

**Date: 20040927**

**Docket: IMM-150-04**

**Citation: 2004 FC 1316**

**BETWEEN:**

**ERKAN ATES**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

**REASONS FOR ORDER**

**HARRINGTON J.**

[1] Turk, Kurd, Islamist, intellectual, human rights activist, pacifist and draft dodger; Erkan Ates is all these things. But a refugee he is not. This is the judicial review of the decision of a member of the Refugee Protection Division of the Immigration and Refugee Board dated December 15, 2003, in which it was held that Mr. Ates is neither a refugee nor a person otherwise in need of international protection within the meaning of sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c. 27.

[2] It is difficult to pinpoint the precise grounds underlying Mr. Ates' plea that he needs Canada to come to his protection. The complexity of his claim derives from the passage of time. During the six years since he left Turkey, and in the three years he has been in Canada, he has evolved as a person and Turkey has evolved as a state. The Board wisely considered all possible refugee grounds, both individually and cumulatively, and apart from one clear misfinding of fact, and forming the impression that he may have had a grander view of being a thorn in Turkey's side than was actually the case, accepted his story. Credibility is not in issue.

**The Facts**

[3] Mr. Ates, currently 26 years of age, is and has always been a Turkish citizen. In his Personal Information Form submitted to the Immigration and Refugee Board he gave Islam as his religion and he identified his "nationality, ethnic group or tribe:" as Kurdish. In 1996, while he was in school in Turkey, he became a follower of Fethullah Gülen, a moderate, non-violent Islamist. The group is known as Hizmet. Notwithstanding that nearly all Turkish citizens are Muslim, religious organizations do not sit very well with the Turkish secular state, particularly with the military.

[4] While in Turkey he was subjected to some police harassment because of his Hizmet views, but he was never arrested. He left for the United States in June 1998, travelling on a student visa. He spent three years there studying American literature. His sense of justice and fair play arising from his membership in Hizmet became more advanced as a result of attending university lectures concerning human rights, racism and discrimination.

[5] While in the USA he wrote letters and e-mails to the Turkish government reminding them of their obligations under international human rights law, and volunteered with Human Rights Watch, Europe and Central Asia Division. Although this work was by no means limited to Turkey, he did assist in the Turkish translation of an article concerning prison conditions there. This article, which specifically identified him as a contributor, was sent to various government departments in Turkey.

[6] Mr. Ates also worked at the New York office of the Zaman newspaper. There is a strong presumption within Turkish circles that anyone involved with that newspaper is Hizmet.

[7] While in the USA he was also involved in signing petitions with respect to the rights of the Kurdish people.

[8] Without having sought asylum in the USA, he came to Canada in May 2001, whereupon he immediately claimed refugee status. In addition to recounting the above facts in his Personal Information Form, he stated that military service was compulsory in Turkey but he did not serve as students are deferred. Some months after arriving here he received his call-up notice, which he has ignored. However, if he were returned to Turkey, he would likely be jailed as a draft dodger. His sense of pacifism is such that he will not bear arms in any circumstances. Apparently, no alternative service is available for conscientious objectors. Even if he were to serve he fears persecution by the military because he is both a Kurd and an Islamist.

### **Who is a Refugee?**

[9] According to section 96 of the Act, a Convention refugee is one who has "a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion". The "well-founded fear" must be both objective and subjective.

*(Rajudeen v. Canada (Minister of Employment and Immigration) (1984), 55 N.R. 129 (Fed. C.A)).*

### **Objective Fear of Persecution**

[10] Counsel for Mr. Ates submits that the Board member got her law wrong; that she so intermingled the concept of "balance of probabilities" with the concept of "mere possibilities", that she wrongly held that the test was that the objective fear of persecution must be established on a balance of probabilities. Although both terms are mentioned more than once in the same paragraphs, she concluded by saying:

I find that there is not more than a mere possibility that the claimant, Erkan Ates, would face persecution should he return to Turkey by reason of any Convention ground.

[11] She got her law right. Although any applicant must prove his or her case on the balance of probabilities, the "fear" portion thereof is reduced to a "mere possibility". As MacGuigan J.A., speaking for the Court of Appeal in *Adjei v. Minister of Employment and Immigration*, [1989] 2 F.C. 680, said at page 682:

It was common ground that the objective test is not so stringent as to require a probability of persecution. In other words, although an applicant has to establish his case on a balance of probabilities, he does not nevertheless have to prove that persecution would be more likely than not.

### **Subjective Fear of Persecution**

[12] The Board member was naturally concerned about Mr. Ates' failure to seek asylum in the USA. She held that this failure was inconsistent with someone who had a genuine subjective fear of persecution. Mr. Ates had a two-fold explanation. First of all, he was led to believe by Turkish compatriots in New York that if he were to file a refugee claim it would jeopardize his status as a student. He might be deported. The second reason is that it was only after he was in the USA for more than a year that he came to learn that such claims must be filed within a year of landing. His counsel referred to a U.S. statute at the hearing, but it was never filed. It is not necessary for me to deal with proof of American law, or lack thereof, because even if Mr. Ates has a subjective fear, there are no grounds for setting aside the Board's determination that there is no well-founded objective fear of persecution in Turkey.

### **Findings of Fact Must Stand**

[13] Counsel for Mr. Ates skilfully dismantled the decision of the Board and put it back together in such a way that at first blush it appears to be patently unreasonable. However, when looked at as a whole there is no patently unreasonable finding which would justify a judicial review. We must always keep in mind what Joyal J. said in *Miranda v. Canada (Minister of Employment and Immigration)* (1993), 63 F.T.R. 81 (F.C.T.D.):

It is true that artful pleaders can find any number of errors when dealing with decisions of administrative tribunals.

The issue is whether an error is material to the decision reached. We have also been warned against over-zealous, microscopic examination of the file. See *Annalingam v. Canada (Minister of Citizenship and Immigration)* (2000), 6 Imm. L.R. (3rd) 316, *Rivera-Velasquez v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1322 and *Agha v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1212.

## **Race, Religion, Political Opinion**

[14] It is abundantly clear from the record, and so acknowledged by counsel for Mr. Ates both at the closing of the hearing before the Board and in argument on this judicial review, that Mr. Ates' Kurdishness, and religious beliefs and activities, and political views inherent therein (Hizmet) are in and of themselves insufficient to support a refugee claim. They may be relevant as being ancillary to his human rights activities and his relationship with the military.

## **Human Rights Activist**

[15] The Board member clearly got one fact wrong. Mr. Ates' name was mentioned in the Turkish translation of an article dealing with conditions in Turkish prisons. The member said:

...nor was there any objective evidence to demonstrate that the claimant's name was on the document presented into evidence.

She is absolutely wrong. However, assuming his various activities did come to the attention of the Turkish authorities, she did not find plausible Mr. Ates' assertion that he would be targeted as a result of assisting in the translation of the article. She accepted that he had worked for Human Rights Watch, but found that his activities were essentially clerical, secretarial in content. In any event, the panel was of the view that he would not face persecution in Turkey based on his political opinion as a result of his newspaper articles or his involvement with human rights activities. A patently unreasonable finding of fact will only justify a judicial review if germane to the decision (*Stelco Inc. v. British Steel Canada Inc.*, [2000] 3 F.C. 282 (C.A.)). There was nothing patently unreasonable about that finding.

## **Military Conscription**

[16] The hearing before the Board was in four sessions, lasting over a year. This helps explain why the conscription point gained prominence. The Board member accepted that Mr. Ates was a pacifist and that his refusal to serve in the armed forces violated Turkish law, as all young men are subject to conscription. However, it was also found that he would not suffer disproportionately severe punishment on account of his race or religion. The panel found that sentences for evasion or refusal to perform military service were not so excessive that they could in and of themselves be regarded as persecutory.

[17] If he were jailed the Board was unable to find evidence that prison conditions were below minimum international standards, a point hotly contested. I cannot say that the Board's findings on these issues were patently unreasonable.

[18] While the Panel acknowledged that Mr. Ates as a follower of Fethullah Gülen might face discrimination at the hands of armed forces because of his beliefs, or by reason of being a Kurd, the panel also noted the human rights violations in the armed forces in Turkey were diminishing significantly. The Board concluded that the claimant failed to provide evidence to support his assertion that he would face

persecution on these grounds. Again, it cannot be said that this finding was patently unreasonable.

[19] Mr. Ates submitted that he would be subject to persecution in Turkey because of his "membership in a particular social group". That group comprises conscientious objectors or draft dodgers. This is like saying someone who does not believe in the right of the state to tax suffers persecution in Canada for failing to file income tax returns!

[20] The Turkish law is of general application. The position of conscientious objectors was considered by the Federal Court of Appeal in *Zolfagharkhani v. Minister of Employment and Immigration* (1993), 20 Imm. L.R. (2d) 1. MacGuigan J.A., speaking for the Court, had this to say:

18. After this review of the law, I now venture to set forth some general propositions relating to the status of an ordinary law of general application in determining the question of persecution:

19.(1) The statutory definition of Convention refugee makes the intent (or any principal effect) of an ordinary law of general application, rather than the motivation of the claimant, relevant to the existence of persecution.

20. (2) But the neutrality of an ordinary law of general application, vis-a-vis the five grounds for refugee status, must be judged objectively by Canadian tribunals and courts when required.

21. (3) In such consideration, an ordinary law of general application, even in non-democratic societies, should, I believe, be given a presumption of validity and neutrality, and the onus should be on a claimant, as is generally the case in refugee cases, to show that the laws are either inherently or for some other reason persecutory.

22. (4) It will not be enough for the claimant to show that a particular regime is generally oppressive but rather that the law in question is persecutory in relation to a Convention ground.

[21] Given that many states have compulsory military service, given that Turkey is democratic, I am satisfied that Turkish law is neither inherently, or for any other reason, persecutory as regards Mr. Ates, or others in his position. This is not to say that matters could not be better in Turkey. However, I am neither so arrogant nor naïve enough to believe that matters could not be better here either.

[22] For all these reasons the application for judicial review will be dismissed. The applicant has until October 4, 2004, to propose a serious question of general importance which would support an appeal to the Federal Court of Appeal. The respondent has until October 7, 2004, to reply.

"Sean Harrington"

Judge

Ottawa, Ontario

September 27, 2004

**FEDERAL COURT**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** IMM-150-04

**STYLE OF CAUSE:** ERKAN ATES

and

THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION

**PLACE OF HEARING:** OTTAWA, ONTARIO

**DATE OF HEARING:** SEPTEMBER 20, 2004

**REASONS FOR ORDER :** HARRINGTON J.

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