Federal Court  Cour fédérale

Date: 20171012

Docket: IMM-1607-17

Citation: 2017 FC 904

Ottawa, Ontario, October 12, 2017

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

YUSUF MAMIS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant, Yusuf Mamis (the "Applicant"), seeks judicial review of a decision of the Refugee Protection Division ("RPD" or "Panel") denying his claim for refugee protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

II. Background

[2] The Applicant is a 23-year old citizen of Turkey. He is a member of a minority religious group, the Alevis; as well as a minority ethnic group, the Kurds. He is also a member of the Peoples' Democratic Party ("HDP"), a minority political party in Turkey.

[3] The Applicant departed Turkey on August 25, 2016, and travelled to Mexico via Russia and Cuba, apparently with the assistance of a smuggler. He subsequently entered the United States ("US"), where he was detained by the US Border Patrol on September 8, 2016. He made a refugee claim in the US while in detention. He was released from detention on October 28, 2016, and entered Canada on or about November 18, 2016, before his US refugee claim was determined.

[4] The Applicant has an uncle residing in Canada and was permitted to enter Canada and claim asylum under an exception to the *Canada-U.S. Safe Third Country Agreement* ("*STCA*").

[5] In his claim for refugee protection in Canada, the Applicant claimed that he feared returning to Turkey due to his religion, ethnicity, and his real or imputed "anti-government" political opinions. The Applicant alleged that he was a known political activist who had been the victim of attacks by Islamic Jihadists and supporters of the Nationalist Movement Party, and that he had been arrested, detained, and beaten by authorities on numerous occasions for participating in various political and religious events.

[6] The RPD found that there were material inconsistencies, omissions, and implausibilities in the evidence led by the Applicant to establish material aspects of his claim, specifically, that he was a known Kurdish political activist who had previously been arrested and tortured. These evidentiary concerns were outlined by the RPD as:

- In his narrative, the Applicant described being arrested and detained four times since 2013, and having been subject to torture. However, in his Schedule A Form, when asked if he had ever been incarcerated, he answered "no." Similarly, when the Applicant was interviewed by an officer at the port of entry (the "POE"), with the assistance of a Turkish interpreter, he answered "no" when asked whether he had ever been arrested or subjected to criminal proceedings.
- The POE officer asked the Applicant whether he had made an asylum claim in the US. The Applicant responded "no."
- When asked by the POE why he was seeking Canada's protection, the Applicant responded "My uncle lives here and the living standards are good here." When asked "what do you fear", the Applicant said "I am Kurdish and am afraid of living there." He did not mention his arrests or detentions, or being severely mistreated in Turkey.
- In his narrative, the Applicant mentions being a member of the HDP since 2014. His Schedule A form indicates that he was a member since 2007.

[7] The RPD decided that these issues undermined the Applicant's credibility. While acknowledging that the Applicant's current story was consistent with the story he gave to US officials, the RPD found that this suggested that the Applicant "has simply attempted to alter his evidence at or just before the hearing stage to align with the story he gave in the US INS notes". The RPD further speculated that the Applicant's story "was likely provided to him by the smuggler."

[8] The RPD also found that the Applicant's credibility was undermined by his failure to make an asylum claim in Mexico, or to "fully prosecute" his claim in the US, which indicated a lack of subjective fear. The RPD acknowledged the Applicant's explanation for not fully pursuing claims in either country – that his uncle was living in Canada, and could support him –

but held that “it simply does not make sense that he would not follow through on his asylum claim started in the USA if he truly feared persecution.” Further, the RPD noted that the Applicant was living in Toronto, while his uncle was in Edmonton, which undermined his explanation that he came to Canada because he needed to rely on his uncle for assistance.

[9] As well, the RPD took issue with the Applicant’s ability to leave Turkey on a genuine passport without issue. Given the stringent exit controls for international passengers at Turkey’s airports, the Panel doubted the Applicant would be able to leave so easily had he truly been a known activist. When the issue was put to him at the hearing, the Applicant explained that his father had arranged for a bribe to be made to airport officials, to facilitate his travel out of Turkey. The RPD found that this fact, which had never been mentioned before, was a material omission. They also found it implausible that a bribe would be sufficient, given the Applicant’s purported profile.

[10] The Panel acknowledged the claimant-specific documents led by the Applicant to support his claim, but found them unconvincing. A letter from the HDP indicating that the Applicant was a member (which was not on letterhead), simply stated he was a member of the HPD, without mentioning his level of involvement with the party, or any mistreatment he suffered as a result of being a member. The RPD noted a brief letter from a psychiatrist in Turkey (undated, and again without letterhead), which stated that the Applicant received therapy “because of the torture he suffered”, but gave it no weight “[g]iven the numerous unresolved inconsistencies in this case.” The RPD also noted that “no information was tendered by any Canadian physician or by the Canadian Center for Victims of Torture, for example.” The Panel further took note of letters

from the Applicant's family and friends, but assigned them little weight because the authors "were not made available to be…questioned by the panel." Overall, the RPD found a "paucity of corroborating documents that it would have expected to see in a case such as this."

[11] While the Panel accepted that the Applicant was an Alevi Kurd who may have participated in some political and religious events, it did not accept that he was a Kurdish political activist known to authorities who had been subject to detention and torture, or that he would attract severe harm at the hands of Turkish authorities were he to return to Turkey.

[12] The Panel went on to consider whether, solely on the basis of being an Alevi Kurd who supports the HDP, the Applicant would qualify for protection under either sections 96 or 97 (i.e. the "Residual Claim").

[13] The Panel acknowledged the evidence from the National Documentation Package that Kurdish political activists and human rights defenders, as well as senior members of the HDP, are subject to severe treatment at the hands of authorities. However, evidence from the United Kingdom ("UK") Home Office's "Country Information and Guidance" report on Turkey was also considered, which suggested that ordinary HDP members generally do not come to the adverse attention of authorities, unless participating in demonstrations and rallies. The Panel found that the Applicant did not fit the profile of someone likely to attract the attention of Turkish authorities for harsh treatment in the future.

[14] Finally, the RPD considered and accepted evidence detailing societal abuses of and discrimination against Alevis. However, it also considered and accepted evidence from the UK Home Office which, while documenting evidence of unequal treatment and "isolated incidents of societal discrimination and violence", concludes that Alevi's are "unlikely to encounter ill-treatment by the authorities amounting to persecution solely on the grounds of religious belief." The RPD also noted the lack of credible or trustworthy evidence that the Applicant had difficulty practicing his faith in Turkey, or would have difficulty if he returned there. The RPD concluded that the Applicant did not qualify for protection pursuant to sections 96 or 97 as a result of his religious identity.

III. Issues

[15] The issues are:

A. Was the RPD's decision on credibility unreasonable?
B. Was the RPD's consideration of the Applicant's failure to report his claim of asylum in the United States or to make a claim in Mexico an error in law or unreasonable?
C. Did the RPD unreasonably consider the evidence relating to the Applicant's departure from Turkey?
D. Did the RPD misapply the test to qualify for protection under section 96?
E. Did the RPD err by relying on documents from the UK?
F. Did the RPD fail to consider that the Applicant would remain politically active in holding he was not in need of protection?

IV. Standard of Review

[16] The standard of review is reasonableness, given that the issues relate to questions of fact and mixed fact and law.

V. Analysis

A. *Was the RPD's decision on credibility unreasonable?*

[17] The Applicant points to two documents before the RPD which were not referred to in their reasons. He argues that these documents support the Applicant's claim that he had been detained and abused by Turkish authorities, and that the RPD erred by not referring to them.

[18] The first of these documents purports to be a letter from Hakan Dicle, a lawyer in Turkey, dated January 12, 2017, who represented the Applicant each time he was detained by police. It is sent in support of the Applicant's Canadian refugee claim, and it outlines the dates of each detention, as well as his difficulties in getting his client released. It states that his client was "mistreated" during all detentions, but that during the last detention he was "subjected to a severe torture." The document is not signed, and without letterhead. The image is partially unreadable – which appears to be the result of this document having been faxed.

