Federal Court  Cour fédérale

Date: 20241031

Docket: IMM-16389-23

Citation: 2024 FC 1741

Toronto, Ontario, October 31, 2024

PRESENT: Madam Justice Pallotta

BETWEEN:

JAVAN LAVON STUART
HU'MARI LAVAN STUART
HULIYAH MARINA FERGUSON
HU'MANI JAVON STUART

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background

[1] The applicants, Javan Lavon Stuart, his spouse Huliyah Marina Ferguson, and their two children, challenge a decision of the Refugee Appeal Division (RAD) that dismissed their appeal and confirmed the Refugee Protection Division's (RPD) determination that they are not

Convention refugees or persons in need of protection under sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] The applicants are citizens of the Bahamas who sought refugee protection in Canada based on a fear of harm by the One Order Gang, and one gang member in particular, because Mr. Stuart witnessed the gang member's involvement in the murder of Mr. Stuart's childhood friend. The RPD dismissed the applicants' claim for refugee protection. Credibility was the determinative issue, and a key factor for the RPD was the lack of sufficient credible and trustworthy evidence to establish that Mr. Stuart witnessed his friend being shot.

[3] The applicants appealed to the RAD and sought to introduce new evidence on appeal. The RAD refused to admit the new evidence on the basis that it did not meet the requirements of subsection 110(4) of the *IRPA*. As there was no nexus to a Convention ground under section 96 of the *IRPA* (which the applicants did not contest on appeal), the RAD conducted its own assessment of the applicants' claim by considering the risk of harm under subsection 97(1) of the *IRPA*. The RAD agreed with the applicants that the RPD had made several significant errors in its credibility analysis and accepted that Mr. Stuart witnessed his friend's shooting. However, the RAD determined that the applicants had failed to prove a forward-looking risk of harm at the hands of the One Order Gang or a gang member, and dismissed the appeal on this basis.

[4] The RAD's reasons included:

- *Lack of credible threats from agents of harm*: The RAD found there was insufficient credible evidence that the applicants were ever threatened by the

agents of harm. It agreed with the RPD that a screenshot of three Facebook messages from an unknown individual with the handle “Crime Boss” did not establish that Mr. Stuart was threatened for witnessing his friend’s murder, or even that the messages, sent more than 3.5 years after the 2019 shooting, represented a serious or credible threat. While the messages were “vaguely threatening”, there was no indication who sent them or what they were about. The RAD also agreed with the RPD that there was insufficient credible evidence that three visits by an unknown individual, who went to Ms. Ferguson’s workplace and asked if Mr. Stuart was her husband, were linked to the murder. The individual made no threats, and the available evidence, including supporting letters, did not demonstrate he was anything other than a strange customer. The RAD found any connection between the messages, the workplace visits, and the murder to be speculative.

- *No contact with agents of harm, the police, or media*: The RAD noted that the applicants did not approach the police and the police never contacted them about the murder. They had not been identified in media reports as being at the scene or witnessing the murder. The applicants lived in Nassau for 2.5 years after the shooting and there was no evidence they had been contacted in that time. The RAD found that the lack of interest in Mr. Stuart as a witness, together with insufficient evidence of any contact by the agents of harm, supported a finding that Mr. Stuart was not perceived as a threat or a target.

- *Failure to seek protection in United States and return to Bahamas*: The RAD agreed with the RPD that the applicants did not credibly explain why they did not seek asylum in the United States and returned to the Bahamas. The visits post-dated two murders the applicants alleged to be connected to the 2019 shooting, and pivotal events regarding their risk. The RAD was not satisfied with the applicants' various explanations and found that their travel to and from the United States without seeking asylum further undermined the allegations of objective risk.

- *The established facts and remaining supporting evidence were insufficient to establish forward-looking risk:* The RAD considered the established facts together with the remaining evidence and found it did not establish a forward-looking risk. The evidence did not establish that the applicants were similarly situated to the victims who were targeted after the 2019 murder, and there was insufficient evidence that the agents of harm are aware of the applicants, have any interest in them, or pose a forward-looking risk.

[5] The applicants submit that the RAD's decision was unreasonable. They contend the RAD should not have rejected the new evidence and also erred in concluding they did not face a forward-looking risk of harm in the Bahamas.

[6] The parties agree that the applicable standard of review is reasonableness. The Court's role is to conduct a deferential but robust form of review that considers whether the RAD's decision, including the reasoning process and the outcome, was transparent, intelligible, and

justified: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 13, 99.

[7] For the reasons below, the applicants have not established that the RAD's decision is unreasonable. The RAD properly excluded evidence that did not meet the requirements of subsection 110(4) of the *IRPA*. The RAD's findings and conclusion that the applicants had failed to prove a forward-looking risk were logical, transparent, and justified in light of the relevant legal and factual constraints.

II. **Analysis**

A. *New evidence*

[8] The applicants' evidence before the RPD included a screenshot showing three Facebook messages Mr. Stuart had received in January 2023. On appeal to the RAD, the applicants sought to admit a new screenshot showing the same Facebook message thread, with the January messages and three additional messages that were received on March 8, 2023 and July 23, 2023. The March and July messages post-date the RPD hearing but pre-date the RPD's decision date of August 25, 2023. Mr. Stuart attested that he only saw these messages in mid-August and did not know he could provide evidence to the RPD after the hearing.

[9] The applicants submit the RAD provided two, unreasonable bases for excluding the evidence. The RAD: (i) concluded that Mr. Stuart was dishonest about when he discovered the later messages, because he had provided the first three messages to his counsel within days of receiving them and it could not be believed he "would take such a lackadaisical approach to

checking his Facebook messages after January 2023, when he was first threatened"; and (ii) further held it was implausible that the applicants would be unaware they could provide evidence to the RPD after the hearing, because they were represented by experienced counsel and had filed post-hearing disclosure. The applicants contend their explanations were not implausible or unreasonable, the RAD's criticisms were unfounded, and it is unknown how the RAD may have decided the family's appeal if it had not erred in refusing to admit the additional messages.

[10] I am not persuaded that the RAD erred in refusing to admit the three Facebook messages.

[11] On judicial review, the Court does not re-examine whether new evidence should have been admitted; the question for the Court is whether the admissibility determination was reasonable: *Morales v Canada (Citizenship and Immigration)*, 2024 FC 133 at para 14 [*Morales*], citing *Khan v Canada (Citizenship and Immigration)*, 2020 FC 438 at para 28. The admissibility of new evidence was an issue for the RAD to decide, and its decision is owed deference: *Morales* at para 14, citing *Frank v Canada (Citizenship and Immigration)*, 2023 FC 696 at para 25.

[12] As the respondent correctly points out, subsection 110(4) of the *IRPA* provides that a refugee claimant may only present new evidence to the RAD that (i) arose after the RPD's rejection of their claim, (ii) was not reasonably available at the time of the RPD's rejection, or (iii) they could not reasonably have been expected in the circumstances to have presented at the time of the RPD's rejection: *IRPA* s 110(4). The applicants had the onus to provide full and

detailed submissions explaining how the proposed new evidence met the requirements of subsection 110(4): *RAD Rules* 3(3)(e), 3(3)(g)(iii), and 29(3).

[13] Since the messages pre-dated the RPD's decision, the RAD could only admit them as new evidence if they were not *reasonably* available at the time of the RPD's rejection, or if the applicants could not *reasonably* have been expected to present them to the RPD. The statute requires more than a plausible or reasonable explanation, and the RAD was not required to accept the explanations the applicants gave.

[14] In my view, the RAD reasonably concluded that the applicants' arguments—that Mr. Stuart did not check his Facebook account and did not know he could submit documents after the RPD hearing—did not meet the requirements of *IRPA* subsection 110(4). The RAD explained that the applicants believed the January 2023 messages were pivotal to their claim, the messages caused them to be afraid, and they promptly provided them to their counsel. The RAD did not find it credible that Mr. Stuart stopped checking Facebook messages after receiving the January 2023 messages, noting they were the only threats Mr. Stuart received personally. The RAD went on to state that, even if Mr. Stuart first discovered the messages in mid-August, the applicants had not satisfactorily explained why they did not provide the evidence to the RPD without delay. In this regard, the RAD did not accept that Mr. Stuart did not know he could provide evidence after the hearing, as the applicants were represented by experienced legal counsel and they either knew or could easily have found out about this possibility.

[15] It was open to the RAD to find that the explanation Mr. Stuart gave did not meet the requirements of *IRPA* section 110(4). I am not persuaded that there is any basis for interfering with the RAD's decision not to admit the new evidence.

B. *Assessment of forward-looking risk*

[16] The applicants submit that the RAD erred in its credibility assessment as it pertains to a forward-facing risk of harm in the Bahamas.

[17] First, the RAD erred by relying on the RPD's "remaining credibility findings" despite finding that the RPD's analysis was plagued with flaws from impaired logic or the misapplication of basic legal principles, including on the most critical assessment in the case—whether Mr. Stuart witnessed his friend's murder in 2019. They state all of the RPD's findings were clouded by its findings that Mr. Stuart lied about this event and that he lacked credibility on a fundamental level. According to the applicants, the magnitude of the RPD's errors left no room for a subsequent decision maker to adopt any of its credibility findings, and the RAD erred by relying on any of the RPD's assessments without providing sufficient reasons to meet the requirements of responsive justification.

[18] Second, the RAD erred by concluding that the January 2023 Facebook messages and visits at Ms. Ferguson's workplace were not credible threats and that the applicants were speculating. In view of the totality of the evidence, the applicants contend it was not speculation to connect the messages and workplace visits to the murder, particularly since they were not involved in any illicit activities and the RAD offered no other explanation for the threats.

Furthermore, the RAD failed to explain why it did not consider the supporting letters by individuals (who interacted with the family when it was receiving threats) and the evidence that other people connected to the 2019 shooting had been targeted or killed, to be corroborating proof.

[19] Third, the RAD misapprehended the evidence to find the applicants lacked subjective fear because they did not seek asylum in the United States and they returned to the Bahamas. The applicants submit that the COVID-19 pandemic provided the family with some sense of being able to hide in the Bahamas, because of masking and quarantining. Also, the trips to the United States pre-dated the visits at Ms. Ferguson's workplace that triggered the family's fears. The applicants submit the RAD criticized their choices with hindsight. The RAD member may have personally acted differently, but the applicants say their choices were not so unreasonable as to undermine their allegations of forward-facing risk.

[20] I am not persuaded that the RAD committed any of the errors alleged.

[21] The RAD did not err by rejecting some of the RPD's findings and accepting others. The RAD has robust powers of error-correction on appeal: *Kreishan v. Canada (Citizenship and Immigration)*, 2019 FCA 223 at paras 41-42. When the RAD finds that the RPD erred, it is entitled to confirm the RPD's determination on another basis: *Canada (MCI) v Huruglica*, 2016 FCA 93 at para 78.

[22] The RAD specifically noted that it did not uphold or rely on any of the RPD's findings apart from those it expressly addressed in the analysis of the applicants' forward-looking risk of harm. Where the RAD accepted the RPD's findings, it explained why it did so. The RAD justified its findings and its reasons were responsive to the applicants' arguments.

[23] While the RAD accepted that Mr. Stuart was present when his friend was shot, it disagreed with the applicants that their claim hinged on whether he witnessed the event. The RAD dismissed the appeal because there was insufficient credible evidence that the family would face a forward-looking risk of harm in the Bahamas, including because the evidence did not establish that they were threatened by the agents of harm or that the agents of harm would perceive the applicants as a threat or a target. The RAD found errors with the RPD's credibility assessment but reasonably concluded, after conducting its own independent assessment, that the errors did not change the ultimate result.

[24] As noted above, two key findings related to whether the Facebook messages and workplace visits were connected to the 2019 shooting. I agree with the respondent that while the applicants disagree with these findings, they have not shown the findings to be unreasonable. The RAD considered the evidence and was not satisfied that the Facebook messages and/or workplace visits were connected to the 2019 shooting, and constituted evidence of credible threats from the agents of harm. The applicants were required to prove their allegations—the RAD was not required explain who may have sent the texts or visited Ms. Ferguson's workplace. With respect to the supporting letters and evidence that other people had been targeted, the RAD

considered this evidence and explained why, together with the established facts, it was insufficient to establish forward-looking risk.

[25] As I read the RAD's decision, it did not make a finding that the applicants lacked subjective fear. Rather, the RAD found that the applicants' behaviour in travelling to and from the United States without claiming asylum undermined their allegations about the objective risk they faced in the Bahamas. Contrary to the applicants' argument, the RAD did not misapprehend the evidence. It specifically considered the applicants' explanations for failing to claim asylum in the United States, and addressed them. As noted above, the RAD noted that the trips were after events the applicants claimed were pivotal to their risk—the murders they alleged were connected to the 2019 shooting. The RAD found the applicants' actions were incongruous with their own allegations about the timeline of the risks they faced, and the allegation that they fled because of the later workplace visit was not credible. The applicants have not shown that the RAD's findings were unreasonable.

[26] In any event, the RAD would have been entitled to find that the failure to seek protection in the United States pointed to a lack of subjective fear: *Cherifi v Canada (Immigration, Refugees and Citizenship)*, 2023 FC 458 at para 24.

III. **Conclusion**

[27] The Court's role on judicial review is not to make its own determination, but rather, to decide whether the applicants have established sufficiently serious shortcomings with the RAD's determination to justify setting it aside. As the applicants have not established a basis for

interfering with the RAD's determination, I must dismiss this application. The RAD reasonably refused to admit the additional text messages, and reasonably determined that the applicants had not established a forward-facing risk of harm in the Bahamas.

[28] The applicants asked the Court to correct the spelling of one child's name in the style of cause, so as to correspond with the spelling in the child's passport. The respondent did not object and the style of cause will be amended accordingly.

[29] The parties did not propose a question for certification. I find there is no question to certify.

JUDGMENT IN IMM-16389-23

THIS COURT'S JUDGMENT is that:

1. The style of cause is hereby amended to reflect correct the spelling of one of the applicants, from Hu'Mani Lavan STUART to Hu'Mari Lavan STUART.

2. This application for judicial review is dismissed.

3. There is no question to certify.

"Christine M. Pallotta"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-16389-23
STYLE OF CAUSE:	JAVAN LAVON STUART, HU'MARI LAVAN STUART, HULIYAH MARINA FERGUSON, HU'MANI JAVON STUART v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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