

Date: 20060501

Docket: IMM-1972-05

Citation: 2006 FC 549

Ottawa, Ontario, May 1, 2006

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

AHMAD YAMA (YOUNG) BAKTASH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an application under section 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 (IRPA) for judicial review of a decision, dated March 8, 2005 (Decision), of the Refugee Protection Division of the Immigration and Refugee Board (Board), wherein it was determined that Ahmad Yama (Young) Baktash (the Applicant) was not a Convention refugee or a person in need of protection.

BACKGROUND

[2] The Applicant is a citizen of Afghanistan. He was born in 1978 and is Tajik by ethnicity and Sunni Muslim by religion. He opened a bookstore in Kabul at the end of 2000, selling books in the Dari, Pashtu and English languages. He left Afghanistan on August 18, 2001. After traveling through Pakistan and the United States he arrived in Canada on August 26, 2001 and made a refugee claim at the Canadian border.

[3] The Applicant's first refugee claim was denied, but his application for judicial review of that decision was allowed. He filed a first Personal Information Form (PIF) on October 24, 2001. At the Board's request, he filed a second PIF on January 20, 2005. The second PIF is identical to his first PIF.

[4] According to the Applicant's PIF, in early 2001 he was paid \$10 U.S. by workers at Noor Hospital to distribute pamphlets and magazines to customers at his bookstore. He was told that he could keep the proceeds of the magazines. The Applicant quickly realized when selling the magazines that they were about Christianity and contained pictures of living things, both of which were prohibited at the time by the Taliban government. Realizing that the magazines would not be acceptable to the Taliban, he placed them in a corner of his store. He put the pamphlets at the back of the store.

[5] The Applicant says he sold seven of the twenty magazines between January and July 2001. He did not, however, distribute any pamphlets. In mid-July 2001, three armed Taliban members came to the store. They found the pamphlets and magazines. Some books were burned in front of him and the Applicant says he was beaten to the point of fainting.

[6] In November 2001, the Applicant's father returned to the store to sell the remaining books. The father was beaten by the Taliban who warned him that, if the Applicant returned home, the Applicant would immediately be handed over to the authorities and would face time in prison for selling anti-Islamic materials.

[7] The Applicant says he went into hiding and then left Afghanistan. He claims a fear of returning to Afghanistan because he is wanted by authorities as a seller of Christian magazines and other anti-Islamic materials. He says that he would face imprisonment, beatings, and possibly forced conscription into the military. He also fears persecution based on his membership within the Tajik minority.

DECISION UNDER REVIEW

[8] The Board found inconsistencies in the evidence and concluded that the Applicant's claim of risk in Afghanistan was not credible.

[9] The Board found it implausible that the Applicant would have sold Christian materials in his store. He claimed that he would approach customers if he thought they spoke English and would show them the magazines. Given the Taliban's religious beliefs and practices at the time, the Board found this sales method implausible.

[10] The Board also noted that, while the Applicant planned to sell the materials quickly, after six months he had only sold seven of twenty magazines.

[11] The Board found it unreasonable that the Applicant would have left Christian pamphlets in the back of his store because he did not hand them out and he did not expect to earn money from them.

[12] The Board also found no credible evidence about the Applicant's father, and doubted whether the father would have been able to re-open the store to sell the remaining books in November 2001, as this would have happened when the Taliban were in power and shortly after the Applicant's father was beaten at the store for trying to sell books.

[13] The Board did not find plausible the Applicant's claim that he fears returning to Afghanistan because he committed a crime against Islam. The Applicant stated that he is perceived in Afghanistan as having changed religions and as having preached Christianity. The Board rejected

this fear because such information was not contained in the Applicant's PIF. The Board found this to be a significant omission. The claim was only made at the hearing.

[14] The Board also noted the Applicant's failure to explain adequately why he did not mention in his PIF that two months after he left Afghanistan the Taliban searched for him at his home. The Applicant claimed his PIF only dealt with what happened to him personally, but the Board noted that this explanation was inconsistent with references in the PIF related to events involving the Applicant's father.

[15] The Board also examined country conditions and held that it was not credible that the Applicant would be subjected to execution, imprisonment or other persecution. The Board noted that the Taliban has lost its political power, and that the Transitional Islamic State of Afghanistan (TISA) has governed since December 2001. The Board cited a Department of State Report dated September 15, 2004 that showed freedom of religion is provided for under the new Constitution for Afghanistan and that there is a small Christian community that is able to congregate freely and worship. The Board also found the Applicant's claim that he would be at risk today would not be credible even if it had found that the Applicant sold Christian magazines.

