

Federal Court



Cour fédérale

Date: 20140722

Docket: IMM-632-13

Citation: 2014 FC 730

Ottawa, Ontario, July 22, 2014

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

ISMET MAMAK

Applicant

And

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This judicial review is of a decision by the Refugee Protection Division [RPD] denying the Applicant refugee protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

II. Background

[2] The Applicant is a Turkish citizen of Kurdish descent. He suffered arrest and beatings at the hands of the Turkish police on several occasions.

[3] He escaped to the USA, and from there he came to Canada and claimed refugee protection.

[4] The RPD identified lack of subjective fear as the determining issue. The RPD did not accept that it took until the third police visit for him to develop a subjective fear; reasoning that he should have developed that fear based on the second such visit. The Applicant's failure to claim refugee protection when he arrived in the USA before coming to Canada also counted against his refugee claim.

Therefore, the RPD concluded that the Applicant did not have a subjective fear as required by s 96 and by s 97.

III. Analysis

[5] The standard of review is dependent on the issue being addressed. While the standard is usually reasonableness (*Hou v Canada (Minister of Citizenship and Immigration)*, 2012 FC 993, 417 FTR 19), where the issue is one of law, particularly as related to the legal test to be applied, the standard is correctness.

[6] The RPD made a finding of “no subjective fear” without indicating whether the finding applied to the s 96 issues or the s 97. If the finding related to s 96, it must be assessed as to reasonableness. If, on the other hand, it was germane to s 97, it is an error of law on the “face of the record” as subjective fear is not a determinative issue on a s 97 analysis. To the extent that the RPD conflated the section 96 and 97 tests, it committed a reviewable error (*Barros v Canada (Minister of Citizenship and Immigration)*, 2013 FC 894 at para 20; *Li v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1 at para 33).

Further, if it was not made in respect of s 97, the RPD erred because it failed to give any consideration to s 97. The entirety of the decision is focused on the Applicant’s subjective fear which is irrelevant to the s 97 determination.

[7] These errors are dispositive of this judicial review. However, if they were not, the Court would have difficulty with the reasonableness of the decision because the RPD failed to articulate why the Applicant should have fled after the second “arrest” rather than after the third.

IV. Conclusion

[8] Therefore, this judicial review will be allowed, the RPD decision quashed and the matter remitted back for determination by a differently constituted panel.

[9] There is no question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, the decision of the Refugee Protection Division is quashed and the matter is remitted back for determination by a differently constituted panel.

"Michael L. Phelan"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-632-13

STYLE OF CAUSE: ISMET MAMAK v THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: FEBRUARY 5, 2014

JUDGMENT AND REASONS: PHELAN J.

DATED: JULY 22, 2014

APPEARANCES:

Micheal Crane

FOR THE APPLICANT

Rafeena Rashid

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Micheal Crane
Barrister and Solicitor
Toronto, Ontario

FOR THE APPLICANT

William F. Pentney
Deputy Attorney General of
Canada
Toronto, Ontario

FOR THE RESPONDENT