

Federal Court



Cour fédérale

Date: 20110617

Docket: IMM-6953-10

Citation: 2011 FC 718

Toronto, Ontario, June 17, 2011

PRESENT: The Honourable Justice Johanne Gauthier

BETWEEN:

ALI ISIK

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR ORDER AND ORDER

[1] Mr. Ali Isik seeks judicial review of the decision of the Refugee Protection Division [RPD] rejecting his claim made pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

[2] Although the applicant raised many issues with respect to this decision, the Court will only briefly discuss the question of procedural fairness, given that it is sufficient in the particular circumstances to justify setting aside the decision.

[3] The basic facts of the case are not relevant. The following circumstances, on the other hand, are relevant.

[4] At the beginning of the hearing, as is now the normal process, the RPD identified the main issues to be addressed, namely, credibility and failure to claim protection in the United States.

[5] The applicant was represented by a legal student who, at the beginning of the hearing, sought permission to call as a witness one of the applicant's nephews who was present at the hearing, despite the fact that a written request to that effect had not been sent 20 days in advance as required by the applicable rules of practice.

[6] This witness was described as an "accepted refugee" who was to testify about some communication he had with the applicant before the departure¹ and that the refugee claims of the nephew and applicant were related "[i]n terms of their basis".

[7] No more details were given and from the exchange one could, at best, reasonably deduce that this evidence was meant to corroborate some of the applicant's testimony, although it is not clear what part exactly. Certainly, the nephew was still in Turkey when the applicant said he was first arrested and beaten by the police because he was a Kurd and an active supporter of the

¹ In the transcript, it is not clear that the reference to "the departure" refers to the nephew's departure or the applicant's departure from Turkey.

Democratic Society Party (Kurdish party). The applicant also testified that he did not make a claim in the United States because the nephew he spoke to in order to get help before leaving Turkey was located in Canada and the applicant knew absolutely no one in the United States.

[8] Towards the end of the hearing, the RPD noted that there was time to hear the nephew but it also noted:

Do not do it for me. I do not think it is necessary. So if you do not want to forget it. Just go to submissions. Are you going to do oral?²

[9] After this exchange, the student went on to make his oral submissions.

[10] In its decision, which is primarily – if not entirely – based on lack of credibility, the RPD starts by noting that the applicant failed to provide corroborative evidence of his detention. It again states later on that “the Panel can make a negative inference as to credibility from the applicant’s failure to corroborate his allegations [...] the Panel has done so in this case”.

[11] In *Sivaraj v Canada (Minister of Citizenship and Immigration)* (1996), 120 FTR 136, 36 Imm LR (2d) 45 [*Sivaraj*] at paragraph 3, Justice McKeown stated:

It is clear that the Board cannot discourage testimony on a point and then rely on the absence of evidence on it in its decision. The Board dissuaded the applicant from pursuing evidence of his work as a seaman. It cannot then rely on the absence of the passport to say he was not a seaman (see *Li v. The Minister of Citizenship and Immigration*, July 20, 1994, Court File A-1657-92 (F.C.T.D.), [1994] F.C.J. No. 1109). The matter must be returned to the Board for this reason alone.

In *Kaur v Canada (Minister of Employment and Immigration)* (1993), 21 Imm LR (2d) 301, 41 ACWS (3d) 382 [*Kaur*] Justice Marc Noël (as he then was) quashed a decision rejecting an

² Certified Record at p. 249, lines 7-8.

applicant's claim as a Convention refugee on the basis that the applicant's testimony was not credible, particularly because the applicant "presented no corroborative testimony to support her allegations". In that case, the presiding member had suggested that if the applicant's son was only to be called to corroborate the testimony of the applicant, his testimony could be dispensed with. He noted, at paragraph 7, "[a]fter suggesting that the corroborative testimony of the Applicant's son was not necessary, it was no longer open to the Board to rule against the Applicant on the basis that her evidence was not supported by corroborative testimony."

[12] In *Veres v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 124, [2000] FCJ No 1913 (QL) [*Veres*] Justice Denis Pelletier (as he then was), after citing *Sivaraj* and *Kaur*, above, confirmed that the RPD can direct which evidence it wishes to hear from the mouth of a witness and which it waives hearing. When it says that it does not need to hear from a witness, it cannot subsequently complain that it has not heard from the witness. Obviously in *Veres*, the circumstances my learned colleague had to deal with were quite different, but the point made at paragraph 32 of his decision that "[t]he price of setting the agenda is to accept the responsibility for the items which are missed" is an important one that can apply to comments such as those made in this case, especially now that the claimants generally present their case only after the RPD has set out the issues to be dealt with and carried out its own cross-examination.

[13] As evidenced by the two cases relied upon by the respondent (*Ndombele v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1211, particularly paragraph 22 where the affidavit of a witness who did not testify had been filed, and *Singh v Canada (Minister of Employment and Immigration)* (1994), 50 ACWS (3d) 651, [1994] FCJ No 1367, where the main

reason for refusing the refugee claim appears to have been the absence of critical aspects of his story from his personal information form) one must always examine the particular facts of each case to see if what was said and done was fair.

[14] That said, the Court strongly believes that the RPD should refrain from taking a position on the necessity of presenting a witness unless it knows exactly what facts the witness will testify about and in what specific respect this evidence is meant to corroborate a claimant's testimony or story. If a counsel simply inquires about the advisability of presenting a witness, the RPD can always refuse to take a position on the basis that it has yet to complete its evaluation of the evidence. If it chooses to take a stand, it must be fully aware that its decision will have consequences.

[15] In this particular case, the Court finds that the RPD ought to have known that its comment that the evidence was not necessary would clearly impact on the legal representatives acting in this case and it is clear that it did so without knowing the full extent of the facts on which the proposed witness was meant to testify.

[16] Even if the RPD did rely on other issues in its reasons, the Court is not convinced that this breach of procedural fairness had no impact whatsoever on the ultimate decision. The Court must thus set aside the decision.

[17] The parties did not present any question for certification and the Court is satisfied that this case turns on its own facts.

[18] The application is granted.

ORDER

THIS COURT ORDERS that the application is granted. The matter shall be remitted to a differently constituted panel for consideration.

“Johanne Gauthier”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6953-10

STYLE OF CAUSE: ALI ISIK
v
THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: June 16, 2011

REASONS FOR ORDER: GAUTHIER J.

DATED: June 17, 2011

APPEARANCES:

Mr. Lorne Waldman FOR THE APPLICANT

Ms. Neeta Logsetty FOR THE RESPONDENT

SOLICITORS OF RECORD:

Waldman & Associates FOR THE APPLICANT
Toronto, Ontario

Myles J. Kirvan FOR THE RESPONDENT
Deputy Attorney General of Canada
Toronto, Ontario