

Federal Court



Cour fédérale

Date: 20160310

Docket: IMM-4051-15

Citation: 2016 FC 302

Ottawa, Ontario, March 10, 2016

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

EMRAH KARAFAZLIOGLU

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This is an application for the judicial review of a decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board [Board], dated August 12, 2015, dismissing the appeal of the applicant and confirming the decision of the Refugee Protection Division [RPD] that the applicant is neither a Convention refugee nor a person in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act].

[2] The 59 paragraph decision of the RPD rested on a number of credibility findings. The RPD also examined the documentary evidence and analyzed the applicant's alleged risk profile in Turkey on the basis of his Armenian ethnicity; his Christian religion; his leftist political activities, including his involvement with the Freedom and Solidarity Party (Özgürlük ve Dayanisma Partisi); and his being a conscientious objector to military service. The RPD drew a negative inference as to the applicant's subjective fear because of his failure to claim refugee status in the three week period he was in the United States (paragraphs 20 and 21).

[3] In his appeal before the RAD, the applicant raised four distinct issues:

- (a) The RPD failed to consider the documentation;
- (b) The RPD made selective reference with respect to the evidence;
- (c) The RPD's findings were implausible and inconsistent; and
- (d) The RPD erred in its conclusion with respect to the applicant's failure to claim in the United States.

[4] The RAD found that the Federal Court's decision in *Huruglica v Canada (Citizenship and Immigration)*, 2014 FC 799 (CanLII) at paras 54-55 [*Huruglica*] provided guidance with respect to the scope of review by the RAD of the findings made by the RPD. The RAD noted diverging jurisprudence from the Federal Court, but affirmed that as per the decision in *Alyafi v Canada (Citizenship and Immigration)*, 2014 FC 952 (CanLII) [*Alyafi*], the RAD may apply either approach pending a final decision on the matter from the Federal Court of Appeal or the Supreme Court of Canada. Accordingly, the RAD affirmed that it would come to an independent assessment of whether the applicant is a Convention refugee or a person in need of protection,

affording deference to the RPD's credibility findings. This approach is not challenged by the parties in the present case.

[5] That being said, the RAD's reasons focus exclusively on the applicant's lack of subjective fear, and do not include any objective analysis of risk. After conducting an analysis of the applicant's failure to claim in the United States, the RAD states:

[17] Based on the evidence adduced, the RAD finds on the balance of probabilities that the Appellant lacks subjective fear of persecution if he were to return to the [sic] Turkey based on his failure to claim for asylum in the United States which is a signatory to the Refugee Convention. [Emphasis added]

[6] Nevertheless, two paragraphs later, the RAD concludes that the applicant has also failed to provide an objective basis for his claim:

[20] Given the lack of objective and subjective basis for his claim, the RAD finds that the Appellant has not satisfied the burden of establishing a serious possibility of persecution on a Convention ground, or that he would personally be subjected, on a balance of probabilities, to a danger of torture, or a risk of life, or a risk of cruel and unusual treatment or punishment, upon his return to Turkey.

[21] Having found the failure to claim asylum in the United States to be the determinative issue, the RAD will not consider the other issues raised by the Appellant. [Emphasis added]

[7] The applicant asserts that the RAD failed to consider his record as a whole, relying instead on one factor alone, and excluding consideration of all other submissions and evidence. By focusing on the issue of the applicant's failure to claim asylum in the United States, the RAD failed to address any of the other equally determinant issues raised by the applicant at the time of appeal. The applicant further submits that the memorandum presented by the applicant at the

time of appeal raised serious concerns about his current status as a draft evader, in the event that he would be required to return to Turkey. The applicant notes that he presented several pieces of documentary evidence in support of this issue. The applicant also states that he made submissions regarding the treatment of Armenian-Christians in Turkey, as well as concerning his status as a conscientious objector. The applicant submits that the RAD's failure to address these issues constitutes a reviewable error.

[8] The applicant further states that the RAD erred by failing to consider additional evidence that was submitted – namely, a decision of the RPD dated July 2, 2015 concerning a relative and a cousin of the applicant. According to the applicant, the claimants in that decision were determined to be Convention refugees on the basis of facts and circumstances similar to those of the applicant in the present case. This decision only became available after the applicant's appeal record was filed. The new evidence was submitted on August 12, 2015 (the same day as the RAD decision); however, this evidence was returned to the applicant with a letter from the RAD stating that it had not been filed in time. The applicant states that the RAD erred in not considering this evidence, in light of its importance.

[9] Finally, with respect to his failure to apply for asylum in the United States, the applicant reiterates that he has a cousin in Canada who successfully claimed refugee status, and who advised him of how to cross the border. Despite having a valid United States visa, the applicant has no family in that country, and preferred to seek asylum in Canada – a fact that does not diminish his fear of persecution in Turkey. The applicant therefore states that the RAD's conclusion regarding his failure to claim in the United States is faulty.

[10] In turn, the respondent submits that a failure to seek asylum in a signatory country through which an applicant travels before coming to Canada is a relevant consideration in rejecting a claim. Furthermore, the Federal Court has found that absent a satisfactory explanation for a delay in seeking asylum, such delay can be fatal to an applicant's claim. In the present case, the respondent submits that the applicant's explanation is an unacceptable reason to delay seeking asylum, strongly indicating a lack of subjective fear. The respondent also notes that the mere fact that an applicant has one relative living in Canada is not sufficient to overcome the fact that he or she did not claim refugee status in the United States as quickly as possible. Therefore, the respondent submits that there is no reviewable error in the negative inference that the RAD drew from the applicant's failure to file a claim in the United States, and that this failure was a legitimate factor for the RAD to consider in assessing the subjective aspects of the claim. As a result, the RAD's decision was reasonable.

[11] Having read the application records filed by the parties and considered the written and oral arguments made by counsel, I am satisfied that the RAD rendered an unreasonable decision in dismissing the applicant's appeal, and also that the matter should be sent back for redetermination by another member of the RAD.

[12] First, the RAD member made no analysis whatsoever of the evidence on record and of the merit of the multiple grounds of appeal raised by the applicant, except to review the reasons and explanations provided by the applicant to the RPD for not claiming refugee status in the United States. Second, the RAD gratuitously concluded that a lack of subjective fear was

sufficient to dispose of the claim made by the applicant pursuant to sections 96 and 97 of the Act.

[13] I agree with the applicant that the RAD's determination regarding the lack of an objective basis for the applicant's claim is not supported by any reasons, and was made without any apparent analysis of factors other than the applicant's failure to claim in the United States and the inference that he therefore lacked subjective fear. Indeed, the criteria for claiming protection under sections 96 and 97 of the Act differ. In particular, while a person seeking protection as a Convention refugee pursuant to section 96 must demonstrate a subjective fear of persecution, there is no such requirement under section 97, which instead requires an objective assessment of risk. While it may be within the discretion of the Board to determine whether it deals with claims made under both sections 96 and 97 of the Act separately or in an integrated analysis – for example, in cases where credibility or the adequacy of state protection is the determinative issue (*Velez v Canada (Citizenship and Immigration)*, 2010 FC 923 (CanLII) at para 22) – the Court must nonetheless be satisfied that the RAD considered the criteria applicable to each section. The RAD failed to do so in the present case.

[14] In addition, the RAD acknowledged that the RPD found the applicant to lack credibility with respect to several aspects of his claim. While the RAD may grant deference to the RPD on issues of credibility (*Huruglica* at para 55), in cases where a credibility finding is based not only on testimony, but also on evidence in the record, the RPD would enjoy no advantage over the RAD when making its findings, thereby requiring the RAD to reconsider evidence on the topic (*Yetna v Canada (Citizenship and Immigration)*, 2014 FC 858 (CanLII) at paras 21-25;

Alyaf at para 34). In the present case, the applicant's written submissions to the RAD raised concerns regarding the RPD's apprehension of the documentary evidence – concerns that may have been relevant to the RPD's credibility findings. As a result, the RAD would have likely been required to address this evidence in coming to its own conclusion concerning the applicant's credibility.

[15] For these reasons, the Court grants the application for judicial review and orders that the decision of the RAD be set aside and that the matter be referred back for determination by a differently constituted panel. Counsel agree that this case does not raise a question of general importance.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be granted, that the decision of the RAD be set aside, and that the matter be referred back for determination by a differently constituted panel. No question is certified.

"Luc Martineau"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4051-15

STYLE OF CAUSE: EMRAH KARAFAZLIOGLU v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

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