Federal Court		Cour fédérale

Date: 20101208

Docket: IMM-4921-09

Citation: 2010 FC 1252

Ottawa, Ontario, December 8, 2010

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

GULER ARASAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated September 15, 2009, wherein the applicant was determined not to be a Convention refugee or a person in need of protection under sections 96 and 97 of the Act. This conclusion was based on the Board's finding that the applicant lacked credibility and lacked a well-founded fear of persecution in Turkey.

[2] The applicant requests that the decision of the Board be quashed and the claim remitted for reconsideration by a differently constituted panel of the Board.

Background

[3] Guler Arasan (the applicant) is a Kurdish-Alevi citizen of Turkey. The applicant alleges a well-founded fear of the Turkish police due to her ethnicity, religion and political activities. The applicant is a supporter of left wing political parties and student, including the HADEP (People's Democratic Party) which she became familiar with during her undergraduate and graduate education. The applicant comes from the Tunceli region of Turkey, which is alleged to be a stronghold of Kurdish-Alevi resistance. The applicant attended a number of university student protests throughout her post-secondary education which she alleges led her to become known to police. The applicant alleges that she was detained by police on the following occasions:

1. Mid-December 1999 (2 days);
2. January 2002 (2 days);
3. July 2005 (1 day); and
4. September 2006 (1 day)

[4] The applicant alleges that police sexually and physically abused her during those periods of detention. The police allegedly threatened her life during the last detention unless she agreed to act as a spy.

[5] The applicant decided to leave Turkey after the September 10, 2006 detention because she could not spy on her friends and political allies. She obtained a student visa to Canada and arrived on January 9, 2007. The applicant claimed refugee protection on January 17, 2009.

Board's Decision

[6] The Board rejected the applicant's claims on the basis that her testimony, behaviour after being released from detention and the lack of documents to corroborate her claims of separate detention on four occasions lacked credibility. The Board found on a balance of probabilities that the applicant was not subject to detention or police mistreatment.

[7] The Board questioned the applicant's ability to continue her university studies and daily routine without difficulty after every round of alleged detention and mistreatment. The Board rejected the applicant's explanations with respect to her quick recoveries at paragraph 7 of the decision:

> One of her explanations was that "the week I stayed away was not the week of exams" and "I started Master in September 2002. I do not find the claimant's testimony to be credible. I do not find either of the explanations adequately explains how the claimant was physically, psychologically and emotionally able to continue with her life after such a brief interruption and without any treatment or assistance.

[8] The applicant adduced a psychological assessment from Dr. Gerald M. Devin dated January 5, 2008, which stated that the applicant suffered from stress related symptom. The Board accepted Dr. Devin's assessment and determined that the stress suffered by the applicant was due to the applicant's uncertain status in Canada and not her persecution in Turkey.

[9] The Board isolated the following concerns with respect to credibility:

1. The applicant's post detention conduct in Turkey was inconsistent with the applicant's present conduct in Canada as described by Dr. Devin in his assessment;

2. The applicant continuously exposed herself to the police through protests but she did not seek medical treatment or attention for fear of detention;

3. The applicant did not seek legal counsel despite having a cousin who was a lawyer;

4. Complaints to Turkish authorities were not pursued because the applicant "did not think she would get anywhere with it";

5. The applicant's lack of action subsequent to her detentions; and

6. The lack of documentation corroborating her detentions.

[10] The Board determined that the applicant was a low level political supporter of pro-Kurdish activities although not a member of a political party. The Board noted that the applicant's family continue to reside in Ankara. The Board concluded that the applicant is unlikely to come to the attention of the authorities upon her return to Turkey and dismissed her claim for refugee status.

Issues

[11] The issues are as follows:

1. What is the standard of review?

2. Did the Board err in finding that that the applicant was not a member of a political party?

3. Did the Board err in finding that it was implausible that the applicant could carry on with her normal life subsequent to her detentions?

4. Did the Board err when it held that the applicant should have stopped attending demonstrations if she was telling the truth?

Applicant's Written Submissions

[12] The applicant submits that the Board erred in determining that the applicant was not a member of a political party but rather a low level supporter of Kurdish causes. The applicant submits that the applicant's letter of membership confirms her party membership status.

[13] Being a party member places the applicant at a greater risk of detection and persecution compared to being a mere low level supporter. The U.S. Department of State report for Turkey indicates a strong risk of persecution for any Kurd who publicly or politically asserts their Kurdish identity or language.

[14] The applicant submits that the Board's findings of fact with respect to the applicant's stress related symptoms are unreasonable. There is no evidence that the applicant could not have carried on with her life subsequent to her detentions or that her psychological problems did not emerge at a later date. The Board's findings are outside its area of expertise and are speculative.

[15] The applicant further submits that she should not be expected to avoid political demonstrations and that her allegations of inability to access state protection are reasonable. The Board's contrary fact findings are therefore unreasonable.

Respondent's Written Submissions

[16] The respondent submits that the applicant stated in her Personal Information Form (PIF) and in testimony that she was a supporter of Kurdish causes and not a member of a political party. The applicant's documentation which purports to show her political membership is contradicted by her testimony and is insufficient in and of itself to establish that fact on a balance of probabilities. There is no link between her alleged party membership and her personal experiences of persecution or the future risks of persecution.

[17] The respondent further submits that the Board reasonably assigned little weight to the applicant's medical evidence in light of her testimony. The respondent states that the applicant could not explain the implausibility of her ability to carry on with her life after the detentions which

renders the psychological evidence with respect to stress related symptoms insufficient to establish the applicant's state at the time of her stay in Turkey.

Analysis and Decision

[18] **Issue 1**

What is the standard of review?

The applicant challenges the Board's credibility findings. A credibility finding is a finding of fact. Findings of fact made by the Board may only be interfered with by a reviewing court if the finding was made in a perverse or capricious manner or without regard for the material before it (see *Federal Courts Act*, R.S.C. 1985, c. F-7 paragraph 18.1(4)(d)). Indeed, it was Parliament's express intention that administrative fact finding would command this high degree of deference (see *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at paragraph 46).

[19] It is well settled that Board conclusions that are determinative of a refugee claim are determinations of mixed fact and law and are reviewable against the standard of reasonableness (see *Kaleja v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 252 at paragraph 19, *Sagharichi v. Canada (Minister of Employment and Immigration)* (1993), 182 N.R. 398 (F.C.A.), [1993] F.C.J. No. 796 at paragraph 3). As such, the reviewing court will inquire into the qualities that make such a determination reasonable and be concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. The court will also

be concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraph 47).

[20] I wish first to deal with Issues 3 and 4.

[21] **Issue 3**

Did the Board err in finding that it was implausible that the applicant could carry on with her normal life subsequent to her detentions?

The Board found that it was implausible that the applicant could have carried on with her normal life if she had been detained. The Board found that if the applicant suffered from medical problems which affect her daily life today, then she would have suffered from medical problems following her detention and torture, prohibiting her from carrying on her normal life. The Board used this as a basis for finding her not to be credible. The Board stated at paragraph 8 of its decision:

> 8 I find the person who was able to accomplish all that the claimant accomplished in Turkey to be in stark contrast with the "person described" by psychologist Dr. Devins in January 2008. The claimant claims she was detained in 1999, 2002, 2005 and 2006. In Turkey the claimant completed her post graduate Masters Degree in 2004 after which she taught high school and middle school science subjects until she left Turkey in December 2006 with the Canadian student visa she successfully applied for. In complete contradiction with the claimant's stated ability to sufficiently cope with her circumstances from her first detention in university in December 1999 until she left Turkey in December 2006, Dr. Devin's noted in 2008 the unemployed claimant's concentration problems impeded her English as a Second Language classes. During the psychological assessment the claimant told the doctor she suffered from stress related symptoms such as headaches, nightmares, loss of appetite,

> lack of energy, problems with concentration and memory, forgetfulness, distraction and at times her mind goes blank. I find on a balance of probabilities that if these conditions exist today it stands to reason the condition of the claimant would have been worse shortly after the detentions. I find it reasonable to expect that a person, who has been detained, tortured and threatened with death to suffer from stress and other debilitating symptoms however given this claimant did not describe suffering from any of these symptoms while in Turkey I find on a balance of probabilities the symptoms she now suffers may be related to her uncertain status in Canada and nervousness related to her refugee hearing. I do not find the claimant to be credible concerning the allegations of her detentions and mistreatment by the Turkish police.
>
> [Emphasis added]

[22] The applicant submits that the Board erred in using medical expertise that it does not have to conclude in the final two sentences of paragraph 8 that her symptoms are the result of her immigration status and not her detention. I agree. The Board does not have the medical expertise to make a finding that the applicant's medical condition should have been worse while she was in Turkey. It was an error to find the applicant not credible for this reason.

[23] **Issue 4**

Did the Board err when it held that the applicant should have stopped attending demonstrations if she was telling the truth?

The Board found that it was not credible that the applicant would not go to a doctor for fear of detention and yet still attend political demonstrations. Mr. Justice James Russell of this Court stated in *Gebremichael v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 547 at paragraphs 46 to 48 stated:

46 Turning to Hiwote's claim, the Board held that "a person truly abused and mistreated as alleged would be fearful of her safety [and would] make efforts to protect herself from any such encounters in the future" (Decision at p. 8). The Board drew an adverse inference with respect to Hiwote's subjective fear. In doing so, I believe the Board fell into the trap warned against in *Anwar v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 1434, 2002 FCT 1077.

47 In *Anwar*, as the Applicants note, a claimant continued her daily life after being released from detention on four separate occasions. Only after being released from a fifth detention did the claimant go into hiding. The Court in *Anwar* made the following helpful observations:

> 48. The analysis of the Board with respect to the arrests of the claimant and her subsequent conduct merits our discussion. The Board did not find the conduct of the applicant and her family during the period of the first four arrests plausible. Such a finding was stated and explained throughout the reasons of the Board.
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> 49. In my view, however, the Board considered the plausibility of their conduct during this period with undue hindsight. Looking back at the relevant period, we see four arrests in succession in 1999. That the claimant continued going to school after each of the first four arrests, rather than remaining at home, was a factor that led the Board to conclude that the version of events advanced by the applicant was implausible.
>
> 50. However, the record, including the transcript of the hearing, indicates that the applicant was acting on a belief that she did nothing wrong and that, accordingly, she should not have to change the way in which she led her life. In *Samani*, [1998] F.C.J. No. 1178, *supra*, Hugessen J. stated at paragraph 4:
>
> [...] It is never particularly persuasive to say that an action is implausible simple because it may be dangerous for a politically committed person.

> 51. I am hesitant to adopt entirely the submission of the applicant that her attendance at school should be assimilated to the conduct of a politically committed person. However, I accept the line of reasoning advanced by Hugessen J. that the conduct to which an applicant testifies is not implausible for the simple reason that it was risky from the vantage point of a CRDD Board - or a court undertaking judicial review - with a full record before it. Without engaging in speculation of the same nature which led the Board astray in this case, I cannot imagine that the documentary or other evidence on the record would require a finding that the applicant had no reason to believe, or at least hope, that after the first period of detention, during which she denied knowledge of what was being alleged, that would be the end of her problems with the authorities.
>
> 52. The Board noted that her first three detention periods were one week, two days and five days, respectively, and that between May 1999 and March 2000, she had not been arrested. It was not implausible for her to believe, during that period, that the worst for her may have been over; nor was it implausible that, despite such assaults on her physical integrity, such as electric shocks, beatings and being doused with cold water, it took the threat to her sexual integrity to serve as the impetus for her to go into hiding. The conclusions reached by the Board in this regard are unreasonable as they are not justified by the record before me.

48 In my opinion, the Board in the case at bar considered Hiwote's actions, most notably her return to school, with undue hindsight. It was not implausible for Hiwote to have honestly believed or hoped that she would not be sexually assaulted in the future, and that she would be safe because the authorities were interested in her brother and not her. The Board's conclusions on this point seem to be made in a vacuum, and fail to consider Hiwote's PTSD or any cultural factors that may have affected her decision to continue going to school. The psychologist's report notes that sexual assault is highly stigmatized in Amharic and Ethiopian cultures (Devins Report, Applicants' Record, at page 62). The Board erred by failing to consider this relevant, important evidence. The Respondent points

> out that the Board does refer to Hiwote as the "Minor Applicant" and thus acknowledges her age. But when the Decision is read as a whole this was clearly an identification tag rather than a way of showing that the Board attempted to look at Hiwote's evidence from the perspective of someone her age and with her cultural background. This is the aspect of the Decision that concerns me the most. The Board assesses the reasonableness of Hiwote's explanation from its own perspective and not hers.

[24] Applying this reasoning to the present case, I am of the opinion that the Board was in error in finding that the applicant was not credible because she did not go to a doctor for fear of being detained yet she attended political demonstrations.

[25] Because of my finding with respect to the basis for finding the applicant not credible, I will not deal with Issue 2. Because the issue of the applicant’s credibility appears to have played such a pivotal role in the outcome of the decision, I cannot tell what the final decision might have been had these negative credibility findings not been made.

[26] The application for judicial review should therefore be allowed and the matter is referred to a different panel of the Board for redetermination.

[27] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

[28] **IT IS ORDERED that** the application for judicial review is allowed and the matter is referred to a different panel of the Board for redetermination.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

The *Immigration and Refugee Protection Act*, S.C. 2001, c. 27

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
97.(1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	97.(1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention	a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la

Against Torture; or	Convention contre la torture;
(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,	(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,	(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

FEDERAL COURT

SOLICITORS OF RECORD

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