

Date: 20081127

Docket: IMM-5395-07

Citation: 2008 FC 1328

Ottawa, Ontario, November 27, 2008

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

ERTAN AYILAN

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR ORDER AND ORDER

[1] Ertan Ayilan applies for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the “Board”) dated December 3, 2007. The Board decided that Mr. Ayilan had not established a well founded fear of persecution, or of risk of cruel or unusual treatment or punishment, or of torture under sections 96 and 97 of the *Immigration and Refugee Protection Act*, (the Act) 2001, c.27.

[2] I have decided that the application for judicial review succeeds in part for reasons that follow.

BACKGROUND

[3] Mr. Ayilan is a Kurd from Bingol in southeast Turkey. He was an active supporter, though not a member, of HADEP a pro-Kurdish party; he says he became a member of DEHAP, a successor party. Mr. Ayilan says that he was arrested and detained first in 1995 when he was rounded up along with other villagers by the military and again in 1999 when he was arrested by the police in Istanbul during Newroz celebrations. In 2001, he says he fled the police in Bingol while distributing protest flyers for HADEP and he decided to leave Turkey after a companion was arrested.

[4] Mr. Ayilan left Turkey for Israel in 2001. He returned in 2005, stayed two months and left again for Israel. In June 2005, he travelled to Canada on a false passport and made his claim for protection in Canada on July 3, 2005.

[5] Mr. Ayilan claims that as a supporter of HADEP he has been subject to attention by Turkish authorities. He fears he would be persecuted if he returned to Turkey.

[6] The Board accepted that Mr. Ayilan was a Kurd from southeast Turkey. The Board found that Mr. Ayilan did not give a credible account of his association with HADEP. It found he did not

provide credible evidence to prove the police's interest in him. The Board gave no weight to his DEHAP membership form noting discrepancies in the document which were not sufficiently explained. The Board found it significant that Mr. Ayilan had not lived in Turkey since February 2001 except for a two month period in 2005. Since there was insufficient credible evidence that the police had an interest in Mr. Ayilan because of his political activities, the Board decided that he was not a Convention refugee, nor a person in need of protection.

ISSUES

[7] The issues in this judicial review are:

1. Did the Board err in deciding the evidence was insufficient to prove Mr. Ayilan was the subject of police interest?
2. Did the Board fail to consider relevant evidence in the section 97 analysis?

STANDARD OF REVIEW

[8] The Board's assessment of factual evidence is to be reviewed on the standard of reasonableness. *Sukhu v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 427, at para. 15.

[9] The Board's assessment of the factual evidence with respect to the risk of persecution that Mr. Ayilan would face on return to Turkey should also be assessed on the standard of reasonableness. *Sivanathan v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 1199, at para. 7.

ANALYSIS

Did the Board err in deciding the evidence was insufficient to prove Mr. Ayilan was the subject of police interest?

[10] Mr. Ayilan submits that the Board erred in that it failed to give due weight to his membership documentation, in particular:

- a. The genuineness of the application form was not questioned;
- b. The original, filed at the hearing, bore a DEHAP stamp overlaying a photo of Mr. Ayilan;
- c. The Board ought not to have disregarded the DEHAP documentation simply because his address was listed as Karakocan, Turkey when he claimed to be living in Israel. Mr. Ayilan explained that the membership form lists a member's home town for membership purposes. He submits there is nothing implausible about DEHAP requiring a home address.

He submits that the evidence of DEHAP membership was reliable and relevant to his claim and that the Board did not refer to any evidence to call his membership into question.

[11] The Board based its decision on more than just the evidence of DEHAP membership. It considered his treatment in school and in the military to be less than persecutory. It found his claim of political activism was not credible because Mr. Ayilan had been vague and unable to provide specific answers about HADEP, not only at the hearing but also at the Port of Entry. The Board dealt with the 2003 DEHAP membership form by questioning why Mr. Ayilan's home address was listed in Turkey at a time when he lived in Israel. The Board rejected his explanation of the contradiction.

[12] In *Rahmaty v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 635, at para. 7, an applicant's claim was rejected for lacking credibility where the applicant did not demonstrate sufficient detailed knowledge of the circumstances claimed. Considering the deference due to the Board on findings of fact, *Dunsmuir* at paras. 47-48, I consider the Board's findings reasonable.

Did the Board fail to consider relevant evidence in the section 97 analysis?

