

Date: 20080221

Docket: IMM-2089-07

Citation: 2008 FC 225

Ottawa, Ontario, February 21, 2008

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

SEVER RASHID KAREEM JABARI

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated April 24, 2007 concluding the applicant, a 17-year-old citizen of Iraq, was not a Convention refugee or person in need of protection. This is a case where a boy was sent by his father to seek refuge in Canada from violent tribal revenge against his family in Iraq.

FACTS

[2] The applicant is a 17-year-old teenager from Iraq who arrived in Canada as an unaccompanied minor on September 10, 2006. Upon his arrival, the applicant filed for refugee

protection, claiming a well-founded fear of persecution and need of protection arising from a violent feud between his family and the leader of another tribe.

[3] The applicant states the dispute began in 2005, when Fattah Mihayedn attempted to forcibly take his father's land. The applicant states that this individual is the leader of the Mihayedn tribe and is connected with both the Iraqi central government and the Kurdish government in the north.

[4] The applicant states that members of the Mihayedn tribe attacked his father. In March 2006, the applicant's father complained to authorities about the land dispute. In response to the complaint, tribal government officials arranged for both sides discuss the issue, and eventually decided the land should be partitioned between the parties. The applicant's father opposed this partition.

[5] On June 9, 2006, the applicant states that Fattah Mihayedn, his two sons, and seven other tribe members arrived at the applicant's family home looking for the applicant's father. An altercation ensued with the members of the Mihayedn tribe shooting at the applicant's father, and the applicant's father shooting and killing Fattah Mihayedn. The applicant states his father then disappeared and that the applicant, along with his mother and sister, went to the home of his maternal uncle, where the applicant's father met them five days later.

[6] Fearing he would be killed by members of the Mihayedn tribe as revenge for the killing of Fattah Mihayedn, the applicant left Iraq with the help of a smuggler in July 2006. After travelling

through Iran and Turkey, the applicant arrived in Canada in September 2006, upon which time he filed a claim for refugee protection.

[7] In addition to fearing attempted revenge at the hands of the Mihayedn tribe, the applicant also states in his Personal Information Form (PIF) that he fears returning to Iraq on account of the fact that his paternal uncle was a well-known Kurdish fighter and American supporter who was killed in Mosul in 2003.

Decision under review

[8] On April 24, 2007, the Board concluded the applicant was not a Convention refugee or a person in need of protection. The Board held that the applicant's credibility was the determinative issue in its decision, and found the applicant was not credible with respect to the material elements of his testimony. In its decision, the Board made a number of negative credibility findings relevant to this application. These included:

1. two of the applicant's reasons for fearing a return to Iraq were not substantially addressed in his PIF narrative and port of entry declaration. Accordingly, the Board held that neither reason impacted his decision to leave Iraq;
2. it was implausible there would not exist any documentation over the government's decision to partition the land;
3. the applicant's evidence concerning the events of June 9, 2006 were found to contain inconsistencies, and were therefore not credible;

4. there was no evidence the applicant would be targeted upon return to Iraq because his father is a fugitive; and
5. the applicant's general claim of dangerous country conditions in Iraq were not well-founded.

[9] The Board concluded that the applicant's lack of credibility undermined his claim for protection and established that he was neither a Convention refugee nor a person in need of protection.

ISSUES

[10] The applicant raises two issues for consideration:

1. Did the Board err in rejecting the applicant's credibility by misquoting the applicant's evidence and ignoring aspects of the evidence; and
2. Did the Board err in failing to analyze whether the applicant faces an objective risk of persecution if returned to Iraq?

STANDARD OF REVIEW

[11] The first issue concerns the reasonableness of the Board's credibility findings. It is well settled that such findings are subject to the highest degree of deference and will only be set aside if found to be patently unreasonable: see *Gonzalez v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 128.

