

Federal Court



Cour fédérale

Date: 20121029

Docket: IMM-1630-12

Citation: 2012 FC 1254

Ottawa, Ontario, October 29, 2012

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

ISMAIL DAG

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of a decision of the Immigration and Refugee Board, Refugee Protection Division (the Board), dated January 19, 2012, wherein the applicant was determined to be neither a Convention refugee within the meaning of section 96 of the Act nor a person in need of protection as defined in subsection 97(1) of the Act.

[2] The applicant requests that the Board's decision be set aside and the application be referred back to the Board for redetermination by a different panel.

Background

[3] The applicant is a citizen of Turkey. He alleges that he was persecuted due to his participation in Kurdish political groups, including detention and torture by the Turkish police.

[4] The applicant is Kurdish and was marginalized growing up in Turkish society. He is a supporter of HADEP, known as the People's Democracy Party in English, which supports the cause of Kurdish nationalism.

[5] In 1995, he was detained for three days and subjected to being blindfolded and tortured. He was abused in the military and badly beaten.

[6] In 1999, he attended a HADEP press conference in Amasya and was detained for two days, accused of being a member of the Kurdistan People's Party (a terrorist organization) and subjected to torture.

[7] In 2009, he was attacked by Turkish nationalists and detained by police for two days. He was badly tortured, resulting in a chest wound.

[8] In 2010, he was detained by police, who attempted to recruit him as an informant. They repeatedly called him on his cell phone. This led to his decision to leave Turkey. He arrived in Canada via the United States on November 23, 2010 and his refugee claim was heard on January 18, 2012.

Board's Decision

[9] The Board rendered its decision on January 19, 2012. The Board began by summarizing the applicant's allegations.

[10] The Board considered credibility to be the determinative issue in this claim. The Board focused on a psychological report in evidence that referred to the applicant's religion as Alevi instead of Muslim and rejected the applicant's explanations that this was due to translation error or left in the doctor's template by error. The applicant was unable to produce any document proving his religion. Since many Alevi bring forward refugee claims in Canada, the Board found that the applicant had attempted to embellish his claim by telling the doctor he was Alevi and made a negative credibility finding.

[11] The Board also made a negative inference as to credibility based on the fact that the applicant had expressed no pro-Kurdish political opinions during his time in Canada and noted the lack of documentary evidence supporting his claim of supporting political parties or his detentions and beatings.

[12] The Board noted the applicant omitted mention of a 1995 attack in his Personal Information Form (PIF) narrative, IMM 5611 and part of entry interview. The Board rejected the applicant's explanation that he had forgotten to mention this incident and made a negative credibility inference.

[13] With regards to the applicant's description of his 1999 torture, the applicant wrote in his narrative he had been beaten on the soles of his feet. The Board noted that only at the hearing did the applicant claim he was also beaten in the abdomen. The Board rejected his explanation that he had probably forgot and made a negative credibility inference.

[14] The Board found that the applicant had been inconsistent in describing whether it was during his 1999 or 2009 torture incidents that he had been stripped naked. The Board rejected his explanation that he had mixed up the two incidents and drew a negative credibility inference.

[15] Similarly, the Board pointed out that the applicant had written in his narrative that during the 2009 torture, he was beaten with wooden and iron sticks, but at the hearing only referred to iron sticks. The applicant was unable to explain this inconsistency.

[16] The Board identified other inconsistencies between the applicant's medical evidence and his oral evidence, including whether a scar from his 2009 torture was on his right side or his left side and whether his face had been beaten.

[17] Given the identified credibility concerns, the Board did not accept the applicant's claim that he was involved in pro-Kurdish agitation. Instead, the Board considered whether he would suffer

persecution simply as a Kurdish person in Turkey and concluded Kurds face discrimination but not persecution. Therefore, the Board rejected the claim.

Issues

[18] The applicant submits the following points at issue:

1. Did the Board member err in law by failing to provide adequate and valid reasons for the negative credibility determination?
2. Did the Board member err in law by making patently unreasonable inferences and relying on such to justify the negative decision?
3. Did the Board member err in law by selectively referencing supporting documentary evidence while ignoring contradictory documentary evidence?
4. Did the Board member err by simply misunderstanding or misapprehending central aspects of the applicant's claim?

[19] I would rephrase the issues as follows:

1. What is the appropriate standard of review?
2. Did the Board err in rejecting the applicant's claim?

Applicant's Written Submissions

[20] The applicant submits that in assessing credibility, the Board should not microscopically comb the evidence searching for trivial errors and inconsistencies. In this case, the Board made a number of negative inferences due to matters irrelevant or peripheral to the applicant's claim.

[21] The Board focused on the trivial matter of whether a certain scar was on the left or the right side of the applicant's chest, but ignored the doctor's evidence that various scars were consistent with torture described in the applicant's narrative.

[22] The Board made an issue of the applicant's religion, but the applicant has not claimed refugee protection based on religious persecution. The applicant has been consistent in identifying his religion as Muslim. The Board rejected the possibility that the doctor's report referred to Alevi religion as a template error by referring to "several other concerns in regard to credibility", an inadequate justification given the applicant had claimed to be Muslim in every other piece of evidence.

[23] The Board doubted the applicant's pro-Kurdish sentiments since he had not engaged in any political activity in Canada, an unreasonable finding given that a person arriving in a new country may easily have more pressing issues than political activity.

[24] The Board erred by considering the omitted details about the detention and torture of the applicant to be contradictions and embellishments. The thrust of the evidence regarding an

altercation with ultra-nationalists was to showcase the brutal treatment by police of detained Kurdish demonstrators.

