

CANADA / JUDGMENT

TB9-13489

COURT

Refugee Appeal Division

DECIDED

16 January 2020

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RAD File / Dossier de la SAR : TB9-13489 TB9-13490 / TB9-13491 Private Proceeding / Huis clos
Reasons and decision ? Motifs et décision Persons who are the subject of the appeal XXXX XXXX
XXXX XXXX XXXX XXXX XXXX XXXX (a.k.a. XXXX XXXX XXXX) Personnes en cause Appeal
considered / heard at Toronto, ON Appel instruit / entendu à Date of decision January 16, 2020
Date de la décision Panel G. Erauw Tribunal Counsel for the persons who are the subject of the
appeal John Cintosun Conseil de la/des personne/s en cause Designated representative XXXX
XXXX XXXX Représentant(e) désigné(e) Counsel for the Minister N/A Conseil du ministre
REASONS FOR DECISION

INTRODUCTION

- [1] This is the decision allowing the appeal of XXXX XXXX XXXX (the "principal Appellant"), her husband XXXX XXXX (the "associate Appellant"), and XXXX XXXX XXXX (the "minor Appellant"). The Appellants are citizens of Turkey. They fear returning to Turkey because they believe they will be harmed or killed by the principal Appellant's brother, who they allege is a member of a far right-wing nationalist political party.
- [2] The Refugee Protection Division (RPD) rejected their claims for refugee protection on the basis of credibility and because they had a viable internal flight alternative (IFA) in Ankara. The Appellants appeal the RPD's decision. As a preliminary issue, they submit new evidence, and they request an oral hearing. They argue that they were denied a fair hearing due to their former counsel's incompetence, and that the RPD erred in its credibility and IFA assessment.
- [3] I accept the Appellants' argument that they received inadequate representation from their former counsel, which prevented them from fully presenting their case to the RPD. This issue is determinative, and as a result, I remit the case back to the RPD for redetermination by a differently constituted panel. ADMISSIBILITY OF EVIDENCE SUBMITTED ON APPEAL
- [4] In support of their appeal, the Appellants propose six items as new evidence:
- Affidavit of the Principal Appellant, dated 9 June 2019;1
 - Affidavit of the Associate Appellant, dated 9 June 2019;2

- c. Allegation of Inadequate Representation to Former Counsel, 10 June 2019;3
 - d. Support Letters from the XXXX XXXX XXXX (XXXX), 10 and 15 May 2019;4
 - e. XXXX XXXX XXXX XXXX XXXX (XXXX) XXXX Support Letters, undated, and Application Form for XXXX XXXX, dated XXXX XXXX 1995;5
 - f. Newspaper Articles on Turkey-Syria Fellowship and Peace Declaration, dated 31 March 2012.6
- [5] New evidence will only be admitted where that evidence: (1) arose after the rejection of the claim by the RPD; (2) was not reasonably available; or (3) was reasonably available, but that the claimant could not reasonably have been expected in the circumstances to have presented the evidence, at the time of the rejection.⁷ If one of these conditions is met, the Refugee Appeal Division (RAD) will then consider if the evidence is credible, relevant, and new.⁸ The RAD finds the Appellants' submitted documents are admissible as new evidence
- [6] In reviewing the above documents submitted as new evidence, I find that they meet the statutory requirements to be admitted as evidence in this appeal. The affidavits and the complaint against former counsel address the Appellants' allegation that they would have provided particular information and corroborating documents to the RPD had they been properly represented by their former counsel. It was not until they received the decision and retained new counsel that they learned about the deficiencies in their representation. Therefore, I accept they could not have provided this evidence to the RPD at the time it rejected their claims.
- [7] In addition, having reviewed their affidavits and the allegations against former counsel, I find they are credible and relevant. They are credible in their source and circumstance because the Appellants' have sworn to the shortcomings in the representation they received at the RPD, and their former counsel has not contested these allegations. In this respect, I find it telling that their former counsel has not replied to these allegations as encouraged by the Immigration and Refugee Board's (IRB) "Practice Notice - Allegations against Former Counsel."⁹ While the Appellants' former counsel's silence on the matter is not determinative, after reading the Appellants' affidavits in light of the overall evidence in the record, including the audio recording of their hearing, I find their allegations are plausible. This evidence is relevant because the allegations against former counsel concern whether the Appellants received a fair hearing. For these reasons, I accept the Appellants' evidence related to their allegations against former counsel as new evidence.
- [8] Considering I have accepted the Appellants' allegations against former counsel, it follows they could not have provided their documents from the XXXX, XXXX XXXX, and the news articles, until after the RPD rejected their claims. Furthermore, I accept that these documents meet the requirements of relevance and credibility. The documents are relevant to their new allegations of political opinion, which they claim former counsel's actions, or lack thereof, prevented them from advancing at the RPD. The documents also appear

relevant for the purposes of admissibility, as there are no apparent irregularities on the face of these documents. Therefore, I accept the documents from the XXXX, XXXX XXXX, and the news articles as new evidence. However, for the reasons discussed below, these documents are not necessary for the disposition of the appeal.

ANALYSIS

- [9] The determinative issue is whether the Appellants were denied a fair hearing, owing to inadequate representation by their former counsel.
- [10] I find the Appellants argument that they were denied a fair hearing because of their former counsel's actions has merit. This is demonstrated in two respects.
- [11] First, the Appellants allege that their former counsel never arranged for an interpreter to interpret their Basis of Claims (BOC) to them, despite the fact they did not speak English and requested an interpreter for their hearing. They allege that their former counsel instructed one of them to complete the declaration that they are able to read English and that they understood the entire contents of the BOC. I note that the principal Appellant completed the declaration that she reads English and understood her BOC, even though elsewhere in her BOC she does not indicate she speaks English. The Appellants state that it was at their interview with the immigration officer that it was noted that the interpreter's declaration was not completed. However, in order to not delay their claim, they asked if their son could sign it, which he did on both the adult Appellants' BOC forms. Since their BOCs were not properly interpreted to them, they claim they did not realize important information was missing from their BOC, including their political opinion and party membership, which was not assessed by the RPD.
- [12] I have no reason to doubt the Appellants' allegations on this point. This is because the Appellants' former counsel does not contest these allegations. In addition, it is clear from the recording of the RPD hearing that the Appellants do not speak English well, particularly the principal Appellant. This is consistent with the information in her BOC, which does not list English as a language she speaks. The fact that her BOC shows she signed the declaration that she reads and understands English, when she does not, lends credibility to her allegations that she was instructed to sign that declaration and that it was not properly interpreted to her. Also, the signature of the interpreter does appear to be that of the minor Appellant, and no date is provided in the declaration of the interpreter. This indicates that it was not interpreted the day it was signed and corroborates her allegation that it was signed the day of her appointment with the immigration officer. As a result, I find it plausible that the Appellants were not provided with a qualified interpreter to interpret the content of their BOCs to them, potentially leading to the omission of key details from their BOCs. Such information could likely have appeared, had counsel provided the Appellants with a qualified interpreter to interpret the contents of their BOC forms.

- [13] Second, the associate Appellant states that he was caught by surprise when he learned the day of his wife's RPD hearing that his claim was joined with her claim. As a result of the joinder, primarily his wife was questioned and he was only given one question regarding his Kurdish ethnicity. The associate Appellant alleged he was not able to present his case as he anticipated.
- [14] Having reviewed the record, I find on a balance of probabilities that the associate Appellant was prevented from presenting his case to the RPD. In particular, I note that there was no discussion at the beginning of the RPD hearing explaining to the Appellants what joinder meant and the implications of joining their claims in their circumstances. Their counsel did not object to the joinder, nor did she request an adjournment or recess to explain the implications to him. The decision to join the claims was brief and perfunctory. Also, following the RPD's questions of the principal Appellant, the RPD did not ask the associate Appellant if he agreed with his wife's testimony, or whether there was anything he wanted to add to her testimony. Instead, he was only asked about his Kurdish ethnicity. Furthermore, it is clear from the last minute of the RPD hearing that the associate Appellant was still unaware that he did not have to comeback for his hearing, which was scheduled for the following week. This later information indicates that his counsel did not advise him about the practical implications of joining the claims at the RPD.
- [15] Finally, as an aside, I note that in the brief questioning by the RPD about the associate Appellant's Kurdish ethnicity, he did mention that he was a Kurdish socialist, indicating a potential profile. However, the RPD and his counsel failed to question further on this issue and the RPD did not assess it in its decision. While I am curious as to why the associate Appellant did not mention his membership in the XXXX at this time, yet mentioned he was a socialist; this is a credibility issue for the RPD to assess upon redetermination.
- [16] Based on the evidence before me and the lack of response from former counsel about the allegations against her, I find that the Appellants' uncontested allegation that their former counsel failed to provide them with an interpreter for their BOCs, as well as advise them of the implications of joinder so that the associate Appellant could fully participate in his hearing, meets the burden of establishing that their former counsel failed to provide reasonable professional assistance in this instance.
- [17] In addition, of counsel's many basic obligations, counsel is to assist claimants by: building trust and eliciting evidence, including through an interpreter; properly preparing the BOC; marshalling the necessary evidence; preparing claimants for the hearing; and protecting the claimant's interests and ensure the required evidence is presented fully and fairly to the tribunal.¹⁰ In my view, the Appellants' former counsel has not met her obligations in this regard.
- [18] Given the RPD's credibility findings rely solely on the testimony of the principal Appellant, who was unaware of information that was missing from her BOC, and the associate Appellant appeared to not be fully aware that the RPD hearing was going to be his only

opportunity to participate and make his case, I find these issues impacted the RPD's findings of the overall evidence in a determinative way. As a result, I find that the Appellants' inability to make their case due to their former counsel's actions, or lack thereof, is a denial of procedural fairness. Therefore, the RPD decision cannot stand. This error taints the entirety of the RPD's decision.

- [19] This is not to say I find the Appellant's new allegations that they are members of the XXXX and XXXX XXXX are credible. However, since the Appellants' original allegations need to be reassessed in light of former counsel's inadequate representation at the RPD, their allegations of involvement in the XXXX and their documents submitted in this appeal can be assessed upon redetermination at the RPD. I reject the request for an oral hearing
- [20] The RAD may hold a hearing if, in its opinion, there is documentary evidence referred to in s.110(3) of the IRPA that raises a serious issue with respect to the credibility of the person who is the subject of the appeal, is central to the decision with respect to the refugee protection claim, and, if accepted, would justify allowing or rejecting the refugee protection claim.¹¹
- [21] I find that in this case, the proposed new evidence related to inadequate representation relates to an issue of procedural fairness. As a result, it does not deal with a serious issue of credibility of the person of the subject of the appeal, nor would it justify allowing or rejecting the refugee protection claim if the new evidence is accepted. With respect to the additional new documents submitted and accepted related to the Appellants' membership in XXXX XXXX and the XXXX, which the Appellants' allege they would have provided, but for former counsel's inadequate representation, these documents are not determinative. These documents are not determinative because I am only able to convene a hearing to inquire into the new evidence, and not review all of the Appellants' evidence, such as their original allegations of risk in Turkey that are tainted by the breach of procedural fairness. Therefore, I find that an oral hearing in this appeal is not appropriate, and I choose not to hold a hearing in this case.
- [22] Consequently, I must refer this matter back to the Refugee Protection Division for re-determination.

CONCLUSION

- [23] The appeal is allowed. The RAD refers the matter to the RPD for redetermination by a differently constituted panel. (signed) "G. Erauw" G. Erauw January 16, 2020 Date 1 Exhibit P-2, Appellant Record, Principal Appellant's Affidavit, at pp. 2-4. 2 Exhibit P-2, Appellant Record, Affidavit of Associate Appellant, at pp. 5-8. 3 Exhibit P-2, Appellant Record, Allegation of Inadequate Representation to Former Counsel. 4 Exhibit P-2, Appellant Record, Support Letters from the XXXX XXXX XXXX XXXX, at pp. 16-19. 5 Exhibit P-2, Appellant Record, Support Letters and Application Form for XXXX XXXX, at pp. 10-15. 6 Exhibit P-2, Appellant Record, Newspaper Articles on Turkey-Syria Fellowship and Peace

Declaration, at pp. 20-32. 7 Immigration and Refugee Protection Act, S.C. 2001, c. 27, as amended, subsection 110(4). 8 Canada (Citizenship and Immigration) v. Singh, [2016] 4 FCR 230, 2016 FCA 96. 9 Immigration and Refugee Board, Practice Notice - Allegations Against Former Counsel, September 2018. 10 Law Society of Upper Canada v. Hohots, 2015 ONLSTH 72, at paras. 19-25. 11 Immigration and Refugee Protection Act, S.C. 2001, c. 27, as amended, S.110(6).

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Commission de l'immigration et du statut de réfugié du Canada Section d'appel des réfugiés
RAD.25.02 (April 04, 2019) Disponible en français

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