Federal Court  Cour fédérale

Date: 20210928

Docket: IMM-5675-20

Citation: 2021 FC 1007

Ottawa, Ontario, September 28, 2021

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

KLEVIS BERHANI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is the judicial review of a decision by the Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada, dated October 7, 2020. The RAD dismissed the Applicant's appeal and, pursuant to s 111(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], confirmed the decision of the Refugee Protection Division [RPD], that the Applicant is neither a Convention refugee nor a person in need of protection pursuant to ss 96 and 97 of IRPA, respectively.

Background

[2] The Applicant is a citizen of Albania. He began work with the government Land Registry Office in Lac, Albania. He claims that beginning in 2015 Andrea Gjini [Gjini], a Lac police officer, began to attend at the Land Registry Office seeking to have a property registered. During these visits, the Applicant would explain what documentation was needed to effect the registration of the building that had been constructed on the subject property. Gjini was dissatisfied, demanding that the property be registered based on the documentation that he held. In 2017, the situation escalated. Gjini's visits occurred more frequently and he threatened to have the Applicant fired. On January 15, 2018, Gjini threatened that he would find a way to make the Applicant effect the registration. On the same day, the Applicant was hit by a car while he was riding his motorcycle. The Applicant believes that Gjini was the driver of the car and deliberately struck him. The Applicant claims that between April 2018 and April 2019 Gjini attended at the Land Registry Office about every other month and demanded that the subject property be registered. On April 19, 2019, Gjini threatened the Applicant's life if the Applicant did not register the property. That same day, the Applicant fled to the United States. He entered Canada on May 3, 2019 and made a claim for refugee protection. After the Applicant had left Albania, his car was set on fire; he attributes this to Gjini.

[3] The RPD found that the Applicant had failed to inform the police of his suspicion that Gjini was the driver of the car that struck him or to otherwise seek state protection. Thus, he had failed to rebut the presumption of state protection. Alternatively, the RPD found that there was a

viable internal flight alternative [IFA] open to the Applicant. The Applicant appealed both of these findings to the RAD.

RAD Decision – decision under review

[4] On September 9, 2020, prior to the RAD hearing, the RAD wrote to the Applicant advising that the RAD wished to raise the issue of the Applicant's credibility - as it relates to the motivation of his agent of persecution to seek him out in the proposed IFA and invited him to make submissions in response. In that regard, the RAD identified three allegations that the Applicant had raised, for the first time, at the RPD hearing. The Applicant responded providing new evidence, being a sworn declaration by Etmond Stojani, Director of the Land Registry Office, dated September 28, 2020 [Director's Declaration] and written submissions. The RAD accepted both documents. It found, pursuant to s 110(6) of the IRPA, that the new evidence did not raise a serious question with respect to the Applicant's credibility which would be determinative of the claim and, therefore, it was not necessary to convene a hearing.

[5] The RAD found that the determinative issues were credibility and the availability of an IFA. It agreed with the RPD that the Applicant has a viable IFA in Tirana.

[6] As to the first prong of the IFA test, the RAD addressed the three allegations that the Applicant had made, for the first time, when testifying before the RPD and which allegations were omitted from his Basis of Claim narrative [BOC]. These were the omissions the RAD had previously invited the Applicant to address in its September 9, 2020 communication. The RAD

found that the Applicant had not established that he faces a serious possibility of persecution in the proposed IFA of Tirana. More specifically, that the Applicant had failed to establish that his agent of persecution has an ongoing motivation to seek him out in Tirana. The RAD concluded that, on a balance of probabilities, the Applicant did not make a final, irreversible decision on Gjini's property registration application and, given that the Applicant no longer has authority over that application, Gjini would not be motivated to seek the Applicant out in Tirana.

[7] As to the second prong of the IFA test, the RAD noted that on appeal the Applicant had not substantively challenged the reasonableness of the proposed IFA and that his arguments were limited to Gjini's ability to track the Applicant in the proposed IFA. Regardless, the RAD considered whether Tirana is reasonable in his particular circumstances and found that the Applicant had not met his burden of demonstrating that the proposed IFA would be unreasonable or unduly harsh in his particular circumstances.

Issues and standard of review

[8] In my view, the issues raised in this application are:

> Preliminary Issue: Is the second affidavit of the Applicant, sworn on December 2, 2020, [Affidavit #2] admissible?
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> Issue 1: Did the RAD breach its duty of procedural fairness or the principles of natural justice?
>
> Issue 2: Was the RAD's decision was reasonable?

[9] Questions of procedural fairness and principles of natural justice are reviewable on the standard of correctness (see *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; and *Mission Institution v Khela*, 2014 SCC 24 at para 79).

[10] As established by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] there is a presumption that reasonableness is the applicable standard whenever a Court reviews an administrative decision (*Vavilov* at paras 16, 23, 25). That presumption can be rebutted in two types of situations, neither of which are asserted by the Applicant or arise in this case (*Vavilov* at paras 17, 69) with respect to the first issue.

Preliminary Issue: Admissibility of Affidavit #2

[11] The Respondent raises a preliminary issue, being the admissibility Affidavit #2, sworn by the Applicant on December 2, 2020, which affidavit post-dates the RAD's decision.

[12] In Affidavit #2 the Applicant asserts that after the RAD made its decision the Applicant learned from the person who took over the Applicant's job at the Land Registry Office, Arber Hoxha [Hoxha], that Gjini's reputation was ruined after people found out that he could not force the Applicant to obey him and that Gjini told Hoxha that he would destroy the Applicant to show people what happens to those who do not listen to him. Attached as Exhibit A to Affidavit #2 is a Notary Statement of Mr. Hoxha [Hoxha Statement] in which he states, amongst other things, that Gjini told him that the Applicant would pay dearly because this is not only a matter of

registration of the building but is also a matter of honour as the whole district now knew that Gjini was unable to make the Applicant do as Gjini wished.

[13] In Affidavit #2, the Applicant also asserts that a few weeks before swearing that affidavit he had learned from a neighbour, Erand Rrjolli [Rrjolli], that Gjini is still looking for the Applicant. Attached as Exhibit C to Affidavit #2 is the Notary Statement of Mr. Rrjolli [Rrjolli Statement] in which he states that in the first week of November 2020 he ran into Gjini who asked if Mr. Rrjolli knew of the whereabouts of the Applicant. Gjini stated that wherever the Applicant might hide, Gjini would find and "disappear him" from the face of the earth.

[14] As this Court has stated on many occasions, it is well-established that, as a general rule, the evidentiary record before a court on judicial review is restricted to the evidentiary record that was before the decision maker (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 19 [*Assn of Universities and Colleges*]; *Henri v Canada (Attorney General)*, 2016 FCA 38 at para 41 [*Henri*]). Evidence that was not before the decision maker and that goes to the merits of the matter is, with certain limited exceptions, not admissible *('Namgis First Nation v Canada (Fisheries and Oceans)*, 2019 FCA 149 at paras 7-12; *Ohwofasa v Canada (Citizenship and Immigration)*, 2020 FC 266 at paras 13-15).

[15] The Applicant acknowledges that Affidavit #2 was not before the RAD and, by way of explanation, in his written submissions states only that this judicial review is his first opportunity to address this evidence. When appearing before me the Applicant submitted that Affidavit #2 is

admissible on the basis of natural justice. As I understand the submission, this is based on the Applicant's view that the RAD erred in considering the ongoing motivation of the Applicant's agent of persecution as part of its IFA analysis when this is exclusively part of the convention refugee analysis. Therefore, the Applicant was denied natural justice as he was unable to respond to this new issue and to provide the evidence contained in Affidavit #2. For the reasons set out in my analysis that follows, I find that this premise is ill-founded.