[25] The Board omitted important evidence such as the police's threats against the applicant in July 2010 that led to his fleeing Turkey and the letter from his wife indicating the police had visited his home five times since he had left Turkey. On this error alone, the decision should be quashed.

Respondent's Written Submissions

[26] The respondent contends the applicant's evidence contained inconsistencies and embellishments, that the reasons provided were adequate and that the Board properly considered country conditions.

[27] The respondent argues the Board is owed deference on the weighing of evidence and drawing conclusions from evidence. Reasons should be read as a whole. The Board understood the facts of the claim and found insufficient evidence to support a positive finding.

[28] Credibility findings are based on oral hearings and the Court should not interfere unless satisfied the Board based its conclusion on irrelevant considerations or ignored evidence. It was open to the Board to reject the applicant's explanation for the document identifying him as Alevi. It is possible that none of the Board's findings on their own would have resulted in a negative decision, but the Board's decision was based on a totality of the evidence. The Board is entitled to reject uncontradicted evidence if it is implausible.

[29] Refugee status does not exist at large for anyone from a country with an unfavourable human rights record. The applicant failed to adduce evidence that he was personally threatened.

Analysis and Decision

[30] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[31] It is established jurisprudence that credibility findings, described as the “heartland of the Board’s jurisdiction”, are essentially pure findings of fact that are reviewable on a reasonableness standard (see *Lubana v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116, [2003] FCJ No 162 at paragraph 7; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at paragraph 46; and *Demirtas v Canada (Minister of Citizenship and Immigration)*, 2011 FC 584, [2011] FCJ No 786 at paragraph 23). Similarly, the weighing of evidence and the interpretation and assessment of evidence are reviewable on a standard of reasonableness (see *Oluwafemi v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1045, [2009] FCJ No 1286 at paragraph 38).

[32] In reviewing the Board’s decision on the standard of reasonableness, the Court should not intervene unless the Board came to a conclusion that is not transparent, justifiable and intelligible

and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 47; and *Canada Khosa* above, at paragraph 59). As the Supreme Court held in *Khosa* above, it is not up to a reviewing court to substitute its own view of a preferable outcome, nor is it the function of the reviewing court to reweigh the evidence (at paragraph 59).

[33] **Issue 2**

Did the Board err in rejecting the applicant's claim?

As described above, deference is owed to the Board on credibility findings since they are based on oral hearings while the Court only considers a paper record. The Board is entitled to make findings based on implausibility (see *Gbremichael v Canada (Minister of Citizenship and Immigration)*, 2006 FC 547 at paragraph 37, [2006] FCJ No 689).

[34] However, not every kind of inconsistency or implausibility in the applicant's evidence will reasonably support the Board's negative credibility finding. This is particularly true of issues irrelevant or peripheral to the claim (see *Gbremichael* above, at paragraph 37).

[35] The applicant's alleged torture is hardly irrelevant to his claim. That said, the Board's focus on minor details (such as whether the instrument of torture was made of wood or iron, which of four incidents of torture the applicant involved being stripped naked, whether the applicant was beaten on his face in addition to his abdomen and the location of a scar) is indicative of an overzealous approach that demands more of the applicant's memory than is reasonable, especially given his central allegation that he is a victim of repeated torture.

[36] The Board was right to be concerned that a key piece of the applicant's evidence, a medical report, referred to the applicant's religion as Alevi. The Board's rejection of the applicant's explanation for this inconsistency, however, was in part based on "several other concerns in regard to credibility". I would note that all of the applicant's other documents that mentioned religion stated that his religion was Islam or Muslim. Given this fact, it does not appear to me that the Board's conclusion that this would result in the applicant being not credible is reasonable.

[37] With respect to the Board's finding that the applicant did not take part in Kurdish activities in Canada that would support the Kurdish movement does not, in my view, make the applicant not credible.

[38] With respect to the location of the scar on the applicant's chest, the doctor states that the scar is on the right side of his chest. The applicant consistently stated it was on the left side of his chest. I cannot see how the applicant could control what the doctor wrote. On the facts of this case, I do not believe that this alone supports a non-credibility finding, particularly since the doctor also stated that, "The scars that I observed are consistent with Mr. Dag's history of assault while in police detention in Turkey."

[39] There is also the further submission that the Board did not take into consideration the applicant's wife's letter that stated the police had visited her five times asking about her husband and that they had threatened her with detention. Also, the Board did not take into consideration the fact that the applicant's nephew was found to be a Convention refugee in September 2002. This information could be relevant to the claim but was not considered by the Board. This results in a

reviewable error (see *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 157 FTR 35, [1998] FCJ No 1425 at paragraph 17).

[40] For the above reasons, the application for judicial review must be allowed and the matter referred back to a different panel of the Board for redetermination.

[41] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

THIS COURT’S JUDGMENT is that the application for judicial review is allowed, the decision of the Board is set aside and the matter is referred to a different panel of the Board for redetermination.

“John A. O’Keefe”

Judge

ANNEX

Relevant Statutory Provisions***Immigration and Refugee Protection Act, SC 2001, c 27***

25. (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible or does not meet the requirements of this Act, and may, on request of a foreign national outside Canada who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual

25. (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa

residence and is unable or, by reason of that fear, unwilling to return to that country.

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1630-12

STYLE OF CAUSE: ISMAIL DAG

- and -

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: October 18, 2012

**REASONS FOR JUDGMENT
AND JUDGMENT OF:** O'KEEFE J.

DATED: October 29, 2012

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