[16] The Board did not find it reasonable that the Applicant failed to mention in his PIF that he also fears religious persecution from warlords in Afghanistan other than the Taliban.

[17] The Board also found that the only reports of forced military conscription are from northern Afghanistan. Since the Applicant is not from that area, the Board held it is not plausible that he would be forcibly conscripted upon return to Kabul.

[18] The Board noted that the Applicant's counsel submitted that membership in the Tajik minority group was no longer a basis for the Applicant's claim.

[19] The Board concluded by noting that there is factional fighting in Afghanistan, and the security situation is unstable. It suggested there may be humanitarian and compassionate grounds against the Applicant's returning to Afghanistan, but held that the Applicant is not a Convention refugee or a person in need of protection.

ISSUES

[20] The Applicant raises the following issues:

- 1. Did the Board err by misinterpreting or misapplying the definition of a Convention refugee?**

- 2. Did the Board err by ignoring or misapprehending the evidence before it, or by basing its Decision on erroneous findings of fact made in a perverse or capricious manner or without regard to the evidence?**

APPLICANT'S SUBMISSIONS

[21] The Applicant submits that, regardless of whether he was a credible witness, he may be found to be a Convention refugee if his perceived religious activities are likely to lead to his arrest and punishment (*Attakora v. Canada (Minister of Employment and Immigration)* (1989), 99 N.R. 168 (F.C.A.)). He has provided evidence that he would be perceived as carrying on Christian activities. The documentary evidence indicates that a person selling Christian materials in Afghanistan would be regarded as preaching Christianity and as having converted to Christianity. The Applicant submits that the Board erred in its reliance on the evidence. While there may be evidence that Christians can freely exercise their faith, the Applicant submits this is not the same as a person who has converted from Islam to Christianity and who then proceeds to proselytize Muslims.

[22] The Applicant also says the Board ignored documentary evidence that indicates the situation in Afghanistan continues to be unstable and that there is little recognition of the rule of law. There was documentation that confirmed unlawful killings by security forces and the use of torture in jails by officials.

[23] The Applicant argues that the Board resorted to pure speculation and conjecture in determining he would not have sold Christian materials in the manner he stated (*Canada (Minister of Employment and Immigration) v. Satiacum* (1989), 99 N.R. 171 (F.C.A.)). Moreover, he says the Board erred by failing to provide reasons for this finding.

[24] The Applicant also argues that the Board imposed Western values or concepts in a situation where other values and concepts prevail. He argues that the Board erred in law by requiring that a lease for the store be provided when he told the Board that the lease was made by verbal agreement only. The Applicant was not obliged to provide documentation to substantiate this claim and, in the absence of contradictory evidence, the Board should not have connected his failure to offer documentation to a lack of credibility (*Ahortor v. Canada (Minister of Employment and Immigration)*(A93), 65 F.T.R. 137, [1993] F.C.J. No. 705 (QL) (T.D.); *Attakora*, above).

[25] The Applicant submits that the Federal Court of Appeal in *Attakora* held that there may be less of a need to examine the credibility of a claimant whose account of past persecution is corroborated by his country's record of human rights abuses. The documentary evidence provided by both the Applicant and the Refugee Protection Officer (RPO) demonstrated that the current situation in Afghanistan continues to be unstable. This evidence confirmed a rise in Taliban activity and fighting between local militias.

[26] The RPO pointed out that the Applicant had provided answers in a straightforward manner and had not embellished his evidence. The Applicant submits that the Board's finding that his story contains minor inconsistencies, or that parts of the story are exaggerated, is not sufficient to reject all of the evidence (*Yaliniz v. Canada (Minister of Employment and Immigration)*, [1988] F.C.J. No. 248, (1988) 7 Imm. L.R. (2d) 163 (QL) (F.C.A.); *Armson v. Canada (Minister of Employment and Immigration)*, [1989] F.C.J. No. 800, (1989) 9 Imm. L.R. (2d) 150 (QL) (F.C.A.)). He submits that a Court is as capable as the Board of deciding whether the series of events he described might reasonably have occurred.

[27] The Applicant also submits that the Board's determination that he was not expecting to receive money for the pamphlets, and that he placed the pamphlets where they could be found, are both findings that are contrary to the evidence and, therefore, constitute errors in law.

