

Federal Court



Cour fédérale

Date: 20111214

Docket: IMM-1089-11

Citation: 2011 FC 1424

Ottawa, Ontario, December 14, 2011

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

MOHAMMAD RATIB ABEER

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant seeks judicial review of a decision, dated January 19, 2011, of the Refugee Protection Division of the Immigration and Refugee Board of Canada (the Board) which found the applicant to be neither a *Convention* (United Nations' *Convention Relating to the Status of Refugees*, [1969] Can TS No 6) refugee nor a person in need of protection under section 97 of the *Immigration and Refugee Protection Act*, 2001, c. 27 (*IRPA*).

[2] The application is founded on two grounds; a breach of procedural fairness arising from the conduct of the hearing and, alternatively, that the findings of credibility were unreasonable. For the reason that follows the application is granted on the first ground. The second ground need not be addressed.

[3] Courts have long recognized a nexus between procedural fairness and the doctrine of deference. Deference is predicated on an assumption that the proceedings below have met the requisite standard of fairness. As Justice Binnie said in *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 59:

There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.

[4] In consequence, if the Court concludes that there has been a breach of natural justice, no deference is paid and the Court will, save exceptional circumstances, set aside the decision; see *Thamotharem v Canada (Minister of Citizenship and Immigration)*, 2006 FC 16, [2006] 3 FCR 168 per Justice Edmond Blanchard; *Benitez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 461, [2007] 1 FCR 107 per Justice Richard Mosley for two examples of the application of this principle.

[5] In this case the proceedings of the Board do not, to use the language of *Khosa*, fit comfortably into the established practices and procedures essential to ensure natural justice. While the breach of natural justice is, in and of itself, sufficient to grant the application, it is also evident that the breach had a material bearing on the second ground of argument, the unreasonable findings

of fact. In making this latter observation I do not detract from the standard of review for natural justice in correctness and that the decision here falls on that ground alone.

[6] The applicant is a citizen of Afghanistan who made a claim for refugee protection upon arrival in Canada before the Refugee Protection Division (RPD). At his hearing he was represented by Ms. Z. Khedri, a lawyer licensed to practice in Ontario by the Law Society of Upper Canada. The applicant had requested that a Dari interpreter be present to assist him in giving evidence.

[7] Despite the applicant's request for a Dari interpreter, a Farsi interpreter was provided by the Board. The interpreter explained to the Board that Farsi, the language spoken in Iran, was the umbrella language of which Dari, spoken in Afghanistan, was a dialect. The interpreter explained that while there was a mutual understanding between dialects, she did not speak the Dari dialect nor did she enunciate her words in the Dari dialect.

[8] The applicant informed the Board that, in these circumstances, he would prefer to have his hearing conducted in English. The interpreter was therefore to be used by the applicant when he required additional assistance.

[9] Before the formal hearing began the Board member informed the applicant's counsel that he found her English to be very difficult to follow and asked her to speak in Dari and to have the Farsi interpreter relay her representations and questions to the Board in English. According to the Board, the applicant's counsel "speaks English with a very strong accent", and "the Panel had difficulty

comprehending her English.” In the result, the translator was pressed into service in interpreting counsel’s representations into English.

[10] This arrangement was reached between the Board member and counsel in a conversation which was “off the record” and not in the presence of the applicant. It was in fact, recorded.

COUNSEL FOR CLAIMANT: I try to speak slowly.

PRESIDING MEMBER: No I want to propose is something [...] If and when it comes your turn to ask questions maybe we could do it this way; you could ask the question in Dari and then Madam Interpreter could translate your question...

COUNSEL FOR CLAIMANT: No problem, sure...

PRESIDING MEMBER: In English. Now the problem is he is going to have a gap. You are going to ask the question in Dari and he will understand it right away so you are translating back for me. Okay? As...he is going to hear the question in your language, Dari, but there is going to be a gap because there is going to be English in-between.

But instead of me interrupting you say I am sorry, say it again please, I do not understand you...I hope you do not take offense if we do that.

COUNSEL FOR CLAIMANT: No I do not. Sometimes I do not understand you too so...

[11] The implementation of this entente between the Board and counsel was then discussed:

COUNSEL FOR CLAIMANT: Sure. So you want me to ask questions, ask him in Dari and the interpreter will translate to you in English.

PRESIDING MEMBER: Wait, let me just repeat what I said. Normally when it is your turn to ask questions you ask questions in English...

COUNSEL FOR CLAIMANT: Yes.

PRESIDING MEMBER: Madam Interpreter translates into Dari.

COUNSEL FOR CLAIMANT: Yes.

PRESIDING MEMBER: He answers in Dari, she speaks in English. What I want to do is you speak in Dari. So instead of right away your question being translated into Dari...I am getting confused.

It is simple. Look, you ask a question in Dari...do you not speak, you speak Dari when you are questioning him and she will translate your Dari back into English because I understand her English better than I understand your English.

COUNSEL FOR CLAIMANT: Okay.

