Federal Court  Cour fédérale

Date: 20210730

Dockets: IMM-5902-19
IMM-5903-19

Citation: 2021 FC 804

Ottawa, Ontario, July 30, 2021

PRESENT: Mr. Justice Norris

Docket: IMM-5902-19

BETWEEN:

KEMAL EDE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: IMM-5903-19

AND BETWEEN:

FIRDEVS EDE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] The applicants, a married couple, are citizens of Turkey. They sought refugee protection in Canada in 2005 on the basis of their fear of religious and political persecution because of their Kurdish/Alevi identity. The Refugee Protection Division ("RPD") of the Immigration and Refugee Board of Canada accepted their claims in 2006. They became permanent residents of Canada in 2008.

[2] In 2015, the Minister of Public Safety and Emergency Preparedness asked the RPD to cease Firdevs Ede's refugee protection under section 108 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*") because she had voluntarily reavailed herself of the protection of Turkey. The Minister alleged that, since being granted refugee protection, Ms. Ede had renewed her Turkish passport and had returned to Turkey for extended visits. The Minister brought a similar application with respect to Kemal Ede, who had also renewed his Turkish passport and visited Turkey since being granted refugee protection.

[3] The Minister also asked the RPD to vacate the decision granting Mr. Ede refugee protection under section 109 of the *IRPA* because he had obtained it by "having misrepresented or withholding material facts relating to a relevant matter." The Minister alleged that when he applied for refugee protection in 2005, Mr. Ede failed to disclose that, in 2001, he "had committed and/or been charged" in Turkey with the offence of exporting heroin. The Minister contended that this was material to Mr. Ede's potential exclusion from refugee protection for

having committed a serious non-political crime: see section 98 of the *IRPA* and Article 1F(b) of the *United Nations Convention Relating to the Status of Refugees* (28 July 1951, 189 UNTS 150) ("*Refugee Convention*"). The Minister also contended that this omission was material to the credibility of Mr. Ede's stated reasons for fleeing Turkey and seeking protection in Canada. The Minister alleged that Ms. Ede was a party to this failure to disclose information and sought the vacation of the decision granting her refugee protection as well.

[4] The RPD heard the cessation and vacation applications together over several dates in 2018 and 2019. In a decision dated August 23, 2019, the RPD granted the application to cease Ms. Ede's refugee protection. It also granted the application to vacate Mr. Ede's refugee protection. The application to cease Mr. Ede's refugee protection consequently became moot. On the other hand, the RPD rejected the application to vacate Ms. Ede's refugee protection because the Minister could not point to any overt misrepresentations on her part.

[5] The applicants filed separate applications for leave and judicial review of the RPD's decision under subsection 72(1) of the *IRPA*. Given the links between the two applications, they were heard together and I will deal with both in a single judgment. A copy of these reasons will be placed in each court file.

[6] While there are links between the applications, the legal issues and relevant facts are distinct. I will address Ms. Ede's application first and then Mr. Ede's. As I explain in the reasons that follow, I am dismissing Ms. Ede's application because she has not persuaded me that the RPD's decision to cease her refugee protection is unreasonable. However, I am allowing

Mr. Ede's application because he has persuaded me that the RPD's decision to vacate the decision granting him refugee protection is unreasonable.

[7] Before addressing the merits of the two applications, I should note that there is no dispute regarding the applicable standard of review. The parties agree, as do I, that the RPD's determinations should be reviewed on a reasonableness standard. A reasonable decision "is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 85). The onus is on the applicants to demonstrate that the RPD's decision is unreasonable. To set aside a decision on this basis, the reviewing court must be satisfied that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100).

II. FIRDEVS EDE (IMM-5903-19)

A. *Background*

[8] Ms. Ede was born in Turkey in 1964. Mr. Ede was born there in 1959. The two married in 1977. They have four children: the youngest was born in 1988, the eldest in 1979.

[9] Mr. and Ms. Ede entered the United States on December 21, 2004, using their Turkish passports and valid US visas they had obtained a few months earlier. On January 26, 2005, they claimed refugee protection in Canada at the Fort Erie, Ontario, Port of Entry. In a decision dated

October 30, 2006, the RPD accepted their claims and determined that they are Convention refugees. Mr. and Ms. Ede became permanent residents of Canada in 2008.

[10] In asking the RPD to cease Ms. Ede's refugee protection, the Minister alleged that she had returned to Turkey on at least four occasions between 2011 and 2014. On three of these occasions, Ms. Ede had travelled on a Turkish passport that she had obtained in 2012 through the Turkish Consulate in Toronto. Ms. Ede did not dispute these allegations. She testified that she did not want to go to Turkey but she and her husband had "obligations" there that required them to return. She explained that she had returned to Turkey for her son's wedding, to attend to her late mother's affairs, and to receive medical treatment. Each time she stayed in Turkey for several months. Ms. Ede acknowledged that she did not encounter any difficulties while she was there, nor did she make any secret of her presence.

B. *Decision Under Review*

[11] Individuals who have been granted refugee protection but then voluntarily reavail themselves of the protection of their country of nationality no longer meet the definition of Convention refugee. This is because it is no longer the case that they are unable or unwilling to avail themselves of this protection, an essential element of that definition: see paragraph 96(a) of the *IRPA* and Article 1A(2) of the *Refugee Convention*.

[12] Accordingly, section 108 of the *IRPA* provides in relevant part as follows:

Cessation of Refugee Protection	**Perte de l'asile**
Rejection	**Rejet**
108 (1) A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, in any of the following circumstances:	**108 (1)** Est rejetée la demande d'asile et le demandeur n'a pas qualité de réfugié ou de personne à protéger dans tel des cas suivants:
(a) the person has voluntarily reavailed themself of the protection of their country of nationality;	**a)** il se réclame de nouveau et volontairement de la protection du pays dont il a la nationalité;
…	…
Cessation of refugee protection	**Perte de l'asile**
(2) On application by the Minister, the Refugee Protection Division may determine that refugee protection referred to in subsection 95(1) has ceased for any of the reasons described in subsection (1).	**(2)** L'asile visé au paragraphe 95(1) est perdu, à la demande du ministre, sur constat par la Section de protection des réfugiés, de tels des faits mentionnés au paragraphe (1).
Effect of decision	**Effet de la décision**
(3) If the application is allowed, the claim of the person is deemed to be rejected.	**(3)** Le constat est assimilé au rejet de la demande d'asile.

[13] The RPD begins this part of its decision by noting that the test for reavailment has three requirements: the protected person must act voluntarily; she must intend to reavail herself of the protection of the country of nationality; and she must actually obtain that protection. See

UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection (Reissued February 2019) at paras 118-125. The RPD was satisfied that the Minister had established all three elements with respect to Ms. Ede.

[14] Regarding voluntariness, the RPD found that Ms. Ede had requested and was granted a passport at the Turkish Consulate in Toronto in May 2012 which she used to return to Turkey. No one compelled her to do this, nor was she constrained by circumstances beyond her control. She did all this "of her own initiative." Accordingly, the element of voluntariness was met.

[15] Regarding intention, the RPD noted that the UNHCR Handbook states that "[i]f a refugee applies for and obtains a national passport or its renewal, it will, in the absence of proof to the contrary, be presumed that he intends to avail himself of the protection of the country of his nationality." As well, the fact that Ms. Ede travelled to Turkey was evidence of her intent to reavail herself of that country's protection. The RPD found that Ms. Ede's reasons for going were insufficient to demonstrate that she lacked this intent. Specifically, her "personal desire" to return to Turkey to "satisfy what she calls social obligations is not sufficient justification to overcome the intent that this travel shows." Accordingly, the RPD concluded that Ms. Ede intended to reavail herself of the protection of her country of nationality.

[16] Finally, regarding actual reavailment, the RPD found that this was demonstrated by Ms. Ede travelling with her Turkish passport and actually returning to Turkey several times and staying there for lengthy periods of time.

[17] In summary, the RPD concluded that, after considering Ms. Ede's explanations for her actions, "there is insufficient 'proof to the contrary' to rebut the presumption that she voluntarily and intentionally re-availed herself of the protection of the authorities of her country of origin, by applying for and obtaining a new national passport" and, further, that she actually obtained the protection of Turkish authorities by applying for and using the passport to return to Turkey.

[18] Having so concluded, the RPD determined under subsection 108(2) of the *IRPA* that the refugee protection conferred on Ms. Ede has ceased. The RPD therefore determined under subsection 108(3) that her claim for protection is deemed to be rejected.

C. *Analysis*

[19] Ms. Ede challenges the RPD's determination in several respects but her arguments all come down to a single contention: the RPD's conclusion that her reasons for obtaining a Turkish passport and returning to Turkey were insufficient to rebut the presumption that she intended to reavail herself of Turkey's protection is unreasonable. I do not agree.

[20] In oral argument, counsel for Ms. Ede focused on one passage in particular where the RPD stated: "The panel has considered the reasons why Ms. Ede obtained these passports; to return because of her personal desire to satisfy what she calls her social obligations is not sufficient justification to overcome the intent that this travel shows." Counsel submits that this conclusory statement is insufficient to meet the requirements of *Vavilov*. While this passage may appear conclusory when viewed in isolation, it must be read in the context of the decision as a

whole. Doing so helps one to see how this conclusion is justified in relation to the facts and the law that constrain the decision maker.

[21] The RPD considered whether there were any circumstances suggesting that Ms. Ede did not act with the intention she is presumed to have had by virtue of obtaining a Turkish passport and using it to return to Turkey. In doing so, the RPD was guided by the UNHCR Handbook. While the Handbook is not binding on the RPD, its discussion of the test for reavailment is recognized as a valuable guide for the interpretation of paragraph 108(1)(a) of the *IRPA*: see *Chowdhury v Canada (Citizenship and Immigration)*, 2021 FC 312 at para 8. Ms. Ede does not suggest otherwise.

[22] According to the Handbook, "[t]he most frequent case of 're-availment of protection' will be where the refugee wishes to return to his country of nationality. He will not cease to be a refugee merely by applying for repatriation. On the other hand, obtaining an entry permit or a national passport for the purposes of returning will, in the absence of proof to the contrary, be considered as terminating refugee status" (at para 122). Indeed, one who merely obtains such a document for this purpose "normally ceases to be a refugee" (at para 123).

[23] The RPD found that Ms. Ede not only obtained a Turkish passport for the purpose of returning to Turkey, she actually returned there several times for extended visits. Ms. Ede does not dispute the RPD's findings of fact. Nor does she suggest that the RPD misunderstood her explanations for why she acted as she did or that it overlooked relevant evidence.

[24] The RPD applied the test for reavailment to the facts as it found them to be. On review, Ms. Ede does not argue that the RPD erred in finding that her reasons for returning to Turkey were insufficient to demonstrate that she acted involuntarily. That she actually reavailed herself of Turkey's protection is not disputed, either. Consequently, the determinative issue is whether the RPD's finding that she intended to reavail herself of that protection is unreasonable.

[25] Ms. Ede accepts that her actions gave rise to a presumption that she intended to reavail herself of Turkey's protection. Whether her reasons for returning to Turkey were sufficient to rebut this presumption was for the RPD to determine. The RPD explained why, when compared to the sorts of circumstances discussed in the UNHCR Handbook, they were insufficient. It did so in a way that was transparent, intelligible and justified. While Ms. Ede undoubtedly hoped that the RPD would find that her decisions to return to Turkey were more constrained by circumstances beyond her control than it did, a reviewing court may interfere with the RPD's determination only if it is unreasonable. Ms. Ede has not persuaded me that it is. Consequently, her application for judicial review must be dismissed.

III. KEMAL EDE (IMM-5902-19)

A. *Background*

[26] Section 109 of the *IRPA* provides as follows:

Applications to Vacate	**Annulation par la Section de la protection des réfugiés**
Vacation of refugee protection	**Demande d'annulation**
109 (1) The Refugee Protection Division may, on application by the Minister, vacate a decision to allow a claim for refugee protection, if it finds that the decision was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter.	**109 (1)** La Section de la protection des réfugiés peut, sur demande du ministre, annuler la décision ayant accueilli la demande d'asile résultant, directement ou indirectement, de présentations erronées sur un fait important quant à un objet pertinent, ou de réticence sur ce fait.
Rejection of application	**Rejet de la demande**
(2) The Refugee Protection Division may reject the application if it is satisfied that other sufficient evidence was considered at the time of the first determination to justify refugee protection.	**(2)** Elle peut rejeter la demande si elle estime qu'il reste suffisamment d'éléments de preuve, parmi ceux pris en compte lors de la décision initiale, pour justifier l'asile.
Allowance of application	**Effet de la décision**
(3) If the application is allowed, the claim of the person is deemed to be rejected and the decision that led to the conferral of refugee protection is nullified.	**(3)** La décision portant annulation est assimilée au rejet de la demande d'asile, la décision initiale étant dès lors nulle.

[27] The Minister commenced the application to vacate Mr. Ede's refugee protection in 2015 by filing a Notice of Application with the RPD. The Notice included detailed submissions in support of the Minister's position. The burden was on the Minister to establish that the

requirements of subsection 109(1) were satisfied: see *Nur v Canada (Minister of Citizenship and Immigration)*, 2005 FC 636 at para 21.

[28] The Minister's application rested on two key factual allegations: first, that on July 10, 2001, Mr. Ede had been charged in Turkey with the offence of exporting "addictive or exciting drugs" – namely heroin; and second, that on March 13, 2012, he was convicted of this offence by a Turkish court and sentenced to imprisonment for 17 years and six months. According to the Minister, Mr. Ede had "participated in the criminal offence of heroin smuggling on 10 July 2001." The Minister also alleged that Mr. Ede had been charged with this offence prior to entering Canada and seeking refugee protection. The Minister argued that the fact that Mr. Ede was subsequently convicted of the offence demonstrated "that he in fact *committed* the offence with which he was charged" (original emphasis). Despite this, when he applied for refugee protection in Canada, Mr. Ede "did not disclose this offence, nor any arrest or criminal charge" in relation to it, as he was required to do. The Minister contended that Mr. Ede's "misrepresentation and withholding of the material facts of the offence committed and the criminal charge against him as of 10 July 2001" related to two relevant matters: his potential exclusion from refugee protection (for having committed a serious non-political crime) and his credibility as it relates to his reasons for seeking protection in Canada. The Minister therefore sought an order vacating the October 2006 decision of the RPD that had accepted Mr. Ede's claim for refugee protection.

[29] Following the hearing before the RPD, counsel for the Minister continued to rely on the written representations in the original Notice but appeared to narrow the nature of the allegedly

withheld information slightly, submitting that "the misrepresentation relates to [Mr. Ede's] criminal charges. Both of the respondents knew that he was facing some kind of criminal sanctions for drug smuggling before they came to Canada."

[30] There is no issue that Mr. Ede did not disclose either any involvement in exporting heroin or any resulting criminal charge in his application for refugee protection. Nor can there be any issue that such information would be material to relevant matters. The determinative question is whether Mr. Ede actually withheld this information when he applied for refugee protection. In the proceeding before the RPD, this turned on whether, when he applied for refugee protection in Canada in 2005, Mr. Ede knew that Turkish authorities had charged him with the crime of exporting heroin.

[31] When the Minister filed the application to vacate in 2015, the only evidence relating to Mr. Ede's alleged commission of the offence of exporting heroin was an INTERPOL Red Notice. Mr. Ede responded to the Minister's case with other documentary evidence relating to the criminal proceedings in Turkey and with his own testimony. He denied committing the offence and denied that he knew, when he applied for refugee protection, that he had been charged with this crime.

(1) The INTERPOL Red Notice

[32] On May 2, 2014, INTERPOL published a Red Notice regarding Mr. Ede on behalf of Turkey. The Notice stated that Mr. Ede was a "fugitive wanted to serve a sentence." The Notice requested that any country in which he is found commence extradition proceedings against him.

The Notice stated that on March 13, 2012, the High Criminal Court in Istanbul had convicted Mr. Ede of exporting "addictive or exciting drugs" and had sentenced him to imprisonment for 17 years and 6 months. Of this sentence, 17 years, 2 months, and 25 days imprisonment remained to be served. The Notice also stated: "The subject was present in court when the judgment was rendered."

[33] The Notice also set out the following summary of the facts:

> **Summary of Facts of the Case:** TURKEY, Istanbul: On 10 July 2001:
>
> According to the information gathered, EDE f/n Kemal and DEMIR f/n Mehmet have planned to smuggle heroin from Turkey to Germany. For this purpose EDE f/n Kemal bought a truck and found an international company to work with. He agreed with the company to transport strawberries from Turkey to Germany. After this agreement, EDE f/n Kemal has prepared a secret stash in the truck and placed 88 kilograms and 800 grams of heroin inside. Then gave the truck to DEMIR f/n Mehmet to drive it to Germany and on 10.07.2001 he was arrested in Bulgaria for the seizure of 88,800 grams of heroin.

[34] Finally, the Notice stated that on May 2, 2013, the Public Prosecutor's Office in Istanbul issued a warrant for Mr. Ede's arrest to enforce the execution of the remainder of his sentence. As noted above, the Red Notice was published a year later, on May 2, 2014.

(2) RPD Proceeding on August 15, 2018

[35] The hearing of the Minister's applications was scheduled to begin on August 15, 2018. While their counsel was present, neither Mr. Ede nor Ms. Ede attended because of medical reasons. (Issues relating to the attendance of Mr. Ede and Ms. Ede over the course of the

proceeding occupied considerable time and attention at the RPD but they are immaterial for present purposes.) As a result, the proceeding was adjourned to October 15, 2018.

[36] Before the matter was adjourned, the RPD member raised a question with Minister's counsel concerning the value of the Red Notice (as opposed to a Certificate of Conviction) as proof that Mr. Ede had been convicted of the offence in question. For his part, counsel for Mr. Ede noted that the Red Notice stated that Mr. Ede was present in court at the time of the decision and then stated: "but he was here in Canada at that time. That's for sure actually he can prove [*sic*]." After some further comments by Mr. Ede's counsel about the unreliability of Red Notices from Turkey, the RPD member stated the following:

> [. . .], but anyway if Minister's Counsel can come up with something to document the reliability of a red notice or if claimants' counsel is able to show that his – sorry, respondents' counsel is able to show that his client was in Canada at the time that he was supposedly arrested, then those are matters that, you know, we have to hear the evidence and test it and so on and I look forward to that, but I just wanted to put those ideas out there because we don't get to do vacation cessation applications very often and therefore we're not familiar [*sic*]. I don't claim to be entirely familiar with the type of evidence that we face.

(3) RPD Proceeding on October 15, 2018

[37] After some other preliminary matters were dealt with, and just before Minister's counsel was to begin questioning Mr. Ede, the latter's counsel requested an adjournment of the hearing. When it became apparent that counsel was effectively giving evidence, Mr. and Ms. Ede were asked to leave the hearing room briefly. In their absence, counsel explained that he needed time to obtain "some clarification" from the Turkish court. As he had on the previous date, counsel asserted that Mr. Ede was not present in court for the verdict or for any part of his trial in Turkey.

Counsel also stated that Mr. Ede had recently retained a lawyer in Turkey to submit a petition to the High Criminal Court in Istanbul to re-open his trial on this basis. (Although it was not filed at this time, it appears from his comments that Mr. Ede's counsel had in hand a copy of this petition, dated September 20, 2018. It is discussed further below.) Minister's counsel opposed an adjournment, arguing that this was just another stalling tactic by Mr. and Ms. Ede. The RPD member pointed out that many of the things Mr. Ede's counsel was saying were matters that needed to be established by evidence in any event. Mr. Ede's counsel ultimately agreed to proceed with the hearing, apparently expecting that Mr. Ede would address the developments that he had just described.

[38] Mr. Ede testified in Turkish. As interpreted by the Turkish interpreter, the Minister's questioning of Mr. Ede began with the following exchanges:

> **MINISTER'S COUNSEL:** [. . .] Were you convicted of drug charges by Turkish court [*sic*] in 2012? That was a question, were you?
>
> **CLAIMANT:** No, I was not.
>
> **MINISTER'S COUNSEL:** Sir, I have evidence from Interpol that you were.
>
> **PRESIDING MEMBER:** Well hold on, do you want to show him what you have maybe?
>
> **INTERPRETER:** Mr. Member, I think I made a slight mistake I need to correct.
>
> **PRESIDING MEMBER:** Okay, hold on. Yes, Mr. Interpreter, go ahead, what happened?
>
> **INTERPRETER:** Yes –
>
> **PRESIDING MEMBER:** No, talk to us first, what –
>
> **INTERPRETER:** I translated the conviction as the sentence.

PRESIDING MEMBER: Okay, all right. Would you mind asking the question again and Mr. Interpreter interpret it properly this time please. Go ahead.

MINISTER'S COUNSEL: Were you convicted of drug charges by a Turkish court in 2012?

CLAIMANT: No, I was not.

MINISTER'S COUNSEL: Sir, I have evidence from Interpol that you were convicted.

CLAIMANT: They took, they simply took me to the court and asked me three questions.

PRESIDING MEMBER: Okay, hold it, sir, you can't say they, I don't know who they are. Who took you to the court?

CLAIMANT: Police.

PRESIDING MEMBER: Go ahead, continue.

MINISTER'S COUNSEL: The police took you to court in 2012?

CLAIMANT: No. They took me to court in 2004.

PRESIDING MEMBER: Sir, that wasn't the question. You have to listen to the question. Were you convicted by a Turkish court in 2012?

CLAIMANT: No.

PRESIDING MEMBER: Okay. That has nothing to do with 2004 at this stage, okay? So now counsel is asking you what about the report from Interpol that says you were convicted in 2012, are you aware of that, sir?

CLAIMANT: Since I had not been there I was not aware of this fact, this claim. And I only learned about this after you summoned me to this hearing.

PRESIDING MEMBER: And [that] was three years ago, sir?

CLAIMANT: It was three years ago, yes.

PRESIDING MEMBER: Go ahead, Mr. Whitelock.

MINISTER'S COUNSEL: Okay. So, but you are stating as a fact that you were not convicted by a court in Turkey?

CLAIMANT: Yes.

MINISTER'S COUNSEL: Have you –

PRESIDING MEMBER: Sorry, sir, I sense a contradiction here. A moment ago I thought you said you became aware of the conviction three years ago.

CLAIMANT: Yes, I did.

PRESIDING MEMBER: But you just told Mr. Whitelock that you were not convicted. So either you were convicted and you became aware of it later or you weren't convicted, you have to explain, sir.

CLAIMANT: I did not understand the question.

PRESIDING MEMBER: Well didn't you say two minutes ago that you became aware of your conviction three years ago when you were served with the documents in this proceeding?

CLAIMANT: Yes, I did.

PRESIDING MEMBER: So you were aware three years ago that there was a conviction in Turkey in 2012.

CLAIMANT: Yes.

PRESIDING MEMBER: So how can you say when the next question is asked that you were not convicted, how can you say that? Short sentences.

CLAIMANT: I became aware of this fact after these documents were sent to me, and in addition was I found guilty or was I, if I were guilty I wouldn't be able to come here.

PRESIDING MEMBER: Okay, I remind you, sir, you have to speak in short sentences. Go ahead, Mr. Whitelock.

MINISTER'S COUNSEL: Have you recently retained a lawyer in Turkey?

CLAIMANT: Yes, I sent power of attorney and my brother hired the lawyer.

MINISTER'S COUNSEL: What did you hire him for?

CLAIMANT: In order for him to follow this legal matter.

MINISTER'S COUNSEL: What does follow this legal matter mean?

CLAIMANT: About my conviction.

MINISTER'S COUNSEL: Okay, sir, again, I'm not asking you what you think of the propriety of the process in Turkey, I'm asking were you convicted of a crime in Turkey?

CLAIMANT: No.

[39] At this point, counsel for Mr. Ede (who apparently also understood Turkish) raised a concern about the accuracy of the interpreter's translation of the word "conviction". After the interpreter agreed to use a different word, the questioning of Mr. Ede continued:

PRESIDING MEMBER: Do you want to hear the question again?

INTERPRETER: I remember the question.

CLAIMANT: According to this file yes, I was found guilty, yes.

MINISTER'S COUNSEL: Okay. So according to this information the Minister has you were convicted of drug charges for smuggling drugs in 2001, is that correct? That's a question, is that correct?

CLAIMANT: No, it's not.

MINISTER'S COUNSEL: What did you think you were convicted of in Turkey?

CLAIMANT: I was not capable of smuggling drugs first of all, the only thing I did was to purchase a truck.

PRESIDING MEMBER: Sir, answer the question, what did you think you were convicted of?

CLAIMANT: Because I did not have registration since I am from southeastern part of Turkey I am wrongfully charged with this.

> **MINISTER'S COUNSEL:** Okay. Are you saying that that is the charge under the Turkish Penal Code of which you were convicted?
>
> **CLAIMANT:** There is no law in Turkey.

[40] At this point, counsel for the Minister raised the concern that Mr. Ede may not be able to appreciate the nature of the proceedings "because his answers have been nonsensical." Mr. Ede then interjected:

> **CLAIMANT:** Even if it happened I was not guilty.

[41] When counsel for the Minister raised the question of whether it was necessary to appoint a designated representative for Mr. Ede, counsel for Mr. Ede asked for a brief recess so that he could speak with his client. This was granted. When the proceeding resumed, counsel for Mr. Ede stated: "Yes, after I talked to him I understand he misunderstood the question actually and he can explain where, how he misunderstood."

[42] From this point on, in response to further questions from counsel for the Minister, Mr. Ede explained that while he had been convicted of "smuggling or trafficking" heroin, he had nothing to do with the offence. He had provided a truck to someone to deliver a shipment of cherries to Germany. The truck needed a trailer and someone else provided one. (Mr. Ede later clarified that the driver, Mehemet Demir, had provided the trailer. This was a business arrangement the two had entered into which had nothing to do with drugs.) He learned later that the truck had been stopped and heroin was found hidden in the trailer. He did not know anything about the drugs at the time. He was detained by Turkish authorities sometime in 2004 but he could not recall exactly when. He was told that his truck had been "seized, or stopped." He was

told that a controlled substance had been found in his truck and he needed to go to court. He was kept in custody for three months. When he went to court, he was asked if the truck was his, if there were drugs in the truck, and if he knew certain people. After he answered, he was told he was free to go. He did not mention this incident in his narrative in support of his refugee claim because he was embarrassed about being suspected of involvement in drug smuggling.

[43] Eventually the RPD proceeding had to be adjourned because of a health-related issue concerning Ms. Ede.

(4) RPD Proceeding on August 7, 2019

[44] The hearing did not continue until nearly a year later. Counsel for the Minister completed questioning Mr. Ede. The only new area covered was what Mr. Ede had told Ms. Ede about the drug smuggling allegations when they were still in Turkey. Mr. Ede explained that he had told her that drugs had been found and his truck had been seized. Since he had taken out a loan to pay for the truck, they had to sell their house to pay off the loan. Mr. Ede could not recall exactly when this happened but thought it was either 2002 or 2003.

[45] Counsel for Mr. Ede then asked the latter some questions about the heroin smuggling incident. When asked how he was released from the Turkish court after he had been detained in relation to this incident, Mr. Ede replied as follows:

> At that time, I was being tried at the security court of the state, state security court. I went to that court. The lawyer that was assigned to me told me that you are not really related to this matter, you're not really inside it, you're not really outside it. That's all I know. Up until the file was sent here, I was not aware that I was

> being punished, I was being sentenced to a crime, I was being charged with any crime.

[46] When asked whether he had been in Turkey in March 2012 (when the High Criminal Court delivered its decision), Mr. Ede was initially unsure but later confirmed that he had not been. He had been in Turkey for about six months in 2012 and had returned to Canada on December 20, 2012. The latter date was recorded in his passport and in Canadian border control records. (As set out below, Turkish border control records indicated that Mr. Ede had entered Turkey on July 2, 2012, and departed on December 20, 2012.) In any event, he denied being present at the trial. As he pointed out, "if I was there how would they let me go? How would they let me exit the country if I was subject to such a proceeding of such gravity?"

(5) Post-Hearing Documents

[47] Following the hearing, counsel for Mr. Ede submitted several additional documents to the RPD. Only three are relevant to the vacation application. All three were accepted by the RPD and marked as exhibits.

(a) *Turkish Border Control Entry and Exit Records*

[48] Counsel provided what was represented to be Turkish border control records pertaining to Mr. Ede. The records stated that Mr. Ede had arrived at Ataturk Airport in Istanbul on July 2, 2012, and departed on December 20, 2012. The records do not have any other entries for 2012. They are consistent with Canadian border control records, which indicate that Mr. Ede

entered Canada at Pearson International Airport on December 20, 2012. Mr. Ede's passport has a Canadian entry stamp with this same date.

[49] According to the Turkish records, Mr. Ede's most recent previous trip to Turkey was in 2011. He arrived on May 10, 2011, and departed on August 6, 2011. This is also consistent with Canadian border control records, which indicate that Mr. Ede entered Canada at Pearson International Airport on August 6, 2011. Canadian records do not indicate any other entries to Canada between that date and December 20, 2012.

(b) *Reasoned Decision of the 9th High Criminal Court, Istanbul, dated March 13, 2012*

[50] This is the written reasons for judgment of the High Criminal Court for finding Mr. Ede and Mehemet Demir guilty of exporting heroin. It appears that counsel for Mr. Ede had had this document since at least January 2019. He stated in his covering letter that he had filed it with the RPD then but had inadvertently neglected to provide a copy to counsel for the Minister so he was filing it again.

[51] The decision notes that Mehmet Demir had been arrested in Bulgaria in 2001. He was imprisoned there for 8 years for smuggling drugs (having been sentenced to 13 years imprisonment) and then extradited to Turkey. The decision also notes that Mr. Ede had been arrested on March 9, 2003, and then released on June 12, 2003. (This suggests that Mr. Ede may have been mistaken about the year in which he was detained in relation to the drug smuggling incident.) The decision summarizes what Mr. Ede had "stated in his inquiry and defense" –

namely, he had nothing to do with the heroin that was seized – but it does not indicate when this statement was taken. The final paragraph of the decision appears to suggest that it was delivered in the absence of the accused but that their lawyers were present. Nothing in the decision suggests that Mr. Ede was present for any part of the trial.

(c) *Petition to the High Criminal Court*

[52] This document, dated September 20, 2018, is a petition to the 9th High Criminal Court in Istanbul in relation to the court's decision concerning Mr. Ede. It was submitted by a Turkish lawyer on behalf of Mr. Ede. It requested "the abolition of the convictions given" and "renewal of the trial" because the court's decision was rendered without hearing any defence from Mr. Ede. The petition also specifically asserts that Mr. Ede was not present when the court delivered its verdict.

B. *Decision Under Review*

[53] The RPD begins the decision by noting that the Minister alleged that Mr. and Ms. Ede "obtained refugee status by misrepresenting the criminal record of the male Respondent Kemal Ede."

[54] After determining which of the post-hearing documents submitted by counsel for Mr. Ede would be admitted, the RPD turns to an assessment of Mr. Ede's credibility. The RPD begins by commenting on three aspects of Mr. Ede's testimony. First, at the beginning of the hearing, Mr. Ede "denied three times that he had been convicted of drug smuggling in Turkey in 2012.

Finally, in the course of being questioned by the Minister's Representative, he admitted that he was found guilty in a court in Turkey." Second, Mr. Ede gave "confused and incoherent evidence about when he told his wife [. . .] that he had been arrested and convicted of smuggling heroin. He was consistent in maintaining that he told her of his conviction before the couple came to Canada in 2004, but he gave several answers indicating that he may have told his wife in 2001, or 2002 or 2003 or 2004." Third, Mr. Ede testified on August 7, 2019, "that he was not aware that he had been charged with any crime" despite the fact that he had testified on October 15, 2018, that he had been arrested and questioned by police about drug smuggling and that he had spent some three months in jail in 2004 "while the matter was being dealt with by the courts."

[55] The RPD then turns to the information Mr. Ede had provided in support of his refugee application. Mr. Ede had answered "Yes" to the question "Have you ever been sought, arrested or detained by the police or military or any other authorities in any country, including Canada?" and referred to an attached narrative. The RPD notes that this narrative refers to several occasions between September 1980 and March 2003 when Mr. Ede was detained by Turkish authorities. The RPD finds, however, that "[a]t no time did [Mr. Ede] disclose that he had been arrested and detained for a period of three months in 2004, nor did he disclose the reasons for such detention."

[56] The RPD then makes the following finding:

> It is inconceivable that a person could be on trial in state security court, detained for three months, and yet allege that he had not been charged with an offence, nor had he ever been detained for that reason. On a balance of probabilities, the male Respondent

> did know when he was detained by Turkish police in 2004 and that he was charged with drug smuggling. Therefore, the panel finds that he was not telling the truth when he testified that he was not aware of being charged with a crime by Turkish authorities.

[57] The RPD also finds on a balance of probabilities that, notwithstanding his denial, Mr. Ede was present at this trial, including when the verdict was announced. The RPD notes that this is stated in the INTERPOL Red Notice. While the RPD also notes that Mr. Ede's evidence that he was not in Turkey in March 2012 (when the verdict was announced) is consistent with Turkish border control records, this "is not irrefutable proof [. . .] that [Mr. Ede] was not present in a Turkish court in 2012 when his trial took place. Even if [Mr. Ede] is correct, this does not take away from the fact that he misrepresented that he had not been arrested and had not been charged with an offence in Turkey." (Despite this comment, the RPD expressly finds that Mr. Ede is not correct about this.)

[58] In summary, the RPD finds that Mr. Ede "was vague and gave contradictory and untrustworthy evidence."

[59] On this basis, the RPD concludes that the Minister's evidence had established, on a balance of probabilities, that Mr. Ede misrepresented himself when he applied for refugee protection – specifically, by failing to disclose that he had previously been arrested in Turkey and had been charged with a serious offence, namely drug smuggling. Without any further analysis, the RPD concludes that these were material misrepresentations: "The original panel, if it had been aware of those misrepresentations, would likely have rendered a determination other than the one that was rendered." Finally, the RPD finds that "there is no other sufficient credible

evidence that was considered at the time of the first determination to justify refugee protection." Consequently, "[b]ut for the misrepresentation, which information was not before the original panel," Mr. Ede would not have been declared to be a Convention refugee. The RPD therefore allowed the application to vacate the decision granting Mr. Ede refugee protection.

C. *Analysis*

[60] Mr. Ede challenges the RPD's decision on two main grounds: first, that the RPD's analysis of the causal nexus between the misrepresentation and the granting of refugee protection is unreasonable; and second, that the RPD's findings of fact, including its adverse findings regarding his credibility, are unreasonable. The respondent counters that the RPD's adverse credibility findings are determinative and reasonable. In my view, the determinative issue on this application is whether the RPD's finding of misrepresentation is unreasonable. That finding depends entirely on the RPD's adverse findings regarding Mr. Ede's credibility. I agree with Mr. Ede that those findings are unreasonable.

[61] The RPD's central finding was that Mr. Ede "was not telling the truth when he testified that he was not aware of being charged with a crime by Turkish authorities." This is the foundation for the finding of misrepresentation. The basis for this finding was the RPD's view that it was "inconceivable that a person could be on trial in state security court, detained for three months, and yet allege that he had not been charged with an offence." While this might be the case in Canada, the RPD does not provide any basis for its understanding of Turkish criminal procedure that would rule out this possibility. Moreover, there is nothing in the record to suggest that a party detained for questioning about a criminal matter in Turkey (even for three months)

would necessarily be *charged* with an offence or, even if that person had in fact been charged, that he would necessarily have been *informed* of this fact if subsequently released without a trial. The RPD's determination is unreasonable because the reasons read in conjunction with the record do not make it possible to understand its reasoning on this critical point: cf. *Vavilov* at para 103.

[62] I acknowledge that, even if this specific finding is not reasonably supported by the reasons or the record, the RPD's disbelief of Mr. Ede's denial that he knew he had been charged with exporting heroin could still be supported by its general determination that Mr. Ede was not a credible witness. After all, the RPD found that he was "vague and gave contradictory and untrustworthy evidence." However, none of the other considerations the RPD relied on to reach this conclusion reasonably support it.

[63] First, the RPD appears to have found that Mr. Ede gave contradictory evidence regarding whether he had been convicted of exporting heroin: after repeatedly denying this, Mr. Ede eventually acknowledged that he had been convicted by the Turkish court in 2012. As set out above (see paragraphs 38 to 40), Mr. Ede's evidence on this point is certainly confusing. However, before the RPD could reasonably conclude that this testimony was *contradictory* and, as such, undermined Mr. Ede's credibility, it was required to consider whether there might be some other explanation for the apparent inconsistencies – for example, that there were interpretation problems or that Mr. Ede had not understood the questions correctly. These were reasonable possibilities on the record before the RPD. The RPD was not required to accept these

explanations but if it did not accept them (as must have been the case, assuming it even considered them), it was required to explain why. It did not do so.

[64] Second, the RPD found that Mr. Ede gave "confused and incoherent evidence about when he told his wife [. . .] that he had been arrested and convicted of smuggling heroin. He was consistent in maintaining that he told her of his conviction before the couple came to Canada in 2004, but he gave several answers indicating that he may have told his wife in 2001, or 2002 or 2003 or 2004." The RPD has misapprehended the evidence: cf. *Vavilov* at para 126. There was never any suggestion that Mr. Ede and his wife discussed his *conviction* before they left Turkey. (That conviction, of course, only occurred in 2012, years after they came to Canada.) What he was asked about was whether he and his wife had discussed the drug smuggling incident. Mr. Ede's evidence on the point was clear: he had explained to his wife that his truck had been seized because drugs had been discovered and this was why they had to sell their house (to pay off the loan for his truck). The only thing he could not recall was when this all happened.

[65] Third, the RPD's finding that Mr. Ede was present for his trial in Turkey (and its consequent disbelief of his denial that he was there) is unreasonable. The only "evidence" that Mr. Ede was there is the uncorroborated statement to this effect in the Red Notice. On the other hand, Mr. Ede's denial that he was there is consistent with the Turkish border control records (which are themselves consistent with Canadian border control records and with information in Mr. Ede's passport). The RPD reasoned that the Turkish records are not "irrefutable proof" that Mr. Ede was not present in court in 2012 when the trial took place. This may be true, but it is also beside the point. In addition to placing an unreasonable burden of proof on Mr. Ede, this is

not a reasonable basis to reject his evidence. Further, the RPD fails to address the other evidence suggesting that Mr. Ede was *not* present – namely, the decision of the High Criminal Court and the petition to re-open the trial. The RPD also fails to consider how it could be that, if he were present when he was found guilty and sentenced to a lengthy term of imprisonment, Mr. Ede had simply left the court and the country, as he must have done. In short, the RPD has fundamentally failed to account for the evidence before it: cf. *Vavilov* at para 126.

[66] Finally, it is important to note that there was no direct evidence that, when he applied for refugee protection in 2005, Mr. Ede knew that he had been charged with a drug offence in Turkey. This was the crux of the allegation of misrepresentation. The RPD rested its finding that Mr. Ede did know this entirely on its rejection of his denial. In the absence of any direct evidence to support an affirmative finding that Mr. Ede knew he had been charged, it was unreasonable for the RPD to base this finding simply on the rejection of Mr. Ede's denial. If nothing else, this reflects a fundamental misunderstanding of the burden of proof in a matter such as this.

[67] In summary, the RPD's determination that Mr. Ede withheld material information when he applied for refugee protection in Canada because he knew he had been charged with a serious criminal offence in Turkey and did not disclose this is unreasonable. This central finding lacks justification, intelligibility and transparency. This renders the decision as a whole unreasonable. Mr. Ede's application for judicial review must, therefore, be allowed.

IV. CONCLUSION

[68] For these reasons, the application for judicial review of the decision to cease Ms. Ede's refugee protection is dismissed and the application for judicial review of the decision to vacate Mr. Ede's refugee protection is allowed. The decision of the Refugee Protection Division dated August 23, 2019, in respect of Kemal Ede is set aside and the matter is remitted to the Refugee Protection Division for redetermination. For greater certainty, since the Refugee Protection Division did not address the merits of the Minister's application to cease Mr. Ede's refugee protection, it is open to the Minister to proceed with that application again, if so advised.

[69] The parties did not suggest any serious questions of general importance for certification under paragraph 74(d) of the *IRPA*. I agree that none arise.

JUDGMENT IN IMM-5902-19 & IMM-5903-19

THIS COURT'S JUDGMENT is that

1. The application for judicial review in IMM-5903-19 is dismissed.
2. The application for judicial review in IMM-5902-19 is allowed.
3. The decision of the Refugee Protection Division dated August 23, 2019, vacating the decision granting Kemal Ede refugee protection is set aside and the matter is remitted to the Refugee Protection Division for redetermination.
4. For greater certainty, since the Refugee Protection Division did not address the merits of the Minister's application to cease Kemal Ede's refugee protection, it is open to the Minister to proceed with that application again, if so advised.
5. No question of general importance is stated.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5902-19
STYLE OF CAUSE:	KEMAL EDE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
AND DOCKET:	IMM-5903-19
STYLE OF CAUSE:	FIRDEVS EDE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	MAY 19, 2021
JUDGMENT AND REASONS:	NORRIS J.
DATED:	JULY 30, 2021

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