

Federal Court



Cour fédérale

Date: 20111005

Docket: IMM-53-11

Citation: 2011 FC 1137

Toronto, Ontario, October 5, 2011

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

ERDAL AKAR

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant seeks to set aside a December 8, 2010 decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada (the Board) which found that he was neither a Convention refugee nor a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act, 2001, c. 27 (IRPA)*. The determinative issue before the Board was the applicant's failure to establish the claim with credible and trustworthy evidence. Despite the reasonableness of many of these findings, the decision fails in one material respect and, in consequence the application is granted.

Facts

[2] The applicant is a citizen of Turkey. He claimed refugee protection pursuant to sections 96 and 97(1) of the *IRPA* on the basis of his identity as an Alevi Kurd. Being Alevi distinguishes him from Muslims in Turkey, and being Kurdish distinguishes him from Turks in Turkey. He claimed refugee protection on the basis that his political activities in support of Alevis and Kurds have led him to be persecuted by the Turkish police and others. Furthermore, he claimed that allegations of his membership in Ergenekon, a Kemalist organization, the alleged object of which to topple the incumbent government, have been made against him. He claimed that while returning to Turkey from Azerbaijan where he was studying at university, he was questioned by police about his Demokratik Toplum Partisi (DTP) political activities. The applicant also claimed that his support for a political candidate of the Cumhuriyet Halk Partisi (CHP) party and for being a member of the Ataturku Thought Association (ADD) and, at one time, its youth leader, led to police interest in him.

[3] The applicant said that he was attacked by Turkish nationals at the festival of Newroz in Baku, Azerbaijan, following which he was questioned by police upon re-entry into Turkey. He claimed that the “pro-Islamic” Adalet Kalkinma Partisi (AKP) party stands in opposition to the CHP party and that his support for the CHP party resulted in telephone death threats from AKP fundamentalists. The applicant said that he was detained and questioned about his political activities, and although he was released without being charged, he was beaten by the police while in custody.

[4] The applicant submitted documents in corroboration of his claim; a letter from Sevket Kose, the CHP party member he supported; his ADD membership card; a copy of a letter sent by the Adiyaman Headman to the applicant's father which claimed that the applicant was wanted for questioning by the police (not the warrant itself); a letter from Aziz Akar, the applicant's brother who lives elsewhere in Turkey, and a letter from the Toronto Kurdish Community and Information Centre stating that the applicant visits the Kurdish Community and Information Centre in Toronto.

[5] The Board accepted that the applicant was an Alevi Kurd but found that the determinative issue in the claim was "the failure to establish the claim with credible and trustworthy evidence. [Mr. Akar] has not established past persecution, or political profile with credible evidence." It thus rejected the claim.

Decision under review

[6] The Board's decision is based in the jurisprudence and for the most part demonstrates in its reasoning justification, transparency and intelligibility. With respect to credibility, the Board found:

When a claimant swears that certain facts are true, this creates a presumption that they are indeed true, unless there is valid reason to doubt their veracity; and the determination as to whether a claimant's evidence is credible is made on a balance of probabilities I find that the claimant did not provide sufficient credible and trustworthy evidence to establish any political profile, and to establish a well founded fear of persecution, if returned to Turkey today.

[7] The Board then analyzed most of the elements of the claim in an extensive manner, and noted the applicant's reavilment prior to coming to Canada, delay in advancing a Convention claim and lack of participation in Alevi political activities in Canada. These findings of fact are not challenged.

[8] With respect to subjective fear, the Board held that the questioning by police was neither serious, threatening or systematic and did not reach the threshold required by the United Nations'

Convention Relating to the Status of Refugees, July 28, 1951, [1969] Can TS No 6 (the *Convention*):

By definition, a Convention refugee is someone who has a well-founded fear of persecution. Fear is, by its very nature, subjective, while the well-foundedness of that fear is an objective matter. Both subjective and objective components are required to meet the definition, and a lack of evidence going to the subjective element of the claim is, in itself, sufficient for the claim to fail. The claimant's conduct of reavailment does not reflect a genuine subjective fear, due to 2004 events.

[9] The Board also noted the absence of any documentation supporting the applicant's political activities in the DTP:

The claimant stated that he was involved with the DTP. He had no membership card confirming this. He was asked why he did not get a letter from any of his past connections with the party, confirming his activities on behalf of the party, or from DEHAP, where he was also associated; and the claimant indicated that he could not get anything, and did not provide any evidence of any efforts made to obtain corroborating evidence. He had no contacts. I find it unreasonable that the claimant could not obtain any corroborating evidence of political profile, and find that he exaggerated or embellished his involvement with these political parties to bolster his claim. Where a claimant's story has been found to be implausible or otherwise lacking in credibility, a lack of documentary corroboration, or a lack of effort to obtain the documentation, can be a valid consideration for purposes of assessing credibility.

[10] Finally, there was no evidence of any warrant for the arrest of the applicant, and he passed through both Turkish and Canadian border controls without incident. On the whole, the applicant did not marshal credible and trustworthy evidence in the eyes of the Board.

[11] However, the applicant argues that the overarching error made by the Board is that it failed to address the principal basis of his claim, which was that he feared persecution on the ground of what has been described as the Ergenekon investigation, a government investigation the ostensible purpose of which is to ferret out a conspiracy to topple the government but which the applicant describes as a campaign by the (Islamist) government to persecute secularists. This was central to the claim for status, hence the member was required to assess his profile in the light of the risk posed by the Ergenekon investigation. A finding that a claimant did not have a political profile implicitly requires that the question of perspective be addressed. The Board needed to situate its conclusion that he had no profile in the context of the risk he faced. The applicant may have been perceived to have been part of Ergenekon, on the basis of his identity as an Alevi Kurd, regardless of his political profile. The Board, having failed to allude to source of risk, namely that he was within the scope of the Ergenekon on the basis of his identity, could not conclude that he faced no risk from it.

[12] The application for judicial review is therefore granted. The matter is sent back for redetermination by a differently constituted panel.

[13] No question for certification has been proposed and none arises.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted. The matter is referred back to the Immigration Refugee Board for reconsideration before a different member of the Board's Refugee Protection Division. No question for certification has been proposed and the Court finds that none arises.

"Donald J. Rennie"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-53-11

STYLE OF CAUSE: ERDAL AKAR v. THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: July 20, 2011

**REASONS FOR JUDGMENT
AND JUDGMENT:** RENNIE J.

DATED: October 5, 2011

APPEARANCES:

Mr. Michael Crane FOR THE APPLICANT

Mr. Kevin Doyle FOR THE RESPONDENT

SOLICITORS OF RECORD:

Michael Crane FOR THE APPLICANT
Toronto, Ontario

Myles J. Kirvan, FOR THE RESPONDENT
Deputy Attorney General of Canada
Toronto, Ontario