

Date: 20081125

Docket: IMM-5396-07

Citation: 2008 FC 1313

Ottawa, Ontario, November 25, 2008

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

OZAK BEYHANI

Applicant

and

**MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR ORDER AND ORDER

INTRODUCTION

[1] Beyhani Ozak applies, pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001 c.27 (IRPA), for a judicial review of the decision dated December 6, 2007 by the Refugee Protection Division of the Immigration and Refugee Board (the “Board”). The Board decided that Mr. Ozak was not a section 96 Convention refugee nor was he a person in need of protection under section 97 of IRPA.

[2] Mr. Ozak is a Turkish citizen from a village in the south east of Turkey. He is of Kurdish ethnicity and Alevi faith. Mr. Ozak was 41 years old at the time of the hearing. He claims to have been forced to end his education because he was an Alevi Kurd. During his military service from 1986-1988, he was insulted by his superior officers and by Sunni soldiers. Following his military service he returned to his village. After a clash between the state security forces and the Kurdistan Workers Party (PKK), he was arrested and physically mistreated while detained for three days. He was arrested again and similarly treated in 1995. Mr. Ozak said he fell in love with a Sunni girl and had to run away because her family tried to kill him. He left for Cyprus where he stayed until 1999. He returned to Turkey as a result of attacks in Cyprus by Turkish ultranationalists.

[3] As a result of his support for the People's Democratic Party (HADEP), a pro-Kurdish party in 2000, he was detained again by the military. He claims he was severely beaten and his finger was broken. After that incident he attempted to flee the country but he says he was arrested at the airport when he attempted to pass through security with a falsified passport. He says the prosecutor decided not to proceed on charges; instead he was ordered to return to his village and report regularly to the police. During this period he says he was pressured to join the village guard.

[4] In 2004 he assisted the Union of Democratic Power in a local election and was again arrested by the authorities. He says they pressured him to become an informer; he decided to again attempt to flee the country.

[5] Mr. Ozak arrived in Canada on November 13, 2004, and immediately made a claim for refugee protection.

[6] Mr. Ozak claims to have a history of anxiety and panic attacks which he attributes to his mistreatment at the hands of Turkish ultra-nationalists and state authorities. At the Port of Entry (POE) he was twice interviewed by an Immigration Officer with the aid of an interpreter. He claims the first interpreter berated him when he said he was oppressed in Turkey. Mr. Ozak said he panicked and felt uncomfortable speaking about the real nature of his claim; his account at the two POE interviews differ from his PIF narrative. Mr. Ozak says he wrote a letter of complaint addressed to the immigration officials at the airport. While a copy of the letter written in English was filed with the Board, there is no indication if it was received by Immigration officials.

[7] Mr. Ozak says he is afraid of returning to Turkey because: his home region continues to be volatile; he was pressured to become an informer; and he has now twice resorted to falsified travel documents for which he will be prosecuted.

THE DECISION UNDER REVIEW

[8] The first sitting of the Board was rescheduled because Mr. Ozak was reported as ill. Prior to the second sitting, his counsel proposed that one of Mr. Ozak's siblings would act as a designated representative (DR) because of Mr. Ozak's psychiatric condition. At the second sitting, Mr. Ozak's brother acknowledged the responsibility of a DR. The Board noted that the DR had not seen Mr. Ozak for about ten years; that his knowledge of his brother's problems was limited; but that the DR did not attempt to embellish Mr. Ozak's claim.

[9] Counsel for Mr. Ozak moved that the two sets of POE notes be excluded. The Board decided that the POE notes would be included and the weight to be ascribed would be dependent on what arose on the merits. The Board had before it Mr. Ozak's POE notes, the PIF narrative, supporting evidence, and the DR's testimony. The hearing was conducted over two days, August 11, 2006, and September 20, 2007.

[10] The Board accepted Mr. Ozak's personal and national identity. The Board began by discussing Mr. Ozak's allegation of discrimination as an Alevi and a Kurd. The Board noted the documentary evidence that Turkish and Kurdish Alevis number between 10 and 20 million, making up 15 and 30 percent of Turkey's population. The Board decided the documentary evidence indicated that being an Alevi or Kurd was not a basis for persecution in Turkey.

[11] The Board found there was no evidence that Mr. Ozak was a member in any political parties; his involvement was limited to participating in rallies and canvassing for votes. The Board

found that Mr. Ozak did not have a political profile to be of targeted interest to the authorities, rather he was an individual in a village where the majority of people supported pro-Kurdish parties.

[12] The Board assessed the claim that Mr. Ozak was pressured to join the village guard. It concluded that the evidence did not show he was subject to recruitment pressure while residing in the village from 1990-1994. On the occasions when he was arrested he was also released. The Board noted that while the documentary evidence described forced recruitment occurred in the 1990's, the documentary evidence also stated refusal to serve did not lead to sanctions by the national authority and any pressure from local authorities could be avoided by relocating.

[13] The Board noted that Mr. Ozak's medical history was not substantiated. A doctor's note from Turkey three weeks before leaving and prescriptions were insufficient evidence of a medical history of a post traumatic disorder. The psychiatric report prepared in Canada, in January 2006, indicated that Mr. Ozak was able to communicate with the psychiatrist through an interpreter. The Board noted that at the hearing Mr. Ozak did not respond sensibly to questions nor did he show any emotion throughout the two days of hearing. The Board observed that Mr. Ozak had not sought any further visits with the doctor after his initial examination, and did not accept that Mr. Ozak suffered from a psychiatric condition as a result of being beaten in 1999.

[14] The Board considered the POE notes. The Board stated that interpreters have an obligation to translate what a claimant says. It noted that Mr. Ozak had provided a hand written note narrative in his PIF. The Board found it significant that there was no notation of panic attacks or

requirements for medication in either the Immigration Officer's interview reports or Mr. Ozak's written PIF narrative. The Board considered it significant that Mr. Ozak's POE notes presented a different claim than the one he eventually put forward.

[15] The Board found Mr. Ozak had: a very simple level of thinking; little education; and a claim enhanced by allegations of persecution due to being Alevi and Kurdish, having difficulty because of a Sunni girl and being pressured to act as a village guard. The only part of Mr. Ozak's claim the Board believed was his report of being caught when attempting to leave Turkey the first time. The Board noted that he did not face repercussions then. The Board was of the view that if Mr. Ozak faced prosecution because of his leaving the country it would be under a law of general application and not because he was targeted for persecution.

[16] The Board decided the issues were credibility and state protection. It found Mr. Ozak was not credible. It decided he was not a Convention refugee nor was he a person in need of protection.

ISSUES

[17] The issues in this judicial review are:

- a. Did the Board violate procedural fairness by referring to the POE notes?
- b. Did the Board misconstrue the documentary evidence in an unreasonable manner?

STANDARD OF REVIEW

[18] Issues that relate to a question of procedural fairness are to be reviewed on a correctness standard. *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4, at paragraph 65.

[19] Issues that relate to the treatment of evidence and inferences drawn from it are to be reviewed on the reasonableness standard. *Dunsmuir v. New Brunswick*, 2008 SCC 9.

[20] Issues relating to assessment of credibility are also reviewed on a standard of reasonableness. *Arizaj v. Canada*, 2008 FC 774; *Dunsmuir v. New Brunswick*, 2008 SCC 9.

ANALYSIS

Did the Board violate procedural fairness by referring to the POE notes?

[21] Counsel for Mr. Ozak submits that the Board's reliance on the POE notes was improper given Mr. Ozak's psychiatric condition and the conduct of the first interpreter. He argues the POE notes were not credible or trustworthy. He relies on Lorne Waldman's comment in *Immigration Law and Practice* at 9.197-9.198 which states in part:

The section does not, therefore, give a licence to the persons conducting the inquiry to accept evidence which has absolutely no credibility or the evidentiary worth of which is very slight in comparison to its prejudicial nature. Waldman, L. *Immigration Law and Practice* (Markham: Lexis Nexis Butterworths, Looseleaf.)

[22] Counsel relied on Mr. Ozak's psychiatric assessment provided as evidence which provided the following conclusion:

In my opinion Mr. Ozak suffers from three psychiatric disorders. He suffers from Posttraumatic Stress Disorder, Major Depressive Disorder and Panic Disorder. All of these disorders are defined by the American Psychiatric Association's "diagnostic and Statistical Manual of Mental Disorders", (4th ed.) better known as DSM-IV.

...

Mr. Ozak was confronted at the border by an interpreter who scolded him for speaking ill of Turkey. This resulted in Mr. Ozak experiencing a panic attack, which made it impossible for him to provide details of his history.

[23] Counsel relies on *Singh v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J.

No. 963, at paragraph 10, where Justice Campbell stated:

The thing that pushes it over the line is that the Board neglected to refer to what I think is a critical piece of evidence, and that's the psychiatric evaluation which states that this man at the time he was interviewed in October of 1992 was suffering from post-traumatic syndrome. As to the answer to the Board's question on page 4 of what would prevent him from disclosing the truth as far as they were concerned; this could have provided an answer. I have already said that I think that to put so much weight on the notes as they did is a poor practice, but to completely neglect this particularly important piece of information is an error in law.

[24] I conclude that the Board did not neglect the medical evidence. The Board specifically acknowledged the Turkish doctor's report and the Canadian psychiatric report. The latter report was not made contemporaneously with the POE interview and the doctor's conclusion that Mr. Ozak suffered a panic report during the interview was dependent on Mr. Ozak's account of the POE interview which the Board did not accept.

[25] In *Krishnasamy v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 451, a case where a refugee applicant gave one account during the POE interview and later presented a psychiatric assessment with a finding that he suffered a major depressive order that caused him

difficulty in concentration and recollection such as to raise a doubt about his POE interview, Justice Layden-Stevenson stated:

These comments are apposite here. The ID Member's reasons, as well as the transcript, reveal that the Member was "alert and sensitive" to the psychiatric report. Moreover, the negative finding of credibility was open to the ID notwithstanding the report. If the ID had failed to consider the report, or had disbelieved its contents, the situation might well be different. However, that is not the case. The Member was aware of Mr. Krishnasamy's diagnosis and did not fail to acknowledge it in the credibility assessment. The ID Member's determination that the psychiatric report did not provide the better explanation for the inconsistencies and evasiveness in Mr. Khrisnasamy's evidence was a determination for the Member to make. The conclusion is neither patently unreasonable, nor unreasonable, in the circumstances.

[26] I find the Board did not err in considering the POE notes. The Board was alive and alert to the psychiatric assessment and Mr. Ozak's purported condition. The Board had evidence upon which to find the psychiatric assessment as less than certain. I conclude that the Board did not deny Mr. Ozak procedural fairness in considering the POE notes.

Did the Board misconstrue the documentary evidence in an unreasonable manner?

[27] Mr. Ozak submits that the Board failed to consider the documentary evidence before it. He submits that the documentary evidence indicates that supporters of the pro-Kurdish Democratic People's Party (DEHAP) had been detained or arrested by Turkish authorities. It is in disregarding this evidence, he submits, that the Board errs. *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1425.

[28] Mr. Ozak further submits that the risk he faces on return is not merely based on being a returned asylum seeker but on the greater danger of a returnee who holds anti-state views or is from

a suspect area. The Board must consider whether Mr.Ozak's profile will cause him to face persecution or risk of cruel and unusual punishment under section 97 of IRPA analysis.

[29] I find that the Board did consider Mr. Ozak's profile. Mr. Ozak was a member of a village where the great majority of villagers were pro-Kurdish party supporters. He was not a member of any pro-Kurdish party and had only participated in rallies and canvassing for votes. The Board did not consider him to be a person of interest to the authorities.

[30] The Board also considered that Mr. Ozak would only be subject to the general laws of the country on return because of his use of illegal passports to depart. The Board found Mr. Ozak had not established he had a well-founded fear of persecution and did not face a risk to life or cruel and unusual punishment if he was returned to his country of origin.

CONCLUSION

[31] I find the Board did not deny Mr. Ozak procedural fairness by referring to the POE notes. It had considered the medical evidence and had reason to decide as it did. I also find the Board's decision with respect to its assessment of Mr. Ozak's profile in relation to the documentary evidence to be reasonable. The application for judicial review is dismissed.

ORDER

THIS COURT ORDERS that:

1. The application for judicial review is dismissed.
2. No question of general importance is certified.

“Leonard S. Mandamin”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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