Date: 20080526

Docket: IMM-4609-07

Citation: 2008 FC 668

Ottawa, Ontario, May 26, 2008

PRESENT: The Honourable Mr. Orville Frenette

BETWEEN:

ONUR MAHMUTYAZICIOGLU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This application for judicial review arises from a decision of Gordon McKenzie of the Refugee Protection Division (RPD). That decision held that Mr. Mahmutyazicioglu (the Applicant) is not a refugee or a person in need of protection because he does not, subjectively or objectively, have reason to fear persecution or a risk of cruel and unusual treatment or punishment or torture based on his ethnicity, religion, or political views if he were returned to Turkey.

I. The Refugee Claim

[2] The Applicant is a citizen of Turkey, a member of the Kurdish ethnic group, and is of the Alevi religion. He claimed refugee status in Canada in March 2005, stating in his Personal Information Form (PIF) that he feared abuse or mistreatment by the police if he were to return to Turkey. He claims this fear based on grounds of religion, ethnicity, and political opinion.

[3] The Applicant's PIF and the documentary evidence demonstrate that discrimination against Kurds is ongoing in schools and other institutions. For example, throughout his education, the Applicant was compelled to take Sunni religious instruction and to recite songs and slogans which denigrated the Kurdish people. The Applicant stated in his PIF that at his university in Ankara, Kurdish and Alevi students were frequently stopped and questioned by police.

[4] The Applicant stated that on November 6, 2001, while at university, he participated along with other minority students in a protest against the education policies of the Higher Education Council. The police arrested some of the demonstrators after government supporters began attacking the demonstrators. The Applicant stated that he was arrested and held overnight, questioned and beaten before being released the next day.

[5] In March 2002, he participated in an annual Kurdish celebration which he testified was often interpreted by Turkish security forces as a political demonstration. The Applicant stated that he was arrested at random as the police dispersed the crowd. The police, once he was identified, became

aware of his previous detention. He stated that they questioned him about his associations, beat him, and released him the next day.

[6] After his second year of university, the Applicant decided to take time off and leave the country. He received a student visa in December 2002 to come to Canada to study English as a Second Language (ESL). He only planned to stay in Canada temporarily. He returned to Turkey in July 2003, apparently at the encouragement of his parents and to see his father who had recently undergone surgery.

[7] The Applicant stated that, upon his return to Turkey, his bags were searched and he was interrogated for three hours at the airport. Because of this, he stayed in Turkey for just one month and was nervous to leave his home during that period. He returned to Canada in August 2003 and claimed refugee status in March 2005. His claim is based on his religion, ethnicity and political opinions.

[8] The Applicant added to his claim at the RPD hearing the explicit allegation that he was a conscientious objector. He said that he objected to serving in the Turkish army, but would be required to do so if he were to return to Turkey. Military service is compulsory in Turkey for all Turkish citizens. However, an exception can be obtained, *inter alia*, for educational purposes. The applicant did obtain such an exemption for the duration of his studies. However, but the Applicant claimed at the RPD hearing that there was now an arrest warrant out for him because he had not shown up for his military service. The Applicant provided no other evidence of this claim.

II. The decision under review

[9] The RPD member, whose decision was accompanied by twenty-one pages of reasons, did not find the Applicant to be credible or trustworthy and as a result concluded that there was no subjective fear of persecution. He accepted that the claimant may have been detained, but did not accept the allegations of abuse. Nor did the RPD member accept that the Turkish police forces would be looking for him, as he was able to get a passport and leave Turkey twice without incident. The RPD member noted the lateness of the Applicant's claim to be a conscientious objector and the lack of substance behind this claim. The RPD member therefore rejected the aspect of the claim based on conscientious objector status. The RPD member also found that, if the Applicant was detained, it was part of a general police initiative to preserve public order and that this was not the result of targeting the Applicant on the basis of his religion, ethnicity, or political views.

III. Issues

[10] The Applicant alleges the following errors in the RPD member's decision, which I have re-phrased slightly:

a. The RPD erred in finding that the Applicant was not credible and therefore that
    i) the Applicant did not have a subjective fear of persecution; and
    ii) the Applicant's detention was not for Convention reasons;
b. The RPD erred in failing to assess the possible future risk if the Applicant returns to Turkey and participates in activities that promote Kurdish culture, religion, or politics;

c. The RPD erred in finding that the Applicant was not a conscientious objector; and

d. The RPD did not conduct a separate analysis of section 97 risk.

