Federal Court  Cour fédérale

Date: 20170419

Docket: IMM-3976-16

Citation: 2017 FC 375

Toronto, Ontario, April 19, 2017

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

BAYRAM DAG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background

[1] This is an application for judicial review of a decision [Decision] of the Refugee Protection Division [RPD or the Board] of the Immigration and Refugee Board dated August 31, 2016, concluding that Mr. Dag [the Applicant] is neither a Convention refugee nor a person in need of protection pursuant to ss. 96 and 97 of the *Immigration and Refugee Protection Act*, SC

2001, c 27 [Act or IRPA]. The Applicant is a Turkish citizen of Kurdish ethnicity, and of the Alevi faith.

[2] In 2016, the Applicant's son visited the United States [U.S.] with his school, and the Applicant was granted a U.S. visa to accompany him. At the end of the school trip, the Applicant entrusted the care of his son to school officials. The son returned to Turkey with the school and the Applicant crossed the border from the U.S. into Canada. He sought refugee protection in Canada on May 12, 2016; the RPD rejected his claim on August 31, 2016, due to credibility issues. Among the RPD's various negative credibility findings was the fact that it did not believe the discrimination claims based on his (accepted) Kurdish ethnicity. Furthermore, the RPD found a lack of subjective fear due to failure to claim asylum when the family went on vacation to Switzerland three years prior to the claim, at a time when the Applicant claimed to fear persecution.

[3] In addition, the Applicant claimed that he feared the same risks of persecution for his son in Turkey, having the profile of Kurdish ethnicity and Alevi faith. However, when questioned why the Applicant sent his son back from the U.S. to the alleged ethnic and religious-based risks in Turkey, rather than bringing him along to Canada, the Applicant first stated that the school was able to accompany his son back to Turkey because the Applicant had signed a notarized authorisation allowing the school to do so. However, when the RPD asked the question again to better understand why the Applicant did not bring his son to Canada if indeed he was to face persecution in Turkey, the Applicant answered that the school did not allow him to bring his son to Canada. The RPD wrote that it simply did not believe this response, as it was unclear why the

Applicant could not revoke the authorisation and bring his son with him to Canada. This undermined the Applicant's credibility.

[4] Ultimately, the RPD did not believe any part of the Applicant's story, both because of a lack of subjective fear, and numerous inconsistencies, contradictions and implausibilities in testimony, in addition to instances of hesitation in answering questions. These negative credibility findings as a whole were not challenged in this judicial review, with the exception of one short passage, where the Applicant contended that the RPD misapprehended his testimony.

[5] Instead, the Applicant focused his arguments on the RPD's failure to conduct a s. 97 risk analysis based on his ethnicity and religion, which he contends was a fatal error: the Applicant claims that the RPD should have examined the danger of returning to Turkey as a failed Kurdish Alevi refugee claimant. I find that although the Applicant raised a fear of lack of protection during the second day of RPD hearings, the Board, in these particular circumstances, did not err by failing to conduct a s. 97 analysis, for the reasons explained below.

II. Analysis

[6] The parties agree that the standard of review for a subs. 97(1) finding under IRPA is reasonableness; the Court may intervene only where the decision lacks justifiability, intelligibility and transparency, and falls outside the range of possible, acceptable outcomes (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 47 and 51 [*Dunsmuir*]).

[7] The Applicant claims that the RPD erred in failing to evaluate whether a refused Kurdish (Alevi) refugee claimant would be in need of protection. Despite determinative credibility findings with respect to his s. 96 claim, the Applicant maintains that the RPD nonetheless had to address the objective evidence he provided that supported his subs. 97(1) claim. In failing to do so, according to the Applicant, it erred.

[8] There are several reasons why I cannot agree with the Applicant in this circumstance. Before explaining them, I will briefly review the subs. 97(1) jurisprudence most relevant to this matter.

[9] The Federal Court of Appeal held in *Canada (Citizenship and Immigration) v Sellan*, 2008 FCA 381 [*Sellan*] at para 3, that:

> […] where the Board makes a general finding that the claimant lacks credibility, that determination is sufficient to dispose of the claim unless there is independent and credible documentary evidence in the record capable of supporting a positive disposition of the claim. The claimant bears the onus of demonstrating there was such evidence [emphasis added].

[10] The Respondent cites numerous decisions both pre-dating and post-dating *Sellan*, to support its position that the negative credibility findings in this matter were determinative, including three recent decisions of this Court, namely *Gebetas v Canada (Citizenship and Immigration)*, 2013 FC 1241[*Gebetas*]; *Kusmez v Canada (Citizenship and Immigration)*, 2015 FC 948 [*Kusmez*]; and *Eker v Canada (Citizenship and Immigration)*, 2015 FC 1226 [*Eker*]. In each of these, like in the case under review, the applicants were refugee claimants from Turkey of Alevi faith and Kurdish ethnicity. And in each case, the Board made fatal credibility findings,

determining that the applicants had put forward insufficient credible and trustworthy evidence to support positive findings.

[11] In *Gebetas*, the Court held that a general finding of non-credibility derived from omissions, contradictions and implausibilities regarding central allegations of the claim can be dispositive of the claim and affect all relevant evidence submitted (*Gebetas* at paras 26-29). In *Eker*, the Court held that the Board's finding that the applicants' Kurdish origin was itself insufficient to be a ground of persecution (*Eker* at para 13). And in *Kusmez*, like in this case, the applicants criticized the Board for failing to consider the risk of persecution based on their ethnicity or faith under s. 97. The Court found (*Kusmez* at paras 20-21) that the adverse credibility findings permeated all aspects of the applicants' claims, and that there was insufficient documentary evidence in the record to support a positive disposition of the claim.

[12] Considering this jurisprudence, and in light of the record, I find the RPD's Decision to be reasonable, and do not agree that the RPD erred in failing to conduct a s. 97 analysis in this case. First, the RPD's credibility findings are reasonable. The RPD undertook a comprehensive review of the Applicant's experiences, work history, and travel to and from Turkey, and noted an absence of any evidence of any discrimination, let alone persecution. These conclusions were based on two days of oral testimony, as well as the written evidence before the RPD.

[13] The purpose of a s. 97 analysis is to determine whether the Applicant is in need of protection in Canada due to danger or risk if returned to Turkey. Given that the RPD found that (i) the Applicant's story was wholly untrue (in its original words, "le tribunal… ne croit rien de

cette histoire"), and (ii) he was never subject to any discrimination, let alone persecution, the record simply does not bear out what danger or risk awaits him in Turkey. The Applicant provided no documentary evidence to address the alleged risk raised for returning asylum seekers with his ethnic and religious profile.

[14] The law is clear that it is the claimant's case to make: the onus rests squarely on him or her to present the evidence and information necessary to establish the claim (*Kusmez* at para 21, relying on *Ward v Canada (Minister of Employment and Immigration)*, [1993] 2 SCR 689 [*Ward*]). While *Ward* focused on a different aspect of refugee law (state protection under s. 96 persecution), appellate courts have ruled that the evidentiary burden applies equally to s. 97 protection. The Court held in *Sellan* that an applicant has the onus to demonstrate that there is independent, credible evidence to support his claim. And *Prophete v Canada (Citizenship and Immigration)*, 2009 FCA 31 at para 7 held that the RPD must conduct an individualized assessment of the objective documentary evidence in order to render a positive disposition of the claim.

[15] It follows that, when an applicant does not meet the onus of providing independent, credible evidence to support a claim -- including where the documentary evidence does not lend itself to an individualized assessment -- there is no prospect of success. That was the crux of the RPD's conclusion in this case, namely that the Applicant's evidence did not support a positive disposition of the claim. Simply put, there was insufficient evidence to conduct a meaningful s. 97 analysis.

[16] In reviewing a tribunal decision, it is well established that the Court must consider the entirety of the record – both in terms of the subjective and objective fear, and the evidence supporting both (*Aria v Canada (Citizenship and Immigration)*, 2013 FC 324 at para 27).

[17] Here, the RPD reviewed the Applicant's testimony regarding risks upon return and once again found that the Applicant's answers (on a subjective basis) completely lacked credibility.

[18] Without any objective documentary evidence allowing the RPD to establish personalized risk (based on Kurdish Alevi identity), there is no prospect of success under a s. 97 analysis. That is why I come to the conclusion that there was thus no need to engage in a risk analysis in these particular circumstances.

[19] As a result of the totality of the findings, the RPD reached a decisive conclusion on credibility, one which I find to be reasonable, and one that was not contested in review – outside of a brief exchange during the hearing raised by counsel as to whether the Applicant knew people who had been killed or if he himself feared that he could be killed. That specific exchange represented just one of a multitude of negative credibility findings. While another decision-maker could have interpreted the impugned exchange a different way, I find the RPD's interpretation was reasonable.

[20] Even if I were to take the view that the RPD misconstrued the brief exchange in that isolated part of the testimony, the Court is not to microscopically examine every aspect of the RPD's reasons in a treasure-hunt for errors (*Communications, Energy and Paperworkers Union*

of Canada, Local 30 v Irving Pulp & Paper, Ltd, 2013 SCC 34 at para 54). By extension, the many remaining credibility findings still tip the balance convincingly and incontrovertibly in the other direction – that the Decision still fell well within the range of outcomes open to it, and was clearly defensible based on the facts and under the law.

[21] I would be remiss in failing to acknowledge counsel for the Applicant's able efforts to advocate for his client, including raising several cases which have been decided in favour of the claimant. However, I find they differ from the case at hand. Two, in particular, merit comment.

[22] First, in *Ayilan v Canada (Citizenship and Immigration)*, 2008 FC 1328, this Court found that a s. 97 analysis was required, given (a) the Board's finding that the applicant was or may have been discriminated against, coupled with (b) the documentary evidence provided by the applicant. Neither (a) nor (b) were present in this case. Here, however, the RPD made an entirely reasonable finding that the Applicant had never been subject to discrimination, given his lengthy work history, travel to and from Turkey, and his son's success at school, among other points raised. Of particular note was that the Applicant also took his family to Switzerland on a vacation in 2013, without seeking refugee status.

[23] Second, *Paramanathalingam v Canada (Citizenship and Immigration)*, 2017 FC 236 [*Paramanathalingam*] provides a helpful overview of the current s. 97 law. In *Paramanathalingam*, the evidence demonstrated that the applicant and some family members had - or were perceived to have - ties to the Liberation Tigers of Tamil Eelam [LTTE]. The applicant's father had also been arrested for his ties to the LTTE. Both factors could have

objectively put the applicant at risk based on the accompanying documentary evidence. Both the subjective and objective evidence on display in *Paramanathalingam* were absent here. In addition, the RPD in *Paramanathalingam* unreasonably found that because the applicant never established a s. 96 fear, he could not succeed under a s. 97 analysis. That conclusion was wrong in law. But here, the RPD did nothing of the sort, rejecting the claim because it did not believe the entire story, and simply lacked an evidentiary basis on which to conduct a s. 97 analysis based on personal risk to the Applicant.

III. Conclusion

[24] Given the reasons provided above, the application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. No question for certification was posed, and none is certified.

3. No costs are ordered.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3976-16
STYLE OF CAUSE:	BAYRAM DAG v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 16, 2017
JUDGMENT AND REASONS:	DINER J.
DATED:	APRIL 19, 2017

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