong influence such as Southern Lebanon and the Beqaa valley) suggested that he or she had not dismissed it as unverifiable or unreliable. Even if these were merely isolated reports, they were consistent with what the applicant claimed had happened to him, including that the harassment had begun when he was living at home with his family in the Beqaa Valley. Moreover, while the Response to Information Request also cites the opinions of other academics that Hezbollah does not forcibly recruit its members, the evidentiary support for these opinions is not stated. We do not know whether they are the product of systematic study, anecdotal reports, or something else. As a result, the member's decision to prefer that evidence to the evidence that supported the applicant's position is lacking justification, transparency and intelligibility.

[17] The applicant also submits that the RAD unreasonably determined that evidence that Hezbollah had begun recruiting minors did not support his contention that the organization recruited members involuntarily. It is not necessary for me to address this issue. The probative

value and weight of this evidence will be for the RAD to determine anew should the applicant continue to rely on it or similar evidence.

[18] For the sake of completeness, I note that the RPD also found a number of problems with the applicant's account of the forced recruitment of his cousin by Hezbollah and his cousin's death in Syria. The RPD had several difficulties reconciling the applicant's account with the ostensibly corroborative evidence the applicant filed. The RPD's concerns in this regard had nothing to do with questions of plausibility or implausibility. On his appeal to the RAD, the applicant's primary position concerning these findings was that it was not necessary to consider them but, in the alternative, the applicant submitted that the RPD's findings should be set aside. The RAD agreed with the applicant's principal submission and decided the appeal without considering the credibility of the applicant's account of his cousin's fate. As a result, I will not address this issue either.

[19] For these reasons, the application for judicial review is allowed, the decision of the RAD dated January 22, 2018, is set aside, and the matter is remitted for redetermination by a different decision-maker.

[20] The parties did not suggest any serious questions of general importance for certification under section 74(d) of the *IRPA*. I agree that none arise.

[21] Finally, the original style of cause names the respondent as the Minister of Immigration, Refugees and Citizenship. Although that is how the respondent is now commonly known, its

name under statute remains the Minister of Citizenship and Immigration: *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, s 5(2) and *IRPA*, s 4(1). Accordingly, as part of this judgment, the style of cause is amended to name the respondent as the Minister of Citizenship and Immigration.

JUDGMENT IN IMM-787-18

THIS COURT'S JUDGMENT is that

1. The style of cause is amended to reflect the Minister of Citizenship and Immigration as the correct respondent.
2. The application for judicial review is allowed.
3. The decision of the Refugee Appeal Division dated January 22, 2018, is set aside and the matter is remitted for redetermination by a different decision-maker.
4. No serious question of general importance is stated.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-787-18
STYLE OF CAUSE:	ALI ZAITER v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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APPEARANCES:

Leigh Salsberg	FOR THE APPLICANT
Nicholas Dodokin	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Leigh Salsberg Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT