

Federal Court



Cour fédérale

**Date: 20130820**

**Docket: IMM-12403-12**

**Citation: 2013 FC 884**

**[UNREVISED ENGLISH CERTIFIED TRANSLATION]**

**Montréal, Quebec, August 20, 2013**

**PRESENT: The Honourable Madam Justice Gagné**

**BETWEEN:**

**MOHAMED DJOUAH**

**Applicant**

**and**

**MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] The applicant, Mr. Djouah, is a young dancer in the Algerian ballet, a member of his country's national ballet. He seeks judicial review of a decision by the Refugee Protection Division of the Immigration and Refugee Board (the panel) dated November 7, 2012, which determined that he is not a Convention refugee or a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act).

*I. Background*

[2] On November 5, 2010, the applicant arrived in Canada with a national ballet company to participate in a two-show tour in Ottawa and Montréal. He then decided, like the seven other dancers in his company, to seek refugee protection in Canada. He based his claim on his fear of persecution, as a ballet dancer, by the authorities in his country and by Islamist extremists in whose eyes ballet and art are linked to homosexuality and depraved acts.

[3] Since the age of thirteen, the applicant has danced for different professional ballet companies. He has been threatened and persecuted by Islamist extremists throughout his entire artistic life. He went to the police several times to report these acts, but neither the national ballet directors nor the Algerian police, he says, have ever wanted to intervene to protect the dancers and ensure their safety.

[4] Moreover, the national ballet directors threatened the applicant and the other members of his group with prosecution on their return to Algeria for having sought refugee protection in Canada, an event that was widely publicized in Algeria.

*II. Impugned decision*

[5] The panel rejected the applicant's refugee claim essentially for three reasons.

[6] First, the panel noted that, in the six-page narrative attached to his Personal Information Form (PIF), the applicant did not indicate that he had taken steps to obtain the protection of the Algerian state. At the hearing of his application, he claimed that he had done this [TRANSLATION]

“every time” he was threatened. The applicant explained that he had written his narrative in a general way and had wanted to mention his problems rather than the steps taken to try to resolve them. The panel did not accept this explanation and found that it affected the applicant’s credibility.

[7] According to the panel, the applicant did not substantiate, even in a small way, the Algerian state’s lack of protection. Therefore, the applicant did not rebut through “clear and convincing” evidence, including the newspaper articles filed and the objective documentary evidence, the presumption that Algeria, like any other state that is not experiencing a complete breakdown of the state apparatus, is generally able to protect its citizens (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689, at para 50; *Canada (Minister of Employment and Immigration) v Villafranca* (FCA), [1992] FCJ No 1189, at para 7).

[8] Second, it was not until the end of the hearing that the applicant submitted that he feared not only Islamist extremists and terrorists, but also the Algerian authorities. The panel stated that this aspect of the application was not in the applicant’s PIF and drew a negative credibility inference from this omission.

[9] Third, the panel did not assign any probative value to the newspaper article that states that the applicant, like the other members of the national ballet who sought refugee protection in Canada, would be expected and could face criminal charges in his country. This article, published in the November 22, 2010, edition of the *Al Chourouk* newspaper, quotes the former director of the national ballet, who is currently in a senior position at the department of culture, when she stated

that the ‘ballet’s management will take draconian measures against members of the ballet who have fled. They will be punished and sent back or they will be prosecuted, in addition to measures taken by the government if they return to the country. . . . They are the losers. They will bear the consequences of their awe for Canada.”

[10] The panel found that, contrary to the applicant’s submissions, nothing in that article indicates that he was likely to be imprisoned and tortured on his return to Algeria. The panel added that there was no evidence before it establishing that the applicant would be persecuted by the Algerian state if returned to his country. In addition, the panel drew a negative inference about the applicant’s credibility from the fact that he did not file the document until the end of his hearing and from the fact that an official translation was not filed until the panel asked for one. It added that, according to another article in the file, the Algerian ambassador to Canada personally promised to assist the dancers in returning to Algeria.

[11] Finally, the panel noted that the documentary evidence referring to the hostile treatment of failed refugee claimants returned to Algeria who are suspected of taking part in international terrorism (National Documentation Package on Algeria, June 8, 2012, tab 14.2, DZA101152.EF. May 26, 2006. *Treatment of failed refugee claimants returned to Algeria; whether low-ranking police officers or members of the security forces would be subject to any reprisal from state authorities*) does not apply to the applicant.

[12] The panel therefore concluded that the applicant had not discharged his burden of establishing that there was a serious possibility he would be persecuted on one of the Convention

grounds or that, on a balance of probabilities, he would be subjected personally to a danger of torture, a risk to his life or to a risk of cruel and unusual treatment or punishment if he returned to his country.

### *III. Issues*

[13] Essentially, the applicant is challenging two aspects of the panel's decision in his application for review. The issues may be formulated as follows:

1. Were the panel's findings on state protection that was available to the applicant reasonable?
2. Did the panel err in its assessment of the applicant's credibility and the basis for his claim as a "refugee sur place"?

[14] There is no dispute that the reasonableness standard applies to both of these issues (see, for example, *Rios v Canada (Minister of Citizenship and Immigration)*, 2012 FC 276, at para 56-60; *Lezama v Canada (Minister of Citizenship and Immigration)*, 2011 FC 986, at para 19-22; *W.O.A. v Canada (Minister of Citizenship and Immigration)*, 2011 FC 827, at para 3-4; and *A.D. v Canada (Minister of Citizenship and Immigration)*, 2011 FC 584, at para 15, 23-24).

### *IV. Analysis and decision*

[15] For the following reasons, the applicant's application for judicial review will be allowed.

#### *Panel's findings on state protection available to the applicant*

[16] After reviewing all the evidence, it is apparent that the panel erred in its assessment of the applicant's alleged grounds of persecution. He clearly stated both at the hearing and in his claim for

refugee protection signed on September 20, 2010 (form IMM 5611, p.128 of the Tribunal Record), that he was threatened by the Algerian state and that his safety would be compromised if he returned to Algeria. This error by the panel unduly undermined the applicant's credibility.

[17] Moreover, where it is alleged that the state itself is an agent of persecution and in the absence of a genuine analysis of a refugee claimant's prospective subjective fear of prosecution, any finding that the applicant could have sought state protection becomes superficial and may be reviewed by the Court. I find the remarks of Justice Martineau in *Pikulin v Canada (Minister of Citizenship and Immigration)*, 2010 FC 979, at para 20-24, relevant on this point:

20. Once again, the issue is rather to determine whether in fact the refugee claimant or similarly situated persons are persecuted or have serious reasons to fear that they will be persecuted (where applicable, further to the enforcement of the law in question by representatives of the state).

21. Moreover, in terms of the objective basis for the fear of persecution, the panel must consider, based on credible evidence in the record, whether it would be objectively unreasonable for the claimant not to have sought state protection before seeking protection in Canada (*Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, at paragraph 49 (*Ward*); *Capitaine*, above, at paragraphs 20 to 22).

22. Of course, at this stage of the panel's analysis, the refugee claimant was believed; otherwise, the entire exercise loses its meaning and purpose (*Flores*, above, at paragraphs 29 to 32).

23. That being said, in a case where a refugee claimant claims that the agent of persecution is the state itself or one of its agents, can the democratic nature of the state serve as a universal screen, allowing the panel to reject a refugee claim without a serious analysis of the specific reasons for the fear of persecution and the personal situation of that individual?

24. To ask the question is to answer it: in assessing the possibility for a claimant to obtain state protection, the panel must take into account the claimant's personal situation and the various means at

his or her disposal, including the claimant's own testimony about personal incidents during which state protection was not provided, without disregarding the documentary evidence in the record and the testimony of similarly situated persons (*Ward*, above, at paragraph 50; *Jabbour*, above, at paragraphs 22, 23 and 31; *Zaatreh v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 211, at paragraphs 38 and 55).

