Date: 20030516

Docket: IMM-4469-02

Citation: 2003 FCT 617

Ottawa, Ontario, this 16th day of May, 2003

PRESENT: The Honourable Mr Justice James Russell

BETWEEN:

YOUSIF KAKOS ZIROU,

HARBIAH TOMA

Applicants

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("IRPA") of the decision of the Refugee Protection Division of the Immigration and Refugee Board (the "Refugee Division") dated July 30, 2002, wherein claims for refugee protection made under section 107 of the IRPA on behalf of the Applicants were rejected.

Facts

[2] The principal Applicant, Yousif Kakos Zirou, was born on July 1, 1936, in Betanaya, Iraq.

[3] The principal Applicant claims Convention refugee status because of his particular social group, perceived political opinion, the family's refusal to join the Ba'ath Party, and religion, being a Chaldean Christian. He also claims to be a person in need of protection from the danger of torture, risk of life, or cruel and unusual punishment if he returns to Iraq.

[4] His spouse, Harbiah Toma, born on June 10, 1940, in Mousil, Iraq, bases her claim on that of the principal Applicant. The Applicants' allegations of past persecution make up a long and complex narrative.

[5] The eldest of the Applicants' sons, Thaer Yousif Kakos, was recruited by the military after his graduation on January 4, 1983. He was sent to the Reserve Officers's College on condition he join the Ba'ath Party. Because Thaer did not wish to join the Ba'ath Party, and because he was accused of being a supporter of the Dawa Islamic Party, he was dismissed from the College and sent to the 4th army corps, where he was transferred to the front lines of the Iraq-Iran war. Because of his refusal to join the Ba'ath Party and his Christian faith, Thaer suffered ill treatment which led him to desert the military. The principal Applicant alleges that three months later, he turned his son over to the army and the military court sentenced Thaer to six months of imprisonment, after which time he was returned to his unit.

[6] Thaer's dishonourable conduct ensured continued mistreatment by the military.

[7] Thaer was transferred from his unit to a military manufacturing facility, and ultimately, on March 17, 1985, to the Al-Quea'aqa'a Establishment. His job consisted of loading cars with boxes containing weapons to be taken to the front.

One day, because he felt sick, he refused to do this work. He was sentenced to ten days of imprisonment and was later transferred to another factory.

[8] Thaer's psychological health deteriorated because of the regular beatings he endured from those working for Hussein Kamel Hassan. After being absent from work for a period of 20 days, private security men under the command of Hussein Kamel Hassan and the Presidential Office took him into custody, even though he had a medical report. He was jailed for three months, after which he was transferred to the Jaber Ben Hayan Establishment.

[9] Thaer worked under the command of Major Abdel Hadi, an individual with an aggressive character and obvious malice toward non-Muslims. After being accused of vandalism and destruction in the establishment, and despite a lack of evidence, Thaer was sentenced to nine months of imprisonment by a military court.

[10] After that, on September 9, 1987, although the Iraq-Iran war had ended, and an order discharging those born in his birth year had been issued, Thaer was returned to his previous military unit at the 4th army corps.

[11] Thaer was still in the army when Iraq invaded Kuwait. His unit, the 4th army corps, was transferred to Kuwait. When Thaer refused to go, he was told he would be shot as a traitor; he therefore obeyed the order. However, once he had arrived at his location in Kuwait, he fled from the military ranks and directed himself back to another military unit in Iraq, where he knew an officer, Subhi Abd Al-Ameer, who had the rank of captain. He bribed the captain with 10,000 Iraqi dinars in order to obtain his discharge papers from the captain's unit. On June 5, 1991, Thaer was discharged from the army.

[12] The Applicants owned a supermarket in the Dowra and Karada area and allege that, because of Thaer's perceived recalcitrance, they were always subjected to harassment by state security and the Ba'ath Party who would come and take whatever they needed (cigarettes, food, drinks, money, etc.) from the supermarket. The Applicants were sometimes threatened with closure or confiscation and were accused of being traitors.

[13] On December 16, 1994, Ba'ath Party men came to the supermarket and arrested Thaer without giving any reason. The Applicants later learned that their son had been arrested on orders from A'ashour Hussein, the Ba'ath Party's person in charge of the Applicants' area.

[14] Two days later, Mr. Hussein called the principal Applicant and asked him to come to the Karkh Section. He told the principal Applicant that he must either pay one million Iraqi dinars to have his son returned alive or Thaer would be returned dead. The principal Applicant asked for two days in order to get the money, which he did. However, his son was not released until January 16, 1995, on which day Mr. Hussein called and asked that the Applicants organize a banquet for him and his section members so that he would deliver Thaer. During the banquet, Mr. Hussein asked the principal Applicant for 100,000 Iraqi dinars as a loan, which sum was handed over.

