Federal Court  Cour fédérale

Date: 20130731

Docket: IMM-5152-12

Citation: 2013 FC 839

Ottawa, Ontario, July 31, 2013

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

CEREN YILDIZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of a decision of the Immigration and Refugee Board, Refugee Protection Division (the Board), dated May 4, 2012, wherein the applicant was determined to be neither a Convention refugee within the meaning of section 96 of the Act nor a person in need of protection as defined in subsection 97(1) of the Act.

[2] The applicant requests that the Board's decision be set aside and the application be referred back to the Board for redetermination by a different panel.

Background

[3] The applicant is a citizen of Turkey who is a Kurdish Alevi. Her parents suffered from the Turkish state's persecution of Kurds and Alevi and moved cities within Turkey many times. Her father was tortured by the Turkish military.

[4] As an adult, the applicant became active in an Alevi cultural association. She was arrested four times in Turkey for her political and cultural activities, beginning in 2007. She suffered beatings and threats during some of these arrests.

[5] After the fourth incident, she decided to flee the country for fear of what would happen if she remained there. She arrived in Canada on a study permit on September 6, 2009 and claimed refugee protection on September 10, 2009.

[6] The Board heard her claim on November 24, 2011 and March 14, 2012.

Board's Decision

[7] The Board's decision dated May 4, 2012, begins by summarizing the allegations of the applicant as described above. The Board indicated it had granted an application to have the

applicant designated a vulnerable person and the accommodations of reverse ordering questioning, a female panel member and a female interpreter. The Board's reasons also invoke the Chairperson's Guidelines on Gender-Related Persecution.

[8] The Board laid out credibility concerns, beginning with the applicant's psychological evidence. She had consulted a psychologist in Turkey but had been unable to provide any documentary evidence. She produced a psychological report from a Toronto doctor, but the Board noted it was a single visit for the express purpose of obtaining a report for her refugee claim. The Board noted the report did not satisfactorily establish that the applicant's condition was the result of the facts alleged in her claim. The Board gave the report no weight since opinion evidence is only as valid as the truth of the facts on which it is based and the Board found the applicant lacked credibility.

[9] The Board found that on a balance of probabilities, she did not face the problems she alleged in Turkey and was not at a risk of harm at the hands of Turkish authorities. The reasons detail each credibility concern in turn.

[10] The applicant claimed that she and two of her cousins were detained in June 2007. In oral testimony, the applicant stated that one of the cousins lives in Ankara, but in her Personal Information Form (PIF) narrative, she said both lived in Istanbul. The Board rejected the applicant's explanation that the cousin went to Ankara, as it does not explain the inconsistency. The Board rejected the explanation that the applicant was referring to the cousin's mother's house being in Istanbul.

[11] The Board found that the applicant claimed at the hearing for the first time, that her cousin had been arrested due to the applicant's own activities. There was no mention in the PIF, including in amendments made at the start of the hearing. This allegation is a material part of her claim of persecution by the Turkish state.

[12] The Board gave little weight to two receipts showing membership in Alevi associations in Turkey based on the applicant's inconsistent answers to questions about who paid the dues and at what time. The Board also found that the handwritten letter from her cousin confirming the payment of dues contained no security features and the Board had no way of assessing its origins.

[13] The Board noted the inconsistency between the applicant's letter indicating she was a member of a cultural association's youth committee and her testimony indicating she was unaware of any committee.

[14] The Board questioned the authenticity of the letter dated December 26, 2012, from an Alevi association in Turkey. The applicant could not produce the original and only supplied an English translation. The fact that the translation was on the official letterhead suggested blank letterhead had been supplied. The translated letter only refers to two of the four alleged detentions.

[15] The Board noted the conflicting dates regarding the arrests of the applicant. The March 1999 arrest was mentioned only in the record of examination. Neither the PIF or oral testimony mentioned the July 2008 arrest. The applicant explained this discrepancy by saying she was

referring to the March 2008 arrest, but the Board rejected this as the record of examination was written in the applicant's own handwriting and she was assisted by a friend.

