Date: 20040326

Docket: IMM-5310-02

Citation: 2004 FC 466

OTTAWA, (Ontario), this 26th day of March, 2004

Present: THE HONOURABLE JOHANNE GAUTHIER

BETWEEN:

IBRAHIM AYKUT and

NILUFER AYKUT

Applic

ants

- and -

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respond

ent

REASONS FOR ORDER AND ORDER

[1] Mr. and Mrs. Aykut are Turkish citizens. Mr. Aykut is of Kurdish ethnicity and alleges a well-founded fear of persecution on the basis of his ethnicity. As a journalist and a member of Mazlumber, a prominent human rights organization in Turkey, he also alleges fear of persecution because of his political opinion. Finally, he claims to be a conscientious objector who refuses to serve in the Turkish army because of the atrocities committed against Kurds in South Eastern Turkey.

[2] Mrs. Aykut bases her claim on her gender and religion. She claims to have been expelled from her university and prevented from completing her medical degree because she was wearing her headscarf. She also says that she participated in public protests against the statute banning headscarves in public buildings, was arrested and charged by the police, and now faces four (4) years in jail because of her perceived political opinions. She finally bases her claim on that of her husband.

[3] Their claims under sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "*Act*") were rejected by the Refugee Protection Division of the Immigration and Refugee Board (the "Board")on September 24, 2002. They seek judicial review of that decision.

[4] Mr. Aykut submits that the Board rejected his claim under s. 97 without dealing with the documentary evidence concerning the treatment of similarly situated journalists and human rights activists such as Metin Goktepe and Akin Birdal.

[5] Mrs. Aykut says that: (i) the Board misconstrued the documentary evidence; (ii) erred in holding that the Turkish statute banning headscarves in public places was a law of general application, and (iii) also erred when it found that

this ban was analogous to the banning of the Lord's Prayer in certain public institutions in Canada. These errors led the Board to wrongly conclude that the restrictions imposed through this Turkish statute do not amount to persecution.

ANALYSIS:

a) Mr. Aykut's claim

[6] The Board rejected the applicant's claim under section 96 of the *Act* mainly because of "an astonishing lack of subjective fear". The decision with respect to the claim under that section has not been challenged.

[7] Mr. Aykut did not challenge either the Board's decision to reject his claim that he is a person in need of protection because of his ethnicity or because he is a conscientious objector who also fears to be killed by the military because of his articles on human rights issues.

[8] What is challenged is the Board's decision to reject his claim that he needs protection as a journalist covering human rights issues and as a human rights activist.

[9] In that respect, the Board noted that the applicant had never been detained or tortured, that "he had not provided even one instance when his reporting resulted in censure of his writing, banning of his articles, or indeed, loss of job at the newspaper; the paper, he indicated, is still in existence".

[10] The Board did not accept as credible his testimony that the police followed him and tapped his phone as well as his statement that a friend of his father's had told his father that his son was in danger. In that respect, the Board properly examined Mr. Aykut's explanation as to why he had not mentioned this fact in his Personal Information Form before rejecting it. The Board concluded that "the preponderance of the evidence illustrates that the claimant pursued his career for several years without state obstruction, as a reporter, a journalist and a member of a human rights group, which indicates that he was of no interest to the authorities".

[11] Mr. Aykut argues that there was relevant and trustworthy documentary evidence (for example; pp. 140, 252-258, 272 and 273 of the Board's Record) establishing that at least another journalist covering human rights issues, who had worked for several years without state obstruction or any indication that he was of interest to the authorities, was nevertheless one day tortured and killed simply because of his work. According to the applicant, this evidence shows that the same thing happened to a human rights activist. He says that he testified (pp. 555, 556 of the Board's Record) that this state of affairs was one of the reasons why he felt the need for protection under s. 97 of the *Act*.

[12] I agree with the applicant that this was important documentary evidence that could not be ignored. The Board could decide to assign little weight to it or even to discard it because it did not consider those victims to be similarly situated persons but, whatever its views, it had the duty to explain how it dealt with this evidence.

[13] There is simply no indication at all in the decision that it was even considered and in the circumstances, this constitutes a reviewable error.

[14] That is not to say that this evidence is sufficient in itself to establish that Mr. Aykut is a person in need of protection when this claim is reconsidered. This is precisely what the differently constituted panel will have to evaluate having regard to all relevant considerations including Turkey's human rights record (*Bouaouni v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1540 (T.D.)). My decision to quash the Board's decision in respect of this particular aspect of Mr. Aykut's claim should not be construed as an opinion on this question.

[15] Moreover, as mentioned, Mr. Aykut's claim under s. 96 and his claim under s. 97 of the *Act* based on his ethnicity and his refusal to serve in the Turkish military, was properly decided by the Board and need not be reconsidered.

b) Mrs. Aykut's claim

[16] The arguments of Mrs. Aykut relating to the selective use of evidence, the misinterpretation of the European Commission on Human Rights's decision, the use of a defective analogy (The Lord's Prayer) and the misapplication of the concept of a law of general application, all relate to one main issue: Did the Board erred in determining that the measures taken against women wearing headscarves in Turkey do not amount to persecution?

[17] Like Martineau J. in *Mohacsi v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 429, [2003] F.C.J. No. 586 (QL) (T.D.), I find that this is a question of mixed fact and law to which the standard of reasonableness simpliciter applies.

[18] This means that the Court will only quash the decision of the Board if "...there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand-up to a somewhat probing examination..." (*Law Society of New Brunswick v. Ryan*, [2003] S.C.J No. 17 at para. 55 (QL)). Thus, it is clear that the Court is not called upon to substitute its decision for that of the Board.

[19] Reading the decision of the Board as a whole, it appears that it found that: (i) the Turkish Constitution guarantees freedom of religion and non-discrimination on the basis of religion or beliefs, provided that one does not violate the principle of secularism, a fundamental principle of the Turkish state; (ii) the Turkish Constitutional Court found that the wearing of headscarves or turbans, which shows who belongs to which religion on university premises is contrary to the principle that all beliefs are equal before the law and any form of dress considered or perceived as religious is incompatible with secularism; (iii) the issue of headscarves is therefore analogous to the banning of the Lord's Prayer in certain public institutions in Canada in order to protect the rights of religious minorities. The Turkish law also aims at preventing politisation of religious issues in protecting the rights of Muslims who do not interpret the Koran the same way as some observant do, thus, the restrictions provided by law do not amount to persecution.

[20] In its decision, the Board refers to three main documents. First, a report entitled the U.S. Department of State, Turkey Country Report on Human Rights Practices for 2000. Second, the United Nation General Assembly's Interim Report on the elimination of all forms of intolerance and of discrimination based on religion or belief prepared by the Special Rapporteur of the Commission on Human Rights and third, the decision of a European Court of Human Rights in the case of *Refah Partisi (The Welfare Party) and others v. Turkey*; dated July 31, 2001. Mrs. Aykut claims that the Board misconstrued these last two documents.

[21] I agree with the applicant that the question before the European Court of Human Rights was very different from the one before the Board. Had the Board relied on this decision to determine the claim before it, it would have indeed erred. But this is not what the Board did. It clearly states that the issue before the European Court was the dissolution of the Islamic Refah Party and that it was only "relevant in part". The portions quoted were those that confirmed the position of the Turkish Constitutional Court that the wearing of headscarves in state schools and buildings occupied by public authorities infringes the principle of secularism enshrined in the constitution and the Court's view that manifesting one's religion in such a manner amounted to exhorting pressure on persons who did not follow that practice and created discrimination on the grounds of religion and beliefs.

[22] The Board also referred to the section of the decision where the European Court summarizes general principles with respect to the application of the European Convention of Human Rights. It particularly focussed on the statement that freedom to manifest a religion may be restricted in certain circumstances.

[23] The Board's use of those extracts of the European decision, which confirmed to some extent other passages it quoted from the U.S. Department of State's report and the United Nation Special Rapporteur's report, was not unreasonable.

[24] I therefore disagree with the applicant that the Board showed a fundamental misunderstanding of her claim when it applied legal holdings having to do with a political party seeking to impose religion on others.

[25] With respect to the Interim Report of the Special Rapporteur, the Board clearly states that the report is extensive and deals with the majority as well as, minority religious groups and that the portion it uses is only the one entitled "Legal Aspect of Freedom and Religion". There is no indication that the Board took this to reflect the personal views of the Rapporteur or that it tried to portray it as such. Here again, the Board limited itself to sections dealing with the constitutional guarantees of freedom of religion and beliefs and non-discrimination on the basis of religion and beliefs, the principle of

secularism and the position of the Turkish Constitutional Court that the wearing of headscarves or turbans or any form of dress considered or perceived as religious, is incompatible with secularism.

[26] The Court carefully reviewed this report which deals with issues bigger than the one before the Board, including among other things, the rights of non-Muslim communities, of the Armenian minority, religious education in Turkey, the mention of religion on identity cards and the practice of religion during military service. It also summarizes the opinion of various non-governmental experts on how secularism has almost become a state religion. It confirms that generally speaking, many of those representatives deplore the fact that Islam is being used as a "tool of political exploitation by all players in the country's political life, both in government and within the political parties, particularly the Fazilet . . . This paradoxical situation demonstrates, according to several experts, that Turkey has not yet been able to create a true secularism either of ideology or of action". But none of these issues were directly relevant to Mrs. Aykut's claim nor do they affect the validity of the decision.

[27] In his conclusions and recommendations, the Special Rapporteur states at para. 124:

> The Special Rapporteur is pleased to note that Turkey's legislation, and particularly its constitutional legislation, provides absolute guarantees of freedom of religion and belief and protects its manifestations (in particular freedom of worship), while imposing certain limitations (article 14).

[28] The applicant particularly relies on the passage which follows this paragraph:

125. Some of these constitutional limitations contain vague expressions that led themselves to very broaden interpretation which, in turn, may lead to extensive intervention by the state and enhance excessive restriction of freedom of religion and belief.

(emphasis added)

[29] However, the Special Rapporteur does not say that such statement applies to the restrictions imposed with respect to the wearing of veils or headscarves. In fact, the report states:

127. The Turkish constitution enshrines the principle of secularism in relation between the State and religion. The Turkish Constitutional Court has interpreted this secularism in accordance with the principle of neutrality, whereby, on one hand, religion is a personal affair and, on the other hand, no manifestation of religion may be restricted by the State except under precise conditions, namely the protection of public order and safety and the public interest, and only in a manner consistent with the jurisprudence of the Commission on Human Rights.

[...]

130. On this point, the Special Rapporteur considers it essential that the jurisprudence of the Turkish Constitutional Court relating to secularism should be clearly and fully reflected in State policy concerning religion, in order to prevent any interference that would run counter to the limitations prescribed by international law.

131. On the issue of wearing the Islamic veil, in particular, such an approach would provide the authorities with a solid legal basis for addressing their legitimate concerns over the political exploitation of religion, while allowing free expression of dress within legitimate limits established to this end.

[30] It would thus appear that the Special Rapporteur, like the Board, found that the Turkish Constitutional Court's jurisprudence provides a solid basis for State policy on such matters.

[31] The Court must therefore, reject Mrs. Aykut's argument that the Board misconstrued this evidence and failed to consider documentary evidence contrary to its conclusion. The Board had no obligation to specifically comment on every part of this report, including the passage cited in paragraph 28 above.

[32] I agree with the applicant that the analogy used by the Board (the banning of the Lord's Prayer) is far from perfect. But, I cannot agree that it was unreasonable to compare these two situations or that it constitutes a reviewable error justifying that the decision be set aside.

[33] As indicated by Mrs. Aykut, one of the reasons for banning the Lord's Prayer in schools was that it created peer pressure to which children are particularly sensitive. It was an instance where individual freedom of religion can be limited because its manifestation injures others or interferes with their right to manifest their own beliefs and opinions.

[34] Obviously, in the case of the Lord's Prayer, the religion of the majority was imposed on the minority. It was easier to determine that it had an impact on this minority.

[35] Contrary to what was submitted, I do not construe the Board's decision as saying that Mrs. Aykut was, herself, trying to impose her religion on others but simply that the wearing of headscarves or any other religious insignia could have this effect because of the pressure it imposes on others and this even if Mrs. Aykut has no political agenda and simply wishes to follow her own conscience. The evidence quoted by the Board supports that view. For example at page 15 of its decision, the Board quotes the U.S. Department report:

The Council of State Danistay ruled in a 1999 case that universities are public institutions, and as such, have an obligation to protect the country's basic principles, including secularism. In making its ruling, the Danistay referred to its understanding of a ruling I.D. EHCR [European Court] in favour of Turkey, which noted that students had to abide by university dress codes, and that the wearing of the headscarf could be construed as pressure on other students. (my emphasis)

[36] Finally, Mrs. Aykut says that the panel's conclusion that "the restriction on headscarves in certain specific situation falls under a law of general application" and that "such restrictions do not translate into an inability to practice one's religion and cumulatively do not amount to persecution" is logically untenable. For the applicant, this conclusion is flowed because the statute aims solely at Sunni Muslim women and because its application does indeed result in excessive oppression of those women when for example they are denied medical treatment in hospitals.