[28] The Applicant also argues that the Board's comments that he has not sought legal assistance to find out whether he could be charged or wanted in Afghanistan demonstrate that the Board misunderstood the evidence and the nature of the Applicant's fear. He contends that he fears extra-judicial persecution, not legal persecution.

[29] At the oral hearing of this matter before the Court, Applicant's counsel said that the Board made the same errors as the first board made and emphasized that the Board had ignored the "similarly situated persons test," and had even failed to conduct a separate analysis in relation to section 97 issues.

RESPONDENT'S SUBMISSIONS

[30] The Respondent submits that the Board's negative credibility finding was reasonably open to it. The Board's assessment of credibility should be treated with a high degree of deference and the Board is entitled to rely on rationality and common sense in this regard (*Shahamati v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 415 (QL) (F.C.A.)). Assessing evidence is also within the discretion of the Board. (*He v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 1107 (QL) (F.C.A.)).

[31] The Respondent says the Board is entitled to apply its own understanding of human behaviour when determining whether an applicant's story is credible (*Gonzalez v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 805 (QL) (T.D.); *Qasem v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1182; *Mehmet Aktan v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1222, [2002] F.C.J. No. 1661 (QL)). It was open to the Board to find it implausible that the Applicant would have sold the Christian materials during the Taliban rule by approaching strangers. The Board noted that it was not believable that the Applicant was willing to sell magazines for a few cents when he had already been paid \$10 USD to sell them, or that he would keep the Christian pamphlets in the store when they would not be sold.

[32] The Respondent also argues that the Board correctly drew adverse credibility findings from discrepancies between the Applicant's PIF and his testimony, and also from omissions in his PIF.

There were inconsistent dates between the Applicant's PIF and his testimony regarding when the Taliban discovered the Christian content of the magazines and materials. The Respondent notes that the Applicant omitted to mention in his PIF that he was wanted by the Taliban for converting to Christianity or preaching Christianity, and also failed to mention that the Taliban visited his home in Afghanistan one or two months after he left the country. It was reasonable for the Board to have considered omissions from the Applicant's PIF, and to find that such omissions undermined the credibility of his story (*Grinevich v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 444 (QL) (T.D.); *Lobo v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 597 (QL) (T.D.)).

[33] The Respondent also submits that if a central incident is disbelieved, as in the case at bar, other alleged errors are of no consequence (*Yang v. Canada (Minister of Employment and Immigration)*, [1995] F.C.J. No. 121 (QL) (F.C.A.)).

[34] The Respondent says the Board was reasonable in not being persuaded that the Applicant would be persecuted by the Taliban if he returned to Afghanistan. There is no indication that the Applicant is being sought by any authority today.

[35] Finally, the Respondent says that, in order to qualify as a Convention refugee because of the general human rights situation, the Applicant had to link the general situation in Afghanistan to his personal circumstances. In the absence of any evidence indicating a threat to the Applicant

personally, he could not be a Convention refugee (*Sheikh v. Canada (Minister of Employment and Immigration)*, [1990] 3 F.C. 238 (F.C.A.)).

ANALYSIS

[36] Credibility findings are reviewed on a standard of patent unreasonableness (*Aguebor v. Canada (Minister of Employment and Immigration)* (1993), 160 N.R. 315, [1993] F.C.J. No. 732 (QL) (F.C.A.); *Pissareva v. Canada (Minister of Citizenship and Immigration)*, [2000] A.C.F. No. 2001 (QL) (T.D.); *Umba v. Canada (Minister of Citizenship and Immigration)*, [2001] FCT 582). In this case, it was open to the Board to find the Applicant's claim was not credible.

[37] It was open to the Board to doubt the Applicant's story that he sold prohibited books to strangers by approaching them if they spoke English. Although the Applicant claimed he only approached customers who had visited the store at least once before, the Board had reason to find that the Applicant's method of selling the magazines was imprudent and unbelievable, given the life-threatening consequences if he had been caught. It was also not a reviewable error to find it unbelievable that the Applicant kept the pamphlets inside his store. The pamphlets would not draw revenue, but they would endanger the Applicant. Since the evidence demonstrated that the Taliban religious police passed by the Applicant's bookstore on occasion, the Board reasonably found that it was not credible he would keep the pamphlets in the store.