[16] The Board noted the allegation that the Turkish authorities were still looking for the applicant and this was not mentioned in the PIF. While the applicant only learned of this allegation after submitting her PIF, it was not mentioned in the PIF amendments at the start of the hearing either.

[17] The Board outlined the applicant's conflicting testimony on her contact with her family in Turkey. She said she did not talk to her family on the phone and feared wiretapping, but later said she had spoken to them on the phone regarding obtaining a copy of the Turkish psychologist's report. She attempted to clarify this by saying she speaks to her family every few months, but this does not explain the discrepancy with the clear statement that she never speaks to them on the phone.

[18] The Board described conflicting oral testimony on whether the applicant went to a hospital after a beating during an arrest. She first said she did not go to a hospital, but then later said the Turkish authorities took her to a doctor. The Board consulted the audio recording and it indicated the applicant clearly said she did not go to a hospital.

[19] The Board found contradictions between the applicant's testimony and that of the supporting witness she offered. Her record of examination described him as a cousin, but her

testimony described him as her father's friend. The applicant said she met him the day after arriving in Canada but the witness said he knew her as a little girl and met her at the airport upon arrival.

[20] The Board found that a family letter dated July 2, 2011, had no security features and there was no way of assessing its origins.

[21] The Board noted the contradiction between the applicant's claim that she left Turkey in a legal manner and her allegation that the Turkish authorities were watching her. If she was being watched by them, it does not make sense she could leave in a legal manner.

[22] The Board concluded that the applicant's contradictory testimony had cast doubt on the totality of her evidence and held that the applicant was lacking in credibility generally. The Board held she had failed to establish her claim with credible and trustworthy evidence.

[23] The Board nonetheless went on to consider her claim on the basis of being an Alevi in Turkey and separately on the basis of being a Kurd.

[24] The Board canvassed evidence of discrimination against Alevis in Turkey, noting positive and negative elements of their treatment by the state. The Board again emphasized the contradictory evidence regarding the applicant's membership in Alevi organizations, including questioning why she did not attend any activities of the pre-existing Alevi association in Toronto before taking part in founding a new association. The Board concluded there was no persuasive evidence that the practice of her faith in Canada would be problematic if she returned to Turkey.

[25] The Board noted the applicant did not speak the Kurdish language and led no evidence that all people from the area her grandparents came from were Kurdish. The Board accepted that she was Kurdish and there was discrimination and harassment against Kurdish people in Turkey, but found that this discrimination did not amount to persecution in the applicant's case.

Issues

[26] The applicant submits the following points at issue:

1. Did the Board breach procedural fairness owed to the applicant by failing to provide an opportunity to respond to the Board's concerns?

2. Did the Board err in concluding that the applicant did not provide credible and trustworthy evidence in support of her claim?

3. Did the Board err in not performing a separate section 97 analysis of the applicant's risk?

[27] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Did the Board breach procedural fairness?

3. Did the Board err in rejecting the application?

Applicant's Written Submissions

[28] The applicant argues the standard of review for procedural fairness is correctness and reasonableness for the other issues.

[29] The applicant argues that given what is at stake in a refugee protection determination, procedural protections should be stringent. The Board made negative credibility findings based on doubting the authenticity of three letters without ever raising this issue at the hearing and giving the applicant an opportunity to respond to this concern. The applicant argues there similarly was no notice of the Board's concerns over inconsistent arrest dates. This was a breach of the duty of fairness.

[30] The applicant disputes the Board's treatment of the evidence. The Board failed to presume the applicant's testimony was true, engaged in overzealous and microscopic examination, failed to explain its credibility findings in clear terms and made negative credibility findings based on the failure to offer documentation.

[31] The Board was required to analyze the applicant's explanations for the Board's concern and explain why it finds these explanations unreasonable. Board decisions of plausibility rather than other findings of fact are afforded less deference.

[32] The applicant provides rebuttal of several of the Board's credibility concerns. The arrest of the cousin was confirmed by a letter sent to the Board. The applicant only learned of the authorities

seeking her after the PIF narrative was drafted. It was unreasonable to doubt the authenticity of the letter from her parents given it was hand written, signed and dated, and the Board did not indicate what other security features could be expected from a personal letter. Such documents are obtained for the specific purpose of overcoming credibility concerns. There was no conflicting testimony regarding the dues receipts as the association was simply unconcerned with the dues of an active member. The Board's questioning of the authenticity of the cousin's letter confirming the payment of dues also had no basis. The translated letter bore a translated letterhead, not the original. It was reasonable for a letter to mention only two of the four arrests and this is not a contradiction.

[33] The applicant argues the March 1999 date is not mentioned in neither the record of examination nor the PIF. The only reference is to March 1995, which is the date of the Gazi killings commemorated by the March 2008 event. All of the events mentioned in the PIF and testimony are in the record of examination, with the exception of the July 2009 date which the applicant explained should have been July 2008. The record of examination should only be used for exclusion and ineligibility and not for substantive issues and credibility, given applicants are not represented by counsel and these proceedings are not recorded.

[34] The applicant argues the inconsistency regarding the hospital is simply the difference between what she did after being released from the authorities and their treatment of her during custody, which included a visit to a doctor.

[35] The applicant argues the Board made a microscopic examination of her statements regarding where her cousin lives. The applicant explained in her culture, one refers to one's mother's home as one's home.

[36] The applicant disputes the Board's plausibility finding that a person who had problems with the Turkish authorities could leave the country legally. The Board cites documents that an individual will be stopped if she has been wanted or charged with a crime, but the applicant's arrests were illegal and extrajudicial. The Board cites no evidence for its conclusion that a victim of illegal detention would be unable to leave Turkey. The Board unreasonably rejected the applicant's explanation of the youth committee issue, that it was not a specific committee but only to distinguish the youth in the group.

[37] The Board's country conditions conclusions were based on the negative credibility findings above, that the applicant did not fit the profile of a politically active Kurd or Alevi who would be at risk. The Board overlooked country conditions evidence showing persecution of those participating in demonstrations.

[38] Finally, the applicant argues the Board erred by not undertaking a separate analysis under section 97 of the Act. There is a serious risk to those similarly situated to the applicant, yet the Board did not consider it at all.

Respondent's Written Submissions

[39] The respondent argues there was no breach of the duty of fairness as the Board's written reasons are replete with examples of the applicant being warned of inconsistencies. The problems with the letter from the Alevi association were obvious so did not need to be raised by the Board. The Board had a right to observe the basic reliability of the other letters without first apprising the applicant. The misstatement of the March 1999 date instead of March 1995 in the Board's reason is merely a clerical error.

[40] The respondent argues it was reasonable for the Board to fault the applicant for inconsistencies, even if there is evidence supporting her testimony; it does not resolve the inconsistencies. The Board did not ignore the proffered evidence such as the receipts or the letters. The respondent argues the Board may rely on the record of examination, especially in the context of other grounds for suspecting credibility. The testimony regarding the hospital visit was indeed inconsistent.

[41] The respondent argues the Board wrote six pages in considering the applicant's claim under section 97.

Analysis and Decision

[42] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[43] It is established jurisprudence that credibility findings, described as the "heartland of the Board's jurisdiction", are essentially pure findings of fact that are reviewable on a reasonableness standard (see *Lubana v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 at paragraph 7, [2003] FCJ No 162; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 46, [2009] 1 SCR 339; *Demirtas v Canada (Minister of Citizenship and Immigration)*, 2011 FC 584 at paragraph 23, [2011] FCJ No 786). Similarly, the weighing of evidence and the interpretation and assessment of evidence are reviewable on a standard of reasonableness (see *Oluwafemi v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1045 at paragraph 38, [2009] FCJ No 1286).

[44] In reviewing the Board's decision on the standard of reasonableness, the Court should not intervene unless the Board came to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 47; *Khosa* above, at paragraph 59). As the Supreme Court held in *Khosa* above, it is

not up to a reviewing court to substitute its own view of a preferable outcome, nor is it the function of the reviewing court to reweigh the evidence (at paragraph 59).

