



**Date: 20120501**

**Docket: IMM-7422-11**

**Citation: 2012 FC 500**

**[UNREVISED ENGLISH CERTIFIED TRANSLATION]**

**Ottawa, Ontario, May 1, 2012**

**PRESENT: The Honourable Mr. Justice Shore**

**BETWEEN:**

**ERSIN SEDAT KUCCUK**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

**I. Introduction**

[1] The panel must carefully consider the documentary evidence if it wants to be able to properly identify the crux of a claim that has both a subjective component evinced by the testimony and an objective component reflected by the documentation adduced in evidence.

[2] It is not enough to merely make reference to the documentary evidence; one must ensure that a modicum of rigour has been employed in the analysis of that evidence. In this case, the documentary evidence cited by the panel contradicts the panel's findings in no uncertain terms.

## II. Judicial procedure

[3] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA), of a decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board (IRB), dated October 3, 2011, in which it was determined that the applicant was neither a Convention refugee under section 96 of the IRPA nor a person in need of protection under section 97 of the IRPA.

## III. Facts

[4] The applicant, Ersin Sedat Kuccuk, is a twenty-six-year-old citizen of Turkey. He is of Kurdish origin and practises the Alevi faith.

[5] The applicant grew up in the village of Iskenderun in the province of Haytay, where he claims he was persecuted because of his Kurdish ethnicity and his religion.

[6] In 2006, the applicant was arrested in his family's store where he worked and was accused of having written a Kurdish propaganda slogan on a wall. The applicant was detained for three days, during which he alleges that he was repeatedly insulted, abused and tortured by the authorities.

[7] The police released the applicant, threatening to keep a close eye on him.

[8] In 2007, the applicant completed his mandatory military service. During this period, he alleges that he was mistreated because of his Kurdish ethnicity and because his family was considered to be a threat. He claims that he was beaten about the face, suffering a broken nose as a result, because his commanding officer found a CD of Kurdish music among his personal effects.

[9] In August 2009, the applicant participated in a Kurdish demonstration during which he was arrested. He was detained for two days and was subjected to an interrogation under torture because of his ethnicity.

[10] The applicant fled Turkey for Canada on January 13, 2010, using a U.S. visa that had been obtained by means of falsified documents. He claimed refugee status on January 18, 2010.

#### IV. Decision under review

[11] The RPD found the applicant to be credible. It determined that the applicant's allegations were true. Nonetheless, the RPD found that there was an internal flight alternative (IFA) in the city of Istanbul. The applicant had apparently lived in this city before his departure and was not a member of a Kurdish organization. Thus, the RPD was of the opinion that the applicant would not be persecuted in Istanbul in light of the documentary evidence showing that the government had taken steps to protect the rights of the Kurdish minority.

[12] The RPD noted that the applicant had not been persecuted by local authorities in the village of Iskenderun and that it did not appear that he was being sought after by the Turkish government.

In fact, according to the RPD, the use of a Turkish passport and the fact that the applicant had been released without conditions supported this finding.

## V. Issue

[13] Is the RPD's decision reasonable?

## VI. Relevant statutory provisions

[14] The following provisions of the IRPA are applicable in this case:

### **Convention refugee**

**96.** 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,

(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

(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.

### **Person in need of protection**

### **Définition de « réfugié »**

**96.** 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 :

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;

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.

### **Personne à protéger**

**97.** (1) A qualité de personne

**97.** (1) 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 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 :

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

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;

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(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,

(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,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(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,

(iv) the risk is not caused by the inability of that

(iv) la menace ou le risque ne résulte pas de

country to provide adequate health or medical care.

l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

**Person in need of protection**

**Personne à protéger**

(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.

(2) A également qualifié 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.

VI. Positions of the parties

[15] The applicant is essentially claiming that the RPD ought to have given more weight to the testimonial evidence which showed the problems endured by the applicant rather than using elements that supported its finding. Thus, he claims that the IFA determination is contradicted by documentary evidence which purportedly shows that the police are not capable of protecting the Kurdish population.

[16] The respondent argues that the RPD correctly applied the IFA criteria and that the applicant had not demonstrated that he was targeted by the Turkish government. In addition, the respondent argues that the documentary evidence adduced by the applicant does not support his allegations.

VIII. Analysis

[17] The IFA finding is based on the RPD's assessment of the facts and, in this perspective, calls for some degree of deference. Accordingly, the applicable standard of review is reasonableness

*(Dunsmuir v New Brunswick, 2008 SCC 9, [2008] 1 SCR 190; Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board), 2011 SCC 62, [2011] 3 SCR 708).*

[18] In matters concerning IFAs, the Federal Court of Appeal in *Ranganathan v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 164 (CA), explained the principle to be applied as follows:

[14] We read the decision of Linden J.A. for this Court as setting up a very high threshold for the unreasonableness test. It requires nothing less than the existence of conditions which would jeopardize the life and safety of a claimant in travelling or temporarily relocating to a safe area. In addition, it requires actual and concrete evidence of such conditions. The absence of relatives in a safe place, whether taken alone or in conjunction with other factors, can only amount to such condition if it meets that threshold, that is to say if it establishes that, as a result, a claimant's life or safety would be jeopardized. This is in sharp contrast with undue hardship resulting from loss of employment, loss of status, reduction in quality of life, loss of aspirations, loss of beloved ones and frustration of one's wishes and expectations. [Emphasis added.]

