

Federal Court



Cour fédérale

Date: 20130125

Docket: IMM-4378-12

Citation: 2013 FC 76

Ottawa, Ontario, January 25, 2013

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

MOHAMMAD ASHAR MALIK

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] Through no fault of the participants, parties and the Immigration and Refugee Board [IRB], the evidentiary record in this case is a mess because of the multiple inputs and uncertain and unreliable sources of evidence. That state of affairs results in a denial of natural justice which requires that the matter be heard again. The facts of this case are extremely unusual.

[2] The Court's primary concern is the interests of the child who is under the care of the Children's Aid Society. The Applicant was placed in the custody of the Children's Aid Society [CAS]. A Designated Representative [DR] was appointed to act on the Applicant's behalf. The Applicant was placed and remains in foster care.

II. FACTS

[3] The Applicant is a citizen of Pakistan and was a child of 10 when he entered Canada and filed his PIF. His mother and a sister remain in Pakistan; his father and four other sisters are in the United States where his father is a citizen. At the time of the Applicant's refugee hearing, the father was unable to come to Canada because he had been charged with drug-related offences and was required to surrender his passport.

[4] The Applicant came to Canada en route to the United States to live with his father. The Applicant was travelling with his father's girlfriend when he was apprehended by Canadian immigration authorities on June 21, 2011.

[5] With the assistance of the DR, the Applicant made a claim for refugee protection and filed a PIF. The claim was based on belonging to a particular social group due to the wealth of the Applicant's father as well as the Applicant's age and gender.

[6] The PIF provides that the information was obtained by his counsel and his DR from the Applicant and his parents. The PIF disclosed that the Applicant was subject to a number of threats

and at least one attempted abduction. These events appear to be motivated by the perception that the father is a wealthy man living in the United States.

[7] The PIF describes threats received by the mother, several beatings of the Applicant, demands for money and threats of abduction. The family complained to police but nothing was done. As a consequence, the family planned for the Applicant to leave for the United States to be with his father. Despite the state of the record, it is evident that neither the Applicant nor his family intended that the Applicant remain in Canada much less that he would claim refugee protection here.

[8] At the IRB hearing, aside from the Applicant, there was on his side his counsel, the DR, the CAS case-worker and a CAS observer. The Applicant, after identifying himself, left the hearing and was not present for any of the testimony at the hearing.

[9] The testimony was a mish-mash of hearsay upon hearsay. The DR and CAS case-worker testified as to their conversations with the Applicant, the father testified by telephone. Significantly, the father was in the United States at the time of all the events pleaded and had no direct knowledge of what happened in Pakistan. The mother did not testify.

[10] The IRB decision turned on credibility. The IRB acknowledged that this was an unusual claim and “very hard to determine”. The IRB also acknowledged that determining credibility was problematic.

[11] Despite recognizing the problems of determining credibility, the IRB concluded that there were serious credibility concerns which were attributed to the father. Even where the father acknowledged the limitations on his own knowledge of events in Pakistan because he was not there, the IRB rejected the explanation of inconsistencies between the father's evidence and the PIF because the father was said to be the source of the PIF narrative.

[12] The record contained a much confusing and fuzzy discussion about whether the Applicant was grabbed and injured in an attempted abduction or whether he said he was beaten.

[13] It will serve little purpose to go through all of the microscopic analysis of the story attributed to the Applicant. It is sufficient to say that negative credibility was based on the father's second or third-hand knowledge and the contents of the PIF prepared by persons acting on the Applicant's behalf from mixed sources of information. Even the DR and the CAS case-worker were confused as to whether there had been an abduction or attempted abduction.

III. ANALYSIS

[14] While the decision on credibility and findings of fact are subject to the reasonableness standard of review (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190), whether the hearing was fair is a matter of law to which the correctness standard applies.

[15] There is no doubt that those assisting the Applicant were trying their best to assist him. Their task was difficult due to the age of the Applicant and the somewhat sketchy knowledge of the father.

[16] The IRB became lost in the inconsistencies, often minor but which in a usual case are relevant to credibility; however, in this case the inconsistencies were the result of circumstances beyond anyone's control.

[17] What was missing in this case is the direct evidence of the Applicant. Children's evidence is contemplated by the IRB's *Chairperson's Guidelines: Guideline 3 – Child Refugee Claimant's Procedural and Evidentiary Issues* (effective date September 30, 1996) which recognize the care which must be taken in hearing a child's testimony. A new hearing at which the Applicant gives evidence is a minimum procedural protection which was not afforded the Applicant. He will be older now. He will also be aware of the issues and prior evidence. The IRB can sort out what impact on credibility any of these and other factors may have.

IV. CONCLUSION

[18] Therefore, this judicial review will be granted, the decision quashed and the matter referred back to the IRB for a new determination before a different member.

[19] There is no issue for certification.

JUDGMENT

THIS COURT’S JUDGMENT is that the application for judicial review is granted, the decision is quashed and the matter is to be referred back to the Immigration and Refugee Board for a new determination before a different member.

“Michael L. Phelan”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4378-12

STYLE OF CAUSE: MOHAMMAD ASHAR MALIK
and
THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: January 16, 2013

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

DATED: January 25, 2013

APPEARANCES:

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