Date: 20061116

Docket: IMM-2868-06

Citation: 2006 FC 1376

Ottawa, Ontario, the 16th day of November 2006

Present: The Honourable Mr. Justice Shore

BETWEEN:

HACÈNE OUKACINE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] A story steeped in a lack of credibility dissolves layer by layer into its own nothingness.

[2] [120] Both the existence of the subjective fear and the fact that the fear is objectively well-founded must be established on a balance of probabilities. In the specific context of refugee determination, it has been established by the Federal Court of Appeal in *Adjei v. Canada* (*Minister of Employment and Immigration*), [1989] 2 F.C. 680, that the claimant need not prove that persecution would be more likely than not in order to meet the objective portion of the test. The claimant must establish, however, that there is more than a "mere possibility" of persecution. The applicable test has been expressed as a "reasonable possibility" or, more appropriately in my view, as a "serious possibility". See: *R. v. Secretary of State for the Home Department, ex parte Sivakumaran*, [1988] 1 All E.R. 193 (H.L.).

(*Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593, [1995] S.C.J. No. 78 QL.)

[3] [9] This case raises the disturbing question of asylum shopping. If applicants' counsel were correct in his domicile argument, applicants could, at their own will, reject the protection of one country by unilaterally abandoning that country for another. Indeed, that is what has occurred here. The Geneva Convention exists for persons who require protection and not to assist persons who simply prefer asylum in one country over another. The Convention and the Immigration Act should be interpreted with the correct purpose in mind.

(*Mohamed v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 400 (QL).)

[4] [20] However, the Board is entitled to reject the applicant's explanations as to why he decided to leave France, a country which "is a signatory to the Convention, has a reputable international human rights record, and has an established system to process claims", while his refugee claim was pending.

[21] In my opinion, it was not unreasonable for the Board to find his explanations and behaviour incompatible with the behaviour expected from that of someone who genuinely fears for his life.

[22] As stated by my colleague Justice Max M. Teitelbaum in *Saleem v. (Minister of Citizenship and Immigration)*, 2005 FC 1412, at paragraph 28:

> This statement cannot be enough to allow a refugee claimant to pass through two countries, i.e. England and United States, and claim refugee status in Canada more than a month after leaving Pakistan. We cannot allow "forum shopping", i.e. we cannot give the claimant the luxury of deciding which country would be the most convenient for claiming refugee status, whatever the reason may be.

(*Samseen v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 542, [2006] F.C.J. No. 727 (QL).)

NATURE OF THE LEGAL PROCEEDINGS

[5] This is an application for judicial review brought under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act), of a decision of the Refugee Protection Division of the Immigration and Refugee Board (Board) dated February 16, 2006, setting aside the decision by which the applicant was granted "Convention refugee" status.

FACTS

[6] The applicant, Hacène Oukacine, alleges the following facts:

[7] Mr. Oukacine was born on February 24, 1966. He is a Berber and an Algerian citizen. Mr. Oukacine studied at the Institut National d'Agronomie in Algeria from 1986 to 1991. In 1991, he obtained a student exemption from compulsory military service (CMS). In September 1991, Mr. Oukacine was at the same time a student and a professor.

[8] Times were hard in Algeria at the end of the eighties and the beginning of the nineties. Many civilians were killed and massacred during the civil war. The Berbers were a group that suffered discrimination at the hands of the state. Muslim fundamentalists were particularly hostile towards intellectuals in Algeria because they were perceived as being westernized.

[9] Mr. Oukacine left Algeria in 1992 to study in France. During his stay in France, he obtained a student visa and undertook the following studies: (1) 1992–1994: Bachelor of Science; (2) 1994–1996: Diploma in Parasitology; (3) 1996–1998: Athletic Nutrition (not completed). In 1996, Mr. Oukacine married a French citizen while he was still in France.

[10] During this time, he received notices from Algerian authorities advising him to report to the army to do his CMS. These notices were sent to his parents' home in Algeria. Mr. Oukacine's brother brought him copies of these notices whenever he came to France to visit.

[11] Mr. Oukacine and his wife separated in 1998. In May 1998, following this separation, and since he was on the verge of finishing his studies, Mr. Oukacine left France for the United States. He lived in New York for five months. In October 1998, Mr. Oukacine came to Canada and made a claim for refugee protection. He received a positive answer to his application on May 20, 1999.

[12] In 2000, during an interview with Citizenship and Immigration Canada (CIC) and the Canadian Security Intelligence Service, as well as during his interview with the RCMP in 2003, Mr. Oukacine admitted that he had given misleading information in his Personal Information Form (PIF) when he entered British Columbia in October 1998 and at the hearing of his claim for refugee protection in April 1999.

[13] His story is not truthful, in particular on the following points:

a. He did not leave Algeria for Tunisia in 1998;
b. He did not travel from Tunisia to Montréal by ship in 1998;
c. He did not travel from Montréal to Vancouver in 1998;
d. Before the hearing of his claim for refugee protection in 1999, Mr. Oukacine travelled from Vancouver to Montréal to find out what he could about the port system and about sailing from Algeria to Montréal so as to be able to answer all questions on this point at the hearing;
e. During his stay in France, Mr. Oukacine travelled to Great Britain and the Netherlands;
f. Contrary to the allegations made in his PIF, Mr. Oukacine was married when he claimed refugee protection in Canada;

g. Contrary to Mr. Oukacine's allegations, he entered Canada with a valid Algerian passport, which he had obtained in France.

[14] On April 2, 2004, acting on his own initiative, Mr. Oukacine asked the Canadian government for a pardon for his misleading statements. On February 16, 2006, the Board vacated the decision granting Mr. Oukacine "Convention refugee" status.

IMPUGNED DECISION

[15] The Board vacated Mr. Oukacine's refugee status pursuant to subsection 109(3) of the Act. He misrepresented certain facts in his PIF in 1998 and at the hearing of his claim for refugee protection in April 1999. The Board decided that the remaining evidence was insufficient to allow Mr. Oukacine's claim for refugee protection.

ISSUES

[16] There are five issues in this case:

(1) Did the Board err in determining that all of Mr. Oukacine's statements were false because he had lied on September 30, 1998, in his PIF and at the hearing of his claim for refugee protection in April 1999?

(2) Did the Board err in concluding that Mr. Oukacine was not a credible person because he lied in his PIF in 1998?

(3) Did the Board err in concluding that Mr. Oukacine was not an intellectual, since he had just finished school in Algeria and would not be targeted by Islamists?

(4) Did the Board err in determining that Mr. Oukacine should not have taught if that employment represented a danger to his health and safety?

(5) Did the Board respect Mr. Oukacine's language rights at the hearing on December 9, 2005?

STANDARD OF REVIEW

[17] The standard of review applicable to pure questions of fact and of credibility is patent unreasonableness. (*Aguebor v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 732 (QL), at paragraph 4; *Umba v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 25, [2004] F.C.J. No. 17 (QL), at paragraph 31; *N'Sungani v. Canada (Minister of Citizenship)*, 2004 FC 1759, [2004] F.C.J. No. 2142 (QL), at paragraph 6; *Kathirgamu v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 300, [2005] F.C.J. No. 370 (QL), at paragraph 41; *Mugesera v. Canada* (*Minister of Citizenship and Immigration*), [2005] 2 S.C.R. 100, at paragraph 38; *Chowdhury v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 139, [2006] F.C.J. No. 187 (QL), at paragraph 12.)

[18] As regards the Board's decision rendered pursuant to section 109 of the Act, it is trite law that the applicable standard of review is reasonableness *simpliciter* (*Bortey v. Canada*, 2006 FC 190, [2006] F.C.J. No. 246 (QL), at paragraph 13). Moreover, the Board's decisions on questions of mixed law and fact and of law cannot be set aside unless they are unreasonable. (*Harb v. Canada* (*Minister of Citizenship and Immigration*, 2003 FCA 39, [2003] F.C.J. No. 108 (QL), at paragraph 14; *Apotex Inc. v. Wellcome Foundation Ltd.*, [2002] 4 S.C.R. 153, [2002] S.C.J. No. 78, at paragraphs 41-42, 44; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003]

1 S.C.R. 226, [2003] S.C.J. No. 18, at paragraph 43; *Starson v. Swayze*, [2003] 1 S.C.R. 722, [2003] S.C.J. No. 33, at paragraphs 83-84.)

ANALYSIS

1) Did the Board err in determining that all of Mr. Oukacine's statements were false because he had lied on September 30, 1998, in his PIF and at the hearing of his claim for refugee protection in April 1999?

[19] The application for vacation of Mr. Oukacine's refugee status was filed pursuant to section 109 of the Act, which reads as follows:

109. (1) The Refugee Protection Division may, on application by the Minister, vacate a decision to allow a claim for refugee protection, if it finds that the decision was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter.	**109.** (1) La Section de la protection des réfugiés peut, sur demande du ministre, annuler la décision ayant accueilli la demande d'asile résultant, directement ou indirectement, de présentations erronées sur un fait important quant à un objet pertinent, ou de réticence sur ce fait.
(2) The Refugee Protection Division may reject the application if it is satisfied that other sufficient evidence was considered at the time of the first determination to justify refugee protection.	(2) Elle peut rejeter la demande si elle estime qu'il reste suffisamment d'éléments de preuve, parmi ceux pris en compte lors de la décision initiale, pour justifier l'asile.
(3) If the application is allowed, the claim of the person is deemed to be rejected and the decision that led to the conferral of refugee protection is nullified.	(3) La décision portant annulation est assimilée au rejet de la demande d'asile, la décision initiale étant dès lors nulle.

[20] Mr. Oukacine alleges that his claim for refugee protection was allowed "as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter". Furthermore, he contests the Board's decision on the basis of subsection 109(2) of the Act, according to which no "other sufficient evidence was considered at the time of the first determination to justify refugee protection".

(a) The Board did not disregard all of the evidence

[21] Contrary to what Mr. Oukacine claims, the Board did not conclude that all the statements he made for the purposes of his claim for refugee protection must be disregarded because they were found not to be credible. Rather, the Board wrote the following on this point:

> The relevant information that remains to be considered at the time of the original determination after the misrepresentations are removed is that the respondent is an Algerian Berber, age 32 at the time of the hearing in 1999, who left Algeria in 1992, who said he was opposed to the military service, and who received a military call up notice in 1994. The issue is whether that is sufficient to justify refugee protection. I find this information must be considered in the context of knowing the claimant lied about his country of residence from 1992 to 1998 and his travel to Canada.

(Decision of the Board, at page 5).

[22] The Board never doubted the truth of the following facts: Mr. Oukacine is an Algerian Berber who was 32 years of age at the time of the Board hearing in 1999 and who left Algeria in 1992.

(b) Mr. Oukacine's claim that he risks being persecuted in the Algerian army because he is a Berber

[23] Mr. Oukacine argues that the Board erred in concluding that, when he made his claim, his being a Berber, in the context of his CMS, was insufficient to allow a claim for refugee protection.

[24] Mr. Oukacine alleges having a real fear of persecution because he belongs to the Berber ethnic group. According to him, Berbers were discriminated against, attacked, and sent into action on the battlefield. He also argues that the Board erred in concluding there was little objective documentary evidence supporting his claim to the effect that Berbers were mistreated and even brutalized during their military service.

[25] The Board wrote the following on this point:

> Regarding his status as an Algerian Berber, the documentation from that time indicates that, while Berbers faced discrimination, the government of Algeria did not engage in systemic targeting of Berbers nor were their official programs against Berbers. In fact, the Berber language was taught in schools and Berber culture was practiced. I am satisfied that being a Berber in Algeria was not sufficient for a determination of refugee protection at the time of the original determination. Further, while the respondent says Berbers were mistreated in the military, there is little objective documentation to confirm that. As the respondent has lied about other material matters, I am not satisfied that his allegations on this point and the country documentation from the time are reliable and sufficient enough to justify refugee protection on that point.

