Federal Court  Cour fédérale

Date: 20220916

Docket: IMM-93-20

Citation: 2022 FC 1300

Toronto, Ontario, September 16, 2022

PRESENT: Madam Justice Go

BETWEEN:

LALI DORESI

Applicant

And

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. Lali Doresi [Applicant] seeks judicial review of the decision of the Refugee Protection Division [RPD] to grant the application by the Minister of Public Safety and Emergency Preparedness [Minister] to vacate his refugee protection status pursuant to section 109 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] [Application to Vacate].

[2] The Minister's Application to Vacate is based on the allegations that the Applicant was convicted of drug trafficking in Albania and failed to disclose that fact to the RPD, despite this being material to the question of his possible exclusion from refugee protection due to serious criminality. In a decision dated December 13, 2019 the RPD found that the Applicant committed a serious non-political crime in Albania prior to coming to Canada in April 2005, and that the Applicant directly misrepresented or withheld material facts relating to a relevant matter of whether he is or is not excluded from Convention refugee protection [Decision].

[3] For the reasons set out below, I conclude that the RPD's finding that the Applicant directly misrepresented or withheld material facts relating to his possible exclusion from Convention refugee protection was unreasonable. I therefore grant the application.

II. Background

A. *Factual Context*

[4] The Applicant is a citizen of Albania. He fled the country in 2005 and arrived in Canada on April 24, 2005. He applied for refugee protection on April 28, 2005. After an in-chamber hearing on December 8, 2005, he was granted refugee status by the RPD on March 27, 2006.

[5] The Applicant had indicated on the Personal Information Form [PIF] submitted with his application for refugee protection that he had never been sought, detained, or arrested by the authorities and had never committed, been charged with, or convicted of any crime.

[6] In December of 2012, the Minister applied to the RPD to vacate the decision granting refugee protection. The Minister argued that the positive decision was obtained as a result of the Applicant's directly or indirectly misrepresenting or withholding the material facts about his conviction and that he had been sentenced to a term of imprisonment of six years that he had not served. The Minister submitted that had the Applicant's conviction been revealed to the RPD, it would have considered his possible exclusion from refugee protection based on section 98 of the *IRPA* and Article 1F(b) of the Refugee Convention. These provisions specify that a person is not a Convention refugee if they have committed a serious non-political crime outside the country of refuge prior to entry.

[7] In support of the Application to Vacate, the Minister relies on the Verdict of the Court of First Instance for Serious Crimes in Tirana, Albania dated June 6, 2005 [Verdict], declaring the Applicant guilty of the crime of drug trafficking and sentencing him to six years of imprisonment. The conviction was upheld in a decision of the same court on October 24, 2005 [October 24, 2005 Court Decision], on which the Minister also relies. The Minister also produced an Interpol warrant posted on May 16, 2008 for the Applicant's arrest, as his sentence was still outstanding by then.

[8] The events surrounding the crime for which the Applicant was convicted took place in 2003. As reported in the October 24, 2005 Court Decision, on September 29, 2003, a car licensed in the Applicant's name and containing his passport was stopped at the Albanian border to Greece. While the car was being processed by the Greek authorities, eight packages of a heroin-like substance were found hidden in the dashboard. The driver, found by the court to be the

Applicant, fled back into Albania and escaped arrest. The court's judgments note that the trial was held in the absence of the Applicant, but report that he was represented by a lawyer, authorized by power of attorney to represent the Applicant and enter a guilty plea on his behalf.

[9] The Applicant testified at the RPD that he only learned of the charges and conviction against him upon receiving the Minister's application in 2012. He stated that he was not in the car when it was stopped on September 29, 2003, but rather that he had lent his car to a friend, Altin Mydini [Mydini]. The Applicant stated Mydini told him at the time that he had been in an accident resulting in the total loss of the car. Mydini provided a sworn affidavit to the RPD confirming that he – not the Applicant – was the person driving the car and attempted to smuggle drugs across the border.

[10] Shortly after the incident on September 29, 2003, the police visited the Applicant's family home (where he was not staying at the time). The Applicant testified that his parents told him about the visit, that the police did not say what they wanted, and that his parents had told the police where he was staying. He testified that he told his parents it was probably about what he thought to be the car accident. The Applicant stated he had no further interactions with the police, and was never informed of any investigation, charges against him, or the trial. He testified that he went to the police station in 2004 to obtain a new passport and the police did not mention the charges at the time.

[11] According to the Minister's evidence, in 2013, the Applicant obtained the Special Authorization that he had allegedly signed authorizing a lawyer, Saimir Vishaj, to represent him

at the trial and plead guilty on his behalf. The Applicant denied any prior knowledge of the document and retained a forensic expert to analyze it. The forensic report concludes that the signature on the Special Authorization is not the same as a signature the Applicant provided in 2013.

[12] That same year, the Applicant retained a lawyer in Albania to have his conviction overturned. In the end, the Applicant obtained a judgment from the First Instance Court for Serious Crimes extinguishing his sentence, although the conviction itself remains on his record.

B. *Decision Under Review*

[13] A hearing on the Minister's Application to Vacate was held before the RPD on October 31, 2019. The Applicant testified at the hearing.

[14] The RPD disbelieved the Applicant's explanation that he was not aware he had been charged with or convicted of any crime. It relied on the facts stated in the Albanian court decisions to find that, on a balance of probabilities, the Applicant was the person in the car in 2003 when the drugs were found.

[15] The RPD concluded that the Applicant knew he had been charged with drug trafficking when he submitted his application for refugee protection, and that he had therefore made a false declaration when he denied having been charged with an offence in his PIF.

[16] The RPD found that the charges the Applicant faced were a material fact relating to a relevant matter, namely the possibility that he was excluded from refugee protection pursuant to Article 1F(b) of the Convention. The RPD also found a causal link between the alleged misrepresentation and the grant of refugee protection, concluding that had the Applicant disclosed the charges, the RPD would have investigated his possible exclusion from refugee protection.

[17] Given its finding that the previous panel could have excluded the Applicant from protection had his conviction been disclosed, the RPD decided it was unnecessary to consider whether there was sufficient evidence at the time of the first determination to justify granting protection.

C. *Procedural History*

[18] The hearing before the Court was initially set for September 22, 2021. Prior to the hearing, I invited parties to prepare additional oral submissions to clarify some of the factual and legal issues involved. One day before the hearing, with the Applicant's consent, the Respondent asked the matter to be held in abeyance until the Federal Court of Appeal rendered its decision in a matter that may be of assistance to the case at hand. I granted the Respondent's request. The Federal Court of Appeal has since released its decision in *Canada (Minister of Public Safety and Emergency Preparedness) v Bafakih*, 2022 FCA 18 [*Bafakih*].

[19] The hearing was adjourned, on consent, on two more occasions due to other reasons.

[20] I have received additional submissions from the parties. I acknowledge the parties' helpful submissions and the professionalism they have displayed throughout the proceedings.

III. Issues and Standards of Review

[21] In their initial written submissions, the Applicant raised a number of issues to show that the RPD erred in finding that the Applicant had committed a "serious, non-political crime" and was aware of the criminal proceedings, and in relying on the findings of the Albanian court judgments as evidence. Specifically, the Applicant submits: 1) court decisions are not evidence, 2) the Albanian court judgment should not be recognized, 3) the RPD unreasonably rejected Mydini's affidavit, 4) the RPD rendered an unwarranted plausibility finding with respect to the Applicant's interaction with the Albanian police, 5) the RPD erred in its finding with respect to the Applicant's evidence of his interaction with his father, 6) the RPD made an absurd conclusion concerning the "fraudulent" Special Authorization to counsel, 7) the RPD erred in finding the Applicant conceded that he had misrepresented or withheld information relating to the question of exclusion, and 8) the RPD imported its erroneous findings in assessing the mitigating and aggravating factors in this case.

[22] The Respondent, on the other hand, asserts that the Decision was reasonable, in view of the legislative framework, and the legal principles to be applied when considering an application to vacate.

[23] As stated above, the parties were also asked to prepare additional submissions based on my reading of the record and the law. Having considered the parties' submissions, I have summarized and re-stated the issues as follow:

a) What is the standard of review?

b) What are the material facts alleged to have been misrepresented or withheld, and in relation to that, what is the relevant point in time at which the alleged misrepresentation or withholding of material facts should be assessed?

c) Does a finding of misrepresentation or withholding of material facts require a finding of actual knowledge of the facts allegedly misrepresented or withheld?

d) Was the RPD's finding that the Applicant directly misrepresented or withheld material facts relating to his possible exclusion from Convention refugee protection reasonable?

[24] The parties generally agree that the RPD's decision is to be reviewed on a standard of reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 16–17.

[25] In his written submission, the Applicant argues in addition that issues related to procedural fairness are reviewable on what is effectively a standard of correctness. He appears to be referring to the lack of procedural justice in the criminal proceedings against him in Albania. The Applicant cites *Abdelrahman v Canada (Citizenship and Immigration)*, 2021 FC 527 [*Abdelrahman*] at paras 12–13 "and cases cited therein." *Abdelrahman,* and the cases cited in Justice Brown's analysis of the standard of review, dealt with the standard for determining whether the decision-maker, whose decision was under review, complied with the duty of procedural fairness.

[26] I am not persuaded that this line of jurisprudence is applicable to the present case. This Court is not reviewing the decision of the Albanian court to convict the Applicant. The standard of review remains that of reasonableness, even on the question of whether a foreign conviction should be recognized, which is imbedded in a review of the RPD's finding regarding the Applicant's potential exclusion. This standard is consistent with the Court's decisions in *Biro v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1428 and *Biro v Canada (Citizenship and Immigration)*, 2007 FC 776, which dealt with the RPD's failure to properly assess the legitimacy of a foreign conviction on a standard of patent unreasonableness.

[27] A reasonable decision "is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker": *Vavilov*, at para 85. The onus is on the Applicant to demonstrate that the Decision is unreasonable. To set aside a decision on this basis, the 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": *Vavilov*, at para 100.

IV. Analysis

[28] The relevant statutory provisions can be found in Appendix A.

A. *What are the material facts alleged to have been misrepresented or withheld, and in relation to that, what is the relevant point in time at which the alleged misrepresentation or withholding of material facts should be assessed?*

[29] It is necessary to clarify the material facts that are alleged to have been withheld or misrepresented by the Applicant, and the point in time at which to assess the alleged misrepresentation/withholding of material facts, in order to examine the reasonableness of the RPD findings.

[30] In the Application to Vacate, the Minister described the material fact that the Applicant directly or indirectly misrepresented or withheld as follows:

> The material fact that the [Applicant] was convicted for trafficking a heroin substance in Albania, prior to his refugee hearing in Canada, which he failed to disclose at his original hearing, which relates to the relevant matter of possible exclusion under Article 1F(b) of the Convention, relating to serious criminality prior to entering the country or refuge

[31] The Minister's description gave me pause. The alleged misrepresentation/withholding of material facts related only to the Applicant's conviction even though the Applicant was convicted *in absentia*, while he was in Canada, after he had already filed his refugee claim. It was in part due to this puzzling description that I approached the parties for additional submissions.

[32] However, I note that in the Application to Vacate, the Minister also set out the particulars of the Applicant's alleged misrepresentation and withholding of material facts to include, among other things:

- The Applicant entered Canada on April 24, 2005;
- The Applicant claimed inland on April 28, 2005;

- The Applicant's claim was heard on December 8, 2005 and he was granted refugee protection on March 27, 2006;
- On May 16, 2008, Interpol posted a warrant for the Applicant regarding an outstanding sentence to be served in Albania for drug trafficking. The Applicant was convicted on June 6, 2005 *in absentia*, but was represented by a lawyer on a guilty plea, which was upheld by the Court of First Instance for Serious Crimes on October 24, 2005; and
- The Albanian crime of drug trafficking would be trafficking in substance and importing/exporting were it to be committed in Canada which have a maximum sentence of life imprisonment.

[33] The Applicant submits that the point in time to determine the existence of the facts related to exclusion is when the application for refugee protection is made, citing *Parvanta v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1146 at para 13, and *Ede v Canada (Citizenship and Immigration)*, 2021 FC 804 [*Ede*].

[34] The Respondent, on the other hand, does not cite any specific case law, but points out that a foreign national seeking to enter Canada has a "duty of candour" which requires disclosure of material facts. In addition, the Respondent submits a refugee claim is a "continuous ongoing process" and does not cease on the day the asylum request is made. Rather, the Respondent contends that refugee claimants have the obligation to divulge truthful, accurate and complete information up to the determination of their asylum applications.

[35] The jurisprudence on the issue of timing appears to be mixed. Most decisions on applications to vacate refer only to the language of the legislation, namely, whether a positive decision was obtained "as a result of" a misrepresentation: see, for instance, *Mansoor v Canada*

(Citizenship and Immigration), 2007 FC 420 at para 23; *Canada (Minister of Citizenship and Immigration) v Wahab*, 2006 FC 1554 [*Wahab*] at para 29. This formulation does not specify at what time the misrepresentation is assessed, but its silence, in conjunction with reference to the decision, could be interpreted to mean that any information arising prior to the refugee status being conferred can be considered.

[36] However, some decisions from this Court crystalize the relevant question as whether the refugee claimant withheld the fact in question at the time the claim was made.

[37] In *Ede*, the Minister sought to vacate Mr. Ede's refugee protection, granted in 2006, alleging that when he applied for refugee protection in 2005, Mr. Ede failed to disclose he "had committed and/or been charged" in Turkey with the offence of exporting heroin in 2001. When the Minister filed the application to vacate in 2015, the only evidence relating to Mr. Ede's alleged commission of the offence was an "INTERPOL Red Notice." Mr. Ede denied committing the offence and denied that he knew when he applied for refugee protection that he had been charged with this crime. Justice Norris found the determinative question to be "whether Mr. Ede actually withheld this information when he applied for refugee protection. In the proceeding before the RPD, this turned on whether, <u>when he applied for refugee protection in Canada in 2005</u>, Mr. Ede knew that Turkish authorities had charged him with the crime of exporting heroin": *Ede*, at para 30 [emphasis added].

[38] Similarly, in *Al-Maari v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1037 [*Al-Maari*], the Court stated:

> [10] It is not disputed that for an order to vacate a positive refugee determination, the Minister has the burden of proving, on a balance of probabilities, that an applicant misrepresented or withheld material facts at the time a refugee claim was made (*Shahzad v Canada (Minister of Citizenship and Immigration)*, 2011 FC 905).
>
> [Emphasis added]

[39] Based on *Ede* and *Al-Maari*, the relevant time for assessing whether an applicant misrepresented or withheld material facts is at the time when the applicant made a refugee claim. In the context of this case, the RPD appeared to be applying the same point in time in its assessment. As noted at para 18 of the Decision:

> In his Personal Information Form (PIF), the [Applicant] replied "No" to question 9(a), which reads as follows, "Have you ever been sought, arrested, or detained by the police or military or any other authorities in any country, including Canada?" He also replied "NO" to question 10, which states, "Have you ever committed or been charged with or convicted of any crime in any country, including Canada?" In each instance he indicated the negative by checking the "No" box.