IV. Standard of Review

[11] Most of the issues above are based in the member's credibility finding, which is to be reviewed on a standard of reasonableness: see *Dunsmuir v. New Brunswick*, 2008 SCC 9; *Khokhar v. Canada (MCI)*, 2008 FC 449, [2008] F.C.J. No. 571 at paras. 17-23 (QL). With respect to the obligations to conduct a separate analysis under section 97 and to deal with future risk, these are questions of pure law for which less deference is required by the Court. They are reviewable on a correctness standard: *Choudhary v. Canada (MCI)*, 2008 FC 412, [2008] F.C.J. No. 583 at para. 13 (QL).

V. Analysis

a. Did the decision-maker err in finding that the Applicant was not credible and that he did not have a subjective fear of persecution?

[12] The RPD member considered the Applicant's claims but determined that, contrary to those claims, the Turkish authorities were not attempting to persecute the Applicant. At para. 33 of his reasons, the member stated:

> In summary, given the totality of my negative findings respecting the central elements of the claimant's refugee protection claim, and my analysis of the documentary evidence before me on the treatment of Kurdish and Alevi citizens of Turkey, I do not believe that the

> claimant was the victim of systematic ethnic, religious or political harassment at the hands of Sunni Muslim fundamentalists, Turkish nationalists or that he was subjected to acts of police brutality in November 2001 and March 2002 by reason of his partial Kurdish ethnicity, Alevi religion and his leftish or pro-Kurdish political views and activities in Turkey as is alleged.

[13] The RPD member based this conclusion on the fact that the Applicant was allowed a passport and was permitted to leave the country twice; on the inconsistencies in the Applicant's evidence; and on the Applicant's considerable delay and re-availment before claiming refugee protection.

[14] The Applicant submits that the RPD member erred in basing his negative credibility finding on his conclusion that the Turkish officials would not have issued him a passport or allowed him to leave the country if he was wanted by the police. The Applicant submits that this is in error because there is no evidence that those who are arrested but not charged for being involved in Kurdish activities would be denied passports. The Applicant submits that "if one is not the subject of an investigation, the passport will be issued."

[15] With respect to subjective fear, the Applicant submits that the RPD decision fails to explain how it could find no subjective fear when it has already found plausible that he was detained. The Applicant also submits that it was an error for the member to consider re-availment in 2003, when the Applicant testified that he did not begin to have a subjective fear until later.

[16] The Applicant alleges that the RPD member erred in finding that the police arrested the Applicant for the purpose of preserving public order. The Applicant submits the purpose of his detainment was to suppress the promotion of Kurdish cultures and leftist political opinion.

[17] The Respondent submits that the issuance of a passport was not the only reason why the Board did not believe the Applicant's allegations of beatings and torture. The Respondent submits that other omissions, inconsistencies and implausibilities were considered: the delay in leaving Turkey; re-availment; and the delay in claiming protection in Canada all contributed to the negative credibility finding. The Respondent submits that it was not an error to rely on the omission from the Port of Entry (POE) notes of the harassment and of his objection to military service as demonstrative of a lack of credibility.

[18] The Respondent notes that the Applicant does not challenge the finding that the delay between 2003 and 2005 was significant. The Respondent also argues that the delay from 2002 is significant.

[19] I agree with the Respondent that the passport issue was not the sole basis from which the RPD member drew his conclusion that the Applicant was not credible. Although it is somewhat convoluted, I am also convinced that the passport aspect of the decision was reasonable.

[20] The essence of the RPD member's decision with respect to the passport is that if the Applicant was under any kind of serious watch by the authorities, then he would not have been free

to obtain a passport and leave the country twice. Since he was able to do these things, the member said, it is implausible that the police would still be looking for him and persecuting him if he were to return. As the Applicant himself pointed out, if he were under investigation, they would not have allowed him to leave. This leads to the inference that the police have no serious interest in the Applicant. This is not an unreasonable conclusion.

[21] With respect to detainment, the documentary evidence suggests that freedom of assembly is not a well-protected right in Turkey. The Country of Origin report of 2005 (several years after the Applicant alleges that he was detained) notes that public demonstrations are less restricted than in the past, but noted that there is cause for concern. In 2005 a Women's day march was dispersed with teargas and violence; with respect to other public gatherings, police had "repeatedly used unnecessary force to break up peaceful demonstrations", "police killed demonstrators during the year… Police beat, abused, detained, or harassed some demonstrators"; "police with batons held back hundreds of Kurdish demonstrators".

[22] The RPD member's reasons on this aspect could have been more explicitly set out, but nonetheless I find his decision on this record reasonable. The member accepted that the Applicant may have been detained. However, the member then made a clear finding that the Applicant's detention both times was for reasons of public peace and was unrelated to any Convention ground for persecution. I think that this is a reasonable finding. Although it is likely that the police could have imputed a particular political opinion or ethnicity to the Applicant based on his presence at a rally for education and at a Kurdish celebration, it is not clear that the Applicant's detention was in

reaction to these perceived political opinions or ethnicity. The Turkish authorities do not seem to treat Kurdish gatherers any differently than they treat any other sort of gathering. In fact, the record suggests that anyone gathering, even peacefully, in Turkey is liable to be harassed or detained. The Applicant therefore has not demonstrated that it was because of a Convention ground that he was detained, and given the documentary evidence this justification for his detainment cannot be inferred. I cannot interfere with the RPD member's conclusion that any detention was not for Convention grounds.

[23] The member's acknowledgement of other inconsistencies lends strength to his conclusion that the Applicant was not credible. The Applicant's POE notes did not mention the years of discrimination and harassment which he has faced in Turkey. The RPD member asked for an explanation for this omission, heard it, and then concluded with reasons that he did not accept that explanation. This is exactly the process which this Court has held should be followed before using omissions towards a credibility finding and this aspect of the decision is not in error.

[24] Similarly, the Applicant only mentioned his objection to military service in the last paragraph of his PIF and did not provide much in the way of evidence to support his objection. It was reasonable for the member to have found that this was merely a fact added to bolster the refugee claim. If the Applicant had wanted to make this a central aspect of his claim, he ought to have included it in his POE notes and provided more substantial evidence documenting his objections and the persecution which he would face.

[25] The RPD member was entitled to consider delay and re-availment as potentially indicative of a lack of subjective fear: see *Nimour* v. *Canada (MCI)* (1999), 93 A.C.W.S. (3d) 732 (F.C.T.D.), F.C.J. No. 1356 (QL) and *Heer* v. *Canada (MEI)*, [1988] F.C.J. No. 330 (C.A.) (QL). It is not clear from the parties' submissions exactly when the Applicant claims he began to fear persecution, but in this case, it is not necessary to determine the exact moment. Even if the member erred in considering the delay and re-availment until 2003, his conclusion would still be reasonable on the basis of the Applicant's delay in claiming in Canada. The Applicant's reason for more than two years' delay - that he did not know how to apply - is not particularly compelling.

[26] The Applicant's inconsistency in identifying when his fear began only serves to further undermine his claim. He testified that he did not fear persecution in 2002, and therefore, he argues in his memorandum, reavailment and delay before 2003 should not be relevant. In my opinion, this claim puts in doubt his entire refugee claim, which is based primarily on events occurring in 2001 and 2002. Without some significant intervening factor, it is unsustainable to suggest that subjective fear did not develop until years after the events underlying the fear. I note that this court has acknowledged the possibility of fear arising after a series of individual events, and that it need not arise from one particular moment. Even taking this into consideration, there is still no reason for a subjective fear based on a Convention ground.

[27] As was noted by Justice Robert Barnes in *Sundararajah v. Canada (MCI)*, 2007 FC 1148, 161 A.C.W.S. (3d) 966 at para. 17, the assessment of credibility is generally based on a cumulative assessment of the evidence and rarely turns on any one particular piece of evidence. The RPD

member in the case at bar considered a number of factors and applied them completely in accordance with the jurisprudence. His determination that the Applicant was not credible was reasonable and therefore is immune from judicial interference.

[28] The credibility finding of the RPD member extends, as described above, to the finding of a lack of subjective fear, lack of Convention grounds, and also to the finding that the Applicant was not abused by the police while in custody.

[29] At this point I note that the Applicant raised an issue regarding whether, objectively speaking, mistreatment of detainees by police is acceptable. This question responds to the documentation which states that abuse is not infrequent while in policy custody. However, since the member found the Applicant not to be credible regarding mistreatment by the police, and I have found this decision to be reasonable, there is no need to discuss this issue.

b. Did the RPD err in failing to deal with the question of whether the Applicant will face a risk of persecution or mistreatment or torture (under ss. 96 and 97) if the Applicant perseveres with activities that promote Kurdish culture, religion, or politics?

[30] Canadian courts, including the Supreme Court, have on many occasions observed that hypothetical questions fail to meet the "live controversy" test and thus are moot: see for example *Borowski v. Canada (A.G.)*, [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231 at para. 16. In my opinion, this argument must fail for mootness.

[31] The RPD member determined that the Applicant would not face persecution or a risk of serious harm if he were sent back to Turkey, based on past and current evidence of country conditions and on the Applicant's activities. Once the member has determined that the Applicant would not be at risk if returned, he is not required to consider whether or not a new risk might arise based on hypothetical future events. The RPD member was correct in not addressing this issue.

c. Did the RPD err in any way in relation to the claim as based on evasion of military service?

[32] The Applicant mentioned in his testimony, but failed to substantiate, claims that he has received documents suggesting that there is an arrest warrant out for him because he did not report for military service. Unfortunately, the Applicant did not submit any of these documents – neither his call-up for service, nor any documentation or affidavit concerning his arrest warrant were provided to the tribunal.

[33] The Respondent submits that, although the RPD decision omitted to mention several of the details, its failure to mention every piece of evidence is not fatal. Further, they submit that the RPD member found that the Applicant was not credible.

[34] The RPD member noted in his decision that the Applicant had been able to defer his service because he was at university, but that upon his return to Turkey, he would be required to serve.

[35] During the hearing, the Applicant was questioned about the military. He acknowledged that it may be possible to "buy himself out" of service by paying the government, but said that this was dependant upon luck. Although he also mentioned not wanting to use a gun against his own people, his primary fear seemed to relate to his own background and the possibility that he would be targeted and killed because of his ethnicity while he was in the military.

[36] The Applicant's limited testimony and evidence was not sufficient to demonstrate that he could meet the high burden to be a conscientious objector. Conscientious objectors may be granted refugee status where it can be said that the prosecution that they would likely face is so severe as to amount to persecution. However, there is no evidence on the record to explain the extent of the Applicant's objections or what kind of treatment a conscientious objector in Turkey would be given. The Applicant failed to mention whether his unwillingness to serve was full or partial – i.e., whether he would be willing to serve in a non-combat role or against non-Kurdish enemies. Often, conscientious objectors are allowed to serve in non-combat roles but Turkey's policy on this is not mentioned in the record. The evidence before the RPD member also left uncertain the punishment

for refusing to serve. Without these details, it is not possible to evaluate whether a conscientious objector could face persecution.

[37] In short, the Applicant did not put in any evidence aside from his own brief testimony on this issue. This is not an uncommon issue, and it is surprising that the Applicant did not provide at least the documentation which he said was in his family's possession. The RPD member found that this claim was simply added to bolster the Applicant's refugee claim and that the Applicant had not demonstrated his status as a conscientious objector. There is nothing unreasonable on this record about such a decision.

d. Did the RPD err in relation to the separate analysis required under section 97?

[38] The Applicant submits that there is no subjective fear component to a section 97 analysis, and therefore implies that the RPD member ought to have conducted a full section 97 analysis, quoting *Ozdemir v. Canada (MCI)*, 2004 FC 1008, 256 F.T.R. 154 and *Kilic v. Canada (MCI)*, 2004 FC 84, 245 F.T.R 52.

[39] The Respondent submits that, having found no subjective fear, the RPD member had no need to go on to complete a separate section 97 analysis. The Respondent also cites *Kulendrarajah v. Canada (MCI)*, 2004 FC 79, 245 F.T.R. 145 for the proposition that, where no grounds other than the Convention grounds are put forward, and where the Convention grounds are not sustainable for lack of credibility, there is no need for a separate analysis.

[40] I note that the RPD member explicitly found that the claimant's fear of persecution was neither subjectively nor objectively well-founded. The RPD member also considered the evidence on failed asylum-seekers returning to Turkey and found that they are treated in the same way as other Turkish citizens. The Applicant did not put forward any different reasons for claiming that he was a person in need of protection than those he put forward for claiming persecution. Given that those reasons were not accepted to be true, there is no basis upon which a section 97 claim could have been grounded in this case. Thus I would follow Justice Judith Snider in *Nascimento v. Canada (MCI)*, 2005 FC 1078, 141 A.C.W.S. (3d) 1024 when she noted that:

> [17]….Accordingly, there was nothing before the Board that could have resulted in a different outcome or that required separate analysis by the Board for purposes of s. 97. Even if the Board erred in not undertaking a clear s. 97 analysis, there would be no purpose served by sending this matter for re-determination.

Conclusion

[41] For the reasons discussed above, I find that the RPD member committed no reviewable error in this decision. In the result, this Application for Judicial Review is dismissed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this Application for judicial review is dismissed.

"Orville Frenette"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4609-07
STYLE OF CAUSE:	Onur Mahmutyazicioglu **v.** MCI
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	May 14, 2008
REASONS FOR JUDGMENT AND JUDGMENT BY:	FRENETTE D.J.
DATED:	May 26, 2008

APPEARANCES:

Micheal Crane	FOR THE APPLICANT
Rhonda Marquis	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Micheal Crane Barrister & Solicitor 166 Pearl Street, Suite 100 Toronto, Ontario M5H 1L3	FOR THE APPLICANT
John H. Sims, Deputy Attorney General of Canada	FOR THE RESPONDENT