

Federal Court



Cour fédérale

**Date: 20210421**

**Docket: IMM-6589-19**

**Citation: 2021 FC 349**

**Ottawa, Ontario, April 21, 2021**

**PRESENT: The Honourable Mr. Justice Favel**

**BETWEEN:**

**SHKELQIM MEMIA  
LEMANDA ZYBERI**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

I. Nature of the Matter

[1] This is an Application for judicial review of an October 10, 2019 decision [Decision] of the Refugee Appeal Division [RAD] pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, [IRPA]. The Decision dismissed the Applicants' appeal of a

Refugee Protection Division [RPD] decision, which denied their claims for refugee protection under section 96 and 97 of the *IRPA*.

[2] The Applicants submit that the RAD erred in its assessment of state protection resulting in an unreasonable decision. The Applicants request that the Court set aside the Decision and remit it to a different member for redetermination.

[3] The application for judicial review is dismissed.

## II. Background

[4] The Applicants, Mr. Memia [Male Applicant] and his wife Ms. Zyberi, are from Albania. The Male Applicant worked for the Energy Ministry of Albania, disconnecting illegal electrical connections, resulting in arrests and convictions for the offenders. The Applicants fear physical harm or death at the hands of a private businessperson with an alleged criminal profile, who was arrested for theft from the electrical grid.

[5] On August 10, 2017, unknown individuals beat and threatened the Male Applicant at gunpoint. The Male Applicant believes that these individuals were associated with the private businessperson. He reported the incident to his supervisor and the Male Applicant assumed that the supervisor would report the matter to police. The Male Applicant is unsure whether his supervisor filed a police report since the police never followed up. The Male Applicant fears the police and believes them to be corrupt. In August 2017, an unmarked car started following him. Out of fear, the Applicants came to Canada to seek protection.

[6] On April 19, 2018, the RPD denied the Applicants' claim for refugee protection with credibility being the determinative issue. The Applicants made submissions and gave testimony on the issues of state protection and an internal flight alternative [IFA]. The RPD noted numerous concerns with the issues of state protection and an IFA, but ultimately declined to make findings on these issues as it found credibility to be the determinative issue.

### III. The Decision

[7] The Applicants submitted that the RPD erred in its credibility assessment and in its state protection analysis. They requested an oral hearing pursuant to subsection 110(6) of the *IRPA*. Since the Applicants had not put forward new evidence, the RAD denied the oral hearing pursuant to subsection 110(3) of the *IRPA*.

[8] The RAD confirmed the decision of the RPD that the Applicants are not Convention refugees nor are they persons in need of protection. The RAD found that state protection was the determinative issue so it did not need to consider the Applicants' arguments on how the RPD erred in its credibility analysis.

IV. Issues and Standard of Review

[9] The sole issue for consideration is whether the RAD erred in its assessment of state protection. This issue is reviewable on the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 23 [*Vavilov*]).

[10] Under the reasonableness standard, the Court must focus on the decision, including the reasoning process and the outcome (*Vavilov* at para 83). This does not include a redetermination of the matter but rather a consideration of whether the decision is “one that is based on an internally coherent and rational chain of analysis that is justified in relation to the facts and law that constrain the decision maker” (*Vavilov* at para 85). In doing so, the decision-makers’ written reasons must be interpreted holistically and contextually (*Vavilov* at para 97).

V. Parties’ Positions

(1) Applicants’ Position

[11] The Applicants state that since the RAD failed to conduct its own assessment of credibility, their explanation for not contacting police directly should lend credence to their claim that state protection is insufficient. They submit that the RAD did not engage in an objective assessment of state protection and imputed from the Male Applicant’s behaviour, that he did not do enough to seek state protection, without assessing the reasonableness of his explanation for not doing so. They further state that the RAD’s conclusion about the police being responsive

does not adequately address the Applicants' allegation that the police are corrupt and connected to organized crime.

[12] Since the RPD did not make findings on state protection, the Applicants submit that the RAD erred in expecting more than "two paragraphs" on that issue in their appeal. They state that the RAD should have requested a more fulsome set of submissions from the Applicants.

[13] Lastly, the Applicants submit that the rules governing the RAD do not impose a burden on appellants either to request or to satisfy the RAD that the circumstances merit an oral hearing. Rather, they state that the onus rests on the RAD to consider and apply the statutory criteria reasonably, which it did not.

(2) The Respondent's position

[14] The Respondent submits that the Male Applicant did not provide credible evidence to show that the private businessman did not have the criminal profile as alleged and the objective evidence confirmed that state protection would likely have been forthcoming had it been sought. The Respondent states that the RAD gave clear reasons for why it did not accept the Applicants' explanation for not approaching the police. They submit that the RAD cannot be at fault for requiring corroboration of the Applicants' claims.

[15] The Respondent states that the RAD only conducts oral hearings where the statutory requirements are met, specifically where new evidence is submitted that was not reasonably

available before the RPD. The lack of new evidence submitted by the Applicants meant that the RAD lacked the jurisdiction to conduct a hearing.

VI. Analysis

[16] A portion of the Applicants' submissions focus on how the RPD erred. This judicial review concerns the RAD's Decision. Reviewing the Decision along with the record, I find that the RAD's Decision is reasonable.

[17] The Applicants state that their submissions on state protection on appeal were limited because the RPD's reasons on the issue were limited. They submit that if the RAD required more, they should have made that request.

[18] The Respondent states that since the issue of state protection was not a newly proposed issue by the RAD, the onus to present the case fully was on the Applicants and the RAD was to respond to the submissions before it.

[19] I agree with the Respondents. The Applicants were aware of the issues and had the onus to present their case on appeal with sufficient evidence in support (*Gill v Minister of Citizenship and Immigration*), 2004 FC 1498, at para 25). The Applicants made a decision to present their submissions as they did before the RAD. The RAD did not have an obligation to make the case for the Applicants.

[20] I am not persuaded by the Applicants' submissions that state agents could also be agents of persecution in this particular matter. I agree with the Respondent's submissions that refugee claimants from democratic countries have a heavy burden to show that state protection is not available. As the RAD pointed out in its reasons, a state is presumed to be able to protect its citizens and, absent some evidence, a claim of a state's inability to provide protection should fail (*Ward v Canada (Minister of Employment & Immigration)*, [1993] 2 SCR 689).

[21] In this particular case, the Applicants cannot fault police for not offering protection when the Applicants did not report the crime nor did the Applicants take any steps to follow up to see if a complaint had, in fact, been made. State protection cannot be rebutted when it has not been tested (*Camacho v Canada (Citizenship and Immigration)*, 2007 FC 830 [*Camacho*] at para 9; *Rio Ramirez v Canada (Citizenship and Immigration)*, 2008 FC 1214 at para 28). This is so notwithstanding, as counsel submitted at the hearing, that since the Applicant was performing his duties as part of a state mandate, his report to his supervisor was also in effect seeking state protection.

[22] In this particular case, the Applicants do not rebut the presumption of state protection by submitting only a "subjective reluctance to engage the state" (*Kim v Canada (Minister of Citizenship & Immigration)*, 2005 FC 1126 at para 10).

[23] To this end, paragraph 16 of the Decision states that "there is simply no evidence stemming from the Appellants' personal experience to justify their alleged distrust of police as a basis for not reporting the August attack on the male Appellant to police directly...".

Considering the Applicants' testimony respecting their subjective fear of the police, it is clear that the RAD assessed the Applicants' statements in light of the totality of the evidence before it, including the country condition evidence, and made its determination. This was a reasonable approach for the RAD to take.

[24] Similar to *Camacho*, the RAD assessed the reasonableness of the Applicants' failure to pursue police or state protection. It is evident from the RAD's reasons that it considered the Applicants' explanation for not doing so but found them objectively deficient. The RAD's determination was reasonable based on the evidence before it.

[25] The Applicants allege the RAD made a veiled credibility finding when it stated that it did not find it "persuasive" that the businessperson was someone the Applicants should fear, characterizing their fear as a "simple allegation". After reviewing the Decision, I find that the RAD did not question the fear felt by the Applicants but rather pointed out that the Applicants' allegation that the businessperson had a criminal profile that rose to the level of circumventing justice by the police and the judicial system, was vague and uncorroborated. It boiled down to the insufficiency of evidence.

[26] The Applicants also submit that the RAD made a further credibility finding by concluding that there was a lack of corroborative documentary evidence to support their claim (*Ndjavera v (Minister of Citizenship & Immigration)*, 2013 FC 452 [*Ndjavera*]). In short, the Applicants submit that corroborating evidence is not always required.



[27] I agree with the Applicants on the statement of the law but disagree with their interpretation of the law in relation to this matter. Firstly, the Applicants have conflated the idea of requiring corroborative evidence with noting a lack of corroboration. Second, the Court in *Ndjavera* focused on the need for corroborating evidence to establish credibility (*Ndjavera* at para 6). Since credibility was not the determinative issue for the RAD, I do not find *Ndjavera* helpful to the Applicants.

[28] Additionally, *Ndjavera* cites *Dundar v Canada (Minister of Citizenship & Immigration)*, 2007 FC 1026 at para 19, which found that “while corroborative evidence is not determinative of a refugee claim, the Board is free to inquire into its absence”. Considering the above authorities, I see no error with the RAD taking issue with a lack of corroborative evidence in coming to its Decision. More than mere allegations are required for a refugee claimant to succeed in their claim.

[29] The Applicants take issue with the RAD denying an oral hearing, submitting that they should not have to request or satisfy the RAD that a hearing is warranted (*Dusan Horvath v Canada (Citizenship and Immigration)*, 2018 FC 147) [*Horvath*]. The Respondent states that the lack of new evidence submitted by the Applicants meant that the RAD was not required to conduct a hearing (*Canada v Singh*, 2016 FCA 96 at para 48).

[30] *Horvath* does not assist the Applicants as that case dealt with credibility issues and the submission of new evidence, neither of which are at issue in this case. I find that the RAD acted within its jurisdiction in not holding a hearing since no new evidence was submitted.

[31] After reviewing the Decision as a whole, I do not find that the RAD committed any error. The Decision is reasonable.

VII. Conclusion

[32] The application for judicial review is dismissed.

[33] The parties did not raise any question of general importance for certification and none arises.

**JUDGMENT in IMM-6589-19**

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

1. The application for judicial review is dismissed.
2. There is no question for certification.
3. There is no order as to costs.

"Paul Favel"

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Judge

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

**DOCKET:** IMM-6589-19

**STYLE OF CAUSE:** SHKELQIM MEMIA, LEMANDA ZYBERI v THE  
MINISTER OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** HELD BY TELECONFERENCE BETWEEN  
TORONTO, ONTARIO AND OTTAWA, ONTARIO

**DATE OF HEARING:** NOVEMBER 26, 2020

**JUDGMENT AND REASONS:** FAVEL J.

**DATED:** APRIL 21, 2021

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