Federal Court  Cour fédérale

Date: 20111125

Docket: IMM-920-11

Citation: 2011 FC 1361

Ottawa, Ontario, November 25, 2011

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

KEMALETTIN KAHYAOGLU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Defendant

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Kahyaoglu is a citizen of Turkey. He sought protection in Canada due to a fear of persecution and harm by a group of Turkish criminals known as “the mafia”. He had incurred a debt to them he could not repay. When he was assaulted by these criminals, the Turkish police responded and arrested his assailants. Mr. Kahyaoglu chose not to testify and to report a second incident.

[2] The Immigration and Refugee Board, Refugee Protection Division, accepted that the events described by Mr. Kahyaoglu had occurred but found that he had failed to rebut the presumption of state protection: *Canada (Attorney General) v Ward*, [1993] 2 SCR 689.

[3] Mr. Kahyaoglu has brought this application for judicial review under section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27. The sole issue is whether the Board erred in its state protection finding.

[4] The issue is one of mixed fact and law. The applicable standard of review, as determined by the jurisprudence, is reasonableness: *Flores Zepeda v Canada (Minister of Citizenship and Immigration)*, 2008 FC 491 at paras 8-10; *Cobian Flores v Canada (Minister of Citizenship and Immigration)*, 2010 FC 503 at para 21; *Morales Lozada v Canada (Minister of Citizenship and Immigration)*, 2008 FC 397 at para 17; *Holmik v Canada (Minister of Citizenship and Immigration)*, 2008 FC 581 at para 9; and *Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171 at para 38).

[5] The Federal Court of Appeal addressed the burden of proof, standard of proof and quality of the evidence necessary to rebut the presumption in *Canada (Minister of Citizenship and Immigration) v Flores Carrillo*, 2008 FCA 94 [*Carrillo*]. The applicant bears both an evidentiary and legal burden; he must introduce evidence of inadequate state protection and must convince the trier of fact that the evidence adduced establishes that the state protection is inadequate on a balance of probabilities. The evidence must be relevant, reliable and convincing.

[6] The parties disagree on whether the applicant met the *Carrillo* requirements. It is not for the Court to determine on judicial review if the requirements were or were not met. The role of the Court is to determine whether the Board's decision was reasonable.

[7] In reviewing a decision against the reasonableness standard, the Court must consider the justification, transparency and intelligibility of the decision-making process, and whether the decision falls within a range of possible acceptable outcomes which are defensible in light of the facts and the law: *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR190 at para 47, and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 59.

[8] The applicant submits that the board erred in giving insufficient weight to his credible oral testimony.

[9] The respondent contends, and I agree, that the Board considered the applicant's testimony, the documents submitted by the applicant, and the Board's documentation package respecting conditions in Turkey.

[10] I do not agree with the applicant that the Board preferred documentary evidence over his testimony. Based on all of the evidence, the Board reasonably arrived at the conclusion, on the balance of probabilities, that the applicant could benefit from state protection in his home country. The decision falls within the "range of possible, acceptable outcomes in respect of the facts and law" (*Dunsmuir* at para 47).

[11] The Board did not ignore the applicant's fear of the mafia. It acknowledged his fear and the fact that there are corruption problems in Turkey. It was open to the Board to conclude, as it did, that the applicant had not taken sufficient steps to seek protection noting that the police did respond to his call, arrested the aggressors and came to his help again when he was hit by a car (see *Sanchez v Canada (Minister of Citizenship and Immigration)*, 2008 FC 134 at paras 9-10).

[12] The applicant elected not to take advantage of the protection that he would have been afforded had he testified in a court proceeding that could have sent his aggressors to prison. It was reasonable on the evidence for the Board to find that Turkey is a democratic state which is taking measures to deal with crime and corruption within its territory. As stated in *Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171 at paragraph 57, an applicant from a democratic country

> … is faced with the burden of proving that he exhausted all the possible protections available to him and will be exempted from his obligation to seek state protection only in the event of exceptional circumstances.

[13] Although subjective fear can amount to an "exceptional circumstance" (*Flores Zepeda v Canada (Minister of Citizenship and Immigration)*, 2008 FC 491 at para 16), the applicant failed to establish that he had grounds to believe that the police would not provide him with protection. This is not a case such as *Enriquez Palacios v Canada (Minister of Citizenship and Immigration)*, 2010 FC 363, where the police had given the claimant reason to fear them. Here there was no evidence to that effect.

[14] I agree with the applicant that the Board cannot disbelieve a claimant's credible testimony on country conditions simply because there are no corroborating documents: *Ahortor v Canada*

(Minister of Employment and Immigration), [1993] FCJ No 705 (TD) at para 46. However, while the Board must consider all of the evidence before it, it is entitled to determine the weight to be given to the evidence: *Velinova v Canada (Minister of Citizenship and Immigration)*, 2008 FC 268 at para 21; and *Cosgun v Canada (Minister of Citizenship and Immigration)*, 2010 FC 400 at para 54.

[15] Here, the Board believed the applicant's testimony. But that testimony was not sufficient to rebut the presumption. The Board adequately explained why in accordance with *Okyere-Akosah v Canada (Minister of Employment and Immigration)*, [1992] FCJ No 411 (CA) at paragraph 5.

[16] The applicant did not provide clear and convincing confirmation of the state's inability to protect. The Board considered all of the relevant evidence including the applicant's testimony. Its finding that state protection was available is reasonable and the Board made no reviewable error in reaching that conclusion.

[17] No questions were proposed for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed. No questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-920-11
STYLE OF CAUSE:	KEMALETTIN KAHYAOGLU and THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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APPEARANCES:

Nicole Goulet	FOR THE APPLICANT
Andrew Gibbs	FOR THE RESPONDENT

SOLICITORS OF RECORD:

NICOLE GOULET Barrister & Solicitor Gatineau, Quebec	FOR THE APPLICANT
MYLES J. KIRVAN Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT