

Federal Court



Cour fédérale

**Date: 20140529**

**Docket: IMM-4221-13**

**Citation: 2014 FC 521**

**Ottawa, Ontario, May 29, 2014**

**PRESENT: The Honourable Mr. Justice Simon Noël**

**BETWEEN:**

**AHMED AWADH**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**REASONS FOR ORDER AND ORDER**

**I. Introduction**

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision rendered orally on May 16, 2013 by Stéphane Morin, member of the Refugee Protection Division of the Immigration and Refugee Board of Canada [the RPD Member], finding that the Applicant is neither a refugee within the

meaning of section 96 of the IRPA nor a person in need of protection under subsection 97(1) of the IRPA.

## **II. Facts**

[2] The Applicant is a stateless Bidoon born in October 1989 in Kuwait, his country of habitual residence. His mother is a Kuwaiti and his father is also a Bidoon.

[3] The Applicant left Kuwait and arrived in Canada on November 5, 2011 where he claimed refugee protection, fearing persecution in his country of habitual residence as a result of his stateless Bidoon status.

## **III. Decision under review**

[4] The RPD Member heard the Applicant's claim on May 16, 2013 and denied it the same day in an oral decision.

[5] The RPD Member's decision begins by summarizing the Applicant's allegations, which included claims that his status as a Bidoon prevented him from going to university or getting a job. The RPD Member stated that the determinative issue was whether the discrimination faced by the Applicant amounted to persecution.

[6] The RPD Member then said that Bidoons are discriminated against, but that the country documentation distinguishes between Bidoons who are recognized by the State and Bidoons who

are not. The latter are worse off than the former. Here, the RPD Member concluded that the Applicant was a person recognized by the State because his connection to Kuwait could be traced back to before 1965. The RPD Member also observed that the government had issued the Applicant a review card and some other documents unavailable to people in the latter category. The Applicant had also been treated at a hospital for his asthma for 10-11 years, and the RPD Member also found that the Applicant had access to some services in Kuwait.

[7] People in the category to which the Applicant belongs are still discriminated against and do not have the same rights as Kuwaiti citizens, but the RPD Member found that they are allowed to work and are treated like registered foreign migrant workers. He also observed that the evidence was unclear about how long the Applicant had attempted to find work before leaving the country, as documents issued in 2010 had still listed him as a student. Anyway, the RPD Member ended by concluding that “even taken cumulatively, even taking into consideration the discrimination that one in your situation faces in Kuwait, I cannot find that it amounts to persecution.” Therefore, the Applicant was not entitled to protection under either section 96 or subsection 97(1) of the IRPA.

#### **IV. Applicant’s submissions**

[8] The Applicant claims that the RPD Member failed to apply the proper test, as can be seen in the following excerpt of the reasons:

Therefore, I determine that there is no serious possibility that you will be persecuted in Kuwait or that, on a balance of probabilities, you would be personally subjected to a danger of torture or face a

risk to life or a risk of cruel and unusual treatment or punishment in Kuwait.

The Applicant claims that this shows that the RPD Member was requiring proof that the Applicant was personally persecuted, when the real test could also be satisfied by showing that similarly-situated people are persecuted.

[9] As a second argument, the Applicant primarily contends that the Board simply stated that it considered the cumulative effect of the discrimination without explaining why it did not amount to persecution. Specifically, the Applicant notes that he complained also of inadequate healthcare and education discrimination, but the RPD Member did not analyze these incidents and simply stated they were discriminatory but not persecutory. The lack of any critical analysis is fatal to the decision.

[10] The Applicant elaborated on these arguments in his reply memorandum. Specifically, he challenged the RPD Member's finding that the Applicant would have access to government services because he had been issued some identification documents. Such a division between groups of Bidoons was unwarranted. Rather, the evidence revealed a much more complex situation where even those Bidoons recognized by the State are treated as illegal residents. In his view, the RPD Member did not properly consider this evidence and simply rushed to a negative decision.

**V. Respondent's submissions**

[11] With regard to the argument that the wrong test was applied, the Respondent argues that the RPD Member correctly identified that it was looking for a “serious possibility” of persecution. Further, an individualized assessment like the one conducted here is necessary to determine whether the possibility of discrimination reaches the threshold of persecution. In any event, the Respondent contends that the RPD Member actually did consider similarly-situated individuals, and located the Applicant among Bidoons who are relatively better off.

[12] As for the second argument, the Respondent says that the findings were reasonable as the RPD Member dealt with all of the evidence regarding each allegation of discrimination and then expressly found that they did not cumulatively amount to persecution. In addition, the evidence supports the RPD Member’s distinction between documented and undocumented Bidoons in Kuwait, and it was reasonable to find that the Applicant was in the former category. In fact, he had several identification documents, had completed secondary school, and had received medical treatment for many years. The RPD Member reasonably found that the limitations the Applicant may face with respect to education, employment, and other government services did not rise to the level of serious mistreatment necessary to establish persecution.

