

Date: 20090205

Docket: IMM-3174-08

Citation: 2009 FC 122

Ottawa, Ontario, February 5, 2009

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

**NAHIDE ULUK
ERSIN ULUK
DURU ULUK**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] This judicial review raises issues of quality of translation, failure to consider evidence, and flawed implausibility/credibility findings in a decision denying a refugee claim by persons claiming persecution because of alleged familial connections to a terrorist organization in Turkey.

II. BACKGROUND

[2] The principal Applicant, Nahide Uluk, her husband, Ersin, and their daughter, Duru, are Alevi Kurds and nationals of Turkey. The couple also have a son who is Canadian born.

[3] The principal Applicant's sister-in-law (her brother's wife) was a spokesman for the PKK until 2004 and has been a resident of the U.K. since 1980. The sister-in-law's ties with the PKK were a subject of considerable concern to the Applicants and apparently to Turkish authorities. The PKK is considered by Turkey, the U.S., and the E.U. to be a terrorist organization. The sister-in-law's *nom de guerre* was Mizgin Sen. She also served as a member of the Kurdish Parliament in exile. The sister-in-law severed those ties in 2004.

[4] The core of the Applicants' case is that, since 1994, they and other family members were targeted by police because of their perceived alliance or association with the PKK through the sister-in-law, Mizgin Sen.

[5] Mrs. Uluk outlined a number of incidents of threats, intimidation, and assaults against members of her family. These incidents included her father being detained and beaten on several occasions by the local gendarme and her sister being questioned by police and put under police surveillance, all of which were said to be related to their connection to Mizgin Sen.

[6] With respect to the Applicants, in 1997 Mr. Uluk, when challenging the police about the warrantless search of their home, was beaten and questioned concerning the whereabouts of Mizgin Sen and her husband. He was then taken into custody and held overnight.

[7] A week after the above incident Mrs. Uluk was accosted by an individual who warned her that her brother would be harmed and that she should tell them everything she knew or she would suffer. The individual then hit her with his revolver and she regained consciousness in hospital. The police refused to assist Mrs. Uluk because of her connection to Mizgin Sen.

[8] These types of incidents died down thereafter, until 2004 when Mrs. Uluk received a telephone call from her brother. The following day police arrived at the Applicants' home to question them. In the course of questioning, each of the adult Applicants were slapped and threatened. A lawyer that the Applicants consulted immediately following this incident advised them that while the police had no authority to do what they did, there was no protection against police abuse and no other assistance available from any other organizations such as those for the protection of human rights or civil liberties.

[9] The Applicants also claimed that, in 2005, police had attempted to take their child away from her daycare centre. The attempt was prevented by school officials.

[10] It was after this incident that the Applicants made plans to leave Turkey as unobtrusively as possible and chose to flee to Canada, rather than a European country, because they perceived a

substantial risk that their refugee claim would be rejected and they would be returned to Turkey under an even greater threat if they fled to Europe. The Immigration and Refugee Board (Board) rejected the Applicants' claim principally on the grounds that the story lacked overall coherence in that it did not make sense.

[11] The Board made a number of credibility/implausibility findings, some of which are:

- a. the police would not have attempted to abduct the child rather than arresting the parents, and that the police would have forced the abduction of the child if they truly wished it;
- b. that the Applicants were not genuine in their fear as they did not seek immediate refugee status in Europe, to which they frequently travelled, in the face of alleged threats to their child;
- c. that the Applicants were not genuine in their fear as they had left their daughter and simultaneously been out of the country;
- d. that there was no sensible reason for police to be interested in a person who was the eighth youngest sibling in a family where the sister-in-law had renounced her association with the PKK;
- e. that it had taken four attempts to have the Applicants answer a question related to what attempts had been made to question other siblings about Mizgin Sen before their departure for Canada, for which the answer was that only one sister was questioned back in 1997; and

- f. that, having accepted Amnesty International's contention that family members involved in opposition politics in Turkey are at risk of persecution, the Board expected that evidence of this fact would have been forthcoming from the Applicants.

[12] The Board was dismissive of any and all explanations advanced by the Applicants. It therefore rejected the refugee claims.

[13] The Applicants have raised three challenges to the Board's decision:

- a. that there was a breach of natural justice due to the seriously flawed interpretation;
- b. that the Board failed to consider specific documentary evidence which was contrary to the Board's findings;
- c. that the Board made improper findings of implausibility.

[14] The last two grounds are so closely intertwined that in these Reasons they may be collapsed into one for purposes of analysis.

III. ANALYSIS

A. *Standard of Review*

[15] The parties avoided the issue of the standard of review, perhaps hopeful that it would somehow disappear as a matter for consideration. However, the Court must address the matter.

[16] In the post-*Dunsmuir* era (*Dunsmuir v. New Brunswick*, 2008 SCC 9), the issues of implausibility/credibility are generally reviewed on the reasonableness standard, with deference to the Board's role in assessing evidence in the context of the case (see *Bal v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1178). However, in this case, a critical aspect of the implausibility issue is the failure to consider (or address) key documentary evidence. Failure to consider important evidence is a legal error and, like a breach of natural justice, is subject to the correctness standard of review (*Ozdemir v. Canada (Minister of Citizenship and Immigration)*, 2001 FCA 331 at paragraph 7). In the alternative, if the Board did address the evidence, the treatment of this highly relevant evidence was so cursory and one-sided that it was outside the realm of reasonableness.

