

Federal Court



Cour fédérale

Date: 20141120

Docket: IMM-5245-13

Citation: 2014 FC 1103

Toronto, Ontario, November 20, 2014

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

HASAN ALI ORS

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] Hasan Ali Ors' claim for refugee protection was rejected by the Refugee Protection Division of the Immigration and Refugee Board on credibility grounds. Mr. Ors asserts that the Board unreasonably concluded that a psychiatric report indicating that he suffered from dementia and severe cognitive impairment did not explain the confusion and contradictions in his testimony.

[2] At the conclusion of the hearing, I advised the parties that I would be allowing the application. These are my reasons for that decision.

I. Background

[3] Mr. Ors is a retired police officer from Turkey. He claimed to have a well-founded fear of persecution in Turkey because of his political views and because he had objected to law enforcement personnel, including his colleagues, brutalizing detainees and individuals in crowd control situations.

[4] The Minister of Public Safety intervened in Mr. Ors' case, asserting that the claim should be dismissed under Article 1F(a) of the *Refugee Convention* because of the human rights abuses committed by the Turkish police force.

[5] Due to her concerns regarding his competency, counsel for Mr. Ors brought a motion at the commencement of the hearing seeking to have him declared to be a vulnerable person and to have a designated representative appointed to assist in protecting his interests.

[6] The motion was supported by a report from a psychotherapist, indicating that Mr. Ors appeared to be very anxious and somewhat disoriented during their appointment and that he could not remember details of his experiences. The psychotherapist stated that Mr. Ors was "experiencing significant trauma and stress response symptoms due to his experiences as well as the constant fear of having to return to Turkey." She noted that Mr. Ors' family doctor had diagnosed him with depression and anxiety. The psychotherapist concluded that Mr. Ors' "lack of memory regarding the details of his experiences, and [his] general state of confusion and

anxiety” meant that he did not have “the mental and emotional capacity to testify” at his refugee hearing.

[7] The Board member asked Mr. Ors a number of questions in order to ascertain whether he was capable of appreciating the nature of the proceedings. Mr. Ors appeared to be quite disoriented. He could not tell the Board member why he was there. Nor could he explain what it meant to tell the truth, and he was unable to tell the Board member the colour of the microphone in front of him.

[8] The Board member refused to declare Mr. Ors to be a vulnerable person and dismissed the motion for the appointment of a designated representative. Amongst other things, the member was concerned that Mr. Ors had not been receiving ongoing treatment for his psychological problems. The member was also concerned that no suggestion had been made as to a specific individual who could act as designated representative.

[9] Although Mr. Ors took issue with this ruling in his memorandum of fact and law, his counsel indicated that he would not be pursuing this argument at the hearing, and would instead focus on the Board’s treatment of a psychiatrist’s report filed later in the proceeding.

[10] Mr. Ors’ hearing proceeded over three days spanning a period of approximately six months. He was examined at length by the Minister’s representative and was also questioned by the Board and by his own counsel. At the conclusion of the evidentiary portion of the hearing, the Board member adjourned the case to allow the parties to file written submissions.

[11] As a result of her ongoing concerns regarding the quality of Mr. Ors’ testimony, particularly on the last day of his hearing, Mr. Ors’ counsel filed a motion seeking leave to file a

psychiatric report from a Doctor Richard Stall as post-hearing evidence. Dr. Stall noted in his report that Mr. Ors had struggled to answer many of the doctor's questions, including the number of children that he had.

[12] Dr. Stall performed cognitive testing on Mr. Ors which indicated that Mr. Ors had severe cognitive impairment. He scored 5/27 on a test where a score of less than 26 indicated cognitive impairment and a score of less than 9 indicated a severe cognitive impairment. Dr. Stall concluded that Mr. Ors "fulfilled the diagnostic criteria for Major Depressive Disorder, Posttraumatic Stress Disorder and Dementia, not otherwise specified".

II. The Board's Decision

[13] The Board concluded that the Minister had produced insufficient evidence to establish that Mr. Ors was excluded from the protection of the Refugee Convention.

[14] Insofar as its inclusion analysis was concerned, the Board concluded that Mr. Ors had failed to establish that he had a well-founded fear of persecution in Turkey. The Board based this finding on Mr. Ors' lack of credibility and his lack of subjective fear, as evidenced by his delay in seeking refugee protection after his arrival in Canada.

[15] In concluding that Mr. Ors' evidence was not credible, the Board noted that his testimony was "confusing, at times hard to follow and the claimant was contradictory in his evidence". The Board further noted that parts of Mr. Ors' testimony were "extremely difficult to understand", that some of his evidence "ma[de] little sense", and that his evidence "suffered from consistent contradictions and discrepancies without satisfactory reasons as to why this was the case".

[16] The Board considered the fact that Mr. Ors was taking medication, observing that there was no evidence showing that this medication would impair his ability to testify. The Board further noted that Mr. Ors' testimony was punctuated with responses such as "I don't know", and "I can't remember", answers that impacted negatively on his credibility. The Board member was not persuaded that the psychotherapist's report sufficiently explained the gaps in Mr. Ors' memory, or why he could remember some things and not others. The member concluded that Mr. Ors' non-responsive answers were "a way of deflecting how lacking in credibility his evidence is once tested".

[17] Referring to the psychotherapist's report, the Board noted that a psychological report cannot serve as a "cure-all" for any and all deficiencies in an applicant's evidence, and that the evidence is only as reliable as the truth of the facts upon which it is based. Having found Mr. Ors' story not to be credible, the Board chose to ascribe little weight to the psychotherapist's evidence.

[18] As concerned Dr. Stall's evidence, the sum total of the Board's analysis was its statement that:

While it is possible that the claimant suffers from the conditions stated in the report, the panel has not been sufficiently persuaded, based on Dr. Stall's report of May 23, 2013 that the claimant's condition affected his evidence to the point that limited his ability to recall certain events of his claim. The panel assigns low probative value to the report from Dr. Stall.

[19] Having concluded that Dr. Stall's report did not explain the numerous problems with Mr. Ors' testimony, the Board dismissed his claim. As was noted earlier, the only issue to be decided is the reasonableness of this finding.

III. Analysis

[20] It is now well-established that reasons do not have to be perfect, and that administrative decision-makers do not have to make explicit findings on each constituent element leading to its final conclusion: *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras. 16, [2011] 3 S.C.R. 708. It will be sufficient if a 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, at para. 47, [2008] 1 S.C.R. 190.

[21] Notwithstanding the deference that this Court owes to a finding of fact such as the one in issue in this case, I am satisfied that the Board’s finding that Dr. Stall’s evidence did not explain the problems with Mr. Ors’ testimony was unreasonable as it lacked justification, transparency and intelligibility.

[22] The Board did not explicitly reject Dr. Stall’s diagnoses, nor did it have the expertise to do so. Indeed, this lack of medical expertise on the part of the Board is expressly recognized in the Board’s own procedural guidelines. Indeed, the Board appears to have accepted Dr. Stall’s finding that Mr. Ors “fulfilled the diagnostic criteria for Major Depressive Disorder, Posttraumatic Stress Disorder and Dementia, not otherwise specified”, and that his cognition was severely impaired.

[23] The Board had itself observed that Mr. Ors’ testimony was difficult to follow, confusing and contradictory, and that some of his answers made little sense. With that in mind, it is impossible to ascertain from the Board’s reasons how or why it concluded that Dr. Stall’s finding

of severe cognitive impairment did not explain why Mr. Ors was unable to consistently recall the events giving rise to his claim for refugee protection.

[24] In *Kaur v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 1379, [2014] 2 F.C.R. 3, this Court observed that the Supreme Court's decisions in *Dunsmuir* and its progeny have greatly restricted the Court's ability to intervene in Board findings regarding the import of psychological reports. The Court went on to observe that the Court should not intervene "unless there is something in a psychologist's report which strongly suggests that an adverse credibility finding made by the Board was unreasonable": at para. 38, emphasis in the original. In my view, this is such a case.

IV. Conclusion

[25] For these reasons, the application for judicial review is allowed. I agree with the parties that the case does not raise a question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is allowed, and the matter is remitted to a differently constituted panel for re-determination.

"Anne L. Mactavish"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5245-13

STYLE OF CAUSE: HASAN ALI ORS v THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: NOVEMBER 19, 2014

JUDGMENT AND REASONS: MACTAVISH J.

DATED: NOVEMBER 20, 2014

APPEARANCES:

Lorne Waldman

FOR THE APPLICANT

Kareena R. Wilding

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Waldman & Associates
Barristers and Solicitors
Toronto, Ontario

FOR THE APPLICANT

William F. Pentney
Deputy Attorney General of
Canada

FOR THE RESPONDENT