[12] The second issue deals with the sufficiency of the Board's reasons. The failure to provide adequate reasons is a breach of procedural fairness subject to the standard of correctness: *Via Rail Canada Inc. v. Canada (National Transportation Agency)*, [2001] 2 F.C. 25 (C.A.).

ANALYSIS

Issue No. 1: Did the Board err in rejecting the applicant's credibility by misquoting the applicant's evidence and ignoring aspects of the evidence?

[13] The applicant argues the Board erred in a number of its credibility findings concerning the applicant's oral and written testimony. Specifically, the applicant raises three situations in which the Board committed reviewable errors. These include:

1. the Board misquoted and misinterpreted the applicant's testimony regarding why he fears returning to Iraq;
2. the Board placed too much emphasis in its decision on the applicant's lack of supporting documentation; and
3. the inconsistencies relied on by the Board in its assessment of the June 9, 2006 incident did not exist on the record.

I will consider each of these arguments in turn.

The applicant's fears in Iraq

[14] The Board states at page 2 of its decision that the applicant provided three reasons for why he fears returning to Iraq. These reasons were worded in the following manner:

1. Vendetta from Fattah's family and his tribesman due to the dispute of a property in his father's name;
2. A known paternal uncle who fought for the Kurdish; and
3. All terrorist groups.

After outlining the three reasons, the Board stated that because the applicant's PIF narrative only emphasized the property dispute – *i.e.*, the first reason – then it was not plausible that either the second or third reasons had any impact on the applicant's decision to leave Iraq.

[15] The applicant, however, argues the Board misunderstood his testimony regarding his fear of returning to Iraq; specifically, his fear of “a known paternal uncle” and “all terrorist groups.” The applicant states he never testified fearing all terrorist groups, but rather that, as a member of the Sunni Muslim minority, he feared being targeted by the powerful Shia militia. Further, the applicant states that he does not *personally* fear his paternal uncle, who was killed in 2003, but rather fears possible reprisals from anti-American militants because his uncle was a well-known Kurdish fighter and American sympathizer. Finally, the applicant argues that the Board misinterpreted his testimony with respect to the context of his fears; namely that he never testified that the fears were his reason for leaving Iraq, but that they were reasons why he feared *returning* to Iraq. Essentially, they were prospective fears and were not associated with past persecution.

[16] Having reviewed the record, I conclude that the Board did not make a reviewable error in its treatment of the applicant's fears. While the Board's reasons could have more effectively outlined the nature of the applicant's fears, it is clear from the record that the Board member understood that the applicant did not fear his uncle, but rather his uncle's notoriety and reputation. As the member stated at page 40 of the transcript in reference to the applicant's PIF narrative: “I know he talks about it in there. I'm just talking about that you say your fear emanates from that, you uncle's – emanates from you uncle's affiliation.”

[17] Further, while the applicant stated in his oral testimony that he fears returning to Iraq because of the terrorist activities of the Shia militia, the applicant at no point asserts that he was ever targeted by such militant groups, for reasons of his uncle's alleged notoriety or otherwise. The applicant provides no evidence that he had ever been persecuted for reasons other than the family conflict and land dispute that formed the substantive portion of his PIF narrative. Accordingly, the Board was entitled to question the veracity of the applicant's fears relating to his paternal uncle and the Shia militia, neither of which was substantively addressed in the applicant's written evidence. For these reasons, the Board did not err in concluding that such fears did not ground the applicant's decision to leave Iraq.

[18] Further, the fact that the fears were provided in the context of prospective fears had no relevance on the Board's ultimate conclusion that his fears were not credible. However, the applicant also submits that the Board erred in summarily discarding these reasons without addressing them in the context of an analysis under section 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA). This argument forms the basis of the second issue of this application and will be considered at that time.

Applicant's lack of supporting documentation

[19] The Board decided it was implausible there is no documentation of the government's decision to partition the land between the applicant's family and the Mihayedn tribe. Accordingly, the Board drew an "adverse inference" from the "lack of such documents." However, the applicant argues that the Board's implausibility finding was made in error because it was premised on an

assumption that the decision was made by a court functioning under a legal system that always issues documents. The applicant, however, testified before the Board that the tribal government's decision to partition the land was an oral one in which no such document was created. Accordingly, the applicant argues there was no evidentiary basis for the Board's finding. The Court agrees. The tribal government is not a conventional system.