[16] With respect to the admissibility of Affidavit #2, I note that the alleged incident reported in the Rrjolli Statement occurred in November 2020, after the RAD's decision was issued on October 7, 2020. Affidavit #2 and the Rrjolli Statement provide evidence relevant to the merits of the matter decided by the RAD – whether Gjini poses an ongoing threat to the Applicant in the proposed IFA. Accordingly, it is not admissible. To the extent that the Applicant is suggesting that Affidavit #2 should be admissible because it establishes that the RAD breached natural justice, the RAD did not breach any duty of procedural fairness or principle of natural justice by failing to consider this information that was not only before it but, in fact, concerned an incident that had not even occurred when the RAD made its decision. Therefore, Affidavit #2 does not serve to bring to the attention of this Court any procedural defect that cannot be found in the record so that the Court can fulfill its role of reviewing for procedural unfairness.

[17] As to the Hoxha Statement, the alleged threat described in that statement occurred in May 2019. As pointed out by the Respondent, this pre-dates the Applicant's hearing before the RPD on January 28, 2020. Thus, while the Applicant asserts that he only learned of this information

after the RAD made its decision, the Applicant does not explain why the information could not have previously been provided.

[18] Further, in my view, the Applicant could reasonably have anticipated the need for this evidence.

[19] The IFA test is well established and, in determining whether there is an IFA, the RPD or RAD must be satisfied, on a balance of probabilities, that:

a) There is no serious possibility of the claimant(s) being persecuted in the part of the country in which it finds an IFA exists; and

b) The conditions in that part of the country are such that it would not be unreasonable for the claimant(s) to seek refuge there.

(*Rasaratnam v Canada (MEI)*, [1992] 1 FC 706 at 710 at paras 5-10 (CA); *Thirunavukkarasu v Canada (MEI)*, [1994] 1 FC 589 at 594-595; *Ehondor v Canada (MCI)*, 2017 FC 1143 at para 11).

[20] The RPD raised the potential IFA and the Applicant addressed that issue at the RPD hearing as demonstrated by the RPD's reasons. The RPD's alternate finding was that the Applicant had a viable IFA in Tirana or Shkoder.

[21] And, significantly, the RAD explicitly raised in its September 9, 2020 communication to the Applicant the issue of whether his agent of persecution has a continuing motivation to seek the Applicant out in the proposed IFA. The RAD stated:

> The RAD wishes to raise the issue of the Appellant's credibility, insofar as it relates to the motivation of the agent of persecution to seek him out in the proposed IFA.
>
> The Appellant alleged for the first time at the RPD hearing that he had made a decision to demolish the police officer's home, which could not be reversed so long as he was mentally capable or alive. He further alleged that the court would merely uphold his decision, given the land registry officer's expertise. He also alleged for the first time at the hearing that the police officer had inquired about the him at the land registry office on two occasions after his the car was set on fire, according to the receptionist at that office.
>
> The RAD seeks submissions on these omissions to assist in determining whether the agent of persecution has a continuing motivation to pursue the Applicant…

[22] In responding to the RAD, the Applicant provided the Director's Declaration, which the RAD admitted as new evidence. However, the Applicant did not, at that time, provide the RAD with the information now contained in the Hoxha Statement and Affidavit #2.

[23] I agree with the Respondent that the Hoxha evidence existed and could have been provided by the Applicant prior to the hearing before the RPD. More significantly, the Applicant was afforded the opportunity by the RAD to respond to the issue of his agent of persecution's continuing motivation to seek out the Applicant in the proposed IFA but again did not provide the Hoxha evidence at that time. Nor does he provide an explanation for the failure to do so. Instead, the Applicant provides this evidence for the first time by way of his submission of Affidavit #2 at the application for judicial review.

[24] In these circumstances, Affidavit #2 and its content was not before the RPD or the RAD and no satisfactory explanation for this omission is provided by the Applicant. Affidavit #2 does

not bring to the Court's attention procedural defects that cannot be found in the record so that the Court can fulfill its role of reviewing for procedural unfairness. I also agree with the Respondent that the mere fact that the Applicant now provides this purported new evidence does not mean that natural justice was breached by the RAD. Nor is it the role of this Court on judicial review to conduct a *de novo* review of the RAD's decision (see *Vavilov* at para 83).

[25] For these reasons, Affidavit #2 is not admissible.

Issue 1: Did the RAD breach its duty of procedural fairness or the principles of natural justice?

[26] As I understand the Applicant's written submission, his position is that the RAD breached natural justice because it only required submissions on the agent of persecution's motivation to pursue the Applicant in the proposed IFA. According to the Applicant, the RAD denied the Applicant the opportunity to know the case against him and to defend it because the RAD did not identify the real issue. When appearing before me, the Applicant submitted that there is a massive distinction between an IFA analysis and the more general analysis of a forward-facing risk to the Applicant from an agent of persecution. As I understood the submission, the Applicant asserts that by addressing motivation, the RAD was raising a new issue and making a s 96 convention refugee determination outside the scope of an IFA analysis. And, because the issue had not been properly identified by the RAD, the Applicant was denied natural justice as he could not respond to it. The Applicant also asserts that the transcript of the RPD hearing demonstrates that the RPD did not ask the Applicant about the motive of the agent

of persecution. Thus, the Applicant did not know the case to be met. The Applicant asserts that the RAD erred by not permitting the Applicant to give additional testimony to address this question of motivation and should have sent the matter back to the RPD for this purpose. The Applicant submits that the RAD could also have convened an oral hearing and its failure to do so was a breach of natural justice.

[27] In my view, there is no merit to this submission.

[28] Section 110(1) of the IRPA permits appeals to the RAD from decisions of the RPD on questions of law, of fact or of mixed fact and law. The RAD must proceed without a hearing, on the basis of the record of the proceedings of the RPD, and may accept documentary evidence and written submissions from the applicant and the Minister (IRPA s 110(3)). On appeal, the applicant may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented at the time of the RPD rejection (IRPA s 110(4). Pursuant to s 110(6), the RAD may hold a hearing if, in its opinion, there is documentary evidence provided pursuant to s 110(3):

a) that raises a serious issue with respect to the credibility of the person who is the subject of the appeal;

b) is central to the decision with respect to the refugee protection claim; and

c) if accepted, would justify allowing or rejecting the refugee protection claim.

[29] After considering an appeal, the RAD must make one of three possible decisions: confirm the RPD's determination, set aside the RPD's determination and substitute a determination that

the RAD, in its opinion, should have been made, or, refer the matter back to the RPD for redeterminations giving the RPD directions that the RAD considers appropriate (IRPA s 111(1)). The matter can only be referred back for redetermination if the RAD is of the opinion that the RPD's decision is wrong in law, in fact or in mixed law and fact, and the RAD cannot make a decision to confirm or set aside the RPD's decision without hearing evidence that was presented to the RPD (IRPA s 111(2)).

[30] In this case, as seen from the RAD's September 9, 2020 communication to the Applicant, the RAD explicitly asked the Applicant to provide submissions addressing his agent of persecution's continuing motivation in seeking out the Applicant in the proposed IFA. Although this request was made in the context of omissions in the Applicant's BOC as identified by the RAD, the request squarely raised the issue of the continuing motivation of the agent of persecution. This engaged the first branch of the IFA test. The onus was on the Applicant to establish, on a balance of probabilities, that he faces a serious possibility of persecution in the proposed IFA.

[31] There is also no merit to the Applicant's submission, as I understood it, that the motivation of an agent of persecution can only be addressed as part of a general s. 96 analysis, rather than as part of the IFA test. As stated by Justice Kane in *Adebayo v Canada (Citizenship and Immigration)*, 2019 FC 330:

> [52] In *Valasquez v Canada (Citizenship and Immigration)*, 2010 FC 1201, [2010] FCJ No 1496 (QL), relied on by the Applicants, Justice O'Reilly summarized the approach and principles from the jurisprudence at paragraph 15:
>
> The concept of an IFA is an inherent part of the Convention refugee definition because a claimant must be a refugee from a

> country, not from a particular region of a country (*Rasaratnam v Canada (Minister of Employment and Immigration*), [1992] 1 FC 706 at para 6). Once an IFA has been proposed by the Board, it must consider the viability of the IFA according to the disjunctive two part test set out in *Rasaratnam*. The claimant bears the onus and must demonstrate that the IFA does not exist or is unreasonable in the circumstances. That is, the claimant must persuade the Board on a balance of probabilities either that there is a serious possibility that he or she will be persecuted in the location proposed by the Board as an IFA, or that it would be unreasonable to seek [refuge] in the proposed IFA given his or her particular circumstances.
>
> [Emphasis added]
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> [53] As highlighted in the jurisprudence, a refugee claimant is a refugee from their country as a whole, not from a village or region of their country. Therefore, a refugee claimant cannot seek the refugee protection of another country while there is a place within their own country—even if it may not be where they wish to live—which offers safety from the risk they claim and is not unreasonable in all the circumstances. **In all cases, a refugee claimant bears the onus of establishing with objective evidence that the proposed IFA is unreasonable. This means establishing that there is a serious possibility of being persecuted in the proposed IFA or that the conditions in the proposed IFA make it unreasonable to relocate there, taking into consideration all the circumstances, including their personal circumstances.** The high threshold set in *Ranganathan* at para 15 ("nothing less than the existence of conditions which would jeopardize the life and safety of a claimant in travelling or temporarily relocating to a safe area") applies to both parts of the test.
>
> [Emphasis in bold added]

[32] Further, as stated in *Akinkunmi v. Canada (Citizenship and Immigration)*, 2020 FC 742 at para 20: "In each case, the decision maker must consider all relevant evidence regarding the serious possibility of harm to an applicant in the proposed IFA, including the characteristics of the particular alleged agent of persecution **and its ability and motivation to take action in the IFA**" (emphasis added). Thus, in assessing the viability of an IFA, the RPD or RAD is to

conduct a prospective and forward-looking analysis as to whether there is a serious possibility that the claimant will be persecuted in the IFA (*Rasaratnam* at para 6). The RAD did not err in considering the ongoing motivation of the Applicant's agent of persecution to seek him out in the proposed IFA. Further, the onus was on the Applicant to provide sufficient credible evidence that he faced an ongoing risk, in the IFA, from his agent of persecution.

[33] However, in responding to the communication from the RAD, the Applicant argued that the RAD misapprehended his evidence pertaining to a decision to demolish Gjini's home. He did not address why he had not indicated in his BOC narrative that he had made a final decision (either refusing to register the building or to demolish it) that cannot be reversed so long as he was mentally capable or living, which was his testimony before the RPD. As the Respondent points out, the omission was also raised by the RPD at the hearing but was again not addressed by the Applicant. Thus, the Applicant had two opportunities to address the omission but failed to do so.

[34] Further, the RAD also accepted the Applicant's responding new evidence, the Director's Declaration. However, this evidence did not explain the omission from the BOC narrative or confirm that the refusal to register the property was a final irreversible decision made by the Applicant.

[35] As to the issue of the BOC narrative not specifying that Gjini inquired about the Applicant at the Land Registry Office on two occasions after the Applicant's car was set on fire, the Applicant argued in his responding submissions to the RAD that this did not constitute a

material BOC omission. According to the Applicant, all of Gjini's visits to that office were equally important, none were particularly memorable, and together they represented a pattern of behaviour. The Applicant asserted that there was no requirement for the BOC to specifically state that Gjini had inquired about him at the Land Registry Office twice after his car was set on fire and that there was no credibility issue. I agree with the Respondent that the fact that the RAD in its decision ultimately disagreed with the Applicant that the failure to mention these visits was not a material BOC omission does not mean that the Applicant was denied an opportunity to be made aware of the issue and to address it.

[36] In my view, the record clearly demonstrates that the RAD alerted the Applicant to the RAD's concern with the ongoing motivation of the Applicant's agent of persecution to pursue him in the proposed IFA and afforded the Applicant the opportunity to respond to the concern. There was no breach of natural justice by the RAD. The Applicant simply disagrees with its decision.

[37] As to the Applicant's suggestion that there was a breach of natural justice because he was denied an oral hearing to address the motivation issue, I note that in his responding written statement, the Applicant stated that he was not requesting an oral hearing unless the RAD made further findings per paragraph 66 of the Appellant's Memorandum of Argument. Paragraph 66 states that if the RAD wanted to raise other issues, including issues not particularized by the RAD, then the Applicant requested an opportunity to provide evidence and submissions on those issues. The RAD did not raise any issues other than those set out in its September 9, 2020 communication to the Applicant to which the Applicant was afforded the opportunity to respond.

And, in its decision, the RAD noted that it had admitted the new evidence. However, that the new evidence did not raise a serious question with respect to the Applicant's credibility which would be determinative of the claim. Therefore, it was not necessary to convene and oral hearing.

[38] Put otherwise, the RAD's credibility concerns arose from the BOC omissions that it identified and raised with the Applicant. The Director's Declaration did not meet the s 110(6) IRPA criteria required for the RAD to convene an oral hearing as it did not raise a serious issue with respect to the Applicant's credibility, which would be determinative of the claim. In my view, the RAD's decision not to convene an oral hearing was in keeping with statutory requirements, it did not give rise to a breach of procedural fairness or principle of natural justice and, it was reasonable.

[39] Further, the RAD did not find that the RPD erred, but instead raised the issue of the Applicant's credibility insofar as it relates to Gjini's continuing motivation to pursue the Applicant in the proposed IFA. As such, pursuant to s 111, it was not open to the RAD to refer the matter back to the RPD for re-determination. Again, this is not a breach of natural justice.

Issue 2: Was the RAD's decision reasonable?

[40] The Applicant submits that, based on erroneous findings of fact, the RAD speculated that Gjini lacks the motivation to seek him out in Tirana. Because the Applicant's submissions are somewhat repetitive, I address below his main submissions in this regard.

i. Significance of the BOC omission to mention visits by the Gjini to the Land Registry Office after the Applicant left Albania

[41] The Applicant submits that the RAD erred in finding that the omission from the Applicant's BOC narrative of any mention of Gjini asking for the Applicant at the Land Registry Office after the Applicant had fled Albania was a significant omission that was not adequately explained or otherwise corroborated and is an embellishment. The Applicant argues that the RAD cannot find this to be a significant omission unless it explains why the narrative must specifically address this point.

[42] In my view, this argument cannot succeed. The onus lies on an applicant to include all significant information in the BOC and it is reasonable for the RAD to draw adverse inferences as to an claimant's credibility where material facts are omitted from the BOC and only raised in oral testimony (*Zeferino v Canada (Citizenship and Immigration)*, 2011 FC 456 at paras 31-32; *Jareno Gonzalez v Canada (MCI)*, 2019 FC 49 at para 17).

[43] Further, the RAD in its September 9, 2020 communication to the Applicant stated that this allegation had been raised for the first time in his testimony before the RPD. The RAD clearly identified this omission in the context of the Applicant's credibility and the determination the RAD was required to make as to the motivation of agent of persecution to pursue the Applicant in the proposed IFA. And, significantly, the RAD explicitly states why the new submissions were being sought, being "to assist in determining whether the agent of persecution has a continuing motivation to pursue the Appellant". Thus, the Applicant knew why the omission was of concern to the RAD and was afforded an opportunity to respond.

[44] In his responding submissions the Applicant did not seek to submit evidence from the receptionist and his new evidence, the Director's Declaration, does not indicate that Gjini continues to look for the Applicant. Rather, it states that Gjini "continues the threats even with the employee who took over the duty of Mr. Berhani after his departure". The Applicant instead submitted to the RAD that, by his testimony, he had answered the RPD's questions relating to inquiries after the fire, that visits before and after the fire were equally relevant and important and were all encompassed by a pattern of repeated visits as described in the BOC. The RAD did not agree with the Applicant's position, finding that the more recent inquiries by Gjini go directly to whether he would be motivated to seek the Applicant out in the proposed IFA.

[45] In its reasons, the RAD explained that the materials provided by the Applicant to the RPD included the Notarial Declaration of Mark Vuka, a colleague of the Applicant at the Land Registry Office. This declaration states Mr. Vuka on several occasions witnessed Gjini entering the office and threatening the Applicant "until the moment Kelvis left Albania". I note that Mr. Vuka also stated that Gjini "continued to step into our office with the same type of intimidations until April 19, 2019 when he came again and openly threatened to life Klevis, if he would not register a property under his ownership".

[46] The RAD did not accept the Applicant's submission that failure to mention the post-fire visits in his BOC narrative did not constitute an omission. It noted that the alleged post-fire inquiries go directly to whether Gjini would be motivated to seek out the Applicant in the proposed IFA and that this significant omission had not been adequately explained and is not

corroborated elsewhere in the record. The RAD found, on a balance of probabilities, that the Applicant had embellished this aspect of his testimony.

[47] In my view, the RAD reasonably found that the Applicant's failure to address the omission was significant for the reasons that it gave. And, contrary to the Applicant's submission before me, on its face the Director's Declaration does not state that Gjini continued to make threats pertaining to the Applicant after he left that office. The evidence overall establishes that Gjini's focus was on getting the property registered and that his threats were ongoing and made Land Registry office holder before and after the Applicant left the office. The RAD reasonably found that Applicant failed to establish that Gjini has a continuing motivation to seek out the Applicant in the proposed IFA. I also do not agree with the Applicant's attempt to characterize this omission as a peripheral detail. Whether Gjini continued to seek out the Applicant after he left Albania was central to the RAD's IFA determination.

ii. When the alleged subsequent visits occurred

[48] The Applicant also asserts that the RAD had no evidence as to when the alleged subsequent two visits occurred. They could have occurred shortly after the fire or much later, which would speak to the agent of persecution's motivation to seek the Applicant in the proposed IFA. Accordingly, the Applicant submits that the RAD lacked the necessary facts to make a finding of relevancy. The Applicant also submits that the RAD imposed an obligation on him that does not exist at law and that "[i]t is perverse and capricious for the RAD to claim on omission regarding the contents of a document [the BOC narrative] created at the discretion of Klevis". Further, that what is material for the RAD is not critical to the Applicant. Again, in my

view, this argument cannot succeed. The onus was on the Applicant to put forward sufficient credible evidence to demonstrate that he would be at risk of persecution in the proposed IFA. His BOC narrative did not mention the alleged subsequent visits by Gjini and the Applicant failed to address this omission before the RAD – including providing evidence of when the subsequent visits occurred.

iii. Finality of Applicant's registration decision

[49] The Applicant also submits that the RAD erred in its finding that, regardless of whether the decision to demolish the property rests with the Applicant or a court, the Applicant's failure to mention in his BOC narrative that he had made a decision (either not to register the property or to have it demolished) on Gjini's application, and that his decision could not be changed, remained a significant omission which was not addressed on appeal or reasonably explained. As I understand the Applicant's submissions, he asserts that the RAD erred by finding that the Applicant omitted to mention that he made a final decision in his narrative because the fact that a government official make a decision implies finality.

[50] The Applicant does not otherwise directly respond to the RAD's finding that the failure to mention in his BOC narrative that his decision was final was a significant and unexplained omission. Rather, he relies on his testimony given at the RPD hearing to assert that it was not open to the RAD to make an adverse credibility finding based on the omission.

[51] I note, however, that the RAD referred to the Applicant's new evidence, the Director's Declaration, which indicated that the employee who has taken over the Applicant's duties is now

the target of Gjini's threats with respect to the property registration. The RAD found that this suggests that the Applicant did not make a final irreversible decision and, therefore, that Gjini's is not interested in the Applicant personally, but rather that his interest lies with the office holder who has the authority to grant or deny the requested property registration application. In other words, based on the Director's Declaration – and I note that the Vuka statement similarly indicates continuing threats against the new office holder – the RAD inferred that the continuing visits by Gjini meant that the Applicant had not made a final irreversible decision. And, as the Applicant no longer works at the Land Registry Office and has no authority to grant or deny property registration applications, based on the evidence before it, Gjini would have no reason to seek out the Applicant in the proposed IFA. As stated by the Respondent, the RAD found that the material and unexplained omission about the finality of the registration decision undermined the Applicant's claim that his decision was final thereby making him an ongoing target for Gjini.