[19] The RPD's position with respect to the applicant's credibility is very clear:

[11] For the purposes of this decision, the panel will accept that the allegations of the claimant are true.

[20] In the case at bar, the RPD's analysis of the documentary evidence is problematic. In fact, the documentary evidence cited by the RPD contradicts its assertion to the effect that the Turkish government has gone to great lengths to improve the situation of the Kurdish minority, such as having amended laws (RPD decision at para 13). Thus, the paragraphs of Tab 2.8 of the National Documentation Package on Turkey, dated June 29, 2011, entitled "Country of Origin Information Report, August 2010", cited by the RPD are the following:

## **KURDS**

- 19.04 The Minority Rights Group International, Turkey Minorities, undated, accessed on 9 July 2010 noted that:

“Kurds are the largest ethnic and linguistic minority in Turkey. The estimated numbers claimed by various sources range from 10 to 23 per cent of the population. According to the 1965 national census, those who declared Kurdish as their mother tongue or second language constituted around 7.5 per cent of the population. However ... [given restrictions on the use of Kurdish] it is possible that this figure was under-inclusive at the time.

“Kurds speak Kurdish, which is divided into Kurmanci, Zaza and other dialects. The majority are Sunni Muslims, while a significant number are Alevis. Historically concentrated in eastern and south-eastern region of the country, where they constitute the overwhelming majority, large numbers have immigrated to urban areas in western Turkey.” [57f]

For background information on the treatment of Kurdish minorities and the escalation of violence from Kurdish insurgents, notably with the emergence of the Kurdistan Workers Party or PKK in 1982, refer to the History section – The Kurdish Issue

- 19.05 The US State Department *Country Report on Human Rights Practices 2009*, Turkey (USSD Report 2009), published on 11 March 2010, noted that in considering the impact of ethnicity in relation to human rights violations, and specifically cases of state torture and mistreatment, an October 2008 report from the Societal and Legal Research Foundation (TOHAV) reported that as well as an increase in torture cases during 2008, there was in addition a higher incidence of torture being conducted against ethnic Kurds. The study comprised of 275 surveys from “credible sources” of torture between 2006 and 2008. The findings of the study showed that from the 275 individuals surveyed, 210 were found to be ethnic Kurds. [5i] **(Section 1c. Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment)**

- 19.06 Information on the treatment of Kurds should be read in conjunction with various sections listed in the Contents. In addition specific reference to treatment of Kurds can be found under the following sections or subsections:

- Security Forces – Human rights violations committed by the security forces
- Judiciary – Access to Justice
- Political Affiliation – Political demonstrations and Kurdish opposition groups
- Freedom of Speech
- Human Rights institutions, organisations and activists – Treatment of human rights activists
- Children – Detention of Children
- Internally Displaced People (IDPs)



19.07 On the subject of Kurdish rights, the Human Rights Association (IHD) and Human Rights Foundation of Turkey (HRFT) in a report entitled *Evaluation of 2009 human rights violations report by IHD and HRFT*, noted: “Although the Kurdish question was formally accepted by the state in 2009, as the government did not make any legal or Constitutional regulations for democratic and peaceful solution of Kurdish question armed conflict restarted as of 2010. In 2009, even government's statements regarding recognition of Kurdish question and to solve it reduced the number of death in clashes.” [13d]

19.08 The information below covers several key Kurdish issues, this should be read in conjunction with Recent developments -- Kurdish issues: November 2009 – present

[Emphasis added.]

[21] This document refers to the following sections, which support the applicant’s allegations with regard to the torture he endured:

8.28 The USSD Report 2009 stated that “... members of the security forces continued to torture, beat, and abuse persons. Human rights organizations continued to report cases of torture and abuse in detention centers and prisons during the year. They alleged that torture and abuse had moved outside of detention centers and into more informal venues where it was harder to document.” [5i] **(Section 1c Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment)**

8.29 The HRW World Report 2010 observed: “Police ill-treatment occurs during arrest, outside places of official detention, and during demonstrations, as well as in places of detention. In October Güney Tuna was allegedly beaten by seven police officers in Istanbul, leaving him with a broken leg and serious head injury that were not recorded in a routine custody medical report.” [9e] **(p457)** [Emphasis added.]

[22] It is clear from the evidence cited by the RPD that the applicant would be at risk if he returned to Turkey. The RPD’s finding is not supported by the documentary evidence cited by it.

[23] Furthermore, in light of the fact that the RPD believed the applicant's allegations to be true, there is reason to question why the RPD disregarded the applicant's testimony that he had been under surveillance by the police when it determined that he would be safe in Istanbul.

[24] Upon reading the decision, it is obvious that the RPD failed to draw a link between the applicant's subjective circumstances described in his testimony and the objective nature of the fear which was supported by the documentary evidence cited by the RPD. What is even more troubling is that the RPD cited documentary evidence which categorically contradicts its findings.

#### IX. Conclusion

[25] For all of the foregoing reasons, the RPD's decision is unreasonable. The applicant's application for judicial review is allowed and the matter is referred back for redetermination by a differently constituted panel.

**JUDGMENT**

**THE COURT ORDERS** that the application for judicial review be allowed and the matter be referred back for redetermination by a differently constituted panel. There is no question to certify.

“Michel M.J. Shore”

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Judge

Certified true translation  
Sebastian Desbarats, Translator

Cour fédérale



Federal Court

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** IMM-7422-11

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