Federal Court Cour fédérale

Date: 20200122

Docket: IMM-2852-19

Citation: 2020 FC 92

Ottawa, Ontario, January 22, 2020

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

YUNUS GOKKOCA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the case

[1] In this case, the Applicant submits that the Refugee Appeal Division [RAD] adopted six different standards of proof in assessing the Applicant's refugee claim: "what is likely to happen," "will face persecution," "is likely to suffer persecution," "would be persecuted," "convince," and "more than a mere possibility." To the Applicant, the RAD's adoption of

varying, and sometimes incorrect statements of the applicable legal tests constitutes a grave legal error; hence, this judicial review proceeding.

[2] However, the Applicant's arguments consist of objections to certain turns of phrases that merely elaborate upon the RAD's findings under the rubric of the appropriate legal tests.

[3] For the reasons that follow, I would dismiss the application.

II. Facts

[4] The Applicant is a citizen of Turkey. He is of Kurdish ethnicity and adheres to Alevism. He is also a member of the Republican People's Party [Cumhuriyet Halk Partisi or CHP]. Since 2002, the CHP has been the main opposition political party in the Grand National Assembly of Turkey. The CHP is the oldest political party in Turkey.

[5] The Applicant claims that his Turkish teachers humiliated and discriminated against him, and that he is at risk of persecution in Turkey due to his support for the CHP, his Kurdish ethnicity, and his Alevi faith.

[6] In May and June 2013, the Applicant participated in demonstrations. At one of these demonstrations, the Applicant was detained, beaten, and then released the following day. He was also photographed and questioned about various incidents. In 2015, the Applicant became CHP's vice president in his town. He also took part in a demonstration in October 2015 at which he was beaten and released the following day.

[7] In March 2016, the Applicant was detained during a demonstration. The Applicant was taken to the Security Headquarters by a police officer, where he was searched, beaten, and questioned about illegal organizations. The Applicant was released after 36 hours of detention.

[8] Following the July 2016 Turkish coup d'état attempt, the Applicant was regularly stopped and searched, and threatened with detention.

[9] During the 2017 Turkish constitutional referendum, the Applicant worked for the "No" campaign. While campaigning, he was confronted by the same police officer who had harassed him in March 2016, and taken to the Anti-Terror branch where he was strip searched, forced to sign a Body Search Report, humiliated, fingerprinted, questioned, threatened with detention, beaten, and released after 36 hours. In April 2017, he was threatened by the police chief of his town who said that the next time he would not be released. The "Yes" side eventually won the referendum, and Turkey has since adopted an executive presidency model of government.

[10] The Applicant was threatened again by the same police chief after participating in a demonstration held after the results of the constitutional referendum.

[11] In July 2017, the Applicant received a study permit to Canada. The Applicant arrived to Canada on July 19, 2017. The Applicant was informed by his father that the police chief came to their home asking about his whereabouts after he came to Canada, and that the same police chief (who threatened to kill him in April 2017) came to the family home seeking the Applicant in the first week of August 2017 and in mid-September 2018.

[12] The Refugee Protection Division [RPD] dismissed the Applicant's refugee claim in December 2017. In essence, the RPD concluded that the Applicant was not a Convention refugee nor a person in need of protection because he had failed to establish that he would face more than a mere possibility of persecution in Turkey.

[13] During the hearing, the Applicant's counsel conceded that there was no documentary evidence of CHP supporters being targeted or mistreated in Turkey. The RPD found that the Applicant's claims of mistreatment by Turkish authorities were contradicted by the absence of any evidence of mistreatment against CHP supporters. The RPD also considered the Applicant's residual profile (half-Kurdish, Alevi in religion, and a member of the CHP).

[14] The Applicant appealed the RPD's decision to the RAD. On appeal, the Applicant argued that the RPD failed to conduct a cumulative, mixed-motives analysis of his risk profile as a Kurd, Alevi and member of the CHP. The Applicant did not challenge the RPD's finding regarding the implausibility of his mistreatment by Turkish authorities.

III. Decision under review

[15] On April 10, 2019, the RAD confirmed the RPD's decision. The central issue was the Applicant's risk profile as an Alevi, as a person of Kurdish descent, and as a partisan of the CHP. The RAD dismissed the Applicant's section 96 claim. The RAD did not find any evidence to suggest that support for the CHP would cause any problems for the Applicant. The RAD found that the Applicant's profile did not constitute a cumulative factor of risk in Turkey. The RAD did not agree with the Applicant that the RPD failed to consider the mixed-motives aspect of the

claim. The RAD concluded that the Applicant did not require protection under section 97 in his hometown (Mersin) or in other parts of Turkey unaffected by the civil war conditions.

IV. Issues

[16] This case raises the following issue:

> Did the RAD adopt the appropriate standard of proof for its analysis of the Applicant's refugee claim?

[17] While the arguments on judicial review are different, the following cases present a similar fact pattern to the one at bar: *Kuzu v Canada (Citizenship and Immigration)*, 2018 FC 917; *Kusmez v Canada (Citizenship and Immigration)*, 2015 FC 948; *Aydin v Canada (Citizenship and Immigration)*, 2012 FC 1329).

V. Standard of review

[18] The parties are in agreement that the RAD decision attracts the reasonableness standard of review, correctly in my view (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 23 [*Vavilov*]).

[19] To determine whether the decision was reasonable, this Court must ask whether the RAD's decision "bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99).

[20] Reasonableness review should not be viewed as a "line-by-line treasure hunt for error" (*Vavilov* at para 102 citing *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 at para 54).

VI. Discussion

[21] The Applicant submits that the Supreme Court's decision in *Vavilov* does not constitute a departure from precedent (*Adjei v Canada (Minister of Employment and Immigration)*, 1989 CanLII 5184 (FCA), [1989] 2 FC 680 [*Adjei*] and *Alam v Canada (Minister of Citizenship and Immigration)*, 2005 FC 4 [*Alam*]) in relation to the proper test to be applied as regards the risk of persecution. I agree. I do not read *Vavilov* as a repudiation of the well-settled test for risk under section 96 of the IRPA, that is whether there is a reasonable chance, or more than a mere possibility, of facing persecution.

[22] The Applicant submits, however, that the RAD adopted six standards of proof in assessing the Applicant's section 96 claim, and, citing *Alam* and *Adjei*, argues that the lack of clarity on the RAD's choice of standard of proof constitutes a reviewable error.

[23] In *Adjei*, the Immigration Appeal Board [the Board] dismissed an application for refugee protection on the ground that the applicant had not demonstrated a well-founded fear of persecution. In coming to its decision, the Board stated "[t]he test is whether there is a *reasonable chance*, or are *substantial grounds* for thinking that the persecution may take place" [emphasis added] (*Adjei* at para 3).

[24] The Federal Court of Appeal allowed the application for judicial review on the ground that the Board relied on the test of "substantial grounds" as equivalent to the test of "reasonable chance" in the determination of whether the applicant was likely to suffer persecution if he was to return to his native Ghana. According to the Federal Court of Appeal, by equating "substantial grounds" with "reasonable chance", the Board introduced an element of ambiguity into the formulation of the test itself.

[25] That is not, however, what has happened in this case. I agree with the Respondent that the Applicant's objections result from a distortion of the significance of the RAD decision. He failed to appreciate the distinction between the formulation of a legal test, and the rephrasing of the components of a thought process.

[26] On a full reading of the RAD decision, in particular the conclusion, unlike the situation in *Adjei*, the RAD did not rely on an erroneous or confusing test, but on the proper test to be applied under the circumstances. The Board did not impose a more onerous burden of proof upon the Applicant than the law requires (*Alam*). It seems clear to me that the RAD assessed the evidence against the correct legal standard (*Sivagnanasundarampillai v Canada (Minister of Citizenship and Immigration*), 2018 FC 1109 at para 14 [*Sivagnanasundarampillai*]; *Talipoglu v Canada (Minister of Citizenship and Immigration)*, 2014 FC 172 at paras 27-28).

[27] The Applicant's submissions concentrate on five turns of phrase. I highlight each one below.

(1) "What is likely to happen"

[28] The Applicant argues that the RAD adopted an inappropriate standard of proof at paragraph 16 of its decision. Paragraph 16 reads as follows:

> However, refugee protection must be forward looking, that is, what is likely to happen if the Appellant is returned to his country of nationality. Regardless of what has or has not occurred in the past, does this Appellant face more than a mere possibility of persecution upon his return to Turkey.
>
> [Emphasis added.]

[29] The Applicant argues that a plain reading of the words "what is likely to happen" shows that the RAD adopted a higher standard of proof, and that although the RAD did identify the proper test, when it tried to explain what it meant, it still erred.

[30] I agree with the Applicant that the use of the words "likely to suffer" is confusing. Normally, the use of the word "likely" denotes a test more in line with the "balance of probabilities" or "more likely than not". This is not the test for the assessment of risk in relation to persecution.

[31] However, I do not read paragraph 16 in the same way as the Applicant. The reference to "what is likely to happen" is not meant as a recital of the test for persecution, but rather a reference to the fact that the process itself is "forward looking." As regards the assessment of risk, the RAD did articulate the proper test: "does this Appellant face more than a mere possibility of persecution."

[32] I see no confusion here.

(2) "Will face persecution" and "real risk of persecution"

[33] At paragraphs 25 and 26 of the RAD reasons, the Applicant argues that the RAD gave itself the task of determining whether the Applicant "will face persecution" in Turkey. Paragraphs 25 and 26 read as follows:

> 25. It is not the role of the RAD to decide on the righteousness of one cause over another which is what I would be doing were I to side with Kurdish militants or the Turkish forces on this struggle. My job is to determine whether the Appellant will face persecution upon his return to Turkey.
>
> 26. The document cited above, in conjunction with others, strongly indicates that the Appellant will not be exposed to a real risk of persecution in Turkey […]
>
> [Emphasis added.]

[34] As regards paragraph 25, the Applicant argues that it is not for the RAD to determine whether the Applicant will face persecution. However, upon reading the whole paragraph, it is clear to me that the RAD is not elucidating a legal test. Rather, the RAD is simply clarifying that it will not pick sides in the conflict between the Kurdish separatists and the current Turkish government.

[35] As regards paragraph 26, the use of the phrase "real risk of persecution" is, again, not meant to articulate or explain the test to be applied in the assessment of persecution, but rather is used to explain the extent to which the documents referred to support the Applicant's argument of an exposure to such persecution.

[36] Again, I see nothing here to suggest that the RAD conflated two different tests in the assessment of the risk of persecution.

(3) Section 96 vs Section 97 test

[37] The Applicant argues that, at paragraph 29, the RAD applied a lower test to the Applicant's section 97 claim and a higher test (balance of probabilities) to his section 96 claim. Paragraph 29 reads as follows:

> In this appeal, however, Counsel has referenced many paragraphs and pages from various documents on the record (the NDP and news articles). Most of these documents are speaking to what has become to be called a "human rights disaster" in Turkey. In most cases, the issues are dealing not with law-abiding Kurds but with Kurdish militants who have waged what amounts to a civil war against the Turkish government. As previously stated, it is not for me to decide which side of the conflict is right or wrong. What I can decide is whether a Kurd who is not involved with the militancy in south-east Turkey is <u>likely to suffer persecution</u>. <u>Is there more than a mere possibility</u> that Kurds, in general and this Kurdish Appellant, will suffer a risk to their lives, or a risk to cruel and unusual treatment or punishment, or a risk of torture?
>
> [Emphasis added.]

[38] Again, the use of the word "likely" may open the door to interpretation. However, I do not believe that anything turns on this word in this paragraph, standing alone, nor that it is determinative.

[39] Reading the RAD decision as a whole, it seems clear to me that the RAD did have the proper test in mind. I say this, in particular, because of the proper enunciation of the test elsewhere in its decision, in particular, in the conclusion. I am also mindful of the finding of the

RAD, at paragraph 26, after having reviewed the documents cited by the Applicant, where it stated:

> Should the Appellant return to Turkey and live in Mersin, where his family resides, he should experience no persecution.

[40] The RAD found that there was no discernable evidence of persecution towards the Applicant, regardless how paragraph 29 is to be interpreted.

[41] In the context of paragraph 29, it seems to me that the RAD is, again, careful not to take sides in the ongoing political conflict in Turkey, and is focusing on what the Applicant may face upon his return. I do not see here a restatement of the applicable test.

(4) "Would be persecuted"

[42] The Applicant submits that, at paragraph 32, the RAD adopted an erroneous standard of proof when it found that there was insufficient evidence to suggest that the Applicant "would be persecuted" in Turkey.

[43] Paragraph 32 reads as follows:

> In regard to possible section 97(1) appeal, it would appear from the documents on the record that the south-east zone of Turkey would present a substantial risk to the Appellant, as it does to all of the people living in what is a virtual war zone, between the government troops and the Kurdish militants. However, the Appellant does not live, nor did he live, in that area. He is from Mersin in the south-west of Turkey. The Appellant has shown insufficient evidence to support his allegations that he would be persecuted in Mersin, or in three-quarters of Turkey, due to his ethno-religious CHP involvement.

> [Emphasis added.]

[44] If one reads the paragraph in its entirety, it is clear that the RAD was simply reiterating the Applicant's allegation on appeal, namely, his allegation "that he would be persecuted in Mersin, or in three-quarters of Turkey, due to his ethno-religious CHP involvement." The RAD's summary of the Applicant's allegation on appeal should not be confused with a statement of a legal test.

(5) "Convince"

[45] The Applicant takes issue with the RAD's use of the word "convince" (at paragraph 33) within the section 96 claim, arguing that it connotes a stricter assessment of the risk threshold (citing *Chichmanov v Canada (Minister of Employment and Immigration)*, [1992] FCJ No 832 (FCA), *Mirzabeglui v Canada (Minister of Employment and Immigration)*, [1991] FCJ No 50 (FCA)). To the Applicant, the RAD's use of the word "convince" constitutes a clear error of law because it connotes a modification of the standard of proof.

[46] Paragraph 33 is the "Summary" of the decision, and reads as follows:

> The Appellant has failed to convince me that he faces more than a mere possibility of persecution, of cruel or unusual treatment or punishment, or of a risk of torture for a Convention ground. As the Appellant can live safely in Mersin or many other parts of Turkey, his claim would fail as well under section 97(1).
>
> [Emphasis added.]

[47] The RAD's use of the word "convince" was not a statement of a test, but rather a reference to the Applicant's failure to establish his claim (see, for example, *Pararajasingham v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1416 at paras 50-52; *Ye v Canada (Citizenship and Immigration)*, 2014 FC 1221 at paras 17-21).

[48] Since the test is correctly articulated in the concluding paragraph, I find that what may have been a rather loose use of words in a few paragraphs does not amount to any confusion on the part of the RAD, nor to a formulation of a stricter test for persecution.

VII. Conclusion

[49] The Applicant has not convinced me that the intervention of this Court is warranted in the case at bar. In addition, there is no need to supplement the reasons provided by the RAD. Accordingly, I would dismiss the application for judicial review.

[50] At the outset of the hearing, counsel for the Applicant raised the possibility of certifying a question, but in the end, none was submitted, and I did not identify one of such importance requiring certification.

JUDGMENT in IMM-2852-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question for certification.

"Peter G. Pamel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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