[19] The second document is a report from Nanette Mills, a registered psychotherapist in Toronto, produced in support of the application. Ms. Mills interviewed and assessed the Applicant. She reports that the Applicant was forthcoming, and that the "fear, discrimination,

threats and violence he has experienced have resulted in deleterious psychological after-effects." She further reports that the Applicant is exhibiting symptoms consistent with post-traumatic stress disorder ("PTSD"). The Applicant argues that it was particularly erroneous for the RPD to ignore this report, given their stated concern that "no information was tendered by any Canadian physician or by the Canadian Center for victims of torture."

[20] Reasons of administrative agencies are not to be read hypercritically, and decision makers are not required to refer to every piece of evidence which is contrary to their finding. 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'" (*Cepeda-Gutierrez v Canada* 1998, CanLII 8667 at paras 15-16 (FC) [*Cepeda-Gutierrez*]).

[21] I find that the RPD did not err by not specifically referring to these documents. The RPD's conclusion was not based solely, or even largely, on the lack of corroborating documents. Rather, the RPD was centrally concerned with "numerous material inconsistencies, omissions and implausibilities" in the Applicant's evidence, which were extensively detailed in the RPD's reasons. These included:

- **Discrepancies** in the Applicant's own version of events as to whether or not he had ever been arrested or detained, and how long he had been a member of the HDP;
- **Omissions** of having claimed refugee status in the US, having bribed an official at the Turkish airport, and of being arrested or detained in Turkey; and
- The **implausibility** of exiting Turkey without issue after paying a bribe to an official, despite being a known political activist who had been tortured by the authorities

[22] While the documents relied on by the Applicant may lend some support to the Applicant's overall narrative, they do not cure the above defects in the Applicant's own evidence, which appears to have been the central basis of the RPD's decision. The evidence is not of sufficient importance that the RPD erred by not specifically referring to it. Contrary to the Applicant's argument, the importance of these two documents does not rise to the level of what was considered in *Cepeda-Gutierrez*.

[23] Finally, the Applicant's argument that it was an error for the RPD to hold that "no information was tendered by any Canadian physician or by the Canadian Center for Victims of Torture" given Ms. Mills' report, is without merit. The author of the report led by the Applicant is not a physician, but rather a psychotherapist. The RPD's specific use of the word "physician" in this context implies that they were aware of Ms. Mills' report.

[24] Finally, there is certainly a reasonable basis in the evidence for the Panel's adverse credibility findings, notwithstanding the fact the two documents referred to by the Applicant were not mentioned or addressed.

[25] As stated by Chief Justice Crampton in *Kaur v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1379, at paragraphs 33-34:

> **33** In my view, this recent jurisprudence from the Supreme Court has significantly reduced the scope for setting aside decisions of the Board on the basis that it did not consider or did not sufficiently consider the contents of a psychologist's report. It has also significantly narrowed the range of potential circumstances in which the Board may be said to have an obligation to explicitly consider and address, in its reasons, the contents of a psychologist's report in making credibility findings.

> **34** If the Court can ascertain any reasonable basis in the evidence for the Board's adverse credibility findings, or if those findings can be said to be rationally supported, for example, on the basis of confirmed and important inconsistencies, contradictions or omissions [ICOs] in the evidence, those findings should ordinarily withstand the Court's review (Dunsmuir, above at para 41). This is true even if the evidence in question is not specifically mentioned, or is only partially addressed, in the Board's decision.
>
> Emphasis in original

B. *Was the RPD's consideration of the Applicant's failure to report his claim of asylum in the United States or to make a claim in Mexico an error in law or unreasonable?*

[26] The Applicant appears to make several arguments here. First, the RPD's consideration of this factor would necessarily have been different had they not ignored a psychotherapist's report, which indicated that the Applicant has PTSD. Second, the RPD erred when it stated that "the claimant illegally entered Canada", which then undermined their analysis. Third, the RPD unreasonably "speculated" about when refugees will seek protection, "generally speaking", and wrongly assessed the subjective nature of the Applicant's fear through objective terms. Finally, the RPD was mechanical in its analysis of this factor, and it should have considered that the US might not have protected the Applicant, in which case his failure to complete his claim in the US actually supports his subjective fear.

[27] The Respondent acknowledges that, in one instance, the RPD incorrectly stated that the Applicant's entry to Canada was "illegal", but argues that it has nothing to do with the analysis of the Applicant's subjective fear. The Respondent also points to case law which holds that delays in seeking asylum may indicate a lack of subjective fear, and argues that it was open for the RPD to consider this factor here.

[28] With respect to the psychotherapist's report, this document was not "ignored." Moreover, the report does not state that the Applicant "has PTSD", but rather that he is exhibiting symptoms consistent with PTSD. Finally, when asked why he came to Canada, the Applicant did not offer his psychological condition as an explanation. Rather, he stated that it was always his intention to come to Canada, where he has an uncle.

[29] The remainder of the Applicant's arguments amount to taking a microscopic view of the RPD's reasons, and/or a request for the Court to reweigh the evidence differently. The RPD did state, wrongly, that the Applicant entered Canada illegally. However, elsewhere in the Decision, the RPD recognized that the Applicant "was allowed to enter into Canada because he has a maternal uncle in Canada" (para 2). Contrary to the Applicant's submissions, when the RPD decision is read in context, it is clear that the reference to "illegality" is not a basis for the RPD's assessment of this factor. Rather, the RPD examined the Applicant's failure to claim elsewhere, as well as the Applicant's explanation for why he was living in Toronto as opposed to Edmonton, which it found unconvincing.

[30] As well, the Applicant's failure to claim at an earlier opportunity is a relevant factor when assessing an applicant's subjective fear, even when an applicant arrives in Canada by way of an exception to the *STCA*. This factor was not treated mechanically as suggested by the Applicant. The RPD considered the Applicant's explanation for why, in spite of his purported fear of persecution, he waited until arriving in Canada before fully seeking protection. It found this explanation unconvincing, noting that the Applicant was living alone in Toronto rather than in Edmonton with his uncle, whose support he apparently required. Finally, while the Applicant

did offer an explanation for why he was living in Toronto– there are more services for Kurdish refugees, and the claim would be more likely to succeed there – it was not unreasonable for the RPD to note that the Applicant's vast separation from his uncle was inconsistent with his assertion that his uncle's support was essential to him.

C. *Did the RPD unreasonably consider the evidence relating to the Applicant's departure from Turkey?*

[31] The RPD held that it was implausible that Applicant was able to leave via a Turkish airport, where Turkish citizens are subject to exit requirements, after simply bribing an airport official. The Applicant argues that this was unreasonable because it selectively ignores evidence that authorities at Turkish airports only check for defaults in military service, arrest warrants, and tax arrears, none of which applied to the Applicant.

[32] The Respondent argues that it was reasonable for the RPD to note the apparent ease by which the Applicant left Turkey, despite being known to Turkish authorities, as well as the "evolving evidence" that a bribe was required to leave the country.

[33] The RPD's consideration of this factor was reasonable. The evidence before the Panel was not that exit-checks are *only* for warrants, defaults in military service, or tax arrears, but that Turkish officials scan for "the person's military status along with other information, such as convictions, arrest warrants and tax arrears". It was reasonable for the RPD to think that the Applicant's apparently extensive history with Turkish police might also come up as part of this search, and to ask more about it. Further, if the Applicant is now arguing that the exit

requirements were of no concern, it is unclear why he would need to bribe airport officials at all. It cannot be maintained that it was unreasonable for the RPD to consider this factor, as well as the Applicant's belated evidence regarding the bribe.

D. *Did the RPD misapply the test to qualify for protection under section 96?*

[34] The Applicant argues that it is unclear whether or not the RPD understood the correct test under section 96 (whether there was a serious possibility of persecution) because at a certain point it states that the Applicant was not "likely to attract the attention of Turkish authorities" (para 28), thus suggesting a balance of probabilities test. The Applicant argues that this Court cannot be certain the correct test was employed, and the decision should therefore be quashed. The Applicant also relies on case law holding that merely reciting the correct test in one part of the reasons does not necessarily mean that the decision-maker applied the correct legal test throughout (*Talipoglu v Canada (Minister of Citizenship and Immigration)*, 2014 FC 172 at para 31).

[35] When the Decision is read as a whole, it is clear that the RPD understood and applied the correct test. It is referenced, repeatedly, throughout the reasons:

> The panel also considered whether the claimant would meet the burden of proving a serious possibility of persecution… (para 24)
>
> Accordingly, the panel finds that the claimant is an Alevi who was a supporter of the BDP (now HDP) but not a party member and who may attend peaceful legal demonstrations and practice his faith has not established that he has a serious possibility of harm rising to the level of persecution if he were to return to Turkey (para 34).
>
> …there is no persuasive evidence before the panel that the claimant has a profile that would attract attention of the Turkish

> authorities and the panel finds that there is not a serious possibility of persecution or risk of harm as the claimant does not have the profile of an Alevi Kurd likely to experience such treatment in a systemic way (para 35).

[36] The excerpt quoted above shows a distinction between evidentiary findings ("there is no persuasive evidence before the panel that…") and the ultimate legal test being applied ("the panel finds that there is not a serious possibility of persecution").

E. *Did the RPD err by relying on documents from the United Kingdom (UK)?*

[37] The Applicant argues that the RPD erred by relying on documents from the UK, because UK immigration laws employ a different, higher test for obtaining refugee protection (a "reasonable degree of likelihood").

[38] The RPD relied on information about Turkey from the UK Home Office as *evidence* in its assessment of the conditions for Alevi Kurds in Turkey. In did not err in doing so. The RPD is entitled to consider any evidence it considers credible and trustworthy. Nothing in the RPD's analysis on this point suggests that the RPD employed an incorrect, UK-based legal test for assessing whether the Applicant qualified for protection.

F. *Did the RPD fail to consider that the Applicant would remain politically active in holding he was not in need of protection?*

[39] The Applicant argues that the RPD failed to consider that he would continue attending peaceful demonstrations, which would put him at risk. The Respondent does not address this point.

[40] The RPD *did* acknowledge that the Applicant may continue attending demonstrations:

> …the panel finds that the claimant is an Alevi who was a supporter of the BDP (HDP) but not a party member and who may attend peaceful legal demonstrations and practice his faith has not established that he has a serious possibility of harm rising to the level of persecution if he were to return to Turkey at present" (para 34, emphasis added)

[41] The RPD accepted documentary evidence that "when ordinary members of the HDP have come to the adverse attention of the authorities, this has generally been whilst participating in demonstrations and rallies", which might appear to contradict their conclusion that the Applicant was not "likely to attract the attention of Turkish authorities for harsh treatment in the future."

[42] However, the RPD's overall assessment of the conditions in Turkey – that, generally, supporters of the HPD would not ordinarily come to the attention of the authorities, unless they were senior or otherwise well known – was reasonably open to them on the record. The conclusion that the Applicant would not face a serious possibility of persecution was reasonable.

JUDGMENT in IMM-1607-17

THIS COURT'S JUDGMENT is that:

1. The application is dismissed;

2. There is no question for certification.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1607-17
STYLE OF CAUSE:	YUSUK MAMIS v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 3, 2017
JUDGMENT AND REASONS:	MANSON J.
DATED:	OCTOBER 12, 2017

APPEARANCES:

Micheal Crane	FOR THE APPLICANT
Catherine Vasilaros	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Micheal Crane Barrister & Solicitor Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT