Federal Court  Cour fédérale

Date: 20211101

Docket: IMM-5838-20

Citation: 2021 FC 1165

Ottawa, Ontario, November 1, 2021

PRESENT: The Honourable Mr. Justice Henry S. Brown

BETWEEN:

BAYRAM ASLAN

Applicant

And

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review by the Applicant pursuant to s. 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], of an adverse Pre-Risk Removal Assessment [PRRA] by a Senior Immigration Officer [Officer] dated February 12, 2020 [Decision].

II. Facts

[2] The Applicant is a 45-year-old citizen of Turkey and is of Kurdish ethnicity. He alleges fear of persecution due to his Kurdish ethnicity, anti-government political opinion, and his support for the Pro-Kurdish HDP (People's Democracy Party).

[3] In February 2018, the Applicant says he was detained by police after attending his local HDP office. While in detention, he was subjected to verbal and physical abuse.

[4] In January 2019, the Applicant started work as a crewmember on a ship. In July 2019, while sailing from Spain to Canada, the Applicant got into an argument with crewmates who were insulting Kurds and the HDP party. In response, the Applicant made a comment insulting President Erdoğan of Turkey, which led to him being beaten and threatened by his crewmates. They threatened to report what he had said once they returned to Turkey.

[5] Soon afterwards Turkish police visited his home and asked his wife about his whereabouts. While the Officer dealt with this visit, no mention or discernible attention was paid to the wife's allegation that the Turkish police not only physically assaulted her, but also verbally attacked her and called her a liar. Notwithstanding this, the Officer said there was "no indication" Turkish police were interested in the Applicant for the comments he made against the President.

[6] In August 2019, the Applicant was granted entry into Canada. Shortly thereafter, he deserted his ship, thereby ceasing to be a temporary resident. An immigration warrant was issued for his arrest. When the Applicant eventually attempted to claim refugee protection, he was told a removal order had been issued against him because he deserted the ship and failed to regularize his status. As such, he was precluded from making a refugee claim.

[7] He was, however, given a PRRA which was dismissed, which dismissal is the subject of this application for judicial review. When the Respondent attempted to deport him from Canada, this Court issued a stay.

III. Decision under review

[8] In February 2020, the Officer rejected the Applicant's PRRA.

[9] New evidence was assessed by the Officer because the Applicant did not have a hearing before the Refugee Protection Division [RPD].

[10] Regarding the statements made on the ship, the Officer noted country condition evidence stating those who are reported for criticizing President Erdoğan may be detained, prison conditions in Turkish prisons are harsh, and those in detention have reported instances of torture. The Officer accepted as a fact the Applicant cursed the President in front of crewmates and that his crewmates told him they would "report what he had said".

[11] However, the Officer found the Applicant failed to produce sufficient evidence to demonstrate: 1) he would be arrested and beaten in prison for his statements, 2) police were interested in him for comments made against the president when they visited his wife in August 2019, and 3) those who desert ships are detained upon re-entry to Turkey. Therefore, the Officer found it is less likely than not the Applicant would be at risk upon return to Turkey for comments he made on the ship.

[12] Regarding ethnicity, the Officer found the Applicant had demonstrated he is an individual of Kurdish ethnicity. However, the Officer noted the submitted country condition evidence describes the general country conditions in Turkey, relates to conditions faced by the general population, or describes specific events faced by persons not similarly situated to the Applicant. Thus, the Officer found the Applicant had not linked the evidence to his personalized, forward-looking risk in Turkey.

[13] Moreover, the Officer acknowledged the Applicant's description of various instances of discrimination due to his Kurdish ethnicity and that conditions in Turkey are not ideal for what the Officer considered "some Kurds". After reviewing the country condition evidence, the Officer found the Applicant if returned will not be subjected to discrimination amounting to persecution due to his Kurdish ethnicity.

[14] Regarding the Applicant's pro-Kurdish political activity in Turkey and the alleged incident in 2018 when he was arrested, beaten and detained for a day after visiting the HDP office, the Officer noted the Applicant did not indicate whether he was charged with an offence,

he was able to continue working, left the country on a valid passport, and no further interactions with authorities were reported until their visit to the Applicant's wife in 2019. As such, the Officer found the Applicant did not establish a profile of a politically active Kurd to the degree that authorities would harass, intimidate, and imprison him upon his return.

[15] Regarding the Applicant's pro-Kurdish political activity in Canada, the Applicant states he has been actively involved in the Kurdish Community and Information Center and has attended various events and demonstrations against the Turkish government. However, the Officer notes a lack of detail surrounding these events, as well as a lack of documentary evidence to indicate whether the Applicant's participation in these activities is known to the Turkish government or whether the Turkish government monitors the activities of its citizens when they are abroad.

[16] The Applicant was found to be neither a *Convention* Refugee nor a person in need of protection.

IV. Issues

[17] The only issue in this application is whether the Decision is reasonable.

V. Standard of Review

[18] In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, majority reasons by Justice Rowe [*Canada Post*], which was issued at the same time as the Supreme

Court of Canada's decision in *Vavilov*, the majority explains what is required for a reasonable decision, and importantly for present purposes, what is required of a court reviewing on the reasonableness standard:

> [31] 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" (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
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> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
>
> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).
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> [Emphasis added]

[19] The Supreme Court of Canada in *Vavilov* at para 86 states, "it is not enough for the outcome of a decision to be justifiable. Where reasons for a decision are required, the decision must also be justified, by way of those reasons, by the decision-maker to those to whom the

decision applies," and provides guidance that the reviewing court review decide based on the record before them:

> [126] That being said, a reasonable decision is one that is justified in light of the facts: *Dunsmuir*, para. 47. The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them: see *Southam*, at para. 56. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. In *Baker*, for example, the decision maker had relied on irrelevant stereotypes and failed to consider relevant evidence, which led to a conclusion that there was a reasonable apprehension of bias: para. 48. Moreover, the decision maker's approach would *also* have supported a finding that the decision was unreasonable on the basis that the decision maker showed that his conclusions were not based on the evidence that was actually before him: para. 48.
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> [Emphasis added]

VI. Analysis

A. *Did the Officer apply the wrong legal test under s. 96?*

[20] The legal threshold and applicable test to demonstrate a well-founded fear of persecution under section 96 of *IRPA* has been expressed as "serious possibility" or "reasonable chance". This is distinct from the standard of proof for findings of fact which is a "balance of probabilities": *Gebremedhin v Canada (Minister of Citizenship and Immigration)*, 2017 FC 497 [McVeigh J] at para 28 [*Gebremedhin*].

[21] The Applicant submits the Officer applied the wrong legal threshold under section 96 of *IRPA.* The Officer found "on a balance of probabilities that it is less likely than not that the applicant would be at risk of torture, or risk of cruel and unusual treatment or punishment or at

risk to life upon return to Turkey due to comments he made on a ship." The Applicant submits the Officer either applied the legal threshold under section 97 of *IRPA* to a section 96 claim, or failed to understand this part of the claim presented a nexus to section 96 (political opinion). The Applicant cites generally to *Ramanathy v Canada (Citizenship and Immigration),* 2014 FC 511 [Mosley J] [*Ramanathy*].

[22] The Applicant further submits the Officer made a similar error when discussing risk faced by the Applicant due to his Kurdish ethnicity: "Whether discrimination reaches the level of persecution is determined on a balance of probabilities." The Applicant submits the standard of proof for findings of fact is "balance of probabilities" and the Officer erred because the determination of whether a claimant will face discrimination that amounts to persecution is a legal threshold under section 96.

[23] The Applicant acknowledges the Officer did refer to the correct legal threshold elsewhere in the Decision but submits this is not sufficient to cure the error, see *Gopalarasa v Canada (Citizenship and Immigration),* 2014 FC 1138 [Diner J] at paras 25-27. The Applicant further relies on *Ramanathy* at para 23 where this Court found when a decision-maker applies the wrong legal threshold, the application for judicial review must be granted irrespective of any other issues.

[24] That said, in my view the Decision is read as a whole, demonstrates the Officer did not misunderstand the allegations about the ship or apply the wrong test for that part of the claim. The Officer assessed the claim on the entirety of the Applicant's circumstances, as well as

political opinion, and concluded he did not have the profile of someone whose political opinion would put him at risk. Ultimately, the Officer's findings in relation to the comments on the ship turned on the fact there was a lack of sufficient evidence to show the crewmates had actually reported his comments.

[25] Thus, this case is like *Gebremedhin* in which Justice McVeigh found that when the decision is assessed as a whole, the RAD did not impose a higher legal threshold than was required:

> [29] The RAD assessed whether the Applicant's activities in Canada would come to the attention of the Ethiopian authorities. This is a factual determination which the RAD made on a balance of probabilities. This is not the same as replacing the legal threshold of "serious possibility" of persecution (*Sebastio*, above, at paras 14-15). Once the RAD made its factual determinations on a balance of probabilities, it then looked at the totality of evidence and determined that the Applicant did not face a serious possibility of persecution. When the decision is assessed as a whole, the RAD did not impose a higher legal threshold than was required. The RAD found there was no basis for a sur place claim.

[26] See also *Jeyaratnam v Canada (Citizenship and Immigration)*, 2018 FC 1244 at para 45 [*Jeyaratnam*], where Justice Russell found: "A reading of the whole Decision makes it clear that the RPD did not conflate the standard of proof test ("balance of probabilities") with the legal test for persecution ("serious possibility" or "reasonable chance or good grounds"). Wherever the RPD invokes the "balance of probabilities" test, it is clearly referring to the standard of proof, and the distinction is enforced in the conclusion."

[27] Here, the Officer concluded:

> The onus is on the applicant to objectively support the personal and forward-looking assertions of risk that they believe exist for them in their home country. I find that there is a lack of sufficient evidence to suggest such risk. Therefore, pursuant to section s 96 and 97 of the IRPA, I find that the applicant does not face more than a mere possibility of persecution in Turkey nor is he more likely than not to face a danger of torture, or a risk to life, or a risk of cruel and unusual treatment or punishment. The application has failed to meet the requirements of Sections 96 and 97of the IRPA.

[28] As in *Jeyaratnam* and *Gebremedhin,* read the decision as a whole the Decision makes it clear the Officer did not conflate the standard of proof test with the legal test for persecution.

B. *Did the Officer unreasonably assess risk faced by the Applicant due to insulting the president of Turkey?*

[29] The Applicant submits, and I agree, the Officer unreasonably assessed his risk due to insulting the president of Turkey by mischaracterizing his wife's allegations regarding the police visit to her home in August 2019. The wife's letter states of the police: "They asked if he went to Canada. Since I was scared I did not tell them that my husband made refugee claim. Since I answered 'no' to all of their questions they told me that I was lying to them. They punched me and used bad words against me."

[30] Despite this, the Officer found there was "no indication" that police were interested in the Applicant for his comments.

[31] With respect, the Officer ignored "the most salient, relevant and probative element of the incident".

[32] This violent and abusive conduct by Turkish police establishes a degree of interest in the Applicant by Turkish authorities on this record. The Officer focused on one aspect of the letter (the police asking if the Applicant had gone to Canada), but wholly ignored the unchallenged fact that police assaulted the Applicant's wife and called her a liar during their August 2019 visit. The Officer neither grappled with this undisputed fact, nor was it considered.

[33] In addition the Officer mischaracterized the evidence when stating there was "no indication" of interest. The evidence did not support that finding; the word "no" is an absolute which could not be used because there was some evidence to the contrary, namely the undisputed fact Turkish police showed up at the wife's home and physically and verbally abused her shortly after the Applicant criticized the Turkish President.

[34] I also agree with the Applicant's concern about being detained or arrested upon return to Turkey is not speculative, as found by the Officer. The Officer accepted the Applicant was in fact threatened with being reported for cursing President Erdoğan. In addition, the Officer not only acknowledged those who are reported for criticizing President Erdoğan may be detained, but affirmed that prison conditions in Turkey are harsh and there have been reported instances of torture by those in detention.

[35] On this point, the Applicant relies on *Zhang v Canada (Citizenship and Immigration),* 2008 FC 533 [Dawson J] at para 2 where this Court held:

> [2] Drawing an inference is a matter of logic. As stated by the Newfoundland Supreme Court (Court of Appeal) in *Osmond v. Newfoundland (Workers' Compensation Commission)* (2001), 200 Nfld. & P.E.I.R. 203 at paragraph 134:

> Drawing an inference amounts to a process of reasoning by which a factual conclusion is deduced as a logical consequence from other facts established by the evidence. Speculation on the other hand is merely a guess or conjecture; there is a gap in the reasoning process that is necessary, as a matter of logic, to get from one fact to the conclusions sought to be established. Speculation, unlike an inference, requires a leap of faith.

[36] In my view, the Officer acted unreasonably in finding the Applicant's concern of being detained or arrested upon return to Turkey was speculative; on these facts, and with respect, it was not. Once again, the Officer stepped outside the factual and legal constraints imposed by this record.

[37] I also agree the Officer acted unreasonably in requiring proof the threats he received will be carried out. The Applicant relies on *Kulmiye v Canada (Citizenship and Immigration)*, 2014 FC 1198 [Boswell J] at para 26. Here, the Officer accepted the threat occurred but doubted whether the Applicant had been reported, despite his wife's letter describing when police visited the home, asked about his whereabouts, and then assaulted her and accused her of lying. This finding was not available to the Officer on this record which obviously failed to consider the physical and verbal police attack on the wife.

[38] Overall, in my respectful view, the Officer's assessment of the Applicant's risk due to insulting the president of Turkey was unreasonable. I am unable to say what the result would have been but for the unreasonable findings noted above; I conclude it is not safe to allow the Decision to stand.

VII. Conclusion

[39] In my respectful view, the Applicant has shown the Decision of the Officer was unreasonable based on the Officer's assessment of risk arising from his insulting the President of Turkey. The Decision will be set aside.

VIII. Certified Question

[40] Neither party proposed a question of general importance, and none arises.

JUDGMENT in IMM-5838-20

THIS COURT'S JUDGMENT is that judicial review is granted, the Decision is set aside, the matter is remanded to a different Officer for reconsideration, no question of general importance is certified, and there is no Order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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