

Federal Court



Cour fédérale

Date: 20150806

Docket: IMM-5828-14

Citation: 2015 FC 948

Ottawa, Ontario, August 6, 2015

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

MURAT KUSMEZ, CANAN KUSMEZ,
IPEK NIL KUSMEZ AND
INCI DENIZ KUSMEZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Murat Kusmez, his wife Canan Kusmez, and their two children Ipek Nil Kusmez and Inci Deniz Kusmez [collectively the Applicants] have brought an application for judicial review pursuant to s 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA]. The Applicants challenge a decision of the Refugee Protection Division of the Immigration and

Refugee Board [the Board] which determined that the Applicants are neither Convention refugees pursuant to s 96 of the IRPA, nor persons in need of protection pursuant to s 97(1).

[2] The Board rejected the Applicants' claims primarily because it found that Mr. Kusmez was not a trustworthy witness. This adverse finding of credibility permeated all aspects of the Applicants' claims. For the reasons that follow, I have concluded that the Board's decision was reasonable and the application for judicial review is therefore dismissed.

II. Background

[3] The Applicants are citizens of Turkey. They are of Kurdish ethnicity and members of the Alevi faith.

[4] Mr. Kusmez's Basis of Claim [BOC] narrative included the following assertions:

- In 2008, Mr. Kusmez was detained while attending Kurdish cultural celebrations with friends who were members of the Peace and Democracy Party [BDP]. On his way home he was detained for 24 hours and interrogated about his association with other members of the BDP.
- In May, 2008, Mr. Kusmez was protesting against police violence with friends from the Republican People's Party [CHP] when he was detained and injured by the police.

- On July 2, 2011, Mr. Kusmez attended a memorial ceremony which was hosted by the CHP. When he left he was detained and threatened by the police.
- In April, 2013, Mr. Kusmez was detained and tortured after attending Newroz celebrations with friends from the CHP. Mr. Kusmez was questioned about his connection to the BDP and asked to act as a police informant.
- On June 25, 2013, six police officers came to the home of Mr. Kusmez's parents. Mr. Kusmez was not there at the time but he was detained later the same day when he refused to give the police information about the BDP. Mr. Kusmez was tortured during his detention and was coerced into assisting the police.
- In July, 2013, Mr. Kusmez was assaulted by three individuals as he left an Alevi place of worship.
- In September, 2013, Mr. Kusmez found a letter in his parents' mailbox demanding that he give up his political activities or he would regret it in the future.

[5] Mr. Kusmez decided that it was necessary to leave Turkey, and he fled the country with his family in December, 2013. The Applicants travelled to Canada via the United States and made a claim for refugee protection upon arrival. Their claim was based on an alleged fear of persecution at the hands of the police, the government, and nationalist extremists due to the Applicants' ethnicity, religion and political activity.

[6] The Board heard the Applicants' claims on February 21, April 1, and May 30, 2014. The Board rejected their claims with reasons dated July 11, 2014.

III. The Board's Decision

[7] The Board identified several discrepancies and inconsistencies in the statements and submissions offered in support of the Applicants' claims. The Board ultimately rejected the claims because it found that Mr. Kusmez was "not a credible or trustworthy witness with respect to the central allegations of his case."

[8] The Board noted that Mr. Kusmez had testified that he was a member of the CHP, but he had not included this in his BOC narrative. The Board rejected Mr. Kusmez's explanation that the information contained in his port of entry [POE] forms was neither confirmed nor translated back to him, that his uncle had rushed when filling them out, and that Mr. Kusmez was tired and suffering from psychological stress when the forms were completed. The Board found on a balance of probabilities that Mr. Kusmez was not a member of the CHP, and that his involvement with the CHP did not occur as alleged. The Board therefore drew a negative inference regarding Mr. Kusmez's credibility.

[9] The Board found that the testimony of Mr. Kusmez and his wife regarding an incident that occurred on June 25, 2013, when the police allegedly visited the home of his parents, was not credible due to inconsistencies in their respective versions of the events. This was said to have resulted from a miscommunication between Mr. Kusmez and his wife, an explanation that the Board found to be "highly unlikely."

[10] The Board drew a further negative inference from the fact that Mr. Kusmez had indicated in his POE forms that he had not been detained in Turkey, but he then said during an interview with Canadian immigration officials that he had been detained twice. This number changed again in Mr. Kusmez's BOC narrative and his testimony before the Board, where he indicated that he had been detained five times. The Board found Mr. Kusmez's explanation for these discrepancies to be unreasonable.

[11] The Board also rejected Mr. Kusmez's claim that he was asked by the police to act as an informant within the BDP party. The Board found this to be implausible, given that he did not speak Kurdish and was neither a supporter nor a member of the BDP party.

[12] The Board determined that the Applicants had put forward insufficient credible and trustworthy evidence to support a positive determination under ss 96 or 97 of the IRPA. The Board found that the Applicants had not satisfied the burden of establishing a serious possibility of persecution on a Convention ground or that they would personally face a danger of torture or a risk to life, or a risk of cruel and unusual treatment or punishment if they were returned to Turkey.

IV. Issues

[13] The following issues are raised by this application for judicial review:

- A. Whether the Board failed to consider the risk of persecution based on the Applicants' ethnicity or religious faith;

- B. Whether the Board placed undue reliance on Mr. Kusmez's POE statements;
- C. Whether the Board failed to consider corroborative evidence in assessing the Applicants' credibility; and
- D. Whether the Board's implausibility findings were unreasonable.

V. Analysis

[14] Whether the Board failed to consider all of the grounds on which a refugee claimant sought asylum is a question of procedural fairness and is to be assessed by this Court against the standard of correctness (*Varga v Canada (Minister of Citizenship and Immigration)*, 2013 FC 494 at para 6).

[15] The Board's findings of credibility are subject to review by this Court against the standard of reasonableness (*Rahal v Canada (Minister of Citizenship and Immigration)*, 2012 FC 319 at para 22).

[16] A reasonable decision is one that is justified, transparent and intelligible, and that falls within the 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).

A. *Whether the Board failed to consider the risk of persecution based on the Applicants' ethnicity or religious faith*

[17] The Board commits a reviewable error by failing to consider all of the grounds upon which a refugee claim is based, but this does not mean that each ground must be considered in isolation. On the contrary, this Court is more likely to intervene if the Board fails to consider the interplay between multiple grounds of persecution advanced by an applicant (*Mabuya v Canada (Minister of Citizenship and Immigration)*, 2013 FC 372 at para 10).

[18] In this case, the nature of the Applicants' claims required the Board to consider their religious, political and ethnic background together. Mr. Kusmez's own statements demonstrate the inter-dependence of his religion, politics and ethnicity in the formulation of his claim for protection. For example, in his BOC narrative Mr. Kusmez said the following:

[34] One evening in the middle of July 2013, after I was done with cleaning and left the Cemevi, I was attacked by three religious and fascist-looking people. They said "separatists like you cannot live in this neighborhood." They beat me and asked "where do you find the guts to join demonstrations against the government?" [...]

[35] Being afraid for my own and family's life and safety, having confirmed that I had no legal recourse, having relocated without success, being unwilling and unable to hide and not express my identity forever, and being afraid of myself and my family being in even more danger once the authorities realized I lied about wanting to help them; I realized that I had to leave the country with my family, in order to stay safe. Leftist Alevis being killed on a regular basis increased my fear [...]

[Emphasis added.]

[19] It is clear from the evidence presented by the Applicants that their alleged fear of persecution and corresponding need for protection was based on their religious beliefs, political activities and ethnicity combined. These were not separate considerations to be reviewed by the Board in silos (*Djubok v Canada (Minister of Citizenship and Immigration)*, 2014 FC 497 at para 18). I am satisfied that the Board was alive to all three grounds advanced by the Applicants in support of their claims:

[46] [...] The panel asked the claimant why did the police keep asking him questions about BDP members on the detentions when he was not a supporter or a member of that party. The principal claimant testified that it was their way to intimidate Alevi and Kurdish people and also because the principal claimant had friends who were BDP supporters. The panel does not find this aspect of the principal claimant's testimony to be credible.

[Emphasis added.]

[20] Furthermore, whether the Board properly considered all three grounds advanced by the Applicants in support of their claim is largely moot. Their claims were rejected primarily because the Board found that Mr. Kusmez was not a trustworthy witness. This adverse finding of credibility permeated all aspects of the Applicants' claims, as reflected in the Board's decision:

[49] After reviewing the evidence in its totality, the panel finds that the principal claimant is not a credible or trustworthy witness with respect to the central allegations of his case. The panel finds that the principal claimant's account of problems he faced in Turkey lacking in credibility. As a result, the panel does not believe his story in support of his claim. Therefore, I find that I have insufficient credible and trustworthy evidence before me upon which to reach a positive determination under s. 96 or s. 97(1) of IRPA.

[21] The onus is on a refugee claimant to present all of the evidence and information that may be necessary to establish the claim (*Ward v Canada (Minister of Employment and Immigration)*, [1993] 2 SCR 689). In this case, the Board's adverse finding of credibility undermined Mr. Kusmez's ability to establish his claim and those of his family. In *Canada (Minister of Citizenship and Immigration) v Sellan*, 2008 FCA 381 at para 3, the Federal Court of Appeal held 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. That is not the case here.

B. *Whether the Board placed undue reliance on the Applicant's POE statements*

[22] POE statements are to be treated with caution by the Board (*Cetinkaya v Canada (Minister of Citizenship and Immigration)*, 2012 FC 8 at paras 50-51). Nevertheless, inconsistencies between an applicant's statements at the POE and those given before the Board may support an adverse finding of credibility (*Arokkiyanathan v Canada (Minister of Citizenship and Immigration)*, 2014 FC 289 at para 35). While minor discrepancies between POE declarations and oral testimony are not sufficient, the Board may find that a claimant lacks credibility if the omission concerns an element that is central to the claim (*Jamil v Canada (Minister of Citizenship and Immigration)*, 2006 FC 792 at para 25). In this case, Mr. Kusmez's allegations of his detentions and his political involvement were central to the Applicants' claims, and it was open to the Board to make an adverse finding of credibility due to inconsistencies in the evidence concerning these matters.

[23] The Applicants say that the Board should have acceded to their request to summon the immigration officer at the POE so that he could be questioned about the circumstances in which Mr. Kusmez's POE statements were made. As noted by the Respondent, Rule 44 of the *Refugee Protection Division Rules*, SOR/2012-256, requires a party to identify a proposed witness in advance of the hearing. The Applicants did not abide by this requirement. The denial by the Board of a late request for a witness in these circumstances does not amount to a breach of natural justice or procedural fairness (*Rrukaj v Canada (Minister of Citizenship & Immigration)*, 2004 FC 605 at para 10; see also *Igbinosa c Canada (Ministre de la Sécurité publique et de la Protection civile)*, 2008 FC 1372 at para 36).

C. *Whether the Board failed to consider corroborative evidence in assessing the Applicants' credibility*

[24] The Board is presumed to have considered all of the evidence that was before it and is not required to refer to each piece of evidence in its decision (*Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (FCA) at para 1). Where a particular piece of evidence is important and directly contradicts an essential element of a finding, the failure of the Board to address the evidence or to explain why it was disregarded may lead to an inference that the decision was made without regard for the evidence before it (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35 (Fed TD) at para 17).

[25] Considerable deference is owed by this Court to the findings of the Board, given its ability to directly observe witnesses' demeanour, its expertise, and its role as a finder of fact (*Aguilar Zacarias v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1155

[*Zacarias*] at para 9). Provided that the inferences drawn by the tribunal are not clearly unreasonable, its findings are not open to judicial review (*Aguebor v Canada (Minister of Employment and Immigration)*), [1993] FCJ No 732 (FCA) at para 4).

[26] In this case, the corroborative evidence referred to by Mr. Kusmez does not contradict the essential findings of the Board. A text message from a friend, a letter from a lawyer who was consulted by Mr. Kusmez, and a photograph purporting to show a visit by the police to a residence were all inconclusive and were not inconsistent with the Board's adverse findings of credibility, which were in any event based on the totality of the evidence (*Owusu-Ansah v Canada (Minister of Employment and Immigration)*), [1989] FCJ No 442 (FCA)).

D. *Whether the Board's implausibility findings were unreasonable*

[27] The Board is entitled to consider plausibility, common sense and rationality in its assessment of a refugee claim (*Ye v Canada (Minister of Citizenship and Immigration)*), 2014 FC 1221 at para 29). As noted by Justice Gleason in *Zacarias* at para 10, "this Court has often cautioned that plausibility determinations are best limited to situations where events are clearly unlikely to have occurred in the manner asserted, based on common sense or the evidentiary record." Where the Board seeks to impugn the credibility of a refugee claimant based on an implausibility in the claimant's story, its findings must be reasonably drawn and must be set out in "clear and unmistakable terms" (*Lubana v Canada (Minister of Citizenship and Immigration)*), 2003 FCT 166 (Fed TD) at para 9).

[28] The Applicants take issue with two implausibility findings made by the Board. The first concerned an alleged visit by the police to the home of Mr. Kusmez's parents when he was absent. The Board found it implausible that his wife would recall the precise number of officers who attended, and how many remained outside of the house. More generally, the Board indicated that it did not find "the principal claimant and claimant credible in this area of testimony."

[29] The Board also found that Mr. Kusmez's assertion that the police had asked him to become an informant and provide the names of members of the Kurdistan Workers' Party (PKK) who held management positions within the BDP to be unlikely. The Board's conclusion was based on the Applicant's testimony that he was neither a member nor a supporter of the BDP, and that he does not speak Kurdish.

[30] I am satisfied that both of these plausibility findings were based on common sense, and that the Board's conclusions were reasonably drawn and set out in clear and unmistakable terms (*Lubana*). They therefore disclose no reviewable error.

VI. Conclusion

[31] For the foregoing reasons, the application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

No question is certified for appeal.

"Simon Fothergill"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5828-14

STYLE OF CAUSE: MURAT KUSMEZ, CANAN KUSMEZ, IPEK NIL KUSMEZ, INCI DENIZ KUSMEZ v MINISTER OF CITIZENSHIP AND IMMIGRATION

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