Federal Court  Cour fédérale

Date: 20101217

Docket: IMM-1695-10

Citation: 2010 FC 1305

Ottawa, Ontario, December 17, 2010

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

NECATI KARAYEL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated March 3, 2010, wherein the Applicant was determined to be neither a convention refugee nor a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, R.S. 2001, c. 27 (IRPA). The Board found that the Applicant failed to provide sufficient credible and trustworthy evidence to support his claim.

[2] For the reasons below, the Application is allowed.

I. Background

A. *Factual Background*

[3] Necati Karayel, the Applicant, is a citizen of Turkey who seeks refugee protection in Canada due to his alleged involvement with, and support for, Kurdish political parties.

[4] The Applicant is an ethnic Kurd from Polatli and was the owner of a food wholesale business. He claims to have been an active supporter of the Democratic People's Party (DEHAP), which, in 2005, became the Democratic Society Party (DTP). Due to his political involvement, the Applicant claims he was subject to several short term detentions by the Turkish police between 2002 and 2008.

[5] On his personal information form (PIF) he details five detentions:

1. In 2002 he attended a DEHAP event in Ankara and was among the supporters rounded up for detention as part of the Turkish government's crackdown on the Kurdish political movement. He claims to have been held for two days during which time he was interrogated and beaten.

[6] The Applicant continued to support the Kurdish cause, attending events organized by DEHAP even though he did not become a party member because he feared the adverse effect formal association might have on his business.

2. While participating in DEHAP-organized Newroz celebrations in March 21, 2005, the Applicant was among those in the crowd who were taken by the police. He was detained until the following day. He was questioned and beaten and released with a warning not to support DEHAP in the future.

3. In March 2006 the Applicant drove a shipment of food to the southeast city of Diyarbakir. Stopped at a security checkpoint, the Applicant's car was searched. When the security forces found some Kurdish music cassette tapes they began to question the Applicant, and took him into custody. He was held for 24 hours and was again interrogated and beaten.

4. In March 2007 the Applicant went to a coffee shop with some friends to talk to the patrons about the DTP, the political party that succeeded the DEHAP. Police Officers entered the shop, requested identification and then arrested the Applicant and his friends. This time the Applicant was kept in detention for 36 hours, questioned three times, accused of spreading separatist political propaganda, and beaten. The police claimed to know about the Applicant's previous detentions and threatened the Applicant's family.

[7] After the March detention, the Applicant separated from his wife, thinking it would make the situation safer for his family. At the same time, police visits to his business intensified. The situation was so unpleasant he decided to close his business.

5. May 1, 2008 the Applicant travelled to Ankara as part of the DTP contingent to participate in the May Day parade. The police eventually moved in to disperse the crowd using tear gas. The Applicant was again detained and beaten. He was told that he would be watched no matter where he went in Turkey and that if he were arrested again he could expect even worse treatment.

[8] After five detentions, the Applicant decided that he had to flee Turkey. He applied for and received a visitor's visa to visit his cousin in Canada. To protect his family, he divorced his wife. He waited for the divorce to be finalized and then made arrangements to leave Turkey. The Applicant arrived in Canada on June 21, 2008 and claimed refugee status five days later.

B. *Impugned Decision*

[9] The determinative issue for the Board was credibility. Based on significant inconsistencies between the Applicant's PIF and testimony at the hearing, the Board found that the Applicant failed to provide sufficient credible and trustworthy evidence to support his fear of returning to Turkey. Absent reasonable explanations for the inconsistencies, the Board did not accept, on a balance of probabilities, that the Applicant was subject to arrest or detention as a result of his support for Kurdish political parties. The Board's reasons detail the following inconsistencies:

- The Applicant testified that his most recent arrest was March 2008. When told that his PIF makes no mention of such an arrest, he stated that he was confused and that it was actually May 2008;

- The Applicant testified that his longest detention was 24 hours. When informed that his PIF mentions a 36 hour detention, the Applicant said there was a misunderstanding;

- More significantly the Applicant stated during the hearing that he had no problems with the police between the 2007 and 2008 detention. However, his PIF states that visits from the police intensified during this time. When questioned about this inconsistency, the Applicant stated that he meant that he had not been taken to the police station;

- In the PIF the Applicant stated that he closed his business in March 2007. At the hearing he stated that he closed it in March, April or May 2008.

- The Applicant gave inconsistent evidence regarding his separation and divorce from his wife. At the hearing he initially testified that he was living with his wife at the time of the 2008 detention, though his PIF indicated that he separated from his wife in 2007. Asked about the inconsistency he answered that he did not understand the question, and that he lived with his wife up until two months before he left Turkey. After further questioning he explained that he had moved out in 2007 and the confusion was due to his misunderstanding of the difference between official and unofficial separation.

- The Board asked the Applicant to provide detailed accounts of what occurred when he was detained by police. The Board member clarified several times what kind of details he was looking for, but there was still some confusion and the Applicant failed to provide a detailed account of how he was apprehended. Testimony

> regarding this point was improved when the Applicant was questioned by Counsel. But given the prior inconsistencies and inability to answer the Board member's attempt at questioning the Applicant, this failed to allay the Board's concerns regarding the earlier testimony.

II. Issues

[10] The Applicant raises three issues:

(a) In concluding that the Applicant's evidence was not credible, did the Board ignore corroborating evidence?

