

Federal Court



Cour fédérale

Date : 20201026

Dossier : IMM-3542-20

Citation: 2020 FC 1000

Toronto, Ontario, October 26, 2020

BEFORE: Mr. Justice Andrew D. Little

BETWEEN :

MEHMET BARAN UCAR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT ON CONSENT AND REASONS

I. Background

[1] On September 16, 2020, Mr Ucar filed an application for leave and for judicial review under the *Immigration and Refugee Protection Act* (“IRPA”).

[2] The applicant and the respondent have jointly moved informally for consent judgment. They filed a Notice of Settlement and Request for Judgment on Consent in this proceeding. The parties agreed that the decision of the Refugee Appeal Division (“RAD”) of the Immigration and Refugee Board of Canada dated July 28, 2020 should be set aside because the decision was

based on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before the RAD.

[3] In their filed materials on this application, the parties did not specify what erroneous findings of fact or other errors they agreed upon in the RAD's decision that would support a Judgment setting aside the RAD's decision.

[4] I have reviewed the materials in the record having regard to the requirements for setting aside a decision on consent of the parties, which are set out by the Federal Court of Appeal in *Garshowitz v. Canada (Attorney General)*, 2017 FCA 251 at paras 17-19 and related cases.

[5] In its decision, the RAD confirmed a decision of the Refugee Protection Division (the "RPD") that the applicant was neither a Convention Refugee under IRPA s. 96 nor a person in need of protection under IRPA s. 97. The applicant based his claims on his identity as a gay man.

[6] In his application for leave and judicial review, the applicant asserted several grounds for judicial review related to the RAD's conclusions about the applicant's identity as a gay man. The RAD concluded that the RPD was correct in determining the applicant had failed to establish, on a balance of probabilities, his identity as a gay man. The RAD found that the applicant would not face a serious possibility of persecution in Turkey because of his sexual orientation.

[7] The applicant submitted in his Memorandum of Fact and Law that the RAD made confusing, inconsistent and contradictory statements in its decision. The applicant's submissions included the following:

- The applicant contended that the RAD unreasonably used perceived inconsistencies between the testimony of the applicant and one of his witnesses about certain events and discussions in Canada to impugn his credibility and therefore his evidence that he is a gay man.
- The applicant referred to the uncontradicted evidence of two other witnesses in Turkey (his sister and his former male partner) who had direct knowledge that he is a gay man, in addition to his own evidence, to support his identity and his claims under the IRPA. The applicant noted that the RAD held that the RPD had erred in assessing this evidence. The RAD concluded that the evidence was credible and was "first-hand knowledge" of his sexual orientation and held that it would give the statements "some weight". Yet, the applicant argued, the RAD concluded that the applicant is not a gay man in the face of those findings about the evidence, which is illogical and inconsistent, and demonstrates a selective use of evidence.
- The applicant also submits that the RAD failed to use the letters for what they did say, and wrongly used them for what they did not say (i.e., the two witnesses in Turkey did not explain the discrepancies between the applicant's testimony and the other witness about events and discussions that occurred in Canada and not in their presence), contrary to the principle set out in *Mahmud v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 729, at para 11).
- The applicant further submitted that the RAD ignored evidence from the applicant's psychotherapist's report that stress-related cognitive difficulties could have affected his testimony, and that the RAD made findings related to the RPD's conclusions that were contrary to the evidence in that report.

[8] Having regard to the requirements in *Garshowitz*, I agree with the parties that the RAD's decision must be set aside. The RAD's decision used minor inconsistencies in the evidence to undermine the applicant's credibility and concluded that the applicant had not established his identity as a gay man, and in doing so based its decision on erroneous findings of fact that it made in a perverse or capricious manner and without proper regard to the evidence in the record. The RAD's decision contained internal inconsistencies and logical flaws, and disregarded the evidence, in its assessment of the applicant's credibility; in the assessment of the letter from the applicant's sister and the letter from his former partner, both of which provided direct evidence that the applicant is a gay man; and in its assessment of the psychotherapist's report.

[9] The applicant also challenged the RAD's rejection of country condition and other documentary evidence in support of his claims. A redetermination by the RAD will also enable it to consider all the country condition and other evidence that relates to the applicant's claims under the IRPA.

[10] The applications are allowed and decision of the RAD is set aside, on consent. The matter is remitted to the RAD for redetermination by a different member. By agreement of the parties, no costs are awarded to either party.

JUDGMENT ON CONSENT IN IMM-3542-20

THE COURT ORDERS THAT:

1. The application for leave to appeal and the application for judicial review are allowed and the decision of the Refugee Appeal Division dated July 28, 2020 is set aside, on consent.
2. The matter is remitted to the Refugee Appeal Division for redetermination by a differently-constituted panel.
3. There is no order as to costs.

“Andrew D. Little”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3542-20

STYLE OF CAUSE: MEHMET BARAN UCAR v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

**MOTION IN WRITING CONSIDERED AT TORONTO, ONTARIO PURSUANT TO
RULE 369 OF THE *FEDERAL COURTS RULES***

JUDGMENT ON CONSENT AND REASONS: A.D. LITTLE J.

DATED: OCTOBER 26, 2020

WRITTEN REPRESENTATIONS BY :

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