[Emphasis added]

[18] Contrary to what the respondent argued before the Court, it was not sufficient to assess the protection offered to artists in Algeria, while acknowledging that their situation [TRANSLATION] “is not perfect”, or the efforts and various measures the Algerian government has taken to fight against terrorism.

[19] The necessity of considering applicants' personal situations and the means available to them to obtain the protection of their own state also applies where applicants submit that they are refugees sur place and fear being persecuted by governmental authorities if they return to their country. The panel erred by rejecting the applicant's claim that he was at risk of being persecuted by the Algerian state, on the ground that “only at the very end of his hearing did he claim to fear the authorities in his country.”

[20] All the evidence shows that this was one of the alleged risks of persecution, and the panel could not disregard it at least with respect to the claim for refugee sur place status, which arose out of events that occurred since the applicant has been in Canada.

*Assessment of the applicant's credibility and the basis for his claim as a "refugee sur place"*

[21] Regarding the evidence, the panel's primary error was failing to analyze the claim for refugee protection under subsection 97(1) of the Act. The documentary evidence presented by the applicant in support of this aspect of his claim was relevant and credible, and the panel erred by refusing to assign it the probative value it deserved. This error was probably due to a misapprehension of the very basis of the applicant's claim for refugee protection.

[22] The article that appeared in the Al Chourouk newspaper, translated from Arabic to French during the hearing by the panel's interpreter, clearly refers to threats of reprisal against all the members of the troupe who had claimed refugee protection in Canada. The Algerian national ballet is a state institution. The article noted the fact that Ms. Kouadri, former director of the national ballet, is now in a senior position at the ministry of culture and that she was interviewed in that capacity. The panel did not provide any valid reason for rejecting this evidence that it had, moreover, agreed to consider except for the fact that the article should have been translated and filed prior to the hearing. This ground is not sufficient in the circumstances to reject evidence that is relevant and probative.

[23] Finally, the panel erred by ignoring the article *Danse avec les loups* [dances with wolves], which appeared in the Algerian newspaper El Watan and was filed in evidence prior to the hearing. It states [TRANSLATION] "statements made by one of the officials at the embassy [Algerian in Canada] who, once the information about a dance troupe refusing to return to the country was confirmed, promised to 'bring them back in handcuffs' and especially, in pure CIA style, threatened to harm their families in Algeria."



[24] Considering these threats made publicly by the Algerian authorities against the applicant and his troupe, it is difficult to accept that the applicant was speculating when he said that he feared for his safety. Consequently, the application for judicial review should be allowed and the matter remitted to the panel for reconsideration and review by a different panel. .

[25] Last, from a strictly practical point of view, the panel's decision regarding the applicant cannot stand in the context where his seven colleagues were granted refugee status in Canada on the basis of the same facts and evidence that the applicant relied on (Exhibit D to the applicant's supplementary affidavit dated May 9, 2013). In the circumstances, I believe there is a risk that the applicant would become a scapegoat and would have to pay the price for his colleagues if returned to Algeria.

[26] Counsel for the parties did not suggest any question of general importance for certification and this case does not raise any.

**JUDGMENT**

**THE COURT ORDERS AND ADJUDGES as follows:**

1. This application for judicial review of the decision dated November 7, 2012, by the Refugee Protection Division of the Immigration and Refugee Board is allowed. .
2. The matter is remitted to a differently constituted panel of the Refugee Protection Division for reconsideration on the merits.
3. No question of general importance is certified.

“Jocelyne Gagné”

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Judge

Certified true translation  
Mary Jo Egan, LLB

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-12403-12

**STYLE OF CAUSE:** MOHAMED DJOUAH AND MCI

**PLACE OF HEARING:** Montréal, Quebec

**DATE OF HEARING:** July 10, 2013

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

**DATED:** August 20, 2013

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