Federal Court  Cour fédérale

**Date: 20220126**

**Docket: IMM-2312-20**

**Citation: 2022 FC 85**

**Ottawa, Ontario, January 26, 2022**

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

**BETWEEN:**

**HALYNA BLAVATNA**
**ANDRIY BLAVATNYY**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## JUDGMENT AND REASONS

[1] One of the ways that decision makers assess whether a refugee claim is valid is to measure the claimant's behaviour against their claim that they fear persecution. Sometimes this involves considering whether a claimant made a claim after they left the country of alleged persecution and travelled to another safe country. If the claimant did not make a refugee claim when they reached a safe country, or if they returned to the country of alleged persecution, the decision maker may doubt whether the claimant is a genuine refugee.

[2] Similarly, if the claimant arrives in a safe country and stays there without legal status for an extended period before making a refugee claim, the decision maker may find that delay calls into question whether the individual genuinely feared persecution in their home country.

[3] Both of these principles were applied in the Applicants' case, based on the evidence before the Refugee Protection Division (RPD), and on appeal to the Refugee Appeal Division (RAD). The only question raised by the Applicants before this Court is whether the RAD's decision is unreasonable because of the panel's treatment of supporting documents they had filed, which they claim support their allegations about their risk of persecution.

[4] For the reasons that follow, I find that the RAD's decision is unreasonable, and that it must be set aside and the Applicants' case must be sent back for reconsideration. This may be an unfortunate result, given the otherwise reasonable assessment by the RAD, but it is necessary to set this decision aside in order to remain faithful to the doctrine of reasonableness review endorsed by the Supreme Court of Canada in the *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], for the reasons explained below.

## I. Background

[5] Halyna Blavatna (the Female Applicant) and Andriy Blavatnyy (the Male Applicant) are Ukranian citizens who came to Canada on tourist visas in March 2013, saying they intended to stay in Canada for seven days. They did not do that. Instead, they remained in Canada, working on a farm near Calgary, from September 2013 until September 2016. In December 2016, they claimed refugee protection based on their risk of persecution in the Ukraine because of their political affiliation.

[6] The Applicants operated market stalls at the Krakowsky market in Lviv, Ukraine. The Female Applicant was a supporter of the Party of Regions, and she says that their market stalls were vandalized because of their affiliation with that party. They say that authorities subjected them to inspections and harassment, and wrongly blamed them for a fire at one of their market stalls, because of their support for the Party of Regions. The Applicants also claim that the market manager, who supported the Party of Ukraine, told them that their problems would disappear if they would support that party, and that he eventually forced them to sell their stall and leave the market.

[7] The Applicants say they filed complaints with the market manager and with police authorities, but no protection was offered and no investigation was carried out. They tried to obtain visas to the United States, but were refused. They then obtained Shengen visas and travelled within Europe, because they were told that their chances of obtaining a visa would be higher if they established a travel history.

[8] The Applicants obtained Canadian tourist visas early in 2012, and they came to Canada in March 2013. They say that they had intended to make refugee claims on arrival, but did not do so after they were advised that their chances of success were low. They say that they retained an agency to submit applications for work permits, but they began to work on a farm outside of Calgary in September 2013, before they obtained the permits. They say they waited patiently for the permits, which never arrived, and the agent held their passports during this period.

[9] The Applicants also say they delayed making a refugee claim in Canada because they were advised to do so pending the results of the 2015 federal election, in the hope that a change in government might result in a change in Canada's immigration policies.

[10] After three years of waiting, the Applicants say they lost patience, so they moved to Toronto, retrieved their passports from the agent, and claimed refugee status on December 29, 2016.

[11] The RPD dismissed their claims on September 4, 2019, finding that the Applicants were not credible. This finding was based on their delay in leaving the Ukraine, their failure to claim in the other countries in Europe that they visited, and their delay in claiming after their arrival in Canada. All of this undermined their claim of subjective fear of persecution, and thus the RPD dismissed their claims.

[12] The RAD dismissed their appeal on March 5, 2020, essentially for the same reasons as the RPD had provided. The Applicants had filed new evidence before the RAD, but it was rejected because it simply reiterated the narrative they had provided to the RPD, and some of the documents were already in the record.

[13] The RAD agreed with the RPD that the Applicants' failure to claim refugee status when they travelled to France in June 2012, to the Netherlands in August 2012, and to Poland in December 2012 undermined their credibility and subjective fear. The RAD rejected their explanation that they had been trying to build up a travel history in order to obtain visas for

Canada or the United States, and noted the absence of any evidence to corroborate their claim that they had sought advice about whether to make a refugee claim in these countries.

[14] The panel also rejected the evidence the Applicants submitted about the refugee situation in Europe, which they claimed explained their failure to claim in these countries. The RAD found that the evidence was not pertinent to their claims, because it largely focused on the crisis that arose in Europe with the arrival of millions of Syrian refugees in 2015-2016. The RAD also noted that the materials submitted were incomplete because only extracts of the articles had been provided, and the failure to provide complete copies undermined their value.

[15] Turning to the Applicants' delay in claiming in Canada, the RAD found that the RPD had considered their explanation but did not believe it and noted the paucity of evidence to support it. The RAD agreed with the RPD, finding that there was no evidence to support their claim that they had sought advice about whether to make a refugee claim, and that it was not credible that people as well-educated and resourceful as the Applicants would wait for over three years for their agent to obtain visas to regularize their status in Canada. The panel also rejected their explanation that they had been advised to wait to see if the federal government changed after the October 2015 election, in the hope that Canadian immigration policies would be changed. The RAD found that this claim "stretches credulity beyond the breaking point" (RAD Decision, para 33).

[16] The RAD then dealt with the documentary evidence the Applicants submitted to bolster their claim, and since this forms the basis of their arguments before this Court, this aspect of the

RAD's decision will be dealt with in more detail below. At this stage, it is sufficient to note that the RAD found that the documents did not overcome the Applicants' credibility problems.

[17] Based on the panel's weighing of the Applicants' credibility issues against their supporting evidence, the RAD concluded at paragraph 59: "I find, on a balance of probabilities, that the [Applicants] came to Canada to seek work, were prepared to work illegally, and after three-and-one-half-years, made a fraudulent refugee claim with a view to regularizing their status here." The RAD therefore confirmed the RPD decision that the Applicants are neither Convention refugees nor persons in need of protection and dismissed their appeal.

[18] The Applicants seek judicial review of this decision.

## II. Issues and Standard of Review

[19] The only issue raised by the Applicant is whether the RAD's assessment of the supporting documents they had submitted was reasonable.

[20] The standard of review that applies to this case is reasonableness as set out in *Vavilov*.

[21] Under the *Vavilov* framework, a reviewing court "is to review the reasons given by the administrative decision maker and determine whether the decision is based on an internally coherent chain of reasoning and is justified in light of the relevant legal and factual constraints" (*Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at para 2 [*Canada Post*]). The burden is on the applicant to satisfy the Court "that any shortcomings or flaws relied

on… are sufficiently central or significant to render the decision unreasonable" (*Vavilov* at para 100, cited with approval in *Canada Post* at para 33).

[22] In examining the reasons, and the reasoning process, a reviewing court must be able to follow the logic of the analysis, to "connect the dots on the page where the lines, and the direction they are headed, may be readily drawn" (*Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431 at para 11, cited with approval in *Vavilov* at para 97). *Vavilov* provided an important clarification of the approach (at para 87):

> [I]t is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies. While some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning, an otherwise reasonable outcome also cannot stand if it was reached on an improper basis.
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> [Emphasis in original.]

## III. Analysis

[23] The Applicants' only challenge to the RAD decision relates to its treatment of the supporting documents. They claim that this is a significantly serious error that renders the RAD's decision unreasonable. They focused their arguments on two elements of the RAD's decision, and these will be dealt with in turn.

[24] The first argument of the Applicants arises from the following statement of the RAD:

> [44] Based on my review of the documents, I note that some are less probative than others and therefore deserving of less weight. Included here are the documents that are written by the [Applicants] (documents 3, 4, 5, 6, 7 and 11). Because they bear no

> indicators of the date on which they were written, I cannot disregard the possibility that they were written by the [Applicants] after the fact, with a view to bolstering their claim.

[25] The Applicants contend that the statement that these documents "bear no indicators of the date on which they were written" is not true, and that the RAD had no basis to accuse them of having submitted false documents to bolster their claim. They point to the following evidence to support this aspect of their claim:

(a) Document 3 is a handwritten letter from the Female Applicant to the management of the Karakowsky Market, dated October 15, 2010. The translation of this letter in the Certified Tribunal Record (CTR) shows that it bears the following: "Stamp:/Received October 15, 2010" together with a signature;

(b) Document 4 is a handwritten request from the Female Applicant to Police Colonel Petryk, dated April 12, 2012. The version in the CTR shows that it bears a stamp, date and signature, showing it was received;

(c) Document 5 is a handwritten letter from the Female Applicant and two others to the management of the Krakwosky Market, dated October 21, 2010. The version in the CTR shows that it was stamped "Received, October 21, 2010" together with a signature;

(d) Document 6 is a handwritten letter from the Female Applicant to the management of the Krakowsky Market, dated August 25, 2012. The version in the record also shows that it was stamped "Received August 25, 2011" together with a signature;

(e) Document 7 is a handwritten letter from the Male Applicant to Police Colonel Petryk, dated January 3, 2012. The CTR version shows that it was stamped “Received, Entry number 12-01 AC, January 3, 2012” together with a signature;

(f) Document 11 is a handwritten letter from the Female Applicant to the management of the Krakowsky Market, dated May 10, 2012. The CTR version shows that it was stamped “Received May 10, 2012” along with a signature.

[26] The Applicants points to other evidence that they say also confirms that some of the documents were submitted when they said and not fabricated later to bolster their claims, but it is not necessary to go into this evidence in any detail. The summary of the evidence set out above demonstrates the problem with the RAD’s statement that the documents prepared by the Applicants bore no indicators of when they were prepared and thus may have been prepared later to bolster their claims.

[27] I agree with the Applicants that this statement is directly contradicted by the versions of these documents that were in the record before the RAD. The RAD’s statement that the documents “bear no indicators of the date on which they were written” is not consistent with its listing of these documents three paragraphs earlier in the decision, because that list shows the date of each one. The only way to make sense of this statement is to understand it to mean that these documents did not bear any <u>other</u> confirmation that they were, in fact, prepared when the Applicants said they were. The problem with that is the documents in the record all bear official stamps, dates and signatures that appear to confirm their date of receipt, and this is confirmed by the translations.

[28] Perhaps the RAD thought that these documents and the stamps were forgeries, prepared after the fact to bolster the Applicants' claims. Or that the documents were otherwise reliable, but did not bolster the Applicants' claimed fear of persecution because of their political affiliation. Perhaps the RAD had other reasons to doubt the veracity of the documents or to diminish their weight in its overall assessment of the claims. The problem is that the RAD did not say any of these things in the decision.

[29] The RAD's statement about the lack of confirmation of when these documents were written, and the inference that they may have been prepared after the fact to bolster the Applicants' claim, is not consistent with the evidence. The statement is contradicted by the record. In this sense, the RAD went outside of the "factual and legal constraints" (*Vavilov* at para 99) that bound it as a decision maker, and this aspect of its decision is unreasonable.

[30] The Applicants also challenge the RAD's treatment of the affidavits of the Female Applicant's mother and sister. They argue that the RAD discounted both affidavits because they contained second-hand evidence and speculation. In doing so, the RAD failed to give due weight to the other statement in these affidavits that confirm that the mother and sister were threatened and harassed by people who were trying to find the Applicants due to their political views.

[31] I am not persuaded that this aspect of the RAD's reasoning was unreasonable. A review of these affidavits confirms the RAD's finding that some of the statements were based on second-hand evidence rather than direct observation, and there is also some speculation. The RAD's decision notes this, but also states that the panel would take these affidavits into account in weighing the Applicants' credibility. This is consistent with the record, and the RAD explains

its reasons for giving some of the statements in these affidavits less weight. There is nothing unreasonable in this.

[32] Some of the statements in these affidavits support the Applicants' narrative that they were being sought because of their political views. They claim that this contradicts the RAD's conclusion that there was no connection between the Female Applicant's membership in the Party of Regions and any targeting by nationalists, members of other political parties, or the management of the Krakowsky market.

[33] I am not persuaded that this finding of the RAD is unreasonable. It reflects the RAD's overall assessment of the credibility of the Applicants. Although the RAD's decision on this point could have been more fulsome, the panel's reasons are justified when read in the light of the case overall and the record. The decision makes it clear that the RAD did not believe that the Applicants were fleeing persecution, because they did not claim refugee status when they had the chance to do so in other countries in Europe, and because they waited over three years without legal status in Canada before making their claim. This is consistent with the record, and the RAD's reasons show how the result is justified.

## IV. Conclusion

[34] The RAD's conclusion that the Applicants' failure to make a claim in the first safe country of arrival undermined their credibility is consistent with the jurisprudence: *Kreishan v Canada (Citizenship and Immigration),* 2019 FCA 223 at para 1. So is its conclusion that the Applicants' credibility was diminished because of their delay in making a claim in Canada, during a period when they did not have any lawful status in Canada and thus faced the risk of

being returned to the Ukraine. This is a relevant consideration in assessing a claimant's subjective fear of persecution, and a decision maker must take into account a claimant's explanation for the delay: *Waseem v Canada (Citizenship and Immigration)*, 2021 FC 1422 at para 24; *Renee v Canada (Citizenship and Immigration)*, 2020 FC 409 at para 27, citing *Kayode v Canada (Citizenship and Immigration)*, 2019 FC 495, *Osorio Mejia v Canada (Minister of Citizenship & Immigration)*, 2011 FC 851 and other cases; *Pulido Ruiz v Canada (Citizenship and Immigration)*, 2012 FC 258 at para 57. The RAD's conclusions on both of these elements are reasonable and are supported in the record.

[35] The question that remains, however, is whether the RAD's unreasonable findings in regard to the other supportive documentation are sufficiently important to warrant overturning the decision. In *Vavilov*, the Supreme Court of Canada was clear that reasonableness review is not a standard of perfection, and that the reasons provided by a decision maker must be read in light of the record (*Vavilov*, paras 91-94). The overall tenor of the exercise is reflected in the statement that courts are to engage in "a sensitive and respectful, but robust" review (*Vavilov*, para 12).

[36] One of the core elements of reasonableness review under this framework is an assessment of whether the decision is "justified in relation to the constellation of law and facts that are relevant to the decision" (*Vavilov*, para 105). In this regard, "[t]he reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it" (*Vavilov*, para 126). Not every factual error will be fatal: "the court must be satisfied that any shortcomings or flaws relied on by the party challenging the

decision are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, para 100)

[37] The key problem in this case is that there is ample support in the record for the RAD's conclusion that the Applicants are not genuine refugees. However, the RAD's statement that some of the supporting evidence may have been concocted after the fact is directly contradicted by the very documents the panel refers to in the record, and the RAD offers no reason to call the veracity of those documents into question. This casts doubt on the RAD's reliance on these findings in support of its conclusion that the Applicants were not genuine refugees.

[38] The over-arching thrust of the reasonableness review under *Vavilov* is that it seeks to "develop and strengthen a culture of justification in administrative decision making" and that such justification must be provided to the individuals directly affected by the decision (*Vavilov*, paras 2 and 87). Applying this to the case before me, I am unable to conclude that the RAD's decision can be upheld as reasonable. I say this with some reluctance, given the otherwise reasonable assessment of the case conducted by the RAD.

[39] For these reasons, I am granting this application for judicial review. The decision of the RAD is set aside and the matter is remitted back for reconsideration by a differently constituted panel.

[40] There is no question of general importance for certification.

**JUDGMENT in IMM-2312-20**

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

1. The Application for judicial review is granted.

2. The decision of the Refugee Appeal Division is set aside.

3. The matter is remitted back for reconsideration by a different panel.

4. There is no question of general importance for certification.

"William F. Pentney"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-2312-20 |
| **STYLE OF CAUSE:** | HALYNA BLAVATNA<br>ANDRIY BLAVATNYY v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | HEARD BY VIDEOCONFERENCE |
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| **JUDGMENT AND REASONS:** | PENTNEY J. |
| **DATED:** | JANUARY 26, 2022 |

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