Federal Court  Cour fédérale

Date: 20130318

Docket: IMM-7961-12

Citation: 2013 FC 281

[UNREVISED ENGLISH CERTIFIED TRANSLATION]
Ottawa, Ontario, March 18, 2013

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

BEYAZIT TAS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, a citizen of Turkey, seeks judicial review of a decision dated July 18, 2012, by which the Immigration and Refugee Board, Refugee Protection Division [panel], determined that he was neither a Convention refugee nor a person in need of protection within the meaning of sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27. Essentially, the panel based its decision on the applicant's lack of credibility and on the existence of contradictory evidence regarding his alleged fear of persecution.

[2] The applicant alleges that he is an Alevi Kurd from the city of Izmir. He claims to fear persecution in his country for reasons of his Kurdish ethnicity, his Alevi faith and his perceived political opinion by reason of his father's membership in the Democratic Society Party [DTP], a Kurdish nationalist party.

[3] For the reasons that follow, the Court is of the opinion that this application for judicial review should be dismissed.

Facts and procedural history

[4] In his Personal Information Form [PIF], the applicant alleges that he has suffered from systemic discrimination since he was a young child. At school, he was forced to take religious classes and pray with Turkish students. He also alleges that since the mandatory language of instruction was Turkish, he was not allowed to learn his mother tongue and was discriminated against because of his Kurdish accent.

[5] The applicant alleges that in March 2007, during Kurdish New Year's celebrations in which he was taking part, the Turkish police attacked the crowd, and many people were arrested. The applicant was not arrested, but he was allegedly bitten by a police dog.

[6] In November 2009, the applicant and his father allegedly took part in an assembly of DTP members during which members of the Nationalist Movement Party [MHP], supported by the security forces, allegedly attacked DTP supporters. Ten people were allegedly injured, and many people, including the applicant and his father, were arrested and detained by the police. The

applicant alleges that during the two days they were detained, he and his father were beaten and warned not to take part in such demonstrations.

[7] After his release, the applicant decided to leave Turkey and claim refugee protection in Canada, where his sister lives. He arrived in Canada on August 21, 2010, and filed his refugee protection claim on August 23, 2010. His PIF is dated September 15, 2010.

[8] The panel's refusal to allow the applicant's refugee protection claim is based entirely on a lack of credibility regarding various elements of his claim, essentially because of contradictions and inconsistencies arising from the evidence which the applicant was unable to explain to the panel's satisfaction.

[9] The panel's main concerns may be summarized as follows:

- The applicant stated in his testimony that upon his release in November 2009, he went to Istanbul and stayed with his aunt until he left Turkey in August 2010. However, this fact was not mentioned in his refugee protection claim or in his answer to Question 11 in his PIF. On the contrary, the applicant states in his PIF that he worked as a cleaner for the municipality of Izmir from December 2008 to August 2010. Furthermore, in his temporary visa application filed on July 19, 2010, in Ankara, he gives a residential address in the city of Izmir. The applicant was unable to explain this inconsistency to the panel's satisfaction;

- In his refugee protection claim, the applicant states that he fears [TRANSLATION] "the police, the army and right-wing youth groups", whereas he does not mention any negative experiences with the army in the narrative included in his PIF. In his refugee protection claim, the period during which the applicant allegedly performed his mandatory military service (August 1999–February 2000) does not match the period stated in his PIF (August 2000–February 2002), and he was unable to provide the name of his commanding officer;
- In response to Question 37 in his refugee protection claim, as in his temporary visa application, the applicant states that he has never been arrested or detained by the police or any other authority, whereas he alleges in his PIF and testified at the hearing that he was arrested and detained for two days;
- The applicant also provided contradictory information concerning his employment history, particularly between 1998 and 2008. While in his refugee protection claim, he does not list any employment during that period, he states in his PIF that he worked in construction as an independent contractor between February 2002 and January 2008. At the hearing, however, he stated that between 2002 and 2008, he held only temporary, short-term jobs. The panel noted that the applicant's testimony on this subject was not credible;
- In his PIF, the applicant claims that he belongs to the Alawite religion, while in his refugee protection claim, he states that he is Alevi. At the hearing, the applicant confirmed that he is Alevi and claimed that the contradiction was due to a translation error. The panel had doubts about this explanation, since the applicant thought it relevant to file in support of his refugee protection claim an article from the *Financial Times*,

dated March 23, 2012, regarding discrimination against the Alawite community in Turkey;

- In his PIF, the applicant states that Kurdish is his mother tongue and that he speaks both Turkish and Kurdish fluently. However, he asked for a Turkish interpreter at the panel hearing, saying that he did not speak Kurdish fluently;
- Finally, the applicant's passport contained a visa for Thailand, received on July 15, 2010, of which he claimed to be unaware. The applicant explained that the agent he had hired to obtain a Canadian visa had also obtained a Thai visa for him, without his knowledge, but the panel found this explanation to be implausible.