[45] It is trite law that on the content of procedural fairness, no deference is owed to a tribunal (see *Khosa* above, at paragraph 43).

[46] **Issue 2**

Did the Board breach procedural fairness?

The applicant argues the Board breached the duty of fairness by not giving the applicant an opportunity to defend the authenticity of many documents in her evidence.

[47] Mr. Justice Leonard Mandamin dealt with a similar issue in *Garcia v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1368 at paragraphs 33 to 37, [2011] FCJ No 1671:

> 33 The error in translation is obvious on its face. The English translation of the Applicant's August 8, 2008 session with the psychologist is approximately one page in length and ends in mid-sentence. The Spanish original is two and one half pages in length.
>
> 34 The RPD discounted the occurrence of the kidnapping, the core element of the Applicant's claim, on the basis of an incomplete translation and found a non-existent inconsistency since the Spanish report corresponds to the Applicant's testimony. Moreover, the RPD acknowledges its failure to bring the contradiction to the Applicant's attention.
>
> 35 I find the Applicant was not given the opportunity to explain this apparent contradiction.
>
> 36 In *Muthusamy v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 1333 at paragraph 4, Justice Cullen wrote:

> Moreover, the Board drew an adverse inference from the lack of proper translation of the Applicant's identification documents. During the course of the hearing, it failed to bring this matter to the attention of the Applicant. It is a well-settled principle of natural justice that one must know the case to meet. If the Board was to rely on the translated identity documents but had concerns about the accuracy of the translation and their authenticity, they had a duty to alert the Applicant. To not do so and then base their decision on an issue to which the Applicant did not reply, is a breach of natural justice.
>
> (Emphasis added)
>
> 37 In *Santos v Canada (Minister of Citizenship and Immigration)*, 2004 FC 937 at paragraph 18, Justice Mosley also found that the RPD should have alerted the Applicant to concerns that it had about the reliability of the Applicant's documentary evidence, which was significant to the Applicant's claim.

[48] The respondent attempts to distinguish this case law on the basis that the problems with the letters were obvious, but the first paragraph of the excerpt above shows that the Board's obligation to raise this concern with the applicant applies equally to obvious deficiencies.

[49] Similarly, the respondent's attempt to distinguish *Santos* above, on the basis that it dealt with doubting the security features on a bank letter is unconvincing, given the Board in that case was concerned with the lack of security features, just as in the decision under review (see *Santos* above, at paragraph 12).

[50] The Board's reasons cast doubt on three such documents:

- Letter from the applicant's cousin confirming she paid dues (at paragraph 25);
- English translation of a letter from an Alevi association in Turkey (at paragraph 28); and

- Letter from the applicant's family describing Turkish authorities looking for her (at paragraph 45).

[51] A review of the transcript indicates the Board never raised the issue of the authenticity of these documents. As described in *Garcia* above, this is a violation of the duty of fairness because the applicant was unaware of the case to be met. Given the two hearings afforded the applicant and the detailed questioning, the Board had ample opportunity to question the origins or authenticity of these documents, but it chose not to do so.

[52] The respondent has not argued that the Board would have come to the same conclusion absent these breaches and it is not obvious to me that this is the case. The Board rejected the applicant's credibility, but might not have had it put faith in the three documents corroborating her allegations.

[53] Because of my finding on Issue 2, I need not deal with the third issue. The application for judicial review is therefore granted and the matter returned back for redetermination by a different panel.

[54] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed and the matter is referred to a different panel of the Board for redetermination.

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutory Provisions

***Immigration and Refugee Protection Act*, SC 2001, c 27**

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.
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.
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	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 incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne 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.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5152-12
STYLE OF CAUSE:	CEREN YILDIZ - and - THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	February 11, 2013
REASONS FOR JUDGMENT AND JUDGMENT OF:	O'KEEFE J.
DATED:	July 31, 2013

APPEARANCES:

Daniel Radin	FOR THE APPLICANT
Stephen Jarvis	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Daniel Radin Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT