Federal Court  Cour fédérale

Date: 20220405

Docket: IMM-7408-19

Citation: 2022 FC 471

Ottawa, Ontario, April 5, 2022

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

ALISAN ARSU

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 November 1, 2019 [Decision]. The Applicant is a 66-year old citizen of Turkey. He is of Kurdish ethnicity and practices the Alevi faith.

II. Facts

[2] The Applicant alleges his family in Turkey has a history of protesting against the Turkish state as a supporter of the People's Democratic Party [HDP]. As a result, he was subject to arrests, torture and assault by police. These circumstances eventually forced the Applicant to flee Turkey. The Applicant entered Canada in April 2015 with one of his daughters and subsequently made a claim for refugee protection. The Refugee Protection Division [RPD] refused their claims in July 2015, finding them not credible. Leave to judicially review the RPD decision was dismissed in November 2015.

[3] The Applicant submitted a PRRA application in March 2019, alleging new *sur place* risk arising after his refugee claim was decided in 2015. The Applicant's daughter is not a minor nor a dependant (she is 33-years old) and was not included in his PRRA.

III. Decision under review

[4] The Officer rejected the Applicant's PRRA.

[5] New evidence was provided by the Applicant to corroborate his allegations of new risk arising after 2015, including:

- Sworn statement from his nephew;
- Letters from his wife, neighbour and two daughters in Turkey;
- A complaint written by his wife to Turkish authorities;
- Letters from Kurdish and Alevi community members and organizations in Canada;

- Photographs of his political participation and activities in Canada; and
- Updated country condition documents.

[6] The Officer accepted the Applicant's Kurdish-Alevi identity and, importantly, that the Applicant has remained politically active against the Turkish regime since his refugee claim including participation in pro-Kurdish demonstrations in Canada that were posted on social media. However, the Officer found the Applicant had not produced sufficient objective evidence to establish his perception as a dissident by Turkish officials or how they could accurately identify him during these activities in Canada.

[7] With respect to the Applicant's personal evidence from Turkey, the Officer noted the RPD's findings and found the Applicant is essentially re-arguing the basis of his refugee claim. The Officer found the facts outlined in the Applicant's documents are materially consistent with those already presented to the RPD and are not capable of overcoming the previous credibility findings.

[8] The PRRA Officer found the country condition evidence submitted speaks only to a generalized risk, and do not establish a linkage directly to the Applicant's personal circumstances.

[9] The Officer concluded the Applicant provided insufficient objective evidence indicative of new risks that have arisen since his RPD decision and was not persuaded to conclude differently from the decision of the RPD. The Officer found the Applicant has not sufficiently demonstrated he is at risk in Turkey under s. 96 or s. 97 of *IRPA*.

IV. Issues

[10] The issue is whether the Decision is reasonable.

V. Standard of Review

[11] In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, issued at the same time as the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the majority per Justice Rowe explains what is required for a reasonable decision, and 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]

[12] 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 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]

[13] Moreover, *Vavilov* requires the reviewing court to assess whether the decision subject to judicial review meaningfully grapples with the key issues:

> [128] Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis"

> (*Newfoundland Nurses*, at para. 25), or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (para 16). To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. However, a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning: *Baker*, at para. 39.

VI. Analysis

[14] In his PRRA application, the Applicant argued two distinct but related risks arising from his profile as a politically active Kurdish Alevi: 1) his ongoing political participation has led to a *sur place* risk, and 2) his commitment to advocating for Kurdish rights and expressing his dissent against the Turkish government will put him at risk if returned to Turkey. He provided photos displaying his political activism (shared on social media), as well as letters from the Toronto Kurdish Community & Information Centre and the Canadian Alevi Culture Centre.

[15] Importantly, the Applicant provided country condition evidence to establish that following an attempted coup d'état in Turkey in 2016, someone with the Applicant's profile as a visible Kurdish Alevi political activist is at risk of arbitrary arrest, detention and violence.

[16] Notwithstanding, the Officer found the Applicant's personal evidence was "essentially re-arguing the basis of his refugee claim", found the country condition evidence was

"generalized in nature", and overall found "the applicant has provided insufficient objective evidence that would be indicative of a new risk".

[17] In my view, the Officer's treatment of the evidence was unreasonable. I say this because the Applicant's refugee claim was decided by the RPD in 2015 on facts arising well before the attempted coup d'état against President Erdoğan in July 2016. There is no doubt the situation for dissidents and opponents of the Erdoğan regime changed remarkably in and after July 2016, and changed for the worse. People whose profile would not attract attention in 2015 became subject to arrest, arbitrary detention and imprisonment and worse virtually overnight. This Officer in my respectful view did not come to grips with this new evidence as they should have.

[18] I agree PRRA officers are charged to assess new risks arising since a previous risk determination be it by a valid RPD, RAD, PRRA or otherwise. As a consequence, PRRA officers are bound to accept the results of a prior risk assessment. Put another way, a PRRA is not intended to be a second refugee claim or an appeal of an RPD decision (*Inbarooban v Canada (Citizenship and Immigration),* 2019 FC 802 [per Bell J] at para 17) and a PRRA officer may properly rely on findings made by the RPD (*Mahamat v Canada (Citizenship and Immigration),* 2019 FC 1360 [per LeBlanc J as he then was] at para 12).

[19] However, the rule that PRRA officers are bound to accept the results of a prior risk assessment logically applies only where personal or profile conditions of the claimant and or country conditions remain materially unchanged. Deference afforded to negative RPD decisions is not absolute. Previous findings may be rebutted by new evidence of materially changed

circumstances of the applicant or changed country conditions. See *Baydal v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 711.

[20] In the result, where personal or country condition circumstances have changed between the relevant risk assessment and the PRRA, the officer must reassess the risk and may not defer to the findings of an earlier assessment. This is because the underlying factual conttext of the earlier risk assessment no longer exists. It seems to me this is the rationale underlying Justice Grammond in *Magonza v Canada (Citizenship and Immigration)*, 2019 FC 14 at paras 66 to 68 [*Magonza*]:

> [66] That leaves me with the RPD's and RAD's negative credibility findings against Ms. Magonza. PRRA officers may rely on adverse credibility findings made by previous decision-makers (*Perampalam* at para 20; *Ahmed* at para 36). However, this does not mean that PRRA officers may disbelieve every piece of evidence brought by an applicant for the sole reason that the applicant was found not to be credible by the RPD or RAD. If that were the case, the PRRA process would be rendered largely nugatory for a significant class of applicants (see, by analogy, *Chen v Canada (Citizenship and Immigration)*, 2015 FC 565 at para 16).
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> [67] When importing credibility findings made in prior proceedings, PRRA officers must explain why those findings affect the evidence before them. In principle, the evidence presented to the PRRA officer must be different from that before the RPD and RAD. Thus, it would normally require a separate credibility assessment (*Perampalam* at para 42).
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> [68] The documents filed by Ms. Magonza in support of her PRRA application were not the same as those in evidence before the RPD and RAD. As a result, the credibility findings made by the RPD and RAD can only be transposed to them if some explanation is given (see, for a similar situation, *Dinartes v Canada (Citizenship and Immigration)*, 2018 FC 986 at para 18 [*Dinartes*]; *Martinez* at paras 27-28). The PRRA officer gave no such explanation and did not find that any of the documents submitted by Ms. Magonza were forged or contained false information. As I

> mentioned above, I am unable to find any obvious reason to doubt their authenticity.

[21] In this case, the Applicant pointed to new risks for political activists arising out of the attempted coup d'état in 2016, which took place more than a year after the original RPD decision. He also made submissions on his *sur place* risk, and provided changed country condition evidence on the targeting and surveillance of Turkish political dissidents aboard.

[22] That said, the Officer having referred to the new evidence – all of which he accepted – stated that the Applicant "is essentially re-arguing the basis of his refugee claim. The facts outline in these documents are materially consistent with those already presented to the RPD and are not capable of overcoming its findings. Namely, those of credibility." The Applicant says this is unreasonable. I completely agree.

[23] I acknowledge the Respondent submits the Decision is reasonable because: 1) the Officer acknowledged the Applicant's political activism in Canada but was not persuaded his activities would come to the attention of Turkish authorities, 2) the Officer acknowledged photographs taken of the Applicant were shared on social media but was not satisfied Turkish officials would be able to identify him, and 3) the country condition evidence did not indicate whether individuals similarly situated as him would be targeted. The Respondent submits the Applicant did not demonstrate a profile which would bring him to the attention of Turkish authorities such as to put him at risk of persecution, citing to *Payrovedennabi v Canada (Citizenship and Immigration)*, 2022 FC 165, para 9-11, 20, 24; *Akkaya v Canada (Citizenship and Immigration)*, 2015 FC 1162, [per Fothergill J] para 31-34; *Worku v Canada (Citizenship and Immigration)*,

2019 FC 784 [per McDonald J] para 18, 32, 35-36; and *Asfew v Canada (Citizenship and Immigration)*, 2017 FC 800 [per Southcott J] para. 4, 8-11.

[24] However, and in my respectful view, the cases cited by the Respondent are not relevant because they are distinguishable. None involve the sort of material and significant country condition shift lying at the heart of the present case. In the present case, the country of origin (Turkey) experienced a major event in 2016. This event - the attempted coup d'état - occurred well after the Applicant's refugee claim was decided in 2015. Instead of assessing the Applicant's risk as a politically active Kurd after the attempted coup d'état, the Officer assessed the matter as if nothing had changed, i.e., as if the findings of the RPD were as valid in 2021 as they were in 2015, i.e. as if the attempted coup d'état and its aftermath did not occur. Those are not the facts of this case.

[25] The Officer does not dispute the Applicant is politically active in Canada. Instead, the Officer discounts the Applicant's marked political activism in Canada by saying he is "not satisfied Turkish officials would become aware of the Applicant's political activities and expression of his Kurdish-Alevi identity in Canada." With respect, I do not find this persuasive or reasonable. I agree with the Applicant that the better and determinative question, given risk must be assessed on a forward-looking basis, is whether the Applicant would face more than a mere possibility of persecution if he conducted himself in Turkey as he conducts himself in Canada. On the basis of the country condition evidence on the record, I have little difficulty in suggesting the answer to that question would be "yes" - this Applicant would face more than a mere possibility of persecution in Turkey. I suggest but do not conclude on this point, which is

for the Officer on the redetermination of this matter. The point is, this is a question that must be asked and answered but was neither.

[26] In this respect, the Applicant submits and I find the Officer unreasonably fettered his discretion by adopting the 2015 RPD's findings without reasonably considering the differences caused by the intervening attempted coup in 2016.

[27] The difference of course, lies in the alleged consequences of the attempted coup. In this respect, the Officer said nothing and therefore unreasonably assessed the key issues namely changed country conditions and the Applicants alleged *sur place* claim.

VII. Conclusion

[28] The Decision did not come to grips with the alleged key differences between country conditions pre - and post the attempted coup in 2016 and the *sur place* claim. Therefore, the Decision was not justified in light of the facts, evidence, and submissions before the Officer, as required by *Vavilov* at para 126. It also failed to come to grips with the fundamental issues in this PRRA application, contrary to *Vavilov* at para 128. Therefore, judicial review will be granted.

VIII. Certified Question

[29] Neither party proposed a question of general importance for certification, and none arises.

JUDGMENT in IMM-7408-19

THIS COURT'S JUDGMENT is that judicial review is granted, the Decision is set aside, the matter is remanded for redetermination by a different decision maker, 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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