Federal Court  Cour fédérale

Date: 20180209

Docket: IMM-2173-17

Citation: 2018 FC 149

Ottawa, Ontario, February 9, 2018

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

ATIF ACIKGOZ
and
SAFIYE SENA IZ ACIKGOZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] In this application, the Applicants seek judicial review of a decision of the Refugee Appeal Division (RAD) dated April 18, 2017, in which the RAD confirmed the finding of the Refugee Protection Division (RPD) that the Applicants, Atif Acikgoz and Safiye Sena Iz

Acikgoz, are neither Convention refugees nor persons in need of protection within the meaning of s 96 and 97 of the IRPA.

[2] At the conclusion of the hearing I indicated that I would grant the application and remit the matter for reconsideration by a differently constituted panel. These are my reasons for arriving at that conclusion.

II. Background

[3] The Applicants, citizens of Turkey, assert a fear of persecution on account of their alleged affiliation, involvement and belief in the Hizmet movement (Hizmet), also known as the Gulen movement.

[4] The Applicants graduated from and were employed at the Fatih University, a university affiliated with the Hizmet. Mr. Acikgoz earned a Ph.D. in 2013 and Ms. Iz Acikgoz earned a M.Sc. in 2012. The Applicants were later employed by the Fatih University; Mr. Acikgoz as an assistant professor and Ms. Iz Acikgoz as a lecturer.

[5] The Applicants were heavily involved with the Hizmet; they held bank accounts with the Bank Asya, a bank affiliated with the Hizmet which is now proscribed by the Turkish government; they volunteered for the Kimse Yok Mu, a Hizmet affiliated charity; and routinely participated in Hizmet related activities at the Fatih University.

[6] On June 29, 2016, the Applicants entered Canada to visit family. While they were here,

Turkey suffered a coup attempt on July 15, 2016. It was attributed to the Hizmet by the Turkish government. A great number of persons have been detained, allegedly mistreated in jail and subjected to investigation solely due to their affiliation with the Hizmet.

[7] The Applicants were scheduled to fly back to Turkey on July 22, 2016 but their flight was cancelled and they were informed that their university was going to be closed by the government. On August 4, 2016, the Applicants claimed protection in Canada under s 96 and s 97 of the IRPA based on their alleged affiliation and involvement with Hizmet. They feared returning to Turkey due to persecution.

[8] On December 15, 2016, the RPD refused their claims. The RPD found that the Applicants were not credible about central elements of their claims, failed to establish their Hizmet identity, and were not at risk of harm because of their profiles as academicians. In particular, the RPD found that the Applicants had embellished their claims by providing additional information as the application had progressed. The RPD reached this conclusion while noting that claims from Turkey could evolve over time due to the changing political climate.

[9] The RPD placed considerable emphasis on what it considered to be differences between the information provided by the principal Applicant on their initial application form (the IMM 5669 Form), the Basis of Claim forms filed on August 25, 2016, the Narrative filed October 5, 2016 and an Addendum to the Narrative, filed November 2, 2016.

[10] One particular finding related to the failure of the principal Applicant to identify the Hizmet as an "organization" that he supported in the IMM 5669 form. This was considered to be, in the RPD's view, "devastating to [his] credibility" notwithstanding the Applicant's explanation at the hearing that Hizmet was not an organization in the normal sense of the word but a movement.

[11] The RPD concluded that the Applicants' activities in support of Hizmet would not lead to a serious possibility of persecution if they returned to Turkey; only a mere possibility. The RPD noted that it is clear that the Turkish government is acting swiftly and harshly against those it believe to be involved with the coup, but academics appear to be less likely to be targeted than members of the police, judiciary, media and security forces. While losing their employment at Fatih University is extremely stressful, the RPD was unable to find that this is persecutory given the current situation.

[12] On appeal to the RAD, the Applicants argued that the RPD had erred in its credibility assessment, in its assessment of their Hizmet identity and in its assessment of their risk based on their profile as academics at the Hizmet affiliated university. They submitted twenty-two documents as proposed new evidence including: letters of reference from three academic colleagues who had been successful in their refugee claims before the RPD dated in October and November 2016 with attached Notices of Decision from the RPD; letters of reference from organizations including the SAYGI Canadian Turkish Academics Association, all dated in January 2017; and a series of articles from news outlets regarding the detention of academics in Turkey, all dated between November 2016 and January 2017.

[13] On April 18, 2017, the RAD dismissed the Applicants' appeal and confirmed the RPD's decision pursuant to s 111(1)(a) of the IRPA.

[14] The RAD dismissed most of the new evidence submitted by the Applicants on the ground that it was reasonably available and could have been presented at the time of the RPD hearing.

[15] The RAD showed deference to the RPD's credibility finding and drew multiple negative inferences from the Applicants' failure to include relevant information in their immigration forms, such as membership, volunteer work or employment with Hizmet. The RAD accepted the RPD's finding that many people who supported the Hizmet were at risk, but found that the Applicants were not targeted, and that the loss of their jobs was not persecutory as academics were not being targeted as much as other groups.

III. Issues

[16] In my view, the issues submitted by the parties for consideration can be reduced to this: was the RAD's decision reasonable? That issue subsumes a number of questions relating to the rejection of the new evidence, the weighing of the evidence, the findings about Hizmet and the overall finding that the Applicants' lacked a fear of persecution.

IV. Relevant Legislation

[17] The relevant provisions of the IRPA read as follows:

Convention refugee	**Définition de réfugié**
96 A Convention refugee is a person who, by reason of a well-founded fear of persecution	**96** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui,

for reasons of race, religion, nationality, membership in a particular social group or political opinion,

craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

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

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) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

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

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant:

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(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,

(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,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	**(iii)** la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	**(iv)** la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
Person in need of protection	**Personne à protéger**
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	**(2)** A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.
[…]	[…]
Evidence that may be presented	**Éléments de preuve admissibles**
110 (4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.	**110 (4)** Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans les circonstances, au moment du rejet.
[…]	[…]

V. Standard of Review

[18] In their written argument, the Applicants argue that the standard of correctness is applicable to the review of the RAD's decision as it is based on the interpretation of the *1951*

Refugee Convention as implemented in the IRPA: *Canada (Minister of Citizenship and Immigration) v. Dhillon*, 2012 FC 726, at para 20.

[19] Counsel for the Applicants acknowledged at the hearing that more recent jurisprudence has established that the standard is reasonableness: see *B010 v Canada (Minister of Citizenship and Immigration)*, 2013 FCA 87, at paras 59-61. In my view the standard of review of such decisions is now well established. Accordingly, I see no reason to revisit that question.

[20] I agree with the Respondent that the presumption to-day is that the interpretation and application of statutes that are at the heart of the tribunal's jurisdiction is subject to the standard of reasonableness: *Canada (Attorney General) v Canadian Human Rights Commission*, 2013 FCA 75, at paras 13-14; *Abraham v Canada (Attorney General)*, 2012 FCA 266, at paras 45 and 48.

[21] Moreover, the present questions involve the credibility of witnesses, the weighing of evidence and the reasonableness of the RAD's decision that the Applicants do not meet the requirements under s 96 and 97 of the IRPA; it is not a constitutional question, nor is it a question regarding the jurisdictional lines between two or more competing specialized tribunals: *Alberta (Information & Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, at para 30. In the result, the standard is reasonableness.

VI. Analysis

A. *Did the RAD unreasonably reject new evidence pursuant to s 110(4) of the IRPA?*

[22] The Applicants submit that the RAD zealously dismissed their new evidence and, in particular, take issue with the letters from their colleagues and the news articles that post-date the RPD's hearing.

[23] The Respondent submits that the letters were reasonably rejected as, notwithstanding that they were written after the RPD hearing, the events described therein had occurred previously: *Raza v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385 [*Raza*], at para 16. In the Respondent's view, the Applicants could have provided these letters at the RPD's hearing but failed to disclose their existence and relevance.

[24] I agree that *Raza* is applicable, in particular the questions asked by Justice Sharlow at para 13. These questions are as follows:

1. Credibility: Is the evidence credible, considering its source and the circumstances in which it came into existence? If not, the evidence need not be considered.

2. Relevance: Is the evidence relevant to the PRRA application, in the sense that it is capable of proving or disproving a fact that is relevant to the claim for protection? If not, the evidence need not be considered.

3. Newness: Is the evidence new in the sense that it is capable of:

    a) proving the current state of affairs in the country of removal or an event that occurred or a circumstance that arose after the hearing in the RPD, or

b) proving a fact that was unknown to the refugee claimant at the time of the RPD hearing, or

c) contradicting a finding of fact by the RPD (including a credibility finding)?

If not, the evidence need not be considered.

4. Materiality: Is the evidence material, in the sense that the refugee claim probably would have succeeded if the evidence had been made available to the RPD? If not, the evidence need not be considered.

5. Express statutory conditions:

a) If the evidence is capable of proving only an event that occurred or circumstances that arose prior to the RPD hearing, then has the applicant established either that the evidence was not reasonably available to him or her for presentation at the RPD hearing, or that he or she could not reasonably have been expected in the circumstances to have presented the evidence at the RPD hearing? If not, the evidence need not be considered.

b) If the evidence is capable of proving an event that occurred or circumstances that arose after the RPD hearing, then the evidence must be considered (unless it is rejected because it is not credible, not relevant, not new or not material).

[25] In particular, did the RAD consider whether the evidence was new in the sense that it contradicted a finding of fact by the RPD, including a credibility finding? Was the information known to the Applicants at the time of the RPD hearing?

[26] The RAD rejected the letters from colleagues because the Applicants had failed in the RAD's estimation to provide an explanation about why the letters were not submitted to the RPD prior to the rejection of their claims. In other words, during the brief period between the RPD hearing on November 2 and 4 2016, and the issuance of its decision on December 15, 2016. I

consider this to be another example of excessive zeal to reject the evidence particularly in light of the evolving situation relating to Turkey.

[27] The Applicants submitted letters with Notices of Decision from other Turkish refugee claimants who were involved in the Hizmet movement and had obtained protection from Canada following the coup attempt. The RAD rejected the letters but admitted the Notice of Decisions as case law and indicated that it would consider them under the heading of Merits of the Claim: RAD, para 12. The letters served to explain the Notices of Decision and it is not clear to me why they were not admissible for that purpose. Moreover, I can't find any further reference to the Notices of Decision in the RAD's reasons. Thus it appears that the RAD failed to consider the Notices submitted by the Applicants, although it indicated the contrary.

[28] The articles, which detailed the firing and detention of academics affiliated with Hizmet, were rejected because - while they described events which occurred earlier - the articles themselves post-dated the RPD's decision. This, in my view, was an unreasonable finding. When events are occurring in the context of an authoritarian regime's suppression of dissidents, the regime may seek to conceal its activities. A period of time may elapse for accounts of persecution to emerge, be published and made available to the outside world. Evidence of the firing and detention of academics affiliated with Hizmet was particularly relevant to the appeal before the RAD as the RPD had found that academics had not been targeted as much as other groups. The RAD endorsed that finding in reaching its conclusion that the risk of persecution was only a possibility.

B. *Did the RAD reasonably weigh the evidence?*

[29] The RPD had, in my view, unreasonably relied on its assessment of the evolution of the Applicants' claims between their initial submission and the hearing. It was incumbent on the RAD, applying the standard found in *Canada (MCI) v Huruglica*, 2016 FCA 93, to carefully analyse the evidence to determine whether the RPD had erred and to come to its own determination. In my view, the RAD failed in reasonably applying that standard.

[30] While the RAD seemed to appreciate the objective evidence relating to the Turkish government's suppression of the Hizmet or Gulen movement, it accepted the RPD's assessment of the evidence relating to the treatment of academics. The RPD's view was coloured by its focus on what it considered to be the evolution of the Applicants' claims over time. And the RPD appeared to have been annoyed with their counsel for the late filing of disclosure – an annoyance that was then reflected in the reasons. The RPD faulted the Applicants for what may have been an omission on the part of their counsel. The RAD erred, in my view, for not considering whether the RPD's credibility finding related to late disclosure was well founded.

[31] Both the RPD and the RAD gave insufficient weight to the reality that the actions of the Turkish government did not come to an end on the day of the attempted coup on July 15, 2016. The Turkish government did not detain everyone believed to be opposed to the regime on that date. They are continuing to arrest and detain anyone perceived to be associated with the Hizmet movement. As demonstrated by the record, among the first targeted were the universities which were closed. The fact that it may have taken the government some time to get around to arresting

and detaining academics, among the many thousands of other members of Turkish society who have been subjected to similar treatment, did not diminish the risk of persecution.

[32] The RPD saw inconsistencies between a negative response to a question on the IMM 5669 Form and the content of the Basis of the Claim form. The principal Applicant answered "none" on the IMM 5669 form to the question whether he had "supported, been a member of or been associated with any organization". In the BOC form, signed just a few days later, he gave a detailed explanation that he and his wife feared persecution for being "active members of Hizmet Movement." Both of these forms, it should be noted, were completed with the aid of an interpreter. It is not clear how the form was translated for the Applicants. Moreover, there is no inconsistency if the BOC is viewed as an expansion upon or continuation of the initial application form.

[33] The principal Applicant attempted at the hearing to explain that Hizmet was not an "organization" in the sense of the word as he understood it. It was a "movement". He had no card or other evidence to demonstrate membership as that concept did not apply in the context. The Applicant's explanation was brushed aside by the RPD and that finding was endorsed by the RAD. This reflected a fundamental misunderstanding of the Applicant's evidence and constituted a reviewable error. A movement implies adherence to shared values and principles and may have no formal structure. The focus on membership by both the RPD and RAD was misplaced. They sought to create contradictions in the Applicants' evidence which, in light of the record, weren't there.

[34] The RPD drew an adverse credibility finding over a difference between the principal Applicant's testimony that he had first became involved with Hizmet when he was a student at university between 2003 and 2004 and his narrative which stated that his involvement began when he attended university preparation courses in 1999-2000. The Applicant explained that he had understood the question to mean that the RPD was interested in knowing when he had embraced the movement and not just his first encounter with it. The RAD upheld the RPD's finding that this was a contradiction going to credibility. It is not unknown for a young person to be first intrigued by a philosophy before fully adopting it at a later stage in their development. The difference in how the Applicant explained the evolution of his thinking was not significant particularly when it is again considered that his testimony was given through an interpreter.

[35] Another inconsistency seized upon by the RPD to make an adverse credibility finding concerned the Applicant's explanation for why he had become attracted to Hizmet. In his testimony he said that it represented a modern version of Islam, which he liked. This explanation was not mentioned in his narrative. It was reasonable for the principal Applicant to omit this level of detail in his narrative and written material.

[36] At the hearing, the Applicant was pressed to provide more information about his reasons for being drawn to Hizmet and his evidence was much more detailed. It was entirely reasonable for him at that time to elaborate on the elements of the Hizmet philosophy that he found attractive. There is no question that Hizmet is Islamic but for some who adhere to its principles, it has also transformed into a broader civil society movement. The RPD's reasons indicate that

the panel had little or no understanding of this. The RAD erred in dismissing that argument on appeal.

[37] In my view, both the RPD and the RAD were, in the words of Justice Mahoney in *Owusu-Ansah v Canada (Minister of Citizenship and Immigration)*, [1989] R.c.J. No. 442, "reaching for inconsistencies in the claimant's evidence to support findings of lack of credibility". In the present matter, the Board undertook a similar microscopic review of the claimants' evidence. Mr. Acikgoz's testimony is not "rife with contradictions" as the RPD and RAD found if read with some consideration to the situation in which he and his wife found themselves after they had come to Canada and the attempted coup was put down back home in Turkey.

[38] The RAD upheld the RPD's finding that a letter from the SAYGI Turkish Canadian Academics Association (SAYGI letter) was worthy of little weight because it did not explicitly state that the principal Applicant was a member of the Hizmet movement when he had joined SAYGI. There were two letters from SAYGI. The first, which was discounted by the RPD, and a second letter, dated January 23, 2017 that was submitted to the RAD. The RAD stated that this letter offered "little to no new information."

[39] It is trite law that it is not the role of this Court to reweigh the evidence that was before an administrative tribunal: *Smith v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1283, at para 49; *Dunsmuir*, above; *Khosa v Canada (Minister of Citizenship)*, 2009 SCC 12, at para 59. However, the RAD's justification for attributing the second SAYGI letter no weight is

unreasonable. The letter clearly states that SAYGI is “inspired” by the teachings of the Hizmet movement. The letter was clearly relevant to the merits of the refugee claims; it spoke to the Applicants’ ongoing involvement and belief in the Hizmet movement.

[40] The claims were based, at least in part, on perceived political opinion. Whether the Applicants were or were not active in Hizmet, their affiliation with the University and other institutions associated with Hizmet, would identify them as targets of a government intent on suppressing the movement. In interpreting a claim based on political persecution, the test is not whether the Board considers that the Applicants engaged in political activities but whether the government of the claimed against country would consider their conduct to be political: *Astudillo v Canada (Minister of Employment and Immigration)*, [1979] FCJ No 904 at para 4. That does not appear to have addressed by the RAD.

[41] The RAD’s finding with regard to the Applicants’ evidence of social media statements was reasonable. The Applicants had tendered a short summary of the statements in English together with 12 pages of posts entirely in Turkish and untranslated. The summary did not indicate when the statements were made. Moreover, as the RAD pointed out, it was almost impossible to discern what the posts actually say in the original documents due to the size of the font.

[42] Both the RPD and the RAD held that the Applicants’ continuing disclosure prior to and at the RPD hearing was not merely an attempt to elaborate on their initial statements but rather an unjustified attempt to bolster and exaggerate the Applicants’ affiliation with Hizmet. They drew

negative credibility findings based on this assessment. This was not, in my view, a reasonable conclusion to draw from the Applicants' efforts to provide additional information as it came to their attention. This was not surprising in the circumstances as the situation in Turkey and the Applicants' awareness of it continued to evolve and change in the months leading to the hearing. The situation was not static as the RPD seems to have concluded. The RPD, the Applicants' argue, inserted "its complain[t] about late disclosure under the rubric of credibility." The RAD then erred in endorsing that conclusion.

VII. Conclusion

[43] I agree with the Applicants that the RAD's decision, as a whole, reflects an overzealous and microscopic effort to find fault with their claims and their evidence, including the new evidence submitted pursuant to s 110(4) of the IRPA. The Federal Court of Appeal has routinely cautioned against this approach: *Arslan v Canada (Minister of Citizenship and Immigration),* [2013] FCJ No 246, 2013 FC 252, at paras 89-90; *Owusu-Ansah v Canada (Minister of Employment and Immigration)*, [1989] FCJ No 442 at para 2.

[44] As Justice Hugessen stated in *Attakora v Minister of Employment and Immigration,* [1989] FCJ No 444 (CA), "[w]hile the Board's task is a difficult one, it should not be over-vigilant in its microscopic examination of the evidence of persons who, like the present application, testify through an interpreter and tell tales of horror in whose objective reality there is reason to believe." In the result, the application is granted and the matter will be returned to the RAD for reconsideration by a different member.

[45] No questions were proposed for certification.

JUDGMENT IN IMM-2173-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review in Court file IMM-2173-17 is granted, the decision of the RAD is quashed and the matter is referred back to the RAD to be determined by a different member;

2. No questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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