(Decision of the Board, at page 5).

[26] On this point, in a document entitled *Algeria-Profile of Asylum Claims and Country Conditions, Bureau of Democracy, United States Department of State, Human Rights and Labour*,

(June 1996, reproduced in Respondent's Record, Vol. 2, 5B) III- Claims and Relevant Information, A. Berbers, the following was stated:

> While there may be some discrimination and harassment of Berbers in the capital city of Algiers and other large towns, but there is no pattern of action by the Algerian authorities against Algerians simply because they are of Berber origin. As noted in the Country Report for 1995, the Berbers were the original inhabitants of Algeria, and many citizens claim to be of mixed Berber and Arab ancestry. The Berbers, therefore, are an important indigenous minority group who participate freely and actively in the political process. They hold influential positions in the Government and in the army.

[27] In his affidavit, Mr. Oukacine refers to two documents which attest to the persecution of Berbers in Algeria at the relevant time. However, it appears that these two documents do not deal with discrimination against or persecution of Berbers and do not support Mr. Oukacine's argument. The first article, entitled "Assassination of Lounes Matoub: Algeria Loses One of its Most Respected Singers", *The North Africa Journal*, No. 34, dated June 27, 1998, deals with the persecution of singers and artists by Algerian Islamists. The second article, entitled "Skepticism in Algeria", John F. Burns, *New York Times*, April 18, 1999, denounces the fact that, at that time, Islamists were a threat to civil peace in Algeria.

[28] To sum up, the documents do not support Mr. Oukacine's claim to the effect that Berbers were victims of persecution by the Algerian army when they performed their military service in that organization. Therefore, the Board's decision according to which being a Berber performing CMS in Algeria is insufficient to allow Mr. Oukacine's claim for refugee protection is not unreasonable.

(c) CMS and Mr. Oukacine's status as a conscientious objector

[29] Mr. Oukacine also submits that the Board erred in refusing to believe he is a conscientious objector with regard to CMS in Algeria.

[30] The Board wrote the following on this point:

> Next is the issue of the respondent's opposition to military service. There was an ongoing civil war in Algeria and reports of gross violations of human rights by the Algerian military at that time. The previous panel considered all of that information. The issue is whether that information justifies refugee protection. To my mind, that depends on the credibility of the respondent's allegation that he left Algeria in 1992 because he was opposed to military service. The respondent says that is the truth, but the respondent told significant lies in the past to try to obtain refugee protection. His only reason for lying earlier was he thought Canada would send him back to the USA, even though he had heard Canada was accepting Algerian claims. In fact he chose Canada over France, Britain, Germany and the USA. I find he has provided a weak explanation for his significant misrepresentations and omission in 1998 and 1999. He lived in France for six years, traveled in Europe, got married, had marital problems, went to the USA for six months, and then decided he preferred Canada. It seems possible he was someone who would rather not fight in a war and preferred to live in other countries. That does not make him a conscientious objector – either to military service generally or to the particular conflict at that time.
>
> . . . The respondent provided reasons to the original panel for not wanting to serve – he said he was not a conscientious objector generally but did not want to fight in this particular civil war because the army was killing civilians. He also said it was very dangerous to serve in the military.
>
> The difficulty is to assess the credibility of the respondent's alleged motives now that he has admitted he lied about other key aspects of his story. If his lies were not significant, they might not undermine his credibility generally, especially given the conduct of the Algeria military at the time. However, I find the respondent's misrepresentations and omissions were very significant and sufficient to undermine his credibility generally. He provided no other evidence at that time to confirm his story that he objected to fighting in this particular war as a true matter of conscience – rather than just having an aversion to military service and preferring to live in France or Canada. There is no independent evidence from that time that indicates the respondent engaged in public opposition to the war or did anything to make his

> views known to others. I find his explanation for lying is very weak. There is no evidence from that time as to why he did not claim refugee protection in the other countries he visited between 1992 and 1998 if, as a matter of conscience, he was opposed to serving in the Algerian military.
>
> I find there is not sufficient other reliable evidence to show, on a balance of probabilities, that the respondent left Algeria because, as a true matter of conscience, he did not want to serve in the Algerian military because he opposed the civil war at that time. He left Algeria in 1992 and studied in France, and when he was called for military service in 1994 he did not want to return. He had freedom to move about in France and attend school there. He did not want to give up that freedom. He says he was a conscientious objector on the civil war at that time, but in light of his serious lack of credibility on key aspects of his claim, I find there is not sufficient reliable or credible evidence to show, on a balance of probabilities, that was his motivation for leaving Algeria or for not wanting to return to Algeria in 1999. If he had told the truth about other important matters in 1999, the panel might have believed him on that part of his story as well. However, by making such significant misrepresentations and omissions, he has lost the opportunity to have his alleged motive examined in the context of being considered a credible person.

(Decision of the Board, at pages 6 and 7.)

[31] As stated by the Federal Court in *Sheikh v. Canada* (*Minister of Employment and Immigration*), [1990] 3 F.C. 238, [1990] F.C.J. No. 604 (QL), a finding that a claimant's testimony lacks credibility may extend to all evidence emanating from that testimony:

> . . . a tribunal's perception that he [the applicant] is not a credible witness effectively amounts to a finding that there is no credible evidence on which the second-level tribunal could allow his claim.

Although this decision was rendered on the basis of the former *Immigration Act*, it is still valid. In fact, within the legislative framework of the current Act, "a tribunal's perception that a claimant is not credible on an important element of their claim can amount to a finding that there is no credible evidence to support the claim". (*Chavez v. Canada* (*Minister of Citizenship and Immigration*), 2005 FC 962, [2005] F.C.J. No. 1211 (QL), at paragraph 7; *Touré v. Canada* (*Minister of Citizenship and Immigration*), 2005 FC 964, [2005] F.C.J. No. 1213 (QL), at paragraph 10;

Rahaman v. Canada (*Minister of Citizenship and Immigration*), 2002 FCA 89, [2002] F.C.J. No. 302 (QL), at paragraphs 29-30.)

[32] Without doubt, it is up to the Board to assess the credibility of residual evidence. Accordingly, it is not patently unreasonable for the Board to conclude that Mr. Oukacine's lack of credibility affects the weight of the other evidence submitted, as it is to a large extent based on his testimony. Accordingly, no intervention by the Court is warranted on this point.

(2) Did the Board err in concluding that Mr. Oukacine was not a credible person because he lied in his PIF in 1998?

[33] Subsection 109(2) of the Act states that the Board "may reject the application if it is satisfied that other sufficient evidence was considered at the time of the first determination to justify refugee protection". It is understood that the evidence must be credible.

[34] In *Rahaman, supra*, the Federal Court of Appeal stated the following:

> [29] . . . as MacGuigan J.A. acknowledged in *Sheikh, supra*, in fact the claimant's oral testimony will often be the only evidence linking the claimant to the alleged persecution and, in such cases, if the claimant is not found to be credible, there will be no credible or trustworthy evidence to support the claim . . . .

[35] Moreover, on this point, the Board is entitled to determine that because Mr. Oukacine was not found to be credible, there is no credible or trustworthy evidence to support his claim. This conclusion is consistent with the applicable rules of law.

[36] The Board is an independent tribunal which has jurisdiction to assess and determine the credibility of evidence submitted. The Board's jurisdiction as a first-level specialized tribunal must be respected unless it exceeds its functions in a capricious, malicious, or inherently illogical manner, which is not the case here.

(3) Did the Board err in concluding that Mr. Oukacine was not an intellectual because he had just finished school in Algeria and would not be targeted by Islamists?

(4) Did the Board err in determining that Mr. Oukacine should not have taught if that employment represented a danger to his health and safety?

[37] Mr. Oukacine submits that the Board erred in determining that he was not targeted by Islamists. He argues that the evidence instead shows that he was at that time in danger of being persecuted by Islamists because he had just finished his university studies in agricultural engineering in Algeria to become a professor, and Islamists were especially targeting persons who held university degrees, no matter what their field, as they were perceived as being Westerners.

[38] In addition, it is important to note that from 1991 to 1992, Mr. Oukacine was a professor at the Institut de Biologie of the Université de Tizi Ouzou without being harassed by Islamic groups.

[39] Considering the preceding, the Court is of the opinion that the Board did not err. Accordingly, no intervention by this Court is warranted on these issues.

(5) Did the Board respect Mr. Oukacine's language rights at the hearing on December 9, 2005?

[40] Mr. Oukacine submits that he could not properly answer the questions he was asked and could not sufficiently express his feelings and opinions, which is essential in the circumstances, because he would have been able to convince the Board not to vacate his refugee status.

[41] At the beginning of the hearing, the panel member who heard the application for vacation asked Mr. Oukacine directly if he could proceed in English without an interpreter, and Mr. Oukacine said that he could.

[42] As appears from the transcript of the hearing, Mr. Oukacine did indeed understand the questions asked, and his answers were given in comprehensible English. In addition, Mr. Oukacine did not speak or act as if he did not understand the language and never mentioned having any language difficulties. Because he understands English and speaks it relatively well, this Court cannot reasonably conclude that he needed an interpreter to guarantee his right to be heard. There was no reason for the panel member to suspect that Mr. Oukacine needed interpretation, especially since the panel member asked him directly and he waived his right to be assisted by an interpreter.

[43] The principle which applies to the right to an interpreter was established in *R v. Tsang*, [1985] B.C.J. No. 1762 (QL), at paragraph 20, and reads as follows:

> If a person is free to exercise his right, but chooses not to do so, he cannot be heard to a say afterwards that his right was infringed.

[44] In addition, in *Singh v. Canada* (*Minister of Citizenship and Immigration)*, 2005 FC 742, [2005] F.C.J. No. 924 (QL), at paragraphs 18-19, Madam Justice Danièle Tremblay-Lamer wrote the following:

> The applicant also claims that there was a violation of the *audi alteram partem* principle, the right to a fair hearing. He claims to have requested the hearing in English, but was given a hearing in French . . . .
>
> Furthermore, the applicant stated that he spoke some English, yet did not object to the hearing being conducted in French. It was up to him or his counsel to object to the language of the hearing at the first opportunity possible. The fact that no objections were presented, implies acceptance on behalf of the applicant. It is too late to object at this point in time (see *Mohammadian v. Canada (Minister of Citizenship and Immigration)*, [2001] 4 F.C. 85 at paragraph 19 (C.A.)).

[45] Mr. Justice Richard Mosley made a similar ruling in *Bilal v. Canada* (*Minister of Citizenship and Immigration)*, 2005 FC 1692, [2005] F.C.J. No. 2104 (QL), at paragraph 24:

> In her written submissions, the applicant also alleged that the Board breached its duty of fairness by failing to provide an interpreter. This was not pressed in oral argument as it is apparent from the transcript that the opportunity to have an interpreter present was expressly waived by the applicant and her counsel. The applicant chose to proceed and to provide her evidence in English. It was not open to her now to claim a denial of natural justice: *Mohammadian v. Canada (Minister of Citizenship and Immigration)*, [2001] 4 F.C. 85 at para. 19, 2001 FCA 191.

[46] For these reasons, the Court is of the opinion there was no infringement of the *audi alteram partem* rule in this case.

CONCLUSION

[47] Considering the preceding, the Court rules as follows: (1) the Board's findings of fact are not patently unreasonable; (2) the Board's decision to vacate Mr. Oukacine's refugee status was not unreasonable; and (3) the Board did not err in law or violate a rule of natural justice or procedural fairness in making its decision. Accordingly, the application for judicial review is dismissed.

JUDGMENT

THE COURT ORDERS that

1. The application for judicial review be dismissed;

2. No serious question of general importance be certified.

"Michel M.J. Shore"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

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