Federal Court  Cour fédérale

Date: 20130308

Docket: IMM-4854-12

Citation: 2013 FC 252

Ottawa, Ontario, March 8, 2013

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

YASAR ARSLAN, SEHRIBAN ARSLAN,
EFE ARSLAN
(a.k.a. EFE YASAR ARSLAN)

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 (Act) for judicial review of the decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board, dated 27 April 2012 (Decision), which refused the Applicants' application to be deemed Convention refugees or persons in need of protection under sections 96 and 97 of the Act.

BACKGROUND

[2] The Male Applicant is a 45-year-old Kurdish citizen of Turkey. The Female Applicant is his wife, who is also Kurdish. The Minor Applicant is their 6-year-old son. The Applicants were living in Adiyaman, Turkey before coming to Canada.

[3] In April, 2004, the Male Applicant was walking home from work when he was stopped by a car. Two men jumped out, put a gun to his head, and pushed him into the car. The men were undercover policemen. They asked the Male Applicant questions about where he had been for the celebration of Newroz, the Kurdish New Year. They said that he had been identified by security agents as a participant in the local celebration. The officers asked him why he had given the victory sign with his fingers at the celebration, and accused him of being a member of the Parti Karkerani Kurdistan (PKK), and of wanting to establish a separate Kurdish state.

[4] The policemen drove the Male Applicant to the outskirts of town. They beat him severely, hitting him with the butt of a gun. One of the officers put a gun to his head and told him that if he filed a report he would be killed. The Male Applicant was left with a large scar on his forehead where he was hit with the butt of the gun. His cousin, a physician, treated his injuries, and the Male Applicant stayed home from work for a week to recuperate.

[5] In September, 2009, the Female Applicant was in a park with her son, the Minor Applicant, who was then two and a half years old. She was speaking to him in Kurdish when a teenager in the park overheard her. He asked her why she was speaking in Kurdish and told her to get out of the park. He then pushed the Female Applicant while she was holding her son and she fell backwards.

Her son hit his head on a metal bar and was knocked unconscious. He was taken to the hospital and had a small fracture.

[6] On 12 September 2010, a referendum was held on amendments to Turkey's Constitution. Kurds had been urged to boycott the referendum by the Kurdish Peace and Democracy (BDP) party. After the polls closed at around 6pm, three men showed up at the Applicants' house. One was the administrator of the town, and the other two were from the governing Justice and Development Party (AKP). The men asked the Applicants why they had not voted. The Applicants replied that they had boycotted the election, and the men shouted abuse at them and then left.

[7] On 20 September 2010, three men with guns showed up at the Applicants' home and pushed their way in. The men asked the Male Applicant whether he was a PKK member and whether he wanted a separate Kurdish state. They searched the home and took all the Kurdish music and newspapers. The Male Applicant asked the men if they had a search warrant, and they said that the police do not need one and arrested him. They took him to police headquarters and interrogated him and held him there overnight. He was accused of being a Kurdish separatist and was punched and kicked. The next day he was released.

[8] The Applicants left Turkey on 17 November 2010, and filed a claim for refugee protection in Canada on 30 November 2010.

DECISION UNDER REVIEW

[9] The RPD rejected the Applicants' claim because it found that their evidence was not credible and that they lacked a subjective fear of persecution.

Credibility

[10] The RPD found the Applicants not to be credible. The Female Applicant said that she did not go to the police after the incident in the park because it is illegal to speak Kurdish in Turkey and so the police would not help; the RPD found this not to be correct. She also said there are no legal Kurdish television networks, but the RPD pointed to documentation that said otherwise. The RPD drew a negative inference from the Female Applicant's description of the assault, as she lived in a predominately Kurdish area where it would be the norm to hear people speaking Kurdish.

[11] The medical report that the Applicants put forward for their son's injuries from the incident in the park did not corroborate that there had been an attack. It said only that his injuries were due to a fall, and does not say that the police were contacted. The RPD said that, based on the other medical document submitted from the 2004 attack on the Male Applicant (discussed below), it appeared to be the norm that a victim is asked if he or she would like to contact the police after an assault.

[12] Both Applicants testified that after the referendum in September, 2010, many Kurds were arrested in Adiyaman. Although there was extensive country condition documentation before the RPD, none of it suggested that this had occurred. The RPD drew a negative inference from the Applicants' claim that the Male Applicant and others were arrested, beaten, and kept overnight immediately following the referendum.

[13] The Male Applicant provided a letter from his cousin, a physician, dated 28 December 2011, describing the injuries he had suffered from the attack in 2004. The RPD gave this letter less weight because it was not a medical report written contemporaneously at the time of the assault in

2004. The letter also fails to say that it was the police who attacked the Male Applicant, and only says that the injuries were "caused by an assault."

[14] The medical letter also says that, on the patient's request, officials were not contacted to press criminal charges. The RPD found that this statement undermined the Male Applicant's claim that it was the police who had attacked him. The Male Applicant testified that his cousin knew it was the police who attacked him; the RPD said that if the cousin knew this it made no sense that he would say that the Male Applicant opted not to report to the police about their own brutality towards him. Based on this, the RPD drew a negative inference.

[15] For the above reasons, the RPD did not find that the Applicants had presented reliable and trustworthy evidence.

Subjective Fear

[16] The RPD also found that the Applicants lacked a subjective fear of persecution in Turkey. This was fatal to their claim under section 96, as both an objective and subjective fear are required, and also undermined their section 97 claim because it was inconsistent with persons who allegedly feared a risk to their lives, a risk of cruel and unusual treatment or punishment, or torture.

[17] The Male Applicant travelled to Finland twice in 2010, and the Female Applicant once. They testified that these were vacations to see family and they never considered filing a refugee claim in Finland. However, four months after their last trip to Finland they left Turkey for Canada in order to file refugee claims here.

[18] The RPD asked the Applicants why they did not file refugee claims while in Finland. They responded that they had good lives in Turkey, and did not want to leave. They had good jobs, and owned their home and car. They had previously had problems in Turkey because they are Kurds, but they were hopeful that the situation would improve. It was not until September, 2010 when their house was searched and the Male Applicant detained and beaten that they decided they could no longer live safely in Turkey. They said that it was at this point that they developed a subjective fear of harm, and two months after the September events they fled the country.

[19] However, the Applicants' evidence indicated that life for them and their extended family members had been tumultuous for years. For example, during the incident in 2004 the Male Applicant had a gun put to his head, and was beaten badly, punched, kicked, and hit with the butt of a gun.

[20] When the Male Applicant was asked why he did not file an asylum claim in Finland after this incident he said it was because at that point he was single and his son was not born. Until the arrest in 2010 he did not feel that he and his family were in danger in Turkey for being Kurds. He reiterated that his life in Turkey was good until the events of 2010.

[21] In June, 2005, the Female Applicant's sister's home was ransacked by the police, and her husband was tortured by police for allegedly being a PKK member. The officers threatened to kill him and claimed that they would be watching him thereafter. According to the Female Applicant's sister and brother-in-law, the police brutally attacked approximately 1000 Kurds celebrating Newroz in their neighbourhood in March, 2008. Many suffered serious injuries, and about 70-80 were arrested, tortured, and detained for long periods of time. The brother-in-law was one of those detained. After he was released the police regularly attended at his house asking why he was

providing monetary support to the PKK. The brother-in-law and his wife fled Turkey for Canada for this very reason.

[22] Considering this, the RPD found that it was hard to understand how the Applicants were hopeful that the situation would improve; contrary to what they asserted, life was not calm post-2004. Further, the threats against the Female Applicant's brother-in-law continued after he fled to Canada in July, 2008, and these threats took place at the home of her mother in 2009 and 2010.

[23] The RPD stated that if the events had occurred as alleged, the Applicants would have sought a way to remain in Finland or elsewhere outside of Turkey earlier than the time when they decided to come to Canada. The incident with the Female Applicant in the park allegedly occurred in September, 2009. She stated that she felt that police would never arrest and prosecute any Turk for assaulting a Kurd. Thus, as of September, 2009 she believed no state protection existed for her in Turkey, yet she did not seek protection while visiting Finland in 2010.

[24] The RPD found that considering the lack of state protection, assault, police detainment of the brother-in-law, massive attacks on Kurds at Newroz celebrations, and the decision of the Female Applicant's sister to flee the country, it was not plausible that life was good for the Applicants in Turkey until 2010. Yet, they testified that they did not have a subjective fear of harm until the 2010 arrest and detention of the Male Applicant.

[25] Furthermore, the Female Applicant knew what had happened to her brother-in-law after he was arrested, yet when her husband was arrested in 2010 she did nothing. She did not call anyone such as human rights organizations or journalists to intervene, or otherwise try to get her husband

released. She allegedly just remained at home. The RPD found that the Female Applicant's actions at the time of her husband's arrest on 20 September 2010 evidenced a lack of subjective fear.

[26] After the Male Applicant was released by the police, he testified that he feared being arrested again. However, he did not try to hide from the police in Adiyaman or flee the city. When asked about this, the Male Applicant said that he did not see any reason to go into hiding. The RPD found that this also evidenced a lack of subjective fear.

[27] For the above reasons, the RPD rejected the Applicants' claim for refugee protection.

ISSUES

[28] The Applicants raise the following issues in this proceeding:

a. Were the RPD's credibility findings unreasonable based on the evidence before it?

b. Did the RPD err by concluding that the Applicants lacked subjective fear?

c. Did the RPD breach the principles of fairness by failing to advise the Applicants of its concerns about the lack of documentation concerning the events that occurred in September, 2010, having accepted the Applicants' assertion that documentation was available?

STANDARD OF REVIEW

[29] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the

reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[30] In *Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 (FCA) (QL) the Federal Court of Appeal held at paragraph 4 that the standard of review on a credibility finding is reasonableness. Further, in *Elmi v Canada (Minister of Citizenship and Immigration)*, 2008 FC 773, at paragraph 21, Justice Max Teitelbaum held that findings of credibility are central to the RPD's finding of fact and are therefore to be evaluated on a standard of review of reasonableness. Finally, in *Wu v Canada (Minister of Citizenship and Immigration)* 2009 FC 929, Justice Michael Kelen held at paragraph 17 that the standard of review on a credibility determination is reasonableness. The standard of review applicable to the first issue in this case is reasonableness.

[31] When assessing whether the RPD erred in regards to an applicant's subjective fear, the appropriate standard of review is reasonableness (*Mailvakanam v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1422 at paragraph 14). This is a matter of mixed fact and law to which deference is owed (*Cornejo v Canada (Minister of Citizenship and Immigration)*, 2010 FC 261 at paragraph 17). The standard of review applicable to the second issue is reasonableness.

[32] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59.

Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[33] The third issue goes to the Applicants' knowledge of the case to be met, and the opportunity of the Applicants to respond to the RPD's concerns. This is a matter of procedural fairness (*Qureshi v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1081 at paragraph 31), and is reviewable on a standard of correctness (*Canadian Union of Public Employees (C.U.P.E.) v Ontario (Minister of Labour)*, 2003 SCC 29).

STATUTORY PROVISIONS

[34] The following provisions of the Act are applicable in this case:

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;
[…]	[…]
Person in Need of Protection	**Personne à protéger**

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

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.

[…] […]

ARGUMENTS

The Applicants

Credibility

[35] The Applicants say that when someone swears to the truth of certain allegations, this creates a presumption that those allegations are true, unless there is reason to doubt their truthfulness (*Maldonado v Canada (Minister of Employment and Immigration)*, (1980) 2 FC 302). The RPD must state clearly the grounds on which it makes its negative credibility findings (*Hilo v Canada (Minister of Employment and Immigration)*, [1991] FCJ No 228). The RPD cannot make adverse credibility findings while ignoring the Applicants' evidence that explains apparent inconsistencies (*Frimpong v Canada (Minister of Employment and Immigration)*, [1989] FCJ No 441).

[36] The RPD must guard against over-zealousness when attacking the credibility of an applicant, particularly when that applicant has testified through an interpreter (*Attakora v Canada (Minister of Employment and Immigration)*, [1989] FCJ No 444 [*Attakora*]). Further, the RPD must have regard for the totality of the evidence before it when assessing credibility (*Owusu-Ansah v Canada (Minister of Employment and Immigration)*, [1989] FCJ No 442 [*Owusu-Ansah*]).

[37] In making credibility findings, the RPD cannot take judicial notice of matters which are not the proper subject of judicial notice (*Lawal v Canada (Minister of Employment and Immigration)*, [1991] FCJ No 211). Inferences as to credibility must be based on the evidence, and the RPD cannot base its credibility findings on irrelevant considerations (*Owusu-Ansah*).

[38] The Applicants further submit that whether a refugee claimant is credible is not determinative of his or her claim if he or she satisfies the subjective and objective components of the test for refugee status (*Attakora*). If the RPD rejects some of the Applicants' evidence but accepts other parts of it, it must still make a determination on the evidence accepted as credible as to whether the Applicants qualify as Convention refugees (*Rajaratnam v Canada (Minister of Employment and Immigration)*, [1991] FCJ No 1271).

[39] The RPD drew unreasonable inferences upon which it based its credibility findings. Based on documentary evidence that Kurdish newspapers and televisions channels are allowed in Turkey, the RPD rejected the Female Applicant's explanation that she did not go to the police about the incident in the park because she did not think they would help her because she was Kurdish.

[40] The evidence before the RPD was that Kurdish culture in Turkey is repressed, and that Kurds are prevented from celebrating Newroz. Documentary evidence before the RPD states that police are often able to act with impunity, human rights abuses by state officials are common, and there is a lack of independent human rights monitoring devices.

[41] Inferences should be nourished by reference to documentary evidence, or based on common sense (*Divsalar v Canada (Minister of Citizenship and Immigration)*, 2002 FCJ 875). The Court said in *Pulido v Canada (Minister of Citizenship and Immigration)*, 2007 FCJ 281 at paragraph 37:

> There are several problems with this submission. First of all, it is well established that in making plausibility findings, the Board must proceed with caution, and that such findings should only be made in the clearest of cases, where, for example the facts are either so far outside the realm of what could reasonably be expected that the trier of fact could reasonably find that it could not possibly have happened, or where the documentary evidence before the tribunal demonstrates that the events could not have happened in the manner asserted by the claimant: see *Divsalar v. Canada (Minister of*

> *Citizenship and Immigration)*, [2002] F.C.J. No. 875, 2003 FCT 653, at para. 24. That is simply not the case here.

[42] The Applicants submit that the RPD drew an unreasonable inference that it was unreasonable for the Female Applicant to choose not to complain to the police in light of the violence that her family members had previously experienced at the hands of the police, and documentary evidence suggesting that such efforts are often futile.

[43] The RPD also drew an unreasonable adverse inference from the fact that the medical report submitted in relation to the Minor Applicant's injuries just said that they were caused by a fall, and not that they were the result of an attack. The Applicants submit that it is absurd to expect a medical report to include reference to an attack or to the police being notified. There does not appear to be a place on the report for such a notation.

[44] Justice Donald Rennie had the following to say on point in *P.U.A. v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1146 at paragraphs 31-32:

> It was unreasonable for the Board to discount the medical report because it did not mention cuts to the female applicant's hands. The applicant testified that the cuts were small and did not require stitches. This was a reasonable explanation. It is also unreasonable for the Board to discount the medical report with respect to the male applicant because it describes an injury from a sharp cutting object, while the applicant testified he suffered multiple cuts. The report does not exclude the conclusion that there was more than one cut and there was no evidence that it was not a genuine document.
>
> With respect to the medical reports, the applicants rely on *Mahmud v. Canada (MCI)*, [1999] F.C.J. No. 729, for the proposition that it was unreasonable to conclude that a document contradicted an applicant's evidence on the basis of what it did not say, rather than what it did say. The Court noted that when an applicant swears the truth of certain allegations this creates a presumption that the allegations are true and, that on the face, the documents support the claimant's allegations in the absence of evidence to contradict the allegations.

[45] In *Mahmud v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 729, the Court noted at paragraphs 11-12:

> In the present case, in effect, the CRDD found the letters submitted by the applicant to be contradictory of the applicant's evidence, not for what they say, but for what they do not say. To follow established authority, the letters must be considered for what they do say. On their face they support the applicant's evidence, and do not provide evidence contradicting that evidence.
>
> Therefore, I find that the approach adopted by the CRDD is contrary to law. Accordingly, the CRDD's decision is set aside and the matter is referred back for redetermination before a differently constituted panel.

[46] As the medical report was consistent with the Female Applicant's story, and bearing in mind the nature of the report, the Applicants submit it was unreasonable for the RPD to use it to undermine their credibility.

[47] The RPD gave the medical letter from the Male Applicant's cousin less weight because it was not written contemporaneously and it did not state that it was the police who had carried out the attack. The RPD also drew an adverse inference from the fact that the letter said that the Male Applicant opted not to contact the police – the RPD did not think it made sense that the cousin would say this when he knew it was the police who attacked the Male Applicant.

[48] The Applicants submit it was unreasonable for the RPD to draw a negative inference from the above omission when the report was generally consistent with what occurred. Further, it was unreasonable for the RPD to draw an adverse inference from the choice of the Male Applicant not to notify the authorities, given that the authorities were the ones who had threatened and assaulted him.

Procedural Fairness

[49] The RPD also drew an adverse inference from the lack of corroborating evidence of arrests of Kurds after the referendum in September, 2010. At the hearing, the RPD asked the Female Applicant whether if it were to check if these arrests occurred it would find that what happened to the Applicants' home in September, 2010 had happened to many other homes of Kurds in Adiyaman that year. The Female Applicant replied that yes, it had happened. The RPD then moved on to other questions (see page 286 of the Applicants' Record).

[50] The Applicants submit that, given this exchange, it was unfair for the RPD to draw an adverse inference from the Applicants' failure to adduce corroborating evidence of the arrests. If the RPD was going to draw an adverse inference from this, it should have given the Applicants notice and an opportunity to adduce the reports. The inference to be drawn from the RPD's response was that it was satisfied with the Female Applicant's response on this point, and there was no indication that it was planning on drawing an adverse inference in this regard. The Applicants submit that this was a breach of natural justice.

[51] In *Romero v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1452, at paragraph 98-99 and 101-103, a decision was set aside in similar circumstances:

> The Applicant says that procedural unfairness has occurred in this case because the RPD did not ask her about the omission of the death threat from the IMM 5611 form she completed. She says that, in fact, the RPD did not ask her any questions about this form at all at the hearing. She says this is akin to the situation in *Kumara*, above, where Justice Hughes had the following to say about the RPD relying upon inconsistencies that have not been put to a claimant for explanation:
>
> > As to the first issue, whether a well founded fear had been established, the Member based the decision on

five incidents found in the Record. The Member found that because of apparent contradictions there was reason to doubt the Applicants' truthfulness in respect of each of the incidents thus the fear could not be well founded. However at no time in respect of any of these incidents were the so-called contradictions put to the Applicants so that they could offer an explanation, if any; or clarify the matter. The Member simply lay in the weeds, waited till the hearing is over, then pulled out apparent contradictions and used them as the basis for disbelieving the Applicants' claim. As Justice Russell wrote in *Shaiq v. Canada (Minister of Citizenship and Immigration),* 2009 FC 149 at paragraph 77:

77 Although the RPD is not required to raise all concerns with an applicant that are related to the Act and the regulations, procedural fairness does require that an applicant be afforded an opportunity to address issues arising from the credibility, accuracy or genuine nature of information submitted. See, for example, *Kuhathasan v. Canada (Minister of Citizenship and Immigration),* [2008] F.C.J. No. 587 at paragraph 37. Consequently, I think the RPD in the present case should have provided the Applicant with an opportunity to address an issue that was central to its negative credibility finding.

In a similar vein Justice Dubé in *Malala v. Canada (Minister of Citizenship and Immigration),* 2001 FCT 94 wrote at paragraphs 23 and 24:

23 A reading of the transcript leads me to believe that the applicant should have been given a better opportunity at the hearing to comment or explain the contradictions the Board saw in her testimony. Moreover, it appears that in certain instances the Board was over-zealous in discovering contradictions where none necessarily existed.

24 A review of the jurisprudence in the matter, as abridged above, reveals that it is not unanimous. It does however establish that, generally, contradictions must be put to the applicant at the hearing to enable him or her to provide all relevant explanations. The applicant must be afforded an opportunity to explain

> fully the alleged inconsistencies. Where the Board prefers the documentary evidence to the sworn testimony of an applicant, it must show clearly why it does so.
>
> While not every apparent contradiction has to be put to an applicant, where, as here, the decision was clearly and only based on five apparent contradictions, those matters should have been put to the Applicants. In respect of each of those instances the Record shows that the apparent inconsistency was never raised with the Applicants. In respect of the bribe allegedly paid by the brother, the Record shows that the Member overlooked the evidence that shows it was paid not by the brother but by a broker. With respect to the identification of a distant family member, the Record does not show, unlike the Member found, that such member was identified as an LTTE member. With respect to why the Applicants could not be found in a small town, the evidence shows that they were in hiding. Further, as will be discussed later, the Member made contradictory findings as to whether this was in fact a small town or teeming metro area. In brief, just on the face of the Record, the Applicants should have been confronted with these matters before the Member jumped to negative conclusions.

The Applicant says hers is a similar lying-in-the-weeds case.

[…]

Although the RPD points out that the "claimant did not mention this allegation when she first reported her claim to Citizenship and Immigration Canada," the RPD's discussion of this issue also deals with the discrepancy between the alleged death threat and the police denunciation filed in El Salvador. Hence, the Respondent takes the position that, even if the RPD did not point out to the Applicant the contradiction between her death threat testimony and what she said in IMM 5611, the RPD "still pointed out to her the same contradiction elsewhere in her evidence." In particular, the Respondent says that the RPD pointed out and gave the Applicant an opportunity to address the police report which did not mention the alleged death threat.

> I do not think that what the Respondent says quite meets the point of concern. It is evident from the Decision that the extremely important negative credibility finding concerning the death threat was based upon the fact that the "claimant did not mention this allegation when she first reported her claim to Citizenship and Immigration Canada, nor did she mention it to the authorities in her own country." In other words, the omission from IMM 5611 and the police report are both material and equally important to the negative credibility finding. Each supports the other. We do not know what the result would have been had the Applicant been placed on notice of the discrepancy arising from IMM 5611, and given the opportunity to explain. Had her explanation satisfied the RPD, it might have found she received a death threat. This would have been very important for the whole Decision because the RPD would have been obligated to assess that risk, even if the Applicant was wrong when she thought she was in danger from the police, if someone had threatened her life.
>
> For these reasons, then, and relying upon the authorities referred to above, I think it was unfair on the facts of this case for the RPD to rely upon what the Applicant said in IMM 5611 and her later death threat testimony without putting the discrepancy to the Applicant and allowing her a chance to explain.

[52] The Applicants submit that the same reasoning applies in this case. Having raised the issue of whether documentation was available, and having apparently accepted that it was, if the RPD was concerned with the absence of documentation it ought to have raised that concern with the Applicants.

Lack of Subjective Fear

[53] The RPD found that the Applicants' trips to Finland demonstrated a lack of subjective fear, and rejected their explanation that they only decided to flee after the September 2010 incident. The Applicants submit that they explained in a very cogent manner that they did not wish to flee Turkey unless they absolutely had to, and that they had a good life there. They explained that the 2004 incident occurred before the birth of their son. The 2009 incident frightened them, but was not

enough to cause them to flee the country. It was only after the events following the referendum that the Applicants lost hope of any possibility of change and decided to flee the country.

[54] The RPD's reliance on the fact that the Female Applicant's sister fled earlier is particularly troubling, given that her claim was accepted and she was found credible. The Court has held that a finding of a lack of subjective fear is in fact an adverse credibility finding (*Yusuf v Canada (Minister of Employment and Immigration)*, [1991] FCJ No 1049). Given that the Female Applicant's sister's claim was accepted, the Applicants submit it was an error for the RPD to cast doubt on the Applicants' credibility by inferring that these events did not happen.

[55] In *Giron v Canada (Minister of Employment and Immigration)*, [1992] FCJ No 481, the Federal Court of Appeal expressly rejected the drawing of an adverse inference from the failure of an applicant to leave his or her country after an incident of persecution:

> The Convention Refugee Determination Division of the Immigration and Refugee Board ("the Board") chose to base its finding of lack of credibility here for the most part, not on internal contradictions, inconsistencies, and evasions, which is the heartland of the discretion of triers of fact, but rather on the implausibility of the claimant's account in the light of extrinsic criteria such as rationality, common sense, and judicial knowledge, all of which involve the drawing of inferences, which triers of fact are in little, il any, better position than others to draw.
> The documentary evidence shows that Guatemala has perhaps the worst human rights record in the Americas, and that much of its death squad activity is directed against students, particularly those at the claimant's university, and even against ordinary, non-leader students. Given this documentary evidence, the Board's inferences, as to his not being a leader and not having evidence to present about the activities of the death squads, are clearly contrary to it. In point of fact, the claimant was known as an active member of a perceived anti-government group (Appendix at 39).
>
> The fact that he did not reveal the threats he received to other members of his group was explained by the claimant on the ground that he was afraid of informers (Appendix at 41) and that the matter

> was extremely personal (Appendix at 45). He also did not share the fact of receiving threats with his mother and his sister, because they were women (Appendix at 22), though eventually he did tell his mother the substance of what was happening after she had intercepted a telephone threat to him (Appendix at 37). The Board's final comment on this point was (Appeal Book at 272):
>
> > However, if he felt protective of their emotional security, as he claimed, it is not reasonable to believe that he would unhesitantly continue the very activity which was allegedly threatening their lives.
>
> Such a gratuitous counsel of cowardice as the only standard of plausible behaviour can hardly be taken as an objective reflection by the Board. The same may be said of the Board's conclusion (Appeal Book at 272): "In a country with a human rights record such as Guatemala's, we could expect a person under serious threat to go into hiding ...." As for any security precautions he might have taken, it is not obvious to us what they might have been, in circumstances where death squads operated clandestinely, beyond what he actually did, dropping out of classes for a time (Appendix at 34) and taking some precautions on the streets (Appendix at 32).

[56] Further, in *Sundaram v Canada (Minister of Citizenship and Immigration)*, 2006 FC 572, the Court had the following to say on point at paragraphs 6-8:

> In addition, according to the applicant, the Board notes that it does not find it plausible that the applicant would apply for her passport "and then return to the north if she was facing extortion and feared the LTTE would force her to act as a spy for them". However, the applicant submits that these findings result from a superficial appreciation of the evidence. The applicant sought out a passport to visit her daughter in Canada, not to flee the LTTE. At the time that she applied for her passport, the applicant had defied none of the LTTE's demands, and there were no outstanding extortion demands at that time, facts clearly misconstrued by the Board. The fear of being forced to act as a spy by the LTTE was of the army's reaction if problems resumed.
>
> I am inclined to agree with the applicant on this point. The Board seems to have ignored the applicant's evidence that her subjective fear arose after she arrived in Canada and spoke with her daughter and husband, and was informed that the LTTE had been looking for her and demanded that she report to them upon return to Sri Lanka.

> She never professed to have subjective fear prior to this point, and therefore, there is nothing implausible about the applicant returning to the north after applying for her passport so as to visit her daughter. She had no subjective fear of persecution at this point. I find that this conclusion of the Board was therefore patently unreasonable.
>
> The Board also relies on the applicant's failure to leave Sri Lanka earlier as an example of the applicant lacking a subjective well-founded fear of persecution in her native village. This is also a patently unreasonable conclusion because, as noted above, the applicant did not profess to have a subjective fear of persecution at this time.

[57] The Applicants submit that the same reasoning applies in this case. Moreover, the Court has held that re-availment does not preclude an applicant from making a claim if there are subsequent events of persecution that precipitate flight. In *Gurusamy v Canada (Minister of Citizenship and Immigration)*, 2011 FC 990, at paragraph 40, the Court had the following to say on point:

> Also, the finding of re-availment on September 19, 2001 fails to take into account that the Applicant fled Sri Lanka as a result of two precipitating incidents that occurred after that date. Subsequent persecution after re-availment does not preclude a person from making a claim for refugee status without being faced with the re-availment argument. See *Prapahavan v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 272 at paragraph 17.

[58] The Applicants made clear it was the event of September, 2010 that caused them to leave the country. Therefore, the RPD erred by relying on the re-availment in light of this evidence.

The Respondent

Credibility

[59] The Respondent points out that the RPD found the Applicants' claim not to be credible for a variety of reasons. For example, the Female Applicant testified that the Kurdish language is

forbidden in Turkey, but this was not consistent with documentary evidence before the RPD that said that Kurdish is legal and there are Kurdish television channels and newspapers. When asked about this, the Female Applicant replied that there was no Kurdish television in Turkey (see pages 278-279 of the Applicants' Record). The Respondent submits that, as this oral evidence was inconsistent with the documentary evidence, it was open to the RPD to draw a negative inference to the Female Applicant's credibility.

[60] The Female Applicant testified that she was attacked for speaking Kurdish in a park, and the RPD pointed out that the Applicants lived in a predominately Kurdish area where it would be common to hear Kurdish being spoken. Contrary to what the Applicants assert, the RPD did not draw a negative inference from the Female Applicant's failure to go to the police after this assault; it found her description of the event implausible. The Respondent submits it was open to the RPD to find it implausible that the Female Applicant was attacked for this reason.

[61] It was also open to the RPD to find that the medical report submitted for the Applicants' son's injuries did not corroborate their allegations about the incident in the park. Given its other credibility concerns surrounding this alleged attack, it was open to the RPD to give this evidence little corroborative value and to find that it was of insufficient probative value to overcome the credibility concerns about the incident. The RPD did not err by drawing a negative inference from the report's failure to mention that the son was injured because of the attack because the medical note related to the Male Applicant's injuries asked if he wanted to report the assault to the authorities.

[62] Similarly, it was open to the RPD to give the medical letter written by the Male Applicant's cousin little weight. It was not written at the time the assault occurred, it was written by a relative,

and it did not mention that it was the police who had caused the Male Applicant's injuries. It was also reasonable for the RPD to draw a negative inference from the omissions in the report; the physician cousin would have been well aware that the injuries were caused by the police, and the report was written after the Applicants were already in Canada.

[63] The RPD also noted that there was substantial documentary evidence concerning Kurds in Turkey, but none of it supported the Applicants' claim that large groups of Kurds were arrested or harassed after the 2010 referendum in the area where the Applicants lived. The Respondent submits it was reasonable for the RPD to expect there to be documentation of such police action, and to draw a negative inference from the lack of such supporting evidence.

[64] It was reasonable for the RPD to prefer its assessment of the documentary evidence over the Applicants' evidence. The Federal Court of Appeal has held that a claimant's sworn testimony may be rebutted where the documentary evidence fails to mention what would normally be expected (*Adu v Canada (Minister of Employment and Immigration)*, [1995] FCJ No 114 (FCA)).

Procedural Fairness

[65] Contrary to the Applicants' assertion, the RPD did indicate to the Applicants that the documentation of events in Turkey would be checked for evidence substantiating the Applicants' assertions (page 286 Applicants' Record). The RPD did express concern that the documentary evidence should include some mention of police action following the 2010 referendum, and the Applicants were not unaware of this. The onus was on the Applicants to provide such evidence, and they were represented by counsel at the hearing.

[66] The Respondent submits that whether or not there is an onus on the RPD to put a contradiction before a claimant depends on the particular circumstances of the case (*Awolaja v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1240 at paragraph 45; *Dehghani-Ashkezari v Canada (Minister of Citizenship and Immigration)*, 2011 FC 809 at paragraph 14). Here, early in the hearing, the RPD clearly indicated that it intended to check the documentary evidence for corroboration of the Applicants' description of events following the 2010 referendum. If the Applicants had other documentary evidence, the onus was on them to provide such evidence at the hearing. Furthermore, the Applicants were not deprived of an opportunity to respond and had the benefit of counsel at the hearing.

[67] The reasons do not suggest that the RPD failed to consider the Applicants' evidence about what they say happened to Kurds after the referendum. The RPD weighed the Applicants' oral evidence against the documentary evidence. The Federal Court of Appeal has held that a claimant's sworn testimony may be rebutted where the documentary evidence fails to mention what would normally be expected (*Adu*, above, at paragraph 1).

Lack of Subjective Fear

[68] The RPD noted that the Applicants came to Canada to file a refugee claim only four months after visiting Finland. An applicant's delay in claiming refugee status is an important factor in weighing a claim, and it may be fatal to the claim if the applicant cannot provide a satisfactory explanation for the delay (*Espinosa v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1324 at paragraph 16).

[69] The Applicants said that it was only after the referendum in 2010 that they decided they could no longer stay in Turkey. However, it was open to the RPD to reject this explanation. The RPD found the Applicants' statement that they had a good life in Turkey to be inconsistent with the facts they alleged. Given the brutal attacks on themselves and other family members, it was reasonable for the RPD to find it implausible that the Applicants would state they had a good life in Turkey until 2010 and that they did not think of some way of not returning to Turkey when they were in Finland.

[70] The RPD also found the actions of the Applicants after the Male Applicant was arrested in 2010 to be inconsistent with their alleged subjective fear. The RPD noted that the Female Applicant did nothing after her husband was arrested, and that they made no effort to hide from the police after he was released. The Respondent submits it was reasonable for the RPD to find their behaviour inconsistent with that of persons who are in fear of their lives.

[71] In assessing an applicant's subjective fear the RPD may take into consideration an applicant's behaviour (*Espinosa*, above). The Respondent submits that in this case the Applicants' behaviour was inconsistent with the evidence they provided of the long history of mistreatment they and their family experienced due to their Kurdish identity.

The Applicants' Reply

[72] The Applicants point out that although it is not formally illegal to speak Kurdish, the documentary evidence discloses that Kurds are often subject to discrimination and persecution at the hands of the authorities and nationalist groups in Turkey. They submit that it was not reasonable for the RPD to find it implausible that the Female Applicant was attacked for speaking Kurdish, and

that the RPD erred by not recognizing that although it may be formally legal to speak Kurdish, to do so may still result in discriminatory treatment or persecution.

[73] Further, the fact that there are many Kurdish speakers does not mean that the Female Applicant would be immune from attack. The documentary evidence discloses a great deal of discrimination against Kurds.

[74] The Applicants reiterate that at the hearing the Female Applicant stated that she could obtain evidence of the post-referendum attacks, but the RPD did not request it. If the RPD was going to draw an adverse inference from the lack of documentation it was incumbent on it to advise the Applicants and give them an opportunity to provide it. The exchange that occurred at the hearing led them to believe that this evidence was not required. The Applicants also note that the Respondent has failed to address the decision in *P.U.A.*, above.

[75] As regards subjective fear, the Applicants point out that the Respondent has ignored the fact that the event that led them to flee Turkey occurred after they visited Finland.

ANALYSIS

[76] My review of the Decision and the record leads me to conclude that reviewable errors occur with a number of key findings so that the Decision should be returned for reconsideration.

[77] For example, the RPD draws a negative inference regarding the Female Applicant's credibility from her testimony about the 2009 incident in the park. The Female Applicant said it was illegal to speak Kurdish in Turkey and the documentary evidence obviously says otherwise. But the RPD's real concern appears to be as follows:

> I took a negative inference about this assault after hearing the associated claimant's testimony. This was especially so since the claimant lived in a predominantly Kurdish area of Turkey where it could not be unusual to hear a mother and child speaking Kurdish. The associated claimant had testified that her own mother only speaks Kurdish. It would have been the norm in Adiyaman to speak and hear Kurdish.

[78] The RPD's concern here is not inconsistencies between the Applicants' oral evidence and the documentary evidence, but rather that the attack by the racist teenager in the park is implausible because the Applicants live in a predominantly Kurdish area.

[79] Implausibility findings should only be made in the clearest of cases. As was stated in *Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 at paragraph 7:

> A tribunal may make adverse findings of credibility based on the implausibility of an applicant's story provided the inferences drawn can be reasonably said to exist. 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. A tribunal must be careful when rendering a decision based on a lack of plausibility because refugee claimants come from diverse cultures, and actions which appear implausible when judged from Canadian standards might be plausible when considered from within the claimant's milieu. [see L. Waldman, Immigration Law and Practice (Markham, ON: Butterworths, 1992) at 8.22]

[80] There is nothing inherently implausible about an attack in a park by a racist teenager just because the Applicants live in a predominantly Kurdish area. The RPD could have followed this matter up further with the Female Applicant but chose instead to rest its conclusions on inference and surmise about the way a racist teenager would behave.

