

Date: 20040114

Docket: IMM-

5565-03

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4 FC 45

BETWEEN:

NURCAN KAYA

BEDIRHAN MUSTAFA KAYA

OMER BURGAHAN KAYA

Applicants

and

THE MINISTER OF

CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

HARRINGTON J.:

[1] There are four things to keep in mind in considering Nurcan Kaya's case. She is a woman. She is Turkish. She is Muslim. Her reading of the Qur'an dictates that she cover her head and shoulders in public places.

[2] Mrs. Kaya was a teacher in a Turkish Public School. She lost her job because she would not remove her Hejab (head scarf) while teaching. The wearing of non-secular dress in government places or buildings is banned in Turkey.

[3] Mrs. Kaya seeks refuge in Canada. A Convention refugee is defined in the *Immigration and Refugee Protection Act*, S.C. 2001 c.27 as a person who by reason of a well-founded fear of persecution for reason of race, religion, nationality, membership in a particular social group or political opinion is unwilling or unable to avail himself or herself of the protection of the country of nationality. A person may also be given refugee status in Canada if in need of protection because removal to the country of nationality could lead to subjection to torture, a risk to life or to a risk of cruel and unusual treatment or punishment.

[4] The Board found that Mrs. Kaya was not a Convention refugee or a person in need of protection. It was found that the banning of the wearing of head scarves in public places reflected a government policy designed to protect the secular state, and was not discriminatory or persecutory. Her removal to Turkey would not subject her personally to a risk of torture, a risk to her life or to a risk of cruel and unusual treatment or punishment.

[5] She was given leave to seek a judicial review of that decision.

[6] The Federal Court may grant relief in accordance with section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, as amended, if, among other things, the Board in question erred in law or based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it.

[7] The Board found that there was no law in Turkey which required Mrs. Kaya to wear the Hejab and that it was her decision to wear it in a public school which cost her her government teaching job and which denied her access to state institutions. The applicant submits that the Board did not expressly refer to the cases she put before it, and before this Court, which were advanced in support of the proposition that Turkish law violated religious freedom and that the economic consequences to her constituted persecution which justified her refugee claim.

[8] The respondent, and for that matter the applicant, referred to general country information which was on file. Extensive reference was made by the respondent to an article written by Yebim Araet of the Department of Political Science and International Relations, Boozazi University, Istanbul in May 2000 titled, "*Islamist Women, Their Head Scarves and Democracy in Turkey*".

[9] Although almost 100 percent of Turkish citizens are Muslims, it is a secular state. Apparently, dress codes were important in modernizing the country. The material indicates, and indeed Mrs. Kaya agreed, that not all Muslim women wear the scarf, although a majority appears to do so, although not in government premises. Mrs. Kaya reads the Qur'an in Arabic, not Turkish, and sincerely believes she must wear the head scarf in public.

[10] In answer to the argument that the Board should have referred to the case law put before it, the respondent equates legal argument with evidence and points out that failure to mention a piece of evidence does not mean that it was not considered. In any event, there was no persecution in Turkey because there was no punishment due to particular opinions or adherence to a particular creed or mode of worship as was held in *Rajuden v. Canada (Minister of Employment and Immigration)* (1984), 55 N.R. 129 (F.C.A.).

[11] Reliance was put on Mrs. Kaya's own testimony that the Imam at the mosque never encouraged women to wear a Hejab in the workplace.

Analysis

[12] Government takes many forms. There are Democratic States and Totalitarian States. There are Secular States and there are Religious States. We, in Canada, live in a Democratic Secular State and adhere to the principle that one must render unto Caesar the things that are Caesar's and to God the things that are God's. We are entitled to worship openly, or not to worship at all. There is no law which prohibits Mrs. Kaya from wearing the Hejab in Canadian government buildings.

[13] Does it follow however, that she was persecuted in Turkey for reasons of religion? Canada has only one immediate neighbour, the United States. Turkey is surrounded by religious Islamic states and is situated in a politically volatile part of the world. While the wearing of religious dress may not constitute a threat to the secular essence of the Canadian state, it may well constitute a threat in Turkey. Laws must be considered in their social context. The material before the Board indicated that the European Human Rights Commission supported the decision of the Turkish Constitutional Court to the extent that it maintained the right of a secular state to restrict religious practice in line with the right of citizens to equal treatment and religious freedoms. Exhibition of the rituals and symbols of religion without restriction as to place or form could cause pressure on those who do not practice that form of religion or who belong to another religion. Professor Araet noted that in Anatolian universities, women who cover their heads were in the majority and those who did not were frowned upon and pressured to cover, or intimidated by men who thought their heads should be covered. The reverse was true in urban universities where students who covered were in the minority, were marginalised and had to bear the unwelcome glances of the majority.

[14] Like the Board, I do not consider that Mrs. Kaya is a Convention refugee or in need of protection.

[15] Although it may have been preferable for the Board in this particular case to refer to the case law put before it, if only to say that they were distinguishable, the Board could only reach the decision it did by considering that those cases were in fact distinguishable. If they were not, then I tend to the view that the Board erred in law.

[16] The cases submitted on her behalf are distinguishable. Unlike *Rajuden, supra*, the Turkish government is not harassing her or punishing her because of her adherence to her particular interpretation of Islam. Turkey is attempting to maintain its secular nature in an area of the world in which the wearing of religious dress carries with it considerable political connotations.

[17] *Fosu v. Canada (Minister of Employment and Immigration)* (1994), 90 F.T.R. 182, dealt with the well-founded fear of persecution of Jehovah Witnesses in Ghana which had prohibited their religious services and other activities. It held that freedom of religion includes the freedom to practice that religion in public. Mrs. **Kaya** is entitled to practice her religion in public, and to wear her Hejab in public.

[18] *Namitabar v. Canada (Minister of Employment and Immigration)*, [1994] 2 F.C. 42, 78 F.T.R. 1 and *Fathi-Rad v. Canada (Secretary of State)* (1994), 77 F.T.R. 41 both deal with Iranian women who were obliged by Iranian Law to wear the Chador. It was held that the Islamic dress code was not a policy of general application which applied to all citizens in Iran, but rather gave rise to persecution because it dictated the manner in which Iranian women must dress to comply with the religious belief of the theocratic governing regime and provided punishments for violation of law. It would be simple, but wrong, to say that the right of Iranian women not to wear the Chador anywhere and the right of Turkish women to wear the Hejab everywhere is a manifestation of the same fundamental right.

[19] The Turkish government is not coercing anyone, man or woman, to wear religious dress. In furtherance of its secular policies, religious dress of any sort is not to be worn in government buildings.

[20] The material indicates that there is an ongoing political debate in Turkey, with different political parties freely expressing different points of view. The wearing of the Hejab can be decided in Turkish elections. See *Sicak v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1457.

[21] For these reasons, the application for judicial review will be denied.

[22] Mrs. **Kaya**'s husband and son had relied on the same claim. Consequently, they were both found not to be Convention refugees and not to be persons in need of protection. Their applications for judicial review will be dismissed as well.

[23] There is no question of general importance to certify.

"Sean Harrington"

J.F.C.

Montreal, Quebec

January 14, 2004

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:

IMM-5565-03

STYLE OF CAUSE:

NURCAN **KAYA**

BEDIRHAN MUSTAFA **KAYA**

OMER BURGAHAN **KAYA**

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

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