[15] On February 16, 1995, the principal Applicant alleges that Mr. Hussein called him and asked for the same amount of money. When the principal Applicant questioned him as to the nature of the payment, Mr. Hussein said that it was not a loan but a portion of Thaer's release money, and that he would have to pay that amount monthly. When asked about the payment of one million dinars, Mr. Hussein answered that such amount was not for him but for the Master (Ali Hassan Al-Majeed). Consequently, the principal Applicant paid the monthly amount until June 23, 1997, when Thaer and his wife and three children fled. They ultimately arrived in Lebanon on June 27, 1997.

[16] When Mr. Hussein learned that Thaer had fled, he asked the principal Applicant to come down to the Ba'ath Party's Section on July 7, 1997. For two hours the principal Applicant was subjected to verbal abuse, insults, beatings, and torture. Mr. Hussein told him that Thaer had to return, or else "you know what will happen to you and to your family." The principal Applicant told Mr. Hussein that he was not aware of Thaer's whereabouts and that he would tell him when he had information.

[17] After a few days, the principal Applicant alleges that he went to one of Mr. Hussein's relatives and asked him to intervene in order to have him forget about Thaer. This was agreed to on condition that the principal Applicant increase his monthly payments to Mr. Hussein to 150,000 Iraqi dinars.

[18] After receiving news from Ghazi Al-Jobouri, a person close to Mr. Hussein, that Mr. Hussein had orders to arrest him and his two other sons, Firas and Amar, the principal Applicant thought about fleeing. He went to Mr. Hussein and gave him more money (300,000 Iraqi dinars) in order to assure him of his good intentions.

[19] In July 2000, the principal Applicant sold the supermarket and his house for $18,000 US, but continued to work there until December 28, 2000. That day, a smuggler by the name of Salah Abo Samir, agreed to take the Applicants and their family to Windsor, Canada, in exchange for $30,000 US. Because the Applicants did not have such an amount, they agreed that the smuggler would take the family to Turkey, where their two sons would remain, and that they would continue on their way to Windsor for $18,000 US, which included passports and all other expenses.

[20] On February 1, 2001, the Applicants and the smuggler arrived at the Toronto airport. The smuggler took them to Windsor by taxi. The next day, the smuggler took them to the Immigration Office in Windsor, where he left them and took their passports back.

[21] After the Applicants' arrival in Canada, they learned of Thaer's acceptance as a United Nations refugee on July 7, 1999 and of his arrival in the U.S.A. on February 12, 2001, as part of the United Nations resettlement.

[22] At the time of the Applicants' refugee hearing, Firas and Amar had moved to Lebanon.

Impugned Decision

[23] The Refugee Division, under Suparna Ghosh, determined that the Applicants were not Convention refugees, or persons in need of protection, and stated that credibility was the determinative issue in their claim.

[24] A brief summary of the discrepancies noted in the Refugee Division's decision is as follows:

1. The Refugee Division found the principal Applicant's oral testimony relating to Thaer's experiences between 1983 and 1991 to be exceedingly vague, confused, and inconsistent with the Personal Information Form ("PIF").

In his oral testimony, the principal Applicant stated that Thaer was incarcerated three times while he was in the military, providing the sequence, the reasons for the arrests and the jail terms ordered. However, in his PIF, the principal Applicant stated that his son had been jailed four times while in the military and provided inconsistent information concerning the circumstances that surrounded his son's incarceration. When he was asked to make sense of the contradictions, his explanations created further contradictions.

Also, the principal Applicant stated that Thaer was sent to prison for 14 days prior to his graduation. However, in his PIF, there is no mention of this brief incarceration.

2. The Refugee Division was incredulous as to why the Applicants were more concerned about material gains rather than their own safety and that of family members.

In his PIF, the principal Applicant claimed he was beaten and tortured in July 1997 on the orders of a Ba'ath Party official, when it was discovered that his son had fled Iraq in June 1997. He also claimed that he and his family were threatened if Thaer did not return to Iraq. Considering the ill-treatment, the Refugee Division asked the principal Applicant why he did not flee Iraq with Thaer, or, at the latest, immediately subsequent to the July 1997 incident. The principal Applicant responded that one of the reasons he did not leave at that time was because the prices for the sale of his supermarket and house were down.

According to the Refugee Division, this not only illustrated the absence of subjective fear, but also highlighted the lack of credibility of the principal Applicant's allegations of torture and threat to life.

3. The principal Applicant claimed he became aware in July 2000, that a draft warrant for his arrest had been issued, but that it had yet to be signed by the authorities. When the Refugee Division asked him why he did not leave Iraq when he became aware of the warrant, the principal Applicant said that he was able to bribe the responsible official not to have the warrant signed expeditiously. Consequently, the official "sat" on the un-issued warrant for at least five months, providing the Applicants time to make arrangements to leave Iraq in December 2000.

