Federal Court  Cour fédérale

Date: 20190329

Docket: IMM-4670-17

Citation: 2019 FC 387

Ottawa, Ontario, March 29, 2019

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

SUKRU BASBAYDAR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant seeks judicial review of a decision rendered by the Refugee Protection Division [RPD] on September 27, 2017. This was the second time the RPD determined that the Applicant is neither a Convention refugee under section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] nor a person in need of protection under section 97(1) of

the IRPA. The Applicant also asks the Court to grant declaratory relief regarding a disagreement counsel had with the RPD Member presiding the RPD second hearing.

II. Background

[2] The Applicant seeks asylum in Canada because he is allegedly at risk due to his political opinion as a Kurd and his evasion of mandatory military service.

[3] The Applicant claims that during his infancy, his family refused to become military guards for their Turkish village, Bingol. As a result, his family was forcibly displaced from the village and the village was burned to the ground.

[4] Once the family resettled in Istanbul, the family became involved in the Kurdish movement. The Applicant supported the Democratic Society Party [DTP] and subsequently the Peace and Democratic Party (BDP), which was the successor to the DTP, by attending Nowruz celebrations, distributing pamphlets and participating in demonstrations.

[5] On four occasions between 2007 and 2010, the Applicant was detained for short periods of time on account of his participation in the political activities mentioned above. Each time, the Applicant was beaten or threatened with violence but was never charged with an offence.

[6] The Applicant has evaded military service and he claims he is a conscientious objector.

[7] On September 26th, 2010, the Applicant arrived in the United States. He entered Canada on November 11, 2010 and filed a refugee claim shortly after as an exception to the Safe Third Party protocol.

III. Judicial history

A. *Judicial review of the initial RPD decision by Justice Zinn (2014 FC 158)*

[8] The Applicant's initial refugee claim was rejected by the RPD on January 9, 2013. Justice Russell W. Zinn found the decision to be unreasonable for several reasons.

[9] Firstly, the RPD conclusion that there is no more than a mere possibility of persecution was "perverse". Justice Zinn found that the RPD misapplied the test for persecution by focusing on the fact that the Applicant had not demonstrated he was a person of interest for the police. A demonstration of a well-founded fear of persecution is sufficient to satisfy the test for persecution. Furthermore, the RPD failed to refer to the Applicant's family history including efforts of his three brothers to seek refugee protection or to a 2010 Report from Human Rights Watch on Turkish-Kurdish tensions which indicate that *any* show of support for the Kurdish political party can be viewed as terrorism.

[10] Given the considerable number of ordinary activists and demonstrators who are arrested, the RPD member found it unlikely that, in 2009, officers would have remembered threats made in 2007. Justice Zinn also took issue with the negative credibility finding based on this implausibility finding. Not only was it incoherent to simultaneously admit that police would have

beaten hundreds of activists whilst denying the danger of torture, there was no evidence that these officers in particular had beaten hundreds of activists in the two year intervening period. Moreover, it was an error for the RPD to engage in "speculation about police arrest practices without any foundation in evidence" (*Miral v Canada (Minister of Citizenship and Immigration),* [1999] FCJ No 254 at para 25) [*Miral*].

[11] The RPD's suggestion that the expert psychiatric evidence was suspect was also a reviewable error. As a person without medical expertise, it was inappropriate for a member to place weight to his own observations on a claimant's emotional and psychological problems (*Miral* at para 28).

[12] To reject the Applicant's conscientious objector claim, the RPD also pointed to the fact that the Applicant failed to look for and join a group that opposed military service in Turkey during the two years that he had been in Canada. By doing so, the RPD injected an evidentiary requirement that does not exist in law. This was perverse, in light of the corroborating documentary evidence.

[13] Finally, the RPD erred by failing to evaluate any of the documentary evidence related to the treatment of conscientious objectors in Turkey.

B. *Impugned decision*

[14] The RPD found that identity and his Kurdish ethnicity were not in issue. The RPD member also found that the Applicant did not establish either his political identity or his identity

as a conscientious objector. As a result, the RPD member found no reasonable chance or serious possibility that the Applicant would be persecuted if he returned to Turkey, nor that he would be personally subjected to a danger of torture, a risk to life, or a risk of cruel and unusual treatment or punishment in such an event. The specific findings of the RPD member are set out below.

(1) The claimant did not establish his claim with sufficient credible and trustworthy evidence.

