

Federal Court



Cour fédérale

Date: 20100826

Docket: IMM-18-10

Citation: 2010 FC 851

Ottawa, Ontario, August 26, 2010

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

FATIH BAYKUS

Applicant

and

**THE MINISTER OF
CITIZENSHIP AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the RPD) dated December 10, 2009 concluding that the applicants are not Convention refugees or persons in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act* (IRPA), S.C. 2001, c. 27 because of lack of credibility and lack of a subjective fear.

FACTS

Background

[2] The twenty (20) year old applicant is an Alevi Kurdish citizen of Turkey. He arrived in Canada on February 16, 2007 over the Peace Bridge in Fort Erie, Ontario, and claimed refugee protection.

[3] The applicant grew up in the city of Kirikkale in a neighbourhood that contained Sunni Turks and Alevi Kurds. The applicant faced discrimination throughout his childhood and teenage years. In 1996, while he was worshipping at an Alevi community centre, the applicant was detained by the police for two days and tortured. In September 2002 the applicant enrolled in university. He suffered discrimination by other students while at the same time experiencing pressure from a group of Kurdish students to join the Kurdistan Workers Party (PKK). In November 2002 the police detained and tortured the applicant for two days on suspicion of membership in the PKK. The applicant could not focus on his studies, repeated his first year twice, and eventually dropped out. From February 21, 2005 to May 21, 2006 the applicant served his mandatory military service where he was again discriminated against. The pressure to join the PKK intensified following the conclusion of the applicant's military service including threats to his life.

[4] The applicant decided to leave Turkey after speaking to his Canadian brother approximately one month following his military discharge. The applicant's brother introduced him over the telephone to a female friend who is a Canadian citizen. The three agreed to meet in Trinidad and Tobago. On July 4, 2006 the applicant travelled to Trinidad where he met his brother and the female

friend. The applicant married his brother's friend on July 19, 2006 and remained in Trinidad with his wife's family awaiting a decision on an overseas spousal sponsorship application. There were problems with the sponsorship application and the applicant's visa for Trinidad was set to expire on December 29, 2006. The applicant made a two day trip to Grenada to renew his visa to Trinidad and subsequently departed for the United States on February 3, 2007. He entered Canada on February 16, 2007 and claimed refugee protection. The applicant's wife withdrew the sponsorship application after the applicant arrived in Canada and the couple is now seeking a divorce.

Decision under review

[5] The RPD dismissed the refugee claim on December 10, 2009 based on the applicant's lack of credibility and lack of subjective fear of persecution.

[6] The RPD determined that the applicant lacked credibility and subjective fear for the following reasons:

1. failure to claim refugee status in Trinidad or the U.S. and an overall delay of six months in claiming refugee status from the date of departure from Turkey;
2. entering into a marriage of convenience with a Canadian citizen for the purpose of obtaining a permanent resident visa under the overseas spousal sponsorship program;
3. if the applicant was detained and tortured by Turkish police, the applicant's brother would have advised him to seek Canadian refugee status and not fly to Trinidad;

4. the applicant's evidence with respect to his detentions and suspected agents of persecution were inconsistent at his POE interview, in his PIF, and at the RPD hearing:
 - a. at his immigration interview the applicant stated that he feared police because of his Alevi religion;
 - b. in his PIF the applicant described the discrimination he suffered, the two police arrests and torture incidents, and the pressure to join the PKK;
 - c. at the hearing the applicant stated for the first time that he feared forcible recruitment by the "TIKKO" and cited a number incidents where he was approached by members of that organization; and
5. a psychiatric report omitted any reference to the applicant's fears in Turkey;

[7] The RPD determined at paragraph 12 that the applicant intended to come to Canada as soon as he left Turkey but not because of a well founded fear of persecution:

¶12 I find on a balance of probabilities that the claimant was not fleeing persecution when he left Turkey. He may have wanted to come to Canada but it was for reasons other than a well founded fear of persecution.

[8] The RPD found that the applicant may have experienced discrimination growing up but determined that the cumulative impact of the discrimination did not amount to persecution. The RPD found that the applicant lacked credibility and determined that he failed to establish on a balance of probabilities that the alleged detentions and torture by police took place. The RPD considered whether the applicant would be subject to a risk pursuant to section 97 of the IRPA but

determined that there was no evidence that he would be subject to such risk. The applicant's refugee claim was therefore dismissed.

