Federal Court | Cour fédérale

Date: 20120814

Docket: IMM-6294-11

Citation: 2012 FC 992

Ottawa, Ontario, August 14, 2012

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

IREM GUR

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 (RPD or the "Tribunal"), in which the member rejected the Applicant's claim for protection, finding that she was not a Convention refugee nor a person in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

1. Facts

[2] The Applicant is a 35 year old citizen of Turkey, of Alevi faith and Kurdish ethnicity. She entered Canada from the United States on November 1, 2009 and claimed refugee protection based on her nationality and religion.

[3] The Applicant claims that she and her family have suffered a long history of harassment from the authorities and their fellow citizens due to her religion and ethnicity as an Alevi Kurd. Born and raised in Karakocan, in the eastern part of Turkey, she was not allowed by the authorities to speak Kurdish, celebrate Kurdish holidays or practice her religion. Through her primary schooling, she was taught Turkish and a religion other than her own, and subjected to insults and assaults from the teachers and students.

[4] In 1988, the Applicant's brother was arrested, detained, beaten and tortured for possessing a Kurdish book. He left Turkey in 1989 and was granted refugee status in Germany, where he continues to reside. In 1995, he was accused by Turkish authorities of being a member of the Kurdistan Workers' Party (PKK) even though he had not been in the country since 1989; the case was finally dismissed in 2004 for lack of evidence.

[5] In 1999, one of her sisters and that sister's husband were harassed by the police, arrested and their house searched. This was as a result of having worked for and, in the case of the husband, having run as a candidate for, the People's Democracy Party (HADEP), a pro-Kurdish political party. They also fled to Germany, where they were granted asylum.

[6] After the Applicant's brother left Turkey, the authorities constantly harassed the family with regular threats and house raids, and her father was interrogated and beaten several times while in custody. In 1994, the family moved across the country to Izmir, in the western part of Turkey.

[7] The Applicant attended university in the city of Antakya in 1996, where she faced many problems:

- In 1996, a Kurdish spring celebration at the school was dispersed by the police and the Applicant was hit by batons and kicked;

- In 2001, the Applicant was threatened for not taking part in Ramadan (not part of the Alevi faith); and

- In 2002, during a protest by Kurd students, the Applicant was beaten badly by police, and then attacked again after issuing a press release about the attack.

[8] When the Applicant graduated, she became a teacher with the Ministry of Education in the city of Diyarbakir. In 2005, the Applicant called in sick to work in order to attend the Kurdish Newroz celebrations. Despite the school director phoning to warn her that the Ministry was checking all schools to determine who was absent and celebrating the holiday, she did not return to work. On that night, the police arrested the Applicant at her house, detained her for 12 hours, interrogated, threatened and beat her. After that incident she was frequently pulled aside for questioning at road blocks.

[9] On March 8, 2007, the Applicant was involved in setting up a conference for International Women's Day, which was conducted in the Kurdish language. The police raided the conference and arrested the organizers and the Applicant. The Applicant was detained for 24 hours, questioned and treated badly.

[10] After the conference incident, the Ministry of Education forced her to move and teach in the city of Antakya, which she likened to banishment. She was isolated as an Alevi Kurd in this city, where the administration of the new school frequently threatened to fire her, her colleagues avoided her and the students vandalized her property and did not respect her.

[11] The Applicant applied for a Canadian visa but was denied, and subsequently obtained a US visitor visa as a short-term student after having been granted permission from her employers to attend. She completed an English language course in Florida and then came to Canada by means of a people smuggler. She arrived in Montreal on November 1, 2009 and requested refugee protection the following day.

2. The impugned decision

[12] The Tribunal issued a very brief decision on August 23, 2011, which was communicated to the Applicant on September 1, 2011, finding that the Applicant is not a Convention refugee or a person in need of protection.

[13] The Tribunal was satisfied as to the Applicant's identity and concluded that the Applicant was credible. The determinative issue for the Tribunal was that the Applicant had not demonstrated

that her treatment at the hands of the police in Turkey reached the level of severity consistent with persecution. In the alternative, the Tribunal noted that the Applicant would have a viable internal flight alternative (IFA) in the city of Izmir.

[14] The Tribunal determined that the pattern of events did not meet the criteria of persecution, and noted that:

- The Applicant was a teacher with a secure post, had the means to pay for her trip to the US and was able to get permission for the trip from the authorities;

- The Applicant agreed not to attend Newroz celebrations after the incident of 2005, and the police did not bother her again;

- The Applicant claimed that the conference was illegal because Kurdish was spoken by the panellists, but if they had dispersed or stopped speaking that language there would have been no problem. Moreover, the laws regarding the Kurdish language have since changed; and

- The isolation and vandalism faced by the Applicant in Antakya did not meet the severity of persecution.

[15] The Tribunal then concluded that as a young and educated woman with advanced language skills, the Applicant could quit her job with the education ministry and find employment in a range of other worthy professions in Izmir. The Tribunal also noted that the Applicant's parents live in Izmir, which is the city where she wanted to be posted as a teacher following her graduation, and

that the Applicant herself testified that she would be safe living there. As a result, the Tribunal concluded that Izmir would be a viable IFA.

3. Issues

[16] This application for judicial review raises two issues:

a) Did the Tribunal err in determining that the Applicant's treatment did not constitute persecution?

b) Did the Tribunal err in determining that the Applicant has a viable IFA available to her in Izmir?

4. Analysis

a) Did the Tribunal err in determining that the Applicant's treatment did not constitute persecution?

[17] The determination as to whether the treatment received by the Applicant amounts to persecution has been determined by the case law to be a question of mixed fact and law: see, for ex., *Talman v Canada (Solicitor General)*, 93 FTR 266, [1995] FCJ no 41 (QL) at para 15 (TD); *Yurteri v Canada (Minister of Citizenship and Immigration)*, 2008 FC 478 at para 33, [2008] FCJ no 619; *Gebre-Hiwet v Canada (Minister of Citizenship and Immigration)*, 2010 FC 482 at para 13, [2010] FCJ no 561 [*Gebre-Hiwet*]; *Nimaleswaran v Canada (Minister of Citizenship and Immigration)*, 2005 FC 449 at para 10, [2005] FCJ no 559. That being said, the failure of a tribunal to consider the cumulative effects of discrimination is a question of law and would attract a standard of correctness on review: see *Gebre-Hiwet* at para 13, above; *Lebedev v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 728 at para 35, [2008] 2 FCR 585.

[18] Despite the fact that the absence of persecution was perceived by the Tribunal as the determinative issue in this case, the Respondent took no position with respect to this finding. The Applicant, predictably, argued vigorously that the cumulative effect of the numerous instances of discrimination and harassment that she experienced amounted to persecution.

[19] The Tribunal did not address this issue at length and merely offered three rationales for its conclusion that the Applicant had not met her burden of showing that the severity of the discrimination and her treatment at the hands of the police, reached the level of severity which is consistent with persecution:

- The Applicant had a good job as a teacher and was permitted to leave the country for training in the US;

- The Applicant admitted that if she stopped attending Kurdish celebrations and stopped speaking the Kurdish language and dispersed the conference, she would not have had problems with the police; and

- The isolation and vandalism she faced when moved to Antakya are not severe enough to constitute persecution.

[20] These reasons fall far short of a compelling demonstration that the Applicant would not suffer persecution if she were to return to Turkey. The Tribunal, in particular, failed to analyze the cumulative effects of the discriminatory treatment experienced by the Applicant to determine if,

viewed as a whole, it amounted to persecution. As Justice Dawson stated in *Tolu v. Canada (Minister of Citizenship and Immigration)*, 2002 FTC 334 at para 17, 218 FTR 205:

> [I]n cases where the evidence establishes a series of actions characterized to be discriminatory there is a requirement to consider the cumulative nature of that conduct. This requirement reflects the fact that prior incidents are capable of forming the foundation for present fear. See: *Retnem v. Canada (Minister of Employment and Immigration)* (1991), 132 N.R. 53 (F.C.A). This is also expressed in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status in the following terms, at paragraph 53:
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>> In addition, an applicant may have been subjected to various measures not in themselves amounting to persecution (e.g. discrimination in different forms), in some cases combined with other adverse factors (e.g. general atmosphere of insecurity in the country of origin). In such situations, the various elements involved may, if taken together, produce an effect on the mind of the applicant that can reasonably justify a claim to a well-founded fear of persecution on "cumulative grounds".

[21] In the case at bar, the Tribunal fails to perform that task. The Tribunal did say that the isolation and vandalism the Applicant had to go through when reassigned to Antakya in retaliation for her participation in the organization of the International Women's Day did not amount to persecution. It did not, however, even attempt to explain why and on what basis it came to that conclusion. As for the fact that she had a secure post and was given permission to travel to the United States, it is largely irrelevant to the analysis required.

[22] The second ground given by the Tribunal to explain its finding that the Applicant would not experience any problem, reflects a profound misunderstanding of the refugee protection system. First of all, the Applicant is of Kurdish nationality and Alevi faith; these are intrinsic characteristics that the Applicant cannot shun as they define in large part who she is. More importantly, the

Applicant cannot be asked to renounce her faith and language in order to live peacefully. It is undoubtedly true that persecution could often be avoided if groups asserting their ethnicity and religion simply stopped doing so and quietly dispersed when asked by the state. However, it is precisely to avoid this result that state parties have agreed to the *United Nations Convention Relating to the Status of Refugees*, July 28, 1951, [1969] Can TS No 6. An applicant cannot be asked to renounce his or her deeply held beliefs or to stop exercising his or her fundamental rights in order to avoid persecution and as a price to pay to live in security. This is apparently the choice that some of the Applicant's siblings still living in Turkey have made; the Applicant, however, should not be coerced into making the same decision, even assuming that such a course of action would entitle her to live without fear of persecution.

[23] For the above reasons, I am of the view that the decision of the Tribunal is deeply flawed and must be quashed. Not only was the Tribunal's finding that the Applicant had not demonstrated persecution critical to its overall determination, but, as conceded by the Respondent, the Tribunal could very well have come to a different conclusion with respect to the IFA had it focused on the proper criteria to establish persecution. Indeed, a careful reading of the Tribunal Record and of the transcript reveals that the Tribunal misapprehended the testimony and evidence of the Applicant.

b) Did the Tribunal err in determining that the Applicant has a viable IFA available to her in Izmir?

[24] The Tribunal relied heavily on the fact that the Applicant's parents continue to live in Izmir and on its assertion that the Applicant herself testified that "she would be safe living there": Decision of the Tribunal, para 14. Yet, nothing is further from the truth. The Applicant stated in

her testimony that her family was constantly harassed by the authorities and her father interrogated by the police on numerous occasions, even after he decided to move his family to Izmir. The Applicant also said that she did not have any problem while she was attending university in Izmir, because she was always studying. It should be noted, however, that was before she started asserting her Kurdish identity and acting upon it. She specifically claimed that she is now targeted because of her Kurdish ethnicity and Alevi faith, and that she would be at risk everywhere in Turkey (see transcript, pp. 173-74 and 197 of the Tribunal Record).

[25] The Tribunal therefore misapprehended her testimony. Far from saying that she would be safe in Izmir, she stated the exact opposite. In view of the fact that the Tribunal found her credible, this is an especially critical error. Even though the Tribunal is entitled to a high degree of deference on matters pertaining to IFA, I am of the view that the Tribunal's finding is unacceptable in light of the evidence that was before it. Accordingly, this is an additional reason to quash its decision.

[26] This application for judicial review is therefore granted, and the matter is remitted to a different panel of the Refugee Protection Division for re-determination. No question is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is granted. No question is certified.

"Yves de Montigny"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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