[15] The presumption of truthfulness established in *Maldonado v Minister of Employment and Immigration*, ([1980] 2 FC 302 (CA)) [*Maldonado*] can be set aside if the claimant fails to provide acceptable documentation (*Owoussou v Canada (Minister of Citizenship and Immigration)*, 2004 FC 661 at para 12) [*Owoussou*]. The RPD member suspected that the three documents supporting the claim of evading the draft in Turkey - that is to say the deferral letter, the list of conscripts and the letter from the BPD - "are either not genuine documents or, at least, do not indicate what the claimant alleges they indicate".

(2) The claimant is not at risk of persecution or other harm because he is a Kurd.

[16] The documentary evidence is somewhat mixed about the risks Kurds face, but the RPD member found that the discrimination against Kurds in Turkey does not amount to persecution for this reason alone.

(3) The claimant is not facing persecution or other serious harm because of his political opinion.

[17] The Applicant admitted he has no charges, convictions, police or medical reports of any kind. Furthermore, criminal charges would have impeded his procurement of a US study visa and his passage through security clearance procedures at international airports. From the lack of evidence, the RPD drew an adverse inference.

[18] The RPD also notes that, "Nowhere in his PIF [Personal Information Form] narrative does the claimant allege he was active with the BDP, the successor to the DTP, and yet the only evidence the claimant has provided, other than his own testimony, is a letter allegedly from the BDP in Uskudar, his neighbourhood in Istanbul".

[19] The RPD relied on the BPD letter to draw a negative credibility finding about the Applicant's political involvement. The letter only mentions that the Applicant was involved in youth activities. The RPD expected the letter to mention the rallies, detentions or beatings, or organized events. Moreover, nothing corroborates the Applicant's activities with the BDP prior to 2008. The letter from the BDP only says the Applicant was "involved in youth activities organized by our party from 2008 to 2010".

[20] The RPD determined that the Applicant did not have the political profile as alleged or that he would be of interest to the authorities.

(4) The Applicant did not evade the draft.

[21] The main reason the RPD found that the Applicant did not evade the draft was the absence of warrant for his arrest or of any summons from the military or any other Turkish authority, as would be expected if he avoided the draft.

[22] In addition, the military service deferral letter does not appear to be genuine on the balance of probabilities. It is not sufficient for the letter to be possibly credible or trustworthy; it must be probably so (*Orelien v Canada (Minister of Employment and Immigration)*, [1991] 1 FC 592 at para 21). In the RPD's view, the letter presented the following issues:

- No explanation was offered as to why, the Applicant had gone through the trouble of having the letter translated but had not disclosed it until the second RPD hearing.
- It is suspicious that the letter was not written on official letterhead. The RPD considered the letterhead to not be official because there was "no logo, symbol or great seal at the top of the letter, which one tends to see in official government documents".
- The letter is not a form letter, as would be expected from such an agency. None of the pro-forma areas (i.e. the headings and sub-headings) are pre-printed.
- The seal is illegible and its placement in the centre of the document is unexpected.
- The letterhead says the letter is from the "Military Draft Command", but no reference to this branch of the Ministry of National Defense is made in the documentary evidence. Rather, the correct name is the "Department of Recruitment".
- According to the letter, the Applicant was deferred until February 2012, but another RIR indicated that the draft process is to take place between July 1 and October 31 in the year of the call-up.

[23] The RPD declined the Applicant's invitation to send the letter for forensic testing because it was, "not aware that our sources for such testing would have a sample draft letter with which to compare the letter".

[24] The RPD also doubts that the list of conscripts is genuine. First, the Applicant did not remember how the document was obtained but offered a guess whereby it was sent to a "headman" from his neighbourhood in Turkey and then to his father. The RPD finds this makes little sense, because the draft board has the Applicant's address and could therefore have simply sent it directly to the Applicant. Notices of call-up are sent to the recruit's home address, according to the aforementioned RIR from the NDP for Turkey. The RPD also noted there is no sensible order to the list.

(5) If the Applicant did evade the draft, the punishment for draft evasion is not disproportionately harsh or severe.

[25] The punishment the Applicant would face for evading draft would not amount to persecution, torture, or cruel and unusual treatment or punishment. According to the Country Information provided by the United Kingdom's Home Office about military service in Turkey, "it is unlikely that in the majority of cases the consequences of a person's general unwillingness to serve in the armed forces or objection to enter a 'combat zone' will be such that they can make out claim for protection."

