

Federal Court



Cour fédérale

**Date: 20210125**

**Docket: IMM-4540-19**

**Citation: 2021 FC 83**

**Ottawa, Ontario, January 25, 2021**

**PRESENT: The Honourable Justice Fuhrer**

**BETWEEN:**

**OGUZ GURSES**

**Applicant**

**and**

**THE MINISTRY OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] The Applicant, Oguz Gurses is a citizen of Turkey. He came to Canada in 2017 without his family and sought refugee protection. Mr. Gurses alleges fear of the Turkish government based on persecution, including arrests, interrogations and beatings, for his political opinion as a leftist, and for his imputed political opinion as a perceived member or supporter of the Fethullahist Terrorist Organization [FETO]. Mr. Gurses asserts the government's perception

stems in part from his business dealings in the textile industry with “Ismail,” who was suspected of being affiliated with the FETO.

[2] Mr. Gurses also alleges fear of the Justice and Development Party [AKP] which threatened him because of perceived FETO support. He further asserts the AKP’s perception stems in part from his posting of political campaign posters in the windows of his workplace. Despite his support for the Kurdish and leftist coalition, Mr. Gurses denies however being a member of any particular group or party.

[3] On June 24, 2019, the Refugee Appeal Division [RAD] upheld the March 7, 2018 Refugee Protection Division [RPD] decision denying Mr. Gurses’ refugee claim, finding that he was not credible and, thus, not at risk of harm from the Turkish government or supporters of the AKP in Turkey. The RAD therefore confirmed the RPD’s decision that Mr. Gurses is neither a Convention refugee nor a person in need of protection. He now seeks judicial review of the RAD’s decision. Having considered the issues Mr. Gurses raises, I find the sole issue for determination is the reasonableness of the RAD’s decision.

[4] The presumptive standard of review is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 10. To avoid judicial intervention, the decision must bear the hallmarks of reasonableness – justification, transparency and intelligibility: *Vavilov*, at para 99. A decision may be unreasonable if the decision maker misapprehended the evidence before it: *Vavilov*, above at paras 125-126. The party challenging

the decision has the onus of demonstrating that the decision is unreasonable: *Vavilov*, at para 100.

[5] Having reviewed the record and considered the parties' written and oral submissions, I find the RAD's credibility assessment unsustainable, because of unreasonable discounting of the Applicant's psychiatric evidence of memory issues resulting from traumatic experiences, and because of unreasonable treatment of certain invoices. I further find the RAD failed to engage with direct, corroborative evidence of Mr. Gurses' detentions. I therefore grant this judicial review application for the more detailed reasons that follow.

## II. Analysis

### (i) *Psychiatric Report*

[6] I find that the RAD seriously misapprehended the psychiatrist's report, thus rendering its decision unreasonable: *Vavilov*, above at paras 125-126; see also *Isangulov v Canada (Citizenship and Immigration)*, 2014 FC 1197 at para 13. Caution must be exercised where there is a connection between the inconsistencies or omissions identified by the decision maker and a person's cognitive challenges referred to in a medical or psychiatric report: *Joseph v Canada (Citizenship and Immigration)*, 2015 FC 393 at para 33. I find the RAD unreasonably failed to exercise such caution in the matter before me.

[7] Mr. Gurses alleges that fifty percent of his business came from Ismail's company and that Mr. Gurses met with Ismail or one of his employees regularly, including for lunch and dinner.

During the RPD hearing, however, the Applicant could not remember the name of Ismail's company, indicating he had difficulty "memorizing" things. Relying on this fact, and the expectation that Mr. Gurses instinctively would know, rather than having to memorize, the name of the company with which his own company allegedly did a great deal of business, the RAD found that Mr. Gurses inability to recall the name of Ismail's company undermined the credibility of his claim.

[8] The RAD acknowledged the psychiatric report and agreed with the diagnosis of severe and chronic post-traumatic stress disorder [PTSD] resulting in a variety of symptoms including memory issues, difficulty focusing, and disorganization of memories resulting in an inability to recall dates and chronology of past events. The psychiatrist describes the hard time Mr. Gurses had recalling the date of his arrival in Canada and the name of the sleeping pill he was taking in Turkey, and indicates memory issues are common in traumatized individuals. She opines that Mr. Gurses' hearing presentation would have to be assessed through the lens of trauma and makes several recommendations for accommodations at his hearing.

[9] The RAD, however, found it unclear from the psychiatrist's report what to expect from Mr. Gurses in terms of his testimony. He could recall a considerable amount of information from his past during the hearing. The RAD was of the view that the psychiatrist's report failed to account adequately Mr. Gurses' inability to recall certain information, including the company name of his biggest client and the number of times he was arrested, or inconsistencies in his evidence about his wife's treatment by police after he left Turkey. The RAD thus gave the report

little weight, noting that such report does not serve to prove the alleged persecution nor independently verify Mr. Gurses' reported allegations.

[10] I find it unintelligible that the RAD would accept the psychiatrist's diagnosis of severe and chronic PTSD, and the resulting symptoms of memory issues, difficulty focusing, and disorganization of memories resulting in an inability to recall dates and chronology of past events, but then essentially reject the psychiatrist's urging to assess Mr. Gurses' hearing presentation through the lens of trauma. In particular, I find it unreasonable that the RAD seemed to expect the psychiatrist to anticipate the trajectory of the hearing, including when and how Mr. Gurses' PTSD might affect his testimony, in addition to the guidance she provided in her report.

[11] Further, the report was not offered to prove the alleged persecution nor to verify Mr. Gurses' reported allegations; rather, it is clear that the report was offered to explain why he might experience cognitive difficulties recalling information during the hearing: *Mico v Canada (Citizenship and Immigration)*, 2011 FC 964 at para 49. The fact that Mr. Gurses might remember a considerable amount of information does not negate that he may not remember other information, notwithstanding the significance of the information not recalled. The psychiatrist provided examples of both significant (the date Mr. Gurses arrived in Canada) and insignificant (the name of the sleeping pill he took in Turkey) information he had trouble remembering during her assessment.

[12] I find that because the RAD discounted the psychiatrist's report, notwithstanding the RAD's acceptance of the PTSD diagnosis, it unreasonably failed to consider whether severe and

chronic PTSD, rather than the report, could account for the gaps and inconsistencies in Mr. Gurses' evidence, including his testimony. Said another way, it is unreasonable to expect the report to address all gaps and inconsistencies that might occur. Having accepted the diagnosis, it fell to the RAD to take the PTSD into account when assessing the gaps and inconsistencies in Mr. Gurses' evidence, such as the name of Ismail's company and the number and timing of Mr. Gurses' arrests. The RAD failed to do this.

(ii) *Invoices*

[13] Mr. Gurses' documentary evidence includes invoices from his company to Ismail's company. I find the RAD unintelligibly conflated perceived incompleteness of the invoices with lack of authenticity. While I agree with the Respondent that procedural fairness is not in issue in so far as the invoices are concerned, I nonetheless agree with Mr. Gurses that the RAD's analysis is flawed because it is based on the RAD's speculative or unsupported view of what the invoices should contain.

[14] The RAD noted that certain fields in the invoices, such as the due date for payments and interest to be charged on past due amounts, were blank and that there was no description of the fabric purchased or the colour or design of the fabric. The RAD acknowledged, however, Mr. Gurses' testimony at the hearing to the effect that: Mr. Gurses would meet with Ismail or his staff; Ismail's company would order samples of every new material every new season; orders would be placed based on the samples; and **confirmation would be made of the material selected.**

[15] The RAD found it “abnormal” however that the invoices would not describe the type of fabric purchased, or the colour or design of the fabric; in the RAD’s view the fabric ordered would be reflected on the invoice. I find this unreasonable in light of the RAD’s acceptance that “confirmation would be made of the material selected” or ordered. In other words, the RAD failed to explain why the order confirmation was insufficient to address the absence of certain information in the invoices. It thus found, unintelligibly in my view, that the absence of such information in the invoices called their authenticity into question, without any other evidence of such, and seriously undermined Mr. Gurses’ credibility. I also find the RAD’s focus on the name of the company billed (Taha Clothing Industry) versus the name of the company Mr. Gurses alleged (Taha Textiles) unduly microscopic: *Lubana v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 at para 11. Further, the RAD failed to consider whether Mr. Gurses’ PTSD could account for the inconsistency in the name, a minor inconsistency at best.

