Federal Court Cour fédérale

Date: 20220506

Docket: IMM-3724-20

Citation: 2022 FC 659

Ottawa, Ontario, May 6, 2022

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

HUSEYIN AYDEMIR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada [the RPD] vacating the Applicant's refugee status.

Background

[2] The Applicant, Huseyin Aydemir, is a 32-year-old Kurdish man from Turkey. He came to Canada in 2015 and made a claim for refugee protection, which was granted on February 4, 2016.

[3] The Applicant was injured in a farming accident when he was 12 or 13 years old. As a result of this accident, he suffered a severe traumatic brain injury. Neuropsychological reports indicate that he has difficulty with his memory and spoken language comprehension.

[4] On August 10, 2016, the Minister of Public Safety and Emergency Preparedness [the Minister] brought an application to vacate the Applicant's refugee status on the basis that he had been convicted on February 19, 2013, of "felonious injury" in Turkey and had not disclosed this in his initial refugee claim.

[5] The Applicant has conceded that he was convicted of this offence and that he made a misrepresentation on his claim.

[6] According to the Applicant, on May 9, 2009, he was at his home with his friend when a man named Suat Altun arrived with seven other individuals, all of whom were armed with knives and sticks. The Applicant and his friend were unarmed. An altercation ensued, the Applicant disarmed Altun, had him in a wrist lock, and stabbed him in the chest with his own knife.

[7] The Applicant maintained throughout the Turkish criminal proceedings that he had been acting in self-defence. The witnesses at the trial were the Applicant, his friend, a bystander who had witnessed the altercation, and Altun. The testimony of all witnesses other than Altun largely supported the Applicant's narrative.

[8] The Applicant was ultimately found guilty. He was sentenced to 25 months' imprisonment. The Turkish court considered the Applicant's use of a weapon as an aggravating factor. The Turkish court found as mitigating factors the Applicant's history, his "social relations," his behaviour after the act and during the proceedings, and the fact that the Applicant was provoked by Altun.

[9] The Applicant appealed but fled Turkey prior the appeal being concluded.

The RPD Decision

[10] The RPD considered the Applicant's testimony and the evidence regarding his cognitive abilities and found that he was generally credible.

[11] The RPD noted that the onus was on the Minister to establish that (1) there had been a misrepresentation or withholding of material facts; (2) those facts related to a relevant matter; and (3) there was a causal connection between the misrepresentation or withholding and the favourable refugee determination.

[12] The RPD found that the first two elements were made out, as the Applicant had admitted to misrepresenting a material fact, his conviction, relating to a relevant matter, his criminal history.

[13] In order for there to have been a causal connection, the RPD needed to find that the Applicant would have been excluded from refugee protection due to having committed a serious non-political crime, pursuant to section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27, and subsection 1F(b) of the United Nations Convention Relating to the Status of Refugees [the Refugee Convention], included in the Schedule to the Act. There was no dispute that the crime was not political. The RPD therefore considered whether the crime was serious.

[14] The RPD considered the circumstance of the offence and the criminal provisions in Turkey. The RPD concluded that had the offence been committed in Canada, the Applicant would have been charged with aggravated assault, contrary to section 268 of the *Criminal Code*, RSC 1985, c C-46. As the maximum sentence for this offence is 14 years' imprisonment, the RPD noted that it is presumptively serious. However, the RPD considered the circumstances of the offence to determine if this presumption was rebutted. In doing so, the RPD followed the guidance from the Federal Court of Appeal in *Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404 [*Jayasekara*], and the Supreme Court of Canada in *Febles v Canada (Minister of Citizenship and Immigration)*, 2014 SCC 68 [*Febles*].

[15] The RPD noted that the Applicant "acknowledged his guilt with respect to the incident." It considered the Applicant's testimony that he acted in self-defence and had felt threatened by

the victim and his companions, who were armed. The RPD noted that at the hearing, the Applicant was asked by the Minister's counsel, "given that he was in possession of the knife and the victim was being held in a wrist lock and restrained, why he remained in danger and didn't just disperse." In response, he "alluded to the fact that the other individuals (friends of the victim) had weapons," although he "acknowledged that those individuals had not threatened him." The RPD found that the Applicant "was not in imminent danger when he committed an offence which could have resulted in death to the victim."

[16] The RPD considered the sentence of 25 months' imprisonment, reduced by 3 months for time served in pre-trial custody, imposed by the Turkish court. The RPD found that "the offence was serious enough in Turkey to warrant a sentence of imprisonment."

[17] The RPD noted that there was no evidence led with respect to the mode of prosecution in Turkey. The RPD found that had the offence occurred in Canada, it would have been an indictable offence, and therefore the likely mode of prosecution in Canada supported a finding that the crime was serious.

[18] The RPD then considered mitigating factors. It found that the fact that the Applicant was 19 years old at the time of the offence was a mitigating factor. The RPD did not accept the Applicant's submission that his brain injury was a mitigating factor, finding there to be insufficient evidence to establish that the brain injury was connected to the commission of the offence.