(6) The Applicant is not a Conscientious Objector.

[26] The RPD member that the Applicant does not meet the objective component of the test for conscientious objectors. Compulsory military service in and of itself does not amount to persecution (*Zolfagharkhani v Canada (Minister of Employment and Immigration)*, [1993] 3 FC 540).

[27] The subjective component of the test was not met either. The Applicant is not a pacifist categorically opposed to war and militarism. The RPD found that the Applicant would serve the Canadian military yet he explained his refusal to serve in the Turkish military by his "deep hatred of them". The RPD dismissed the Applicant's claim about his religious beliefs against war and militarism because he did not know the passage of the Quran supporting his belief, he only goes to mosque once or twice a month and he defended the historical use of military means to spread Islam. When a claimant's testimony contradicts the written version of their story, their overall credibility is irreversibly undermined (*Randhawa v Canada (Public Safety and Emergency Preparedness)*, 2016 CanLII 28074 (CA IRB) at para 37; *St Louis v Canada (Citizenship and Immigration)*, 2015 FC 996 (CanLII) at para 1).

> (7) The medical reports do not establish that the Applicant suffers from medical conditions as a result of his alleged torture in Turkey.

[28] The assignment of little weight to the medical reports was based on the negative credibility finding of the Applicant; "opinion evidence is only as valid as the truth of the facts on which it is based" (*Danailov v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 1019 at para 2). Furthermore, comments made by two of the doctors who assessed the

Applicant crossed “the line separating expert opinion from advocacy” (*Molefe v Canada (Citizenship and Immigration)*, 2015 FC 317 at para 32).

[29] The RPD member drew an adverse inference from the Applicant’s failure to take any of the prescribed treatment or therapy.

(8) The Federal Court did not direct a verdict.

[30] The Federal Court’s determination that some findings of the first panel were unreasonable does not preclude this panel from making its own decision with respect to the evidence before it. In addition, the Applicant’s application to accept the claim without oral testimony was not made in accordance with the rules.

(9) The RPD presiding at the second hearing need not recuse for bias.

[31] The Applicant relied on two statements by the RPD member as the Applicant’s basis for asking the RPD to recuse himself for bias. In light of the fact that the Applicant married in January 2017, the RPD asked whether the spouse was a citizen or a permanent resident of Canada. The member said the Applicant’s counsel was “unhelpful” when she dismissed the member’s question as irrelevant. The second statement with which the Applicant took issue was the RPD member’s characterization of the Applicant’s decision to continue with his refugee claim, instead of being sponsored by his wife for permanent resident status, as an abuse of process.

[32] Only the second statement is relevant for this case. The first reason raised by Counsel to justify the decision to pursue the refugee claim was the financial requirements for a spouse to sponsor the Applicant, which was dismissed as false by the RPD. The second reason given was that deportation is less likely for refugees who have committed a crime. This was deemed irrelevant by the RPD because nothing suggests the claimant is criminally inclined. When counsel raised the concern that his wife could withdraw her sponsorship, the RPD reminded counsel that she could request a postponement of the hearing until the completion of the sponsorship application.

[33] The request for recusal was rejected because the rule against bias does not require a judge to be free of opinions (*R v S (RD)*, [1997] 3 SCR 484 at para 35).

IV. Issues

[34] Upon review of the submissions of counsel, the Court has reformulated the issues as follows:

- Did the RPD err by not following Justice Zinn's findings and reasons?
- Was the RPD's finding of no more than a mere possibility of persecution on political grounds reasonable?
- Was it reasonable for the RPD to find that the Applicant does not face a risk of persecution and unusual treatment and punishment for military service evasion?

[35] The applicable standard of review for finding of fact and credibility of evidence is reasonableness (*Wang v Canada (Minister of Citizenship and Immigration*), 2011 FC 969 at para

22). In other words, the Court shall only intervene if the decision falls outside "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]).

[36] The applicable standard of review for questions of law which are outside the adjudicator's expertise is correctness (*Alberta (Information and Privacy Commission) v Alberta Teachers' Association*, 2011 SCC 61 at para 32).

V. Relevant Provisions

[37] Sections 96 and 97 of the IRPA provide the following:

Convention refugee	**Définition de réfugié**
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,	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) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	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) 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.	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.

Person in need of protection

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

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

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

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

(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,

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

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

Person in need of protection

(2) A person in Canada who is

Personne à protéger

97 (1) 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 :

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

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

(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) 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) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

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.	**Personne à protéger** (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.

VI. Submissions of the Parties

[38] Given that there are several documents containing arguments, the Court will consider the arguments by topic rather than by the document the arguments appear in.

A. *Did the RPD err by not following Justice Zinn's findings and reasons?*

[39] The Applicant and the Respondent agree that the RPD member did not follow Justice Zinn's findings and reasons, but disagree as to whether this was allowed. They offer different interpretations of a relevant and recent Federal Court of Appeals decision (*Canada (Citizenship and Immigration) v Yansane*, 2017 FCA 48).

[40] *Yansane* provides that "An administrative tribunal to which a case is referred back must always take into account the decision and findings of the reviewing court, unless new facts call for a different analysis." (*Yansane* at para 25). The Applicant argues there were no new facts at the second RPD hearing. The Respondent disagrees and points to an updated PIF and a new allegation that the Applicant is ideologically opposed to all forms of violence. The Respondent

argues that the RPD was allowed to sway from Justice Zinn's reasons on the grounds of credibility issues. These credibility issues called for a "different analysis".

[41] The Applicant argues that the additional information does not call for a different analysis. The Applicant's updated narrative, which simply attests that he continues to assert his Kurdish identity, does not call for a "different analysis".

[42] The Respondent argues that a fresh analysis was required to assess the Applicant's credibility. In support of the argument, the Applicant argues that in applications for judicial review, only instructions explicitly stated in the judgment bind the subsequent decision-maker (Yansane at para 19). Further, the decision-maker is advised to consider the comments and recommendations of the reviewing Court in its reasons, but is not required to follow them (*Ouellet v Canada (Attorney General)*, 2018 FCA 25 at para 7).

B. *Was the RPD's finding of no more than a mere possibility of persecution on political grounds reasonable?*

[43] The Applicant reiterates the *Maldonado* presumption and reminds the Court that no inconsistencies were found in the Applicant's testimony. Moreover, this presumption cannot be displaced on the sole basis that supporting documents corroborate some, but not all, aspects of the claim (*Plaisimond v Canada (Minister of Citizenship & Immigration)*, 2010 FC 998 at para 82).

[44] The RPD did not believe that the Applicant was of such an interest to the authorities that he would be detained on four occasions, yet they would let him leave Turkey through the airport's security clearances without any trouble. The Applicant argues that the facts supporting the Applicant's claim are not outside the realm of what could be reasonably expected and that no documentary evidence contradicts the Applicant's findings. As a result, the RPD's implausibility finding does not meet the requirements set out in *Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 at para 7 [*Valtchev*]:

> However, plausibility findings should be made only in the clearest of cases, i.e., if the facts as presented are outside the realm of what could reasonably be expected, or where the documentary evidence demonstrates that the events could not have happened in the manner asserted by the claimant.

[45] The Applicant argues that the RPD erred by concluding that no mention of the Applicant's involvement with BDP is found is his PIF narrative. In fact, the first paragraph of the Applicant's PIF reads, "I fear persecution in Turkey on account of my … political activity in support of Kurdish rights, the DTP and the BDP."

[46] In addition, the Applicant pleads that the RPD erred by relying on what the BDP letter does not say to support its conclusion that the Applicant is not facing persecution or serious harm because of his political opinion *(Bagri v Canada (Minister of Citizenship and Immigration),* [1999] FCJ No 784).

[47] The Respondent replies that numerous factors cumulatively support the negative credibility finding concerning the BDP letter:

- The Applicant's PIF narrative does not mention that the Applicant was active with the BDP;
- The BDP only shows that he was "involved" in youth activities during three years, not that has an active member of the party or a member;
- The letter does not say the Applicant has a political profile which would have made a target for persecution;
- The Applicant is not wanted in Turkey for any crime and has no criminal record;

[48] As a result, the Respondent argues, the BDP letter does not corroborate the Applicant's broader narrative.

[49] The Applicant also argues that the RPD erred by failing to reference the successful asylum claims of Applicant's three brothers.

[50] The Respondent submits that the immigration status of the Applicant's brothers is irrelevant and of little probative value. More specifically, the Respondent says that the claim that the three brothers claimed and were granted asylum is false. Although one brother was granted Indefinite Leave to Remain in the UK, this was not the result of a claim for refugee status. Another brother was granted Discretionary Leave to Remain in the UK, but one of the conditions for obtaining this type of leave is that the claimant does not qualify for asylum (Home Office's Policy Equality Statement on Discretionary Leave to Remain, April 6th, 2015).