PRESIDING MEMBER: And on the other hand you understand the question better coming straight from you because it is not by interpreter.

[12] As foreshadowed here, the execution of this arrangement would be problematic. In the end, the applicant would, despite his request for translation, respond in English to the Board's questions. In this regard, it was recognized that the applicant, while by no means fluent, had a basic understanding in English. There were, however, limitations to this, as reflected in the following extract from the transcript:

PRESIDING MEMBER: Does he speak better than you; does he speak better than you?

COUNSEL FOR CLAIMANT: Maybe same as me.

[13] If the Board member could not understand counsel's English, it is a legitimate question as to how the Board could understand the claimant's testimony. Indeed, the transcript of the applicant's testimony is replete with broken and disjointed phrases, leaving doubt, ambiguity and at times confusion as to the substance of the applicant's evidence.

[14] The applicant was then brought into the hearing room and the following exchange took place between the Board member, the interpreter and the applicant:

PRESIDING MEMBER: Okay. You know what; I might want to have him sit over there because his English is not perfect and maybe if I am closer to him I will understand him a little better, because he is going to be speaking more to me than to the interpreter, at least to start.

So you speak, Madam Interpreter, some Farsi, is that what you are saying?

INTERPRETER: No, I speak Farsi...

PRESIDING MEMBER: Oh you speak Dari.

INTERPRETER: The name of the language is Farsi or Persian whichever you choose to call it.

PRESIDING MEMBER: I understand.

INTERPRETER: Dari is a dialect of Farsi spoken in Afghanistan and we both speak Farsi but different dialects. The dialect I speak is from Iran the dialect he speaks is from Afghanistan. We both speak the same language.

PRESIDING MEMBER: Except he calls his dialect Dari.

INTERPRETER: He calls it Dari, I call it...I call...refer to it as the name of the language which is Farsi or Persian.

PRESIDING MEMBER: So you would say, even though he says he is speaking Dari you would say he is speaking Farsi.

INTERPRETER: It is not what name you choose to call it. Yes, he chooses to use the dialect as the name of the language. Like I am being specific because my background is linguistics but Dari is a dialect of Farsi, which is the global, like the umbrella language. Dari is one of the many dialects of Farsi.

[15] Problems arose mid-way through the proceeding. Not so much by reason of the applicant's English, but by reason of the fact that the Board could not understand counsel for the applicant:

PRESIDING MEMBER: Say again; sorry counsel?
You know what; this time speak to the interpreter because I am not understanding you.

COUNSEL FOR CLAIMANT: This evidence, I do not know if I can give you this piece. The client spoke in front of me with his father, he called. The father said that he has the documents but it is inside all the papers he has to find.

PRESIDING MEMBER: I have to ask you to repeat it. I am not understanding you counsel and it is my fault.

COUNSEL FOR CLAIMANT: Even not yet?

PRESIDING MEMBER: Can you speak through the interpreter?
Really, I do not understand you.

COUNSEL FOR CLAIMANT: Sure.

PRESIDING MEMBER: I just do not understand your English.

COUNSEL FOR CLAIMANT: No problem.

PRESIDING MEMBER: Really and I go to understand what you are saying. So can we try this now? Can you speak through the interpreter?

COUNSEL FOR CLAIMANT: Sure.

PRESIDING MEMBER: Please.

COUNSEL FOR CLAIMANT: But could I ask the interpreter if she understood what I told.

INTERPRETER: Well I completely understood.

PRESIDING MEMBER: Well you do, but I do not. You understand English, but I just do not and I need to really understand every word she says. Can you understand her...do you understand her when she speaks in Dari?

...

INTERPRETER: It seems like you are not understanding either. The day the client came to my office...

COUNSEL FOR CLAIMANT: I am sorry; I think you are tired.

PRESIDING MEMBER: I am not tired. I just need to understand you perfectly counsel.

[16] In my view, the proceeding adopted did not allow for the orderly and fair presentation of the evidence, and, as such warrants the decision being set aside.

[17] Proceedings before federal boards and tribunals are to be conducted in either of the official languages. Translation is provided for the benefit of witnesses, not counsel. The procedure that unfolded in this case wherein it required the applicant's counsel to speak in Dari, despite the interpreter being Farsi, and with the balance of the proceeding being conducted in English created a situation which undermined the seriousness of a claim under the *Convention* and was at best, confusing. Lost in it all was the applicant who, despite his request for a Dari translator, testified in English. While the Board member made the best he could of a difficult situation, the fact remains that the proceedings did not conform to the requirements of procedural fairness.

[18] The failings in the procedure also had a direct and material impact on the core issue of credibility. The Board prefaced its findings on credibility with the observation that it had:

... an issue with the demeanour of the claimant. Frequently in the hearing he smiled broadly and laughed when answering questions. While the Panel found the claimant to be a pleasant and likeable young man, the Panel finds that his demeanour indicated that he took the proceedings lightly, to some extent as a joke, or laughing matter.

Given that he alleged that he is in fear for his life in Afghanistan, the Panel would have expected a more serious approach by the claimant.

[19] On this basis, the Board member drew a negative inference as to the applicant's credibility.

[20] The record indicates that the behaviour was consistent with his actual character, and laughter may have been his response to a stressful situation. One example of this arises during his testimony about his arrest and detention at the Canadian border:

PRESIDING MEMBER: You stayed there about two weeks or something like that. You made a thing about the interview, about your interview at the border. Just to let you know that I am not that concerned with that interview so I probably will not be asking you any questions on it, I do not think. Except to the extent that if the Canadians gave you a hard time why do you want to come to Canada?

CLAIMANT: This is also a question for me that I mean when you see the reality, I do not know exactly...it is the job of the officer to (inaudible) and although I gave my passport and I explained that I do not have visa but I do have a passport and because of this reason I want to claim.

PRESIDING MEMBER: So anyway the question was if the Canadians gave you such a hard time why not turn around and go back to Washington state and make your refugee claim in the United States?

CLAIMANT: The thing is the Canadian law and the regulation and the reality of Canada is not to make hard for people, this is the thing I decided. Me [ph] this is sort of problem with the person, not the Canada.

PRESIDING MEMBER: Or the assistant [ph]. I am sure the Americans could be just as difficult too if you enter their country without a visa.

CLAIMANT: Yes but I explained that this is my passport, I am a student I do not have visa. But the thing is in the custom...custom service on the second night when they handcuffed me and I laughed.

PRESIDING MEMBER: Probably when you laugh to policemen they probably are not too happy. In any event, okay, that is fine. But more importantly is the USA has signed the 1967 protocol on refugees and accepts, is known for accepting refugees and as a matter of fact I happen to know they accept roughly the same percentage of...at the end, refugees as Canada does. So I am...I am stating that unless you or counsel disagree the United States is as noted a refugee intake country as Canada is. So given that I want to know why you did not stay in the USA and make an asylum claim there. I am concerned about that.

[21] Much later in the proceeding, the applicant's counsel returned to a the issue previously explored by the Board member, the claimant's arrest and detention upon entry into Canada:

PRESIDING MEMBER: Were you like laughing and smiling like you are now; were you doing it then? Could that be the difference?

CLAIMANT: No, at that time I could not talk even, even in the interview with the officer. You can see in my first interview, even I could not able to talk in Dari. There is lots of mistakes on it and when I am reading that interview it is really I think it is not me.

PRESIDING MEMBER: It is just... could it be that you know your laughing and smiling makes people think you do not take things seriously. Did that ever cross your mind?

CLAIMANT: Yes maybe but again it is my style of talking. It is not possible I should cry. But at least I... because my life is full of violence, I try to make... show myself happy, otherwise it is difficult to...

[22] This was not an isolated exchange. There are other examples where the integrity of the factual and credibility determinations are called into question by the lack of precision in language.

To choose but one example:

PRESIDING MEMBER: So anyway the question was if the Canadians gave you such a hard time why not turn around and go back to Washington state and make your refugee claim in the United States?

CLAIMANT: The thing is the Canadian law and the regulation and the reality of Canada is not to make hard for people, this is the thing that I decided. Me [ph] this is sort of problem with the person, not the Canada.

PRESIDING MEMBER: Or the assistant [ph]. I am sure the Americans could be just as difficult too if you enter their country without a visa.

CLAIMANT: Yes but I explained that this is my passport, I am a student I do not have visa. But the thing is in the custom... custom service on the second night when they handcuffed me and I laughed.

PRESIDING MEMBER: You left?

CLAIMANT: I laughed, laughed. And officer ask me why you laughing and I said because people is going... come and going without any handcuff and you handcuff me and it is because I laugh to myself, that is why I should be in this situation.

[23] Two observations flow from these exchanges. First, there were demonstrable and serious issues with respect to the capacity of applicant's counsel to conduct the proceedings in English; secondly the applicant offered a plausible explanation for his behaviour before the Board. Far short of suggesting a lack of credibility, it reflected his anxiety, his manner of coping with stress and the importance he placed on not showing fear or weakness. There was therefore a credible explanation given for his behaviour, which was consistent with past events.

[24] The nuances of the evidence and testimony were lost in the ill-conceived procedure and no conclusion about credibility could safely be drawn. The Board member was in no position to use the testimony as a basis to draw an over-reaching negative inference as to the applicant's credibility.

[25] The application for judicial review is granted. The matter is referred back to the Immigration Refugee Board for reconsideration before a different member of the Board's Refugee Protection Division.

[26] No question for certification has been proposed and the Court finds that none arises.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted. The matter is referred back to the Immigration Refugee Board for reconsideration before a different member of the Board's Refugee Protection Division. No question for certification has been proposed and the Court finds that none arises.

"Donald J. Rennie"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1089-11

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OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Toronto

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**REASONS FOR JUDGMENT
AND JUDGMENT:** RENNIE J.

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