[37] The applicant also asks the Court to make a general declaration that the Turkish statute preventing the wearing of headscarves in certain situations amounts to persecution because there are conflicting decisions of the Immigration and Refugee Board on this issue. I cannot do so because this is a judicial review of a particular decision made on the basis of a specific evidentiary record. As explained before, the Court must determine if the decision is reasonable in light of the evidence, not if it is the correct decision.

[38] The principles of law applicable to determine whether or not a particular restriction or set of restrictions imposed by statute amounts to persecution are known (*Cheung v. Canada (Minister of Employment and Immigration) (C.A.)*, [1993] 2 F.C. 314 (QL), *Zolfagharkhani v. Canada (Minister of Employment and Immigration) (C.A.)*, [1993] 3 F.C. 540 (QL) and *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593 (QL)).

[39] The Board was clearly aware of these principles. It expressly refers to the decision of the Federal Court of Appeal in *Zolfagharkhani*, supra.

[40] Like my colleague, Harrington J. in *Kaya v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 38 (QL) at paragraphs 16 to 19, I agree that the decisions cited by the applicant to support her conclusion such as *Fathi-Rad v. Canada (Secretary of State)*, [1994] F.C.J. No. 506 (FCA) (QL) and *Namitabar v. Canada (Minister of Employment and Immigration)*, [1994] 2 F.C. 42 (QL), are distinguishable on their facts and that one should consider and assess foreign legislation in its social context (see *Kaya*, supra, at paragrah 13). With respect to context for example, the answer to the question of whether the wearing of headscarves actually puts peer pressure on other students in a canadian classroom may be very different than whether it would have this impact in a Turkish classroom.

[41] Moreover, the Court is not satisfied that the applicant has indeed established that the Turkish statute aims solely at Sunni Muslim women or that despite its broader wording, it is in fact applied only to them. The text of the statute and of the directives issued thereunder were not put in evidence before the Board but it appears from the various documents on file that the law applies to all forms of religious dress or insignia including beards, cloaks, turbans, fez, caps, veils, headscarves. There is no evidence that it is not applied in accordance with its terms. In fact, there is evidence that, insofar as medical or university cards are concerned, the requirement for a photograph showing one's full face is definitely applied to men wearing beards.

[42] With respect to the disproportionate result such as the impossibility to obtain emergency treatment in a public hospital, there is little evidence on file apart from articles relating to the death of Mrs. Bircan, a 71 year old cancer patient who died because she was refused emergency medical treatment on the basis that her medical card was not in order, particularly, she wore a headscarf in her photograph. The delay in processing a new photograph was fatal. This is obviously an incredibly sad event and it appears that the Turkish government was asked to launch an inquiry to determine how this was allowed to happen. There is no evidence that this was an intended result of the directive apparently adopted to curb fraud and requiring that the photograph of persons entitled to free health care be taken without anything covering their head or face, be it a beard, a veil or a headscarf. It is true that the Board does not explain in any detail why it found that cumulatively the restrictions imposed do not amount to persecution. But, one has to consider the fact that the Board had already determined that Mrs. Aykut, like her husband, lacked subjective fear and it had reviewed various documents and discussed the objective basis of her claim at some length. It did not need to expand further on the objective basis of her claim under s. 96.

[43] I have not been convinced that this finding in the particular context of this claim is unreasonable. In any event, as I just said, in light of the Board's finding with respect to Mrs. Aykut's lack of subjective fear, an error on this point would not be determinative for Mrs. Aykut had to prove not only that there was an objective basis for her claim but also that she actually had a subjective fear of persecution.

[44] In that respect, it appears that she was forced to drop out of university in 1998. She was arrested and charged for breaching the law against public manifestation without a permit in December 1999. There were three sittings in respect of her court case in March, July and September 2000. But she only left the country in May 2001.

[45] She testified that in fact she decided to leave the country in February 2001. Pressed to explain why she finally came to that decision, she said that things got worse. Between February and May 2001, she was busy with her wedding preparations, the selling of their car and obtaining a visa. Like her husband, she left for the United States where she stayed a few days with friends before coming to Canada.

