Date: 20080526

Docket: IMM-3875-07

Citation: 2008 FC 664

Ottawa, Ontario, May 26, 2008

PRESENT: The Honourable Mr. Orville Frenette

BETWEEN:

CAN GUNES

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant seeks review, under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act), of a decision of the Refugee Protection Division of the Immigration and Refugee Protection Board (Board), dated August 15, 2007, determining that he is neither a Convention refugee nor a person in need of protection. Leave to seek judicial review in this matter was granted by Order dated March 3, 2008.

I. Factual summary

[2] The applicant, a 32-year old citizen of Turkey, made an in-land claim for refugee protection on February 22, 2006 on the basis of his religion, political opinion, and membership in a particular social group under sections 96 and 97 of the Act. The Applicant is an Alevi Kurd and a supporter of the Socialist Democratic Party (SDP).

[3] The applicant alleged that on a number of occasions he was arrested and detained by the police and had suffered from the attacks by nationalists and fundamentalists in Turkey.

[4] The applicant alleged that in November 2005, while he was hosting a gathering at his house for friends and members of the SDP, the police arrived, detained the applicant, and accused him of liaising with an illegal organization. The applicant was then allegedly tortured. He was cut in the back of the neck, suffered cigarette burns on his hand and fist and cuts on his fingers. It is that incident that caused the applicant to flee Turkey and come to Canada.

[5] After his departure from Turkey, the Police arresting his sister and his father to find out where the applicant had gone. He fears what the Police would do to him if he returned to Turkey.

II. The decision under review

[6] In its decision, the Board made negative credibility findings expressing doubt that the events of November 2005 happened. The Board concluded that the applicant's case failed. The Board then determined that there was insufficient evidence to find that the applicant was in need of refugee protection on the basis of his religion and as a member of a particular social group.

[7] The applicant seeks judicial review of the Board's decision.

III. The standard of review

[8] In order to assess the Board's decision, it is necessary to establish the appropriate standard of review and apply it to the Board's decision. The question is whether the Board erred in making its negative credibility findings. Credibility findings are akin to factual findings.

[9] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9 (QL), the Supreme Court of Canada has recently modified the analytical framework for judicial review of an administrative action by abandoning, *inter alia*, the distinction between reasonableness *simpliciter* and patent unreasonableness, thus establishing two standards of review, i.e. correctness and reasonableness.

[10] The process of judicial review now involves two steps outlined in paragraph 62:

> …First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of defence to be

> accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

[11] In paragraph 160, the Supreme Court established that, unlike under the pragmatic and functional approach, all factors need not be considered in every case in order to determine the appropriate standard of review.

[12] There is no reason why the existing jurisprudence is unsatisfactory and should not apply in this case. Pursuant to the existing jurisprudence, the Court should evaluate the decision against the old standard of patent unreasonableness (*Pushpanathan v. Canada (MCI)*, [1998] 1 S.C.R. 982, 226 N.R. 201).

[13] According to the new standard, as set out in paragraph 161 of *Dunsmuir*, "…decisions on questions of fact always attract deference", and "…when the issue is limited to questions of fact, there is no need to enquire into any other factor in order to determine that deference is owed to an administrative decision maker". Reasonableness is therefore the appropriate standard of review in this case.

[14] In paragraph 47, the Supreme Court observed as follows.

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision

> falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[15] In a very recent decision of the Federal Court of Appeal in *Canada (A.G.) v. Grover*, 2008 FCA 97, [2008] F.C.J. No. 401 (QL), the Court wrote at para. 6:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable and in particular whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law. The decision of the adjudicator does fall within that range.

IV. The evidence (summarized)

[16] The applicant claims to be an Alevi Kurd with leftist political views and suffered a history of arrests and detentions by the police, going back to his last year of high school (1988 or 1989). He then became a supporter of the SDP, a legal political entity in Turkey. But he did not become a member because it would have negatively affected his opportunities in the labour market.

[17] He was arrested and jailed for two days in March 2005, and he stated that during a political gathering held at his house in November 2005, he was arrested by the police, accused of having a liaison with an illegal organization. He was tortured by the police and shows scars on his body resulting from this torture. He then decided to seek protection in Canada.

[18] The applicant filed affidavits as to his ethnicity as an Alevi Kurd; he also filed a letter from a representative of the SDP, stating that he participated in the SDP's activities until November 2005.

[19] A letter, signed by a nurse, Derya Hekim who administered “temporary treatment” to the applicant, who exhibited “black and blue marks, cuts, scars and swellings (scars which she suspected has been caused by cigarette burns)”. The applicant also filed a medical report prepared by Dr. A.I. Hirsz, M.D., of April 23, 2007, stating that he examined the applicant and observed objective signs of physical abuse, scars, cuts and a classic cigarette burn scar at the back of his right foot (7 mm x 7 mm circle). These scars were consistent with the applicant’s testimony of beatings and torture.

[20] He had other symptoms consistent with posttraumatic stress disorder. The applicant also produced a report of March 24, 2007, prepared by Gerald H. Devins, Ph.D., a consulting and clinical psychologist who made a psychological assessment of the applicant concluding that the applicant suffered from a chronic posttraumatic stress disorder consistent with his traumatic experience in Turkey. Dr. Donald E. Payne, a psychiatrist from Toronto, also confirmed the diagnosis of “posttraumatic stress disorder”.

[21] The evidence includes international documentation and reports on the situation in Turkey, which reveal that the state forces in Turkey, either the police or other security forces, exercised violent repression, torture and violation of basic human rights. This documentation reveals the existence of police abuse of citizens who have unsuccessfully sought refuge in foreign counties and had to return to Turkey.

[22] A report of the U.S. Department of State cites a 2006 report on Human Rights Practices in Turkey (published on March 5, 2007), mentioning torture by a group of marked police officers who extinguished cigarettes on the body of a detainee.

V. Applicant's arguments

[23] The applicant submits that:

a.) The Board erred in its decision, failed to assess the totality of the evidence. The Board ignored or discarded corroborating evidence supporting his explanations concerning his religion, his political views and the resulting persecution;

b.) The Board erroneously concluded that the applicant was not credible and his recital of the events was implausible; and

c.) The Board failed to consider and give due weight to the medical and psychological reports, particularly their value in assessing the credibility of the applicant who suffered from post traumatic stress disorder.

VI. Respondent's arguments

[24] The respondent submits that:

a.) The Board's finding regarding credibility and plausibility of the evidence was well within their domain and was reasonably justified by the facts in the record;

b.) The Board considered all of the evidence and drew conclusions which were based upon the facts;

c.) The Board considered the documentary evidence which did not confirm the applicant's testimony; and

d.) The Board considered the opinions of the psychologist and the medical doctor. These reports did not establish when these objective signs of traumatic events in the past or scars may have occurred.

VII. Analysis

[25] It is trite law to repeat that administrative tribunals possess a vast discretion in matters of assessing the facts, on questions of weight to be given to the evidence, on credibility and plausibility.

[26] Courts give deferential treatment to administrative decisions on factual findings, weight and the factors mentioned above. The Court will only intervene if it is shown that the findings cannot reasonably be supported by any evidence (*Stelco Inc. v. British Steel Canada Inc.*, [2000] 3 F.C. 282, 252 N.R. 364 (C.A.)).

VIII. Did the Board adequately assess the totality of the evidence?

[27] The Board considered the applicant's evidence and numerous documents he produced to support his version of the events and the torture he suffered in Turkey. The Board discarded his contentions that he supported the SDP and spent wasteful time distinguishing membership or support to such a Party. The Board simply stated that the events of November 2005 did not happen. It was a fabrication. The supporting documentary evidence did not uphold the applicant's version.

[28] The assessment of the Board was too superficial, and even if it did not grant credibility of plausibility to the applicant's version, it could not ignore all the evidence, such as the letter from the SDP confirming that he had made contributions to the Party and the general documentation as to the treatment of Alevi Kurds in Turkey and the evidence of torture (*Kaur v. Canada (MCI)*, 2005 FC 1491 at para. 24, 143 A.C.W.S. (3d) 1094).

IX. Did the Board disregard the evidence of torture?

[29] I believe the Board disregarded factual evidence such as the objective signs of torture such as cuts, scars and psychological trauma with its consequences.

[30] First, there is the letter from the nurse who states she medically treated the applicant in Turkey for injuries, cuts and scars which could have resulted from physical aggressions he described.

[31] Second, the medical report of Dr. A.I. Hirsz made in Canada in 2007, who observed signs of torture or physical abuse on the body of the applicant, such as “a classic cigarette burn”. He also wrote in his report that the applicant was affected by posttraumatic stress disorder. The psychological report of Gerald H. Devins, who made a psychological assessment of the applicant also concluded he suffered from post-traumatic stress disorder; confirmed by Dr. Donald E. Payne, a psychiatrist.

[32] The Board accepted the opinions of these three expert witnesses, yet it concluded it was not bound by the view of medical people as to what caused these injuries. The Board also disregarded the diagnostic of post-traumatic stress disorder and its effects on implausibilities in the testimony of the applicant and his responses to questions (*Chen v. Canada (MCI)*, (1995) F.C.J. 1070 at para. 18 (QL)).

[33] It is difficult to understand how a tribunal could ignore the logical and obvious cause of torture such as cuts and “cigarette burn”, especially when it is shown in the document “Amnesty International report of November 16, 2004, at page 17) that in parts of Turkey, systematic torture and impunity for perpetrators, was still practised. There is no doubt that the Board could evaluate expert witnesses opinions and decide on the quality of the evidence and the extent to which it was central to a claim (*Gosal v. Canada (MCI)* (1998), 78 A.C.W.S. (3d) 577, [1998] F.C.J. No. 346 (T.D.) (QL).

[34] The Board might be sceptical in assessing expert opinion evidence particularly when the factual foundation is based upon a summary of the version given to the expert by the person being examined (*Canada (MCI) v. Szoradi*, 2003 FCT 388, 122 A.C.W.S. (3d) 343). In *Gardanzari v. Canada (MCI)*, 2005 FC 1047, 141 A.C.W.S. (3d) 618, Justice Richard Mosley refused to grant a judicial review in a case where a psychiatrist presented a report and later submitted an amended report. Justice Mosley based his decision on the first report because the factual foundation of the amended report was found to be not credible by the Board.

[35] In *Ameir v. Canada (MCI)*, 2005 FC 876, 47 Imm. L.R. (3d) 169, Justice Edmond P. Blanchard, in a well reasoned decision, granted an application for judicial review in a case where the latter claimed refugee protection based upon a well-founded fear of persecution because he had been arrested and beaten on several occasions since he supported an opposition political group in Tanzania. The decision was based upon the failure of the Board to give any weight to the clinical opinion of Dr. Hirsz who noted scars and Dr. Devins's and Dr. Payne's psychological report who reported the physical symptoms resulting from the ill-treatment suffered in the hands of Turkish authorities (para. 27).

[36] It follows that the Board should have considered more profoundly the expert medical opinions in the present case before deciding the credibility of the applicant's version of the facts and the implausibility of his story.

[37] Failure to do so constitutes a reviewable error which merits a referral back of this matter for reconsideration.

JUDGMENT

THIS COURT ORDERS that:

1. This application for judicial review is allowed and the matter is to be referred to another officer of the Board for reconsideration.

2. No question of general importance is to be certified.

"Orville Frenette"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

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