[19] The RPD considered self-defence as a mitigating factor. The RPD noted that the Applicant's testimony indicated that the victim was restrained by the Applicant and he could have chosen not to use the knife. The RPD found "that he intentionally stabbed the victim without provocation and certainly not in self-defence." The RPD rejected the Applicant's submission that the fact that the victim's companions had weapons amounted to a provocation, as this did not "alter the fact that he was not being threatened at the time he committed the offence."

[20] The RPD considered submissions from the Applicant regarding the lack of fairness in the Turkish criminal justice system, particularly for Kurdish people. The RPD did not find this evidence relevant because the Applicant admitted to stabbing Altun and because, according to the RPD, the RPD was relying on the Applicant's testimony and not the Turkish court documents to establish the facts surrounding the commission of the offence.

[21] Overall, the RPD found that the offence was serious. As a result, there was a causal relationship between the misrepresentation and the granting of refugee status. The RPD therefore vacated the Applicant's refugee status.

Issue and Analysis

[22] The sole issue in this application is whether the RPD's analysis leading to the vacation decision is reasonable.

[23] The Applicant raised several bases as to why this Court should find this analysis unreasonable.

Submissions on Self-Defence and Provocation

[24] The Applicant submits that the RPD made several unreasonable findings with respect to his submission that he was acting in self-defence.

[25] First, the Applicant submits that the RPD incorrectly found that he acknowledged guilt. The Applicant submits that while he conceded that he stabbed Altun and was convicted, he always maintained that he did so in self-defence.

[26] Second, he disputes the finding of the RPD that he testified that he had not been threatened by the seven armed individuals accompanying Altun. The Applicant suggests that the RPD's finding was based on him responding "No," when he as asked "Did any of these other individuals threaten you with a knife?" The Applicant notes that the rest of his testimony indicated that he had in fact been threatened and attacked by these individuals and points to several passages in the transcript that demonstrate this. The Applicant further notes that he is a vulnerable person and the neuropsychological assessment report found that he had low spoken language comprehension and ability to maintain and manipulate verbal information. The Applicant submits that when considering the testimony as a whole and taking into account his cognitive abilities, it was unreasonable to conclude that he was not threatened.

[27] Third, the Applicant submits that it was unreasonable for the RPD to not rely on the Turkish court documents to establish the circumstances surrounding the offence. The Applicant submits that, while he was ultimately convicted, the witness statements support his testimony that he acted in self-defence and the Turkish court found that he was provoked.

[28] Lastly, the Applicant submits that the finding that he stabbed Altun without provocation has no basis in the evidence before the RPD. The Applicant's testimony was that he was provoked. The Turkish court found that he was provoked and reduced his sentence as a result. The Applicant, therefore, submits that the RPD erred by not considering provocation as a mitigating factor.

[29] The Respondent submits that the RPD considered the Applicant's position that he was acting in self-defence but reasonably found that the facts did not support this. The Respondent submits that the key reason for this was that, by the Applicant's own admission, Altun was disarmed and restrained at the time of the stabbing and therefore there was no imminent danger to the Applicant. The Respondent made no submissions on provocation.

Finding on Self-Defence and Provocation

[30] The RPD's analysis on self-defence was reasonable. The RPD relied on the Applicant's testimony regarding the offence, which it believed. This is the most favourable evidence available on this point. Relying on the evidence from the Turkish proceeding would not have affected the result.

[31] While believing the Applicant's testimony, the RPD was not satisfied that the Applicant remained in physical danger when he stabbed Altun. The RPD found that the victim had been disarmed, restrained, and posed no imminent threat. The RPD agreed with the Applicant on what had occurred, but disagreed that his actions amounted to self-defence on the facts. I agree with the Respondent that it was reasonable for the RPD to have made this finding.

[32] The Applicant takes issue with the RPD's statement that he "acknowledged his guilt." I agree that this finding is incorrect. The Applicant conceded that he had been found guilty and that he had stabbed Altun, but he maintained he did so in self-defence. This is not an acknowledgement of guilt. However, decision makers are not to be held to a standard of perfection. It is clear that the RPD did not assume that the Applicant was guilty. The RPD properly engaged with the Applicant's testimony regarding self-defence, which would have served to establish that he was not guilty. It therefore seems that what the RPD meant to say was that the Applicant had conceded that he had stabbed Altun. Given the RPD engaged in a full analysis, this was not, in my view, a reviewable error.

[33] However, I agree with the Applicant that the RPD failed to properly consider the mitigating factor of provocation. The RPD's analysis on this point appears to conflate self-defence and provocation, which are distinct legal concepts. Considering provocation as a distinct mitigating factor, the RPD's findings are at odds with the evidence.

[34] The RPD found that the Applicant "intentionally stabbed the victim without provocation and certainly not in self-defence." The RPD's analysis on this point is entirely concerned with whether the Applicant was in imminent danger at the time of the commission of the offence.

[35] Provocation is a statutory partial defence in cases of homicide (see *Criminal Code*, s 232), and is a mitigating factor in sentencing (see *R v Stone*, [1999] 2 SCR 290). While provocation as a mitigating factor is broader than self-defence, the statutory definition of provocation is informative. Subsection 232(2) of the *Criminal Code* defines provocation as:

> Conduct of the victim that would constitute an indictable offence under this Act that is punishable by five or more years of imprisonment and that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purposes of this section, if the accused acted on it on the sudden and before there was time for their passion to cool.

[36] Unlike self-defence, the presence of imminent danger is not an essential element of provocation.

[37] In the present case, the offence occurred during an altercation that was instigated by the victim. The Applicant's testimony indicated that the offence occurred in the heat of the moment. Moreover, the Turkish court found that the Applicant had been provoked and reduced his sentence accordingly.

[38] The RPD's finding that the attack was unprovoked is completely at odds with this evidence. It was unreasonable for the RPD to conclude that the Applicant's actions were

unprovoked without providing reasons for so finding. Finding that there was no imminent danger was insufficient.

Submissions on Cognitive Function as a Mitigating Factor

[39] The Applicant submits that the RPD failed to properly consider the lasting effects of his brain injury as a mitigating factor. The neuropsychological report indicates that the Applicant has reduced awareness, has poor nonverbal intellectual functions, and demonstrated impulsivity in responding.

[40] The Respondent submits that it was reasonable for the RPD to find that there was no link between the Applicant's brain injury and the offence. The Respondent submits that the expert evidence regarding the Applicant's mental state makes no mention of the offence and did not suggest that his mental state explained or justified his actions.

Finding on Cognitive Function as a Mitigating Factor

[41] I agree with the Respondent that the RPD's consideration of the Applicant's cognitive function as a mitigating factor was reasonable. The RPD considered this factor but found that there was insufficient evidence to establish how the Applicant's brain injury was related to the commission of the offence. The Applicant has not pointed to anything in the record to the contrary, and therefore the RPD's finding was reasonable.

Submissions on the Penalty Prescribed in Turkey

[42] The RPD found that the actual penalty prescribed, 25 months' imprisonment, supported a finding that the Applicant's crime was serious. The Applicant notes that the Minister's submissions before the RPD acknowledged that he had been given a relatively short sentence, which may rebut the presumption of seriousness. The Applicant submits that the RPD did not provide any explanation as to why this light sentence supported a finding that the crime was serious.

[43] By way of comparison, the Respondent points to sentencing ranges for aggravated assault in Ontario, as described in paragraphs 27-30 of *R v Tourville*, 2011 ONSC 1677. The bottom range is non-custodial sentences. The middle range is sentences in the range of 18 to 24 months. Those are generally cases with first offenders and facts showing conflicts where excessive force was applied. The high range is cases with 4 to 6-year sentences, such cases usually involving recidivists or unprovoked or premediated attacks. The Respondent submits that the Applicant's offence falls into the middle range, and therefore a global sentence of 25 months is not inconsistent with what he would likely have received in Ontario. The Respondent submits that it was therefore reasonable for the RPD to conclude that this sentence supported a finding that the offence was serious.

Finding on the Penalty Prescribed in Turkey

[44] Both the Applicant and Respondent noted that the Applicant's sentence was short given the circumstances of the offence. However, the RPD found that the sentence supported a finding that the crime was serious. The only reasoning provided by the RPD is that "the offence was serious enough in Turkey to warrant a sentence of imprisonment."

[45] The RPD's reasons on this falls short of what was required. There was no consideration by the RPD of the fact that sentencing standards vary from country to country. In countries where imprisonment is more regularly imposed than in Canada, a sentence of imprisonment would not necessarily indicate the seriousness of an offence. What is more relevant is the sentence imposed relative to sentencing ranges in the country of commission. The Applicant's sentence was not only low, it was, by the Minister's own admission, a sentence that was significantly less that what Turkish law prescribed, suggesting that the crime was not considered to be particularly serious.

[46] Furthermore, that an offence warrants imprisonment outside of Canada is not enough to establish that it is serious. Were that the case, then any offence for which imprisonment was imposed would be considered a serious offence. However, only those where the maximum sentence is at least 10 years in Canada are presumed to be serious. If an offence carries a lower maximum sentence, it is not presumed to be serious, regardless of whether the foreign court ordered imprisonment. For example, had the Applicant committed an offence with a maximum

sentence in Canada of 5 years' imprisonment and received a sentence of 25 months', it would not have been presumed serious, despite a custodial sentence being imposed.

Conclusion

[47] The Applicant made submissions relating to the fairness or unfairness of the Turkish judicial system and the alleged failure of the RPD to consider as a mitigating factor his good character. I choose not to comment on either, as the errors described earlier are sufficient to support a finding that the decision under review is unreasonable.

[48] Neither party proposed a question for certification. There is none on this record.

JUDGMENT IN IMM-3724-20

THIS COURT'S JUDGMENT is that this application is granted, the decision of the RPD revoking the Applicant's refugee status is set aside, the matter is referred to a different decision maker of the RPD for determination, and no question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3724-20
STYLE OF CAUSE:	AYDEMIR v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	FEBRUARY 9, 2022
JUDGMENT AND REASONS:	ZINN J.
DATED:	MAY 6, 2022

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