

Federal Court



Cour fédérale

Date: 20200225

Docket: IMM-5202-19

Citation: 2020 FC 302

Ottawa, Ontario, February 25, 2020

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

UMIT DEMIRTAS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This case concerns the decision of the Refugee Appeal Division (“RAD”) to dismiss an appeal of the Refugee Protection Division’s (“RPD”) decision, which rejected the Applicant’s refugee claim and found that the Applicant was not a Convention refugee or a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (“IRPA”). The Applicant is a citizen of Turkey who alleged a fear of persecution based on

his Kurdish ethnicity, Alevi faith, and membership in the pro-Kurdish Peoples' Democratic Party ("HDP") in Turkey.

[2] On this application for judicial review, the Applicant submits the RAD erred by failing to properly consider the newly admitted evidence. The Applicant also submits that the RAD erred in its negative credibility findings, and erred in finding that the Applicant's evidence on a central piece of his claim was inconsistent.

[3] For the reasons below, I find that the RAD decision is unreasonable. This application for judicial review is granted.

II. **Facts**

A. *The Applicant*

[4] Mr. Umit Demirtas (the "Applicant") is a 43-year-old citizen of Turkey who fears persecution based on his Kurdish ethnicity, Alevi faith, and membership in the HDP party in Turkey. In his refugee claim, the Applicant claimed to be a successful business man and alleged that he provided a large sum of financial support—an approximate amount of \$65,000 to \$80,000 CAD—to the HDP over a period of five years. The Applicant alleged that the police were interested in him as a result of the Applicant's financial contributions, and that he could not return to Turkey for fear of being killed by the police. The Applicant claimed that he was questioned by the police in April 2017 on his involvement with the HDP. In May 2017, the Applicant's home was raided and searched by the police, which became the "trigger" event for the Applicant's fear for his safety. After this incident, the Applicant travelled to Europe and to the U.S., but did not make a claim for refugee protection in any of these countries and returned

back to Turkey each time. Ultimately, the Applicant travelled to Canada and submitted a claim for refugee protection.

[5] The RPD hearings were held on November 30, 2017 and January 26, 2018. By decision dated February 5, 2018, the RPD found that the Applicant was neither a Convention refugee nor a person in need of protection.

B. *The RPD Decision*

[6] A key finding by the RPD was that the Applicant was “generally not credible”, and that he had not provided sufficient trustworthy evidence to support his fear of persecution in Turkey. The RPD was not persuaded that the Applicant was afraid of returning to Turkey, or that the Applicant was involved with the HDP as he had alleged.

[7] In particular, the RPD concluded that the Applicant did not provide a satisfactory explanation on why he travelled to a number of European countries and to the U.S., but returned to Turkey, when the travels post-dated the “trigger” event, which instigated his fear for his life. The RPD rejected the explanation that the Applicant travelled to build a travel history in order to obtain a Canadian visa, and found that the behaviour of travelling to four safe countries without making a refugee claim, and subsequently returning back to the country of alleged persecution was more reflective of a person who had very little fear in Turkey. Although the Applicant testified that his reason for coming to Canada was to provide a better and more secure life for his family, the RPD found his testimony to be inconsistent with the fact that the Applicant chose to come to Canada by himself, when he could have fled to a Schengen country along with his wife and children, who possessed Schengen visas.

[8] In addition, the RPD concluded that the Applicant did not establish his involvement with the HDP, as the Applicant did not provide evidence of his financial support and provided inconsistent evidence on when he became a member of the HDP. In his narrative, the Applicant did not specifically allege to be a member of the HDP, but noted that he was a “financial supporter”. However, in his Schedule A Form, the Applicant declared that he had been a member of the HDP since July 2017. During his testimony, the Applicant provided multiple unclear and inconsistent answers on when he became a member of the party. The Applicant also provided an inconsistent testimony as to whether he was a member when he spoke with police and what he told the police of his involvement with the HDP when questioned. Given the inconsistencies, the RPD rejected the Applicant’s claim that he was even questioned by the police.

[9] Furthermore, the RPD was not persuaded that the Applicant made donations to the HDP due to the Applicant’s failure to substantiate the large sum of money donated to the HDP and the Applicant’s inability to produce a reasonable explanation on the absence of any documentation.

[10] On March 1, 2018, the Applicant filed an appeal with the RAD. By decision dated July 30, 2019, the RAD dismissed the appeal.