[52] In my view, and contrary to the Applicant's submissions, the RAD did not draw an incorrect inference based on speculation and without evidence. In the absence of an explanation for the omission, and given the evidence before the RAD to which it referred, its finding was reasonable.

iv. Ongoing corruption

[53] The Applicant submits that the RAD erred in its finding that, considering the documentary evidence of widespread corruption within the Albanian judicial system, including the practice of bribing judges, the lack of a court proceeding further supports the RAD's conclusion that the Applicant did not render a final decision in Gjini's registration application.

The Applicant asserts that the RAD erred in speculating, without evidence, about the mental process of the agent of persecution in not resorting to the courts and instead continuing to approach the new employee with his demands.

[54] I note, however, that in making this finding the RAD was responding to the Applicant's testimony, before the RPD, that while Gjini could bring the matter before the court he had not done so because the court would merely uphold the Applicant's decision in deference to his expertise. It is not clear to me how the Applicant could know Gjini's reasoning for not proceeding to court, indeed, the Applicant himself appears to speculate on this point as well as the outcome of any court proceeding.

[55] In any event, for its part, the RAD points to the documentary evidence concerning judicial corruption in Albania and finds that that evidence, together with the lack of a court proceeding, further supports its finding that the Applicant did not render a final decision on Gjini's application. The inference being that if the Applicant had made a final and irreversible decision, there would be no point in continuing harassment of the Land Registry office employees. Further, that given Gjini's willingness to harass the Land Registry Office employees, it was also likely that he would also be prepared to bribe or otherwise influence a judge to obtain the relief that he sought if that route was open to him. As he had not done so, this too supported that the Applicant had not made a final decision.

[56] In my view, the RAD's inference with respect to the lack of a final decision by the Applicant was reasonable as it was based on the evidence of ongoing harassment by Gjini of

Land Registry officer employees and a lack of evidence of ongoing threats by Gjini directed at the Applicant. The further inference that, given his harassing behaviour, Gjini's failure to commence a court action supported the lack of a final decision, is not particularly compelling. However, even if it is speculative, given the RAD's other findings, it does not amount to a reviewable error.

[57] Finally, the Applicant argues that the RAD was relying on its specialized knowledge in reaching this finding and that pursuant to Rule 24(1)(b) of the *Refugee Appeal Division Rules*, SOR/2012-257, the RAD was therefore required to give the Applicant notice of this and provide them with an opportunity to make oral or written representations of the reliability and use of the information or opinion and to provide evidence in support of their representation. In my view, the RAD was not relying on specialized knowledge in making this finding. Its reasons reference the section of the National Documentation Package for Albania upon which it relied to support the statement as to widespread corruption. No breach of natural justice arises due to non-compliance with Rule 24(1)(b).

Conclusion

[58] In summary, the RAD did not breach its duty of procedural fairness or principles of natural justice. Contrary to the Applicant's characterization of this matter one of a lack of natural justice, the RAD's decision was founded largely on omissions from the Applicant's BOC narrative. Those omissions were identified by the RAD and it afforded the Applicant the opportunity to respond to them. The RAD reasonably found that the Applicant's response did not

satisfactorily address the omissions. Although the Applicant raises new points when appearing before me, the RAD cannot be faulted for not addressing arguments that were not made before the RAD. Given this, and based on the evidence that was in the record before it, the RAD reasonably concluded, on a balance of probabilities, that the Applicant did not make a final irreversible decision on Gjini's registration application. And, because the Applicant no longer has authority over the application, Gjini would therefore not be motivated to seek out the Applicant in the proposed IFA. I add that the Applicant's evidence that was before the RAD did not demonstrate any other basis for a motivation by Gjini to seek out the Applicant in the proposed IFA.

[59] The RAD's decision is reasonable because it is transparent, intelligible and justified in relation to the relevant factual and legal constraints that bear on the decision (*Vavilov* at paras 15, 99).

JUDGMENT IN IMM-5675-20

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed;

2. There shall be no order as to costs; and

3. No question of general importance for certification was proposed or arises.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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