**VI. Issues**

[13] This application for judicial review raises the two following issues:

1. Did the RPD Member err by applying the wrong legal test to determine whether the Applicant had a well-founded fear of persecution?
  
2. Did the RPD Member wrongly assess the discrimination faced by the Applicant by finding that it did not amount to persecution?

## **VII. Standard of review**

[14] Both parties agree about the applicable standards of review.

[15] The issue of whether or not the RPD Member applied the correct legal test raises a question of law and is to be reviewed under the standard of correctness (*Kumarasamy v Canada (Minister of Citizenship and Immigration)*, 2010 FC 203 at para 12, [2010] FCJ No 239). With respect to this first issue, no deference is due – either the RPD Member applied the correct test or he did not (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50, [2008] SCJ No 9 [*Dunsmuir*]).

[16] The second issue – whether or not incidents of discrimination amount to persecution – is a question of mixed fact and law and calls for a review under the standard of reasonableness (*Sefa v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1190 at para 21, [2010] FCJ No 1660 [*Sefa*]; see also *Liang v Canada (Minister of Citizenship and Immigration)*, 2008 FC 450 at para 12, [2008] FCJ No 572). A decision is only reasonable if the reasons are transparent enough to “allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes”

*(Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708; see also *Dunsmuir* at para 47).

## VIII. Analysis

### A. *Did the RPD Member err by applying the wrong legal test to determine whether the Applicant had a well-founded fear of persecution?*

[17] It seems unclear which aspect of the test for a well-founded fear of persecution the Applicant thinks was misunderstood by the RPD Member. At paragraphs 26-27 of his original memorandum, the Applicant claims that the RPD Member inappropriately required that he prove he would personally be persecuted. However, nothing in the decision indicates any such error. Quite to the contrary, the Board expressly said that “there is no serious possibility that you will be persecuted in Kuwait” [emphasis added], and that is a correct statement of what the Applicant had to show in order for his fear to be objectively well-founded (*Chan v Canada (Minister of Employment and Immigration)*, [1995] 3 SCR 593 at paragraph 120, 128 DLR (4th) 213 [*Chan*]).

[18] Thus, the Applicant's complaint seems to be based on the fact that he should not have to show that he had personally been persecuted in the past, and that is true (*Fi v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1125 at paragraphs 13-16, [2007] 3 FCR 400 [*Fi*]; *Salibian v Canada (Minister of Employment and Immigration)*, [1990] 3 FC 250 at 259, 73 DLR (4th) 551 [*Salibian*]). Evidence about persecution faced by similarly-situated people will often be compelling because it tends to show that an applicant would face the same risks (*Chan*, above, at paragraph 137; *Fi*, above, at paragraph 14; *Salibian*, above, at 259). However, that does not

change the fact that it is still the Applicant who must face a serious possibility of persecution. The RPD Member stated the test correctly twice, and nothing in the decision suggests that he ignored evidence of similarly-situated people.

[19] To the contrary, the RPD Member was quite sensitive to that element and considered the situation of Bidoons more generally, but found the Applicant was among those Bidoons whose difficulties in Kuwait do not rise to the level of persecution, and nothing in the reasons suggest that the Board disregarded the experiences of other Bidoons solely because they didn't happen to the Applicant.

[20] Therefore, this Court finds that the RPD Member applied the correct test.

B. *Did the RPD Member wrongly assess the discrimination faced by the Applicant by finding that it did not amount to persecution?*

[21] The finding that undocumented Bidoons face worse discrimination than documented Bidoons is well-supported by the record. The reasons referred to paragraph 3.8.11 of the UK Border Agency's Operational Guidance Note on Kuwait which, after reciting a litany of the problems undocumented Bidoons face, said that documented Bidoons also face discrimination but are at least allowed to work and are treated like foreign migrant workers.

[22] This report also said that the ability to obtain documentation largely depends on whether the person can trace residency back to 1965. Another report referred to by the RPD Member, the report from the Human Rights Watch, *Prisoners of the Past: Kuwaiti Bidun and the Burden of Statelessness* (June 2011), also said that the situation of a Bidoon depends on "a number of



factors, including their possession of a security card; whether they have managed to keep jobs in the police or military; having first-degree Kuwaiti relatives or a Kuwaiti mother; and registration in the 1965 census.”

[23] Unlike the UK report, this one concluded that Bidoons “may not legally hold jobs in Kuwait regardless of their status as security card holders,” though earlier it had said that there were some jobs available to them. Anyway, it too recognized that Bidoons who had been issued security cards (also known as review cards or green cards) could register their children in private schools (for which the government pays fees for some students), purchase low-cost health insurance, and obtain birth, marriage, and death certificates after getting clearance from the Bidoon committee.

[24] The Applicant himself confirmed that he had a Kuwaiti mother and a review card. Given that testimony, the RPD Member reasonably concluded that the Applicant was one of the Bidoons who could trace his residency back to the 1965 census and that people in that group faced less discrimination than the Bidoons who could not. There was therefore no error in comparing the Applicant’s situation to that relatively better-off group of Bidoons.

[25] That said, the Applicant further argues that the RPD Member’s assessment of the severity of discrimination that group faces was also unreasonable, claiming that discriminatory actions that are not individually persecutory may nevertheless generate a well-founded fear of persecution when their impact on the applicant is considered cumulatively and that the RPD

Member has a duty to assess that possibility (*Canada (Minister of Citizenship and Immigration) v Munderere*, 2008 FCA 84 at para 41, [2008] FCJ No 395).

[26] The RPD Member said that he considered the effects cumulatively, but the Applicant argues that a mere statement without any critical analysis is not enough. In the case at bar, this Court finds differently. Although a mere statement of the test is not always enough (see *Hegediis v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1366 at para 2, [2011] FCJ No 1669), it at least shows that the RPD Member knew that it was obliged to consider the cumulative impact of the discrimination. In addition, the decision could still be understood, as it considered all the effects the various discriminatory acts have had or would have on the Applicant (see *Sefa*, above, at para 34). In such a case, one can hardly see what more the RPD Member could usefully have said other than that he considered their effects together and not just one-by-one.

[27] In the present case, much of the RPD Member's analysis was reasonable. The Board noted that the Applicant had received documentation and had been cured every time he went to the hospital for his asthma. That responded directly to two of the Applicant's claims of discrimination. As mentioned earlier, it was also reasonable to find that those facts showed that he was better off than a lot of Bidoons, though the RPD Member nevertheless acknowledged that there is "an amount of discrimination associated with this status." As for employment, the finding that some employment is available to documented Bidoons was supported by the documentary evidence upon which it relied, and as such, it cannot be qualified as unreasonable.

[28] However, the RPD Member never really addressed the claim of education discrimination in his reasons. He did mention that it was alleged and he evidently looked at the Applicant's report card which showed that he had completed secondary school, but the Applicant had complained of an inability to attend university. In his Personal Information Form narrative, the Applicant said the following:

[...] even during my study every body was making fun of me; why do you want to finish high school because as they say, I have no future even if I complete the high school, because I cannot continue to study or get a job because I am a Bedoon. I postponed thinking about this until after high school.

My parents tried to get me a place at the University of Kuwait; they thought that the situation of my dad as a prisoner of war will help me to get a place in the university, but it did not succeed even though my mother is a Kuwaiti citizen. No school, no work, by force of law.

[...]

My Kuwaiti friends who studied with me continued their education because they are Kuwaiti but my life was stopped. I was unemployed by force of the law. Getting knowledge is not allowed to me, by law. [...]

[29] Further, this claim finds some support in the documentary evidence. The Human Rights Watch report noted at page 36 that most Bidoons live in poverty and cannot afford to send their children to private universities, and the state-run Kuwait University will not admit people of unspecified nationality. Although it does admit some Bidoons who have a Kuwaiti mother (like the Applicant), the Kuwait government's response to Human Rights Watch suggests at page 11 that there might be a quota limiting how many of these students are accepted every year. As well, this could potentially affect the employment discrimination claim as well, since the Human

Rights Watch report also says at page 6 that these barriers to higher education affect a Bidoon's success in competing for the few jobs for which they are eligible.

[30] One could argue that this still may not be persecution and that it would hardly have affected the RPD Member's decision, but it is not this Court's role to weigh this evidence.

Rather, this task fell upon the RPD Member, and his failure to do so has left a gap in his reasons that cannot be filled by inference or by looking to the record (see *Komolafe v Canada (Minister of Citizenship and Immigration)*, 2013 FC 431 at para 11, [2013] FCJ No 449; *Newfoundland Nurses*, above, at para 15). Without any analysis of the claim about education discrimination or factual findings about it, this Court cannot understand why the RPD Member reached the outcome he did or determine whether that outcome is defensible in view of the facts and the law.

[31] Consequently, this application for judicial review shall be granted and the matter shall be remitted to the same member of the RPD for re-determination.

[32] The parties were invited to submit a question for certification, but none were proposed.

**ORDER**

**THIS COURT ORDERS that:**

1. This application for judicial review is granted;
2. The matter shall be remitted to the same member of the RPD for re-determination;
3. No question is certified.

“Simon Noël”

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Judge

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

**DOCKET:** IMM-4221-13

**STYLE OF CAUSE:** AHMED AWADH v THE MINISTER  
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**PLACE OF HEARING:** OTTAWA, ONTARIO

**DATE OF HEARING:** MAY 27, 2014

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