[10] In light of these contradictions, the panel concluded that there was insufficient evidence to prove the central element of the applicant's claim, namely, that he was an Alevi Kurd. The panel also notes that according to the applicant's testimony, his father, although arrested and detained in November 2009, was not prosecuted and has had no problems with the police or right-wing supporters since that time. It was therefore unlikely that the applicant, who unlike his father was not an active member of the DTP, would risk being persecuted if he returned to Turkey, especially since he allegedly lived peacefully in Izmir from his release in November 2009 until his departure for Canada in August 2010.

[11] The applicant argues that the panel based its decision on a microscopic analysis of the evidence on record and that it did not truly focus on the essential elements of his claim. Although he failed to raise this argument at the first opportunity, the applicant argues that in retrospect, there is an appearance of bias on the part of the panel, since the decision is based solely on unreasonable

findings of fact unrelated to the central elements of his refugee protection claim, which according to the applicant raises the fear of prejudice on the part of the panel. The applicant adds that the fact that the panel rendered its decision in English when the pleadings were drafted in French and the hearing was held in French with the assistance of a Turkish interpreter confirms this bias.

Issues

[12] In light of the arguments made, the issues may be stated as follows:

1. Has the applicant proved that there is a reasonable apprehension of bias on the part of the panel?
2. Does the fact that the reasons for decision were issued in English rather than French amount to a lack of reasons or in any other way constitute a breach of procedural fairness? (This issue will be addressed first.)
3. Did the panel make an unreasonable finding concerning the general credibility of the applicant?

Standard of review

[13] It is trite law that assessing the credibility of witnesses falls within the panel's jurisdiction and that the panel has all the specialized expertise necessary to analyze and weigh the facts with a view to assessing a refugee protection claimant's subjective fear of persecution (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (FCA), [1998] FCJ no 1425 at para 14).

[14] When applying the reasonableness standard of review, the Court must defer to the panel and ask whether the impugned decision meets the requirements of justification, transparency and

intelligibility within the decision-making process and, more generally, whether the decision falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47; *Khosa v Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12 at para 59).

[15] However, with regard to the analysis of the breach of the principles of natural justice or procedural fairness, the Court does not owe deference to the decision maker (*Luzbet v Canada (Minister of Citizenship and Immigration)*, 2011 FC 923 at para 5).

No basis for an apprehension of bias or a breach of procedural fairness

[16] Having read the impugned reasons for decision and the hearing transcripts, I am satisfied that the applicant has not proved any bias, actual or apprehended, on the part of the panel. Essentially, the applicant is arguing that an unfavourable finding, based on peripheral evidence that is of little relevance to the basis for his refugee protection claim, would be enough to conclude that there is an appearance of bias on the part of a decision maker. Such a conclusion has no basis in the applicable case law.

[17] As Justice Mosley notes in *Arrachch v Canada (Minister of Citizenship and Immigration)*, 2006 FC 999 at paras 20-21, the applicable test for a reasonable apprehension of bias differs from the one applicable to allegations of actual bias, which requires "material evidence demonstrating conduct that derogates from the standard" (see *Arthur v Canada (Attorney General)*, 2001 FCA 223 at para 8). I also refer to the remarks of Chief Justice Crampton in *Dunova v Canada (Minister of Citizenship and Immigration)*, 2010 FC 438 at paras 49-51, in which he writes:

The classic articulation of the test for what constitutes a reasonable apprehension of bias was enunciated by Justice de Grandpré in *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 at 394. In the course of dissenting on the issue of whether the facts in that case gave rise to a reasonable apprehension of bias, Justice de Grandpé observed that "the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information." He added that the "test is what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude…"

In *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, at paras. 111 to 113, Mr. Justice Cory adopted Justice de Grandpré's statement of the test, observed that "the threshold for a finding of real or perceived bias is high", and emphasized that "the reasonable person must be an informed person."

In *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259, at para. 76, the high test to be met when alleging bias was confirmed. In a unanimous judgment, the Supreme Court observed that "the standard refers to an apprehension of bias that rests on serious grounds, in light of the strong presumption of judicial impartiality." The Court then proceeded to approvingly note that Justice de Grandpré added to "the now classical expression of the reasonable apprehension standard" when he observed: "The grounds for this apprehension must, however, be substantial, and I … refus[e] to accept the suggestion that the test be related to the 'very sensitive or scrupulous conscience'."

In *Geza*, above, at paras. 52 -53, it was held that the approach described above applies to the determination of refugee claims by the Board, given the Board's independence, its adjudicative procedure and functions, and the fact that its decisions affect the rights of claimants under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 . . . .

[Emphasis added.]

[18] The applicant did not raise any specific act or remark on the part of the decision maker that would allow him to rebut the presumption that the panel was impartial. I have no doubt that the panel was indeed impartial.

[19] The applicant adds that the fact that the panel's decision was originally sent to him in English adds to his reasonable apprehension of bias and of a breach of procedural fairness.