C. *The RAD Decision*

[11] On appeal, the RAD accepted five new pieces of evidence:

- i. A personal affidavit sworn by the Applicant, explaining that his wife was asked to appear before the police and that she was questioned by police about his whereabouts and involvement in the HDP;

- ii. A copy of a summons letter requesting that the Applicant's wife appear before the public prosecutor's office;
- iii. An audio recording and transcript of a telephone call from police;
- iv. A screenshot of search results for arrest warrants from a Turkish police database;
and
- v. Photographs pertaining to the Applicant's wife's visit to police.

[12] The RAD found that the RPD did not err by failing to specifically mention an oral testimony given by Mr. Dimen, the Applicant's brother-in-law, and also concluded that the witness testimony did not overcome the RPD's other credibility concerns regarding the Applicant. The RAD noted that the purpose of Mr. Dimen's testimony was to speak to the facts concerning the Applicant's reavilment to Turkey and the failure to claim asylum elsewhere, which the RPD correctly considered. Although the Applicant emphasized the probative value of Mr. Dimen's testimony on the Applicant's profile as an HDP supporter, the RAD found that Mr. Dimen's testimony had very low probative value on such matters since that was not the substance of his testimony. Furthermore, the RAD concluded there were several significant credibility issues that touched on a core aspect of the Applicant's claim, and that the low probative value of Mr. Dimen's testimony did not assist in overcoming such credibility concerns.

[13] The RAD also found that the Applicant's new evidence was insufficient to overcome the credibility issues or to successfully establish his refugee claim. The RAD accepted that the Applicant was being investigated and wanted for arrest in Turkey, but gave no weight to the Applicant's unsupported statements about the authorities' pursuit due to his HDP involvement because of the Applicant's lack of credibility. As a result of the Applicant's inconsistent

evidence on his membership in the HDP, inconsistent evidence on the Applicant's interactions with police about his HDP involvement, and the lack of corroborative evidence on the Applicant's donations to the HDP, the RAD disbelieved the Applicant's claims of political involvement with the HDP and the alleged reasons for the authorities' interest in the Applicant.

[14] On application for judicial review, the Applicant submits that the RAD erred in its treatment of the new evidence, and that this evidence was improperly considered. The Applicant also submits that the RAD erred in its credibility findings against the Applicant.

III. Issues and Standard of Review

[15] The issue is whether the RAD Decision is reasonable, and in particular:

- A. Whether the RAD erred in its credibility findings;
- B. Whether the RAD erred in its consideration of the Applicant's reavilment to Turkey; and,
- C. Whether the RAD erred in its treatment of new evidence.

[16] Prior to the Supreme Court of Canada's recent decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (CanLII) [*Vavilov*], the reasonableness standard generally applied to the review of the RAD's consideration of RPD's findings, and the RAD's credibility findings, as in the case at bar: *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 (CanLII) at paras 30, 34-35; *Ilias v Canada (Citizenship and Immigration)*, 2018 FC 661 (CanLII) at para 30; *Walite v Canada (Minister of Citizenship and Immigration)*, 2017 FC 49 (CanLII) at para 30; *Deng v Canada (Minister of Citizenship and Immigration)*, 2016 FC 887 (CanLII) at paras 6-7. There is no need to depart from the standard

of review followed in previous jurisprudence, as the application of the *Vavilov* framework results in the same standard of review: reasonableness.

[17] As noted by the majority in *Vavilov*, “a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker,” (*Vavilov* at para 85). Furthermore, “the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency,” (*Vavilov* at para 100).

IV. Analysis

A. *Credibility Findings*

(1) **Financial Support to the HDP**

[18] The Applicant concedes that he provided inconsistent statements on whether he had admitted his membership in the HDP to the police. During the RPD hearing, the Applicant initially testified that he had told the police he was a member, but that he had not provided financial support. On the contrary, the Applicant’s narrative indicated that he told the police that he was not involved with the HDP and that he was not a donor. Subsequently, the Applicant testified telling the police that he did not support the HDP “in any way”—that he was not a member and that he did not support it financially.

[19] However, the Applicant submits that his testimony—on whether he claimed to be a financial supporter of the HDP during the police interrogation—was not inconsistent, and that

the RAD erred in finding that the Applicant's evidence was inconsistent on a central aspect of his claim. The Applicant also submits that the RAD erred by finding that the Applicant could prove his financial support in documentation. The Applicant submits that his testimony supported his position that he could not provide corroborating documentation for his donations to the HDP: the Applicant gave personal funds, so there would be no company records; the Applicant did not send bank transfers, leaving no trace in his bank accounts; he donated piece by piece, so there would be no large withdrawals from his bank accounts; and the individuals that could corroborate his financial support were all imprisoned. The Applicant argues that neither the RPD nor the RAD considered the conditions for the HDP and its supporters, such that any record of financial support would be dangerous for someone who feared police raids.

[20] The Applicant relies on *Khamdamov v Canada (Citizenship and Immigration)*, 2016 FC 1148 (CanLII) [*Khamdamov*] at paragraphs 13 and 16 and *Guyen v Canada (Citizenship and Immigration)*, 2018 FC 38 (CanLII) [*Guyen*] at paragraphs 53 and 54 for the proposition that it is an error for the RAD to rely on a lack of corroboration to doubt credibility at the outset of a credibility analysis.

[21] The Respondent submits that the Applicant's claim contained inconsistencies concerning his membership in the HDP and his statements to the police. The RAD was entitled to draw negative credibility findings against the Applicant. The Applicant admitted that he provided an inconsistent testimony on whether he revealed his HDP membership to the police. The Respondent submits that although the Applicant argues that this inconsistency is immaterial, the Applicant's membership in the HDP party was a central concern in his claim because contradictions in evidence are considered in an overall credibility assessment.

[22] In addition, the Respondent argues that since the Applicant was found to lack credibility in multiple aspects of his claim, the presumption of truthfulness was rebutted, and that the RAD was entitled to require some proof to corroborate his alleged financial support to the HDP (*Elfar v Canada (Citizenship and Immigration)*, 2012 FC 51 (CanLII) at para 4). The Respondent relies on *Guzun v Canada (Citizenship and Immigration)*, 2011 FC 1324 (CanLII) at para 20 for the proposition that it is not unreasonable to require documentary corroboration of critical aspects in an applicant's claim.

[23] I agree with the Applicant's position that the RAD erred by concluding that the Applicant's evidence was inconsistent on a central aspect of his claim. Although the Applicant's testimony on whether he disclosed his HDP membership to the police was inconsistent, the Applicant's testimony that he had denied being a financial supporter of the HDP during the police interrogation was consistent. In my view, the central aspect of the Applicant's claim rested on his status as a financial supporter of the HDP. In his affidavit, the Applicant explains that "after the July 2016 attempted coup in Turkey, being a financial supporter of the HDP is very much seen as akin to treason by the Turkish government". Beyond being a mere member of the HDP, the danger to the Applicant arose out of his monetary contributions that could aid the HDP to further its goals.

[24] Furthermore, the RAD erred in finding that the Applicant could produce corroborating documentation to prove his financial support. The cases in *Khamdamov* and *Guyen* are helpful to the case at bar. In *Khamdamov*, the Court concluded that the RAD had erred in requiring the applicant to provide corroborating documentary evidence although the RAD lacked reasons to find that the applicant's evidence was not credible (*Khamdamov* at para 16). In *Guyen*, the Court found that there was no real contradiction or inconsistency in the applicant's evidence, and that

the RPD erred by basing its negative credibility findings on her lack of corroborative evidence. In the case at bar, the RAD unreasonably dismissed the central aspect of the Applicant's claim, and thus erred in requiring the Applicant to produce corroborative evidence on his financial support for the HDP.

(2) **HDP Letter**

[25] The Applicant submits that the RAD failed to consider the totality of the evidence. The Applicant specifically argues that a letter from the HDP claiming that the Applicant was a member of the HDP, along with the new evidence showing that the authorities are pursuing the Applicant, established that it was likely the Applicant was wanted for his membership in the HDP. The Applicant contends that the letter from his brother stated that the police were making threats to his office, and submits that a reasonable conclusion to be drawn from such conduct is that the police were acting in a persecutory manner towards the Applicant, or that "political thugs" were intent on persecuting the Applicant.

[26] On the issue of the HDP letter, the Respondent notes that the RAD is assumed to have weighed and considered all of the evidence presented. There is no obligation for the RAD to explicitly reference every piece of evidence (*Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No. 598 (CA); *Hassan v Canada (Minister of Employment and Immigration)* (1992), 147 NR 317, [1992] FCJ no 946 (CA); *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC)).

[27] In my view, the RAD failed to consider the totality of the evidence. Although the RAD acknowledged the HDP letter, as well as the letters from the Applicant's family members and friends, the RAD failed to engage with the evidence in a holistic manner. The various pieces of

evidence were considered in separate silos, and without consideration for how each piece fit into the overall narrative.

B. *Reavailment to Turkey*

[28] The Applicant submits that the RAD erred by dismissing the reasonable explanations provided by the Applicant on why he did not make a refugee claim in Europe or in the U.S., namely that the Applicant was seeking reunification with family members in Canada. The Applicant further submits that the RAD repeated the RPD's error in finding that the Applicant could have left with his family on their Schengen visas to make asylum claims together. The Applicant notes that he left Turkey on July 30, 2017, when he learned that the police were going to arrest him, while his family obtained their Schengen visas on August 2 or 3. The Applicant submits it was unreasonable for the RAD to draw adverse credibility findings against the Applicant for his failure to claim refugee protection in Europe.

[29] The Respondent submits that the RAD did not err in concluding that the Applicant's delay and several return trips to Turkey did not correspond with an immediate and subjective fear of persecution (*Murugesu v Canada (Citizenship and Immigration)*, 2016 FC 819 (CanLII) at para 23; *Ortiz Garzon v Canada (Minister of Citizenship and Immigration)*, 2011 FC 299 at para 30; *Duarte v Canada (Minister of Citizenship and Immigration)*, 2003 FC 988 at para 14; *Hernandez v Canada (Citizenship and Immigration)*, 2012 FC 197, at para 21). In light of the Applicant's failure to claim protection at two separate opportunities in Europe and in the U.S., the Respondent submits that the RAD was entitled to reject the Applicant's explanation. Also, the Applicant could have made his refugee claim with his family in Europe in August 2017, rather than by himself in Canada at the end of July 2017. The Respondent argues that the RAD

reasonably found that the Applicant's actions did not correspond with a subjective fear of persecution.

[30] In my view, the RAD erred by dismissing the Applicant's reasonable explanations on why he did not seek refugee protection at the first opportunity. The Applicant explained that his brother-in-law was already established and living in Canada, and that he would receive assistance from his brother-in-law to make a refugee claim in Canada. As this Court found in *Alekozai v Canada (Citizenship and Immigration)*, 2015 FC 158 (CanLII) [*Alekozai*], attempted reunification with family is a valid reason for failing to claim protection at the first opportunity (*Alekozai* at para 12). Furthermore, when the Applicant left Turkey out of fear of an imminent police arrest, he did not know that his family members would be receiving their Schengen visas a few days later. Given the factual circumstances, it is unreasonable for the RAD to have accepted the RPD's finding that the Applicant could have left for a Schengen country with his family to make an asylum claim together—it is illogical to expect that the Applicant somehow possessed foresight into when his family members would receive their Schengen visas, at the time that the Applicant was fleeing Turkey.

C. *Treatment of New Evidence*

[31] The Applicant submits that the RAD erred in the treatment of the newly admitted evidence. The Applicant submits that the RAD misapplied the test on a finding of facts: while the RAD correctly stated that the legal test was on a balance of probabilities, the RAD found it “possible” that the Applicant was being pursued for reasons unconnected to grounds for refugee protection. The Respondent submits that the Applicant's arguments are without merit and that

they are a microscopic review of the RAD Decision. The term “possible” is encapsulated within the limits of the standard of “more likely than not”.

[32] Given that other aspects of the RAD decision render it unreasonable, I see no reason to consider this issue.

V. **Certified Question**

[33] Counsel for each party was asked if there were any questions requiring certification. They each stated that there were no questions for certification and I concur.

VI. **Conclusion**

[34] The RAD failed to properly consider the totality of the evidence in assessing the Applicant’s claims. The RAD erred in its credibility findings, and erred in finding that the Applicant’s evidence on a central piece of his claim was inconsistent. The RAD also erred in rejecting the Applicant’s reasonable explanations on why he could not provide corroborative evidence to prove his financial contributions to the HDP. Lastly, the RAD erred by dismissing the Applicant’s reasonable explanations on his failure to claim refugee protection at the first opportunity.

[35] The RAD decision is unreasonable. This application for judicial review is granted.

JUDGMENT in IMM-5202-19

THIS COURT'S JUDGMENT is that:

1. The decision is set aside and the matter is to be returned for redetermination by a different decision-maker.
2. There is no question to certify.

"Shirzad A."

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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