The events of June 9, 2006

[20] The applicant argues the Board made erroneous findings of fact with respect to credibility concerning his oral and written recount of the events of June 9, 2006. These include:

1. the Board erred in concluding that the applicant's PIF narrative never stated that members of the Mihayedn tribe confronted and attempted to attack the applicant;
2. the Board erred in concluding that the applicant put forth two stories concerning when and how they left their family home after the confrontation.

[21] Having reviewed the evidence, it is clear that the Board made erroneous findings of fact respecting credibility, which were patently unreasonable. First, there are no inconsistencies between the applicant's evidence regarding whether he was confronted by members of the Mihayedn tribe. Second, the applicant's evidence regarding the events following the shooting were not inconsistent. These patently unreasonable findings of fact are material to the Board's credibility finding about the applicant's principal fear and reason for fleeing Iraq. Accordingly, the Court must set aside the decision.

Issue No. 2: Did the Board err in failing to analyze whether the applicant faces an objective risk of persecution if returned to Iraq?

[22] The applicant argues the Board erred in failing to give sufficient reasons for rejecting the applicant's risk upon returning to Iraq as mandated by section 97 of the IRPA. The applicant argues that the Board erred by not providing separate reasons for concluding that the applicant would not face a risk to his life or cruel and unusual treatment or punishment if returned to Iraq.

[23] In support, the applicant cites the Federal Court decision in *Smoudi v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1139, [2005] F.C.J. No. 1404 (QL), where Mr. Justice O'Reilly held at paragraph 7:

¶ 7 I realize that, in some situations, negative credibility findings in relation to s. 96 will obviate the need to consider s. 97. However, that is not always the case. I agree with Justice Edmond Blanchard [in *Bouaouni v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1211, [2003] F.C.J. No. 1540 (QL)] when he said:

There may well be instances where a refugee claimant, whose identity is not disputed, is found to be not credible with respect to his subjective fear of persecution, but the country conditions are such that the claimant's particular circumstances, make him/her a person in need of protection. It follows that a negative credibility determination, which may be determinative of a refugee claim under s. 96 of the Act, is not necessarily determinative of a claim under subsection 97(1) of the Act. ...

[24] While Mr. Justice O'Reilly's decision states that there may be situations where a negative credibility finding is not sufficient to obviate the need for a separate section 97 analysis, it is also clear that that is not always the case and must be considered on a case-by-case basis. As Mr. Justice

Martineau stated in *Kandiah v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 181, [2005] F.C.J. No. 275 (QL) at paragraph 16:

¶ 16 Subsequent jurisprudence has found the lack of a separate section 97 analysis to be both reviewable and non-reviewable, depending on the circumstances. ... The distinction explicitly depends on the nature of the evidence presented in the case.

[25] In the case at bar, the applicant raised two separate reasons why he feared returning to Iraq. These reasons, as outlined above, were that he feared potential persecution at the hands of both the Shia militia and anti-American militants because of his ethnicity and because of his paternal uncle's reputation as a Kurdish fighter and American sympathizer. The Iraqi country conditions establish that there is significant ethnic violence in the country.

[26] Moreover, if the applicant's principal claim is held to be credible, then he may face a serious risk to his life because of ethnic violence against his family, and the objective documentary evidence may show that there is not adequate state protection in Iraq.

[27] Accordingly, the Court agrees that the Board did not provide sufficient reasons to address this important issue, and the Court must remit this issue back to the Board.

[28] Both parties and the Court agree that this case does not raise a question that should be certified.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application is allowed and the decision is set aside; and
2. The refugee claim is referred back to a different panel of the Board for redetermination.

“Michael A. Kelen”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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