

Federal Court



Cour fédérale

**Date: 20211124**

**Docket: IMM-4179-20**

**Citation: 2021 FC 1287**

**Ottawa, Ontario, November 24, 2021**

**PRESENT: The Honourable Justice Fuhrer**

**BETWEEN:**

**HACI SETIREKLI**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] The Applicant, Hacı Setirekli is a citizen of Turkey who self-identifies as Alevi but not Kurdish, while his spouse identifies as an Alevi Kurd. They fled Turkey, allegedly fearing persecution for their faith and political protest activities. Their refugee claims, which included their minor daughter, were heard together by the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada.

[2] The RPD accepted their identities as Alevi and Alevi-Kurd respectively. The RPD found numerous credibility concerns, however, and thus held the Applicant and his spouse, including their minor daughter whose claim was based on that of her parents, were neither Convention refugees nor persons in need of protection, contrary to sections 96 and 97 of the *Immigration and Refugee Protection Act, SC 2001, c 27 [IRPA]*. They appealed the RPD decision. See Annex “A” for relevant legislative provisions.

[3] The Applicant’s claim was separated from that of his spouse and daughter. Consequently, his appeal was heard separately, and dismissed, by the Refugee Appeal Division [RAD]. He now seeks judicial review of the RAD decision.

[4] There is no dispute that the presumptive reasonableness standard of review is applicable, with the reasonableness of the RAD decision being the sole issue for the Court’s determination: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 10, 25. I find that none of the situations rebutting such presumption (*Vavilov*, at para 17) is present in this matter.

[5] To avoid judicial intervention, the decision must bear the hallmarks of reasonableness – justification, transparency and intelligibility; the party challenging the decision has the onus of demonstrating that the decision is unreasonable: *Vavilov*, at paras 99-100.

[6] I am persuaded that the Applicant has satisfied his onus. For the more detailed reasons that follow, I find the RAD decision is unreasonable for lack of intelligibility regarding a central piece of new evidence that the RAD admitted and, thus, I grant this judicial review application.

## II. Challenged Decision

[7] The RAD determined that the central issue in the Applicant's appeal was his credibility. The RAD summarized the twenty-four negative credibility findings of the RPD regarding the claims of the Applicant and his spouse and noted that, although the RPD accepted the Applicant was a member of the Alevi faith, it found he did not face a serious possibility of persecution or a likelihood of harm in Turkey, as per subsection 97(1), on that basis alone.

[8] As the RAD observed in its decision, the Applicant offered no specific critique of the RPD's assessment of his credibility: "Counsel submits that the [Applicant] is not appealing the RPD's findings *per se*, rather this Appeal application is focusing on the new evidence that emerged after the [Applicant's] proceedings were concluded before the RPD." Accordingly, the RAD concluded that the RPD's findings were uncontested and that there was no need for the RAD to offer analysis of those findings. The RAD nonetheless reviewed the findings and largely agreed with them, with exception of two findings pertaining to the Applicant and three involving his spouse.

[9] The Applicant submitted three documents, as new evidence, to demonstrate his "political profile" in Turkey, and thus, to establish a nexus on the ground of political opinion, further to the *IRPA* s 96. This documentation consisted of a "Cover letter for arrest warrant" dated September

18, 2018 [Cover Letter]; an undated “Report on Execution of Warrant” that, on its face, arose after the RPD decision; and a letter from the Applicant’s lawyer in Turkey dated April 23, 2019 [Lawyer’s Letter].

[10] The RAD assessed the documents under the requirements of the *IRPA* s 110(4) and Rule 3(3)(g)(iii) of the *Refugee Appeal Division Rules*, SOR/2012-257, and determined that the Cover Letter was excluded as new evidence because it was dated before the date of the RPD decision and the Applicant had not explained why it was not available to bring before the RPD.

