Federal Court  Cour fédérale

Date: 20130326

Docket: IMM-6353-12

Citation: 2013 FC 308

Ottawa, Ontario, March 26, 2013

PRESENT: The Honourable Madam Justice Bédard

BETWEEN:

SERKAN ETIZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Serkan Etiz (the applicant) is seeking a judicial review of a decision of the Immigration and Refugee Board (the Board or the Board Member) dated June 14, 2012, in which the Board determined that he was neither a Convention refugee nor a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

[2] For the reasons that follow, I find that this application for judicial review should be dismissed.

I. Context

[3] The applicant is a citizen of Turkey. He seeks protection in Canada under sections 96 and 97 of the Act as a conscientious objector who fears persecution and cruel treatment due to his refusal to serve in the Turkish military, as required by law.

[4] Turkey requires all male citizens aged 19 to 40 years old to perform compulsory military service. The applicant claims that he is a pacifist who has held pacifist beliefs since he was in high school. He refuses to take part in or to be associated with the military in any way, particularly in light of the army's alleged involvement in human rights abuses and war crimes. He is also concerned that he could be forced to serve in Eastern or South-Eastern Turkey, where he submits that many of the alleged abuses are committed.

[5] The applicant argues that if he is sent back to Turkey, he will be imprisoned because he is a deserter and because he will refuse to complete his military service. Furthermore, the applicant argues that as a result he would be submitted to harsh and cruel prison conditions which would amount to cruel and unusual punishment.

[6] Since turning 19, the applicant has been able to defer military service by registering for and completing an undergraduate degree, registering in an MBA post-graduate program (of which he completed five months), and coming to Canada on a work-study permit that was valid until

March 31, 2009. He was able to extend his work-study permit in Canada until November 17, 2010, but an application to further extend his work permit was refused, first in January 2011 and again in May 2011. He alleges that, at that point in time, he had no further options to defer his military service and decided to submit an application for refugee protection.

II. Decision under review

[7] The Board found that the applicant was neither a "Convention refugee" under section 96 of the Act nor a person "in need of protection" within the meaning of paragraphs 97(1)(*a*) or (*b*).

[8] At the outset of his decision, the Board Member indicated that he had concerns with the applicant's credibility. He stated that he was not convinced that the applicant's motivation was not more related to his desire to remain in Canada than to his fear of returning to Turkey where he would be forced to serve in the military. The Board Member held that the applicant had not established, on a balance of probabilities, that he has the "depth of conviction with respect to his desire to avoid compulsory service which reaches the level of a 'conscientious objector'."

[9] The Board Member based this finding on the following elements:

- The applicant never participated in any activities, either in Canada or in Turkey, to confront the Turkish government's conscription policy;
- The applicant has not been a member of any organization, such as a student organization, which confronts the government's conscription policy;
- The applicant made no efforts to seek relief from military service and made no attempt to lengthen his military exemptions by any means or strategy;

- There exists a policy in Turkey that sets out that in circumstances such as the applicant's – being almost 30, having a job and having lived abroad for more than three years – the applicant might be able to shorten his military service by paying a fine. The Board Member was not satisfied with the applicant's statement that he was not aware of that policy.

[10] In addition, the Board Member found that the applicant had not exhibited a level of subjective fear consistent with a fear of persecution arising from compulsory military service. To support this conclusion, the Board Member reiterated that the applicant had failed to act proactively in order to find a way, by any means possible, to avoid military service. The Board Member also seems to have been concerned by the applicant's statement that he was not aware of the policy that could ease the burden of his service by paying a fine. In this regard, the Board Member was of the view that the applicant appeared "solely focussed on remaining in Canada."

[11] The Board Member also discussed the possibility that the applicant would not be able to avoid military service upon returning to Turkey and noted that this Court has concluded that mandatory military service in Turkey does not necessarily amount to persecution. The Board Member referenced *Ozunal v Canada (The Minister of Citizenship and Immigration)*, 2006 FC 560, 291 FTR 305 [*Ozunal*], in which Justice Shore held that an applicant must meet two requirements: first, he (or she) must show that that the depth of his belief is such that he can be described as a conscientious objector; and, second, he must show that if he were forced to serve in the Turkish military forces there would be "a reasonable chance that he, if conscripted, would be required to participate in military activities considered illegitimate under existing international standards" (at para 17).

[12] The Board Member then discussed the documentary evidence regarding punishments imposed on those who refuse to serve in the military. In this regard, the Board Member was of the view that there was evidence that people who refused service but did not demonstrate "strong views" on the subject did not face "persecution level severity" as a result of the application of the Turkish Law. He referenced an excerpt from the UK Guidance Notes for Turkey from which he understood that the punishment for refusing to serve in the military imposed by the Turkish government "is not normally of a quality that would necessitate a grant of asylum unless there is some other 'convention reason;' for example that the claimant were a Kurd." The Board Member noted that the applicant is a Sunni Muslim and that when his brother served in the military, he served in the west part of the country, a region where there was no conflict.

[13] At paragraph 20 of the decision, the Board Member summarized his findings:

- The applicant has not exhibited a level of conviction consistent with a conscientious objector;
- The applicant has not convinced the Board that he would be forced to perform military service, or that, by refusing to perform military service, he would face a prison sentence;
- The applicant has asserted, but failed to provide evidence that in his particular circumstances he would be forced into a situation where his pacifist beliefs would be challenged because he could be required to participate in a conflict;
- The applicant has asserted, but failed to provide evidence that in his particular circumstances, if he were to be sent to prison, "his treatment in prison would reach a level of

severity of punishment consistent with persecution or that in prison he would face a risk as understood in section 97 of IRPA."

[14] The Board Member concluded his reasons by stating that the applicant had not "met his burden of showing that he would face a serious possibility of persecution if he were to return to Turkey or a risk as understood in section 97 of IRPA."

III. Issues

[15] This case raises the following issues:

(1) Was the Board's conclusion that the applicant did not demonstrate that he is a genuine conscientious objector reasonable?

(2) Did the Board err in failing to conduct a proper analysis under section 97 of the Act or provide sufficient reasons in that regard?

(3) Did the Board Member's refusal to recuse himself following the incident that occurred during a hearing break constitute a violation of natural justice?

IV. Standard of review

[16] With respect to the first issue, it is well established that the assessment of the genuineness of an applicant's conscientious objector claim is reviewable on a standard of reasonableness (*Ozunal*, above, at para 14). Reasonableness is concerned with justification, transparency and intelligibility within the decision-making process and whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190 [*Dunsmuir*]).

[17] Regarding the second issue, in reviewing the Board Member's analysis under section 97 of the Act, questions regarding his assessment of danger or risk will be subject to a reasonableness standard of review (see *Dunsmuir*, above). However, where a Board Member fails to consider and comment on evidence relevant to its determination, his failure to do so has been held to constitute a reviewable error, whether the standard applied is one of reasonableness or correctness (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35, 83 ACWS (3d) 264 (TD) [*Cepeda-Gutierrez*]; *Baranyi v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 664 at para 14, 106 ACWS (3d) 506). Nevertheless, on the basis of *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] SCR 708 [*Newfoundland Nurses*], the Board Member's reasons are not required to be perfect, nor do they need to be comprehensive. The reasons must be reviewed in the context of the evidence, the parties' submissions and the decision-making process and they must set out a line of analysis that reasonably supports the conclusion reached.

[18] With respect to the third issue, it is well established that the standard of review applicable to a question of fairness or natural justice is one of correctness (*Dunsmuir*, above, at para 129; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 72, [2009] 1 SCR 339).

V. Arguments of the parties

A. *The applicant's submissions*

[19] The applicant argues that the Board erred in its assessment of the evidence regarding his status as a conscientious objector.

[20] First, the applicant argues that although the Board Member stated that he had "some concerns with the credibility of the claimant", he failed to identify any contradictions or omissions raising credibility concerns. The applicant submits that his sworn testimony was uncontradicted and is presumed to be true.

[21] Next, the applicant argues that his uncontradicted evidence clearly establishes that he is a pacifist and conscientious objector. The applicant insists that the Board Member mischaracterized the evidence when he said that the applicant was unaware of the policy that would allow him to reduce the duration of his military service by paying a fine. The applicant testified that he was aware of the policy, but that he would refuse to serve even one day in the military, and would refuse to pay a fine that would be used to fund military activities. The applicant argues that the Board Member's erroneous impression that the applicant was unaware of the policy had an important bearing in his finding that he is not a conscientious objector.

[22] In addition, the applicant argues that the Board Member failed to consider the totality of the evidence by ignoring the fact that he was considered a deserter by the Turkish military and that paying a fine would not prevent him from being recalled for military services in the future.

[23] With respect to the section 97 analysis, the applicant recognizes that a separate section 97 analysis is not always required. However, he argues that the Board should have made such a separate analysis in this case, considering that there was convincing evidence that he would face a prison sentence due to his refusal to perform military service and he would be submitted to very

harsh prison conditions. The applicant acknowledges that section 97 of the Act is addressed at paragraphs 20 and 21 of the Board Member's decision, but argues that the Board Member failed to refer to any evidence for its "cursory dismissal" regarding the potential mistreatment that he would suffer in prison. The applicant submits that this is particularly troubling in light of the fact that the Board Member agreed that cruel and unusual punishment was an issue at the beginning of the hearing (see page 269 of the Tribunal Record), that there was evidence dealing with the harsh prison conditions in Turkey, including abuses and violence, and that counsel for the applicant addressed the issue in his closing submissions. Therefore, the applicant submits that the Board Member failed to address highly relevant evidence which contradicted his finding and he is left not knowing whether the Board Member even considered that evidence.

[24] Finally, the applicant raises an issue with respect to an exchange between the Board Member and the Tribunal Officer that occurred during a break in the hearing before the Board. It appears from the record that when the applicant and his counsel returned from a break, they realized that the Tribunal Officer was telling the Board Member that he intended to submit new evidence.

[25] The applicant argued that this *ex parte* discussion constituted a violation of natural justice and a breach of Rule 60 of the Board's *Refugee Protection Division Rules* (SOR/2002-228) [Repealed, SOR/2012-256, s. 73], in force until December 14, 2012, which stated that "[r]epresentations made by a party or a refugee protection officer must be made orally at the end of a hearing unless the Division orders otherwise." He relies on *Lopez Aguilar v Canada (Minister of Citizenship and Immigration)*, 2011 FC 908 at para 10 (available on CanLII), which cites a prior

finding that: "Whoever is to adjudicate must not hear evidence or receive representations from one side behind the back of the other" (applicant's submissions, para 43).

B. *The respondent's submissions*

[26] The respondent submits that, in light of the evidence, it was reasonable for the Board Member to conclude that the applicant failed to demonstrate that he was a genuine conscientious objector or that the possible prison sentence that he would face for evading military duty would expose him to a serious possibility of persecution, a danger of torture or a risk to his life, or to cruel and unusual treatment or punishment.

[27] The respondent contends that the punishment that can be imposed by a government on its citizens for failing to perform compulsory military service cannot be categorized as a *per se* source of persecution or risk under sections 96 or 97 of the Act.

[28] The respondent argues that applicants who refuse to perform military service cannot generally claim refugee status, but acknowledges that those who are able to demonstrate that they have principled objections to mandatory military service may, in certain circumstances, be recognized. An applicant must first establish that he is a conscientious objector. The respondent contends that the Board Member's assessment of the evidence in that regard was reasonable and insists that the Board Member identified several reasons to doubt the applicant's convictions.

[29] In response to the applicant's submissions regarding credibility, the respondent notes that the Board Member was not required to rely on omissions or contradictions to assess the applicant's

credibility, but could instead focus on his behaviour as an indicator of the sincerity of his convictions.

[30] Counsel for the respondent admitted that the Board Member erred in stating that the applicant indicated he was not aware of the policy allowing persons to pay a fine in order to shorten their military service, but argues that this was not a reviewable error as the Board did not draw any negative inferences from this alleged lack of knowledge.

[31] Regarding the section 97 analysis, the respondent argues that the Board Member made a section 97 assessment and that, in the circumstances of this case, his reasons in that regard are sufficient. The respondent insists that it was the applicant's responsibility to establish that he would face a risk of torture, a risk to his life, or a risk of cruel and unusual treatment, or punishment, and cites authority for the proposition that imprisonment does not constitute *per se* persecution in the case of military deserters (*Ates v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1316, 261 FTR 318; confirmed in *Ates v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 322, 343 NR 234 [*Ates*]).

[32] The respondent notes the Board Member's conclusion that the documentary evidence indicated that persons who refuse to perform military service but who do not demonstrate "strong views" on the subject are not subjected to treatment amounting to persecution was reasonable. Further, the respondent highlights the Board Member's finding that the punishment imposed on those who refuse to serve in Turkey is not normally of a quality that would necessitate the granting

of asylum unless a convention reason exists, and submits that such a reason was not found in this case.

[33] In addition, since the applicant had not demonstrated that he fell into the category of persons that would be subjected to harsh treatment, the respondent submits that it was reasonable for the Board to conclude that the applicant could not rely on documentary evidence relating to the treatment of conscientious objectors.

[34] With respect to the *ex parte* conversation between the Tribunal Officer and the Board Member, the respondent stated that this conversation was limited to the Tribunal Officer saying that he intended to submit new evidence. Before any additional comments were made, the applicant and his counsel walked into the hearing room. The respondent further notes that the additional evidence that the Tribunal Officer wished to adduce was not ultimately entered into evidence and that no breach of natural justice stemmed from that *ex parte* discussion.

VI. Analysis

(1) *Was the Board's conclusion that the applicant did not demonstrate that he is a genuine conscientious objector reasonable?*

[35] In this judicial review, the first issue relates to the Board's finding that the applicant has not established that he is a conscientious objector. I am of the view that the Board Member's finding that the applicant failed to establish that the depth of his conviction was sufficient to make him a conscientious objector was reasonably open to him. It appears from the decision that the Board

Member assessed the applicant's evidence in that regard and afforded weight to elements that were relevant, namely that the applicant failed to make any effort to seek relief from military service or to extend his exemption and that he never participated in any activities or organizations confronting the Turkish government's conscription policy. The Board found that the applicant had not exhibited the level of subjective fear that would be consistent with a fear of persecution arising from compulsory military service. This finding is reasonable in light of the totality of the evidence submitted to the Board.

[36] I am also of the view that the respondent was correct to assert that the Board was not required to rely on omissions or contradictions to assess the applicant's credibility and was justified in focusing on his behaviour as an indicator of the sincerity of his convictions.

[37] Even if accepted, the applicant's submissions that the military already considers him a deserter and that paying a fine would not prevent him from being recalled in the future would not change the Board's conclusions regarding the depth of the applicant's convictions. As such, the failure to engage in these submissions cannot be considered a determinative error. In addition, the Board is presumed to have considered the totality of the evidence and is not required to refer to every piece of evidence in its decision (*Cepeda-Gutierrez*, above, at paras 14-17).

[38] I acknowledge that the Board Member made a mistake in stating that the applicant indicated that he was unaware of the policy allowing persons to pay a fine in order to shorten their military service, but I find this error to be insufficient to vitiate the Board's general appreciation of the evidence.

[39] In light of the above, I believe that the applicant disagrees with the Board's finding regarding the depth of his conviction, and is asking the Court to re-weigh the evidence. This is not the Court's role.

[40] I also consider that it was reasonable for the Board to conclude that compulsory military service is the result of a law of general application, and is not inherently persecutory (*Ozunal*, above, at paras 22-23). The applicant has not established any facts specific to his case that suggests that the law in question is specifically persecutory against him in relation to a convention ground.

[41] I find that the Board Member's conclusion that "there is evidence that those who refuse service but do not demonstrate 'strong views' on the subject are not faced with persecution level severity because of the application of Turkish law" (Decision, at para 18) is supported by the UK Guidance Notes for Turkey referenced by the Board Member, as by other documentary evidence that was part of the record.

[42] Finally, the Federal Court of Appeal has confirmed, in response to a certified question, that imprisonment *per se* does not constitute persecution in the case of military deserters, even where there is no alternative to compulsory service, and a conscientious objector will be subject to repeated prosecutions and incarcerations (*Ates*, above).

(2) *Did the Board err in failing to conduct a proper analysis under section 97 of the Act or provide insufficient reasons in this regard?*

[43] The Board did not fail to conduct a separate section 97 analysis. While the Board's reasons regarding its section 97 analysis could have been more extensive, I am of the view that the reasons provided were sufficient to understand the basis of the finding and to satisfy the test enunciated in *Newfoundland Nurses*, above. Furthermore, I am of the view that the Board's conclusion that the applicant is not a person in need of protection falls within the range of possible, acceptable outcomes which are defensible with respect of the evidence.

[44] It is important to note that the Board Member's decision clearly demonstrates that he turned his mind to the question of whether the prison conditions to which the applicant might be subjected would result in a risk of torture, or a risk of cruel and unusual treatment or punishment in accordance with the requirements of section 97 of the Act.

[45] First, the Board Member clearly indicated at the outset of his reasons that the applicant was claiming protection under both sections 96 and 97 of the Act.

[46] Second, at paragraph 20 of his decision, the Board made a clear finding with respect to section 97 of the Act:

> […] The claimant asserts but has not provided evidence that in his particular circumstances [he] would be forced into a situation where his pacifist beliefs would be challenged (involved in a conflict) or that if he were to be sent to prison that his treatment in prison would reach a level of severity of punishment consistent with persecution or that in prison he would face a risk as understood in section 97 of IRPA.
>
> [Emphasis added]

[47] The Board Member again referenced section 97 at paragraph 21, where he indicated that the applicant had not met his burden of showing that he would face a risk as outlined in section 97 if he were to return to Turkey.

[48] The sufficiency of the Board Member's reasons and the reasonableness of his conclusions are intertwined such that the applicant must demonstrate, as with his section 96 findings, that there was no line of analysis that could reasonably support the Board Member's section 97 conclusions (see *Newfoundland Nurses*, above). I do not accept that the applicant has succeeded in meeting this burden on the facts or evidence of the case at hand. As argued by the respondent, "[t]he Board's analysis, while brief, is sufficient to explain why the Applicant's claim was rejected under s. 97 of the *IRPA*" (respondent's submissions, para 52).

[49] One must also keep in mind that the Board's initial finding was that the applicant had not established that he was a conscientious objector and that most of the documentary evidence discussing the harsh prison conditions in Turkey relates to cases involving recognized conscientious objectors.

[50] In addition, the Board was not convinced that the applicant would be imprisoned should he return to Turkey and refuse to perform military service.

[51] Finally, the Board's conclusion can reasonably find support in the documentary evidence.

[52] For the reasons set out above, I conclude that the Board Member's analysis with respect to section 97 of the Act was not unreasonable and that his reasons were sufficient to support his conclusions.

(3) *Did the Board Member's refusal to recuse himself following the incident that occurred over the break in the hearing constitute a violation of natural justice?*

[53] Although counsel for the applicant did not plead this argument at the hearing, he did not formally abandon it. Therefore, I will deal with it briefly. Although the Tribunal Officer should not have communicated with the Board Member outside the presence of the applicant and his counsel, I consider that there was no breach of natural justice in the particular circumstances of this case. The applicant has provided no evidence suggesting that the Board Member's description of events should not be believed or that the Tribunal Officer made any submissions beyond merely raising the existence of certain articles, as described in the hearing transcript.

[54] It appears from the record that the discussion was not initiated by the Board Member and that the applicant was ultimately given a full opportunity to address the relevance of the evidence that the Tribunal Officer sought to introduce. It also appears from the record that the Board Member did not allow the Tribunal Officer to introduce the additional evidence.

[55] As a result, I am not convinced that there was a violation of natural justice or that the applicant was in any way prejudiced by the *ex parte* discussion.

[56] In light of all of the above, I find that the application for judicial review should be dismissed.

[57] Neither party proposed a question for certification and none arise in this case.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed. No question of general importance is certified.

"Marie-Josée Bédard"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6353-12
STYLE OF CAUSE:	SERKAN ETIZ v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	January 29, 2013
REASONS FOR JUDGMENT:	BÉDARD J.
DATED:	March 26, 2013

APPEARANCES:

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