[13] Mr. Ayilan submits the Board erred in giving little or no weight to his evidence with respect to the risk he faced on return to Turkey. The evidence was:

- a. his membership in DEHAP; including an affidavit by an acquaintance;
- b. the medical evidence submitted in support of a claim to being abused by Turkish authorities.
- c. the documentary evidence concerning treatment of Kurds.

[14] I have found the Board's finding, that the evidence of Mr. Ayilan's political activities was insufficient, to be reasonable. My view does not change with specific consideration of either the acquaintance's affidavit or the medical evidence. The affiant attests to Mr. Ayilan's political activity but the Board based its finding on Mr. Ayilan's own lack of knowledge about HADEP which has a high level of relevance to the issue. The medical evidence is of limited probative value given the medical examination of a scar was done years after the alleged event. The doctor had stated that the injury was compatible with the claim of mistreatment. The medical report was not contemporaneous with the time of injury and mere compatibility was not proof in itself that the injury was caused by mistreatment.

[15] What remains, and is of importance, is the Board's treatment of the documentary evidence. As a result of the Board's finding that Mr. Ayilan would not be of interest to the police, he was left with a profile of being a Kurd from southeast Turkey who spent time outside of the country.

[16] Mr. Ayilan referred to a number of country documents related to the situation of Kurds and Kurdish political parties in southeast Turkey. In Mr. Ayilan's documentation package, a number of documents address this subject matter:

TUR42991.E – Turkey National Documentation Package

During the period covered by this Response (January 2003 to September 2004) numerous DEHAP members and supporters were detained or arrested by Turkish authorities for shouting pro-PKK slogans during demonstrations (Anatolia 26 Jan. 2003; *ibid.* 11 Nov. 2003; *ibid.* 21 Feb. 2004; *ibid.* 9 June 2004; *Turkish Daily News* 12 June 2004), for "propagandizing for the [PKK] terrorist organization" (Anatolia 29 Mar. 2003; *Turkish Daily News* 31 Mar. 2003; Anatolia 19 Sept. 2003a), for protesting against the prison conditions of the PKK leader, Abdullah Ocalan (AFP 19 Sept. 2003; *ibid.* 12 Nov. 2003), for engaging in an advocacy campaign towards a general amnesty for detained DEHAP members (Anatolia 19 June 2003; *ibid.* 28 June 2003), for holding illegal demonstrations (Anatolia 6 July 2003; *ibid.* 5 Jan. 2004; *ibid.* 21 Feb. 2004) and other related reasons (Anatolia 19 Sept. 2003b; *ibid.* 24 Oct. 2003; *ibid.* 17 Apr. 2004; *Turkish Daily News* 19 Apr. 2004; *Country Reports 2003* 25 Feb. 2004, Sec. 2.a). *The Economist* reported that according to Diyarbakir's DEHAP mayor, Feridun Celik, 600 DEHAP members and supporters were arrested between January and August 2003 (2 Aug. 2003). Between September and November 2003, DEHAP alleged that over "1,000 participants in a DEHAP campaign calling for an amnesty for PKK/KADEK members" were detained by the police and although most were released, charges were laid against more than 100 participants (*Country Reports 2003* 25 Feb. 2004, Sec. 3).

Amnesty International – Application Record at 78

Police also regularly used disproportionate force against demonstrators, particularly targeting leftists, supporters of the pro-Kurdish DEHAP, students and trade unionists...

US Department of State Report, Turkey 2006 - Application Record at 50

c. Torture and Other Cruel, Inhuman, or Degrading Treatment or punishment

The constitution and law prohibit such practices; however, members of the security forces continued to torture, beat, and otherwise abuse persons.

Incidents of torture and abuse declined during the year but remained a problem. There was a decline in the severe ill-treatment that prisoners encountered in prior years, but incidents of ill-treatment during police/gendarmerie custody continued, according to the Council of Europe's September 6 report on the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). Courts rarely convicted security officials accused of torture and tended to issue light sentences when they did convict (see section 1.d.).

According to the HRF, there were 338 cases of torture or abuse reported at its five national treatment centers during the year. Of these, 227 cases involved torture or abuse inflicted during the year; the rest involved incidents that occurred previously. HRF stated that there were 10,449 credible reports of torture or abuse from 1990 to 2005. A number of human rights observers claimed that only a small percentage of detainees reported torture and abuse because they feared retaliation or believed that complaining was futile.

Asylum Seekers from Turkey, November 2002 – Certified Tribunal Record:

...Returned person are at risk of mistreatment in order to ascertain with whom they have been consorting during their period of asylum application...the police can detain and mistreat a returnee on the grounds of coming from a notorious district, for example Pazarcik in K.Maras, or of implicitly being an Alevi Kurd, or of being a supporter of HADEP...

...Being Kurdish places a returned asylum seeker at greater risk of mistreatment than being Turkish. Without travel documents he will be thoroughly checked, first at the airport and if there is an apparent need for further investigation, at the notorious political/anti-terror police headquarters on Vatan Cadessi. Torture is likely in either location. It is not actual anti-State activities either in Turkey or Europe which place a returned asylum seeker at risk. It is a wider danger, for example, the suspicion that returnee holds anti-State views or may have committed anti-State activities, or the activities of a returnees relatives or his place of birth which may place a returnee in jeopardy of torture. (underlining added)

Mr. Ayilan submits that the above country documentation supports his submissions that he is at risk if returned to Turkey.

[17] The Board's negative credibility finding that Mr. Ayilan had not proved he was politically active means that the documentary evidence relating to Kurdish political activity is irrelevant.

[18] The Board makes a very brief reference to the document package. It stated:

“The documentary evidence does not support a finding that, on a balance of probabilities, he will be persecuted for being of Kurdish ethnicity.”

[19] The Respondent submits the Board is presumed to have taken all the evidence into consideration whether or not it indicates having done so in its reasons. *Florea v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 598, (F.C.A.). Further, the Respondent submits “the fact that some of the documentary evidence is not mentioned in the Board's reasons is not fatal to its decision.” *Hassan v. Canada (Minister of Employment and Immigration)* (1992), 147 N.R. 317 at para. 3.

[20] The Board did accept that Mr. Ayilan was a Kurd from southeast Turkey. It accepted that he may have been discriminated against in the past but that discrimination had not risen to the level of persecution. What the Board has not done is address the documentary evidence that suggests Kurdish returnees who are from southeast Turkey may face risks not faced generally by other

individuals in that country. In *Kilic v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 84, at para. 27, Justice Mosley stated:

27. In my opinion, the Board in this case did not address the country documentation and other evidence related to prison conditions in Turkey and failed to consider whether the applicant could be a "person in need of protection" if returned to that country, in light of the possibility that he may face a "serious prison sentence" for evading Turkish military service. Despite the Board's negative credibility findings, a separate analysis, along the lines described in Bouaouni, supra, and having regard to the legislative wording of section 97, may have produced a finding that Mr. Kilic was a person in need of protection. Therefore, the result of the Board's error is unknown, and accordingly, this application should be sent back for redetermination on this ground. (underlining added)

[21] Section 97(1) of the Act is to be assessed in the present or prospective sense. In *Sanchez v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 99, at para. 15, Chief Justice Richard of the Federal Court of Appeal stated:

As such, a determination of whether a claimant is in need of protection requires an objective assessment of risk, rather than a subjective evaluation of the claimant's concerns. Evidence of past persecution may be a relevant factor in assessing whether or not a claimant would be a risk of harm if returned to his or her country, but it is not determinative of the matter. Subsection 97(1) is an objective test to be administered in the context of a present or prospective risk for the claimant. (underlining added)

[22] Mr. Ayilan presented some documentary evidence that as a Kurd from southeast Turkey he faced a risk on return. The Board has not shown it weighed the documentary evidence of present or prospective risk despite documentary evidence that tends to support Mr. Ayilan's claim to being a person in need of protection. As such, the Board decided unreasonably. The Board's failure to weigh the documentary evidence in the context of a present or prospective risk under a section 97 analysis is an error.

[23] Given that I have found the Board's findings on the section 96 analysis to be reasonable, the matter will be referred back to the Board for re-determination on the question of present or prospective risk under a section 97 analysis only.

[24] I do not consider that any question of general importance need be certified in this application.

ORDER

THIS COURT ORDERS that

1. The application for judicial review is granted.
2. The matter will be referred back to the same or other Board for re-determination on the question of present or prospective risk under a section 97 analysis only.
3. No question of general importance is certified.

“Leonard S. Mandamin”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5395-07

STYLE OF CAUSE: ERTAN AYILAN v. MCI

PLACE OF HEARING: TORONTO

DATE OF HEARING: JUNE 24, 2008

REASONS FOR ORDER: MANDMIN, J.

DATED: NOVEMBER 27, 2008

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