[40] The RPD then went on to frame the question as follows: "Was the [Applicant] aware of the charges?" It concluded, at para 62 of the Decision:

> [The Applicant] was granted Convention refugee protection on March 27, 2006. At the time he made his claim for refugee protection, the [Applicant] did not disclose that he had been charged with drug trafficking in his native Albania prior to coming to Canada.
>
> [Emphasis added]

[41] The Respondent submits that the RPD analysis included both the charges and the conviction, and that the Applicant's knowledge of either the charges or the conviction for drug trafficking at the time of his claim and at the time the claim was determined must be assessed.

[42] While the RPD made findings about the Applicant's subsequent conviction and other incidents that took place after the Applicant came to Canada, the RPD appears to have made such findings to support its main conclusion in this case, namely, that the Applicant was aware of the charges when he made his refugee claim.

[43] However, ultimately nothing rides on the specific date for the purpose of assessing the Application to Vacate. The Applicant never disclosed the charges nor the conviction, as the Applicant maintains that he had no knowledge of either event. More importantly, the Applicant provided testimony and evidence with regard to the events leading up to the conviction and relied on such evidence to support his position that he was unaware of the charges in the first place. Given the unique set of circumstances of this case, I will consider the alleged omissions with regard to the charges as well as the conviction, as the events and evidence submitted on both fronts are intricately linked.

[44] In addition to the issue of timing, the Applicant also submits that in view of *Bafakih*, the RPD erred in finding that the Applicant's alleged misrepresentation was material because it "may have" led the initial panel to assess exclusion, and not because it "would have" done so. The Applicant submits this was an error as the Federal Court of Appeal in *Bafakih* made clear that a fact is ***not*** material if it only "may have" altered the initial refugee decision.

[45] I am not convinced by the Applicant's argument. The Federal Court of Appeal confirmed in *Bafakih* that omissions need "to be material", and the test requires that (i) there be a "misrepresentation or withholding of material facts;" (ii) that those facts "relate to a relevant matter; and" (iii) that there be a "causal connection between the misrepresenting or withholding on the one hand and the favourable result on the other", citing *Canada (Public Safety and Emergency Preparedness) v Gunasingam*, 2008 FC 181.

[46] In this case, as the Respondent submits, there is a link between the Applicant's alleged omissions and the conferral of refugee protection, namely, the omissions in the Applicant's PIF about the criminal charge/conviction and initial RPD decision to grant him refugee protection without first considering the Applicant's possible exclusion on the basis of Article 1F(b). I thus find the alleged omissions, if proven, to be material facts.

B. *Does a finding of misrepresentation or withholding of material facts require a finding of actual knowledge of the facts allegedly misrepresented or withheld?*

[47] Like the issue of timeframe, the jurisprudence on whether "actual knowledge" is required in misrepresentation/withholding of facts in the context of vacation applications appears to be inconsistent. The only thing that is clear from the case law is there is no *mens rea* element to the withholding of material facts. In other words, the withholding need not be deliberate; it is the act of withholding material facts that is relevant: *Wahab*, at para 29.

[48] Some decisions interpret this principle to mean that the applicant's knowledge of the fact allegedly misrepresented is also irrelevant. In other words, the applicant's lack of knowledge was

no defence to the omission of that fact in the application. In *Abdulrahim* v *Canada (Public Safety and Emergency Preparedness)*, 2020 FC 463 [*Abdulrahim*], the Minister claimed the applicant had been charged with fraud and forgery in Qatar prior to coming to Canada and had withheld that he had committed the acts upon which these charges were based. One of the issues raised by the applicant was that there was no evidence he was aware of the allegations against him when he made his claim. The Court rejected this argument, finding it was irrelevant to the allegation of withholding: *Abdulrahim* at para 21.

[49] Other cases have treated or turned on the question of whether the applicant was aware of the fact allegedly withheld. In *Ede*, one of the central bases on which Justice Norris quashed the decision of the RPD vacating Mr. Ede's refugee status was the lack of evidence that Mr. Ede knew he was charged with heroin exportation. This decision implies that knowledge of the allegedly withheld fact is indeed relevant to the question of whether a misrepresentation has been made.

[50] In the case before me, I note the parties made substantial arguments on the Applicant's actual knowledge during the RPD hearing. I also note that the Decision was based on the RPD's rejection of the Applicant's evidence about his actual knowledge, as opposed to a finding that such actual knowledge was irrelevant.

[51] In view of *Ede*, and in light of the submissions made by the parties at the time of the RPD hearing as well as the findings of the RPD, I find that the Applicant's actual knowledge about the

material facts allegedly withheld or misrepresented is a relevant factor to be considered in the Application to Vacate.

C. *Was the RPD's finding that the Applicant directly misrepresented or withheld material facts relating to his possible exclusion from Convention Refugee protection reasonable?*

[52] The Applicant argues that the RPD erred in finding that he had committed a serious, non-political crime, and was aware of the criminal proceedings against him. The Applicant also takes issue with the RPD's reliance on the Albanian court decisions as evidence.

[53] I do not find all of the Applicant's arguments to be equally persuasive. I will focus my analysis on the issues that I find to be determinative.

(i) *The RPD unreasonably made implausibility findings to reject Mydini's affidavit*

[54] The evidence in this case that the Applicant was not aware of the charges against him consisted essentially of his own testimony, Mydini's affidavit, and the Special Authorization that the Applicant submits is fraudulent.

[55] The RPD rejected Mydini's affidavit, as it relied on the Albanian court decisions to find that it was implausible that the Albanian border officials would not have noticed the discrepancy between the person driving the car and the photo in the passport, which belonged to the Applicant.

[56] The Applicant submits that in the absence of direct evidence that he knew of his conviction, and in the face of evidence that corroborated his testimony, it was unreasonable for the RPD to reject his denial that he knew of the charges. The Applicant relies on *Ede*, in which Justice Norris quashed the RPD's decision to vacate, finding at para 66 that "in the absence of any direct evidence to support an affirmative finding that Mr. Ede knew he had been charged, it was unreasonable for the RPD to base this finding simply on the rejection of Mr. Ede's denial."

[57] The Applicant also submits that the RPD erred by rejecting Mydini's affidavit evidence in the absence of any direct evidence that the Applicant was present in the car and at the border that day.

[58] The Respondent argues that the RPD reasonably weighed the Applicant's testimony and Mydini's affidavit against the undisputed facts that the Applicant's passport was produced at the border and the person carrying it was processed at both the Albanian and Greek borders. The Respondent further submits that the RPD was entitled to rely on common sense and rationality with respect to how the border authorities would have behaved.

[59] I am not prepared to fully endorse the Applicant's position that court decisions do not constitute evidence. I find the cases cited by the Applicant are not exactly on point. However, I agree with the Applicant that the descriptions of the facts as set out in court decisions do not constitute ***direct*** evidence. I also agree that the RPD should not have discounted Mydini's affidavit solely based on the factual descriptions in the Albanian court decisions.

[60] In addition, I find that the factual descriptions included in the court decisions in this case do not necessarily support the RPD's own findings with regard to what transpired at the border crossing.

[61] As noted above, the RPD rejected Mydini's affidavit finding it implausible the Albanian border officials would not have noticed the discrepancy between the person driving the car and the photo in the Applicant's passport. It would appear that the RPD was relying on the October 24, 2005 Court Decision which described the checkpoint process as follows:

> On September 29, 2003, the defendant after staying for one month in Albania left for Greece holding Albanian Passport No. […] and ID number […]. At about 11.00 AM of that date, together with his car branded Volkswagen Golf white colour with licence plate [….] after having completed the documentation for the Albanian border crossing and subject to a customs control by the Albanian authorities, the defendant passed to the Greek Customs of Tre Urat in Merxhani to continue with the customs procedure by Greek authorities. This fact was proved by the report examining the document dated September 29, 2003 where the subject of inspection was the Exiting Registry from the territory of the Republic of Albania for Albanian citizens, compiled by Bernard Lukaj, Judicial Police Officer in the Prosecutor at the Court of First Instance in Permet.
>
> During the control of the car of the defendant Lali Dorsei, 8 (eight) packages packed were found hidden inside the dashboard. The Two Greek Customs Officials […] who were inspecting the car initially suspected to be narcotic drugs. At that moment, the defendant suddenly left by running away parallel to the river Vjosa towards the Albanian territory thus escaping arrest.
>
> [Emphasis added]

[62] That the driver of the vehicle fled back into Albania and escaped arrest was also confirmed by Mydini's affidavit in which he stated:

> On September 29, 2003 in the morning I drove Lali Dorsei's car, a Volkswagen Golf, and headed towards the Greek border crossing called Three Bridges near Merxane in order to enter Greece. One of the Greek Customs officers started to search the car and discovered the packages that I had hidden inside. Right at that moment I was able to escape darting for the river and into Albanian territory.

[63] At the hearing, I asked the parties for submissions regarding the meaning of the "Exiting Registry" in the October 24, 2005 Court Decision and its significance. Parties were unable to shed any light.

[64] Contrary to the RPD's findings, neither the October 24, 2005 Court Decision nor Mydini's affidavit indicate that the Albanian border officials had compared the photo in the passport with the driver, whom they failed to apprehend on the scene, to confirm that they were one and the same person. The October 24, 2005 Court Decision surmised that it was the Applicant who crossed the border, apparently relying on the Exiting Registry from the Republic of Albania. At best, the RPD's finding that the Albanian border officials had compared the passport photo with the driver was speculative. Without any evidence to confirm that the Albanian border control had compared the photo in the Applicant's driver to the driver who fled the scene, the RPD thus unreasonably rejected Mydini's affidavit based on speculation.

[65] The Respondent submits it is reasonable to assume that the officials at the border crossing between Greece and Albania would have checked the identity of the person crossing the border against their passport.

[66] But, as the Applicant points out, there may be other plausible explanations: Mydini said he took off, so the border security may not have had the opportunity to match Mydini to the passport photo; Mydini may look similar to the person in the photo, etc. The RPD, argues the Applicant, should not have assumed that he was at the scene simply because his ID was there. I agree. At the very least, the RPD should have weighed the direct evidence contained in Mydini's affidavit against the indirect evidence as described in the Albanian court decisions, as opposed to simply dismissing Mydini's affidavit out of hand. Doing so rendered the Decision unreasonable.

(ii) *The RPD unreasonably made implausibility findings to reject the Applicant's testimony regarding his interaction with the Albanian police*

[67] The RPD similarly rejected the Applicant's testimony that the police had never contacted him in any way other than to call at his family home in 2003, where the Applicant's father told the authorities where the Applicant was. The RPD found it implausible that, for this crime, the police would not have pursued him more aggressively or left a warrant or court document for him. The RPD also found implausible that the Applicant's family would not have known about the charges and conviction and informed the Applicant.

[68] The Applicant submits that the RPD's dismissal of his testimony regarding his interactions with the police was an unjustified plausibility finding. He argues that his testimony is presumed to be true, and there was no valid reason to impugn his credibility, as plausibility findings should be made only with the utmost caution. He submits that the Court has warned against drawing adverse credibility inferences based on the perceived reasonableness of the conduct of foreign state actors.

[69] The Respondent argues that the RPD's finding was reasonable given the undisputed facts that the police visited the Applicant's family home, the Applicant lived and worked in the same place until shortly before leaving Albania, and he remained in regular contact with his family after arriving in Canada. The Respondent submits that the RPD was entitled to rely on common sense to find how the police would have behaved.

[70] I reject the Respondent's position that the RPD could rely on common sense to predict how the police in another country would have behaved in a case like this, given each country has its own rules governing their police force, and every jurisdiction sets its own priorities when it comes to law enforcement.

[71] Further, while the RPD is entitled to disbelieve an applicant's testimony on the basis of implausibility, common sense, and rationality, implausibility findings should be made only in the clearest of cases, where the applicant's testimony is outside the realm of what reasonably could be expected or is unsustainable in light of the evidence: *Zaiter v Canada (Citizenship and Immigration)*, 2019 FC 908 at para 8, *Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 at paras 6–7; *Aguilar Zacarias v Canada (Citizenship and Immigration)*, 2012 FC 1155 at paras 9–11 [*Aguilar Zacarias*].

[72] The Court stated in *Aguilar Zacarias*, at para 11, that the RPD "should provide 'a reliable and verifiable evidentiary base against which the plausibility of the Applicants' evidence might be judged', otherwise a plausibility determination may be nothing more than 'unfounded speculation.'"

[73] It is worth emphasizing that this is not an application for refugee protection but rather an application to vacate the decision granting it. The onus is on the Minister to establish that vacation is warranted.

[74] I agree with the Applicant that this case bears many parallels to *Ede*. The RPD's rejection of Mr. Ede's denial was based on the view that it was "inconceivable that a person could be on trial in state security court, detained for three months, and yet allege that he had not been charged with an offence": *Ede,* at para 61. Justice Norris found this conclusion unreasonable, as the RPD provided no basis for its understanding of Turkish criminal procedure. In an instructive passage cited by the Applicant, Justice Norris stated:

> [66] Finally, it is important to note that there was no direct evidence that, when he applied for refugee protection in 2005, Mr. Ede knew that he had been charged with a drug offence in Turkey. This was the crux of the allegation of misrepresentation. The RPD rested its finding that Mr. Ede did know this entirely on its rejection of his denial. In the absence of any direct evidence to support an affirmative finding that Mr. Ede knew he had been charged, it was unreasonable for the RPD to base this finding simply on the rejection of Mr. Ede's denial. If nothing else, this reflects a fundamental misunderstanding of the burden of proof in a matter such as this.

[75] Here, similar to *Ede*, there was no direct evidence that when the Applicant applied for refugee protection in 2005, the Applicant knew that he had been charged with drug trafficking in Albania. The Applicant gave sworn, un-contradicted testimonial evidence that the police came to the parents' house, and only asked his parents where he was. The Applicant testified that his parents were concerned, and wanted to know what this was about, and were only told by the police that they had a question for the Applicant to clear up something. The Applicant testified the police did not leave any document. The Applicant was asked if he thought it was strange that

the police did not come back to look for him. The Applicant acknowledged it was, but reconfirmed that they did not come back.

[76] The only direct evidence that suggested the Applicant had knowledge of the trafficking charge was the Special Authorization presumably signed by the Applicant to retain Saimir Vishaj, a document whose authenticity had been questioned, and its relevance discredited even by the RPD itself.

[77] It is uncontested that the Applicant was not present at his trial, and in light of the undisputedly duplicitous nature of the power of attorney, there was no direct evidence that the Applicant knew a trial was being held or prepared.

[78] More importantly, the RPD did not provide any basis for its understanding of what the Albanian police would or would not have done to investigate drug trafficking cases. Yet, the RPD made several implausibility findings: that it is not credible that the police would have made only the single attempt to find the Applicant, that the police would have made a more sustained effort to locate the Applicant, and that it is unlikely the police did not leave a warrant or other document for the Applicant at his family home. These findings were made within an evidentiary vacuum, and could not be sustained by “common sense.”

[79] In the absence of any direct evidence that the Applicant knew of the charges against him at the time he applied for refugee protection, and in the absence of any evidence regarding the

criminal investigation procedures adopted by the Albanian police, the RPD's reliance on its own tenuous plausibility findings to reject the Applicant's testimony was unreasonable.

(iii) *The RPD erred in its assessment of the Special Authorization to counsel*

[80] The RPD noted the Minister's concession that the Applicant had not signed the Special Authorization for the Albanian lawyer to represent him, as the Applicant was in Canada at the time. However, the RPD found that regardless of the lawyer's participation in the proceeding, the Albanian court would likely have tried and convicted the Applicant *in absentia* nonetheless. On that basis, the RPD dismissed the Applicant's contention that the conviction was illegitimate.

[81] Drawing on the test for enforcement of a foreign judgment set out in *Beals v Saldanha*, 2003 SCC 72, [*Beals v Saldanha*] the Applicant argues that his trial was manifestly unfair and that the RPD therefore erred in recognizing the judgment. He submits that in matters of exclusion from refugee protection on the grounds of serious criminality, this Court has held repeatedly that convictions resulting from unfair trials are not recognized under the *IRPA*.

[82] I am not persuaded that the test in *Beals v Saldanha* is applicable to the present case.

[83] However, I agree with the Applicant that the RPD's determination that the Albanian court would have convicted him even in the absence of the representation by a lawyer and guilty plea was pure speculation and not based on any evidence. Without the guilty plea, it is unclear how the Albanian court would have proceeded with the trial and what verdict it would have granted.

The RPD's conclusion that without the lawyer, the Albanian court would still have found the Applicant guilty was speculative and made without evidentiary basis.

[84] I do not find persuasive, the Respondent's contention that the RPD reasonably assessed the evidence and made its own findings regarding the fairness of the criminal process and that the Applicant adduced no evidence to rebut the presumption that the judicial process in a foreign country is fair. The RPD did not in fact address the issue of fairness of the criminal process, when it found that Vishaj's intervention "did not have a negative effect on the outcome of the trial, in fact, it served to reduce the sentence handed down."

[85] While not raised by the Applicant, I do have another concern regarding the RPD's reliance on the Special Authorization to find the Applicant as having misrepresented or withheld material facts.

[86] The Minister submitted to the RPD that the Special Authorization showed that the Applicant was aware of the drug trafficking charges through his contact with his father. The Minister took the position that even if the Applicant had not signed the Special Authorization, this did not mean that his father had not engaged Saimir Vishaj to represent him.

[87] The Applicant, on the other hand, continued to deny any knowledge of the criminal charges and pointed to the forged signature on the Special Authorization as further proof of his position.

[88] The RPD did not address the parties' conflicting positions on this point and instead found at paras 34 and 35 of the Decision:

> [34] The panel acknowledges that any theory regarding Saimir Vishaj's representation of the [Applicant] would be speculative. Nonetheless, it considered the extent to which Saimir Vishaj's participation in the trial affected the question whether or not the [Applicant] misrepresented or withheld material facts. The court documents show that Samir Vishaj's participation was limited to entering a guilty plea and to making submissions for leniency. The panel finds that even if Saimir Vishaj, and the Special Authorisation under which he acted, were taken out of the equation, this likely would not [sic] have little effect on the outcome of the court proceeding so far as the finding of guilt was concerned. The panel finds that Albanian court would likely still have tried and convicted the [Applicant] in absentia. Saimir Vishaj was instrumental only with regards to the length of sentence, having made representations that saw the sentence being reduced by three years.
>
> [35] Taking all of the above together, the panel finds, on a balance of probabilities, that when he made his claim for refugee protection and filed his PIF with the RPD, the [Applicant] knew that he had been charged with the offence of drug trafficking in Albania. The panel also finds that when he completed his PIF, he made a false declaration when he checked off "NO" in response to question 9(a), which asked whether he had ever been charged with a criminal offence.
>
> [Emphasis added]

[89] In short, even though the RPD acknowledged the Minister's theory regarding Saimir Vishaj's representation was "speculative", it relied on the Special Authorization to find that the Applicant knew he had been charged, without explaining why.

[90] The Respondent submits, later on in the Decision at para 48, the RPD came to an opposite conclusion and agreed with the Minister that the possibility of a forgery does not mean

the Applicant's father did not hire Mr. Vishaj. If so, then I note that the RPD did not provide any explanation for its conflicting findings in this respect.

[91] More to the point, by focusing solely on the lawyer's role at the trial and the impact he may or may not have on the outcome of the trial, the RPD failed to address what impact, if any, the "forged signature" of the Special Authorization had on its assessment of the main issue, namely, the Applicant's knowledge of the charges against him. The RPD's finding in this respect failed to display an internally coherent and rational chain of analysis and cannot be said to exhibit the requisite degree of justification, intelligibility and transparency: *Vavilov* at paras 85, 100.

[92] The Respondent argues that Saimir Vishaj's participation in the Applicant's trial is immaterial to the issues on the Application to Vacate. Specifically, the Respondent submits even in the absence of a conviction, the Applicant would still have failed to disclose the criminal charges, and could still have been excluded pursuant to section 98 of the *IRPA*. I reject this argument for two reasons. First, this was not the position taken by the Minister at the RPD hearing. Second, while Saimir Vishaj's participation at the trial *per se* might arguably not be material in the absence of a conviction, whether the Applicant had knowledge about his participation was not.

(iv) *Other Issues*

[93] The Applicant made substantial arguments on the RPD's lack of analysis regarding the validity of his conviction by the Albania court, as well as the RPD's findings regarding the

mitigating and aggravating factors underlying the conviction. I need not address these arguments as I have decided this case needs to be sent back for redetermination.

V. Remedy

[94] The Applicant seeks a number of declarations from the Court: that he is a Convention refugee; that his Albanian conviction was not obtained in accordance with Canadian and international legal standards; and that his conviction should not prevent him from accessing permanent residence, citizenship, or any other benefit he would otherwise be entitled to under Canadian law.

[95] In the event the Court finds the RPD's decision unreasonable, the Respondent requests that the Court send the decision back for redetermination rather than granting declaratory relief.

[96] While the Applicant is correct that the Federal Court has jurisdiction to grant declaratory relief by virtue of paragraph 18(1)(a) of the *Federal Courts Act*, I am not persuaded that it is warranted in this case. Two of the authorities cited by the Applicant - *Canada (Prime Minister) v Khadr*, 2010 SCC 3, and *Canada (Indian Affairs) v Daniels*, 2014 FCA 101 - are factually dissimilar from the present case. The third case, *Ogiamien v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 30, is of no assistance as the paragraph cited by the Applicant is a summary of the applicant's position and not a holding by the Court.

[97] In *Canada (Citizenship and Immigration) v Tennant*, 2019 FCA 206, the Federal Court of Appeal provided guidance about the circumstances under which declaratory relief will be

appropriate, adopting the dissenting reasons of Justice Deschamps in *Giguère v Chambre de notaires du Québec*, 2004 SCC 1 at para 66, since endorsed many times:

> A court of law may not substitute its decision for that of an administrative decision-maker lightly or arbitrarily. It must have serious grounds for doing so. A court of law may render a decision on the merits if returning the case to the administrative tribunal would be pointless […]. Such is also the case when, once an illegality has been corrected, the administrative decision-maker's jurisdiction has no foundation in law: […]. The courts may also intervene in cases where, in light of the circumstances and the evidence in the record, only one interpretation or solution is possible, that is, where any other interpretation or solution would be unreasonable: […]. It is also accepted that a case may not be sent back to the competent authority if it is no longer fit to act, such as in cases where there is a reasonable apprehension of bias […].

[98] In my view, none of these situations applies in the present case. I agree with the Respondent that the most appropriate remedy would be to return the decision to the RPD for redetermination.

VI. Conclusion

[99] The application for judicial review is allowed.

[100] There is no question for certification.

JUDGMENT in IMM-93-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The matter is returned for redetermination by a different member of the RPD.

3. There are no questions to certify.

"Avvy Yao-Yao Go"
Judge

Appendix A: Relevant Provisions

***Immigration and Refugee Protection Act*, SC 2001, c 27**
***Loi sur l'immigration et la protection des réfugiés* (L.C. 2001, ch. 27)**

Refugee Protection, Convention Refugees and Persons in Need of Protection **Exclusion — Refugee Convention** **98** A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.	**Notions d'asile, de réfugié et de personne à protéger** **Exclusion par application de la Convention sur les réfugiés** **98** La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.
Applications to Vacate **Vacation of refugee protection** **109 (1)** The Refugee Protection Division may, on application by the Minister, vacate a decision to allow a claim for refugee protection, if it finds that the decision was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter. **Rejection of application** **(2)** The Refugee Protection Division may reject the application if it is satisfied that other sufficient evidence was considered at the time of the first determination to justify refugee protection. **Allowance of application** **(3)** If the application is allowed, the claim of the person is deemed to be rejected and the decision that led to the conferral of refugee protection is nullified.	**Annulation par la Section de la protection des réfugiés** **Demande d'annulation** **109 (1)** La Section de la protection des réfugiés peut, sur demande du ministre, annuler la décision ayant accueilli la demande d'asile résultant, directement ou indirectement, de présentations erronées sur un fait important quant à un objet pertinent, ou de réticence sur ce fait. **Rejet de la demande** **(2)** Elle peut rejeter la demande si elle estime qu'il reste suffisamment d'éléments de preuve, parmi ceux pris en compte lors de la décision initiale, pour justifier l'asile. **Effet de la décision** **(3)** La décision portant annulation est assimilée au rejet de la demande d'asile, la décision initiale étant dès lors nulle.

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Daniel Kingwell	FOR THE APPLICANT
Laoura Christodoulides	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Daniel Kingwell Mamann, Sandaluk & Kingwell LLP Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT