

Date: 20081008

Docket: IMM-1424-08

Citation: 2008 FC 1134

Ottawa, Ontario, October 8, 2008

Present: The Honourable Mr. Justice Zinn

BETWEEN:

SEYIT OZAN GUNEY

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant tried to bolster his claim for refugee status, more than a year later, by inventing an additional basis for protection. The Board found that this new lie rendered the Applicant's evidence, as a whole, not to be credible and thus did no real analysis of the rest of his story. For the reasons that follow, I am of the view that this approach was unreasonable and that this decision must be set aside.

BACKGROUND

[2] Mr. Guney is a 29 year-old Turkish national of Kurdish descent. He is an adherent of the Alevi sect of Islam. He alleges that he faces persecution in Turkey on account of his nationality and his political opinions, and that he is at risk of cruel and unusual treatment, or torture, in Turkey.

[3] In the personal narrative submitted in support of his claim, Mr. Guney relates that growing up in Istanbul, he faced discrimination and prejudice from Turkish society at large on account of his Kurdish descent and Alevi faith, particularly from nationalists and religious fundamentalists. In his adult life, however, he has had to contend with more than generalized prejudice and harassment. On three occasions he has been arrested and detained by the Turkish authorities. In November of 2003, he was taken into custody and beaten after being stopped for wearing a T-shirt with an Alevi slogan. In July of 2005, he was arrested for participating in a demonstration commemorating the 1993 Sivas Massacre of 37 Alevis. He was detained overnight, accused of being a Kurdish separatist, and beaten. This happened again at the following year's commemoration. This time he was beaten for refusing to provide the police with information about others who had attended the Sivas event, and told that he would be watched.

[4] At the hearing of his claim, the applicant detailed the beatings in the following terms: "Our eyes, we were blindfolded... There is a style which is called *falaka*, and we were punished that way. And because we were – our hands were tied at the back and we were blindfolded, we didn't know where the blows were coming from – and we were unable to defend ourselves. They were just hitting all over."

[5] Mr. Guney also suspects that in 2006 he was falsely reported as a PKK sympathizer by a Turkish military officers' son with whom he worked on a cruise ship – the “*Summit*” - in 2005/2006. This because in May of 2006, upon his return to Turkey, he was interrogated for three hours about his time abroad and “problems” he had with other Turkish crew members. These crew members had accused him of being a PKK sympathizer and one of them went so far as to assault him at a port of call.

[6] It was his third arrest and detention that prompted Mr. Guney to leave Turkey and seek refugee status abroad. He came to Vancouver on July 28, 2006, ostensibly to rejoin the “*Summit*” for an Alaskan run. Rather than board the ship, however, he instead went to Toronto, where he claimed protection on September 8, 2006. Subsequently, on November 23, 2007, he amended his claim to include a second ground for protection, namely a fear of persecution on account of his conscientious objection to mandatory military service.

[7] The Refugee Protection Division’s decision in this matter is relatively brief. The RPD found that Mr. Guney’s failure to initially include conscientious objection as an element of his claim undermined his credibility:

The panel concludes that the objection to military service which the claimant alleged at his hearing has been fabricated, or made up, after completing the Personal Information Form in order to bolster the claim for persecution. The panel does not accept, or believe, that the claimant has an objection to military service in Turkey which would form the basis for his claim to refugee protection.

[8] The RPD considered that this negative credibility finding could be extended to the whole of Mr. Guney's testimony, and stated as follows:

This leaves the claimant's allegations with respect to the history of three arrests and detentions. However, because the applicant has manufactured one arm of his claim, one of the two bases of his claim for protection in Canada, the panel finds that it cannot rely on the other arm either. That is, the claimant's testimony in general is neither reliable nor credible, and as such it cannot support his claim on any arm, or basis. (emphasis added)

[9] Having made this statement, the RPD went on to note that even if it *had* found that Mr. Guney had been arrested and detained on three occasions, this would not demonstrate more than a mere possibility of persecution or exposure to section 97 risks. It was noted that Mr. Guney has worked continuously in an occupation requiring international travel without any hindrance. The RPD closed its decision with the observation that "in Turkey today, people are not in need of refugee protection simply because of their ethnic and religious background."

ISSUES

[10] The Applicant raises two issues:

- (a) Whether the RPD erred by extending a single discrete negative credibility finding to the entirety of the Applicant's testimony; and
- (b) Whether, in considering the other ground advanced by the Applicant, the reasons of the RPD were tainted by the negative credibility finding and were deficient.

ANALYSIS

Did the RPD err by extending a single discrete negative credibility finding to the entirety of the Applicant's testimony?

[11] The Applicant submits that by extending a single discrete negative credibility finding to the entirety of the Applicant's testimony, the RPD overlooked the presumption of truthful testimony affirmed in *Maldonado v. Canada*, [1979] F.C.J No. 248, and more recently in *Zheng v. Canada*, 2007 FC 974. The Applicant also relies on the decision of the Supreme Court of Canada in *R. v. Latour*, [1950] S.C.R. 19, in which it was held that a judge's direction to a jury, to the effect that if on one point they found the evidence of a witness to be deliberately untrue they could not believe him in any other particular, "was a misdirection of a most serious nature and tantamount to an encroachment upon the right of full answer and defence."

[12] The Respondent submits that it was open to the RPD to extend its negative credibility finding with respect to conscientious objection to the entirety of the Applicant's testimony, and relies on the Court of Appeal's decision in *Sheikh v. Canada*, [1990] 3 F.C. 238, in this regard. In that case, the Court affirmed that "a general finding of a lack of credibility on the part of the applicant may conceivably extend to all relevant evidence emanating from his testimony".

[13] In my view, in this case, the RPD's extension of its negative credibility finding on the claim of conscientious objection to the entirety of the Applicant's testimony was unreasonable.

[14] Justice Evans in *Rahaman v Canada*, 2002 FCA 89, explained that the *Sheikh* decision relied on by the Respondent was intended to provide guidance with respect to the "no credible

basis” test which existed under the predecessor to *Immigration and Refugee Protection Act*. At the time, a claim could be screened out at the preliminary stage of a two-step determination process if it lacked a credible basis. *Sheikh* clarified that in cases where a claimant’s testimony is all that links him or her to the persecution alleged (aside from general country of origin documentation), a finding that the claimant is not credible effectively amounts to a finding that the claim as a whole has no credible basis.

[15] It is true that *Sheikh* has had an after-life under the current Act, where it has occasionally been taken as authority for the proposition that a tribunal’s perception that a claimant is not credible on an important element of his or her claim can undermine the claimant’s credibility altogether: See, for example, *Chavez v. Canada*, 2005 FC 962, and *Oukacine v. Canada*, 2006 FC 1376. There are also other authorities submitted by the Respondent, some of which do not reference *Sheikh* where the Board has rejected the whole of a claimant’s evidence on the basis of a lack of credibility of a part of his story and where reviews of the decisions have been denied by this Court. However, in my view, those cases are all distinguishable from the case before the Court here.

[16] *Sheikh* was concerned with the relationship of a claimant’s testimony to other evidence, not with the relationship of testimony to the testimony of the claimant as a whole. Similarly, in other cases submitted by the Respondent, the Board examined and compared the evidence of the claimant to other evidence, and it was on the basis of this comparison that the claimant was found not to be generally credible. In *Pineda v. Canada (The Minister of Citizenship and Immigration)*, 2007 FC 889, the Board determined that “there were implausibilities, inconsistencies, and discrepancies in

his testimony and his Personal Information Form (PIF), in relation to major elements or incidents alleged in support of his claim”. In *Tekin v. Canada (The Minister of Citizenship and Immigration)*, 2003 FC 357, the Board similarly compared the testimony of the claimant to his PIF narrative and to a United States Department of State Country Report in finding that his evidence was not credible.

[17] Those situations are markedly different from the facts at hand. Here the Board disbelieved the Applicant’s claim to have an objection to conscription because it was submitted so long after the original PIF was provided. That finding was reasonably open to the Board, as was its determination that the Applicant had advanced this claim to bolster his refugee claim. However, in my view, it was not reasonable for the Board to conclude that because the Applicant fabricated one part of his story to bolster his claim, he was generally not a credible witness, especially where the fabricated part had little or no bearing on the remainder of his story. The fact that a witness has been caught in one lie, in itself, is insufficient to discredit all of his evidence, where, as here, the evidence is otherwise plausible and consistent.

[18] Absent a finding of a general lack of credibility on reasonable grounds, the Board could not simply dismiss the remainder of the Applicant’s testimony. Having said that, the Board did go on to consider the remainder of the Applicant’s claim as if its negative credibility finding had not been made.

Were the reasons of the RPD were tainted by the negative credibility finding and were they deficient?

[19] While acknowledging that the RPD provided alternative reasons for rejecting the claim, the Applicant submits that these reasons were not only tainted by the negative credibility finding, they were also deficient in that the RPD made them without referring to any documentary evidence whatsoever. It is submitted that at the very least it would have been necessary to consider documentation suggesting that torture of detainees, in particular politically active Kurds, remains common in Turkey.

[20] The Respondent submits that the RPD's alternative findings concerning the remaining aspect of Mr. Guney's claim were open to it. As it was held by the Court of Appeal in *Sagharichi v. Canada (Minister of Citizenship and Immigration)*, [1993] F.C.J. No. 796, it is within the RPD's authority to evaluate whether or not a series of events is serious or systematic enough to constitute persecution; that the Applicant was allegedly detained three times does not mean that he was persecuted. What is more, it is not for the Court to re-weigh evidence the RPD deemed insufficient to show more than a mere possibility of risk.

[21] In my view, the RPD's alternative findings do not save its decision. The Board offers only a peremptory conclusion that the Applicant's three detentions and beatings at the hands of the authorities don't amount to persecution. The Board merely states the evidence and its conclusion – it does not analyze the evidence or refer to other evidence before it. There was an alleged nexus between his detentions and beatings and Convention grounds that required at least a minimal analysis of the documentary evidence of repression of Kurdish activists in Turkey, in line with the

principle expressed in *Cepeda-Gutierrez v. Canada*, [1998] F.C.J. No 1425. Without such an analysis, the decision is fatally lacking in transparency and cannot be qualified as reasonable.

[22] For all of these reasons the decision is set aside. Neither party proposed a question for certification and on the facts of this case, I am of the view that no question can be certified.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is allowed and the matter is remitted for a redetermination before a different panel; and
2. No question is certified.

“Russel W. Zinn”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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THE MINISTER OF CITIZENSHIP AND
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**REASONS FOR JUDGMENT
AND JUDGMENT:** ZINN J.

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