Date: 20090415

Docket: IMM-3901-08

Citation: 2009 FC 382

Ottawa, Ontario, April 15, 2009

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

AHMET ORHAN GOKSU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to s. 72 (1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of a decision of a Board of the Refugee Protection Division of the Immigration Refugee Board (Board), dated August 12, 2008 (Decision) refusing the Applicant's application to be deemed a Convention refugee or person in need of protection under section 96 and section 97 of the Act.

BACKGROUND

[2] The Applicant is a 29-year-old, unmarried, citizen of Turkey, who resided in Istanbul. He is from a middle-class family. His mother is retired and his father is a part-time adviser to a union of artists. The father was previously the Mayor of Istanbul.

[3] The Applicant received his economics degree in Turkey in 2002. In 2003, he went to the United States on a student visa to study English.

[4] He has a Kurdish background and is of the Alevi religion. He describes himself as a believer in leftist causes and of free and open political expression. He is not a political activist in the sense of being a member of any party or a political organizer. He is not a Kurdish separatist.

[5] The Applicant was briefly detained by police and “roughed up” after being randomly grabbed out of crowds at political demonstrations in 1999 and 2001. At the time, he was not specifically targeted; nor was he charged with any crimes, or photographed or fingerprinted on these occasions.

[6] The Applicant returned to Turkey in 2003 after studying in the U.S. In March 2004, he participated in a politically sponsored celebration and was arrested by police along with some others at the celebration. He was held for 24 hours and beaten. He was not charged, photographed or fingerprinted.

[7] In July 2004, the Applicant attended another demonstration and was again detained with others out of a crowd of about 2000 people. The police accused him of being a Kurdish separatist, interrogated him about his friends and family, beat him and held him down while the bottom of his feet were struck with sticks. He was also warned that the police would be watching him in the future. He was released after 30 hours. He was not charged with any crime; nor was he photographed or fingerprinted. However, his name and address were written down. The Applicant claims he suffered bruises and that his feet were swollen, but he had no broken bones and he did not seek medical attention.

[8] The Applicant and his family decided that it would be best if he left the country. He once again obtained a U.S. student visa and went to the U.S. in August 2004. After some time, he consulted a U.S. lawyer about claiming asylum there. The lawyer advised that, post-911, the U.S. has cut back on granting asylum and that the Applicant's chances of succeeding with such a claim in the U.S. were slim.

[9] After the Applicant learned of the possibility of making a refugee claim in Canada from an acquaintance, he applied for and received a student visa to travel to Canada in March 2006. He arrived on March 2, 2006 in Fort Erie, Ontario and made a refugee claim in Toronto at an inland office on March 6, 2006. When the Applicant arrived in Canada, he had a number of months left on his U.S. student visa and he may have been able to extend it further.

[10] The Applicant claims to have a well-founded fear of persecution from police in Turkey by reason of his political opinion or perceived political opinion. He also believes that he would be subjected personally to a danger of torture or to a risk to his life or to cruel and unusual treatment or punishment if he has to return to Turkey.

DECISION UNDER REVIEW

[11] The Board found that the Applicant was not a Convention refugee or person in need of protection because he does not have a well-founded fear of persecution for a Convention ground in Turkey and his removal to Turkey would not subject him personally to a risk to his life, or to a risk of cruel and unusual treatment or punishment, or a danger of torture.

[12] The Board decided that the Applicant had been randomly detained by the police. He was one of 1000-2000 people at each event where he was detained and was simply unfortunate enough to be taken by police. There is no evidence that the police specifically targeted the Applicant.

[13] The Board also held that, should the Applicant fly back to Istanbul, it would not be likely that the police, even if they knew he had arrived, would take any steps against him. In addition, there was insufficient evidence that the Applicant's life would be at risk. The Board found that the beating the Applicant had experienced with a stick and his interrogation could be considered a form of torture; however, it was not prolonged and did not result in serious damage. Based on all of the

evidence, the Board could not conclude that the Applicant would suffer similar harm if returned or that the police maintained an on-going record of the Applicant's previous arrests.

[14] The Board noted that Turkey has changed significantly since the Applicant left in 2004 and is in the midst of attempting to become a member of the European Union. Therefore, benchmarks have been set for the country to improve its human rights conditions prior to the country being able to achieve its desired economic unity with Europe. So while the Applicant suffered physical punishment on one occasion in 2004, the Board found no indication that the authorities have maintained a specific record of his activities or that he was ever charged with a crime. The Board held that there is no more then a mere possibility that the Applicant would be persecuted by reason of his political opinion.

ISSUES

[15] The Applicant submits the following issues on this application:

1) Is there any evidence to support his submissions with respect to the issues set out below, and are any of these issues, either singly or in combination, serious ones:

   i. Did the Board err in law, breach fairness in general or by failing to give adequate reasons, err in fact and exceed jurisdiction in relation to failing to consider the evidence before it regarding the incidents of torture?

ii. Did the Board err in law, breach fairness in general or by failing to give adequate reasons, err in fact and exceed jurisdiction in relation to failing to consider the evidence before it regarding the evidence that the police would be watching him?

iii. Did the Board err in law, breach fairness, err in fact and exceed jurisdiction in failing to consider compelling reasons under section 108 of the Act?

iv. Did the Board err in law, breach fairness, err in fact and exceed jurisdiction in relation to the risk threshold under section 97(1)(*b*) of the Act?

STATUTORY PROVISIONS

[16] The following provisions of the Act are applicable in these proceedings:

Convention refugee	**Définition de « réfugié »**
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	**96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	*a*) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

(*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

b) soit, si elle n’a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Person in need of protection

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

Personne à protéger

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n’a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s’il y a des motifs sérieux de le croire, d’être soumise à la torture au sens de l’article premier de la Convention contre la torture;

(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d’autres personnes originaires de ce pays ou qui s’y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or

(iii) la menace ou le risque ne

incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
Person in need of protection	**Personne à protéger**
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	**(2)** A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

STANDARD OF REVIEW

[17] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada recognized that, although the reasonableness *simpliciter* and patent unreasonableness standards are theoretically different, "the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review": *Dunsmuir* at paragraph 44. Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of "reasonableness" review.

[18] The Supreme Court of Canada in *Dunsmuir* also held that the standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[19] Thus, in light of the Supreme Court of Canada's decision in *Dunsmuir* and the previous jurisprudence of this Court, I find the standard of review applicable to the non-procedural fairness issues raised by the Applicant to be reasonableness. When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir* at paragraph 47. Put another way, the Court should only intervene if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[20] The Applicant has also raised procedural fairness issues, to which the standard of review is correctness: *Suresh v. Canada (Minister of Citizenship and Immigration)* 2002 SCC 1.

ARGUMENT

The Applicant

[21] The Applicant submits that the Board erred in finding that torture was decreasing in Turkey. A 2007 U.S. Department of State report found that torture had increased there. The Applicant views this error as fatal to the Decision.

Unreasonable Finding or Interpretation of Key Document

[22] The Applicant submits that the Board mis-construed some of the documentary evidence; particularly the United Kingdom Operational Guidance Notes dated April 18, 2007. The Applicant says that the policy of the UK Boarder Agency is that if a person has not been previously detained, the risk of future mistreatment is low. The Applicant points out that he was detained four times. The Board does not explain how the Guidance Notes indicate that the Applicant would be at a lesser risk.

Random Contact with the Police

[23] The Board found that any future contact between the police and the Applicant would be random. However, the Applicant submits that the Board ignored his evidence that the police told him he would be watched.

Cumulative Persecution

[24] The Applicant submits that the Board failed to respond to the Applicant's argument that the repeated detentions, even if not persecutory discretely, were persecutory in combination. The Applicant views this as a fatal error.

[25] The Applicant cites and relies upon *Sarmis v. Canada (Minister of Citizenship and Immigration)* 2004 FC 110 at paragraph 19:

> 19 Though it is true that past persecution cannot be used solely to establish a fear of future persecution, such persecution is capable of forming the foundation for present fear, as stated by Dawson J. in *Tolu v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 334, [2002] F.C.J. No. 447, (T.D.) (QL), at paragraph 17 :
>
> > [...] the evidence establishes a series of actions characterized to be discriminatory there is a requirement to consider the cumulative nature of that conduct. This requirement reflects the fact that prior incidents are capable of forming the foundation for present fear. [...]

