

Federal Court



Cour fédérale

Date: 20151014

Docket: IMM-8280-14

Citation: 2015 FC 1162

Ottawa, Ontario, October 14, 2015

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

YASEMIN AKKAYA

Applicant

and

**THE MINISTER OF IMMIGRATION AND
CITIZENSHIP**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Yasemin Akkaya has brought an application for judicial review pursuant to s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA] of a decision of the Refugee Protection Division of the Immigration and Refugee Board [the Board]. The Board held that

there was no credible basis for her claim to be a Convention refugee pursuant to s 96 of the IRPA, and that she was not a person in need of protection pursuant to s 97 of the IRPA.

[2] For the reasons that follow, I have concluded that Ms. Akkaya received adequate, if not perfect, interpretation throughout the hearing, and her right to an interpreter was therefore respected. The Board's rejection of her credibility and refusal of her *sur place* claim were both reasonable. The application for judicial review is dismissed.

II. Facts

[3] Ms. Akkaya is a citizen of Turkey. Although she indicated on her Basis of Claim Form [BOC] that she speaks both Turkish and English, her English proficiency appears to be limited. She appeared before the Board with the aid of an interpreter.

[4] Ms. Akkaya testified before the Board that she is a secular member of the Alevi religious minority and a supporter of the leftist cause in Turkey. She indicated in her BOC that she was not a member of an Alevi religious organisation or a member of a leftist group or party while she lived in Turkey.

[5] Ms. Akkaya alleged that her problems began in or around February 2013, when she opened a travel agency and began to receive demands of extortion from the "idealist mafia," which she also referred to as "right-wing gangs". She said that a Sunni store owner intervened on her behalf, and the demands stopped for a time.

[6] Ms. Akkaya testified that in May, 2013, she attended Gezi Park demonstrations against the Turkish government. She took photographs of the demonstrations, and noted that she was involved in an amateur photography association.

[7] According to Ms. Akkaya, during the second week of July, 2013, the same Sunni store owner who had intervened on her behalf raped her when she refused his advances. She decided to travel to the United States of America after this incident because she “wanted to get away”.

[8] Upon her return to Turkey, Ms. Akkaya was allegedly arrested at the airport because the police had been “tipped off”. According to her BOC, she was detained for two days and accused of supporting a radical left-wing group, and harbouring and aiding demonstrators during the Gezi Park demonstrations. Ms. Akkaya said that, after her arrest, the police searched her home and discovered the photographs she had taken during the Gezi Park demonstrations. She was severely beaten and sexually assaulted. The public prosecutor eventually dismissed the police allegations and released her.

[9] According to Ms. Akkaya, in September, 2013, the idealist mafia began to harass her again. The Sunni store owner offered to intervene a second time if Ms. Akkaya would go out to dinner with him. Ms. Akkaya accepted his offer, but when she later refused his advances he raped her a second time. She said that she complained to the police about the visits from the idealist mafia and the Sunni store owner’s behaviour. The police summoned the Sunni store owner to the station but did not charge him. The police would do nothing about the idealist mafia because she was unable to identify them by name.

[10] Ms. Akkaya received a Canadian visitor's visa in December, 2013. However, she did not leave Turkey immediately. She said that she delayed her departure out of concern for her father, who had been under her care since her mother's death. She changed her mind when she found a note at her workplace that read "you will be get killed [*sic*]". When she attempted to leave her workplace, the Sunni store owner tried to abduct her but she screamed and was rescued by passers-by.

[11] Ms. Akkaya left Turkey for Canada on January 29, 2014. She made an inland claim for refugee status on February 14, 2014. Following her arrival in Canada, Ms. Akkaya published photographs in *Yeni Hayat*, a Toronto-based newspaper that caters to expatriate Turkish minorities. These included photographs that Ms. Akkaya says were taken during protests outside the Turkish consulate in Toronto following the death of an Alevi youth. Ms. Akkaya made a *sur place* claim based on these activities.

III. The Board's Decision

[12] Ms. Akkaya's claim was heard by the Board on August 25, 2014. The following day, she requested a compact disc recording of the hearing. On September 22, 2014, Ms. Akkaya formally notified the Board of alleged errors in the interpretation during the hearing, and said that these gave rise to a reasonable apprehension of bias that required the Board member to recuse himself.

[13] The Board issued its decision on November 26, 2014, finding that there was no credible basis for Ms. Akkaya's refugee claim. The Board drew adverse inferences from what it

considered to be material omissions in Ms. Akkaya's BOC. These included her failure to mention:

- her frequent attendance at Cem houses, which are places where Alevis gather and worship;
- that conservatives and "rightists" had always discriminated against her in school and in her neighbourhood as a result of her Alevi faith;
- her attempts to help injured protesters at the Gezi Park demonstrations or that she opened her office to demonstrators;
- her status as an "independent woman" as the reason for her mistreatment by police; and
- her belief that the idealist mafia, the store owner and the police were conspiring against her.

[14] The Board concluded that Ms. Akkaya was generally not credible. The Board also rejected her *sur place* claim. In addition, the Board found that Ms. Akkaya's right to an interpreter had not been breached, and that she had in any event waived her right to raise the issue because she did not do so at the first opportunity.

IV. Issues

[15] This application for judicial review raises the following issues:

A. Did the Board breach Ms. Akkaya's right to an interpreter?

B. Was the Board's rejection of Ms. Akkaya's credibility reasonable?

C. Was the Board's rejection of Ms. Akkaya's *sur place* claim reasonable?

V. Analysis

[16] Whether the right to an interpreter has been breached is a question of procedural fairness, and is subject to review by this Court against the standard of correctness (*Bouanga v Canada (Citizenship and Immigration)*, 2014 FC 1029 at para 4).

[17] The Board's findings of credibility are owed deference, and are subject to review by this Court against the standard of reasonableness (*Tariq v Canada (Citizenship and Immigration)*, 2015 FC 692 at para 10).

[18] The Board's assessment of a *sur place* claim is subject to review by this Court against the standard of reasonableness. However, whether the Board applied the right legal test is subject to review against the standard of correctness (*Liu v Canada (Citizenship and Immigration)*, 2013 FC 1123 at para 17).

A. *Did the Board breach Ms. Akkaya's right to an interpreter?*

[19] An applicant must raise an alleged error of interpretation at the first opportunity during a hearing or risk waiving her right to an interpreter (*Mohammadian v Canada (Citizenship and Immigration)*, 2001 FCA 191 at para 19). Waiver requires full knowledge of the right that is waived. Where an applicant does not know the extent of the errors because they are not readily apparent during the Board's hearing, she cannot waive her right to an interpreter simply by failing to raise the errors at that time (*Mah v Canada (Citizenship and Immigration)*, 2013 FC 853 [*Mah*] at para 15).

[20] In this case, Ms. Akkaya and her former counsel did not speak the same language. This made it difficult for either of them to assess the quality of interpretation before the Board. The burden is on the Respondent to demonstrate that Ms. Akkaya had full knowledge of the right that she is said to have waived. I am not satisfied that the Respondent has discharged this burden, and accordingly Ms. Akkaya did not waive her right to an interpreter before the Board.

[21] Section 14 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [the *Charter*] requires that interpretation be "continuous, precise, competent, impartial and contemporaneous" (*Mohammadian* at para 4). However, the right guaranteed at section 14 of the *Charter* does not require that interpretation be "perfect" (*Mohammadian* at para 6, citing *R v Tran*, [1994] 2 SCR 951 at para 57). Actual prejudice need not be shown, but the error must be more than trifling. As Justice Gleason explained in *Mah* at paras 23-24:

[23] [...] an applicant need not be prejudiced by a translation error for an award to be set aside if the applicant establishes there were errors in the translation and has not waived his or her right to complain about them. In my view, this holding establishes that an error need not be central to a key portion of the Board's decision to warrant a decision's being overturned. Thus, materiality of the sort asserted by the respondent in this case is not required before a decision can be set aside due to inadequate translation. It is, however, always incumbent on an applicant to establish such inadequacy.

[24] In order to do so, the claimed error must be more than trifling. As noted, in *Mohammadian* the Court of Appeal held that it is only necessary that an adequate translation be provided and hence trivial imperfections in translation do not violate section 14 of the *Charter*. This Court has often applied this principle and held that trifling inconsistencies do not amount to a failure of adequate translation.

[22] Once an applicant establishes that there was a "real and significant translation error", she is not required to demonstrate that the error underpinned a key finding before the Board's decision can be set aside (*Mah* at para 26; *Siddiqui v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1028 at para 68, citing *Bidgoli v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 235 at para 13).

[23] Many of the translation errors identified by Ms. Akkaya were trivial: for example, "declaration" was translated as "form" or "thing" (the BOC was placed in front of Ms. Akkaya); "we pray for those who were killed" was translated as "we pray for those who passed away"; "Cem houses and at the Alevi associations" was translated as "at Cem house and other places Alevis gather"; "hundreds of thousands of people" was translated as "hundreds of people" or "hundreds, thousands of people".

[24] Other alleged errors appear to have more substance: “Now we will talk about your leftist views” was translated as “now we will talk about the mistreatment you received from leftists”. Given the nature of Ms. Akkaya’s claim, this question would have seemed nonsensical. However, a review of the transcript does not suggest that there was any lasting confusion. The questions soon moved on to details of the demonstrations that Ms. Akkaya allegedly attended.

[25] There was confusion in the translation about whether Ms. Akkaya had suffered “visible” or “permanent” injuries, but this was clarified in later testimony. Similarly, the mistranslation of the police wanting to “sue” Ms. Akkaya was later clarified to mean that they wanted to “charge” her. Any confusion was resolved as the hearing progressed.

[26] The hearing before the Board lasted over six hours. Viewed in isolation or cumulatively, I am unable to find that the alleged errors of interpretation were more than trifling. Ms. Akkaya has not established that there was a “real and significant translation error”. She received adequate, if not perfect, interpretation throughout the hearing.

B. *Was the Board’s rejection of Ms. Akkaya’s credibility reasonable?*

[27] Ms. Akkaya argues that the Board improperly framed her claim “as being based on her leftist, Alevi identity and her participation in the Gezi protests”. Instead, she asserts that it “was in fact based on her problems with the idealist mafia, the man who twice raped her, and the mistreatment she suffered at the hands of the police, who were falsely tipped off about her”. In

other words, Ms. Akkaya argues that her political and religious profile were “peripheral” to her claim.

[28] The Respondent counters that Ms. Akkaya referred in her BOC to her support of the leftist cause, and that she testified that she was targeted by the police for being an “Alevi leftist lady”. Ms. Akkaya also relied upon a document that described the treatment of Alevis by Turkish authorities. Her claim was therefore based, at least in part, on her Alevi and leftist identity.

[29] I agree with the Respondent. The narrative attached to Ms. Akkaya’s BOC identified her Alevi religious identity and leftist political views as essential components of her refugee claim. This was also apparent in her references to “Sunni competitors” and the “Sunni store owner”. She linked the false accusations that the Turkish police allegedly brought against her to her leftist profile.

[30] It was therefore reasonable for the Board to reject Ms. Akkaya’s credibility based on the omission from her BOC of key details regarding her persecution as both an Alevi and a leftist. When asked about these omissions, Ms. Akkaya offered no explanation beyond her intention to provide details of her claim at the hearing. The Board’s assessment of an applicant’s credibility attracts a high degree of deference from this Court.

C. *Was the Board’s rejection of Ms. Akkaya’s sur place claim reasonable?*

[31] Ms. Akkaya’s *sur place* claim was based on a photograph credited to her in *Yeni Hayat*, a Toronto-based newspaper that caters to Turkish minorities. The photograph depicted a young

man, a candle, and a loaf of bread, and was said to have been taken outside the Turkish consulate in Toronto following the death of an Alevi youth.

[32] Ms. Akkaya provided no evidence that the Turkish authorities would be aware of photographs in a small overseas publication aimed at expatriate Turkish minorities. However, she argues that the Board wrongly considered “whether it is likely that the situation will become known”, rather than what would happen if the situation were to become known (*Sheikh v Canada (Citizenship and Immigration)*, 2014 FC 264 at para 12).

[33] The United Nations High Commission for Refugees’ *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (Reissued 2011) provides as follows:

96. A person may become a refugee “*sur place*” as a result of his own actions, such as associating with refugees already recognized, or expressing his political views in his country of residence. Whether such actions are sufficient to justify a well-founded fear of persecution must be determined by a careful examination of the circumstances. Regard should be had in particular to whether such actions may have come to the notice of the authorities of the person’s country of origin and how they are likely to be viewed by those authorities.

[Emphasis added.]

[34] Furthermore, it appears that the Board did in fact consider the consequences for Ms. Akkaya if the photographs came to the attention of the Turkish authorities: “The panel finds that the claimant has not established that involving herself in these activities in Toronto would result

in a reasonable possibility of persecution ...” I am therefore unable to conclude that the Board’s rejection of Ms. Akkaya’s *sur place* claim was unreasonable or based upon the wrong legal test.

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

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