

Date: 20091119

Docket: IMM-4999-09

Citation: 2009 FC 1190

Toronto, Ontario, November 19, 2009

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

MUSA YAKUT

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] On November 16, 2009, the applicant, a citizen of Turkey and an Alevi Kurd, sought a stay of his removal from Canada scheduled for December 7th 2009. The underlying application to which the stay application is grafted is his second negative Pre-Removal Risk Assessment (PRRA) dated July 3rd 2009 concluding there was no serious reason to believe, if returned to Turkey, he would be

subject to torture, to risk to his life or to cruel and unusual punishment. It was after his first negative PRRA decision dated May 12, 2006 the applicant returned to Turkey but only stayed there three weeks alleging he had to flee his persecutors the Turkish Police who had arrested and tortured him. He returned to Canada from the U.S., allegedly hidden in a truck, on or about February 1, 2007. He made a second refugee claim but he was declared not eligible to do so. On December 17, 2007 he was offered a second PRRA.

[2] As is well known, in order to obtain a stay the applicant had to establish each element of the three-part test, namely, (a) a serious issue in the PRRA officer's decision assessed on the basis of that issue being arguable (or conversely, not being frivolous or vexatious). (b) He would suffer irreparable harm if the stay was not granted i.e. if returned to Turkey and (c) the balance of convenience favoured the applicant.

The Factual Context

[3] Before dealing with the three-part stay test, in order to appreciate the submissions of the parties and the PRRA officer's negative finding of risk of return to Turkey, a brief factual context to this stay application is necessary.

[4] The applicant's fear of the Turkish Police and security agents is based on his claim the authorities believe he is a supporter and has links to the PKK. He was born and lived in the Kurdish area of south-east Turkey. His persecution, torture and arrests are said to have begun in 1994 and continued regularly until 1999 when he fled Turkey arriving in Canada on August 12, 1999 to make

a refugee claim at the inland port of entry of Lacolle, Quebec. His refugee claim was refused in August of 2000.

[5] While neither motion record contained the Refugee Board's decision of August 2000, leave denied by a Judge of this Court in January 2001, the PRRA officer in his July 3rd 2009 decision wrote the following about that decision:

The IRB accepted his statement that he is an Alevi Kurd. It found his account of the events of 1994 to 1996 plausible, noting that in spite of the reported persecution he had not left Turkey. It concluded, however, that his account of subsequent events, those he says induced him to leave his country, lacked credibility and were implausible (such as the obligation to guide the military through the mountains, the threat of enrolment in the Village Guards, and the lifting of travel restrictions in exchange for working as a spy).

The Second PRRA Decision

[6] The PRRA officer accepted as new evidence for the purpose for the applicant's second PRRA application Counsel for Mr. Yakut's written submissions dated January 4, 2008 which included:

- (i) The applicant's statement of what happened to him upon his return to Turkey on July 25th 2006
- (ii) A letter from his brother indicating the police had come to his house looking for the applicant after he had fled the second time
- (iii) A certificate from an official from the applicant's village dated January 8, 2008 that the applicant has been sought by police from the Besni Police Station and was to go there as soon as possible and, if he did not, he would be arrested

[7] In his statement, the applicant said, on his return to Turkey on July 25, 2006, he was held by the police for four hours at the airport during which he was interrogated and mistreated (punched, kicked and beaten) who accused him of being involved in Kurdish separatist organizations, spreading lies about Turkey and demeaning the country by making a refugee claim. He was told by police at the airport they would contact police and security police in his village. He was then released.

[8] He said he obtained a new Turkish identity card and a Turkish passport “with the assistance of a friend of his that knew someone in the passport office and the registry office that I could easily obtain these documents.” He said nothing had changed in his village where he went to stay with his parents; the Kurds were still targeted by the police and security agents. A week after his arrival at his village, the police came and told him to go with them to Besni Central Police Station where the applicant said they interrogated him, beat him and accused him of linkage with a separatist Kurdish Organization. He was interrogated twice and detained once for 24 hours where he was threatened he would pay the price with his life for not respecting the Turkish state.

[9] This stay application must also be appreciated in the light of the documentary evidence drawn to my attention to the following effect:

- (1) Amnesty International Report 2007 on Turkey which stated “After the introduction of new legislation in previous years, there was little evidence of progress in the implementation of reform. Human rights further deteriorated in the eastern and south-eastern provinces in the

context of an increase in the fighting between the security forces and the PKK and in spite of a general decrease in allegations of torture or ill-treatment were reports that such abuses were widespread in police custody against those detained during the protests.”

- (2) A Freedom House Report released in June 2007 which emphasized that violence in predominantly Kurdish south eastern Turkey grew increasingly out of control in the context of the separatist guerrilla war against government forces and a new Kurdish rebel sprouting up.
- (3) A report on Human Rights Violation in respect of Turkey released in March 2007 with the same commentary. (1) Slow-down in reforming and improving human rights protection in Turkey in 2006 (2) Indiscriminate and excessive use of force by security forces.

Analysis

(a) Serious Issue

[10] Counsel for the applicant made two submissions as to serious issues: (1) the PRRA officer made credibility findings against him in breach of section 113(b) of the *Immigration and Refugee Protection Act (IRPA)* because no hearing was held, and (2) the PRRA officer misunderstood the evidence and failed to properly consider the Applicant’s supporting documentation.

[11] On the first point, Counsel for the applicant argued there were several instances the PRRA officer took into account for not believing he was wanted by the authorities, was suspected of being a PKK supporter and consequently had been beaten tortured and detained (1) he was able to obtain a

passport and leave the country without any problem holding “these facts are at odds with his allegations to the effect he is wanted by the authorities who suspect him of being a PKK supporter” and the fact of the issuance of that passport to him by his alleged persecutors and the objective documentary evidence lend no credence to the applicant’s assertions that he is wanted by the Turkish authorities”; (2) the fact that he did not have a document from an objective, reliable source (such as a report from the police station or the police anti-terrorist unit) as evidence they suspect him of having links to the PKK thus negating any reason to detain and beat him. (3) the PRRA officer did not believe was wanted by the police because it did not give credence to the certificate from his village elder for a number of reasons but did not raise with the applicant the concerns.

[12] Counsel for the applicant argued as a second point the PRRA officer made an unreasonable assessment and showed a misunderstanding of the evidence. On the passport question she argued the PRRA officer misread the evidence on who would be issued a passport and who would be detained at the airport. The PRRA officer pointed to documentary evidence passports are not issued to people who face criminal charges. Counsel argues the applicant never asserted he faced criminal charges but rather that he was detained and tortured because he was a suspected PKK supporter and could provide information to the security forces against the PKK which would be useful in their fight with that organization. In other words, the PRRA officer missed the whole basis of his case.

[13] Counsel for the respondent countered this was not a case of credibility but rather a finding of insufficiency of evidence although he admitted the line between insufficiency of evidence and reliability or credibility of evidence tends to be blurred. I agree with Counsel for the applicant that

on the low threshold of an arguable case or conversely one which is not frivolous or vexatious, a case of serious issue has been made out. As Justice O'Reilly pointed out in *Liban v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1252 at paragraphs 13 and 14 a finding of insufficient objective evidence really means the PRRA officer did not believe the applicant. See also Justice Russell's decision in *Latifi v. M.C.I.*, [2006] F.C.J. No. 1738.

[14] Moreover I agree with Counsel for the applicant the PRRA officer appears to have misunderstood the nature of the applicant's case and discounted new evidence without sufficient reasons such as simply because his brother wrote the letter.

(b) Irreparable Harm

[15] I agree irreparable harm on a balance of probabilities has been made out. As Justice MacKay points out in *Ahmad v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1295 the nature of the serious issues in this case are such that if he were to be removed and the PRRA officer was wrong, the applicant would be exposed to risk of irreparable harm. This is particularly so given the documentary evidence cited in these reasons.

(c) Balance of Convenience

[16] Having made serious issue and irreparable harm the balance of convenience favours the applicant.

ORDER

THIS COURT ORDERS that this stay application is granted; the applicant's removal to Turkey is stayed pending the determination of leave and if leave is granted until the judicial review is determined.

"François Lemieux"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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