[51] The Respondent argues that refugee claims are to be considered on their own merits. Although one of Applicant's brothers was indeed granted refugee status based on a similar experience, the Panel is not bound by the result of another claim, even if that claim involves a relative (*Bakary v Canada (Citizenship and Immigration),* 2006 FC 1111 at para 10).

[52] The Respondent also submits that the Applicant misrepresented his brother's political involvement. Whereas the Applicant said that the three brothers were active in the Kurdish cause at the initial hearing, he corrected himself at the rehearing by stating that they only volunteered with youth activities from 2008 to 2010. Neither he nor his brothers were members of the BDP.

C. *Was it reasonable for the RPD to find that the Applicant would not face a risk of persecution and unusual treatment and punishment for military service evasion?*

[53] The Applicant argues that it was unreasonable for the RPD to conclude that the Applicant did not evade the draft and would not face a risk of persecution or unusual treatment and punishment. The initial submissions including the original and updated PIF referred to the Applicant's claim as a "conscientious objector" and in the last submission and in oral argument counsel for the Applicant submitted that the Applicant was also a "selective" conscientious objector.

[54] The Respondent describes the Applicant's evidence regarding his claim to have evaded military service as "evolving and inconsistent". When broaching the RPD member's treatment of conscientious objectors, the Respondent highlights that the Applicant completely ignores that he was found to have made up a new story at the hearing. With respect to the selective

conscientious objector argument, the Respondent submits that whatever the characterization is, the RPD considered both the subjective and objective aspects of the Applicant's claim.

[55] The Applicant argues that the RPD erred by challenging the Applicant's military service deferral letter without a baseline of what such a document should look like. The Applicant also notes that, unlike the Applicant's experienced counsel, the RPD Member presiding the second hearing had never seen such a letter before. Moreover, he opted not to send the letter for forensic testing. On many occasions, the Federal Court has found that the RPD cannot conclude an official document is forged in the absence of evidence supporting this conclusion *(Tsymbalyuk v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1306 at paras 27-28; *Cheema v Canada (Minister of Citizenship and Immigration)*, 2004 FC 224 at paras 8-9; *Ramalingam v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 10 at para 6).

[56] The Respondent replies that there were reasons for the RPD to question the authenticity of the deferral letter, namely:

- The Applicant waited until 2017 to disclose a letter from 2009;
- The purported department which issued the letter does not actually exit;
- The seal is illegible;
- The deferral was allegedly set to a date where no military call-ups occur.

[57] The Applicant submits that at the first hearing, the RPD member Member accepted that the Applicant was a military service evader, so there was no need to present evidence to further support this claim. The Applicant also has no idea why the seal impression is faint. As for the

department name on the letterhead the Applicant submits this can be chalked up to a translation error, given that “Military Draft Command” and “Department of Recruitment” are functionally similar. As for the delay in disclosing the letter, the Applicant submits that this can be attributed to memory issues arising from the passage of time.

[58] The RPD’s main reason for not believing that the Applicant evaded military service is that no letter was sent to the Applicant. However, the Applicant points to evidence which shows that it is normal that no letter was sent. According to a representative from Vicdani Ret Dernegi (VR-DER), a Turkish association of conscientious objection, “…the Ministry of National Defence releases an arrest warrant against the draft evader but does not send a notification to the subject”.

[59] The Respondent notes that, whereas the Applicant refers the Court to information provided by a Turkish NGO [Non-governmental organization], the RPD relied on information provided by the Government of Turkey. It is not unreasonable for the RPD to prefer evidence from the Government of Turkey rather than on a document from an NGO. Even if the RPD member had accepted the version of the NGO, that is that an arrest warrant would be issued but the person would not receive a letter, the facts do not support this allegation because there appears to be no warrant for his arrest or any summons from the military or from any other Turkish authority.

[60] Like in the first RPD hearing, the Applicant argues that the RPD failed to consider evidence that shows that conscientious objectors face extrajudicial ill treatment. The Applicant

draws attention to the evidence in his Affidavit, referencing documentary evidence, to the effect that “Most conscientious objectors who have been detained in Turkey have reported physical maltreatment” (Exhibit J) and are “frequently ill-treated” (Exhibit I).

VII. Analysis

A. *Did the RPD err by not following Justice Zinn’s findings and reasons?*

[61] The RPD was not bound by Justice Zinn’s findings and reasons. The RPD is advised to consider them but they are non-binding as they are not explicit directions or instructions. (*Ouellet* at para 7).Thus, it was appropriate for the Panel to evaluate the evidence *de novo* at the second hearing.

B. *Was it reasonable for the RPD to conclude there is no more than a mere possibility of persecution on political grounds?*

[62] The RPD member misapplied the test for persecution. The remarks made by Justice Zinn are still relevant (*Basbaydar* at para 14):

> [41] The RPD focused on the fact that Mr. Basbaydar had not demonstrated that he was a person of interest for the police. This was not what he was required to show. He simply had to show that he has a well-founded fear of persecution by reason of his political opinions or nationality and, in my view, this well-founded fear is borne out in the documentary evidence. …

[63] Although the RPD poses the proper question - “*Is the claimant facing persecution or other serious harm because of his political opinion?*” - it provides an answer to a different

question by concluding, “For these reasons, I find the claimant was not of any interest to the authorities when he left Turkey in September 2010.”

[64] The RPD conclusion that the Applicant did not face more than a mere possibility of persecution on political grounds is not supported by the record. The Applicant stated these facts and fears in his PIF.

[65] The RPD also cannot draw negative inferences based on what the BDP letter does not say. This is a reviewable error.

C. *Was it reasonable for the RPD to find that the Applicant does not face a risk of persecution and unusual treatment and punishment for military service evasion?*

[66] There are essentially two groups of persons who claim conscientious objection to military status: those who object to military service and those who object to serving in a particular conflict *((Sounitsky v Canada (Minister of Citizenship and Immigration)* 2008 FC 345 at para 25) and *(Lebedev v Canada (Minister of Citizenship and Immigration), 2007 FC 728 at para 45))*.

[67] Selective objectors are discussed in paragraph 171 of the United Nations High Commissioner for Refugees’ Handbook on Procedures and Criteria for Determining Refugee Status (“the Handbook”) as follows:

> Not every conviction, genuine though it may be, will constitute a sufficient reason for claiming refugee status after desertion or draft-evasion. It is not enough for a person to be in disagreement with his government regarding the political justification for a particular military action. Where, however, the type of military action, with which an individual does not wish to be associated, is

> condemned by the international community as contrary to basic rules of human conduct, punishment for desertion or draft-evasion could, in the light of all other requirements of the definition, in itself be regarded as persecution.

[68] It is the Court's view that the RPD provided adequate reasons for concluding that the Applicant "does not have the deep-seated scruple and sincerely held opinion of a conscientious objector, and he has not provided persuasive objective evidence of his being one, other than his allegation that he hates the Turkish military". In reviewing the RPD decision, the Court is of the view that the panel member considered both the subjective (para 170 of the Handbook) and objective basis (para 171 of the Handbook) for the objection.

[69] The RPD did not dismiss the military service deferral letter without evidence. It provided four reasons justifying the associated negative credibility finding. The explanations provided by the Applicant were not accepted as being credible.

[70] It is reasonable for the RPD to prefer the explanation offered directly by the Government of Turkey respecting treatment of draft evaders, instead of the one reformulated by a NGO. In addition, it is trite law that the RPD member need not comment every piece of evidence in the record (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 53).

[71] Notwithstanding the Court's view on this last issue, the Court is persuaded by the argument of the Applicant that there are three reviewable errors identified in regard to the RPD member's conclusion that there is no more than a mere possibility of persecution. Firstly, the

RPD member misapplied the test for persecution by analyzing whether the Applicant was of interest to the authorities instead of whether he faced persecution or serious harm for his political opinion. Secondly, the RPD member supported its decision with the erroneous assertion that the Applicant did not mention his involvement with the BDP in his PIF. Thirdly, it is a reviewable error to draw a negative credibility finding based on what the BDP letter does not say. Due to these three errors, the analysis leading to the conclusion that there was no more than a mere possibility of persecution on political grounds was unreasonable.

VIII. Conclusion

[72] The application for judicial review is allowed. No question of general importance is certified.

JUDGMENT in IMM-4670-17

THIS COURT'S JUDGMENT is that the application for judicial review is allowed.

There is no question of general importance for certification.

"Paul Favel"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4670-17
STYLE OF CAUSE:	SUKRU BASBAYDAR v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 2, 2018
JUDGMENT AND REASONS:	FAVEL J.
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APPEARANCES:

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Suzanne Bruce	FOR THE RESPONDENT

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