[11] The RAD found the “Report on Execution of Warrant” was fully admissible. The Report describes a warrant issued against Hacı SATIREKLI [*sic*] “in connection with charge of participating in unauthorized demonstration and protesting government” and a failed effort on March 20, 2019 to locate and apprehend the person of interest at the address on record. The Report further describes that when the police knocked on the door it was answered by someone who identified herself as Fatey SATIREKLI [*sic*] and stated that the person of interest was her son who was in Canada at the moment.

[12] The Lawyer’s Letter was deemed admissible but only regarding the lawyer’s conversation with the Applicant’s mother who corroborated a visit from the police on March 20, 2019 searching for the Applicant. The fact that the admissible part of the Lawyer’s Letter came from the Applicant’s mother, however, rather than from the lawyer’s own experience or observation, was found to undermine its probative value somewhat.

[13] Having weighed the RPD's uncontested credibility findings, with which the RAD agreed, against the Applicant's new and admitted evidence, the RAD concluded that the Applicant generally lacked credibility. The RAD further concluded that the new evidence does not raise a serious issue and, therefore, denied the Applicant's request for a hearing under the *IRPA* s 110(6).

### III. Analysis

[14] I find that this matter turns on the RAD's treatment of the Report on Execution of Warrant. Although the Report was undated, the RAD accepted that it referred to the police officers having visited the Applicant's mother on March 20, 2019 and, thus, the information arose after the RPD's rejection of the Applicant's claim. The RAD also found that the Report met the tests of newness and relevance. Significantly, the RAD decision states that there is "no basis to make a finding that it lacks credibility" and that the RAD "will consider this document document-and the impact it has on this case-when weighing the [Applicant's] general credibility below."

[15] The RAD states that, having weighed the uncontested credibility findings against the Applicant's (admitted) supporting documentation, it finds the Applicant generally was lacking in credibility. Notwithstanding the finding that the Report on Execution of Warrant was credible, new and relevant, the RAD however offers no analysis of this new evidence nor ascribes any weight to the Report on Execution of Warrant, unlike the Lawyer's Letter. The RAD fails to provide insight into how it ultimately considered, but disregarded, the Report in light of the credibility findings it accepted. Before concluding that the Applicant generally was lacking in

credibility, it was incumbent on the RAD to do this, especially because, on its face, the document is relevant to his credibility: *Tshibola Kabongo v Canada (Citizenship and Immigration)*, 2012 FC 313 at para 11. In my view, “the error lies in putting the conclusion before the evidence”: *Chen v Canada (Citizenship and Immigration)*, 2013 FC 311 at paras 20 and 22.

[16] In other words, contrary to its signal that it would do so, I find the RAD failed to “consider this document-and the impact it has on this case-when weighing the [Applicant’s] general credibility” by erroneously endorsing the RPD’s decision without conducting its own meaningful independent assessment of the admitted Report on Execution of Warrant: *Rozas del Solar v Canada (Citizenship and Immigration)*, 2018 FC 1145 at para 125. In my view the RAD was required to justify its conclusion, in light of the admitted evidence, by way of its reasons, in a transparent and intelligible manner, having regard to the record as a whole and the applicable legal constraints. Given that the reasons lack any such analysis of the Report on Execution of Warrant, I find the decision is unreasonable.

#### IV. Conclusion

[17] For the above reasons, I allow the Applicant’s judicial review application. The RAD decision is set aside and the matter will be remitted to a different decision maker for redetermination.

[18] Neither party proposed a serious question of general importance for certification. I find that none arises in the circumstances.

**JUDGMENT in IMM-4179-20**

**THIS COURT'S JUDGMENT is that:**

1. The Applicant's judicial review application is allowed.
2. The August 11, 2020 decision of the Refugee Appeal Division is set aside and the matter is to be remitted to a different decision maker for redetermination.
3. There is no question for certification.

"Janet M. Fuhrer"

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Judge

**Annex “A”: Relevant Provisions**

*Immigration and Refugee Protection Act, S.C. 2001, c. 27*  
*Loi sur l’immigration et la protection des réfugiés (L.C. 2001, ch. 27)*

<p><b>Refugee Protection, Convention Refugees and Persons in Need of Protection</b>  <b>Convention refugee</b></p> <p><b>96</b> A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,</p> <p style="padding-left: 40px;">(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or</p> <p style="padding-left: 40px;">(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.</p> <p><b>Person in need of protection</b></p> <p><b>97 (1)</b> A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally</p> <p style="padding-left: 40px;">(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or</p> <p style="padding-left: 40px;">(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if</p> <p style="padding-left: 80px;">(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,</p>	<p><b>Notions d’asile, de réfugié et de personne à protéger</b>  <b>Définition de réfugié</b></p> <p><b>96</b> A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d’être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :</p> <p style="padding-left: 40px;">a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;</p> <p style="padding-left: 40px;">b) soit, si elle n’a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.</p> <p><b>Personne à protéger</b></p> <p><b>97 (1)</b> A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n’a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :</p> <p style="padding-left: 40px;">a) soit au risque, s’il y a des motifs sérieux de le croire, d’être soumise à la torture au sens de l’article premier de la Convention contre la torture;</p> <p style="padding-left: 40px;">b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :</p> <p style="padding-left: 80px;">(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,</p>
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<p>(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,</p> <p>(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and</p> <p>(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.</p> <p><b>Person in need of protection</b></p> <p>(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.</p>	<p>(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,</p> <p>(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,</p> <p>(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.</p> <p><b>Personne à protéger</b></p> <p>(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.</p>
<p><b>Refugee Protection</b> <b>Evidence that may be presented</b></p> <p><b>110(4)</b> On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.</p> <p>...</p> <p><b>110(6)</b> The Refugee Appeal Division may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection (3)</p> <p>(a) that raises a serious issue with respect to the credibility of the person who is the subject of the appeal;</p> <p>(b) that is central to the decision with respect to the refugee protection claim; and</p>	<p><b>Réfugiés et personnes à protéger</b> <b>Éléments de preuve admissibles</b></p> <p><b>110(4)</b> Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans les circonstances, au moment du rejet.</p> <p>...</p> <p><b>110(6)</b> La section peut tenir une audience si elle estime qu'il existe des éléments de preuve documentaire visés au paragraphe (3) qui, à la fois :</p> <p>a) soulèvent une question importante en ce qui concerne la crédibilité de la personne en cause;</p> <p>b) sont essentiels pour la prise de la décision relative à la demande d'asile;</p>

(c) that, if accepted, would justify allowing or rejecting the refugee protection claim.

c) à supposer qu'ils soient admis, justifieraient que la demande d'asile soit accordée ou refusée, selon le cas.

***Refugee Appeal Division Rules (SOR/2012-257)***  
***Loi sur l'immigration et la protection des réfugiés (L.C. 2001, ch. 27)***

**Filing and Perfecting an Appeal**  
**Content of appellant's record**

**3(3)** The appellant's record must contain the following documents, on consecutively numbered pages, in the following order:

- (g) a memorandum that includes full and detailed submissions regarding
- (iii) how any documentary evidence referred to in paragraph (e) meets the requirements of subsection 110(4) of the Act and how that evidence relates to the appellant.

**Réfugiés et personnes à protéger**  
**Contenu du dossier de l'appelant**

**3(3)** Le dossier de l'appelant comporte les documents ci-après, sur des pages numérotées consécutivement, dans l'ordre qui suit :

- g) un mémoire qui inclut des observations complètes et détaillées concernant :
- (iii) la façon dont les éléments de preuve documentaire visés à l'alinéa e) sont conformes aux exigences du paragraphe 110(4) de la Loi et la façon dont ils sont liés à l'appelant,

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-4179-20

**STYLE OF CAUSE:** HACI SETIREKLI v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** HELD VIA VIDEOCONFERENCE

**DATE OF HEARING:** NOVEMBER 17, 2021

**JUDGMENT AND REASONS:** FUHRER J.

**DATED:** NOVEMBER 24, 2021

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