B. *Flawed Interpretation*

[17] The Applicants allege that there were some 10 errors in translation, including at least four wrong interpretations which caused the Board to believe that the Applicants were avoiding answering questions or were otherwise making non-credible or implausible statements.

[18] The Applicants argue that there was a denial of natural justice because an applicant is entitled to "continuous, precise, competent, impartial and contemporaneous" translation and that a party need not show prejudice in respect of misinterpretation (*Mohammadian v. Canada (Minister of Citizenship and Immigration)*, 2001 FCA 191 at paragraph 4). I agree that this is the test in *Mohammadian*.

[19] Even if prejudice had to be shown, the Applicants say that prejudice occurred because of misinterpretation of key elements of the case. These key elements included the Board's perception that the Applicants attempted to avoid answering questions and providing details of what occurred after Mizgin Sen left the PKK and that they provided details of "when" rather than "where" the Applicants travelled.

[20] I have examined the errors in interpretation and am mindful of the caution by Chief Justice Lamer in *R. v. Tran*, [1994] 2 S.C.R. 951, that interpretation can never be perfect.

[21] I am not persuaded that the errors of interpretation were such that, as a general matter, the interpretation fell below the standard set in *Mohammadian*.

[22] I do reject any argument that the Applicants waived the errors in translation by failing to object at the hearing. The evidence is that they only became aware of the errors in translation when they read the decision. It would be illogical to expect a person to object to translation errors when they did not understand the second language or were not sufficiently fluent in both languages to discern such errors.

[23] On the issue of prejudice, it is unclear that misinterpretation caused the implausibility findings. In my view, the more salient issue in this case is the failure to consider the

evidence/implausibility matter. My conclusions as to interpretation can, if it is not apparent, be considered *obiter dicta*.

C. *Implausibility/Failure to Consider Evidence*

[24] The first error was the Board's conclusion that the adult Applicants were outside the country together and the resulting negative conclusion as to credibility and plausibility about their claim because they failed to take the first opportunity together to leave the country. There was no evidence to support this conclusion and the documentary evidence and the testimony was to the contrary. The Applicants explained that they were out of the country individually and at different times, for reasons explicitly related to their fear of persecution and plan to claim refugee status in Canada.

[25] The second and most significant error was the finding that there was no evidence with respect to the harassment of other family members to corroborate the Applicants' claim.

[26] It is accepted jurisprudence that there is an obligation on the Board to consider all documentary evidence and failure to mention or analyse important evidence justifies an inference that the Board ignored the evidence, particularly where that evidence runs contrary to the Board's own conclusions (see *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35).

[27] The Applicants referred to and submitted two letters from family members, each showing that other family members were subjected to pressure and threats (including detention and interrogation) from Turkish authorities, related to the family's deemed association with the PKK.

[28] Not only does this evidence corroborate key components of the Applicants' claim, and show that there is a current risk if the Applicants are returned to Turkey because of a continuing interest by the Turkish authorities in the Applicants, but equally importantly, it addresses a key finding of the Board made against the Applicants and renders the Board's conclusion unsound.

[29] The Board noted at paragraph 30 of the decision:

The panel notes as well the letter from Amnesty International which discusses Amnesty's awareness that family members in Turkey can indeed be at risk of mistreatment. The panel accepts that this is an accurate representation of many families with members involved in opposition politics in Turkey. If that were true of the claimants' families, however, the panel would have expected evidence that more of them were questioned about Mizgin Sen.

[30] The Board accepted Amnesty International's evidence that family members in Turkey, whose members may be involved in political opposition, can be at risk of mistreatment. The Board then expected that similar evidence would have been submitted by the Applicants about their family members' mistreatment. The Board appears to have missed the fact that that expectation was met, and by deeming such evidence absent, the Board considered such absence to be a further evidence of implausibility and lack of credibility.

[31] There is no reference in the decision to the evidence of the other family members, no reference to the two letters submitted and no reference to the testimony of the Applicants as to these letters. Even if it could be said that there is a reference, it appears in one-fifth of a sentence at paragraph 23 of the decision, and ignores the evidence that demonstrates the authorities were targeting other family members based on their relationship to Mizgen Sen.

[32] The conclusion of the Board is directly contrary to the evidence which was before it. The evidence was critical and compelling, and the Board was required to consider it. The Board's failure to do so was a legal error and it resulted in the Board erring in its implausibility and credibility findings.

[33] There are other unsupported findings that undermine the Board's decision, but given that the above review already demonstrates that the matter must be subject to a new determination, no further examination is necessary.

IV. CONCLUSION

[34] Therefore, this judicial review will be granted, the Board's decision quashed, and the matter remitted to a different panel for a new determination. There is no question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is granted, the Board's decision is quashed, and the matter is to be remitted to a different panel for a new determination.

“Michael L. Phelan”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3174-08

STYLE OF CAUSE: NAHIDE ULUK, ERSIN ULUK, DURU ULUK
and
THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: January 21, 2009

**REASONS FOR JUDGMENT
AND JUDGMENT:** Phelan J.

DATED: February 5, 2009

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