[46] As a result, the panel found that "the delay in leaving and making a claim at first opportunity highlights their lack of subjective fear". This finding was not challenged.

[47] As mentioned at the beginning of my reasons, Mrs. Aykut presented her claim under ss. 96 and 97 of the *Act*. However, before the Court, the thrust of her argument related to her claim under s. 96 based on her fear of "persecution" on the basis of religion, that is the restrictions imposed on her as a Sunni Muslim woman wearing a headscarf. Such "persecution" is irrelevant to a s. 97 claim unless one argues that because of it, one faces a personal risk of being subjected to torture or to a risk to life, or cruel or unusual treatment or punishment if one were to return to Turkey[1].

[48] Before the Board, Mrs. Aykut argued that she was facing up to four years in prison as a result of the charges laid against her for her participation in a public demonstration in December 1999.

[49] The Board held that as a matter of fact, it believed that there was no longer a court case outstanding against her.

[50] Before the Court, Mrs. Aykut said that this finding of the Board was perverse in light of the fact that she had produced a copy of her indictment.

[51] The respondent submits that the Board acknowledged that Mrs. Aykut was charged in 1999 but it found that she had not established that this case was still outstanding against her in 2002 when she appeared before it. The Board came to that conclusion because Mrs. Aykut appeared totally indifferent to the outcome of her case, she lacked knowledge of what happened to the many other women who were arrested and charged for their participation in the same demonstration (about 86). She produced no documentation proving that it was still outstanding and she left Turkey on her own passport without any impediment. On that last point, the Board pointed to documentary evidence stating that i) if a Turkish citizen is subject to an arrest warrant he or she must resolve any outstanding legal case before he or she can obtain a passport and ii) police clearance is required for passport issue, and all national frontiers are computerized and passports are automatically scanned before departure. Mrs. Aykut obtained her passport and her visa on April 17, 2001, and left Turkey without any problem. The respondent submits that this finding of fact is not patently unreasonable.

[52] Even if the mentioning of the lack of documentation establishing that the case was still outstanding is somewhat questionable, the Court cannot conclude that the finding is irrational. The Court may well have come to a different conclusion on this point but this is not the standard of review that applies here.

[53] Finally, one must remember that Mrs. Aykut also based her claim on that of her husband. Having set aside part of the decision concerning Mr. Aykut's claim under s. 97, it is only fair that Mrs. Aykut's claim, based on that of her husband, be also reconsidered in that respect.

[54] The applicants submitted two questions for certification:

1. Do restrictions on the use of headscarves in Turkey translate into an inability to practice one's religion, when made in the context of a fear of a rise of Islamic fundamentalism?

2. Originally submitted as: Does section 97 of the *Act* require a purely objective standard[2], but amended to: What is the standard of proof applicable to claims under that section?

[55] The Court finds that these two questions would not be determinative of an appeal in this matter and they do not meet the requirements set out in *Liyanagamage v. Canada (Secretary of State)*, [1993] F.C.J. No. 1279 (QL). This case turns on its own facts and raises no question of general interest.

THIS COURT ORDERS THAT:

The application for judicial review is granted in part. A differently constituted panel shall reconsider Mr. Aykut's claim under section 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 based on his activities as a journalist and as member of a human rights group as well as the claim of Mrs. Aykut based on the claim of her husband.

"Johanne Gauthier"

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-5310-02

STYLE OF CAUSE: IBRAHIM AYKUT ET AL v. MCI

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: Tuesday, August 26, 2003

REASONS FOR ORDER AND ORDER: The Honourable Johanne Gauthier

DATED: March 26, 2004

APPEARANCES:

Ms. Catherine Bruce	FOR APPLICANTS
Ms. Pamela Larmondin	FOR RESPONDENT

SOLICITORS OF RECORD:

Ms. Catherine Bruce	FOR APPLICANTS
Toronto, Ontario	
Morris Rosenberg	FOR RESPONDENT
Deputy Attorney General of Canada	

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[1] Mrs. Aykut argued that she was facing up to four years in prison. She never argued before the Court that any of the restrictions imposed by the Turkish statute banning the headscarves, could amount per se to torture as defined in the Convention or to a risk to her life or any other unusual cruel treatment provided for at section 97. The Court can only assume that this was not argued before the Board for it did not address the issue in its decision and the failure to do so was not raised as a reviewable error by Mrs. Aykut.

[2] The parties both agree that the test under section 97 is an objective one and that a claimant does not need to establish subjective fear.