[20] A similar argument was made in this Court in *Obidigbo v Canada (Minister of Citizenship and Immigration)*, 2008 FC 705, in the matter of an application for judicial review of a decision of a pre-removal risk assessment officer. The Court rejected the argument to the effect that the officer breached a duty of procedural fairness in rendering her decision in French when she did not speak French, stating as follows at paragraph 34:

> No one is challenging the fact that the applicants had proceeded exclusively in English until the decision dated August 8, 2007, and that the PRRA decision was rendered in French. However, the application for leave indicates that the female applicant received the written reasons for the decision on September 7, 2007, and that she did not request that an English version of the decision be sent to her. The female applicant's counsel merely said that [TRANSLATION] "the female applicant's fundamental rights were infringed on because she received a decision only in French, without a translation, which resulted in her being unable to understand the reasons without an interpreter . . . " without stating the type of harm she had supposedly suffered. It should be noted that the letter that was sent with the PRRA decision was in English and that, *a priori*, the language of the PRRA decision did not seem to have hindered the female applicant from finding out what it said, despite having to use an interpreter, and of then undertaking legal proceedings within the prescribed time limit. Considering that the female applicant did not request a translation of the reasons for the officer's decision and that she suffered no harm (*Yassine v. Canada (Minister of Employment and Immigration*, (1994) 172 N.R. 308 (F.C.A.) [1994] F.C.J. No. 949 (QL)), I am of the opinion that there was no breach of the duty of

> procedural fairness in the circumstances. Consequently, this Court's intervention is not warranted for this reason.

[21] I cannot agree with the applicant's argument, since a French version of the decision was sent to the applicant in time for him to adequately present his arguments in this application for judicial review. Moreover, counsel for the applicant was unable to refer the Court to any excerpt from the hearing transcript that would suggest that the parties and the panel had problems communicating with each other. The panel did indeed understand the applicant's position.

The panel's findings of fact are, on the whole, reasonable

[22] The applicant submits that the panel was overzealous in its approach, desperately trying to find contradictions in his testimony and going over the evidence with a fine-toothed comb, contrary to the principles laid down by the Federal Court of Appeal in *Attakora v Canada (Minister of Employment and Immigration)*, [1989] FCA no 444.

[23] Essentially, the applicant relies on case law of this Court that warns against giving too much importance to notes taken at ports of entry when assessing the credibility of a refugee protection claimant. Such an approach may constitute a reviewable error, particularly when the panel "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" (*RKL v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 at para 13 [*RKL*]). The same is true where the panel simply ignores relevant evidence or is selective with regard to the explanations given by the claimant (*Wu v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1102, at para 36; *Hamdar v Canada (Minister of Citizenship and Immigration)*, 2011 FC 382 at para 48).

[24] It is true that it would be an error on the part of the panel to rely on statements given by refugee protection claimants at the port of entry, where conditions are generally unfavourable to them and, at the very least, are likely to give rise to misunderstandings owing to interpretation and translation errors. As Justice Russel states in *Cetinkaya v Canada (Minister of Citizenship and Immigration)*, 2012 FC 8 at para 51, "[t]he purpose of the POE interview is to assess whether an individual is eligible and/or admissible to initiate a refugee claim. It is not a part of the claim itself and, consequently, it should not be expected to contain all of the details of the claim".

[25] However, in the present case, the panel based its decision on contradictions between the applicant's refugee protection claim, filed two days after his arrival in Canada; his PIF, amended at the beginning of the hearing; and the explanations given during the hearing. Both of these documents were signed and approved by the applicant, and although I agree with the applicant that some of the panel's findings of fact are not defensible in respect of the evidence, the significant contradictions noted by the panel with regard to the applicant's employment between 2002 and 2008, his arrest in November 2009, his home address in Istanbul and his mother tongue justify the panel's finding concerning the applicant's general credibility and the lack of a subjective fear on his part. As Justice Martineau wrote in *RKL*, above, at para 20,

> [t]here is no doubt that a failure to mention the key events on which the refugee claim is based in a written statement to immigration authorities, or an inconsistency between such statement and subsequent testimony, are very serious matters that can potentially sustain a negative credibility finding. However, the omission or inconsistency must be real: see *Rajaratnam v. Canada (Minister of Employment and Immigration)*, [1991] F.C.J. 1271 (QL) (C.A.). Besides, explanations given by the applicant which are not obviously implausible must be taken into account: see *Owusu-Ansah, supra*.

[26] The panel had good reason not to be satisfied with the applicant's explanations to the effect that all of these contradictions could be attributed to his nervousness and to errors made by the interpreter.

[27] Finally, the applicant makes no mention of the panel's finding to the effect that the simple fact that his father was not prosecuted and has had no problems with the police or right-wing militants since their arrest in November 2009 contradicts the applicant's fear of being persecuted should he return to Turkey. This finding, too, is reasonable.

[28] For these reasons, this application for judicial review is dismissed. No question of general importance was submitted for certification, and none will be certified.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

a. The application for judicial review is dismissed.

b. No question of general importance is certified.

"Jocelyne Gagné"

Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

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