

Federal Court



Cour fédérale

Date: 20180214

Docket: IMM-3423-17

Citation: 2018 FC 175

Ottawa, Ontario, February 14, 2018

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

NEVZAT ETIK

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

(Delivered from the Bench at Toronto, Ontario, on January 31, 2018)

I. PROCEEDING

[1] Nevzat Etik [the Applicant] has applied for judicial review of a decision dated July 18, 2017 [the Decision] made by a member of the Refugee Appeal Division [RAD]. It upholds the finding of the Refugee Protection Division [RPD] that the Applicant is neither a Convention

refugee nor a person in need of protection. This application is brought pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA].

II. BACKGROUND

[2] The Applicant is a 44 year-old citizen of Turkey. He is of Kurdish ethnicity and a member of the pro-Kurdish Peoples' Democratic Party. The Applicant's marriage to a Turkish woman lasted 10 years and he has two children. The Applicant's former wife is a Turkish national of non-Kurdish ethnicity and her father is a Turkish nationalist and wealthy businessman in Canakkale, Turkey. The Applicant states that because of his Kurdish ethnicity, his relationship with his wife's family has always been tense.

[3] The Applicant states that he has had many interactions with Turkish authorities because of his pro-Kurdish political activities; he has been arrested, detained and tortured after participating in demonstrations. After an incident in which the Applicant was threatened with death by Turkish authorities, he fled Turkey for Iraq in August 2014. In February 2015, the Applicant left Iraq because he feared being returned to Turkey by Turkish intelligence operatives and because he feared attacks by ISIS.

[4] With the assistance of a smuggler, the Applicant travelled through several countries, and on April 11, 2015, he crossed into Texas from Mexico. Thereafter, he was arrested and made a claim for asylum in the United States. However, he appears to have abandoned that claim and on July 18, 2015, he crossed into Canada illegally. He was later apprehended and detained. In a

decision dated May 2, 2016, the Applicant's refugee claim was refused by the RPD on the basis of negative credibility findings and, in the Decision at issue here, the RAD dismissed his appeal.

III. THE RAD DECISION

[5] Before the RAD, the Minister of Public Safety and Emergency Preparedness (the Minister) submitted new evidence which demonstrates that the Applicant was involved in an altercation with his former brother-in-law in a restaurant in Canakkale in 2008. The evidence states that the Applicant carried an unregistered gun and bullets and intended to shoot his former brother-in-law but missed and instead wounded the owner of the restaurant and a waiter [the Bystanders]. Based on the evidence just described, the Minister argued that there are serious reasons for considering that the Applicant committed a serious non-political crime outside Canada and that he is therefore excluded from refugee protection in Canada pursuant to Article 1 F(b) of the United Nations Convention Relating to the Status of Refugees, Can TS 1969 No 6 [Refugee Convention], and section 98 of the IRPA.

[6] The Applicant had not told the United States or Canadian authorities that he had been charged and convicted of two offences in Turkey. One relating to possession of a firearm (the Firearm Offence) and the other arising from the shooting of two Bystanders (the Shooting Offence) (together the "Convictions").

[7] The Minister provided the following new evidence before the RAD:

- Canada Border Services Agency, Notice of Arrest, dated September 8, 2016 (the Arrest Notice);

- Citizenship and Immigration Canada, Section 44(1) Report, dated September 9, 2016 (the Report);
- Canakkale Chief Public Prosecutor's Office, Arrest Warrant (the Arrest Warrant);
- Canakkale Chief Public Prosecutor's Office, Bureau of Judgment and Enforcement, File Examination Record, for Judgment 2015/938, dated April 29, 2015 (the File Record) and;
- Interpol Red Notice, dated November 24, 2015 (the Red Notice).

[8] It is noteworthy that the CBSA Arrest Notice, the CIC Report, the Arrest Warrant and the Interpol Red Notice are all based on the Firearms Offence. Although the Red Notice mentions the Shooting Offence it is not the offence that justifies the Red Notice. In contrast, the File Record mentions both offences but it focuses on the Shooting Offence.

[9] The RAD admitted the Minister's new evidence described above and directed that an oral hearing be held.

[10] The RAD recognized that an assessment of exclusion under Article 1F(b) requires a two-step analysis. First, a determination of the sentence that could have been imposed had the crime been committed in Canada. Second, a consideration of the following factors from the Turkish perspective: the elements of the crime, the mode of prosecution, the penalty imposed, and any mitigating or aggravating circumstances underlying the conviction.

IV. DISCUSSION & CONCLUSIONS

[11] In my view, although the Decision includes some reasonable findings, it is nevertheless unreasonable because the RAD made the significant errors described below.

A. *The Ambush*

[12] The RAD considered whether the charges which led to the Convictions were politically motivated and the Decision reads as follows:

[23] Notwithstanding his admission of having been involved in the incident which resulted in two innocent bystanders being injured, the Appellant submits that he was not responsible for the injuries and that the charges laid against him were politically motivated and resulted from long-standing and on-going threats from nationalists including his ex-wife's family. He testified that his father in law was a wealthy and powerful Turkish nationalist. He alleges that his in-laws never accepted him and that his father in law shot him in the leg shortly after the wedding but was never charged by the authorities.

[24] He alleged that after his separation from his ex-wife, her family wanted nothing to do with the children because they considered them as Kurdish children. He testified that his brother in law arranged to meet him in a restaurant to discuss the Appellant assuming custody of the children. He testified that he was accompanied by a mutual friend of his and his brother in law and that the brother in law was accompanied by two men whom he recognized as plain clothes soldiers or police. He testified that at some point they saw the gun he was carrying and that the bodyguard and his brother in law left the restaurant and began shooting at him through the windows and that they are the ones who shot the two bystanders. He alleges that the mutual friend tried to grab his gun and that it accidentally discharged striking a table leg. [My emphasis]

[25] He testified that the prosecutors conspired to dispose of the forensic evidence to implicate him as the shooter in order to frame him. The Appellant testified that his lawyer in Turkey told him the only reason he was charged was because he was Kurdish.

...

[38] While the Appellant characterizes this as an ambush perpetrated by Turkish nationalists and his ex-wife's family, his testimony in this regard was found not credible. Furthermore, the RAD notes that the Appellant testified that there were only two persons accompanying his brother in law not a dozen as argued.

[My emphasis]

[13] The Applicant's testimony was not as described by the RAD. At pages 876 and 877 of the transcript of the Applicant's evidence before the RAD, he testified that his brother-in-law arrived at the restaurant with three vehicles carrying 10-15 people including two military officers. The Respondent agrees that the finding that the brother-in-law was accompanied by only two people was an error on the RAD's part.

[14] In my view, this error alone is sufficient to support a finding that the Decision is unreasonable. The fact that the shots were fired during an ambush by 10 to 15 men in which officers participated was a crucial aspect of the Applicant's submission that the charges against him were politically motivated.

B. *The purchase of the gun*

[15] In paragraphs 26 and 27 of the Decision, the RAD reviewed the evidence about when the Applicant purchased the gun he took to the restaurant and made a negative credibility finding based on his "evolving" testimony. However, the transcript does not show that his evidence changed.

[16] Contrary to the RAD's statement in paragraph 26 of the Decision, the Applicant did not testify that he acquired the gun after he was threatened in April 2013. What he said at page 873 of the transcript was that he was attacked at that time. His evidence at pages 875 and 891 of the transcript was that he purchased the gun after he started being threatened by Turkish nationalists, but no dates were given. Further, he did not testify that he bought the gun in 2010 and at page 893 of the transcript the Applicant corrected the RAD and denied saying that he had acquired the gun in 2010. On page 893 of the transcript, the Applicant's counsel finally asked him when he purchased the gun and the Applicant testified that he had bought it in 2006.

C. *The Appeal Documents*

[17] The Applicant's explanation for his failure to disclose the charges and Convictions was that they were not final because under Turkish law sentences are not imposed until appeals are complete. He testified that his Turkish lawyer had filed appeals and he did not learn that they had been dismissed until he was in detention in Canada. However, on this topic the RAD said at paragraph 31 of the Decision:

[31] ... The RAD notes that the RAD hearing was specifically delayed at the request of the Appellant's council so that legal documents could be obtained from Turkey. Despite this no effort was made to contact the Appellant's lawyer in Turkey with regard to obtaining appeal documents. The RAD finds that the failure to tender these documents and failure to make any effort to obtain these documents undermines the Appellant's allegations that he filed an appeal of the charges against him and further undermines his explanation for failing to disclose the fact that he had been charged criminally in Turkey.

[My emphasis]

[18] In fact, the Applicant's counsel did make an effort to acquire the appeal documents and provided the Minister's representative with a letter dated May 23, 2017 describing his efforts. A copy was sent to the RAD Registry Office. Further the File Record and the Red Notice indicate that both Convictions were appealed.

V. CONCLUSION

[19] The Decision will be set aside because the RAD failed to appreciate that the Applicant testified that he was ambushed at the restaurant, and because the RAD made two adverse credibility findings which were not supported by the evidence.

VI. CERTIFICATION

[20] No question was posed for certification for appeal.

JUDGMENT IN IMM-3423-17

THIS COURT'S JUDGMENT is that the Application for judicial review is allowed and the matter is to be re-determined by a different member of the RAD.

"Sandra J. Simpson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3423-17

STYLE OF CAUSE: NEVZAT ETIK v THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JANUARY 31, 2018

JUDGMENT AND REASONS: SIMPSON J.

DATED: FEBRUARY 14, 2018

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