Federal Court  Cour fédérale

Date: 20160831

Docket: IMM-808-16

Citation: 2016 FC 993

Ottawa, Ontario, August 31, 2016

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

TUNCDEMIR, OMER

Applicant

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] Mr. Omer Tuncdemir is seeking judicial review of the decision by the Refugee Appeal Division [RAD], dismissing his appeal of the decision of the Refugee Protection Division [RPD] and denying his claim for refugee protection. The RAD refused to admit, as new evidence, the affidavit of a former Member of the Turkish Parliament, whom the Applicant purportedly knew

since 2007 and met again shortly after his claim was heard by the RPD. The RAD found that both the Applicant and the new evidence lacked credibility.

II. Background

[2] The Applicant is a citizen of Turkey, of Kurdish ethnicity, and a landscape architect. In his Basis of Claim [BoC] narrative, he states that he was politically active in pro-Kurdish causes and that on several occasions dating back to November 2002; he was detained, threatened and harassed by Turkish police. On September 20, 2012, the Applicant was taken into custody by the Turkish police, and asked to become an informant with respect to the BDP Party. When he refused, they tortured him for ten or eleven hours.

[3] When the Applicant finally returned home, he sought medical attention and was not physically able to return to work for one month. Shortly after he returned to work, he came home one day and found the police waiting for him. They said: “We are tired of waiting for you. It’s about time you made up your mind. Make your decision”.

[4] The Applicant decided to leave Turkey and obtained a work placement in Saudi Arabia in early 2013. He worked there for nearly two years and during that time, he returned to Turkey to visit his family every six months. The Applicant states he continued to fear that he would be persecuted by the authorities, but minimized the risk by going directly to his family’s home in the city of Van, and by avoiding political activities.

[5] The Applicant testified that he began making visa applications to travel to Canada in January 2014. He became a member of Turkey's HDP Party (People's Democratic Party) in March 2014 and of the Human Rights Society in April 2014. In December 2014, the Applicant came to Canada with a student visa. He states that he did not know anything about the refugee process and did not consult with a lawyer until May 11, 2015. His student visa expired on July 23, 2015. The Applicant made his refugee claim two weeks later, in August 2015.

III. RPD Decision

[6] The Applicant's refugee claim was rejected on October 30, 2015. The RPD concluded that "[the Applicant's] alleged political involvement and subsequent encounters with the Turkish authorities is not supported by evidence that I find to be credible".

[7] First, the RPD noted the Applicant's delay of eight months between his arrival in Canada and the filing of his claim. While acknowledging this was not, in and of itself, determinative of his credibility, the RPD found that the Applicant's statement that he did not know anything about the refugee process until May 2015 to be incongruous with his testimony, in which he expressed that he had come to Canada with the intention of making a refugee claim.

[8] Second, the RPD found that the Applicant's trips to Turkey every six months during his time in Saudi Arabia were incongruous with someone who has been tortured, especially since every return exposed him to scrutiny at the airport by the customs police.

[9] Third, the RPD noted that the Applicant's membership documents with the HDP Party (People's Democratic Party) and the Human Rights Society were obtained after the Applicant had begun making visa applications to travel to Canada in January 2014. According to the RPD, this raised the possibility that the Applicant had obtained these memberships to bolster a refugee claim. Furthermore, the HDP membership certificate indicated that the Applicant had only paid his membership fees once, despite the fact that there are monthly dues. Neither the HDP membership certificate nor the Human Rights Society document was signed by the Applicant, which the RPD considered suspect.

[10] Overall, the RPD found that the Applicant's answers during his testimony were not straightforward or consistent. The RPD had questioned the Applicant as to whether he had any photographs of himself supporting causes, and he testified that his parents had access to CDs in storage in his hometown, but he did not think it was necessary to ask them to forward the CDs. Later in the hearing, he said that the photographs were of him with other architects protesting the removal of their right to sign off on projects. As a result, the RPD was of the view that the Applicant had provided "evolving" answers to the same question.

[11] Given the above credibility concerns, the RPD concluded that the Applicant was not a reliable witness. The RPD finally examined the remaining evidence in support of his claim and found that while Kurdish nationalism still leads to discrimination, Turkish citizens of Kurdish origin who are not seen to be involved with separatist groups have basic human rights in Turkey, providing they can function in Turkish.

IV. Impugned Decision

A. *Admissibility of New Evidence*

[12] Before the RAD, the Applicant submitted the following pieces of new evidence:

- An affidavit from Mr. Bengi Yildiz, dated December 5, 2015, along with supporting documents. Mr. Yildiz claims to be a former Member of the Turkish Parliament and to have worked closely with the Applicant in Turkey;
- A group of photographs of the Applicant's involvement in rallies of the Landscape Architects Student Association.

[13] The RAD notes that under subsection 110(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], an appellant may present only evidence that arose after the rejection of the claim or that was not reasonably available, or that he could not reasonably have been expected to have presented in the circumstances, at the time of rejection (*Olowolaiyemo v Canada (Citizenship and Immigration)*, 2015 FC 895 at para 19).

[14] The RAD then goes on to state that it would not limit its analysis to the test in subsection 110(4) of the IRPA; it would also consider the factors for new evidence set out in *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 at paras 13-15: credibility, relevance, newness and materiality, in addition to any express statutory provisions. The RAD notes it would use the *Raza* factors as "useful guidance" (*Niyas v Canada (Citizenship and Immigration)*, 2015 FC 878 at para 27) rather than applying them strictly, since their applicability to subsection 110(4) of the

IRPA was still unsettled in the jurisprudence (*Deri v Canada (Citizenship and Immigration)*, 2015 FC 1042 at para 56). With respect to a document's "newness", the RAD states that it "cannot be tested solely by the date of its creation; what is important is the event or circumstance sought to be proved by the evidence" (see *Raza*, above at para 16).

[15] Additionally, the RAD indicates that it would consider the credibility or trustworthiness of the new evidence, in the circumstances, as per subsection 171(a.3) of the IRPA, and that it would also assess the relevance of the evidence to ensure that it deals with the proceeding "informally and quickly", as per subsection 162(2) of the IRPA.

[16] Turning first to the affidavit of Mr. Yildiz, the RAD finds that the evidence it contains is not new by any means. Mr. Yildiz says he was elected to Turkish Parliament in 2007 and again in 2011. He claims to have met the Applicant in 2007 and that, thereafter, the Applicant accompanied him to party events, rallies, and meetings, sometimes even acting as his bodyguard. These statements relate to the Applicant's political activism in Turkey and pre-date the rejection of his refugee claim in 2015. Since the information in the affidavit is highly relevant to his claim, the Applicant could reasonably have been expected to have presented such evidence to the RPD prior to the rejection of his claim.

[17] The RAD also rejects the Applicant's argument that the affidavit should be admitted because it directly rebuts a central finding of the RPD, and to do otherwise would be contrary to Canada's commitments under the *Convention relating to the Status of Refugees*, 22 April 1954, 189 UNTS 150, and section 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the

Constitution Act, 1982, being Schedule B to the *Canada Act, 1982 (UK)*, c 11 [Charter]. The RAD states it has no discretion to admit evidence that does not meet the criteria found in subsection 110(4) of the IRPA (*Canada (Citizenship and Immigration) v Desalegn*, 2016 FC 12 at para 17).

[18] Thus, the RAD finds that Mr. Yildiz's affidavit and supporting documents do not meet the disjunctive test in subsection 110(4) of the IRPA. The RAD states that even if the documents did pass the test in subsection 110(4), the RAD would decline to admit them as they lacked credibility when assessed in the context of the Applicant's refugee claim. Mr. Yildiz and the Applicant purportedly worked together closely from 2007 to 2009; however, these activities are conspicuously absent from the Applicant's BoC form. In fact, the Applicant's BoC narrative states that when he moved to Istanbul in 2007, he tried to keep a low profile, though he did attend some protests. Then, from December 2008 to May 2009, the Applicant was in compulsory military service, which contradicts the statement that he and Mr. Yildiz were working closely.

[19] As for the photographs, the RAD finds that the RPD had asked the Applicant a vague question about his participation in "good causes" and had therefore erred in finding that his evidence evolved in response to that question. The RAD concludes that the Applicant could not reasonably have been expected to provide the photographs to the RPD. Nevertheless, while the photographs may meet the test in subsection 110(4) of the IRPA, the RAD finds that they are not admissible on appeal because they are not relevant, material or credible. They are not related to his fear of persecution, and the words on the pictures are not translated.

[20] The RAD rejects all of the new evidence submitted by the Applicant and, therefore, refuses the Applicant's request for an oral hearing.

B. *Assessment of the Evidence and of the RPD Decision*

[21] The RAD considers the decision of the RPD, as well as the submissions regarding that decision, and states it would conduct an independent assessment of the evidence. On matters where the RPD has no advantage, the RAD would show no deference and would apply a standard of correctness (*X (Re)*, 2015 CanLII 19235 (CA IRB) at para 103).

(1) RPD Hearing

[22] First, the RAD rejects the Applicant's argument that the RPD had failed to properly confirm the accuracy of the BoC. The RPD gave the Applicant the opportunity to confirm that he provided truthful information, to which the Applicant answered in the affirmative.

[23] Second, the RAD finds that the RPD erred by failing to consult with counsel about the issues to be addressed at the beginning of the hearing, contrary to the Chairperson's Guidelines. However, prior to receiving counsel's oral submissions, the RPD did identify the issues that had been removed, as well as the issues remaining to be addressed. The RPD's error was of no consequence to the Appellant because his counsel made it clear in his submissions that he was aware that subjective fear was a remaining issue for the RPD.

[24] Third, the RAD rejects the Applicant's argument that the RPD asked unclear questions, since the Applicant failed to properly identify those errors in the proceeding or the decision. The RAD also rejects the Applicant's argument that he had a tendency to misunderstand questions and to give imprecise answers: this was a specific factor in the RPD's credibility assessment and could not now be used against the RPD's decision.

(2) Subjective Fear

[25] The RAD agrees with the RPD that the Applicant's actions were indicative of a lack of subjective fear. Here is a relevant excerpt from the RAD's findings:

> Despite the torture, the police demands, his refusal to cooperate, and the continued interest from the police, the Appellant voluntarily left the safety of Saudi Arabia to visit Turkey – not once, but on multiple occasions. […] The fact that he voluntarily and repeatedly returned to the place where he was allegedly tortured, in danger, and sought by the police seriously undermines his credibility. […] This serious inconsistency between words and actions is [a] valid basis for a negative credibility finding.

[26] The RAD rejects the Applicant's argument that he returned to Turkey because he was deeply committed to social change and the political process and that the RPD was "mandating cowardice" as the only acceptable way for him to act after facing persecution. The Applicant had specifically said that on his returns he only visited family and avoided political activity. Moreover, the RAD finds that his delay in making a refugee claim, though not determinative, is a valid consideration.

(3) Inconsistencies

[27] The RAD rejects the Applicant's argument that the RPD's findings on inconsistency are unreasonable and that its questions were vague. The RAD agrees, however, that the RPD's question about "good causes" had led it to make an erroneous credibility finding.

[28] Regarding the membership documents, the RAD shares the concerns of the RPD: the HDP membership certificate was only issued after the Applicant began his efforts to come to Canada; he paid his monthly dues only once; neither the certificate nor the Human Rights Society document bore his signature; and he was not physically present in Turkey when the documents were filled out. Overall, the Applicant had not provided proof of his political activity.

[29] The RAD declines to admit the new evidence proposed by the Applicant. It finds that the Applicant generally lacked credibility, and dismisses his appeal.

V. Issues and standard of review

[30] This application for judicial review raises the following issues:

A. *Did the RAD err in failing to admit as new evidence the affidavit of Mr. Yildiz?*

B. *Did the RAD err in failing to give the Applicant or Mr. Yildiz an opportunity to respond to its credibility concerns regarding the affidavit of Mr. Yildiz?*

[31] The applicable standard of review with respect to the RAD's interpretation of subsections 110(4) and (6) of the IRPA is reasonableness (*Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 at para 29).

VI. Analysis

A. *Did the RAD err in failing to admit as new evidence the affidavit of Mr. Yildiz?*

[32] With respect to the RAD's interpretation of subsection 110(4) of the IRPA, I do not agree with the Applicant that it was an "overly harsh and restrictive interpretation" of that provision. The RAD's interpretation conforms to *Singh*, above at para 35, in which the Federal Court of Appeal [FCA] held that the conditions in subsection 110(4) are "inescapable and would leave no room for discretion on the part of the RAD", and must therefore be "narrowly interpreted". Moreover, the FCA held that "the implicit criteria identified in *Raza* are also applicable in the context of subsection 110(4)", subject to a modification regarding materiality (ibid at paras 47, 49).

[33] Accordingly, I find that the RAD did not err in its interpretation of subsection 110(4) of the IRPA. The question then becomes: was it reasonable for the RAD to refuse to admit the affidavit of Mr. Yildiz because the Applicant could have reasonably been expected, in the circumstances, to present that evidence at the time of rejection?

[34] I answer that question in the affirmative. The RAD appropriately relied on *Raza*, above at para 16, for the proposition that a document's newness "cannot be tested solely by the date of its

creation; what is important is the event or circumstance sought to be proved by the evidence". Mr. Yildiz's affidavit, while prepared after the RPD hearing, did not contain new information. Since that information was relevant to the Applicant's claim, it was reasonable for the RAD to conclude that the Applicant could have been reasonably expected to have presented such evidence to the RPD prior to the rejection of his claim. He could have brought that information to the attention of the RPD as soon as he met Mr. Yildiz in late October 2015, as noted by the RAD. Also, he could have included the information about his alleged political activities with Mr. Yildiz in his BoC, which he did not do.

[35] The RAD goes further to say that even if the conditions in subsection 110(4) were met, it would decline to admit the affidavit because it lacks credibility. The RAD could properly consider the credibility of the affidavit, as per paragraph 171(a.3) of the IRPA, and *Raza*, above. As held by the FCA in *Singh*, above at para 44:

> … It is difficult to see, in particular, how the RAD could admit documentary evidence that was not credible. Indeed, paragraph 171(a.3) expressly provides that the RAD "may receive and base a decision on evidence that is adduced in the proceedings and considered credible or trustworthy in the circumstances." …

[36] Moreover, if we turn to the language in *Raza* itself regarding credibility, the FCA held that the question to be asked is: "Is the evidence credible, considering its source and the circumstances in which it came into existence? If not, the evidence need not be considered" (*Raza*, above at para 13). In this case, the RAD reasonably came to the conclusion that the affidavit lacks credibility when assessed in the context of the Applicant's refugee claim, especially in light of the fact that the affidavit contradicted certain parts of the Applicant's BoC narrative.

[37] Therefore, it was reasonable for the RAD, in all the circumstances of this case, to simply not believe that the Applicant had randomly met Mr. Yildiz at the exact same time as his refugee claim was rejected by the RPD.

[38] Finally, I reject the Applicant's second argument that the RAD erred by failing to admit the evidence on the basis that doing so is contrary to Charter values. I find that it was reasonable for the RAD to reject this argument since it does not have the discretion to admit evidence which fails to meet the criteria set out in subsection 110(4) of the IRPA, as stated by the RAD in its decision at para 42. This conforms to the reasoning in *Singh*, above at paras 62-63, where the FCA held that subsection 110(4) does not grant any discretion to the RAD regarding the admissibility of new evidence, and thus the RAD cannot consider Charter values in that context. The FCA held that the obligation to enforce Charter values arising out of *Doré v Barreau du Québec*, 2012 SCC 12, was not applicable to circumstances such as these, since that case requires that the administrative decision maker be empowered to exercise a statutory discretion in order to consider Charter values.

B. *Did the RAD err by failing to give the Applicant or Mr. Yildiz an opportunity to respond to its credibility concerns regarding the affidavit of Mr. Yildiz?*

[39] Given that the RAD reasonably found that the affidavit of Mr. Yildiz was inadmissible because it did not meet the conditions in subsection 110(4), and that it was not credible, the RAD did not need to determine whether an oral hearing was required. As the FCA held in *Singh*, above at para 51:

> … The new evidence must meet the admissibility criteria set out in subsection 110(4), and a new hearing can be held only if the new

> evidence fulfils the conditions set out in subsection 110(6). Where the RAD finds that all of the evidence should be heard again in order to make an informed decision, it must refer the case back to the RPD (ss. 111(2)). This legislative framework reflects Parliament's clear wish to narrowly define the introduction of any new evidence.

[40] Since the new evidence was not admitted under subsection 110(4), the RAD did not need to move on to determine whether the new evidence fulfilled the conditions in subsection 110(6). The RAD properly conducted a paper-based appeal founded on the record before the RPD and the RPD's decision.

[41] The Applicant cites *Ching v Canada (Citizenship and Immigration)*, 2015 FC 725 to argue that procedural fairness is required where the RAD makes credibility findings, even if these findings are not determinative of the claim. However, I find that *Ching* is distinguishable from the present case. In *Ching*, above at para 62, the applicant argued that "the RAD should have held an oral hearing because it reviewed the RPD's credibility findings, which the applicant had not raised on appeal, but did not provide any opportunity for the applicant to make submissions to respond to the RAD's concerns". Justice Kane held that this was an issue of procedural fairness that merited further consideration apart from the conditions in subsection 110(6), since the RAD had raised new issues on appeal that were not raised by the applicant (*Ching*, above at paras 64-71).

[42] That is not the case here. The Applicant does not argue that the RAD raised new credibility issues on appeal. Rather, in his memorandum before the RAD, he argues that the RPD

erred in its credibility findings, and thus he asked the RAD to reconsider its evaluation of his credibility (see the Applicant's memorandum at paras 39, 43-56).

[43] In this judicial review, the Applicant does not take issue with the RAD's credibility findings on the merits of his claim. He only takes issue with the RAD's finding that the new evidence was not credible. This is not a "new issue" on appeal, as the RAD had to make a finding on the admissibility of the new evidence. Moreover, as explained above, the RAD's finding that the new evidence lacked credibility was subsidiary to its principal finding that the new evidence submitted did not meet the test in subsection 110(4) of the IRPA.

[44] Accordingly, there is no procedural fairness issue here requiring consideration beyond the conditions for a new hearing found in subsection 110(6).

VII. Conclusion

[45] For the above reasons, this application for judicial review is dismissed. The parties have proposed no question of general importance for certification and none arises from this case.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;
2. No question of general importance is certified; and
3. No costs are granted.

"Jocelyne Gagné"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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