

Federal Court



Cour fédérale

Date: 20130913

Docket: IMM-10210-12

Citation: 2013 FC 949

Ottawa, Ontario, September 13, 2013

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

MEHMET ALI ATACAN YURTAL

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The Applicant seeks a judicial review of a decision by the Refugee Protection Division of the Immigration and Refugee Board [Board], dated September 18, 2012, wherein, it was determined that he is neither a Convention refugee under section 96 nor a person in need of protection under section 97 of the *Immigration and Refugee Protection Act*, SC 2001 c 27 [IRPA].

II. Background

[2] The Applicant, Mr. Mehmet Ali Atacan Yurtal, is a citizen of Turkey; and, was born in 1971. He is of Azerbaijani origin and practices the Christian faith for more than a decade.

[3] The Applicant grew up in the province of Kars to a family of the Shia Caferi religious denomination.

[4] In 1997, the Applicant became active in a leftist opposition political party [the Emek Partisi or EMEP]). He soon, thereafter, converted to Christianity in 2000.

[5] In August 2000, the Applicant was arrested by the police because of his religious activities during which time he suffered beatings during his detention by the police.

[6] The Applicant states that the police continued to harass him after this event; therefore, he decided to move from Istanbul to Ankara in April 2001.

[7] In 2002, the Applicant related he was ambushed and severely beaten by a gang of Turkish extremist nationalists, after attending a church service in Ankara. A letter by Dr. Nurullah Zengin, dated August 3, 2012, confirms that the Applicant was admitted to hospital on July 21, 2002, for fractures suffered to his right arm and left elbow (Applicant's Record [AR] at pp 161-162).

[8] In April 2007, the Applicant was arrested by police again, this time for putting up a banner over a bridge in Ankara in protest for the murder of three Christians in the neighbouring city of Malatya. He explained he was detained for questioning and again subject to beatings and torture. A

letter by Dr. Nurullah Zengin, dated August 3, 2012, confirms that the Applicant was admitted to the hospital on April 27, 2007, for a dislocated left shoulder (AR at pp 163-164).

[9] On May 1 2008, the Applicant testified he attended the May Day Rally with the EMEP in Istanbul, where police confronted demonstrators with armoured vehicles and shields, and used tear gas to disperse the crowd. The Applicant was apprehended by police, together with other demonstrators, and severely beaten.

[10] In February 2009, the Applicant began working as a seaman for an international shipping company. He continued working in this capacity until November 2010.

[11] In September 2009, the Applicant related that a Sunni neighbour complained to the police of his distributing brochures for his Christian Protestant church; after which, he was questioned in respect of his religious and political activities and beaten by the police.

[12] In June 2010, the Applicant was again arrested for distributing brochures, subsequent to more complaints made to the police by the neighbours; thereupon, he was detained and again beaten by police.

[13] In July 2010, after being rehired by the shipping company, the Applicant again left Turkey. The Applicant, as a member of the crew, travelled for four months on a cargo ship, stopping in multiple countries before eventually arriving in Canada. He docked in Quebec City on November 17, 2010.

[14] On November 30, 2010, subsequent to leaving his ship and crew with its related duties, he travelled by bus to Toronto and claimed refugee protection.

[15] The Board heard his claim on April 2, 2012 and also on July 19, 2012.

III. Decision under Review

[16] In its decision, dated September 18, 2012, the Board concluded that the Applicant was neither a Convention refugee nor a person in need of protection. The Board's conclusion was that the Applicant did not have a well-founded subjective or objective fear of persecution neither on religious nor political grounds.

Religious grounds

[17] With respect to the Applicant's first allegation of persecution, based on religious grounds, the Board found that the Applicant failed to demonstrate that he feared persecution in Turkey. The Board determined that the alleged incidents on which the Applicant based his claim were isolated and termed them as random events, spanning a several year period that the Board considered neither repetitive nor persistent.

[18] In assessing the Applicant's claim of persecution, the Board was of the opinion that there were irregularities in the Applicant's narrative which the Board determined pointed to a lack of subjective fear of persecution. For instance, although he specified a fear for his life as a Christian in a predominantly Muslim community, the Board reached the conclusion that, nevertheless, the

Applicant did practice his religion for nearly 10 years, as he attended a (house) church regularly (where a pastor would come to officiate). The Board took the view that discrepancies existed between the Applicant's documentary evidence and oral testimony with regard to his religious activities between 2000 and 2009 (Record of Hearing of April 2, 2012 at pp 16-18). (A careful reading demonstrates that a misunderstanding may have arisen in that the Applicant specified he distributed brochures in respect of his Christian faith that were considered to be of a missionary nature in 2009, and, not in 2000 when he was a simple adherent.)

[19] The Board also considered the Applicant's delay in seeking asylum in determining the well-foundedness of his subjective fear. The Board determined that the Applicant's delay in leaving Turkey was unreasonable, as, it did also in regard to his subsequent delay in seeking refugee status in Canada after having left his country. The Applicant arrived in Canada as a seaman in Quebec City on November 17, 2010 subsequent to which he took a bus to Toronto and filed his refugee claim on November 30, 2010 only after he left the crew of his ship, or only after he was able to leave the crew of his ship.

[20] The Board ultimately found that the Applicant lacked both a subjective and an objective fear of persecution. In its reasons, the Board made specific reference to its above-noted concerns, as well as the International Religious Freedom Report 2010 [IRFR] (Certified Tribunal Record [CTR] at p 72) which states that by 2010 "Christians and Baha'is engaging in religious advocacy were occasionally threatened or pressured by government and state officials" but that "the government generally respected religious freedom in practice" [Emphasis added].

[21] The Board decided to give only specifically chosen, selected documentary evidence considerable weight, finding no objective fear of persecution as opposed to discrimination which is discussed subsequently below.

Political grounds

[22] The Board's analysis concluded that the Applicant's alleged persecution on grounds of political affiliation with the EMEP, was based on its finding of insufficient evidence for the Applicant to fear persecution by police.

[23] According to the Board, the Applicant's alleged detention and torture during the May Day Rally of 2008 – that is the incident raised in the Applicant's narrative in regard to his political activities – resulted from the Applicant's own participation in general demonstrations and not necessarily due to his association to the EMEP. The Board concluded that no evidence existed that the police would have known of his membership in the EMEP. In the Board's view, the evidence demonstrated to it, that the Applicant had no political profile by which he would be a person of interest to the police; according to the Board, he was simply a member of the party with no titled position.

[24] The Board concluded that it was not plausible that the event specified by the Applicant was related to the Applicant's membership in the EMEP; and, thus, the Applicant's alleged fear of persecution by the police was based on his political activities which, according to the Board, remained unfounded.

IV. Issue

[25] Did the Board err by misconstruing or ignoring evidence in its findings?

V. Relevant Legislative Provisions

[26] The following legislative provisions of the *IRPA* are relevant:

Convention refugee

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,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(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.

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

Définition de « réfugié »

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) 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) 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.

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 themselves 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.

Person in need of protection

Personne à protéger

(2) A person in Canada

(2) A également qualité

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.

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.

VI. Standard of Review

[27] The standard of review applicable to the Board's findings on credibility and subjective fear is that of reasonableness (*Kaur v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1379).

[28] To satisfy a reasonableness standard, a decision must fall in the “range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

[29] The Court only intervenes in a credibility finding if the first instance, trier of fact, bases its decision on “an erroneous finding of fact made in a perverse or capricious manner or if it made its decision without regard to the material before it” (*Aguebor v Canada (Minister of Employment and Immigration)* (1993), 160 NR 315, 42 ACWS (3d) 886 (FCA)).

VII. Position of the Parties

[30] The essence of the Applicant's argument is that the Board committed a reviewable error by misconstruing and ignoring evidence in its assessment of credibility and subjective fear; namely, that of the documentary evidence related to membership in the EMEP and the Christian church, as well as that of the medical reports in support of the alleged incidents involving the police.

[31] The Respondent submits that the Board considered the totality of the evidence in its findings on the Applicant's credibility and subjective fear.

VIII. Analysis

[32] The Board did not find that the point-specific documentary evidence with regard to the Applicant's membership to the Christian church, to the EMEP or to the medical reports had probative value by which to assess the well-foundedness of the Applicant's alleged fear of persecution.

[33] With regard to the Applicant's claim of persecution based on religious grounds, the Court considers that the Board was unreasonable in its finding that the Applicant lacked a subjective fear of persecution. The Board drew a negative inference from the Applicant's ten-year delay in seeking asylum and his repeated re-availment to Turkey (*Rengifo v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1177; *Kabengele v Canada (Minister of Citizenship and Immigration)* (2000), 197 FTR 73).

[34] Although the jurisprudence is clear that a delay is not always determinative in a refugee claim, it may be a significant factor in determining a lack of subjective fear of persecution if explanations do not demonstrate otherwise. The Applicant stated that he had lost several members of his family and he did not want to leave even though his child was taken care of by its mother. (That matter was not adequately canvassed by the Board as no conclusive comment is made thereon by the Board in its decision, other than to infer lack of credibility.)

[35] This Court also finds that the Board's conclusions on the Applicant's lack of subjective and objective fear were insufficient when read in respect of the totality of the transcript and written narrative when viewed in context. Without further questioning, more is unknown than is known on this matter, as key information in potential responses was not solicited due to a lack of pertinent questioning on the subject, questioning which needed to be conducted in an atmosphere conducive to such questioning. Although the hearing went on for two days, key elements concluded upon were unclear leading to a lack of reasonableness.

[36] Although the IRFR report states that, in 2010, members of minority religious groups did, themselves, report that "they had freedom to practice their faith", that must be examined on a case by case basis as to specific facts and in context as to activities undertaken by minority religious groups. Improvements were not necessarily witnessed in several areas as specified in contrary objective documentation presented by the Applicant.

[37] Certain reports clearly point to societal persecution, both of a verbal and physical abuse variety against religious groups, the documentary evidence indicates that incidents were directed against all minority religious groups, not only Christians. (Does it make it better, or can it be considered evolutionary for the enhancement of human rights that the abuses were now generalized to all groups rather than one group, which demonstrates that there is no distinction as to who is targeted amongst all minority groups; therefore, all are considered to be subjects of such.) The Applicant's own testimony bears this out (Record of Hearing of April 2, 2012 at p 18).

[38] The Board cited the following in support of its reasoning, in 2010, although “[m]any members of the public viewed religious pluralism as a threat to Islam and to ‘national unity’” [emphasis added], religious minority groups were, in a limited fashion, permitted to establish new religious community foundations as well as to reopen foundations which previously had been closed; and they could seek returns, or compensation on the basis of foundations which had been confiscated by the state authorities in previous decades. These were considered to be improvements; however, the ultimate pragmatic outcome is still yet to be witnessed in regard to protection of religious freedoms in Turkey; and, as yet, they are not indicative of a state that can be said to protect rights. Serious abuse and persecution still continues unabated as is evident on reading the documentary country condition evidence on a non-selective basis, if read in comprehensive context. (It is to be noted that other than mainstream Turkish religious group minorities constitute less than one percent of the country’s population. The Exhibit – U.S. Department of State Report of November 17, 2010.)

[39] The facts of this case do appear to reflect a failure of state protection and a conceivable pattern of systematic violence based on religion and political grounds for this Applicant on his specific evidence and grounds when he does anything in public view rather than worship in a house church he attended; this holds true, also, with regard to the Applicant’s specific claim of persecution on political grounds as well as that of his alleged religious grounds as to his Christian Protestant faith and practice. (See objective evidence thereon, for example, on file, entitled “A threat” or under threat, Legal and Social Problems of Protestants in Turkey, 2010, by the Association of Protestant Churches Committee for Religious Freedom and Legal Affairs, where it is specified that Protestant denominations remain vulnerable in Turkey. See, also, Exhibit “A Ecumenical Patriarch on

Christian Persecution in Turkey, December 23, 2009, www.catholics.org; reference is also made to the Exhibit entitled “Religious Freedom Survey, 2009, re “Serious Violations of Human Rights”.)

[40] It is fully recognized, as stated in *Chan v Canada (Minister of Employment and Immigration)*, [1995] 3 SCR 593, for mistreatment to be considered “persecution”, it must meet two criteria: it must be serious and it must be repetitive or systematic. Harassment or discrimination are not, in and of themselves, sufficient for such. Moreover, mistreatment must be truly demonstrative of “state protection” (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at para 63). In the case of the Applicant, each time he was detained by the authorities or the victim of societal abuse, the situation appeared otherwise as it was serious and of peril to his person as per uncontradicted specific evidence.

[41] Upon reviewing all of the evidence in the CTR and the submissions of the parties, this Court is persuaded that the Board erred in its conclusions with regard to the Applicant’s subjective and objective fear of persecution by having ignored the evidence that must be adequately demonstrated, at least, to have been taken into account to reach any decision. As a specialized tribunal and finder of fact, the Board must, in some manner, account for pertinent evidence in respect of a specific applicant bearing specific evidence, and not assess in a generic nor amorphous manner, out of context.

[42] The Board unsatisfactorily assessed and weighed the evidence, both, the personal evidence of the Applicant and the documentary evidence. Thus, it is not for this Court but only for the specialized tribunal as a finder of fact to ensure that its mandated jurisdiction is carried out

according to its expertise with the evidence to bear such out. The Board's findings were unjustified by the weight it accorded to the evidence without a more substantial in-depth and breath analysis, even if only briefly commented upon, or even merely alluded to, in a more directed manner, so as not to disregard pertinent evidence in its contextual setting.

[43] It is incumbent on the Board, as a result, to examine the (personal) subjective and objective evidence of the Applicant in his oral testimony and written materials which include five uncontradicted arrests, detentions and incidents of violence imposed on his person, none of which evidence had been specifically discredited in the reasons of the Board as per the comprehensive evidence on file. Numerous objective documentary elements of evidence pointed out by the Applicant simply remained wholly ignored.

[44] The potential cumulative effects of the incidents were not found, in and of themselves, to lack credibility. They may, in fact, point to accumulated effects; this, too, needs specific analysis by the Board. Specific evidence from the church, political party and medical reports were discounted without any due explanation by the Board. This evidence may, in fact, have a cumulative effect, if credible.

[45] The delay in respect of the actual claim for refugee status was explained by the Applicant. To be discounted by the Board, it too would have had to have been, at the very least, discussed in specific measure based on the Applicant's answers on file.

[46] In conclusion, the oral testimony of the Applicant cannot simply be discounted if it is not contradicted by the Personal Information Form [PIF] nor lacking in inherent logic with the PIF.

[47] It is not incumbent on the Board to write long explanations for such subject-matter but it must address such; otherwise, the reasons can be said to be improperly motivated, lacking adequate assessment of what appears to be pertinent evidence. It is reiterated by the Court that the how and what, when reached by the Board's eventual reasoning, is for the Board, itself, to determine as a specialized tribunal; that is for the specialized finder of fact to do but the key uncontradicted evidence must, at the very least, be addressed.

IX. Conclusion

[48] For all of the above reasons, the Applicant's application for judicial review is granted and the matter is returned for determination anew (*de novo*) by a different member of the Board.

JUDGMENT

THIS COURT ORDERS that the Applicant's application for judicial review be granted and the matter be returned for determination anew (*de novo*) before another member of the Board with no question of general importance for certification.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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