Federal Court  Cour fédérale

Date: 20100621

Docket: IMM-4149-09

Citation: FC 2010 671

Ottawa, Ontario, June 21, 2010

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

HASAN AY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[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 (the Act) of a decision dated July 22, 2009, by the Refugee Protection Division of the Immigration and Refugee Board (the Board), wherein the Board found the applicant was not a Convention refugee or a person in need of protection pursuant to subsections 96 and 97(1) of the Act.

Factual Background

[2] The applicant is a Kurd born in the village of Koseyahya of Elbistan in the Kurdish province of K. Maras in Turkey. The Kurdistan Workers' Party, better known as the PKK, claims to fight for Kurdish independence and has been classified as a terrorist organization. As a result of the violent conflict between the PKK and Turkish authorities, many Kurds have suffered or fled from their villages.

[3] The applicant is a farmer who recounts years of persecution by Turkish soldiers of his people. As a child, he witnessed soldiers beating and insulting fellow villagers. At the same time, the applicant and his fellow villagers would allegedly be forced to provide provisions for the PKK. When the soldiers suspected such support, they would persecute the villagers. As a result of the conflict, many members of the applicant's village had left. The applicant's family was also prevented by Turkish soldiers from accessing grazing grounds due to fears they would be assisting the PKK.

[4] In September 1995, the applicant was stopped at a checkpoint and arrested. He was accused of attempting to purchase provisions for the PKK. Despite his denials, the applicant was allegedly beaten, tortured and detained for three days. After his release, the applicant attempted to avoid the Turkish soldiers in his region by living and working in different cities. However, he found that he was subject to the same discrimination elsewhere in Turkey. He would often return to his village for visits, but kept a low profile.

[5] In September 1998, soldiers saw the applicant and ordered him to lie down. They searched him and detained him for two days. They were searching for information concerning Kurdish insurgents. During his detention, the applicant was beaten and subjected to inhumane treatment. He was also asked to be an informer but he refused. He was subsequently released with no charges.

[6] In July 2002, the applicant hosted a meeting at his house concerning the upcoming election. The meeting involved sympathizers of the pro-Kurdish parties and the leftist parties who were contemplating the possibility of forming a coalition. The gendarmeries stormed the applicant's house later that day and demanded that the applicant provide the names of all the attendees. The applicant refused and was beaten in front of his family by gendarmerie officers. His wife attempted to intervene but she was also mistreated. The applicant was arrested and taken away while his wife was later brought to the hospital and treated for shock. The applicant was taken to a military base and detained for three days.

[7] Six months after this arrest, the applicant moved to the town centre where he thought he would be more anonymous. However, in March 2006 he was again detained. The authorities suspected he had knowledge of a banner that was hung in protest in Diyarbakir where Kurdish civilians had been killed by the security forces. The applicant was shown pictures of suspects, but denied knowing any of them. He was again beaten then released.

[8] On July 20, 2007 the applicant was arrested on his way to Elbistan. It was two days prior to the general elections. He supported a coalition known as "Candidates for One Thousand Hopes"

consisting of Kurdish DTP and other leftist parties. The applicant had helped the coalition by distributing election brochures and attending meetings. Supporters of the coalition, including the applicant, were often stopped, searched, and had their materials confiscated. After the arrest, the applicant was taken to a military base and held for two days. The applicant claims he was questioned by members of the Gendarmerie intelligence service known as JITEM. The applicant submits that he was physically abused by the JITEM and threatened that they would make him 'disappear'. Furthermore, they requested his cooperation in framing some Kurdish officials and wanted the applicant to make statements that incriminated them. The applicant refused and, as a result, he was subject to further beatings and electrical shocks. He was subsequently released but told that there would be consequences for not cooperating.

[9] After his release, the applicant began to make arrangements to leave Turkey. The applicant came to Canada via the United States in September 2007. The applicant's sister and brother-in-law were granted refugee status in Canada. The applicant also has other siblings who were granted asylum in the United Kingdom.

Impugned Decision

[10] The Board member refused the application on the grounds that the applicant's story was not credible, that he had an internal flight alternative, and that he did not subjectively or objectively fear for his life as illustrated by his delay in making a refugee claim.

[11] First, the Board member found that there were apparent discrepancies between the notes of the Immigration Officer taken on September 12, 2007 and the Personal Information Form (PIF) narrative. The Board member questioned why the applicant first stated he feared the PKK, when he also feared the Turkish authority. The Board member recognized that the port of entry notes stated that the applicant feared both the Turkish authorities and the PKK. However, the fact that the applicant failed to correct the discrepancy until the hearing two years later discredited the applicant's credibility.

[12] The Board member also found the applicant's reasons for not leaving Turkey earlier lacked credibility. The applicant stated that, although he was the main target for the Turkish authorities, he wanted to stay behind until all his siblings were safely out of Turkey. The Board member felt that the applicant's explanation was not logical; if he were the main person sought by the authorities and if he was fearful for his life, he should have left sooner. The Board member found that the applicant's actions illustrate a lack of subjective fear and undermine his credibility.

[13] The Board member was of the view that the applicant was a farmer with no political ties because no party officials or members of the PKK were at his home during the raid. Out of 13 or 14 people in his home, only four were arrested as the rest were over the age of 50. The Board member found the explanation that no one over 50 was arrested not reasonable or credible if they were all engaged in activities against the state. The Board member did not believe that the applicant was a concern to the Turkish authorities because he was always released after his arrests without charges. This was compounded by the fact that the applicant never made the decision to leave Turkey

sooner. The applicant also could not produce any material such as pamphlets or brochures to support his claims of political activity.

[14] The applicant was asked why he did not seek asylum in the United Kingdom where the rest of his siblings were accepted as refugees. The applicant responded that he had a sister in Canada and believed Canada was a better place to live. The Board member felt that the applicant's "refuge shopping" undermined his claim. Furthermore, the applicant's failure to make a refugee claim in the United States reinforced the Board member's belief that the applicant did not truly fear for his life.

[15] The Board also found the applicant's failure to obtain an update from his wife – as to his situation in Turkey – contributed to his lack of credibility. The applicant explained that he did not want to involve his wife in his problems. However, the Board member found it unreasonable that, given his wife's witnessing of the applicant's beating in their home, she would be aware of his problems and would be able to provide an update as to the applicant's present situation in Elbistan.

[16] The Board member also received a psychiatric report stating that the applicant suffered from Post-Traumatic Stress disorder as a consequence of the torture he had endured. The Board member gave little weight to the psychiatric report.

[17] Even if the applicant's claim was credible, the Board was of the view that he had a valid IFA. The applicant could have moved to Istanbul, a city of 9.7 million. The applicant claimed that he would face similar problems in Istanbul by virtue of the fact that he is a Kurd. The Board

member felt there was no evidence that the applicant would not be safe in Istanbul, and that he was capable of building a new life there.

[18] The Board concluded that there is no serious possibility or reasonable chance that the applicant would face persecution for a Convention ground if returned to Turkey. The Board also found that the applicant was not a person in need of protection.

Issue

[19] This application raises the following issues:

a. Did the Board make unreasonable credibility findings with respect to the applicant's refugee claims?

b. Did the Board breach the principles of procedural fairness by considering internal flight alternatives without placing the applicant on proper notice?

[20] For the following reasons, the application for judicial review will be allowed.

Statutory Provisions

[21] The following provisions of the Act are applicable in these proceedings:

Convention refugee	Définition de « réfugié »
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race,	**96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du

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.

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.

Person 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 of Article 1 of the Convention Against Torture; or

(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

Personne à protéger

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 l'article premier de la Convention contre la torture;

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,	(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,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(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,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
Person in need of protection	Personne à protéger
(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	(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.

Standard of Review

[22] Prior to *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the standard of patent unreasonableness was applied to credibility findings (*Mejia v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 354, [2009] F.C.J. No. 438 (Q.L.) at para. 24). The Court

will only intervene with a credibility finding if the Board based its decision on an erroneous finding of fact made in a perverse or capricious manner or if it made its decision without regard to the material before it (*Aguebor v. (Canada) Minister of Employment and Immigration*, (1993), 160 N.R. 315, 42 A.C.W.S. (3d) 886 (F.C.A.)).

[23] In *Diaz v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1243, [2008] F.C.J. No. 1543, the Court summarized the law on standard of review for an IFA. IFA determinations were reviewed on a patent unreasonableness standard because the question fell squarely within the expertise of the Board, and was therefore owed more deference.

[24] In light of *Dunsmuir*, the Court in *Mejia, supra*, concluded that the appropriate standard of review for credibility findings and IFA determinations is reasonableness. According to the Supreme Court of Canada, when reviewing a decision on the reasonableness standard, the court should be concerned with justification, transparency and intelligibility within the decision-making process. The outcome must be defensible in respect of the facts and the law, and should fall within a range of possible and acceptable outcomes (*Dunsmuir* at para. 47).

[25] Finally, it is well settled that issues of procedural fairness are reviewed on a standard of correctness: *Level (litigation guardian) v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 227, [2008] F.C.J. No. 297 at para. 9.

Analysis

a) Credibility

[26] The applicant submits that the Board erred with respect to its findings that the applicant's evidence was not credible. The applicant argued that there was no alleged inconsistency between the port of entry notes and the applicant's later evidence. The applicant's PIF clearly established that he feared both the PKK and the Turkish authorities.

[27] The applicant also argues that his delay in leaving Turkey should not be grounds for a negative credibility finding. The applicant submits that it was only after his detention in July 2007 when his life was threatened that he felt compelled to leave. Prior to this incident, the applicant's life was not in danger.

[28] Further, the applicant alleges that his failure to make an asylum claim in the United Kingdom was irrelevant since he did not travel through the United Kingdom to reach Canada.

[29] The Board member did not believe that it was reasonable that the Turkish authorities only arrested those under 50, and the Board questioned how the authorities learned of the meeting and why they would be concerned. The applicant argues that he provided a reasonable explanation: the authorities likely learned of the meeting through informants, and the documentary evidence clearly shows that use of informants is common in Turkey.

[30] The applicant asserts that he provided rational explanations in relation to the lack of corroborating evidence, the inability of his wife to provide an update as to the applicant's current situation in Turkey, and the applicants recurring arrests and releases.

[31] In addition, the applicant submits that he did not want to endanger his wife in any way by having her inquire as to his current situation. Furthermore, evidence was provided from the applicant's father stating that the family home had been visited by Turkish authorities a month earlier. Finally, the applicant states that his arrests were in relation to particular incidents or activities, and it was perfectly rational that he would be released once the authorities determined there was no evidence to formally charge him.

[32] The respondent argues the fact that the applicant failed to make a refugee claim at the first opportunity he had (i.e. in the United States) can be a relevant factor when assessing credibility: *Gavryushenko v. Canada (Minister of Citizenship and Immigration),* [2000] F.C.J. No. 1209, 194 F.T.R. 161 (Q.L.).

[33] The respondent also submits that the applicant's route to Canada was more indicative of refugee shopping as opposed to a real fear of persecution. While corroborative evidence is not required, the respondent alleges that it was reasonable to consider the applicant's failure to produce it as undermining his credibility. For instance, the applicant could have obtained an affidavit from his wife as evidence to support his allegation: *Bin v. Canada (Minister of Citizenship and Immigration),* 2001 FCT 1246, [2001] F.C.J. No. 1717 (Q.L.); *Syed v. Canada (Minister of*

Citizenship and Immigration), [1998] F.C.J. No. 357, 78 A.C.W.S. (3d) 579 (Q.L.). Finally, the respondent submits that the Board was entitled to assign little weight to the psychiatric report because it was made only two months prior to the hearing and there was no history of the applicant seeking psychiatric help nor was he currently receiving medical treatment.

[34] Upon reviewing the evidence, this Court is of the view that the Board erred with respect to a number of negative credibility findings.

[35] The Court disagrees that there are inconsistencies between the POE notes and the applicant's testimony. The applicant's written statement to the Officer clearly states that he fears the PKK and the Turkish authorities (Tribunal's record at p. 120). Although the Board member acknowledges in his decision that the applicant stated he feared the Turkish authorities (the Board's decision at para. 5), the Board still formed a negative inference.

[36] This Court is also of the view that the Board member unreasonably disregarded the applicant's explanations. Although a claimant's delay in leaving his country can be a factor in assessing credibility, it is not decisive. When making plausibility findings, the Board must be sure that the applicant's story could not have occurred based on the evidence: *Pulido v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 209, [2007] F.C.J. No. 281 (Q.L.) at para. 37. The applicant's explanation for staying behind to assist his siblings was reasonable. Furthermore, the applicant's life was not threatened until July 2007. His decision to leave Turkey was made shortly after the July 2007 threat. Rather than consider this crucial piece of evidence, the Board

simply ignored the nature of the July 2007 detention and how it particularly differs from the applicant's previous arrests. When the applicant realized his life was in danger, he immediately made arrangements to leave Turkey.

[37] Although it was open to the Board to conclude that the applicant was not of much interest to the Turkish authorities, such a conclusion must be well-founded based on the evidence. The Board was of the view that since the Turkish authorities never charged the applicant and always released him he was of no interest to the authorities. In reaching this conclusion, the Board failed to address the overall documentary evidence with regard to the treatment of Kurds by Turkish authorities (e.g. Tribunal's record at pp. 314-347.). The documentary evidence indicates that arrests, torture and subsequent releases are not uncommon. The applicant's story is not "so far outside the realm of what could reasonably be expected" (*Pulido*, *supra* at para. 37).

[38] The respondent refers to *Gavryushenko*, *supra*, as support for the proposition that the applicant should have sought refuge in the United Kingdom or the United States prior to Canada. Further, at the hearing before this Court, the respondent relied on *Remedios v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 437, [2003] F.C.J. No. 617. In *Remedios*, the applicants had left the United Arab Emirates for the United States (Denver, Colorado) in April of 2000 for a three-month visit with the intention of seeking asylum in the United States. However, they were subsequently advised that they would have a better chance to succeed with a refugee claim in Canada as opposed to the United States. In *Remedios*, my colleague Justice Snider held that the Board did not err in concluding that the applicants were country shopping. However, in the case at

bar, *Remedios* and *Gavryushenko* can be of no assistance to the respondent. In finding that the applicant should have claimed asylum in the United Kingdom, where the applicant's other siblings were previously successful, the Board committed an error. Indeed, the Board ignored the essential fact that the applicant had not travelled and passed through the United Kingdom. Thus, the Board's finding that the applicant failed to make a refugee claim in the United Kingdom cannot be sustained.

[39] The Board was also obliged to consider the applicant's explanation in support of claiming refugee status in Canada instead of the United States. However, the Board failed to give due consideration to the applicant's explanation and instead concluded that the applicant lacked credibility. Further, the Officer's notes dated September 12, 2007 mentioned that "[b]ased on the above information, Hasan Ay falls under an exception to the safe third Country Agreement, because he has a relative in Canada who is a permanent resident" (Tribunal's record at p. 126).

[40] Hence, the applicant's decision to seek refuge in Canada made sense given that he had family in Canada. The Board was obliged to consider the applicant's explanation in its reasons and committed an error in finding that the "he [the applicant] chose, in the Panel's view, to refugee shop, rather that make claims in either [the] United Kingdom or the United States" (Board's decision at para. 11).

[41] It is open to the Board to consider a failure to produce corroborating evidence in assessing a credibility finding. However, in the present case, to expect the applicant to provide an election pamphlet used many years ago does not amount to the kind of corroborating evidence that the

applicant could reasonably, in these circumstances, provide in comparison to documents that can reasonably be expected, requested and obtained - e.g. school certificate; insurance claim; – (*Bin, supra*).

[42] In conclusion, the Board's finding that the applicant was not credible was unreasonable given the applicant's very plausible explanations and the overall documentary evidence. This Court is of the opinion that the Board relied on irrelevant or immaterial weaknesses in the applicant's testimony and failed to give due regard to the overall evidence before it.

b) IFA

[43] The Board suggested that even if the applicant would be considered credible, there was a viable IFA in Istanbul and the applicant failed to demonstrate that he would not be safe there, considering it is a major metropolitan area with a population of 9.7 million people.

[44] The applicant submits that there was a breach of natural justice because he was not given proper notice at the hearing before the Board with respect to the IFA.

[45] In *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)* (C.A.), [1994] 1 F.C. 589, [1993] F.C.J. No. 1172, at para. 10, the Federal Court of Appeal concluded that a proper notice is given only when the applicant is notified that the IFA is to be considered prior to a hearing so that the claimant can have an adequate time to adduce evidence to

demonstrate that there is no IFA. The notice requirement was described by the Court in the following terms:

> […] there is an onus on the Minister and the Board to warn the claimant if an IFA is going to be raised. A refugee claimant enjoys the benefit of the principles of natural justice in hearings before the Refugee Division. A basic and well-established component of the right to be heard includes notice of the case to be met (see, for example, *Kane v. Board of Governors (University of British Columbia)*, [1980] 1 S.C.R. 1105, at page 1114). The purpose of this notice is, in turn, to allow a person to prepare an adequate response to that case. This right to notice of the case against the claimant is acutely important where the claimant may be called upon to provide evidence to show that no valid IFA exists in response to an allegation by the Minister. Therefore, neither the Minister nor the Refugee Division may spring the allegation of an IFA upon a complainant without notice that an IFA will be in issue at the hearing.

[46] Upon a review of the hearing transcripts before the Board, this Court concludes there were many ambiguities in regards to the issue of IFA (Tribunal record at pp. 566, 567 and 587). The respondent has not convinced this Court that the Board provided sufficient and clear notice that the IFA was an issue and that it was clearly addressed during the course of the hearing. This Court therefore concludes that there was a breach of natural justice in failing to provide the applicant with an opportunity to address the issue of IFA during the course of the hearing and in making an adverse finding on that point.

[47] In conclusion, the Board's decision was not reasonable in the circumstances and the Court's intervention is justified. The application for judicial review is therefore allowed.

[48] No question was proposed for certification and there is none in this case.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application for judicial review is granted;
2. The Board's decision is set aside;
3. The matter is referred back to the Immigration and Refugee Board to be determined by a new and different constituted Board;
4. No question of general importance is certified.

"Richard Boivin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4149-09
STYLE OF CAUSE:	HASAN AY v. MCI
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	June 10, 2010
REASONS FOR JUDGMENT:	BOIVIN J.
DATED:	June 21, 2010

APPEARANCES:

Krassina Kostadinov	FOR THE APPLICANT
Khatidja Moloo	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Waldman & Associates Toronto, Ontario	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT