Federal Court  Cour fédérale

Date: 20220725

Docket: IMM-3264-21

Citation: 2022 FC 1104

Ottawa, Ontario, July 25, 2022

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

Senay SUSAL
Barkin SUSAL

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Principal Applicant, Senay Susal, and the Associate Applicant, her minor son, Barkin Susal are citizens of Turkey.

[2] The Principal Applicant asserts ethnicity (Kurdish) and religious identity (Alevi), and political profile. She claims that she was politically active in Turkey, that she was detained for one day or less in 2014 and twice in 2015 for attending political rallies and demonstrations, and that she was abused physically and sexually by Turkish security forces while in detention. Authorities also allegedly detained and abused the Associate Applicant.

[3] The Applicants fear discrimination because of their ethnic background, and risk to their life because they have suffered cruel and unusual punishment at the hands of the police during political demonstrations.

[4] The spouse and father respectively of the Applicants initially fled with them to New York; one adult child remained in Turkey, while another adult child had relocated to Switzerland. From New York, the family flew to Seattle. The Principal Applicant's spouse initially crossed into Canada without the Applicants and attempted to claim refugee protection. After being detained, he returned to Turkey instead of pursuing his claim. The Applicants then attempted to enter Canada.

[5] At their port of entry, the Principal Applicant claimed the family were supporters of the Kurdistan Workers Party [PKK] and that she had provided money and stationery to the group. Consequently, she was found inadmissible on security grounds under paragraph 34(1)(f) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[6] The Applicants thus were offered a restricted pre-removal risk assessment [PRRA]: *IRPA* sections 97 and 112(3). In connection with the PRRA, the Principal Applicant asserted membership in the People's Democratic Party [HDP] and submitted evidence that included a letter from the HDP confirming her membership and providing additional information [HDP Letter].

[7] The Applicants received a negative PRRA decision [Decision] that they seek to have set aside in this judicial review application.

[8] I am not persuaded that the Senior Immigration Officer [Officer] who reviewed the Applicants' PRRA application and rendered the Decision erred in failing to hold an oral hearing, or that the Decision on the whole is unreasonable. Further, the Applicants have not come to the Court with "clean hands," as explained below. I therefore dismiss their judicial review application, for the more detailed reasons that follow.

[9] See Annex "A" for relevant legislative provisions.

II. Issues and Standard of Review

[10] As alluded above, having considered the record for this matter, including the parties' written and oral submissions, I find that the issues for this Court's determination are:

A. *Whether the judicial review application should be dismissed for lack of clean hands;*
B. *Whether the Officer erred in failing to hold an oral hearing; and*
C. *Whether the Decision on the whole is reasonable.*

[11] The presumptive standard of review is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 10, 25.

[12] The Applicant submits that there is disagreement in the jurisprudence about whether a PRRA officer's failure to hold an oral hearing attracts the reasonableness or correctness standard of review: *Huang v Canada (Citizenship and Immigration)*, 2018 FC 940 [*Huang*] at para 12. The latter case on which the Applicant relies in support of this submission, however, resolves the disagreement in favour of the reasonableness standard because the decision whether to hold a hearing turns on the interpretation and application of the *IRPA* s 113(b) and section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227: *Huang*, at paras 13-16. See also *Balog v Canada (Citizenship and Immigration)*, 2021 FC 605 at para 24; *Payrovedennabi v Canada (Citizenship and Immigration)*, 2022 FC 165 at para 14; and *Atafo v Canada (Citizenship and Immigration)*, 2022 FC 922 at paras 9-11, citing *Balogh v Canada (Citizenship and Immigration)*, 2022 FC 447 [*Balogh*] at paras 13-25.

[13] I acknowledge that this division in the jurisprudence persists. For the reasons articulated by my colleague Justice Rochester in *Balogh*, I have applied the reasonableness standard to the consideration of the second and third issues.

[14] A reasonable decision is one based on an internally coherent and rational chain of analysis that is justified in relation to the applicable factual and legal constraints: *Vavilov,* above at para 85. To avoid judicial intervention, the decision must bear the hallmarks of reasonableness – justification, transparency and intelligibility: *Vavilov*, above at para 99. The party challenging a

decision has the burden of satisfying the reviewing court that the decision is unreasonable: *Vavilov*, above at para 100.

III. Analysis

A. *Lack of clean hands*

[15] I am satisfied that the Applicants have come to the Court with unclean hands. While their serious misconduct, in my view, warrants deterrence by this Court, nonetheless I considered the merits of decision and the strength of the Applicants' case before determining that the judicial review application will be dismissed.

[16] Applicable jurisprudence guides that a reviewing court may dismiss the application based on a lack of clean hands, without proceeding to determine the merits, or decline to grant relief, even in the face of reviewable error: *Canada (Minister of Citizenship and Immigration) v Thanabalasingham*, 2006 FCA 14 [*Thanabalasingham*] at para 9.

[17] That said, the reviewing court should "attempt to strike a balance between, on the one hand, maintaining the integrity of and preventing the abuse of judicial and administrative processes, and on the other, the public interest in ensuring lawful conduct of government and the protection of fundamental human rights": *Nwafor Ep Antoine Sayegh v Canada (Citizenship and Immigration)*, 2021 FC 795 [*Sayegh*] at para 24, citing *Thanabalasingham*, above at para 10.

[18] Further, in exercising its discretion in this regard, the reviewing court should consider factors such as the seriousness of the applicant's misconduct and the extent to which it undermines the proceeding, the need to deter others from similar conduct, the nature of the alleged administrative unlawfulness, the strength of the case, the importance of the individual rights affected, and the likely impact upon the applicant if the challenged administrative action is permitted to stand: *Thanabalasingham*, above at para 10. The list of factors the reviewing court can consider is not exhaustive and depends on the circumstances in each case.

[19] Here, the Applicants were scheduled for removal in November 2021; this Court dismissed their motion for a stay of removal on November 18, 2021. The Applicants failed to report for their exit interviews and Covid tests. Removal was cancelled and arrest warrants were issued.

[20] Justice Gascon's Order dismissing the stay motion notes the Principal Applicant's repeated failure to abide by the terms and conditions of her release granted in February 2016, following her inadmissibility report.

[21] Although Justice Gascon's Order was issued several months after the Applicants' record for the judicial review application was perfected and before leave was granted to commence the judicial review, I disagree with the Applicants that it was of no effect on the hearing of this matter.

[22] The Court's jurisprudence guides that, even if a judicial review of a PRRA decision is rendered moot by an applicant's removal, a leave application may proceed, regardless of where the applicant is located: *Canada (Public Safety and Emergency Preparedness) v Shpati*, 2011 FCA 286 [*Shpati*] at para 30; *Akyol v Canada (Minister of Citizenship and Immigration)*, 2003 FC 931 at para 11; *Hussein v Canada (Citizenship and Immigration)*, 2007 FC 1266 (CanLII) at para 11. An application for judicial review of a negative PRRA decision does not stay a removal automatically: *Shpati*, at para 31.

[23] In my view, the fact that leave was granted subsequent to the dismissal of the Applicants' stay motion does not negate or forgive the Applicants' misconduct of failing to report for their exit interviews, resulting in the issuance of arrest warrants.

[24] Further, I note that even though the Respondent raised the issue of a lack of clean hands in the Respondent's Further Memorandum of Argument, the Applicants did not address the issue upfront in their initial oral submissions to the Court at the hearing and only dealt with it in reply to the Respondent's oral submissions. I find this strategy is not consistent with counsel's role as an officer of the Court: subsection 11(3) of *Federal Courts Act*, RSC 1985, c F-7; *Ruston v Canada (Attorney General)*, 2020 FC 1020 at para 4. In addition, "[i]t is the applicant's responsibility to recount [their immigration] history accurately and completely, not the Minister's": *Gracia v Canada (Citizenship and Immigration)*, 2021 FC 158 at para 25.

B. *Officer did not err in failing to hold oral hearing*

[25] I am not convinced that the Officer was required to hold an oral hearing. Contrary to the Applicants' assertions, I find the Officer did not question their credibility but instead reasonably concluded their evidence was insufficient to corroborate their statements.

[26] That the Applicants requested an oral hearing is not determinative of whether one should have been held. The *IRPA* s 113(b) is permissive ("a hearing may be held") and requires a prerequisite belief or finding by the Minister that, among other factors, the evidence raises a serious issue of credibility: *Jystina v Canada (Citizenship and Immigration),* 2020 FC 912 [*Jystina*] at para 28.

[27] The Officer's role is to weigh the evidence submitted to determine if the Applicants have met the onus to provide sufficient probative evidence to support their claims: *Notar v Canada (Citizenship and Immigration),* 2021 FC 1038 at paras 16-20.

[28] Findings of insufficient evidence and credibility may be difficult to distinguish from one another, but nonetheless they are different concepts: *Simonishvili v Canada (Citizenship and Immigration),* 2020 FC 193 at para 12; *Fatoye v Canada (Citizenship and Immigration),* 2020 FC 456 at paras 41; *Lv v Canada (Citizenship and Immigration),* 2018 FC 935 at paras 40-41. In assessing whether an applicant has satisfied the evidentiary threshold, the trier of fact determines whether the evidence provided, assuming it is credible, is sufficient to establish the facts alleged, on a balance of probabilities: *Zdraviak v Canada (Citizenship and Immigration),* 2017 FC 305 at paras 17-18.

[29] I am satisfied that here, the Officer made determinations about the probative value of the corroborative evidence the Applicants provided, principally the HDP Letter, and not about its credibility, that went to the weight given to the Applicants' narrative. The HDP Letter is described in greater detail below in connection with the issue of whether the Decision is reasonable.

[30] I add that I would have come to the same conclusion regardless of whether the applicable standard of review were reasonableness or correctness.

C. *Decision not unreasonable*

[31] I am not persuaded that the Decision on the whole, read holistically, is unreasonable: *Vavilov*, above at para 103.

[32] The standard of proof facing an applicant under the *IRPA* s 97 risk assessment is the balance of probabilities: *Li v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1 at para 14. In other words, the Principal Applicant in the case before the Officer here had to establish that, on a balance of probabilities, she would be subject personally to a danger of torture, or risk to life or risk of cruel and unusual treatment or punishment upon removal to her country of nationality. This is a forward-looking personalized risk: *Gari v Canada (Citizenship and Immigration)*, 2018 FC 660 at para 10.

[33] The primary evidence on which the Applicants relied to corroborate the Principal Applicant's HDP membership and detentions by authorities is the HDP Letter. The English

translation indicates that the HDP prepared the letter based on a review of their records. The writer recounts that Senay Susal worked on behalf of the party in the 2015 elections, that the state accuses party members and executives of alleged links to the PKK / KCK organizations, and that two former co-chairmen are in prison for this reason.

[34] The HDP Letter also describes the writer's awareness that Senay Susal was detained in demonstrations in 2014 and that she and her son were arrested when they attended a Labor Day march in 2015. In addition, the writer reports that two plainclothes officers came to the party office in 2017 to ask whether Senay Susal was a party member; the officers swore, when her membership was confirmed, and claimed that a person abroad should not be a party member.

[35] The Officer accepts that the Principal Applicant is a member of the HDP because their records confirm that she paid her membership fees. The Officer finds the HDP Letter's discussion of the Principal Applicant's arrests, for participating in rallies and demonstrations, as opposed to working on the election, based on hearsay, and explains that the HDP Letter is not based on first-hand knowledge; thus the Officer assigned little probative value in the HDP Letter as evidence towards the Principal Applicant's arrests.

[36] I do not disagree with the Applicant that an applicant's evidence in a PRRA review should not be ruled inadmissible for hearsay: *Fahmy v Canada (Citizenship and Immigration)*, 2015 FC 865 at para 13. In my view, however, that is not what the Officer here did. Rather, the Officer admitted the HDP Letter and then reasonably determined to assign it limited weight, a decision properly in the scope of the Officer's analysis: *Guthrie v Canada (Citizenship and*

Immigration), 2018 FC 852 at paras 11-14; *Sierra v Canada (Immigration, Refugees and Citizenship)*, 2020 FC 441 at para 31.

[37] Put another way, I find that the Officer reasonably explains why this evidence did not satisfy the balance of probabilities threshold required in a restricted PRRA; the Applicants arguments to the contrary, in my view, are essentially a request to reweigh the evidence which is not the role of the reviewing court in judicial review: *Vavilov*, above at para 125.

[38] Further, I am satisfied that the Officer was aware of the risks facing persons associated with the PKK/HDP in Turkey, but came to the conclusion that neither the Principal Applicant nor her son would be exposed to those risks given her "low level" political profile. Although one may disagree with this assessment, as the Applicants here do, this is nonetheless the kind of decision that Parliament has entrusted to PRRA officers: *Ferguson v Canada (Citizenship and Immigration)*, 2008 FC 1067 [*Ferguson*] at para 33; *Karim v Canada (Citizenship and Immigration)*, 2019 FC 336 at para 7.

[39] Although the Applicants argue that the state makes the link or association between the PKK and the HDP, as stated in the HDP Letter, the Officer was aware of the Immigration Division's finding that the Principal Applicant was a member of the PKK and, additionally, was prepared to accept that the Principal Applicant was a member of the HDP. I agree with the Respondent that the two are not mutually exclusive. More to the point, I am not persuaded that the Officer did not take into account the Principal Applicant's membership in the PKK, as well as in the HDP, when assessing her potential risk.

[40] The Applicants also question the reasonability of the Decision because it does not refer to the plainclothes officers' visit to the HDP office. There is no question in my mind, however, that the Officer considered the entirety of the HDP Letter. I agree with the Respondent that the Officer did not need to mention every incident. In my view, the visit was not central to the Applicants' claims; at best, the lack of reference to it in the Decision is a minor misstep not warranting the Court's intervention: *Vavilov*, above at para 100; *Metallo v Canada (Citizenship and Immigration)*, 2021 FC 575 at para 26.

[41] I also agree with the Respondent that "[r]easons are rarely perfect, nor do they need to be (Vavilov at para 91)": *Jystina*, above at para 36. It was open to the Officer to require more evidence to satisfy the legal burden, and to provide examples of what evidence could have assisted in the determination of the claims: *Ferguson*, above at paras 31-32; *Jystin*a, above at para 35.

[42] In the end, I find that the Officer explained, in a manner consistent with the Supreme Court's guidance in *Vavilov*, why the Applicants' evidence was insufficient: *Kaya v Canada (Citizenship and Immigration)*, 2019 FC 1519 at para 33.

[43] Although the Applicants submitted several other pieces of evidence, the focus of the hearing was primarily the HDP Letter. I am satisfied that the Officer did not assess the Applicants' other evidence unreasonably.

IV. Conclusion

[44] For the above reasons, I conclude that the Decision demonstrates the requisite degree of justification, transparency and intelligibility to avoid judicial intervention. In other words, the Officer's reasoning "adds up": *Vavilov*, above at para 104. I therefore dismiss the Applicants' judicial review application.

[45] The Respondent requests costs because of the Applicants' circumvention of this Court's Order dismissing their motion for a stay of removal. The Respondent argues that the Applicants' misconduct represents "special reasons" justifying a costs award, further to Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22. Because this Court subsequently granted leave for the judicial review to be commenced, however, I am not persuaded that special reasons are present in the circumstances. I thus decline to award costs in this matter.

[46] No party proposed a serious question of general importance for certification. I find that none arises here.

JUDGMENT in IMM-3264-21

THIS COURT'S JUDGMENT is that:

1. The Applicants' application for judicial review is dismissed.

2. No costs are awarded.

3. There is no question for certification.

"Janet M. Fuhrer"
Judge

Annex "A": Relevant Legislative Provisions

Immigration and Refugee Protection Act, S.C. 2001, c. 27
Loi sur l'immigration et la protection des réfugiés, L.C. 2001, ch. 27

Security **34 (1)** A permanent resident or a foreign national is inadmissible on security grounds for **(a)** engaging in an act of espionage that is against Canada or that is contrary to Canada's interests; **(b)** engaging in or instigating the subversion by force of any government; **(b.1)** engaging in an act of subversion against a democratic government, institution or process as they are understood in Canada; **(c)** engaging in terrorism; **(d)** being a danger to the security of Canada; **(e)** engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or **(f)** being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b), (b.1) or (c).	**Sécurité** **34 (1)** Emportent interdiction de territoire pour raison de sécurité les faits suivants : **a)** être l'auteur de tout acte d'espionnage dirigé contre le Canada ou contraire aux intérêts du Canada; **b)** être l'instigateur ou l'auteur d'actes visant au renversement d'un gouvernement par la force; **b.1)** se livrer à la subversion contre toute institution démocratique, au sens où cette expression s'entend au Canada; **c)** se livrer au terrorisme; **d)** constituer un danger pour la sécurité du Canada; **e)** être l'auteur de tout acte de violence susceptible de mettre en danger la vie ou la sécurité d'autrui au Canada; **f)** être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle est, a été ou sera l'auteur d'un acte visé aux alinéas a), b), b.1) ou c).
Person in need of protection **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	**Personne à protéger** **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) 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, …	**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, …
Consideration of application **113** Consideration of an application for protection shall be as follows: … (b) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required; …	**Examen de la demande** **113** Il est disposé de la demande comme il suit : … b) une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires; …

Immigration and Refugee Protection Regulations, SOR/2002-227
Règlement sur l'immigration et la protection des réfugiés, DORS/2002-227

Hearing — prescribed factors	**Facteurs pour la tenue d'une audience**
167 For the purpose of determining whether a hearing is required under paragraph 113(b) of the Act, the factors are the following:	167 Pour l'application de l'alinéa 113b) de la Loi, les facteurs ci-après servent à décider si la tenue d'une audience est requise :
(a) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act;	**a)** l'existence d'éléments de preuve relatifs aux éléments mentionnés aux articles 96 et 97 de la Loi qui soulèvent une question importante en ce qui concerne la crédibilité du demandeur;
(b) whether the evidence is central to the decision with respect to the application for protection; and	**b)** l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection;
(c) whether the evidence, if accepted, would justify allowing the application for protection.	**c)** la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.

Federal Courts Citizenship, Immigration and Refugee Protection Rules, SOR/93-22
Règles des cours fédérales en matière de citoyenneté, d'immigration et de protection des réfugiés, DORS/93-22

Costs	**Dépens**
22 No costs shall be awarded to or payable by any party in respect of an application for leave, an application for judicial review or an appeal under these Rules unless the Court, for special reasons, so orders.	22 Sauf ordonnance contraire rendue par un juge pour des raisons spéciales, la demande d'autorisation, la demande de contrôle judiciaire ou l'appel introduit en application des présentes règles ne donnent pas lieu à des dépens.

FEDERAL COURT
SOLICITORS OF RECORD

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APPEARANCES:

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