Date: 20080401

Docket: IMM-2288-07

Citation: 2008 FC 407

Ottawa, Ontario, April 1, 2008

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

NAFIYE ERDOGU

Applicant

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Nafiye Erdogu (the "Applicant") applies for judicial review under section 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 (the "IRPA") of a decision made by a Pre-Removal Risk Assessment Officer ("PRRA Officer"), dated May 1, 2007, wherein it was determined that the Applicant would not be subject to risk of persecution, torture, risk to her life or risk of cruel and unusual treatment or punishment should she be removed to Turkey.

[2] For reasons that follow I have decided the application for judicial review should be granted.

BACKGROUND

[3] The Applicant is of Kurdish/Alevi background. She alleged she was both politically and religiously active in Turkey. Because of her activity, she claims she was arrested on a number of occasions during which she was detained, interrogated, beaten and sexually molested. In addition to the arrests, she alleged she had other encounters with the police where she was again detained and threatened. She came to Canada on August 24, 2003 and filed a claim for refugee protection on September 16, 2003.

[4] The Refugee Protection Division (the "RPD") of the Immigration and Refugee Board issued its decision rejecting the Applicant's claim for refugee status on December 17, 2004. The Applicant applied for a pre-removal risk assessment on August 24, 2006. The PRRA Officer issued a negative decision on May 1, 2007.

[5] In applying for a pre-removal risk assessment, the Applicant alleges that being Kurdish and Alevi rather than Turkish and Sunni places her at risk of mistreatment on return. She also alleges that her membership in DEHAP (The Democratic People's Party) places her in jeopardy because the organization is a left-wing, Pro-Kurdish political party.

[6] The Applicant also claims to be at risk because of allegations made in Turkey to her family by a hostile former Turkish boyfriend. Her boyfriend had visited her in Canada and they engaged in an intimate relationship. On January 18, 2006, the boyfriend physically assaulted the Applicant accusing her of having sexual relationships with male friends. The boyfriend shortly thereafter

returned to Turkey whereupon he told the Applicant's family of their pre-marital affair. This resulted in her father threatening to kill her to preserve family honour.

[7] The Applicant's submissions about her situation in Turkey involved information that was before the RPD in its hearing on her application for refugee status. As such, the evidence is not relevant since section 113(a) of the IRPA directs the PRRA Officer to only consider new evidence that arose after the RPD rejection, or that was not reasonably available, or which the Applicant could not have reasonably been expected to present at the time.

[8] The new evidence and therefore the question relevant for the PRRA Officer related to the claim of a risk of an honour killing by her family. The issue is whether the PRRA Officer properly considered all relevant evidence in denying the Applicant's PRRA claim.

THE DECISION UNDER REVIEW

[9] The PRRA officer considered the issue of a risk of an honour killing. He stated in his decision (PRRA Reason at 6):

> The applicant states that she was a victim of domestic violence at the hands of her Turkish boyfriend, Mr. Sedat Tatar, who came to Canada on several occasions during which time he met with the applicant and pursued an intimate relationship with her. Mr. Tartar became enraged when he thought that the applicant was engaging in sexual relationships with her male friends and as a result he assaulted and terrorized the applicant. Mr. Tatar returned to Turkey and informed the applicant's family of his relationship with the applicant. The applicant alleges that her father is now seeking to kill her to regain the family honour. The letter makes the assertion that Turkey demonstrates an oppressive environment, violence and discrimination against women by the government. The applicant has not provided sufficient evidence to substantiate any claim that she would be unable to obtain protection from her violent ex-boyfriend or her father. Moreover, the applicant has

> not provided clear and convincing evidence to rebut the presumption that state protection is available in Turkey for women who are subjected to violence.

[10] After referring to *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R.689, the PRRA Officer concluded with the following (PRRA Reasons at 7):

> The letters authored by Craighan Knight, the applicant's sister and the applicant's mother all refer to essentially the same circumstances namely, the applicant's claim of domestic violence. I have considered this evidence and I have chosen to assign greater weight to more objective documentation on the situation regarding the human rights situation in Turkey, particularly the protection that is available to women who are subjected to violence. As previously mentioned, the publicly available documentation reveals that the government has implemented a number of policies and programs that would provide protection for victims of domestic violence. As such, I do not find the information contained in the letters sufficient to establish that the state would not protect the applicant should she return to Turkey.

STANDARD OF REVIEW

[11] Recently, the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9 held that there are now only two standards or review: correctness and reasonableness (*Dunsmuir* at para. 34). The process of judicial review now involves two steps. First, the reviewing court must determine whether the jurisprudence has already established, in a satisfactory manner, the degree of deference to be afforded to the question at hand. Second, where the first step is unsuccessful, the reviewing court must undertake an analysis so as to identify the proper standard of review (*Dunsmuir* at para. 62).

[12] Prior jurisprudence emanating from this Court has established that the standard of review of a PRRA officer's decision, when considered globally and as a whole, was reasonableness *simpliciter* (*Elezi v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 240; *Figurado v.*

Canada (Solicitor General), 2005 FC 347; and *Kim v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 437). The standard of review for a PRRA Officer's findings of fact was patent unreasonableness.

[13] In *Wa Kabongo v. Canada (Minister of Citizenship and Immigration)* 2008 FC 348, Justice Mosley concluded the effect of *Dunsmuir*, above, was to establish the standard of review for a PRRA officer's findings of fact such as credibility as one of reasonableness. I agree with Justice Mosley's conclusion.

[14] In *Dunsmuir*, above, at para. 47, the Court gave useful instruction on applying the reasonableness standard. Reasonableness is concerned with the existence of justification, transparency and intelligibility within the decision-making process. It is also concerned with "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law". Justification requires that a decision be made with regard to the evidence before the decision-maker. A decision cannot be a reasonable one if it is made without regard to the evidence submitted. I find support for this rationale in Justice Teitelbaum's decision in *Katwaru v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 612 at paras. 18, 22.

ANALYSIS

[15] Section 113(a) of *IRPA* states:

Consideration of application	Examen de la demande
113. Consideration of an application for protection shall	**113.** Il est disposé de la demande comme il suit :

be as follows:

(*a*) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection;

a) le demandeur d'asile débouté ne peut présenter que des éléments de preuve survenus depuis le rejet ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'il n'était pas raisonnable, dans les circonstances, de s'attendre à ce qu'il les ait présentés au moment du rejet;

[16] In *Raza v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FCA 385 at paras. 13-15, Justice Sharlow for the Federal Court of Appeal provided guidance with respect to "new evidence" under section 113(a) of the IRPA. Justice Sharlow identified credibility, relevance, newness and materiality as evidentiary characteristics to be considered, along with the express statutory conditions, in determining whether evidence submitted can by accepted by a PRRA officer under section 113(a) of the IRPA.

[17] The RPD decision was rendered December 17, 2004. The incident of domestic violence involving the Turkish boyfriend occurred on January 18, 2006. After the domestic violence assault, the Turkish ex-boyfriend returned to Turkey. The domestic assault and the report back to the family in Turkey occurred after the 2004 RPD decision and thus is new evidence.

[18] The Applicant's personal evidence concerning the danger to her of being a potential honour killing victim consists of the following:

(a) The Applicant's own narrative about the domestic assault as set out in the FCJ Refugee Centre document (at pages 101 and 102 of the Tribunal Record).

(b) The letter of Craighan Knight relating to the domestic assault and the Applicant's fear of family consequences (at page 118 of the Tribunal Record).

(c) The letter of Naciye Erdogu, sister of the Applicant, telling of their father's anger and threat to kill her (at pages 119-122 of the Tribunal Record).

(d) The letter of Muharrem Erdogu, mother of the Applicant, also warning of her husband's anger and threats (at pages 123-125 of the Tribunal Record).

(e) St. Michael's Hospital Psychiatric Emergency Service Interdisciplinary Record (at page 128 of the Tribunal Record), recording the Applicant's recounting of the domestic assault in the course of a psychological assessment.

[19] The Applicant's evidence dealing with the evidentiary underpinning of her risk of an "honour killing" is credible new evidence coming from multiple sources: the Applicant, family members, a neighbour, and the psychiatric report. The Applicant's evidence satisfies the conditions of credibility, relevance and materiality set out in *Raza*, above.

[20] The PRRA Officer did not dispute that the Applicant was a victim of domestic violence, that her family in Turkey was aware of her pre-marital relationship, and that she faced a risk of a possible honour killing. The Officer chose to give more weight to the documentary evidence that

state protection would be available to the Applicant (*U.S Department of State Country Reports on Human Rights Practices, Turkey – 2006* and the *Amnesty International Report on Turkey: Women Confronting Family Violence*). However, portions of the documentary Reports that the PRRA Officer relied on corroborate the reality of honour killings in Turkey.

[21] The *U.S. Department of State Report 2006* contains a number of statements concerning the situation concerning "honour killings of women" in Turkey. These statements indicate both positive steps taken by the government as well as negative reports about the continuing practice. Illustrative of the dual nature of the Report is the following (non-underlined and underlined portions reflect, respectively, successes and failures with respect to curtailing violence against women):

> During the year the government faced major challenges of increasing legal accountability of government security forces, reducing restrictions on free speech, and modernizing the societal attitudes with respect to antiquated practices such as "honour killings" of women…. Violence against women, including so called honour killings and rape, continue to be a widespread problem.
>
> The law prohibits discrimination based on race, gender, religion, disability, language, or social status. However, problems with implementing these laws existed. The government and NGO's focus on eliminating societal violence and discrimination against women and minorities, as well as trafficking, the problems continued to exist.
>
> Violence against women including spousal abuse was a serious widespread problem. The law prohibits violence against women, including spousal abuse. The government did not effectively enforce the law; however, the interior ministry and Prime Ministry issued circulars during the year instructing relevant departments to better enforce these laws. Domestic human rights organizations reported that these measures were partially effective: more women call the police emergency hotline for domestic violence when two police stations filed these reports.

[22] Later, the same Report states:

> The government undertook a major campaign during the year to end the practice of honor killings – the killing by immediate family members of women suspected of being unchaste; however, the practice remained a problem. The government reported that there were 1,806 honor killings between 2001 and 2006. During the same period, 5,375 women committed suicide. After the government increased penalties for honor killings, family members increasingly pressured girls to kill themselves in order to preserve the family's honor, according to women's rights groups. Broaching the formerly taboo topic, Prime Minister Erdogan condemned the practice of honor killings at the Organziation of the Islamic Conference in November. In July the Prime Ministry issued to all ministries and provincial governments a circular that reminded each government institution of its responsibility to prevent domestic violence, including honor killings. In December the interior ministry issued a circular to provincial governors instructing them to form special committees to prevent honor killings. Turkish imams joined pop music stars and soccer celebrities to produce television and billboard ads declaring honor killing a sin and condemning all forms of violence against women. The State Ministry for Women began a prevention of violence against women educational program for all soldiers doing their mandatory military service. Government officials work with advocacy groups such as KA-MER, the leading women's organization in the southeast, to hold town hall meetings and set up rescue teams and hotlines for endangered women and girls. Under the Penal Code, honor killings require punishment of life imprisonment. Women's rights groups reported that there remained dozens of such killings every year, mainly in conservative Kurdish families in the southeast or among migrants from the southeast living in large cities. Because of sentence reductions for juvenile offenders, observers noted that young male relatives often were designated to perform the killing.

[23] The *Amnesty International Report* also contained information about honour killings. It identified the general problem of violence against women and noted government and NGO efforts to address the problem. Further, it reported on the continuing challenges in this area, including honour killings (non-underlined and underlined portions again reflect, respectively, successes and failures with respect to curtailing violence against women):

> Proposed reforms include restricting the power of the courts to reduce sentences imposed on perpetrators of so-called "honour crimes"; abolishing the postponement of sentences for men who marry the women they abduct or rape; and not allowing as a legal defence the alleged consent of a child to rape. In two recent trials, sentences have been passed that reflect a new awareness within the judiciary of the horror of

> honour killings.
>
> Amnesty International is concerned that the government has failed to ensure the effective implementation of existing legislation and fears that further reforms will also be resisted by the courts and other parts of the criminal justice system. The police frequently fail to investigate or press charges against perpetrators of violence against women. Women are not encouraged to bring complaints against their attackers and receive almost no effective protection from vengeful husbands and relatives. Those responsible – including the heads of family councils – are rarely brought to justice. Shocking failures to uphold the law persist in courts that continue to blame women who have been attacked, raped or killed and to confer less responsibility on their attackers on grounds of honour.

[24] The *Amnesty International Report* goes on to document a series of instances of individual women who were the subject of honour killings as well as other instances of domestic violence.

[25] Neither the underlined portions referred to above nor the report of individual honour killings were referenced in the PRRA Officer's decision.

[26] Is the totality of the Applicant's evidence capable of rebutting the presumption of state protection provided for in *Ward*, above, and expounded upon by the Federal Court of Appeal in *Carrillo v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94? In *Ward*, above, at para. 50, the Supreme Court of Canada held that the quantity and quality of the evidence which a claimant must produce to rebut the presumption of state protection is clear and convincing evidence. For example, an individual may produce evidence that other individuals in similar circumstances were not able to avail themselves of state protection. *The Amnesty International Report* on Turkey documents situations of individual women at risk of or the victim of honour killings in Turkey. This evidence satisfies the latter requirement of *Ward*, above.

[27] Is the Applicant's evidence reliable and of sufficient probative value? In *Carrillo*, above, at para. 16, the Federal Court of Appeal distinguished between the concepts of the burden of proof, the standard of proof and the quality of evidence necessary to meet the standard of proof. The standard of proof required is on the balance of probabilities and the evidentiary requirement the Applicant must meet is that the evidence be reliable and be of sufficient probative value (*Carrillo*, above, at paras. 18, 20, 30). The Applicant's evidence, taken together with the *U.S. Department of State Report* and the *Amnesty International Report,* satisfies the requirement that the evidence rebutting the presumption of state protection be reliable and sufficiently probative.

[28] In *Elcock v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 1438 at para. 15, the Federal Court held that the Convention Refugee Determination Division, the precursor to the RPD, must analyse not merely whether a legislative procedural framework for protection exists but whether the state is able to effectively implement such a framework. Justice Gibson stated:

> The ability of a state to protect must be seen to comprehend not only the existence of an effective legislative and procedural framework but the capacity and the will to effectively implement that framework.

[29] The documentary evidence, while noting the efforts of the Turkish government to address the issue of honour killings also notes that there are continuing problems. As the programs against domestic violence being developed by the government mature and gain political strength, one hopes that the current efforts of the government may provide relief for those seeking protection at a future date. However, as the documentary evidence indicates, at the time of the PRRA decision, there

were significant deficiencies in state protection for women who were subject to the threat of an honour killing. The documentary evidence is clear that the government's efforts do not completely address the issue of effective protection for a woman who faces a present risk of an honour killing

[30] Finally, in *Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 420, aff'd 2007 FCA 171, leave to appeal denied [2007] S.C.C.A. No. 320, Justice Mactavish referred to *Cepeda-Gutierrez v. Canada* (*Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35 (F.C.T.D.) and noted that, where a tribunal does not specifically refer to an important piece of evidence, a court would be more willing to infer from the silence that the tribunal made an erroneous finding of fact (*Hinzman* at para. 177). I find Justice Evans' comments in *Cepeda-Gutierrez* at para. 17 instructive:

> However, the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence": *Bains v. Canada (Minister of Employment and Immigration)* (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact (emphasis added).

[31] The PRRA Officer considered the Applicant's evidence without having regard to the information in the *U.S. Department of State Report* which supported the Applicant's fears. The evidence in the *U.S. Department of State Report* is not for the selective use of a PRRA officer. The

information contained in objective documentary evidence may have opposing elements. It is incumbent on a PRRA officer to expressly consider such contrasting points when arriving at a determination

[32] The PRRA Officer made reference only to evidence in the Reports supporting the conclusion that state protection existed. At no time did the PRRA Officer make reference to evidence in those same Reports pointing to the opposite conclusion. This one sided consideration leaves it open to infer that the PRRA Officer overlooked the contradictory documentary evidence when coming to a negative determination.

CONCLUSION

[33] It is not clear to me that the PRRA Officer considered the totality of the evidence in assessing the Applicant's claim that she faces danger of risk to her life should she be removed to Turkey. The Officer made no reference to adverse documentary evidence. The PRRA Officer's decision lacks transparency and justification in that it fails to clearly address all the evidence. The decision therefore cannot be found to be reasonable.

[34] The judicial review is allowed. The decision of the PRRA Officer is to be set aside and the matter is to be referred to another Officer for redetermination.

<u>JUDGMENT</u>

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is allowed and the matter is to be referred to another Officer for redetermination.

2. No question of general importance is certified.

"Leonard S. Mandamin"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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