(iii) *Direct, Corroborative Evidence of Detentions*

[16] The RPD was not persuaded that Mr. Gurses was arrested at all. I find the RAD’s confirmation of the RPD’s conclusion regarding this issue was unreasonable because the RAD’s decision was not based on the evidence that was actually before it: *Vavilov*, above at para 126. Mr. Gurses documentary evidence includes a letter from his lawyer in Turkey who describes securing Mr. Gurses’ release from detention twice. The RAD only mentions the letter as deserving very little, if any weight, having found Mr. Gurses’ credibility seriously undermined because of his failure to recall the name of Ismail’s company and the invoices produced are not genuine. The RAD thus fails to engage with the lawyer’s letter in its analysis of the alleged arrests, simply concluding the psychiatric report does not account adequately for the

inconsistencies in Mr. Gurses' recollection of the number and timing of his arrests. I already have explained why I consider such conclusion regarding the psychiatrist's report flawed. Given the RAD's acknowledgement that Mr. Gurses' arrests are a central aspect of his claim, I also find the lack of engagement with the lawyer's letter was not justified in the circumstances.

### III. Conclusion

[17] For all of the above reasons, I therefore grant this judicial review application. The RAD's decision is set aside and the matter is to be remitted for redetermination by a different panel. Both parties agree, as do I, that there is no serious question of general importance for certification.



**JUDGMENT in IMM-4540-19**

**THIS COURT'S JUDGMENT is that:**

1. This judicial review application is granted.
2. The June 24, 2019 Refugee Appeal Division decision is set aside and the matter is to be remitted for redetermination by a different panel.
3. There is no question for certification.
4. There are no costs.

"Janet M. Fuhrer"

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Judge

## RELEVANT PROVISIONS

### Immigration and Refugee Protection Act, SC 2001, c 27

#### Convention refugee

**96 A** Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

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

(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.

#### 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

(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 themselves 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,

### Loi sur l'immigration et la protection des réfugiés, LC 2001, ch 27

#### Définition de réfugié

**96 A** qualité de réfugié au sens de la Convention — le réfugié — la personne qui, 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) 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) 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.

#### 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) 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,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

[...]

### **Evidence that may be presented**

[...]

**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.

[...]

### **Hearing**

(6) The Refugee Appeal Division may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection (3)

- (a) that raises a serious issue with respect to the credibility of the person who is the subject of the appeal;
- (b) that is central to the decision with respect to the refugee protection claim; and
- (c) that, if accepted, would justify allowing or rejecting the refugee protection claim.

(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) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

[...]

### **Éléments de preuve admissibles**

[...]

**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.

[...]

### **Audience**

(6) La section peut tenir une audience si elle estime qu'il existe des éléments de preuve documentaire visés au paragraphe (3) qui, à la fois :

- a) soulèvent une question importante en ce qui concerne la crédibilité de la personne en cause;
- b) sont essentiels pour la prise de la décision relative à la demande d'asile;
- c) à supposer qu'ils soient admis, justifieraient que la demande d'asile soit accordée ou refusée, selon le cas.

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-4540-19

**STYLE OF CAUSE:** OGUZ GURSES v THE MINISTRY OF CITIZENSHIP  
AND IMMIGRATION

**PLACE OF HEARING:** OTTAWA, ONTARIO (VIA VIDEOCONFERENCE)

**DATE OF HEARING:** AUGUST 10, 2020

**JUDGMENT AND REASONS:** FUHRER J.

**DATED:** JANUARY 25, 2021

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