It defied the Refugee Division's belief that the principal Applicant was able to evade arrest by simply asking one of the officials to put the "draft" warrant away in a drawer. Furthermore, it did not make sense to the Refugee Division that the highest officials would issue a draft warrant rather than a real warrant.

4. The Refugee Division found that the delay of five months before leaving after such a serious threat pointed to a lack of subjective fear, and also discredited the principal Applicant's allegation that the officials were interested in arresting him.

The principal Applicant claimed that several high Iraqi officials were extorting money from him and, therefore, had him watched closely and constantly. However, he also claimed that he was able to sell his supermarket and house for $18,000 US in July 2000 unbeknownst to the officials because he continued to work at the supermarket until December 2000.

[25] In conclusion, the Refugee Division stated:

When the totality of the evidence is considered, the panel finds on a balance of probabilities that the claimants are here on humanitarian and compassionate grounds, which are not part of the Refugee division's mandate.

Applicants' Submissions

[26] The Applicants submit that the Refugee Division made various reviewable errors in its decision:

1. There may have been some initial confusion about Thaer's experiences in the 1980s, but this was eventually clarified by the principal Applicant. He referred to three periods of imprisonment when there were actually four. He had the sequence correct, but he forgot the second incarceration that Thaer suffered for ten days. Not having perfect recall of events that occurred in the 1980s does not support a finding by the Refugee Division that the principal Applicant was exceedingly vague and discrepant in this regard. The principal Applicant's account is also supported by the fact that the United Nations recognized Thaer as a refugee in July 2000. The principal Applicant's account of what happened from 1994 onwards was coherent and consistent.

2. The principal Applicant's account of why he did not leave in 1997 with Thaer was entirely plausible. He said that he did not want to leave because he felt the situation might improve. By focussing upon the property value issue, the Refugee Division missed the real point of the principal Applicant's testimony. Delay is relevant but it cannot be the primary consideration and the Refugee Division failed in its obligation to look at all of the circumstances surrounding the delay.

3. The Applicants' courage to remain in Iraq ended in July 2000, when a friend told them about the draft warrant for the principal Applicant's arrest. The business and house were sold in July, but the Applicants did not leave until December 2000. The reason for this delay was that the smuggler advised the Applicants to wait until that time. So the Applicants continued to work at the business, live in the house and to make the monthly payments. They wanted everything to appear normal and their actions were perfectly consistent with people who did not want to arouse suspicion. But, once again, the Refugee Division ignored the obviously reasonable account provided by the Applicants and focussed instead on what it regarded as the implausibility of the authorities delaying the issuance of the warrant and not knowing that the Applicants had sold their house and business and had made preparations to leave. In this regard, the Refugee Division was imposing a Western viewpoint on a situation that was totally different in nature.

4. To top it all off, the Refugee Division then concluded that it was the sons who were in need of protection and not the Applicants, who were elderly claimants. This kind of stereotyping ignored all evidence that the authorities made no distinctions on the basis of age and that the Applicants had just as much to fear as their sons. The fact that the Refugee Division came to the conclusions it did on this issue gives rise to a reasonable apprehension of bias.

Respondent's Submissions

[27] The Respondent argues that the Refugee Division is entitled to make an adverse finding regarding credibility on the basis of the implausibility of the principal Applicant's testimony.

[28] The Respondent submits that the principal Applicant did not provide sufficient credible or trustworthy evidence to the Refugee Division to show that, on a balance of probabilities, he had the requisite subjective fear of persecution or that the alleged agents of persecution were interested in treating him in a persecutory manner.

[29] Given that the Refugee Division found many reasons why the Applicants were not credible, no one single factor was determinative and this was not so unreasonable as to warrant intervention by this Court.

[30] The Respondent alleges that it was reasonable for the Refugee Division to assume that the alleged agents of persecution would: i) be aware of the principal Applicant trying to leave Iraq; and ii) know that the principal Applicant would need sufficient liquid assets to finance his departure from, and eventual establishment outside, Iraq. The notion that those agents of persecution would be unaware that the principal Applicant had sold his house and business is virtually inconceivable.

[31] The Respondent submits that it is not a persuasive explanation that the principal Applicant was able to deceive the agents of persecution by continuing to work at the supermarket. Even if this could explain how the Applicants were able to keep the sale of their supermarket hidden, it does not explain how the sale of their house could have been kept hidden.

[32] The Respondent further argues that the sheer length of the delay in issuing the warrant of arrest makes the explanation of evading arrest, by convincing one official to whom he had given money in the past not to pursue issuing the warrant, implausible. This is because the official did not advise the principal Applicant of the maximum amount of time that he could delay issuing the warrant. Therefore, the official appeared not to have felt any pressure to follow the directive of his superiors. So, the Respondent argues, it was not unreasonable for the Refugee Division not to accept this explanation as credible.

[33] As to the allegation of bias because of the Applicants' ages, the Respondent submits that, because the Applicants did not ask the Refugee Division to recuse itself at the hearing, but waited to see what decision would be rendered before raising the allegation, they waived their right to raise the issue.

[34] Finally, the Respondent argues that, because of the recent changes that have taken place in Iraq, there is no purpose to be served in sending this matter back for further consideration. The refugee system is forward looking and the record shows that the Applicants were afraid of the Ba'ath Party and certain individuals who are no longer in power. To send this matter back to the Refugee Division would serve no purpose and would merely add to the already extensive backlog of cases.

Issues

[35] 1. Did the Refugee Division err by making adverse findings of credibility on an arbitrary basis or without proper regard to the evidence before it?

2. Was there a reasonable apprehension of bias?

3. Is there any point in returning this matter for reconsideration even if there is reviewable error?

Relevant Legislation

[36] Subsections 95(1) and (2) of IRPA refer to the availability of refugee protection:

95. (1) Refugee protection is conferred on a person when	95. (1) L'asile est la protection conférée à toute personne dès lors que, selon le cas:
(a) the person has been determined to be a Convention refugee or a person in similar circumstances under a visa application and becomes a permanent resident under the visa or a temporary resident under a temporary resident permit for protection reasons;(b) the Board determines the	a) sur constat qu'elle est, à la suite d'une demande de visa, un réfugié ou une personne en situation semblable, elle devient soit un résident permanent au titre du visa, soit un résident temporaire

person to be a Convention refugee or a person in need of protection; or

95.(2) A protected person is a person on whom refugee protection is conferred under subsection (1), and whose claim or application has not subsequently been deemed to be rejected under subsection 108(3), 109(3) or 114(4).

au titre d'un permis de séjour délivré en vue de sa protection;

b) la Commission lui reconnaît la qualité de réfugié ou celle de personne à protéger;

95.(2) Est appelée personne protégée la personne à qui l'asile est conféré et dont la demande n'est pas ensuite réputée rejetée au titre des paragraphes 108(3), 109(3) ou 114(4).

[37] Section 96 of IRPA determines what a Convention refugee is:

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

96. A qualité de réfugié au sens de la Convention -- le réfugié -- la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques:

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

[38] Section 97 of IRPA defines what is required for a person to be in need of protection:

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée_:

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de

of Article 1 of the Convention Against Torture; or	l'article premier de la Convention contre la torture;
(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant_:
(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,	(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iii) la menace ou le risque ne résulte pas de sanctions légitimes - sauf celles infligées au mépris des normes internationales - et inhérents à celles-ci ou occasionnés par elles,
97(2) Person in need of protection	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	97(2) Personne à protéger (2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

[39] Subsection 107(1) of IRPA is also relevant to the decision on a claim for refugee protection:

107. (1) The Refugee Protection Division shall accept a claim for refugee protection if it determines that the claimant is a Convention refugee or person in need of protection, and shall otherwise reject the claim.	107. (1) La Section de la protection des réfugiés accepte ou rejette la demande d'asile selon que le demandeur a ou non la qualité de réfugié ou de personne à protéger.

Analysis

Standard of Review

[40] In *R.K.L.* v. *Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116, Martineau J. provides an extremely helpful and comprehensive account of the jurisdiction of the Convention Refugee Determination Division (the

"CRDD") under the *Immigration Act* in making credibility findings. For purpose of the case at bar, the CRDD can be equated with the Refugee Division under IRPA.

[41] In *R.K.L., supra*, Martineau J. explains the jurisprudence as follows:

[7] The determination of an applicant's credibility is the heartland of the Board's jurisdiction. This Court has found that the Board has well-established expertise in the determination of questions of fact, particularly in the evaluation of the credibility and the subjective fear of persecution of an Applicant: see *Rahaman v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1800 at para. 38 (QL) (T.D.); and *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35 at para. 14.

[8] Moreover, it has been recognized and confirmed that, with respect to credibility and assessment of evidence, this Court may not substitute its decision for that of the Board when the applicant has failed to prove that the Board's decision was based on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it: see Akinlolu v. Canada (Minister of Citizenship and Immigration), [1997] F.C.J. No. 296 at para. 14 (QL) (T.D.) ("Akinlolu"); *Kanyai v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 1124 at para. 9 (QL) (T.D.) ("Kanyai"); and the grounds for review set out in paragraph 18.1(4)(d) of the *Federal Court Act*.

[9] Normally, the Board is entitled to conclude that an applicant is not credible because of implausibilities in his or her evidence as long as its inferences are not unreasonable and its reasons are set out in "clear and unmistakable terms": see *Hilo v. Canada (Minister of Employment and Immigration)* (1991), 130 N.R. 236 (F.C.A.); *Aguebor v. Canada (Minister of Employment and Immigration)* (1993), 160 N.R. 315 (F.C.A.) ("Aguebor"); *Zhou v. Canada (Minister of Citizenship and Immigration)*, [1994] F.C.J. No. 1087 (QL) (C.A.); and *Kanyai, supra*, at para. 10.

[10] Furthermore, the Board is entitled to make reasonable findings based on implausibilities, common sense and rationality: see *Shahamati v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 415 at para. 2 (QL) (C.A.); and *Aguebor, supra*, at para. 4. The Board may reject uncontradicted evidence if it is not consistent with the probabilities affecting the case as a whole, or where inconsistencies are found in the evidence: see *Akinlolu, supra*, at para. 13; and *Kanyai, supra,* at para. 11.

[11] However, not every kind of inconsistency or implausibility in the applicant's evidence will reasonably support the Board's negative findings on overall credibility. It would not be proper for the Board to base its findings on extensive "microscopic" examination of issues irrelevant or peripheral to the applicant's claim: see *Attakora v. Canada (Minister of Employment and Immigration)*, (1989), 99 N.R. 168 at para. 9 (F.C.A.) ("Attakora"); and *Owusu-Ansah v. Canada (Minister of Employment and Immigration)*, [1989] F.C.J. No. 442 (QL) (C.A.) ("Owusu-Ansah"). In particular, where a claimant travels on false documents, destroys travel documents or lies about them upon arrival following an agent's instructions, it has been held to be peripheral and of very limited value to a determination of general credibility: see Attakora, supra; and *Takhar v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 240 at para. 14 (QL) (T.D.) ("Takhar").

[12] Furthermore, the Board should not be quick to apply the North American logic and reasoning to the claimant's behaviour: consideration should be given to the claimant's age, cultural background and previous social experiences: see *Rahnema v. Canada (Solicitor General)*, [1993] F.C.J. No. 1431 at para. 20 (QL) (T.D.); and *El-Naem v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 185 (QL) (T.D.). Likewise, a lack of coherency or consistency in the claimant's testimony should be viewed in light of the claimant's psychological condition, especially where it has been medically documented: see *Reyes v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 282 (QL) (C.A.); *Sanghera v. Canada (Minister of Employment and Immigration)* (1994), 73 F.T.R. No. 155; and *Luttra Nievas v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 34 (QL) (T.D.).

[13] A person's first story is usually the most genuine and, therefore, the one to be most believed. That being said, although the failure to report a fact can be a cause for concern, it should not always be so. That, again depends on all the circumstances: see *Fajardo v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 915 at para. 5 (QL) (C.A.); *Owusu-Ansah, supra*; and *Sheikh v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 568 (QL) (T.D.). In evaluating the applicant's first encounters with Canadian immigration authorities or referring to the applicant's Port of Entry Statements, the Board should also be mindful of the fact that "most refugees have lived experiences in their country of origin which give them good reason to distrust persons in authority": see Prof. James C. Hathaway, The Law of Refugee Status, (Toronto: Butterworth, 1991) at 84-85; *Attakora, supra*; and *Takhar,supra*.

[14] Finally, the applicant's credibility and the plausibility of testimony should be assessed in the context of her country's conditions and other documentary evidence available to the Board. Minor or peripheral inconsistencies in the applicant's evidence should not lead to a finding of general lack of credibility where documentary evidence supports the plausibility of the applicant's story: see *Attakora, supra*; and *Frimpong v. Canada (Minister of Employment and Immigration)*, [1989] F.C.J. No. 441 (QL) (C.A.).

Did the Refugee Division err by making adverse findings of credibility on an arbitrary basis or without proper regard to the evidence before it?

[42] Firstly, as to the Refugee Division's conclusion that the principal Applicant's oral testimony regarding his son's incarceration experiences was "exceedingly vague, confused, and discrepant", I agree with the Applicants that this was totally unreasonable on the facts.

[43] Although it is clear from a reading of the hearing transcript that, initially, the principal Applicant was confused about the chronology of the incidents, he did explain that this was because "there are so many dates so I'm getting confused, ...", and "...this is now over 20 years old", and "[my] head is not a computer."

[44] Furthermore, he did eventually make sense of those incidents and sequenced them in accordance with his PIF:

- first imprisonment: in 1986, for a period of six months, because Thaer escaped from the military;

- second imprisonment: in 1987, for a period of three months, for not reporting during his sick leave and not being a member of the Ba'ath Party;

- third imprisonment: year not known, for a period of nine months, because he was neither a Ba'athist nor a Muslim and was accused of being a person who wanted the destruction of the establishment.

[45] The chronology of the previously enumerated incidents accords with the chronology mentioned in the principal Applicant's PIF, save for one incident which he did not mention and which would have occurred prior to the second imprisonment of 1987. Indeed, according to his PIF, Thaer's second imprisonment would have lasted for a period of ten days and would have been due to his refusal (he felt sick) to pursue his usual work responsibilities.

[46] Similarly, during his oral testimony, the principal Applicant was asked by his counsel if he recalled Thaer being imprisoned for a period of ten days. The principal Applicant answered positively and stated that the incarceration occurred prior to his son's graduation in 1982, but for a period of 14 days. In respect of that answer, the Refugee Division stated that the principal Applicant:

He had no explanation why there is no mention of this incident in his long PIF narrative, which goes back to 1982, and provides specific dates, events and details. The PIF was prepared with the assistance of counsel and signed on July 17, [2001], just one year ago, when his recall was evidently clear and cogent. At the beginning of the hearing he was also given an opportunity to make minor amendments, and before his PIF was entered into evidence, he declared the information was true and correct to the best of his knowledge.

[47] The Refugee Division appears to have overlooked the fact that the principal Applicant's PIF starts with the statement that "[Thaer] graduated in 1982 and was recruited to the military service on January 4, 1983, . . ." and continues on with the narration of the pertinent events. It seems clear that the principal Applicant did not wish to go through the incidents that had taken place prior to Thaer's graduation. In fact, in its decision, the Refugee Division itself only referred to Thaer's experiences between 1983 and 1991, i.e. his military years. Therefore, it seems clear that the Refugee Division was aware that the starting point of the relevant period of these claims was 1983. In light of this, the approach of the Refugee Division qualifies as the kind of "extensive microscopic examination of issues irrelevant or peripheral to the Applicant's claim" disapproved of in *R.K.L., supra*.

[48] Secondly, regarding the fact that the Applicants waited until the prices for the sale of their house and supermarket had gone up, rather then leave Iraq when their son Thaer in 1997, the Refugee Division stated:

The claimant was allegedly beaten and tortured because his son had left, and the claimant knew that contrary to A'shour's demand, his son was not going to return. The panel is incredulous that the claimant was more concerned about material gains, for instance the fallen prices for his house and supermarket, rather than his safety and the safety of his family members. This not only illustrate the astonishing absence of subjective fear demonstrated by the claimant, it also highlights the lack of credibility of his allegations of torture and threat to life.

[49] The above passage, in light of the principal Applicant's oral testimony, gives rise to serious concerns about the extent to which the Refugee Division paid any attention to his answers. Indeed, from a reading of the hearing transcript, the principal Applicant made the reason why he had to wait for the prices to go up before leaving Iraq quite evident:

COUNSEL: Why did you take your sons with you?

CLAIMANT #1: Because they're going to be arrested and then we went to the smuggler.

...

COUNSEL: And after you met the smuggler what happened?

CLAIMANT #1: It was our agreement between myself and the smuggler to smuggle us, myself, my wife, and my sons, to Windsor in Canada.

COUNSEL: Why Windsor?

CLAIMANT #1: Because we knew somebody in Windsor and our information about Canada it's a safe place and he wanted $30,000 U.S. and as I did not have more than $18,000 U.S. it was agreed between him and myself to get us out of Iraq. We are the four and Farez and Amar stays in Istanbul in Turkey and he will have to supply them with identity cards and then he will transport me, myself and my wife, to Windsor in Canada for amount of $18,000 U.S. and he will have to bear all the costs and he will have to be with us and he will have to accompany us until we get to the Immigration office in Windsor...

...

RCO: Now, given all that has happened to your son which caused him to flee Iraq why didn't you leave Iraq together with your son and family?

CLAIMANT #1: Many reasons. First, I had a supermarket and I had a house and at that time the prices were very down and the smuggler has very, very expensive prices and I was thinking after he leaves the country things will get better in Iraq.

[50] In light of the principal Applicant's oral testimony, I am unable to understand at all how the Refugee Division could characterize itself as "incredulous that the claimant was more concerned with material gains, for instance the fallen prices for his house and supermarket, rather than his safety and the safety of his family members." It never seems to have occurred to the Refugee Division that "material gains" might be the only way to secure that safety. I am of the opinion that the Refugee Division's finding in this regard was capricious and patently unreasonable.

[51] Thirdly, the Refugee Division's credulity was once again challenged by how the principal Applicant was able to evade arrest by simply asking one of the officials to put the "draft" warrant away in a drawer. It did not make sense to the Refugee Division that the highest officials would issue a draft warrant, rather than a real warrant.

[52] Once again, the Refugee Division appears to overlook the obvious fact that the principal Applicant did not simply ask one of the officials to put the draft warrant away, he bribed him to do so. The reference should be to an Iraqi culture where it is not uncommon to pay bribes. As stated in *R.K.L., supra*, the Refugee Division should not be so quick to apply North American logic and reasoning to the principal Applicant's behaviour.

[53] In light of the evidence introduced of the principal Applicant's various payments to officials, it is difficult to see why the Refugee Board would doubt that bribery, in Iraq, could delay an arrest.

[54] A few passages from the hearing transcript help shed light on the whole warrant issue:

CLAIMANT #1: The reason that in July of year 2000 Razi Ajuburakat (ph) came to me who was responsible in the Ba'athist branch, party branch, and he told me there was a warrant, a draft of a warrant from the Mister to arrest me together with my family.

...

CLAIMANT #1: Usually Razi Jaburi types the warrant and takes it to Ashur Razim to be signed for Ali Hassan Majid and then a warrant gets put into execution.

...

CLAIMANT #1: I just want to explain one fact. That Razi is a person that's in financial need, financially weak, and before these events I used to help him financially and I requested him to just to keep that warrant draft in his desk for a period of time until I prepare myself. There are plenty of those warrants. Because of my friendship with him he did not forget that, so he kept that warrant draft in his drawer. Then I sold my house and my supermarket for $18,000 U.S. This is with the understanding that I deliver the house together with the supermarket on the 28th of December 2000. Then I went to Ashur and I paid him $300,000 Iraqi dinars.

...

CLAIMANT #1: ... That's why I paid Ashur 300,000 Iraqi dinars in July, just to cover up and I continued to pay the 150,000 Iraqi dinars a month.

COUNSEL: Okay. So you're still making monthly payments?

CLAIMANT #1: Yes.

COUNSEL: But why did you give the 300,000 in July?

CLAIMANT #1: It was a cover up and it was in July and there were celebrations going on for the 17th of July and I gave that money as a donation for the celebrations, ...

...

RCO: ... What would happen, if anything, to you as a result of that warrant?

CLAIMANT #1: Same as happened to my son. Unless I have to pay so many millions otherwise I would be arrested. They told me we're going to bring your dead son's body to you and I had no millions left, no millions left with me to pay. And I didn't know the reasons for arresting my son, for the reason for issuing that warrant to arrest me.

...

RCO: ..do you know of anyone that a warrant has been issued to arrest them and they having done nothing at all?

CLAIMANT #1: Many people. Many Iraqi people. Especially people who have money and they are Christians.

...

PRESIDING MEMBER: ... Now, given the way the authorities act why would there be necessity for an arrest warrant? Why not just come and take you if they were really interested in you?

CLAIMANT #1: The purpose is to get as much as they can out of people, abuse me. Just like what they did by arresting my son and they asked me for a million.

[55] I find that the above comments satisfactorily explain the circumstances surrounding the principal Applicant's warrant of arrest and that the Refugee Division's position on this issue was also capricious and patently unreasonable.

[56] For similar reasons, the Refugee Division's finding that it was not plausible that the sale of the principal Applicant's supermarket or house could not be achieved in a covert manner was patently unreasonable. The principal Applicant worked at the supermarket as he had always done and lived in his house, with his family, until the 28th of December 2000, the day they left. He has repeatedly insisted that there was an agreement with the buyer that nothing would

be finalized until December 2000. In light of that, I am of the opinion that the Refugee Division's finding was a reviewable error.

[57] The Refugee Division's finding that a delay of five months before leaving after such a serious threat points to a lack of subjective fear, and also discounts the veracity of the principal Applicant's allegation that the officials were interested in arresting him is unsupportable on the evidence and a reviewable error.

[58] The smuggler requested the substantial sum of $30,000 US for the entire family, an amount which they did not have. More importantly, the smuggler had told the principal Applicant that it was not possible to get them out prior to December 2000 because of the Turkish military's presence near the border, which would have made it difficult to get across. Therefore, considering that the bribes were working, that the principal Applicant was still working in the supermarket, and that the smuggler had told the family that it would be too dangerous to take them out before December 2000, why would the Applicants have risked leaving before? There is no reason, in fact, to suggest that they could have left earlier even if they had wanted to.

[59] Relevant to the case at bar, is a passage from *Anwar* v. *Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 1434, where Beaudry J. at paragraph 59 refers to the "options", or risks with which persons who want to flee Iraq are faced:

... It should also be considered that fear of the regime, whose actions cannot be predicted as the same level of rationality that can be expected elsewhere seems not to be present in Iraq, prevented the family from acting as it did sooner. In the same vein, that fear of retaliation for hiding and escape may not have been outweighed by the desire to risk escape until the threats of sexual assault were made. These considerations are neither tangential nor ancillary, and ought to have been taken into account by the panel.

[60] In the case at bar, a delay of five months was not so significant that it could sustain a finding that the Applicants did not have a subjective fear of persecution.

[61] The Applicants argue that the Refugee Division decision gives the impression that age played a significant role in the decision. I disagree. I do not think that age was a determinative factor. However, I do believe that the statement in question represents a finding by the Refugee Division that was not reasonably open to it on the record.

[62] The record makes it clear that human rights violation in Iraq are not age limited. The United States Department of State Country Reports on Human Rights Practices in Iraq for 2000 (the "U.S. DOS Report"), which was part of Exhibit R1 before the Refugee Division, does not support its findings as to the "elderly". The U.S. Dos Report states that the "authorities continued systematically to hold family members and close associates responsible for the alleged actions of others...."

[63] Furthermore, in *Anwar, supra,* at paragraph 13, the panel members of the CRDD recognized that age was not a concern for the Iraqi authorities:

The panel found it implausible that the authorities would not act against the claimant before March 1999, eighteen months after her brother's desertion. It also had a problem with the idea that the authorities would come after her, despite the fact that she is seven years younger than her brother, but would not take similar action against her father, notwithstanding that in 1999, he was sixty-one years old. The panel does not believe that Iraqi authorities are any less aggressive against elderly persons who they believe have information on anti-government activities, such as desertion. [Emphasis added]

[64] There are several passages in the U.S. DOS Report, that support the Applicants' claims:

... The Government has reacted with extreme repression against those who oppose or even question it. The judiciary is not independent, and the President may override any court decision.

...

... The Government continued to be responsible for disappearances and to kill and torture persons suspected of - or related to persons suspected of - economic crimes, *military desertion*, and a variety of other activities. Security forces routinely tortured, beat, raped, and otherwise abused detainees. ...

... The Government neglects the health and nutritional needs of children, and discriminates against religious minorities and ethnic groups. ...

...

... many thousands of persons have been arrested arbitrarily in recent years because of suspected opposition activities or because they are related to persons sought by the authorities. ...

...

... The Special Rapporteur stated in October 1999 that citizens lived "in a climate of fear" in which whatever they said or did, particularly in the area of politics, involved "the risk of arrest and interrogation by the police or military intelligence." He noted that "the mere suggestion that someone is not a supporter of the President carries the prospect of the death penalty."

...

The Government also has sought to undermine the identity of minority Christian (Assyrian and Chaldean) ... . The Special Rapporteur and others reported that the Government has engaged in various abuses against the country's 350,000 Assyrian and Chaldean Christians, ...

[65] Such passages only confirm and support the principal Applicant's oral testimony and PIF that he and his wife did indeed have a well-founded fear of persecution and that the objective aspect of the fear is satisfied.

[66] The following words of Martineau J. in *R.K.L., supra*, apply equally well to this case:

... Furthermore, in its zealous pursuit of inconsistencies, the Board placed too much importance on peripheral elements and failed to focus on the real issues that were before it: the applicant's subjective fear of persecution and the objective basis for such fear. The Board seems to have ignored a great amount of highly relevant evidence that appears on record. ... The Board was, of course, under no obligation to accept any of this evidence, but the Board's decision fails to establish that the evidence received sufficient attention and consideration. For those reasons, I conclude that the Board's general negative credibility finding is patently unreasonable, and that the Board's decision was based on findings of fact made in a perverse or capricious manner or without regard for the material before it.

[67] Finally, I come to the Respondent's argument that, notwithstanding a finding of reviewable error, this case should not be sent back for reconsideration because to do so would serve no purpose in light of recent events in Iraq. I disagree.

[68] There was no evidence before me as to how recent events in Iraq will impact upon the Applicants and the Applicants should not be deprived of the opportunity to make their case before the Refugee Division if they believe that they are still in any danger.

ORDER

THE COURT HEREBY ORDERS THAT:

1. The application for judicial review is allowed, the July 30, 2002, decision is set aside and the matter is remitted for reconsideration by a differently constituted panel.

2. No question will be certified.

"James Russell"

J.F.C.C.

FEDERAL COURT OF CANADA

Names of Counsel and Solicitors of Record

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HARBIAH TOMA v. MCI

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REASONS FOR ORDER BY: Justice James Russell

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FOR THE RESPONDENT

FEDERAL COURT OF CANADA

Date:20030516

Docket: IMM-4469-02

BETWEEN:

YOUSIF KAKOS ZIROU,

HARBIAH TOMA

Applicants

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER