

Federal Court



Cour fédérale

Date: 20240307

Docket: IMM-1200-23

Citation: 2024 FC 389

Ottawa, Ontario, March 7, 2024

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

TIMURDZHAN NAZHMETDINOV

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This is the judicial review of the decision of a Senior Immigration Officer [PRRA Officer or Officer] refusing the Applicant's Pre-Removal Risk Assessment [PRRA].

Background

[2] The Applicant is a citizen of Russia and member of the Muslim faith. He arrived in Canada in May 2017, and sought refugee status based on his ethnicity as an Uzbek, his political

opinions opposing the regime of Vladimir Putin [Putin], and his anti-corruption activism in Russia.

[3] In his affidavit filed in support of his PRRA application, the Applicant claimed that, prior to his arrival in Canada, he and his brother were members of the FKB, a non-profit anti-corruption foundation established by Alexei Navalny [Navalny], the then political opposition leader in Russia. The Applicant claimed he and his brother were detained and beaten twice by the police, in November 2016 and in March 2017, following their participation in anti-corruption protests organized by the FKB.

[4] Further, that in October of 2017, and after the Applicant's arrival in Canada on a visitor visa, his brother was again detained. The Applicant claims that during this detention, his brother was interrogated, beaten, tortured and ultimately died of his injuries. The Applicant then submitted an application for refugee protection under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. His application was denied by the Refugee Protection Division [RPD] on November 28, 2022. The Applicant's appeal of the RPD's decision was dismissed by the Refugee Appeal Division [RAD] on September 4, 2020 and an application for leave and judicial review of the RAD's decision was dismissed by this Court. The Applicant then filed his PRRA application.

[5] In his PRRA application, the Applicant claimed that his father was summoned to the police station September 7, 2019, following which he died of head and brain injuries. A

pathologist's report attributed the death to contact with a blunt solid object and the Applicant attributes it to police conduct.

[6] The Applicant also claimed that in October 2019, the FBK was declared a foreign agent and was closed by the Putin government. The FBK's properties, including all of its records, were seized and the government began fabricating crimes alleged to have been committed by FBK members and those who funded it. In that regard, in September 2022 the Applicant's mother received a Summons for Interrogation requiring the Applicant to attend on September 22, 2022 to be interrogated as a suspect. The Applicant claimed that if he returned to Russia his life would be at risk as a result of his involvement with the FKB.

[7] The Applicant also stated in his affidavit filed in support of his PRRA that in February 2022, Russia invaded Ukraine and, in September 2022, Putin announced a plan to mobilize between 300,000 to 1,000,000 soldiers to aid the invasion. He claimed that if he were returned to Russia his life would be at risk because he would be drafted into the Russian army and, like many other Muslims in Russia, would be forced to serve on the front lines. Further, that he opposes the war against Ukraine and that he is a pacifist and objected to serving in an army that is committing war crimes.

PRRA Decision

[8] The PRRA Officer acknowledged that the Applicant sought to admit new evidence pertaining to his father's death, being a death certificate and pathology report. However, the Officer found that this evidence was not admissible because it pre-dated the RAD's decision and

the Applicant had not provided a sufficient explanation as to why it could not have been put before the RAD. The Applicant does not challenge this determination.

[9] As to military mobilization, the PRRA Officer considered the Applicant's claim that he would be drafted into the Russian army to serve in the war against Ukraine. Further, that the Applicant had submitted a Military Subpoena, which had been served on his mother, requiring him to report for mobilization, as well as several articles outlining Russia's war on Ukraine. The Officer found that the Applicant had not provided documentary evidence, such as a warrant or summons from the Russian authorities, to indicate that the authorities in Russia are either aware that he failed to attend the military centre for mobilization, or that they sought to prosecute him in that regard. The Officer acknowledged that military service is mandatory in Russia for all Russian citizens as regardless of ethnic identity. However, the Officer pointed to a news article indicating that ideological or religious pacifists can take alternative civilian service, although that term is twice as long as regular military service. Finally, the Officer found that there was a lack of evidence indicating that Russian citizens who are Muslim are being sent to the front line of military service (which the Applicant had described as being used as cannon fodder).

[10] The PRRA Officer next considered the Applicant's claim that he is at risk because of his political opinion and involvement with the FBK. However, the Applicant did not challenge this aspect of the PRRA Officer's decision in his written submissions and, when appearing before me, his counsel confirmed that the Applicant is only challenging the mobilization aspect of the PRRA Officer's decision. Accordingly, it is not necessary to further describe or address the Officer's other findings.

Issue and Standard of Review

[11] The sole issue arising in this application is whether the PRRA Officer's decision was reasonable. Accordingly, as the Court is engaged in assessing the merits of the Officer's decision, the reasonableness standard of review applies (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 23, 25).

Positions of the Parties

Applicant's Position

[12] The Applicant submits the requirement to provide documentary evidence, such as warrants or summons, to show that the Russian authorities were either aware of his failure to attend in response to the Military Subpoena or that they would wish to prosecute him was unreasonable. He was in Canada on May 14, 2022. He therefore did not present himself for mobilization. The Russian Military would be necessarily aware of his failure to attend. The only logical and reasonable inference that can be drawn is that because he did not present himself as directed, the Russian Military authorities are aware of his. He submits that the PRRA Officer's reasoning in this regard demonstrates a fatal flaw in their overarching logic (citing *Vavilov* at para 102).

[13] The Applicant also submits that, in his affidavit filed in support of his PRRA, he stated that he did not want to serve in the Ukrainian conflict because the Russian military was killing innocent civilians, including women and children and because he did not want to participate in a

conflict in which war crimes were being committed. However, that the Officer ignored his evidence as to why he did not want to serve and thereby failed to grapple with the key and central component of the Applicant's submissions (citing *Vavilov* at para 128). This failure resulted in the Officer failing to conduct a proper analysis, in the context of the Ukraine war, as to whether or not the Applicant would face persecution in Russia because of his failure to comply with the mobilization order.

[14] In that regard, the Applicant also points to *Zolfagharkhani v Canada (Minister of Employment and Immigration)*, 1993 CanLII 2971, [1993] 3 FC 540, [*Zolfagharkhani*]. In that matter the Federal Court of Appeal made reference to paragraph 171 of UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* [UNHCR Handbook] which states that where the type of military action with which an individual does not want to be associated is condemned by the international community as contrary to the basic rules of human conduct, punishment for desertion or activation could, in light of all the other requirements of the definition, be regarded as persecution in and of itself.

[15] He claims that his evidence established not only that he did not present himself for mobilization, contrary to Russian law, but also that was that he would not have reported even if he had been in Russia. This is because he is opposed to the Ukraine conflict because of war crimes being committed by the Russian forces – which crimes have been confirmed by independent observers as set out in the documentary evidence. Based on paragraph 171 the UNHCR Handbook, punishment for refusal to participate in the Ukraine conflict would amount

to persecution because the Applicant's objection to participation relates to war crimes being committed by Russian forces. However, the Officer failed to consider the Applicant's evidence about why he did not want to participate in the conflict and therefore failed to reasonably consider whether or not he would face risk upon return.

Respondent's Position

[16] The Respondent submits that the Applicant adduced no evidence of any follow-up by the authorities in response to his failure to respond to the Military Subpoena. The Applicant also did not address the possibility of civilian service as an alternative to military service and that the existence of alternative civilian service undermines the possibility of a well-founded fear of persecution. Further, "fear of persecution and punishment for desertion or draft-evasion does not in itself constitute well-founded fear of persecution" citing paragraph 167 of the UNHCR Handbook. Nor did the Applicant desert during wartime. He came to Canada in 2017 and filed a refugee claim that was ultimately rejected. Therefore, his evidence concerning desertion during active conflict has no application.

Analysis

Mobilization of Muslim Russians

[17] The Applicant claimed that Muslim Russians were being mobilized and sent to the front lines to be used as cannon fodder by Russia. The PRRA Officer found that there was a lack of evidence in support of this.

[18] I note that the Applicant submitted two news articles in support of this submission. One of these indicates that an analysis of Russian casualty figures and social media posts suggested that soldiers recruited from the outer reaches of the former Soviet Union, including the largely Muslim North Caucasus, make up as much as a third of known military fatalities and in some cases up to 50 percent of the wounded in the war in Ukraine. It goes on to note that Moscow has openly acknowledged that it is seeking to recruit thousands of mercenaries from Libya and Syria. In short, read in whole, this article indicates, as its title suggests, that evidence from the frontline and casualty lists suggest that ethnic minority troops from far flung corners of the former Soviet Union, including Muslim Russians, have suffered a disproportionate share of fatalities and injuries among Russia's invasion force. The second article is entitled "Russian soldiers in trouble due to the demographic crisis: at the forefront only the poor and Siberians (and it is a lesson for Italy too)". This article refers to birth rates of various areas and ethnicities and also discusses the prevalence of Dagestanis among the wounded Russians (Dagestan is a part of Russia) but only references 150 wounded soldiers in a hospital in Rostov, and provides no means of extrapolating this number to the entirety of the Russian military.

[19] Given this very limited documentary evidence, which does not support the Applicant's implied assertion that Muslim Russians are being deployed and sent to the higher risk front lines because they are Muslim, I am not persuaded that the PRRA Officer erred in finding that the Applicant had failed to establish on a balance of probabilities, a risk of life, a risk of cruel and unusual punishment, or a danger of torture due to his Muslim heritage.

Mobilization – Avoidance of Service

[20] The Military Subpoena states that, in accordance with the federal law “on military duty and military service”, the Applicant was required to attend at the Military Commissar of the Northern Administrative District of Moscow as described for “the presentation of a mobilization order for military training” on May 14, 2022 at 9 a.m.. The document also cites Article 328 of the Criminal Code of the Russian Federation “Evasion of military and alternative civil service” and states:

Evasion of conscription for military service in the absence of legal grounds for exemption from this service is punishable by a fine in the amount of up to two hundred thousand rubles or in the amount of wages or other income of the person convicted for period of up to eighteen months, or by arrest for a period of track up to six months, or imprisonment for up to two years.

[21] The PRRA Officer found that the Applicant has not provided any documentary evidence, such as a warrant or summons from the Russian authorities, or copies of Russian court documents, to indicate that the authorities in Russia are either aware that he failed to attend the military centre for mobilization, or that they would wish to prosecute him with respect to this. Accordingly, the Officer found that the Applicant had not established that he would face a serious possibility of persecution in this regard.

[22] I tend to agree with the Applicant that it can reasonably be inferred from his failure to attend, as required by the Military Subpoena, that the Russian authorities were aware that he had not done so. That said, the Applicant did not provide any evidence that the authorities have subsequently sought to locate him or prosecute him, that is, that he faces a forward-looking risk

because he failed to attend for mobilization. The onus is on the Applicant to establish his claim (*Singh v Canada (Citizenship and Immigration)*, 2017 FC 902 at para 27).

[23] With respect to the consequences of avoiding conscription, the PRRA Officer referred to a Response to Information Request [RIR] for Russia, dated April 23, 2015. The RIR indicates that a source reported that on May 15, 2013 an amendment to Article 23 of the 1998 Federal Law No. 53 on Military Obligation and Military service was “set to be adopted into law” and enter into force on August 1, 2013. This amendment would make it mandatory for all 18- to 27-year-old Russian citizens to serve in Russia’s military (I note that at the time of the PRRA Decision this Applicant was 51 years old). With respect to alternative civil service, the RIR indicates that Russia Today [RT], a Russian state funded television network, reported that “ideological or religious pacifists can take alternative civil service, but that term is twice as long as regular military service.” The RIR also indicates that according to a report by Citizen Army Law, a human rights group for conscripts, military and alternative servicemen in Russia, the length of alternative civilian service is 21 months, compared to a length of 12 months for regular military service. The RIR also indicates that according to a 2013 report by the United Nations High Commissioner for Human Rights on the right to conscientious objection to military service, Russia reported that alternative service is regulated by the Federal Law on Alternative Civilian Service. The RIR also states that according to the Citizen Army Law report, Russian law dictates that an application for alternative service must be filed by an applicant with a military draft committee six months prior to the draft campaign during which that applicant expects to be drafted into the army. Missing this application deadline is the reason "why most applications for

alternative service are denied," though the report goes on to state that this issue has been successfully addressed through several rulings.

[24] The RIR states that sources report that evading the military draft is considered a criminal offence punishable by up to two years in prison. And, according to a lawyer from Citizen Army Law, that there are administrative and criminal penalties for draft evasion. The penalty depends on when the evasion took place. For example, an evasion of a medical examination could result in a fine of about 10 EUR while evasion with respect to coming to the assembly point for sending to the army (mobilization) may result in criminal responsibility, including imprisonment.

[25] In his affidavit filed in support of his PRRA application, the Applicant states that while the Military Subpoena indicated that a failure to report for mobilization could result in imprisonment for up to two years, the law had changed and, if he were returned to Russia, he would have to serve up to 10 years in prison "as per the Criminal Code amendments of the Russian Federation as of September 21, 2022". As an exhibit to his affidavit, he attached a September 20, 2022 article from Newsweek entitled "Russians Deserting During Mobilization Face 10 Year in Jail – Bill Proposal". This article states that Russian soldiers who desert during wartime could face up to 10 years in jail under sweeping legislation which included amendments to the Criminal Code, although I note that the article was unclear as to whether the proposed legislation had actually been enacted.

[26] The Applicant did not, however, provide a copy of the amendment and has not established if it or other legislation removes the possibility of alternative civil service. In that

regard, I note that the described September 2022 amendment also postdates the Military Subpoena (undated but the Applicant's evidence is that it was delivered to his mother in May 2022) which cites Article 328 of the Criminal Code of the Russian Federation "Evasion of military *and alternative civilian service*" and also refers to a potential two, not ten, year term for failure to attend at the mobilization.

[27] While I appreciate that Russia's laws about conscription may have changed since 2013, particularly in the face of its invasion of Ukraine, the difficulty here is that the Applicant did not submit any evidence of this in his PRRA submissions to establish either that penalties have actually changed, as he claimed, or that alternative service is no longer an option (or, I would observe, as a 51-year-old if he would be subject to conscription). And, in any event, he did not specifically argue in his PRRA application that the alleged new 10-year term of potential imprisonment for avoiding military service amounts to persecution.

[28] Moreover, the mere fact that a claimant avoids compulsory military service, or deserts, which under the law of their country of origin are punishable offences, will alone not constitute a well-founded fear of persecution. In that regard, the Respondent points to s 167 of the UNHCR:

B. DESERTERS AND PERSONS AVOIDING MILITARY SERVICE

167. In countries where military service is compulsory, failure to perform this duty is frequently punishable by law. Moreover, whether military service is compulsory or not, desertion is invariably considered a criminal offence. The Penalties may vary from country to country, and are not normally regarded as persecution. Fear of prosecution and punishment for desertion or draft-evasion does not in itself constitute well-founded fear of persecution under the definition. Desertion or draft-evasion does not, on the other hand, exclude a person from being a refugee, and

a person may be a refugee in addition to being a deserter or draft-evader.

[29] Thus, the Applicant's argument that because he did not present himself for mobilization as required by the Military Subpoena and Russian law and, therefore, will be imprisoned upon his return – whether that term is for 2 years or for 10 years – cannot, without more, support a well-founded fear of persecution. As stated in *Zolfagharkhani* at p 548-549, quoting *Musial v Minister of Employment and Immigration*, 1981 CanLII 4734 (FCA), [1982] 1 FC 290 :

.... A person who is punished for having violated an ordinary law of general application, is punished for the offence he has committed, not for the political opinions that may have induced him to commit it. In my opinion, therefore, the Board was right in assuming that a person who has violated the laws of his country of origin by evading ordinary military service, and who merely fears prosecution and punishment for that offence in accordance with those laws, cannot be said to fear persecution for his political opinions even if he was prompted to commit that offence by his political beliefs.

[30] However, in his affidavit filed in support of his PRRA, the Applicant also states that the Putin regime has already been convicted of several war crimes by “many international organizations” and states “I am a pacifist and object to serving and participating in an army that is forcing its own soldiers to commit war crimes and invade foreign lands.” Although the main thrust of his counsel's submission to the PRRA Officer were concerned with the risk of being sent to serve at the front line due to his Muslim faith and his political opinion in connection with the FKB, his counsel's arguments also include that the Applicant is seeking protection on the basis of his objection to participating in an army which brutally committed war crimes.

[31] In that regard and in support of his application for judicial review, the Applicant refers to *Zolfagharkhani*. In that case, no issue arose with respect to conscientious objection in relation to war in general, as the applicant had previously actively served in the Iranian military during wartime. Rather, the issue of conscientious objection related solely to participation in chemical warfare against the Kurdish people. The Federal Court of Appeal found that the applicant had adduced considerable documentary evidence as to the attitude of the world community towards certain excessive means of warfare and held that:

[...] all that is necessary to dispose of the instant case, however, is evidence of the total revulsion of the international community to all forms of chemical warfare, as revealed by the Convention on the Prohibition of the Development, Protection and Stockpiling of Bacteriological(Biological) and Toxin Weapons and on Their Destruction, for which both Canada and Iran vote on December 16, 1971 [GA Res. 2826 (XXVI)] [...]

[32] This and other international undertakings relied upon by the applicant, along with the fact that the use of chemical weapons in the Iran/Iraq war was perhaps their only use in international warfare in the prior 75 years, led the Federal Court of Appeal to the conclusion that the use of chemical weapons should be considered to be against customary international law. Further, at p 555:

The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, Geneva, 1988, paragraph 171, states:

Where ... the type of military action, with which an individual does not wish to be associated, is condemned by the international legal community as contrary to basic rules of human conduct, punishment for desertion or draft-evasion could ... in itself be regarded as persecution.

In my view, that is precisely the situation in the case at bar. The probable use of chemical weapons, which the Board accepts as a fact, is clearly judged by the international community to be contrary to basic rules of human conduct, and consequently the

ordinary Iranian conscription law of general application, as applied to a conflict in which Iran intended to use chemical weapons, amounts to persecution for political opinion.

[33] The Federal Court of Appeal concluded that the Board had erred in failing to find that the applicant's specific objection was reasonable or valid. It also stated that there could be no doubt that the applicant's refusal to participate in military actions against the Kurds would be treated by the Iranian government as the expression of an unacceptable political opinion (at p 556; see also *Bakir v Canada (Citizenship and Immigration)* 2004 FC 70 at para 31).

[34] The UNHCR Handbook states:

169. A deserter or draft-evader may also be considered a refugee if it can be shown that he would suffer disproportionately severe punishment for the military offence on account of his race, religion, nationality, membership of a particular social group or political opinion. The same would apply if it can be shown that he has well-founded fear of persecution on these grounds above and beyond the punishment for desertion.

170. There are, however, also cases where the necessity to perform military service may be the sole ground for a claim to refugee status, i.e. when a person can show that the performance of military service would have required his participation in military action contrary to his genuine political, religious or moral convictions, or to valid reasons of conscience.

171. Not every conviction, genuine though it may be, will constitute a sufficient reason for claiming refugee status after desertion or draft-evasion. It is not enough for a person to be in disagreement with his government regarding the political justification for a particular military action. Where, however, the type of military action, with which an individual does not wish to be associated, is condemned by the international community as contrary to basic rules of human conduct, punishment for desertion or draft-evasion could, in the light of all other requirements of the definition, in itself be regarded as persecution.

[35] Here, the PRRA Officer acknowledged that the Applicant had provided copies of news articles “outlining Russia’s war on Ukraine” but did not comment further on them. In my view, the PRRA Officer erred in failing to assess the documentary evidence submitted by the Applicant to determine if it was sufficient to support the Applicant’s claim that war crimes were or were likely to be committed by Russia in its war against Ukraine and were subject to international condemnation. And, if so, whether the Applicant’s stated opposition to participating in the Ukraine war because of Russia’s war crimes was founded on genuine and sincere reasons of conscience and was sufficiently specific that, if he were to return to Russia, he would be at serious risk of persecution based on his political opinion (see *Lebedev v Canada (Citizenship and Immigration)* (F.C.), 2007 FC 728 at para 45).

[36] I acknowledge the Respondent’s submission that the issue of war crimes is irrelevant as the Applicant has not established that he is being sought out for punishment for evasion of mobilization. However, in my view that is not a complete answer in light of the Applicant’s expressed views as to his claimed opposition to the Ukraine war on the basis of his assertion that Russia has committed war crimes and the PRRA’s Officer’s failure to even mention that aspect of his claim of risk. While the Officer did find that the Applicant had not established that he was being sought for prosecution and that the evidence established that there was an option of alternative military service, the Officer did not find, for those reasons, that it was not necessary for him to consider the Applicant’s claim as to a risk of persecution arising from his objection to participating in the Ukraine war because of alleged war crimes. In my view, the failure to mention – let alone grapple with – this central argument raised by the Applicant renders the decision unreasonable (*Vavilov* at para 128).

[37] I will remit the matter back for redetermination by a different PRRA officer. However, as I have found the PRRA Officer's treatment of mobilization of Muslim Russians to be reasonable and as the Applicant has not taken issue with any of the PRRA Officer's findings, the redetermination will be restricted to the issue of mobilization/avoidance of military service. The redetermination may consider all aspects of that issue including: the Military Subpoena; whether the Applicant would be captured by Russia's conscription laws in light of his age; whether alternative military service remains available given Russia's war on Ukraine; the relevant UNHRC Handbook provisions and their application, if any, in the context of the Applicant's claim of risk; the documentary evidence submitted by the Applicant to support his claim that Russia has committed war crimes in Ukraine; and, the sincerity and genuineness of the Applicant's beliefs in opposing the war due to the alleged war crimes, that is, his "selective objection".

JUDGMENT IN IMM-1200-23

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted, in part;
2. The decision, insofar as it is concerned with military mobilization and avoidance of service as addressed in the PRRA Officer's reasons, is set aside and that issue only shall be remitted to a different officer for redetermination in accordance with these reasons. The remainder of the decision is not set aside and the Officer's findings therein shall remain undisturbed;
3. There shall be no order as to costs; and
4. No question of general importance for certification was proposed or arises.

"Cecily Y. Strickland"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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DATED: MARCH 7, 2024

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