[26] The Applicant submits that the RPD has been taken to task for errors in relation to cumulative persecution in relation to the assessment of claims by Turkish Kurds in at least two decisions: *Ozen v. Canada (Minister of Citizenship and Immigration)* 2002 FCT 521 (*Ozen*) and *Tolu v. Canada (Minister of Citizenship and Immigration)* 2002 FCT 334 (*Tolu*).

[27] In *Ozen*, the Applicant notes that the RPD had discussed all of the relevant incidents but was found to have erred in principle by analyzing each incident in isolation and as discrete elements.

The RPD is required to consider the cumulative effect of the discrimination and consider the incidents together. The Applicant relies upon paragraph 19 of the *Ozen* case, which reads as follows:

> 19 In the present case, the uncontradicted testimony of Mr. Ozen described five incidents involving the police occurring between 1994 and 1999, which incidents included beatings and harassment. The CRDD discussed each of these incidents in its reasons, concluding that they amounted to "random problems" not amounting to persecution. The CRDD did not consider whether the cumulative effect of these incidents could amount to persecution.

[28] The Applicant also relies upon paragraphs 15-18 in *Tolu*:

> 15 I begin by observing three general principles of law. First, the identification of persecution behind incidents of discrimination is a mixed question of fact and law. The Federal Court of Appeal has said that it is for the CRDD to draw the conclusion as to whether conduct constitutes persecution in a particular factual context by proceeding with a careful analysis of the evidence adduced and a proper balancing of the various elements contained therein. This Court is not to intervene in the conclusions of the CRDD unless they appear to be capricious or unreasonable. See: *Sagharichi v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 796 (F.C.A.).
>
> 16 Second, as to what constitutes persecution, the leading case is *Rajudeen v. Canada (Minister of Employment and Immigration)* (1984), 55 N.R. 129 where the Federal Court of Appeal at page 133 defined persecution in terms of to harass or afflict with repeated acts of cruelty or annoyance; to afflict persistently; to afflict or punish because of particular opinions or adherence to a particular creed or mode of worship; a particular course or period of systematic infliction of punishment directed against those holding a particular belief; persistent injury or annoyance from any source.
>
> 17 Third, in cases where the evidence establishes a series of actions characterized to be discriminatory there is a requirement to consider the cumulative nature of that conduct. This requirement reflects the fact that prior incidents are capable of forming the foundation for present fear. See: *Retnem v. Canada (Minister of*

> *Employment and Immigration)* (1991), 132 N.R. 53 (F.C.A). This is also expressed in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status in the following terms, at paragraph 53:
>
> > In addition, an applicant may have been subjected to various measures not in themselves amounting to persecution (e.g. discrimination in different forms), in some cases combined with other adverse factors (e.g. general atmosphere of insecurity in the country of origin). In such situations, the various elements involved may, if taken together, produce an effect on the mind of the applicant that can reasonably justify a claim to a well-founded fear of persecution on "cumulative grounds".
>
> 18 In the present case, I accept the submission advanced on Mr. Tolu's behalf that the CRDD failed to consider whether the cumulative weight of the treatment he experienced could give rise to a well-founded fear of persecution…

Transcript Incomplete

[29] The Applicant submits that it is not possible to evaluate the exact statements made by the Applicant as the transcript is incomplete because the examinations by counsel and the tribunal officer are omitted.

Ambiguous Statement

[30] The Applicant points out that the Board made an ambiguous statement which does not clarify whether the police kept a record of his detentions. The Applicant's evidence states what he was told and why he was mistreated and threatened during the fourth detention. Therefore, the

Board's negative finding is in error because the Applicant's evidence was that the police told him that they knew of his prior arrests when he was detained (and tortured) during the fourth detention. The Board also failed to make a finding one way or the other: *F.H. v. McDougall* 2008 SCC 53.

[31] The Applicant also cites *Rivas v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 624 at paragraph 3 for the following:

> …While the Board has the authority to select and weigh the documentary evidence, it also has a responsibility to make clear findings on the evidence that is before them. The respondent argues that the applicant did not meet his burden of proof. The standard of proof comes into play when the Tribunal is required to make findings of fact. A finding of fact has been described as a determination that a phenomenon has happened, is, or will happen independent of any determination as to its legal effects: see L.L. Jaffe, Judicial Control of Administrative Action, Toronto, Little Brown and Company, 1965, at page 548. The question, of course, is how to interpret and apply the law to the facts that are established in the proceeding. Speculation is not a substitute for that responsibility. The Court is of the view that the Board fell into error when, instead of making clear findings of fact, they engaged in their own speculation as to the reason for the death of the father as well as to why the applicant might be pursued.

Stop Political Expression as a Price for Safety

[32] The Applicant points to decisions of this Court which hold that the RPD cannot expect an applicant to renounce their activities or abandon expression of their political opinion: *Islam v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 135.

Error in Law

[33] The Board found that the Applicant was tortured but that there have been significant changes since he left Turkey. The Applicant says that the Board erred in law by failing to consider whether there were compelling reasons why the Applicant should be determined to be a protected person. The Board never raised the issue of changed circumstances at the hearing and, regardless of whether the Applicant raised the issue of compelling reasons, the Board was required to do so.

[34] The Applicant also relies upon paragraphs 4-5 in *Yamba v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 457 (F.C.A.).

[35] The Applicant says that there is an arguable issue that any person who is tortured may meet the compelling reasons test, and that a finding of torture is extraordinary: *Consolidated Grounds in the Immigration and Refugee Protection Act: Persons in Need of Protection: Danger of Torture*, Legal Services Immigration and Refugee Board (May 15, 2002): http://www.irb-cisr.gc.ca/en/references/legal/rpd/cgrounds/torture/index_e.htm#71.

Threshold of Risk under Section 97(1)(*b*)

[36] The Applicant submits that this case represents an opportunity to examine whether section 97(1)(*b*) requires an applicant to prove that he or she would be cruelly treated, or prove only that there is a risk of such. The Applicant says that the Board correctly expressed the statutory language

when it set out that harm has to be proven on a balance of probabilities. However, the Board makes no distinction between section 97(1)(*a*) and (*b*). The Applicant believes there is a serious issue as to what is required under (*b*).

[37] The Applicant concedes that under section 97(1)(*a*), he has to prove that he would be tortured. However, he says that the jurisprudence is not definitive as to whether he has to prove that he would be killed (life at risk) or would be treated cruelly or unusually or would be punished cruelly or unusually: *Li v. Canada (Minister of Citizenship and Immigration)* 2005 FCA 1.

[38] The Applicant says that there is an increased burden of proof for section 97(1)(*a*) because the danger of torture has to be "believed on substantial grounds to exist." This does not exist for section 97(1)(*b*).

The Respondent

[39] The Respondent submits that the Board did not err in finding that torture has decreased since the Applicant left Turkey in 2004. The finding only related to "the situation for those affiliated to Kurdish, left wing, or Islamic terrorist group or political parties." As well, the Board was not required to refer to every piece of evidence that it received that was contrary to its findings and explain how it was dealt with. The issue is whether the Court should infer from a failure to mention certain documentary evidence relied upon by the Applicant that the Board overlooked important

evidence or made an erroneous finding of fact. A reading of the Decision as a whole does not give rise to such an inference and the Board clearly indicated that it looked at the documentary evidence.

[40] The Applicant produced no reports from his family that the authorities in Turkey had been looking for him since he left in July 2004, or that he had had any difficulties in leaving the country. Therefore, the Board reasonably found that the evidence did not support a finding that the Applicant's profile placed him at risk, or that the "police would be watching him."

