

Federal Court



Cour fédérale

Date: 20120530

Docket: IMM-6656-11

Citation: 2012 FC 662

Ottawa, Ontario, May 30, 2012

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

ALI MOWLOUGHI

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application by Mr. Ali Mowloughi (Mr. Mowloughi) for judicial review of a decision of the Immigration and Refugee Board (the Board), rendered on September 2, 2011. The Board determined that Mr. Ali Mowloughi (Mr. Mowloughi) is neither a Convention refugee nor a person in need of protection as contemplated by sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] For the following reasons, this application for judicial review is dismissed.

II. Facts

[3] Mr. Mowloughi is a citizen of Iran.

[4] Mr. Mowloughi claimed to have been arrested, detained and brutalized by Iranian authorities for having participated in demonstrations against President Ahmadinajad.

[5] On June 14, 2009, he attended a demonstration, was arrested and taken to the Pasdoran station in Mashhad. He was subsequently interrogated and brutalized.

[6] Mr. Mowloughi was detained for two days and then forced to sign a document stating that he would cease participating in demonstrations.

[7] Upon his release, Mr. Mowloughi sought medical attention. Several days later he went to a clinic for a follow-up examination. On his return, he encountered a crowd that was gathered for a demonstration. He was suddenly attacked by Pasdoran agents and forced in a car with other demonstrators. He protested in vain that he was not participating in that demonstration but merely returning home from the clinic. The agents refused to believe him.

[8] Mr. Mowloughi was taken to Vakilabad prison in Mashhad where agents took his finger prints and photograph. He was subsequently tied to a railing and physically brutalized. He was detained for several days and only released after his wife paid a large fine.

[9] He was held again in February 2010, two days prior to another large demonstration, as a preventive measure.

[10] Mr. Mowloughi left Iran on May 17, 2010, after he obtained a temporary Visa to visit his sisters in Canada. He arrived the same day and made his refugee claim on June 2, 2010.

[11] The Board concluded that Mr. Mowloughi was neither a Convention Refugee nor a person in need of protection as per sections 96 and 97 of the *IRPA* due to his lack of credibility.

III. Legislation

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

Convention refugee	Définition de « réfugié »
<p>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,</p> <p>(a) is outside each of their countries of nationality and is unable or, by reason of</p>	<p>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 :</p> <p>a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du</p>

that fear, unwilling to avail themselves of the protection of each of those countries; or

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

Personne à protéger

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

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) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

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) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

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

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

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

(ii) elle y est exposée en tout lieu de ce pays

every part of that country and is not faced generally by other individuals in or from that country,

alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

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

(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. Issue and standard of review

A. Issue

- *Did the Board breach its duty of procedural fairness in view of the quality of interpretation services provided to Mr. Mowloughi during his hearing?*

B. Standard of review

[13] In *Zaree v Canada (Minister of Citizenship and Immigration Canada)*, 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”.

V. Parties’ submissions

A. Mr. Mowloughi’s submissions

[14] In his affidavit, Mr. Mowloughi stated that he only became aware of the deficiencies in the interpretation of his testimony before the board when Ms. Hedieh Tajik listened to the CD of the hearing. It is therefore his position that he was incapable of raising an objection to the interpretation deficiencies before then. Consequently, he claims not to have waived his right to the assistance of a competent interpreter under section 14 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitutional Act*, 1982, being schedule B to the *Canada Act (UK)*, 1982, C 11.

[15] Mr. Mowloughi relies on the following extract from *Zaree*, cited above, to claim that his application for judicial review must be granted. Justice Martineau wrote in paragraph 8:

“...Where problems of interpretation could be reasonably addressed by the refugee claimant at the time of the hearing, there is an

obligation to address them then and not later, in judicial review proceedings. However, if they can only be addressed during judicial review, the refugee claimant is not required to show that he or she has suffered actual prejudice as a result of the breach of that right.”

[16] Mr. Mowloughi alleges that the interpreter made several errors during the hearing which considerably undermined his credibility. He also submits that the interpreter made 49 misinterpretations, some of which have impacted on his claim. As a result, Mr. Mowloughi alleges that he was not provided with a “continuous, precise, competent, impartial and contemporaneous” interpretation (see *Mohammadian v Canada (Minister of Citizenship and Immigration)*, [2001] FCA 191).

[17] Mr. Mowloughi further submits that he need not demonstrate that the interpreter’s misinterpretations were material to the Board’s credibility findings. Instead, he must only prove that the Board breached its duty of procedural fairness.

B. The Respondent’s submissions

[18] The Respondent notes that in order for Mr. Mowloughi to establish a breach of procedural fairness, he must demonstrate that the interpretation provided at the hearing was not “continuous, precise, impartial, competent and contemporaneous” (*R. v Tran*, [1994] 2 SCR 951 [*Tran*]). He must also demonstrate that the interpreter’s misinterpretations were material to the Board’s credibility findings (*Nsengiyumva v Canada (Minister of Citizenship and Immigration)*, 2005 FC 190 at para 16).

[19] The Respondent argues that Mr. Mowloughi failed to demonstrate that the errors of interpretation were important in the Board's assessment. Relying on *Fu v Canada (Minister of Citizenship and Immigration)*, 2011 FC 155 at para 10 [*Fu*], where Justice Rennie stated that "the fact that there was an error in translation, which in turn formed the incorrect foundation of one of the adverse findings of credibility does not mean that the decision should be set aside". The Respondent claims that in the case at bar, just as in *Fu*, the overall credibility determination was reasonable and the judicial review should also be dismissed.

[20] The Respondent submits that half of the alleged errors are mere disagreements with the interpreter's choice of words since the actual substance of the testimony was properly translated during the hearing and as such, was in accordance with *Tran* cited above (see *Sohal v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 1175 at paras 22-23).

[21] The Respondent also claims that Mr. Mowloughi failed to prove that the remaining errors were material to the Board's credibility findings.

[22] Finally, it is the Respondent's position that Mr. Mowloughi waived his Charter right because he failed to raise the issue of misinterpretations at the first occasion. Mr. Mowloughi was aware of the date conversion problem but failed to raise it. Furthermore, he understood enough English to recognize potential problems as evidenced by his testimony when cross-examined on March 12, 2012.

VI. Analysis

- *Did the Board breach its duty of procedural fairness in view of the quality of interpretation services provided to Mr. Mowloughi during his hearing?*

[23] The Board did not breach its duty of procedural fairness for the reasons that follow.

[24] The Court firstly notes that Mr. Mowloughi has not challenged the reasonableness of the Board's credibility findings.

[25] As the Court reviews the transcript of the hearing and Mr. Mowloughi's affidavit, it is clear that several errors of interpretation occurred during the hearing. However, the important question for this Court is whether these errors were material or not to the Board's credibility findings.

[26] The Board found several discrepancies between Mr. Mowloughi's Personal Information Form [PIF] and his testimony. It also determined that Mr. Mowloughi had omitted to include important facts in his PIF such as his purported beating at the Vakilabad prison. Finally, the Board noted that Mr. Mowloughi failed to adduce important medical evidence in support of his application.

[27] The Court reviewed Hedieh Tajik's affidavit for evidence that the alleged errors were material to the Board's nine credibility findings. Some of the alleged misinterpretations can better

be characterized as disagreements on choice of words, or imprecisions and have no bearing on the actual substance of the testimony.

[28] Counsel for Mr. Mowloughi directed the Court to paragraph 40 of the affidavit, amongst others, to indicate that inconsistencies on the chronology of events were material. The Respondent admits these misinterpretations on dates have impacted one of the nine credibility findings.

[29] “The fact that there was an error in translation, which in turn formed the incorrect foundation of one of the adverse findings of credibility, does not mean that the decision should be set aside. It is clear that the [Board] rejected [the Applicant’s claim] because it found him, over the course of his testimony, not to be credible...In sum, [the Applicant’s] right to procedural fairness was not breached as the breach could not, once again in regard to the decision as a whole, have affected the outcome of the decision under review” (see *Fu* cited above at para 10).

[30] Furthermore, as the Court reviewed the transcript, it is apparent from the very onset of the hearing that the interpreter is struggling with the conversion of dates. The Court concurs with the Respondent that Mr. Mowloughi ought to have raised this issue since he failed to do so he waived his right to object to these issues in this judicial review.

MEMBER : Yes. So sir I realize the importance of this hearing for you. I will be asking you questions concerning the reasons for your claim for refugee protection. My questions reflect only the need for information so I can make a fair and informed decision about your claim. So if a question is unclear say so and it will be rephrased. If you have any difficulty communicating with the interpreter say so immediately and I will try to resolve the problem. If you do not know the answer to a question, say so, do not attempt to guess. Often a simple yes or no is an appropriate response to a question. If you wish to respond at length please break up your answers in order to

facilitate interpretation. If you require a break at any time during the hearing say so and we will break for a few minutes.

The microphone in front of you is used to record your testimony; it will not amplify your voice, so it is important to speak clearly in order to ensure your full answer is recorded.

Did you want to get some water before we get started?

CLAIMANT : No I have <inaudible>.

MEMBER : Madame Interpreter you are okay?

INTERPRETER : I am okay, thank you.

MEMBER : So I am going to begin by asking you some questions.

Sir when did you leave Iran?

INTERPRETER : He gave me... I have to convert.

CLAIMANT : It is the second month so approximately in April 2009 ... May 17, 2009.

(see Transcript, pages 164 and 165 of Tribunal Record)

MEMBER : When you were detained; do you remember the date?

CLAIMANT : It is in the spring ... so late spring of 2009 and when I arrived two days after I looked on the calendar and ...

MEMBER : Do you recall the month, the date other than late spring?

INTERPRETER : I can find out the exact date.

MEMBER : Do you have it?

INTERPRETER : I have to convert.

MEMBER : In you can convert it for me.

INTERPRETER : This is ... I have the calendar in front of me. I think it is around June 15.

MEMBER : Thank you.

INTERPRETER : Approximately.

(see Transcript, pages 169 and 170 of the Tribunal Record)

[31] For these reasons this application is dismissed.

VII. Conclusion

[32] This Court dismisses Mr. Mowloughi's application for judicial review as the interpreter's errors were not material to the Board's findings on credibility. Mr. Mowloughi further waived his right to object to the issue based on the date conversions in this judicial review. He is not a Convention Refugee or a person in need of protection under sections 96 and 97 of the *IRPA*.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. This application for judicial review is dismissed; and
2. There is no question of general importance to certify.

"André F.J. Scott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6656-11

STYLE OF CAUSE: ALI MOWLOUGHI
v
THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: April 17, 2012

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

DATED: May 30, 2012

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