(b) Did the Board breach the rules of natural justice or procedural fairness in drawing an inference that Counsel for the Applicant had breached his professional obligation not to discuss evidence the Applicant had already given with the Applicant during a recess, without alerting the Applicant and his Counsel to its concerns in order for the to disabuse the Board?

(c) Was the Board's finding that the Applicant's evidence was vague supported by the record?

[11] The issues are best summarized as:

(a) Did the Board ignore evidence?

(b) Was there any breach of natural justice or procedural fairness?

(c) Is the Board's credibility finding reasonable?

III. Standard of Review

[12] It is well-established that decisions of the Board as to credibility are owed a significant amount of deference and resultantly are reviewed on a reasonableness standard (*Lawal v Canada (Minister of Citizenship and Immigration)*, 2010 FC 558 at para 11; *Aguebor v Canada (Minister of Employment and Immigration)* (1993), 160 NR 315, 42 ACWS (3d) 886 (FCA) at para 4). Similarly, the weight assigned to evidence and the interpretation and assessment of evidence are all reviewable on a standard of reasonableness (*N.O.O. v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1045, [2009] FCJ No 1286 at para 38).

[13] As set out in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190; and *Khosa v. Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12; [2009] 1 SCR 339 review on a standard of reasonableness requires consideration of the existence of justification, transparency, and intelligibility in the decision-making process. It is also concerned with whether the decision falls within a range of acceptable outcomes that are defensible in respect of the facts and law.

[14] Questions of procedural fairness are reviewed on a standard of correctness and as a result the decision maker is owed no deference in such matters (*Villanueva v. Canada (Minister of Public Safety & Emergency Preparedness)* 2010 FC 543 at para 16; *Hussain v Canada (Minister of Citizenship and Immigration)*, 2010 FC 334 at para 15).

IV. Argument and Analysis

A. *Failure to Mention Evidence*

[15] The Applicant submits that in coming to an adverse credibility finding, the Board failed to take into account corroborating evidence provided by the Applicant. The Applicant entered into evidence several items which were not mentioned in the Board's reasons, such as – a letter from the DTP confirming that the Applicant attended events and was detained by the police as a result of his participation; a document from the DTP indicating that the Applicant was an observer during the 22nd parliamentary election; and a letter from the Applicant's wife in which she claims the police are still looking for the Applicant and visit the family home on occasion.

[16] The Applicant relies on *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35, 83 ACWS (3d) 264, for the proposition that the Board committed a reviewable error by not at least acknowledging evidence that contradicted its finding regarding the Applicant's credibility. Cepeda is a seminal case often cited on judicial review when the Board has come to a conclusion that differs from information contained in a piece of evidence submitted by the Applicant. In this particular context it is important to remember that the general principle to be distilled from Cepeda's evolution into an all-purpose documentary evidence citation is that the more probative the evidence, the more likely the Court will find error when the Board ignores it (*Ozdemir v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 331, 282 NR 394 at para 9).

[17] The Board is free to weigh evidence as it sees fit. However, the Applicant must be assured when reading the decision that the evidence was considered. There is nothing in the present decision to show that the Board member turned his mind to the evidence – even if only by one line of text to assign it no weight (*Mladenov v. Canada (Minister of Employment and Immigration)*, 74 FTR 161, 46 ACWS (3d) 302 at para 10). This is unfortunate.

[18] The Board came to the conclusion that the Applicant had not been subject to arrest or detention. This very finding is expressly contradicted by the unmentioned evidence. This evidence is relevant, specific to the Applicant's claim, and corroborates the Applicant's testimony. In my view, the unmentioned evidence of such great importance that the Board's failure to refer to it in its reasons warrants the intervention of this Court and the Board's decision must be set aside.

B. *No Breach of Procedural Fairness*

[19] The Board member writes in his decision, at para 9:

> After the morning recess the claimant's counsel examined the claimant. During this examination the claimant provided details of the arrest. Given the concerns above, and given the timing of this evidence which came after a 15 minute recess, a time during which I have no information as to what conversations the claimant might have had, I do not find that it allays my concerns.

[20] The Applicant submits that the Board in this passage makes a veiled accusation that counsel coached the Applicant during the recess, in violation of the Rules of Professional Conduct.

[21] Having determined that the decision ought to be set aside on the basis of ignored evidence, I do not need to decide this point. I would say, however, that the Board member's wording is regrettable. The excerpt would be inoffensive if it were not for the parenthetical thought "a time during which I have no information as to what conversations the claimant might have had." While the Board member may not have had Applicant's counsel in mind, it is an inference that is there to be drawn, and it is inappropriate. Lawyers called to the bar of Ontario have a duty to abide by the Rules of Professional Conduct and there is no such thing as a casual and inoffensive suggestion that they take this duty only half-heartedly.

V. Conclusion

[22] No question to be certified was proposed and none arises.

[23] The Applicant's application does refer to a further issue not dealt with here, but in consideration of the above conclusions, this application for judicial review is allowed. The matter is referred back for reconsideration by a differently constituted panel.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is allowed.

" D. G. Near "

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**IMM-1695-10**
STYLE OF CAUSE:	**KARAYEL v. MCI**
PLACE OF HEARING:	**TORONTO**
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