[41] The Board also did not err in failing to consider subsection 108(4) of the Act. Firstly, there is no statutory requirement for the Board to consider in every case whether an applicant falls within subsection 108(4). As well, the Board is obliged to consider subsection 108(4) only after finding that applicant was at one time a Convention refugee but then ceased to be one because of changes in country conditions in cases involving appalling past persecution. The Respondent relies upon *Hassan v. Canada (Minister of Employment and Immigration),* [1992] F.C.J. No. 946 (F.C.A.) at paragraph 6:

> It is clear, as the appellant suggests, that subsections 2(2) and 2(3) of the *Immigration Act* speak to the loss of status as a Convention refugee because of, *inter alia*, a change in material circumstance in a refugee's home nation. But those provisions in no way alter the test used to initially determine a claimant's status. It is trite law that to establish status as a Convention refugee within the meaning of the *Immigration Act*, one has to meet both a subjective and objective threshold. One must have a "well-founded fear of persecution". One cannot get to the point of possibly losing one's status as a Convention refugee, i.e. subsections 2(2) and 2(3) cannot be applicable, unless one first falls within the statutory definition contained in subsection 2(1).

[42] The Respondent submits that the Applicant meets none of the *Hassan* requirements and that the *Yamba* case referred to by the Applicant is not applicable to the present situation because the applicant in that case had a well-founded fear of persecution but then ceased to be a Convention refugee. There was no finding in the present case that the Applicant was a Convention refugee and then ceased to be such because of changed country conditions. Instead, the Board found that the Applicant's fear of persecution was not objectively well-founded. Therefore, there was no obligation for the Board to consider subsection 108(4) of the Act.

[43] In addition, the Respondent points out that for subsection 108(4) of the Act to be invoked there must be exceptional circumstances. The Respondent cites *Canada (Minister of Employment and Immigration) v. Obstoj*, [1992] 2 F.C. 739 (F.C.A.) at paragraphs 19-20:

> …On any reading of subsection 2(3) it must extend to anyone who has been recognized as a refugee at any time, even long after the date of the Convention. It is hardly surprising, therefore, that it should also be read as requiring Canadian authorities to give recognition of refugee status on humanitarian grounds to this special and limited category of persons, i.e. those who have suffered such appalling persecution that their experience alone is a compelling reason not to return them, even though they may no longer have any reason to fear further persecution.
>
> The exceptional circumstances envisaged by subsection 2(3) must surely apply to only a tiny minority of present day claimants…

[44] The Respondent also cites and relies upon the Federal Court Trial Division decision of *Hassan v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 630 (F.C.T.D.) at paragraph 11:

> Lest there be some concern that this interpretation of subsection 2(3) detracts from the normal requirement of applicants demonstrating

> ongoing fear of persecution, it should be recognized, as Hugessen J.A. pointed out in *Obstoj*, that subsection 2(3) applies only to a tiny minority of present day claimants -those in a special and limited category who can demonstrate that they have suffered such appalling persecution, that their experience alone is a compelling reason not to return them to the country in which they suffered persecution. While many refugee claimants might consider the persecution they have suffered to fit within the scope of subsection 2(3), it must be remembered that the nature of all persecution, by definition, involves death, physical harm or other penalties. Subsection 2(3), as it has been interpreted, only applies to extraordinary cases in which the persecution is relatively so exceptional, that even in the wake of changed circumstances, it would be wrong to return refugee claimants.

[45] The Respondent submits that, while the Applicant may have suffered some physical punishment on one occasion in the past, he failed to adduce any evidence that meets the compelling reasons doctrine.

[46] The Respondent also submits that the law is well-settled as to the "threshold of risk" required under section 97(1)(*b*) of the Act and that the Board applied the correct test. The degree of risk for paragraphs 97(1)(*a*) and (*b*) is the same, as stated in *Anthonimuthu v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 162 at paragraphs 35 and 56:

> The applicant also goes on to argue that the test for s. 97(1)(a) of the IRPA is different (and lower) from the test for section 97(1)(b) of the IRPA, and definitely lower than the test under section 96. Focusing on the use of the word "risk" in section 97(1)(b), the Applicant contends that it is a standard quite a bit lower than the reasonable chance test that is used in the context of section 96.
>
> …
>
> Finally, there was some discussion as to the proper standard to be used in assessing the risk under section 97(1)(b). This was indeed a question that was certified for an appeal to the Federal Court of

> Appeal under section 74(d) of the Act. Fortunately, we now have the benefit of the Court of Appeal's views, as they decided in *Li v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1, 2005 FCA 1, that the degree of risk under paragraphs 97(1)(a) and (b), is "more likely than not". Rothstein J.A., speaking for the Court of Appeal, also noted that the standard of proof to be applied, under both section 96 and section 97 of the IRPA, is the balance of probabilities test. The Board did not err in applying the balance of probabilities test, but, as it erred in the credibility finding, the decision must be set aside.

[47] The Respondent also relies upon *Chowdhury v. Canada (Minister of Citizenship and Immigration)*, [2008] F.C.J. No. 368 at paragraphs 8-9:

> The selection of the appropriate legal test is a question of law, reviewable on a standard of correctness. I am not satisfied that the member erred by using the phrase 'substantial grounds' in her analysis for assessing the risk to the applicant under subsection 97 (1) of the IRPA, rather than by reference to the balance of probabilities standard.
>
> I note that in *Li v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1, [2005] F.C.J. No. 1, the question was essentially the reverse of the one at issue here. The Court of Appeal was asked to ascertain the appropriate degree of risk for paragraph 97(1)(a) of the IRPA, and held that it was a balance of probabilities, or 'more likely than not'. Justice Marshall Rothstein, as he then was, next determined that the appropriate degree of risk for paragraph 97(1)(b) was also more likely than not. While it is true that the term 'substantial grounds' appears in the former provision but not the latter, the degree of risk is the same. To vacate the member's decision on this narrowly technical point would be to place form above substance.

[48] The Respondent concludes that the Applicant's argument regarding the appropriate threshold of risk under paragraph 97(1)(*b*) of the Act is a red herring.

ANALYSIS

[49] The Applicant has raised a variety of factual and legal issues. I do not think it is necessary to address all of them because I am persuaded that the Board's failure to address the Human Rights Watch Report 2008, and its review of human rights issues in Turkey in 2007, together with counsel's submissions on this document at the hearing before the Board, is determinative.

[50] The Board's view that "the political situation in [Turkey] has changed significantly since the claimant left in 2004" and the documentation relied upon by the Board to support a downward trend in the number of cases of torture and ill-treatment is directly contradicted by the Human Rights Watch Report that was brought to the Board's attention by counsel. In fact, the latter document corrects the impression of improvement given by the earlier documents.

[51] It was the Applicant's position that if he returned to Turkey and engaged in political activity he would be detained and tortured. The Human Rights Watch Report clearly provides objective evidence for his subjective fears. His credibility was never an issue and the Board even acknowledges that "he was verbally attacked, interrogated about his acquaintances, beaten and, more seriously, subjected to physical punishment which could be seen as torturous in nature."

[52] On this basis alone, and in accordance with the well-known principles set out in *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1425 (F.C.T.D.), this matter needs to be returned for reconsideration by a different officer.

[53] I also agree with the Applicant that the Officer's conclusions at paragraph 26 of the Decision that "it is not clear to me that the police have even maintained an on-going record of this claimant's previous arrests such that, four years later, they would likely even be aware of his previous arrests" is at odds with, and fails to take into account, the Applicant's clear and uncontradicted testimony that "they told me that they were aware of my previous detention" and would be watching him in the future.

[54] In light of these conclusions, there is no point in my addressing the other, more legal aspects, of the Applicant's submissions. The Applicant has also submitted a question for possible certification dealing with section 97(1)(*b*) of the Act and the burden of proof. In light of my findings, I do not think it would be appropriate to certify the question because it is not dispositive of my decision.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. This application is allowed and the matter is referred back for reconsideration by a different officer;

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-3901-08
STYLE OF CAUSE:	AHMET ORHAN GOKSU
	APPLICANT
	- and -
	THE MINISTER OF CITIZENSHIP AND IMMIGRATION
	RESPONDENT
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	FEBRUARY 25, 2009
REASONS FOR :	HON. MR. JUSTICE RUSSELL
DATED:	April 15, 2009

APPEARANCES:

Mr. Micheal Crane	APPLICANT
Mr. Stephen H. Gold	RESPONDENT

SOLICITORS OF RECORD:

Micheal Crane Barristers & Solicitors	APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	RESPONDENT