[38] Since the Board found that the sale of Christian materials in the store was not credible, it followed that the claims of the Applicant's beatings and of his father's efforts to reopen the store were also not credible, since they were logically linked to the sale of the Christian materials.

[39] The jurisprudence supports the position that an omission of material facts or of information that is central to the claim from a PIF can form the basis for an adverse finding of credibility (*El Masalati v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1311 (CanLII), referring to *Robles v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 520 (QL), 2003 FCT 374 at para. 43; *Polgari v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 626 (CanLII) at para. 13; *Erdos v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 955 at para. 24, referring to *Grinevich v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 444 (QL) (F.T.D.)). The Applicant omitted critical information by failing to mention that someone had visited his house searching for the person who had sold the magazines. It was open to the Board to draw an adverse credibility inference based upon the Applicant's failure to include this information. Similarly, the Board was entitled to find that the Applicant's fear of persecution at the hands of warlords should have been included in his PIF. Although circumstances have changed in Afghanistan, the Applicant could still have amended his PIF to include new information (*Udeagbala v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1507 (CanLII)).

[40] The Applicant raises a variety of issues but fails to undermine the fundamental basis of the Decision from which everything else follows. The Board specifically found that it was not plausible that the “claimant would have sold Christian material in his store in the manner that he claims he did.” The Decision reveals the Board just could not believe the central tenet of the claim: i.e. that he had sold Christian materials. The Board examined all of the evidence in arriving at this conclusion and it based its Decision on common sense and rationality, as it is entitled to do. See *Gonzalez v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 805 (QL) (T.D.). It was open to the Board to find it implausible that the Applicant would have sold Christian materials during the Taliban rule by approaching strangers. As Justice Sharlow pointed out in *Gonzalez*:

27. In my view, it was open to the CRDD to assess the plausibility of the applicant's conduct as it did, by considering her story, and the manner in which it was told and tested in the course of the hearing, against the backdrop of other evidence and its own understanding of human behaviour. The comments of O'Halloran J.A. in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357 (B.C.C.A.) reflect my view:

In short, the real test of the truth of the story of a witness ... must be its harmony with the preponderance of the probabilities which a reasonable and informed person would readily recognize as reasonable in that place and in those conditions.

28. I see nothing in the Giron case that is inconsistent with this conclusion. In this regard, I refer to the comments of Décary J.A. in *Aguebor v. Minister of Employment and Immigration* (1993), 160 N.R. 315 (F.C.A.) at 316-7:

There is no longer any doubt that the Refugee Division, which is a specialized tribunal, has complete jurisdiction to determine the plausibility of testimony: who is in a better position than the Refugee Division to gauge the credibility of an

account and to draw the necessary inferences? As long as the inferences drawn by the tribunal are not so unreasonable as to warrant our intervention, its findings are not open to judicial review.

[41] In addition, the Board in the case at bar supported its basic conclusions with other findings, such as the contradictions and omissions in relation to the Applicant's PIF.

[42] All of these findings were of a factual nature and were clearly made with regard to the evidence before the Board. The Court should not interfere with them.

[43] Once these basic findings are taken into account, the whole basis of the Applicant's claim disappears. The Board looked at country conditions, but there was really no need to do so, given its findings of fact about the central tenets of the claim.

[44] Given those central findings, there was no need for the Board to consider the risks faced by similarly situated persons, because the Applicant had not established any connection with such persons (i.e. Christian proselytizers) and, on the facts of this case, there was no need to do a separate section 97 analysis because the Board could not accept the Applicants basic evidence about what had happened to him.

[45] I have looked at each of the issues raised by the Applicant, but they do not undermine or overcome this basic aspect of the Decision. There was no reviewable error in this regard and nothing that would justify sending the matter back for reconsideration.

[46] In sum, it was not unreasonable for the Board to find that the core of the Applicant's claim was not credible. It follows that there was no reviewable error in the Board finding that the Applicant was not a Convention refugee or person in need of protection.

ORDER

THIS COURT ORDERS that

1. The application for judicial review is dismissed.
2. There is no question for certification.

"James Russell"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-1972-05

STYLE OF CAUSE: AHMAD YAMA (YOUNG) BAKTAKSH
APPLICANT
and
MINISTER OF CITIZENSHIP & IMMIGRATION
RESPONDENT

PLACE OF HEARING: Toronto, Ontario

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REASONS FOR : RUSSELL, J.

DATED: May 1, 2006

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