[81] The attack upon the Female Applicant is also questioned by the RPD because the medical report regarding the Minor Applicant only indicates that the Minor Applicant "fell." This does not contradict the Female Applicant's account of what happened. Moreover, the RPD bases its negative inference on the fact that the "medical report does not state that the police were notified of the attack." This is important to the RPD, we are told, because

> It appears that when someone is injured in Turkey do (*sic*) to a violent attack that it is suggested to the victim that the police be notified of the attack.

[82] The RPD's source for this assumption is, we are told, the Applicants themselves:

> I gathered this from my reading of the principal claimant's medical report of his attack in 2004. His medical report indicates that the principal claimant had been asked whether he wanted to report his assault to the authorities. Here in the minor claimant's report, there is nothing to indicate that the minor claimant's fall was anything more than an accidental fall.

[83] Once again, there is nothing in the report that contradicts the Applicants' testimony about how the Minor Applicant was injured. The injury is confirmed by the report. The negative inference is based upon a mere surmise by the RPD that a 2009 medical report would contain some indication that an assault had occurred, or that the Applicants' would have been asked if they wanted to report the assault on the Minor Applicant. It is not reasonable to conclude that the fact that the Male Applicant was asked whether he wanted to report the attack upon him in 2004 means that it was the practice in 2009 to suggest a report to the police and this would appear on a form.

[84] Not only that, the RPD itself elsewhere in the Decision questions the 2004 report and describes it as a letter. The 2004 report is insufficient grounds upon which to surmise that, in 2009,

when someone is injured in Turkey in a violent attack, it would be suggested to the victim that the police be notified and that this will appear in the report.

[85] In conclusion on this point, I do not think the RPD provides a sufficient basis for its negative inference concerning the attack upon the Female Applicant and the Minor Applicant in the park.

[86] Similar problems occur with regards to the 2004 assault upon the Male Applicant by the police. The medical report does not contradict the Male Applicant's testimony. The RPD affords it little weight because it is not contemporaneous with the attack, and was written by the Male Applicant's doctor cousin. Even if there are weight issues here, the report provides no basis to reject the presumption of truth which the law says that the Male Applicant's sworn testimony attracts. See *Maldonado*, above.

[87] The principal ground for rejecting the Male Applicant's evidence that it was the police who attacked him is that the doctor cousin says in the report that the Male Applicant requested that officials not be contacted for purposes of bringing criminal charges. This request is consistent with the Male Applicant's evidence that, after the police beat and tortured him in 2004, they held a gun to his head and threatened him with death if he made a report. The RPD finds that the request that no officials be contacted to bring criminal charges "materially undermines the principal claimant's allegation that the police were the ones who had attacked him." The RPD appears to be saying that if the doctor cousin mentioned the request he would also have mentioned the perpetrators of the attack.

[88] Here we see a negative credibility finding based upon a report that does not contradict the Male Applicant's sworn testimony, on the grounds that the report does not mention that it was the

police who were the ones who carried out the assault. I think this is a case of a document being used to draw a negative inference based upon what it does not say, even though what the document does say is entirely consistent with the Male Applicant's testimony. The Court has consistently warned against this kind of inference. See *Pantas v Canada (Minister of Citizenship and Immigration)*, 2005 FC 64 at paragraph 102.

[89] I also agree with the Applicants that the RPD's analysis of the subjective fear issue is unreasonable. There was cumulative oppression here followed by a precipitating incident after the Applicants returned from Finland. For the most, the RPD bases its conclusion upon the "life was good" response made by the Applicants:

> How could it be that life was good for the claimants in Turkey as Kurds in 2010? With the apparent lack of state protection, assault, police detainment of the associated claimant's brother in law, police assault of the associated claimant's sister, massive attacks allegedly on Kurds at various Newroz celebrations, the associated claimant's own sister decision to flee Turkey in 2010 due to ongoing alleged persecution, it does not seem plausible. And yet, this is the claimants' testimonial evidence. Again, they both testified that they did not have a subjective fear of harm until the 2010 arrest and detention of the principal claimant.

[90] It has to be remembered that the Applicants testified through an interpreter. It is clear from the record as a whole that the Applicants were able to tolerate the situation in Turkey until the final attack in 2010 when their home was invaded and the Male Applicant was beaten and taken away in front of their young son. This was a different situation and action of a different order from what had occurred before. The RPD relies upon the Female Applicant doing nothing, but the Male Applicant was only detained for one night. It is difficult to see how in this space of time she could go to the police station, call a lawyer or a human rights organization, or contact journalists when she had a young child to look after.

[91] The RPD also leaves out of account that, although the Male Applicant did not go into hiding after he was released, the Applicants initiated immediate steps to leave Turkey for Canada.

[92] I also agree with the Applicants that it was unreasonable for the RPD to rely upon general country reports to draw a negative inference about what had happened to Kurds in their particular town. They did not say that the attacks were a country-wide problem and the RPD did not consult local media to see what had happened in Adiyaman. The RPD asked if there was documentation about this, so it may be debateable as to whether the Applicants were alerted..

[93] In conclusion, I think there is sufficient reviewable error here to warrant reconsideration.

[94] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is allowed. The decision is quashed and the matter is returned for reconsideration by a differently constituted RPD.

2. There is no question for certification.

"James Russell"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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DATED:	March 8, 2013

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