

Federal Court



Cour fédérale

Date: 20121220

Docket: IMM-3262-12

Citation: 2012 FC 1529

Toronto, Ontario, December 20, 2012

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

EMRAH DEMIRSAHLAR

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR ORDER AND ORDER

[1] The present Application for judicial review concerns a decision of the Refugee Protection Division (RPD) dated March 9, 2012, in which the Applicants' claim for refugee protection under s. 96 and s. 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 on the basis of political identity in Turkey was rejected.

[2] In my opinion, the RPD's decision is made in reviewable error. The key passages in the decision leading to this conclusion are as follows:

This was an unusual hearing in some respects. The claimant initially indicated he could not testify; as he was nervous and-panicked. In fact, a medical note was presented to that effect. To accommodate the claimant, after several sittings of the hearing where no direct evidence was taken, the hearing was finally held. The Panel allowed the unusual accomodation [sic] of allowing the interpreter who assisted the claimant in drawing his PIF to be the Designative Representative [sic] (DR) noted herein. He testified in English only, with the consent of counsel and the claimant, without a translation back to Turkish to the claimant. However, the DR and claimant were advised at the hearing that they could communicate with each other at the hearing, in Turkish even, if the DR needed more information. That in fact was not needed much or at all, as the DR was able to respond to all or most of the questions asked. Counsel and the claimant confirmed, twice, that the claimant would be bound by what the DR said.

Towards the end of the hearing, the claimant himself interjected and insisted that he answer, himself, a question posed of the witness or the DR. He did, and he was thus asked why, if he was so psychologically impaired as he alleged, such that the hearing had to be delayed several times to accommodate his alleged disability to testify, did he suddenly jump in and enthusiastically offer to give testimony. He simply replied that he wanted to answer the question, and then denied that he could have given oral testimony all along. From this dramatic reversal in behaviour of the claimant the Panel makes a negative inference as to credibility.

[Emphasis added]

(Decision, paras. 9 and 10)

[3] The very current January 16, 2012 “medical note” referred to by the RPD is that of a physician who offered the opinions that the Applicant suffers from panic disorder and “he needs a designated representative to talk on his behalf in Court” (Tribunal Record, pp. 60 – 61). Also on the record before the RPD was a November 14, 2011 report from a psychiatrist who diagnosed the Applicant as suffering from posttraumatic stress disorder (Tribunal Record, pp. 356 - 359).

[4] The Applicant's "interjection" arises from a question posed by the Applicant's Counsel to a witness for the Applicant who has known the Applicant since 2005; they both attended a May 1, 2006 Labour Day celebration in Turkey. The transcript on this issue reads as follows:

- A. We did participate in 2006, May 1st rally.
- a. And where was it?
- A. In Izmir.
- Q. And why were you there?
- A. We are labourers and that May 1st represents a labour holiday, therefore we went there to celebrate.
- Q. And how does the government view these May 1st Labour Day celebration?
- A. The government's faith is the Islamic faith, therefore they would perceive that (inaudible) therefore they are against it.
- Q. These people who go to the May 1st, I mean are they -- what issues do they support, is it just labour rights or are there other issues?
- A. First of all, they are defending or supporting the labour workers rights.

CLAIMANT: Can I answer to that?

COUNSEL FOR CLAIMANT: No, because I don't think Mr. Member would allow ---

MEMBER: Yeah, sure.

COUNSEL FOR CLAIMANT: Okay. Thank you, Mr. Member.

CLAIMANT: Could you please ask again?

COUNSEL FOR CLAIMANT: The question was just when you go to demonstrations what issues do people there support, was it just labour rights or are there other issues?

CLAIMANT: The labour rights and human rights, women's rights and gay rights, that's all.

MEMBER: Sorry, I have to ask you a question now. Why did you jump in at this point? I thought you were too depressed to give evidence; so why did you in such an animated fashion jump in?

CLAIMANT: I just wanted to answer.

MEMBER: Were you able to give testimony all along just like you did now?

CLAIMANT: No.

MEMBER: Okay, thank you. Sorry, counsel.

COUNSEL FOR CLAIMANT: Thank you, Mr. Member.

[Emphasis added]

(Tribunal Record, pp. 470 – 471)

[5] On two occasions in the course of the hearing the Designated Representative attempted to explain conflicts in the Applicant's PIF narratives as a result of the Applicants poor psychological state: he said he was in New York for three months, and then later saying he was in Seattle for 3 months (Decision, para. 15); and he failed to mention in a second narrative the agents of persecution he identified in his first narrative as "EMEP" party members, radical Muslims and nationalists (Decision, para. 22). With respect to both instances, reliance was placed on the negative credibility finding arising from the "interjection" incident to make further findings of negative credibility. In my opinion, this course of conduct on the RPD's part was unwarranted and had a remarkably unfair impact on the Applicant's claim.

[6] In essence, as a result of the interjection, the RPD made an implausibility finding and a conclusion based upon it: that is, it is implausible that the Applicant would have interjected as he did if he was incapable of testifying, and, thus, he was not telling the truth about being incapable of testifying. This line of reasoning is sheer conjecture. The only evidence on the record that might supply some evidence of what to expect from the Applicant's conduct is that he suffers from panic disorder and posttraumatic stress disorder. In my opinion, all that is capable of being reliably deduced from the Applicant's interjection is that he wanted to answer, and he did, in 8 words; nothing more.

[7] As a result, I find that the decision under review was rendered in reviewable error and is unreasonable.

ORDER

THIS COURT ORDERS that:

The decision under review is set aside and the matter is referred back for redetermination by a differently constituted panel.

There is no question to certify.

“Douglas R. Campbell”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-3262-12

STYLE OF CAUSE: EMRAH DEMIRSAHLAR V THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: December 19, 2012

**REASONS FOR ORDER
AND ORDER BY:** CAMPBELL J.

DATED: December 20, 2012

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