

Federal Court



Cour fédérale

**Date: 20181116**

**Docket: IMM-4747-17**

**Citation: 2018 FC 1159**

**Ottawa, Ontario, November 16, 2018**

**PRESENT: The Honourable Madam Justice Heneghan**

**BETWEEN:**

**SEREF ALKAN  
ALTUGHAN KEMAL ALKAN**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

[1] Mr. Seref Alkan (the “Principal Applicant”) and his son Mr. Altughan Kemal Alkan (collectively, “the Applicants”) seek judicial review of the decision of the Immigration and Refugee Board, Refugee Appeal Division (the “RAD”) confirming a decision of the Immigration and Refugee Board, Refugee Protection Division (the “RPD”) , that the Applicants are not Convention refugees nor persons in need of protection pursuant to section 96 and subsection 97(1), respectively, of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the “Act”).

[2] The Applicants are citizens of Turkey. The Principal Applicant claims to be at risk on grounds of political opinion, nationality and religion. His son claims to be at risk on the grounds of political opinion, membership in a particular social group, nationality and religious affiliation, that is as an Alevi.

[3] The RPD found that the Applicants lacked credibility and failed to produce sufficient evidence to support their claims of risk on the grounds of political opinion, ethnicity and religion. The RAD confirmed these findings in dismissing the Applicants' appeal.

[4] In this application for judicial review, the Applicants present several arguments. They argue that the RAD unreasonably failed to address the allegations of incompetence raised against the Counsel who represented them before the RPD. They submit that the RAD erred in law by failing to conduct an independent analysis pursuant to subsection 97(1) of the Act relative to the son's claim of risk for evading mandatory military service.

[5] Finally, the Applicants submit that the RAD erred in law by confusing the identity of the Principal Applicant and his son when addressing the issue of who suffered from asthma, thereby negatively impacting the manner in which it considered the evidence from the two Applicants and the conclusions which it drew.

[6] The Minister of Citizenship and Immigration (the "Respondent") submits that the RAD reasonably dismissed the appeal and that there are no grounds for judicial intervention.

[7] Generally, the appropriate standard of review for this Court when reviewing a decision of the RAD is reasonableness; see the decision in *Canada (Minister of Citizenship and Immigration) v. Huruglica* (2016), 396 D.L.R. (4th) 527 (F.C.A) at paragraph 35. Accordingly, the Court should not interfere if the RAD's decision is intelligible, transparent, justifiable, and falls within a range of outcomes that are defensible in respect of the facts and the law; see the decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paragraph 47.

[8] It is not necessary for me to address all the arguments raised by the Applicants since I am satisfied that the RAD committed reviewable errors in respect of each Applicant. I will first address the apparent error relative to the Principal Applicant.

[9] I am satisfied that the RAD erred as a result of confusing the identities of the Applicants.

[10] The RAD referred to the Principal Applicant as suffering from asthma when the evidence before it was to the effect that the son is afflicted with this condition.

[11] The Respondent submits that this is a minor error on the part of the RAD.

[12] I disagree.

[13] This health condition is relevant to the grounds asserted by the son, for protection. As such, it is an important fact to be considered by the RAD in assessing the claim.

[14] This misapprehension of the evidence raises concerns about other ways in which the RAD may have confused the identities and claims of each Applicant. This possibility undermines the overall reasonableness of the RAD's decision.

[15] In my opinion, this error is sufficient to allow judicial intervention in respect of the claim of the Principal Applicant.

[16] I am also satisfied that the RAD committed a reviewable error by failing to conduct an analysis pursuant to subsection 97(1) of the Act, specifically in respect of prison conditions which is an aspect of the fear raised by the son.

[17] According to the decision in *Paramananthalingam v. Canada (Citizenship and Immigration)*, 2017 FC 236 at paragraph 10, the question whether the RAD should have conducted an analysis pursuant to subsection 97(1) is reviewable on the standard of reasonableness.

[18] In *Brovina v. Canada (Minister of Citizenship and Immigration)* (2004), 254 F.T.R. 244 at paragraph 14, the Court said that it is a reviewable error for the RPD not to perform a section 97 analysis when there is evidence relating to a section 97 risk that was not considered by that decision-maker pursuant to section 96. In my opinion, the same principle applies when the RAD fails to conduct a section 97 analysis in like circumstances.

[19] In my opinion, the RAD committed an error by failing to engage in an analysis pursuant to subsection 97(1).

[20] In the result, this application for judicial review will be allowed, the decision set aside and the matter remitted to a differently constituted panel of the RAD for re-determination. There is no question for certification arising.

**JUDGMENT in IMM-4747-17**

**THIS COURT'S JUDGMENT is that** the application for judicial review is allowed, the decision is set aside and the matter remitted to a differently constituted panel of the Refugee Appeal Division for re-determination. There is no question for certification arising.

“E. Heneghan”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-4747-17

**STYLE OF CAUSE:** SEREF ALKAN ALTUGHAN,  
KEMAL ALKAN v. THE  
MINISTER OF CITIZENSHIP  
AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** MAY 4, 2018

**JUDGMENT AND REASONS:** HENEGHAN J.

**DATED:** NOVEMBER 16, 2018

**APPEARANCES:**

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Brad Bechard FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

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Barrister and Solicitor

Department of Justice Canada FOR THE RESPONDENT