LEGISLATION

[9] Section 96 of IRPA grants protection to Convention refugees:

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 themselves 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.

[10] Section 97 of IRPA grants protection to certain categories of persons:

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,

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

their country of former habitual residence, would subject them personally

pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

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) to a risk to their life or to a risk of cruel and unusual treatment or punishment if
 (i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,
 (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
 (iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
 (i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
 (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) 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) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

ISSUES

[11] The applicant raises the following issues:

1. Did the RPD render a finding of credibility that was unreasonable and not in accordance with the evidence?

2. Did the RPD render a negative subjective fear finding that was unreasonable and not in accordance with the evidence?
3. Did the RPD err by failing to make a risk determination?

[12] Since the RPD chose to combine the first two issues the Court will review its findings under a single issue as well. The third issue raised by the applicant will be the second issue.

STANDARD OF REVIEW

[13] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, 372 N.R. 1, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to “ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of (deference) to be accorded with regard to a particular category of question”: see also *Khosa v. Canada (MCI)*, 2009 SCC 12, per Justice Binnie at para. 53.

[14] Questions of credibility concern determinations of fact and mixed fact and law. It is clear that as a result of *Dunsmuir* and *Khosa* that credibility findings are to be reviewed on a standard of reasonableness. Recent case law has reaffirmed that the standard of review for determining whether the applicant is credible is reasonableness: *Mejia v. Canada (MCI)*, 2009 FC 354, per Justice Russell at para. 29; *Syvyryn v. Canada (MCI)*, 2009 FC 1027, 84 Imm. L.R. (3d) 316, per Justice Snider at para. 3; and my decision in *Perea v. Canada (MCI)*, 2009 FC 1173 at para. 23.

Questions of whether sufficient notice was given to the applicant that a specific issue will be

considered is a question of procedural fairness which is reviewable on a correctness standard: *Ha v. Canada (MCI)*, [2004] 3 F.C.R. 195 (F.C.A.).

[15] In reviewing the Board's decision using a standard of reasonableness, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir, supra*, at paragraph 47; *Khosa, supra*, at para. 59.

Issue No. 1: Did the RPD render a finding of credibility that was unreasonable and not in accordance with the evidence before her and did the RPD render a negative subjective fear finding that was unreasonable and not accordance with the evidence before her?

[16] The applicant submits that the RPD's credibility and subjective risk assessments were not reasonably open for the following reasons:

1. the applicant's marriage was an irrelevant consideration and the applicant was not given notice that the genuineness of the marriage was at issue;
2. there was a reasonable explanation for the delay in claiming refugee protection;
3. it was not reasonable to expect that the applicant's brother would provide the applicant with the correct advice as to how to make a refugee claim in Canada; and
4. the RPD relied on the omissions in the psychiatric report but completely ignored a medical report which contained the missing information and which corroborated the applicant's allegations of torture.

[17] I will comment on general principles of law in assessing credibility. Sworn testimony is presumed true unless there is a reason to doubt its truthfulness: *Maldonado v. Canada (MEI)*, [1980] 2 F.C. 302 (F.C.A.), per Justice Heald at para. 5. The RPD is entitled to draw adverse findings of credibility from the applicant's testimony by assessing vagueness, hesitation, inconsistencies, contradictions and demeanor, for which deference is entitled when judicially reviewed: *Zheng v. Canada (MCI)*, 2007 FC 673, 158 A.C.W.S. (3d) 799, per Justice Shore at para. 17. The Court is not in as good a position as the RPD to assess the credibility of the evidence: *Aguebor v. Canada (MEI)* (1993), 160 N.R. 315 (F.C.A.). When a credibility finding is based on a number of points, the reviewing Court's analysis does not involve determining whether each point in the RPD's reasoning meets the reasonableness test: *Jarada v. Canada (MCI)*, 2005 FC 409, per Justice de Montigny at para. 22.

[18] It is trite law that procedural fairness requires the RPD to notify the applicant of the potential issues which may be determinative of the refugee claim: *El-Bahisi v. Canada (MEI)* (1994), 72 F.T.R. 117 (F.C.A.). Notice by an administrative tribunal that the genuineness of a previous marriage will be considered may not always be required. In *Merion-Borrego v. Canada (MCI)*, 2010 FC 631, I held that the Immigration Appeal Division of the Immigration and Refugee Board was not required to notify the applicant that it intended to make a credibility finding based on the genuineness of a prior marriage. In this case the applicant's actions in Trinidad, including his marriage, shed considerable light on the credibility of his refugee claim. The applicant must have been aware that the withdrawal of the spousal sponsorship application upon his arrival in Canada and subsequent separation from his wife cast the genuineness of his marriage and his credibility in

doubt. The RPD did not breach procedural fairness by not notifying the applicant of this issue ahead of time. This was an obvious concern which went to credibility. Moreover, the RPD questioned the applicant about this issue at the hearing.

[19] This Court has held on a number of occasions that failure to claim refugee status in a foreign state or delay in claiming refugee status in Canada is an important factor which the RPD is entitled to consider in assessing the basis of the applicants' subjective and objective fear of persecution and their credibility: *Espinosa v. Canada (MCI)*, 2003 FC 1324, per Justice Rouleau at para. 16; *Negwenya v. Canada (MCI)*, 2008 FC 156, per D.J. Frenette at para. 19. The reasons for not claiming refugee status in a foreign country must be valid in order to avoid an adverse inference: *Bobic v. Canada (MCI)*, 2004 FC 1488, per Justice Pinard at para. 6. The applicant testified at page 16 of the hearing transcript that he did not claim refugee status in either Trinidad or the U.S. because none of his family members resided in those states:

Tribunal Officer: So the only reason why you did not think of making a claim in Trinidad is because you did not have anyone there?

Claimant: No one was there from my family.

[...]

Tribunal Officer: Did you think about making a claim in the United States?

Claimant: I did not.

Tribunal Officer: Why not?

Claimant: I did not have anyone there.

The RPD found the applicant's reasons were unsatisfactory. The applicant stayed for six months with his wife's parents before he flew to the U.S. but he nevertheless felt that he had "no one" in Trinidad and could not claim refugee status. It was reasonably open to the RPD to find that the explanation for the six month delay in claiming refugee status lacked consistency or was not satisfactory to excuse the delay. The RPD reasonably drew an adverse credibility inference from this conduct and the fact that he did not leave Turkey after his first arrest in 1996.

[20] The applicant impugns the RPD's finding at paragraph 12 where it held that it was reasonable to expect that the applicant's brother would properly advise the applicant as to Canada's refugee determination process:

¶12 I find it reasonable to expect that his brother and/or wife, both Canadian citizens, would have properly advised him about claiming refugee status if he had a well founded claim...

The applicant submits that the RPD ignored the brother's affidavit dated November 4, 2009 where he states that he did not know the current process for seeking refugee protection since the process has changed since he came to Canada in 1986. The second part of paragraph 12 demonstrates that the RPD was not concerned with the exact advice the brother may have imparted but was rather concerned by the delay to claim refugee status, the applicant's marriage, and the now withdrawn spousal sponsorship application which the RPD concluded did not indicate a well founded fear of persecution:

¶12 ...Given that the claimant was in contact with his family member in Canada and at least of one of them had been previously determined to be a Convention refugee I find there is even more reason to make a negative finding regarding subjective fear to his delay in departure from Turkey and in making a claim for protection...

It was reasonably open to the RPD to link the applicant's delay in Trinidad to his discussions with his brother and conclude that it demonstrated a lack of subjective fear. It was reasonably open for the RPD to conclude that the applicant would have come to Canada directly to make a refugee claim like his brother did if he had a compelling case.

[21] The applicant submits that the RPD ignored a medical report by Dr. Abraham Hirsz dated November 4, 2009 which confirms the applicant's allegations of beatings and torture. Dr. Hirsz states that applicant's scars are consistent with his allegations:

...Physical examination revealed an 8 x 9 mm scar at his right knee. The scar was a result of being kicked with a police boot and dragged over the ground. There was a 1 cm scar on the left side of the forehead caused by a blow from a handgun handle. There were tiny scar at his left index finger. There was also a squint (mild cross-eye) at his left eye. It was turning inwards towards his nose. I suspect that repeated blows to his face caused a muscle tear of the extra ocular muscles of the left eye...

The applicant submits that the RPD unreasonably criticized the psychiatric reports for not commenting on the applicant's allegations but it engaged in reviewable conduct by ignoring the medical report.

[22] The applicant relies on this Court's decisions in *Gunes v. Canada (MCI)*, 2008 FC 664, per D.J. Frenette, and *Ameir v. Canada*, 2005 F.C. 876, per Justice Blanchard where the Court held that ignoring medical reports by Dr. Hirsz which confirmed "classical signs" of torture rendered the RPD's negative credibility findings unreasonable. The Court may infer that a finding of fact has been made without regard to the evidence if the RPD fails to mention an important piece of

evidence: *Cepeda-Gutierrez v. Canada (MCI)* (1998), 157 F.T.R. 35, 83 A.C.W.S. (3d) 264 (F.C.T.D.), per Justice Evans (as he then was) at paragraph 15. The RPD in this case ignored the medical report and focused unduly on the failure of the psychiatric report to discuss the applicant's allegations. In my view it was not reasonably open to the RPD to make an adverse credibility finding with respect to the psychiatric report without reading it in conjunction with the medical report. The medical report is a significant piece of evidence which was not mentioned in the RPD's reasons. However, at the hearing the RPD does consider the report and comment that it does corroborate the applicant's story. However, it is obvious that these small scars could be consistent with injuries other than torture.

[23] As I mentioned in these reasons, when a credibility finding is based on a number of points, the reviewing Court's analysis does not involve determining whether each point in the RPD's reasoning meets the reasonableness test: *Jarada*, supra at para. 22. The totality of the evidence in this case provides justification for the RPD's overall credibility findings. The failure to mention the medical report does not outweigh all the other considerations. The Court will therefore uphold the RPD's overall negative credibility and negative subjective fear findings.

Issue No. 2: Did the RPD err by failing to make a risk determination?

[24] The applicant submits that the RPD erred in failing to conduct a risk assessment of Alevi Kurds in Turkey despite finding that the applicant lacked credibility. The applicant relies on the Federal Court of Appeal's decision in *Attakora v. Canada (MEI)* (1989), 99 N.R. 168, per Justice

Hugessen where the Court held that a negative credibility finding does not prevent the applicant from being a refugee:

...Whether or not the applicant was a credible witness, and I have already indicated that the Board's reasons for finding him not credible are based in error, that does not prevent him from being a refugee if his political opinions and activities are likely to lead to his arrest and punishment...

[25] *Attakora, supra*, is of no assistance to the applicant on the facts at bar. In *Attakora, supra*, the RPD found that the applicant was involved in political activity which would likely result in his arrest if he were returned to his home country. The Court found that these findings satisfied both the objective and the subjective branches of the test for refugee status. The fact that the applicant lacked credibility did not detract from the well foundedness of his refugee claim. This is not the case here.

[26] The RPD's credibility findings went to the heart of the applicant's subjective fear of persecution. Unlike the applicant in *Attakora, supra*, this applicant's allegation of a well founded fear of persecution was dismissed because his conduct in Trinidad was not that of a person who feared persecution and who was looking to claim refugee status. The RPD's reasonable credibility findings undercut the applicant's allegations risk. While the Board accepted that the applicant was an Alevi Kurd who was discriminated against, it found that there was no evidence that this discrimination amounted to persecution or that he was targeted by the authorities or the PKK. This conclusion was reasonably open to the RPD in light of the lack of credible evidence proffered by the applicant. This ground of review must therefore fail.

CERTIFIED QUESTION

[27] Both parties advised the Court that this case does not raise a serious question of general importance which ought to be certified for an appeal. The Court agrees.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

The application for judicial review is dismissed.

“Michael A. Kelen”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-18-10

STYLE OF CAUSE: *Fatih Baykus v. The Minister of Citizenship and Immigration*

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: August 11, 2010

REASONS FOR JUDGMENT AND JUDGMENT: KELEN J.

DATED: August 26, 2010

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