

Federal Court



Cour fédérale

Date: 20220819

Docket: IMM-1405-18

Citation: 2022 FC 1217

Ottawa, Ontario, August 19, 2022

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

**DAUD MUKHAMMAD
ADALYATKHAN MUKHAMMAD
SAMIR MUKHAMMAD
RIANA MUKHAMMAD
DIANA MUKHAMMAD**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants are a husband and wife plus their three minor children. They seek judicial review of a decision made by the Refugee Protection Division (RPD) on February 8, 2018,

refusing their claims for refugee protection. The Principal Applicant (PA), who is the husband, had fled Afghanistan during the war.

[2] The Applicants are citizens of Kazakhstan who sought refugee protection in Canada as small business owners, after fleeing their home on May 30, 2017. The Applicants fled to escape persecution by the mafia and police who were extorting them and had threatened their lives due to their ethnicities.

[3] For the reasons that follow, this application will be dismissed. The determinative issue is the credibility findings by the RPD, which I have found to be reasonable.

II. **Background**

[4] The PA and his wife stated they opened and operated a clothing store in a local bazaar in Almaty, Kazakhstan in 2007. In 2010, they closed that shop and opened one in Kulager Market in Almaty. On expiry of the lease in 2012, they closed that shop and opened another one in Almaty.

[5] In 2014, they were targeted in the market by a Kazak man. He asked where the Applicants were from and told them that many of his family and friends were killed in the Afghan war. He demanded that they make monthly payments of \$1,500 to the Mafia group to which he belonged.

[6] The PA attempted to report this incident to the local police, but was turned away and instructed to take up the issue with the leader of the bazaar.

[7] The Applicants allege that in February of 2015, the Mafia suddenly demanded a payment of \$20,000 US as a lump sum payment for the year. The PA struggled to obtain this large sum and in November 2015, he was attacked by three men to the point of unconsciousness.

[8] The PA alleges that when he regained consciousness, his hands were tied, he was blindfolded and inside the trunk of a vehicle. The attackers again threatened to kill him and continued to beat him. The PA begged them for one week to arrange for the rest of the money.

[9] After this incident, the Applicants closed their store.

[10] The PA's wife and children relocated to her mother's house in another area of Almaty where they lived in hiding until they were able to leave Kazakhstan on May 30, 2017. The PA relocated to Shymkent, about 1000 km away from Almaty and worked there under the name "Rahim" until he could earn enough money to enable the family to flee the country together.

III. **Decision**

[11] In an extensive 40 page Decision, the RPD made detailed and thorough findings of fact on the issues of the credibility of the Applicants and the viability of an Internal Flight Alternative.

[12] The RPD made four key negative credibility findings:

- There was a lack of reliable proof of the clothing business that was targeted by the mafia;
- There was a lack of credibility of the allegation of targeting due to ethnicity;
- There was a lack of credibility of the allegation of payments to the mafia;
- There was a lack of credibility of the account of relocating due to having been targeted by the mafia.

[13] After reviewing the evidence in detail and considering the written submissions, the RPD found that due to a number of unresolved credibility concerns, the Applicants were never at risk from the mafia and/or from the police. That finding materially undermined the credibility of the Applicants' account of having been targeted by the mafia.

[14] The RPD further reasoned that, even if the allegations were accepted as true, the Applicants had a viable internal flight alternative at the home of the PA's mother-in-law in Almaty.

IV. **Issues**

[15] The Applicant raises the issues of whether the RPD's four credibility findings set out above were reasonable and whether the IFA analysis was reasonable.

[16] As I have determined the credibility findings are reasonable and determinative, I will not address the IFA finding.

V. **Standard of Review**

[17] Review of an administrative decisions starts with a presumption that reasonableness is the applicable standard in all cases: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, at para 10 [*Vavilov*]. While there are certain exceptions to this presumption, none of them are present in this matter.

[18] The focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. The role of courts in these circumstances is to review, at least as a general rule, to refrain from deciding the issue themselves: *Vavilov* at para 83.

[19] To set a decision aside, a reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision: *Vavilov* at para 100.

VI. **Analysis**

[20] In conducting a reasonableness review this Court owes a high degree of deference to the RPD when the impugned findings being challenged relate to the credibility and plausibility of a refugee claimant's story, given that the RPD and the RAD have expertise in that regard and considering their role as the trier of fact: *Vall v Canada (Citizenship and Immigration)*, 2019 FC 1057 at paragraph 15.

[21] Regarding credibility generally, the RPD acknowledged that evidence given under oath or affirmation is presumed to be true unless there is valid reason to find otherwise: *Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 (FCA) at para 5.

[22] The RPD added that it was also aware that many variables, such as cultural, social, linguistic and other variables, which the RPD identified, could impede the ability to establish a claim.

[23] The Applicants submit that the RPD engaged in an impermissible degree of speculation, was hyper-critical of the Applicant's evidence – including unreasonably literal interpretations of the Applicants' BOC narrative, fixated on minor inconsistencies and peripheral aspects of their claims, improperly dismissed all of their corroborative evidence, breached procedural fairness by not allowing them to respond to several credibility concerns, failed to account for plausible explanations they had provided and failed to explain why they were not credible, gave disproportionate weight to the Point of Entry (POE) forms and IMM forms, failed to account for the context and circumstances of the Applicants' story when deciding what evidence it was reasonable to expect the Applicants to provide and was ignorant of the impact on the Applicants of cultural differences and psychological trauma.

[24] The Respondent points out that the Applicants' credibility was the central issue to be decided by the RPD. It cannot be faulted for examining the evidence put forward by the Applicants in support of the Applicants' claims of discrimination.

[25] The Respondent submits that the cumulative effect of the problems in the Applicants' testimony was an overall finding that the Applicants were not credible.

A. *The clothing business*

[26] The RPD found there was a lack of reliable proof that the Applicants' clothing business was targeted by the mafia.

[27] Specifically, the RPD noted that the Applicants did not provide any business documents such as a business registration, banking documents or lease to support their claim to own and run a clothing business in the market. The Applicants explained that no attempts were made to access such documents from management of the market because they were not issued other than a lease, which they said they must have left behind. The Applicants also said they closed the store before the expiry of the lease and the market management would not likely remember them.

[28] The RPD found these explanations were not credible as the PA met with market management about the extortion demands and they would likely remember vendors who left four months prior to the expiry of the lease.

[29] The RPD also noted that the store was not closed immediately after the PA was kidnapped. The PA's wife closed it after she relocated and was able to find a buyer for the inventory. At that time, the PA was already living in Shymkent.

[30] Ultimately, the RPD concluded that there was a lack of reliable evidence to show the Applicants were owners of a clothing business. The RPD found that undermined the credibility of their claim that they had a business targeted by the mafia.

[31] The Applicant argues that the Applicants' sworn testimony, with which the RPD found no fault, detailed the process they underwent to set up their store, the money they paid to secure the space, the name of the market manager and the names and locations of each of the three stores they had operated. They state that the RPD found they had not owned a clothing business for only one reason – the failure to produce a lease or corroborating business documents.

[32] To support this argument the Applicants parse paragraph 41 of the Decision, which states:

Furthermore, the account of the principal claimant's wife not having returned to the store after the day in November 2015 that the principal claimant was kidnapped, is inconsistent with the claimants' own evidence (which the principal claimant's wife also signed) as set out in the amended BOC Form, at paragraph 50. On this amended account, the principal claimant's wife would have had the opportunity to take the lease or any other business documents with her that were at the boutique and to obtain any other evidence of the business from the market management. This amended account indicates that she looked after winding down the business at the store and that after the week that it took to do so, she remained at home and stopped working:

Within that first week [In context, other having relocated to her mother's house] my wife sold everything from our store for approximately \$11,000 US, enabling us to pay back the loan from the bank. My wife **then** remained at home, **stopped working** and our kids stopped going to school. The three of them remained in hiding until we fled.

[underlining and bold emphasis in the original and noted there as 'added']

[33] The Applicants state that “to the Board, the bolded words can only mean that, contrary to her testimony, Mrs. Mukhammad was at the boutique when selling off her merchandise since she only stopped working afterwards”.

[34] The testimony in question is this:

BM: When you say you closed the store, what did you do?

AM: **You know that I found a person who bought from me the clothing, merchandise at a very low price. I even didn’t come there.**

[Counsel’s emphasis]

[35] The Applicants submit the RPD took an unreasonably literal view of the wording in the BOC.

[36] I do not view the paragraph in the Decision the same way that the Applicants do. The word “then” can mean “after”, “next” or “subsequently”. It can also mean “at that time”.

[37] In the context of the entire paragraph, it is clear that the RPD interpreted the PA’s use of the word “then” as “after”:

This amended account indicates that she looked after winding down the business at the store and that after the week that it took to do so, she remained at home and stopped working.

(My emphasis)

[38] The RPD had the advantage of seeing and hearing the Applicants. In that respect, the Court is in no position to re-weigh the evidence nor is it the role of the Court to do so. The

RPD's interpretation of the word "then" in this context is reasonable. It is one of two, or perhaps more, available outcomes.

[39] The RPD considered the evidence and explained why it arrived at each conclusion. It also noted other documents that could have been, but were not, produced to show there was a business owned by the Applicants.

[40] The reasons provided to explain the finding display the requisite characteristics of being justified, intelligible and transparent. I can discern no sufficiently serious shortcoming to the contrary.

[41] For the foregoing reasons, I find the RPD reasonably determined the Applicants were not credible when claiming to have owned a business that was targeted by the mafia.

B. *The allegation of targeting due to ethnicity*

[42] The RPD acknowledged that the omission of this ground from the BOC might be explained by the lack of counsel to assist with preparation of the forms and by the multi-language interpretation from English to Dari to Russian.

[43] The RPD was concerned with the PA's oral testimony, given through a Russian-speaking interpreter and his responses during his POE interview. In oral testimony, when the PA was asked whether there was any reason other than the business that caused the mafia to target the business the PA said there was no other reason.

[44] The RPD notes in the Decision that the PA's wife immediately interjected and indicated, as set out in the amended BOC form, that targeting was also due to their ethnicities. The PA then adopted that answer and attributed his error to nervousness.

[45] The RPD rejected the PA's excuse of nervousness as the amended BOC had been signed only one and one-half months before the sitting at which the question was posed. The PA had interpreted the amendment to his wife, in Russian, on the day of the sitting. The RPD reasonably concluded that it was not credible that nervousness would come to mind when the panel asked the question. The RPD found that as the ethnicity of the PA was noted in the amendment, it reasonably expected the PA to mention that more personal risk in his oral testimony rather than the reason of carrying on a business.

[46] The RPD went on to examine other evidence related to ethnicity as being the reason for the Mafia's demand for money. This included the statement by the person who first demanded money that he had lost friends and family in the Afghan war and the PA was an Afghan. The PA's wife had testified to the same effect and added that neither of them was considered native Kazakhstani.

[47] The RPD reviewed the answers given by the PA at the POE interview and noted that, without being asked, he twice offered to the Officer that the business was the reason for their targeting.

[48] The RPD found there was also a contradiction in the PA's testimony regarding whether others in the market paid extortion money to the Mafia. The PA indicated that he and his wife were the only ones who paid the Mafia as they were the only owners linked to an Afghani background.

[49] However, the PA contradicted himself when responding to the question of whether the Applicants had made a complaint to the manager of the market. The PA answered that the manager of the market told him everyone paid the Mafia as they controlled every store. The RPD noted that answer was consistent with the POE answer provided by the PA.

[50] The RPD conducted an in-depth review of the evidence addressing why the Applicants were targeted. It clearly accepted some of the explanations given by the PA and his wife concerning inconsistent answers about the reason they were targeted and, based on the evidence in the record, it rejected other explanations.

[51] The RPD cannot base a negative credibility finding on minor contradictions that are secondary or peripheral to the claim for refugee protections. It cannot be too granular or overzealous in analysing the evidence. It is open to the RPD not to give evidentiary weight to assessments or reports based on underlying elements found not to be credible: *Lawani v Canada (Citizenship and Immigration)*, 2018 FC 924 at paras 23 – 24 (internal citations omitted).

[52] The inconsistencies relied upon by the RPD in arriving at the finding that the Applicants were not targeted by the Mafia due to their ethnicities were not based on minor contradictions that were secondary or peripheral to their claim for protection.

[53] As was the case with the clothing business finding, the reasons provided by the RPD concerning the allegation that ethnicity was the cause of the Mafia's persecution are supported by the evidence. They also display the requisite characteristics of being justified, intelligible and transparent. I can discern no sufficiently serious shortcoming to the contrary in the reasons.

[54] For the foregoing reasons, I am of the view that the RPD reasonably concluded, after reviewing the evidence, that ethnicity was not a reason for the Mafia to target the Applicants.

C. *Lack of credibility of the allegation of paying money to the mafia*

[55] The RPD determined that the Applicants did not pay extortion money to the Mafia. This finding was based on the PA's evasive and inconsistent account of the payments. He was unable to state the total sum he paid to the Mafia. He did indicate that on a monthly basis he paid \$1,500 USD and sometimes \$2,000 USD.

[56] The BOC amendment indicated that from February 2015 onward, the Applicants were required to pay an annual lump sum of \$20,000 USD but only paid \$10,000. Thereafter they said they paid \$500 USD every time they (the Mafia) returned and each month the PA begged them to give him more time.

[57] The RPD noted the PA's testimony was that he paid \$1,500 USD and sometimes \$2,000 USD until November 2015 and did not mention the monthly payments of \$500 USD.

[58] The RPD found that it was not credible that the Applicants would not record or otherwise know the sum of money they alleged they paid to the mafia. The RPD found the Applicants' explanation that they did not tally or otherwise calculate how much they paid to the Mafia because it made them upset was not credible.

[59] The RPD also found that the PA's inconsistent account of how much was paid monthly, and how many times it was paid, materially undermined the credibility of the allegation that they were targeted by the Mafia and that extortion money was paid.

[60] These findings by the RPD are supported by the evidence. They are justified, intelligible and transparent. There is no serious shortcoming to the contrary in the reasons.

D. *Lack of credibility of the account of relocating due to targeting by the mafia*

[61] The RPD found the Applicants' account of having to relocate due to targeting by the Mafia was not credible. This finding was based on the answer to Question 10 on the Schedule A Forms of the PA and his wife. They attested that they both resided at the PA's wife's mother's home from August 2015 to June 2017.

[62] The RPD found that answer materially undermined the credibility of the PA's claim that he did not reside with his wife and children and had not seen them for about one and one-half years when they met at the airport on May 30, 2017, to leave the country.

[63] The PA had said that he lived in Shymkent for about one and one-half years but that was not shown on his Schedule A form. His explanation when asked to explain that anomaly was that the address he had in Shymkent was both his official address and, he was not living in an apartment. He was living at his place of employment in cabin-like accommodation.

[64] The RPD rejected that explanation noting that the Question in Schedule A states “[p]rovide all of the addresses where you have lived in the past ten years or since your 18th birthday, whichever is most recent. Do not exclude any period of time during this timeframe [underling emphasis added]. Do not use P.O. box addresses.”

[65] The RPD noted several other anomalies such as failing to list in his personal history any employment in Shymkent and not including his alias “Rahim” in his Generic Application Form for Canada.

[66] The RPD was not satisfied with the PA's explanation, which included that he did not understand the Schedule A form and he did not know why the omission was made in the Generic Application form.

[67] The RPD reviewed several other pieces of evidence including various letters of support and letters describing the children's circumstances. It noted more contradictions between the PA's written description of the children's circumstances and his testimony.

[68] After reviewing all the evidence and arguments, the RPD concluded that all of the unresolved credibility concerns led it to find on a balance of probabilities that "the claimants were not ever in hiding, which materially undermines the credibility of their account of having been targeted by the mafia."

[69] Once again, I am persuaded that the RPD came to a reasonable conclusion on the evidence in the record. They outlined their concerns, questioned the Applicants during the hearing, took the submissions of the Applicants into account and thoroughly explained how and why they arrived at the determinations they did.

VII. Conclusion

[70] In applying the reasonableness standard to review an administrative decision the Court of Appeal has summarized the task of the reviewing judge to be as follows:

[. . .] our task is not to decide the issue ourselves according to our own yardstick or determine what the correct decision would have been. Our role is rather to approach the reasons provided by the Commissioner with "respectful attention", with a view to understanding the chain of analysis and ensuring that the decision falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and the law that constrain the Commissioner (*Vavilov* at paras. 83-86; see also *Dunsmuir v New-Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 47).

Burlacu v Canada (Attorney General), 2022 FCA 10 at para 18.

[71] I am satisfied the RPD's analysis does fall within the range of possible, acceptable outcomes and, it is defensible in respect of the facts and law by which it was constrained.

[72] That the Applicants disagree with the outcome is understandable. It is however indicative of the fact that there is, in this matter as with many others, a range of possible, acceptable outcomes.

[73] For all the foregoing reasons, this application is dismissed.

[74] No serious question of general importance for certification was posed.

JUDGMENT in IMM-1405-18

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.
2. There is no serious question of general importance for certification

"E. Susan Elliott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1405-18

STYLE OF CAUSE: DAUD MUKHAMMAD, ADALYATKHAN
MUKHAMMAD, SAMIR MUKHAMMAD, RIANA
MUKHAMMAD, DIANA MUKHAMMAD v THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

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APPEARANCES:

Subodh S. Bharati FOR THE APPLICANTS

Judy Michaely FOR THE RESPONDENT

SOLICITORS OF RECORD:

SSB Law Chambers FOR THE APPLICANTS
Barristers and Solicitors
Toronto, Ontario

Attorney General of Canada FOR THE RESPONDENT
Toronto, Ontario