

Federal Court



Cour fédérale

Date: 20210730

Docket: IMM-1239-20

Citation: 2021 FC 811

Ottawa, Ontario, July 30, 2021

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

SARKHAN KHUSIYEV

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Sarkhan Khusiyev, seeks judicial review of the January 29, 2020 decision (Decision) of the Refugee Appeal Division (RAD), upholding the March 21, 2018 decision of the Refugee Protection Division (RPD) which held that the applicant is not a Convention refugee nor a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001 c 27 [IRPA].

[2] The determinative issue in the appeal was the applicant's credibility.

[3] The determinative issue in this application is the *sur place* claim.

[4] The RAD found the applicant's claim, regarding both the events that allegedly occurred in Azerbaijan and articles the applicant allegedly published while in Canada, was fabricated.

[5] The applicant seeks an order setting aside the RAD's decision and referring the application back for reconsideration by a differently constituted panel of the RAD with such instructions as the Court may consider appropriate.

[6] For the reasons that follow, this application will be granted because of errors made in the RAD's treatment of the applicant's *sur place* claim.

II. **Relevant Facts**

[7] The applicant is a citizen of Azerbaijan who claims to have published an article on April 30, 2016 about a member of parliament while working as a journalist at Vicdan Sesi newspaper in Baku, Azerbaijan.

[8] As a result of the article, he says he and other newspaper employees were arrested, the newspaper office was raided and all records, computers and archives were seized by the agents of the Ministry of National Security (MNS). While detained, the applicant claims that he was psychologically and physically tortured. The applicant says he was released on May 2, 2016.

[9] On May 24, 2016, the applicant filed a complaint against the Azerbaijani government.

[10] On May 25, 2016, the applicant stayed in a clinic in Baku for two days due to craniocerebral trauma he says resulted from being assaulted by MNS.

[11] The applicant irregularly crossed into Canada from the United States on September 23, 2016.

[12] In July 2017, the applicant's mother was allegedly contacted by Azerbaijani police who asked about her son's whereabouts and told her to report him if he returns to Azerbaijan.

[13] The applicant says that since his arrival in Canada he has published four articles online. They contained his name and photograph. The articles are critical of the Azerbaijani government. He also claims that his ex-wife has filed documents in court in Azerbaijan that refer to him as a "political refugee".

[14] The applicant is from Zagatala in northern Azerbaijan. He claims to have lived in Baku from 2006 to 2016. However, his national registration card still shows his Zagatala address.

[15] The RPD found, *inter alia*, that the applicant did not live in Baku, that his journalism certificate was not credible and that the newspaper Vicdan Sesi never existed.

[16] On appeal, the RAD dealt only with the question of whether the applicant had established that he lived in Baku. On the basis that he had not, the RAD found that the applicant's claim was fabricated and dismissed his appeal.

III. Decision under Review

[17] The RAD began by finding that the RPD did not enjoy a meaningful advantage in making its findings therefore the RAD would apply a correctness standard to the RPD decision.

[18] The RAD concluded that the determinative issue was credibility. After an independent assessment of the evidence, the RAD found the RPD's conclusion that the applicant lacked credibility was correct. The RAD found that the applicant's claim was fabricated and upheld the RPD's finding that he is not a Convention refugee or a person in need of protection under the *IRPA*.

[19] The RAD also held that the applicant did not author political articles in Canada and that there was no credible evidence that the Azerbaijan government was aware of his claim in Canada. The RAD therefore found that the applicant does not face a serious risk of persecution or a likelihood of other harm if he returns to Azerbaijan.

IV. Issues

[20] The issue is whether the Decision is reasonable.

[21] Within that, the applicant submits the RAD made three errors, any one of which would justify returning the Decision for redetermination:

1. The RAD's assessment of the applicant's credibility was unreasonable.
2. The RAD's treatment of the applicant's supporting documents was unreasonable.
3. The RAD's assessment of the applicant's *sur place* claim was unreasonable.

[22] As I have determined that the assessment of the *sur place* claim was unreasonable there is no need to address the other two issues.

V. **Standard of Review**

[23] The applicant argues that the application of the legal test in determining a refugee *sur place* claim should be reviewed on a correctness standard. Both parties agree that the standard of review for all other issues is reasonableness.

[24] I disagree. The standard of review for the *sur place* claim is reasonableness.

[25] The Supreme Court of Canada noted in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*], that the Court “starts with a presumption that reasonableness is the applicable standard whenever a court reviews administrative decisions” except where legislative intent or the rule of law suggests otherwise: *Vavilov* at paragraphs 16 and 23.

[26] There is nothing in the *IRPA* to suggest that the legislature intended the correctness standard to apply to the review of refugee *sur place* claims.

[27] The recognized categories of legal questions where the rule of law does require a correctness standard are constitutional questions, general questions of law of central importance to the legal system as a whole, and questions related to the jurisdictional boundaries between two or more administrative bodies: *Vavilov* at paragraph 17. The application of the legal test in refugee *sur place* claims does not fall under any of these categories.

[28] When applying the reasonableness standard while conducting judicial review, a Court is to refrain from deciding the issue afresh. The Court is to consider only whether the Decision, including the rationale for it and the outcome to which it led, is unreasonable: *Vavilov* at paragraph 83.

[29] The requirements of a reasonable decision were re-stated in *Vavilov* as being one that possesses an internally coherent and rational chain of analysis that is justified in relation to the facts and law that constrain the decision-maker. The reasonableness standard requires a reviewing court to defer to such a decision: *Vavilov* at paragraph 85.

[30] A reviewing court must also remember that the written reasons given by an administrative body are not to be assessed against a standard of perfection. If the reasons given for a decision do not include all the arguments, statutory provisions, jurisprudence or other details a reviewing judge would have preferred, that, on its own, is not a basis to set aside the decision. The court's review is not to be divorced from the institutional context in which the decision was made nor from the history of the proceedings: *Vavilov* at paragraph 91.

VI. **The RAD credibility findings**

[31] The RAD identified several negative credibility findings made by the RPD that were challenged by the applicant. However, it only dealt with one: that the applicant did not live in Baku as he claimed.

[32] The RAD found that this negative credibility finding was sufficient to deny the applicant's claim, which it held was fabricated.

[33] On this basis the RAD concluded that "he did not write articles that attracted the attention of the Azerbaijan government due to his political opinion or his perceived political opinion; that he was not detained, abused or threatened in the manner he claims to have been, and that he did not write articles in Canada in the manner he alleged."

VII. **The RAD *sur place* finding**

[34] The applicant's argument before the RAD was that the RPD erred by not considering the risk of persecution to the applicant that resulted from the perception that he had authored publicly available articles that are critical of the government.

[35] The applicant claimed that the RPD accepted that the four articles which were critical of the government of Azerbaijan were available online with the name and picture of the applicant as the author. He argues that regardless of whether the RAD believed the applicant actually wrote the articles, the perception that he did puts him at risk of persecution by the government of Azerbaijan.

[36] The applicant also claims that since his ex-wife filed court documents in which she characterizes him as a “political refugee” in Canada, the government knows about his refugee claim and as a result, he is at risk of persecution.

[37] The RAD stated that “because of his general lack of credibility, I do not accept that the authorities in Azerbaijan are seeking him due to perceived political opinion or for any other reason.”: Decision at para 42.

[38] In *Ejtehadian v. Canada (Citizenship and Immigration)*, 2007 FC 158, Mr. Justice Blanchard held that the Board cannot reject a *sur place* claim due solely to lack of credibility or improper motive but, rather, it must assess the genuineness of the applicant’s basis for claim to determine if he or she will be at risk if returned to the country of origin.

[39] Neither the RPD nor the RAD engaged in any such determination. The RAD said “I find that the Appellant's credibility problems are so prejudicial that when they are weighed against his supporting evidence, I do not accept that is (sic) perceived by the Azerbaijan authorities as being in opposition to it.”

[40] The RAD also stated “I have found that the Appellant is not perceived to hold anti-government opinions by the authorities in Azerbaijan. As such, there is no ‘residual profile’ for the RPD or me to consider.”

[41] I note that a finding that the applicant did not write the articles does not necessarily lead to a conclusion that the government of Azerbaijan would not perceive the applicant to have written the articles and to hold anti-government opinions.

[42] When addressing the *sur place* claim, the RAD held that the applicant's overall lack of credibility extended to his evidence about the publication of articles while in Canada. The RAD found the articles were not genuine and that the applicant "does not face a serious risk of persecution or a likelihood of harm if he returns to Azerbaijan."

[43] The RAD marked the word "genuine", which I have underlined in the above paragraph, with a footnote numbered 24.

[44] In footnote 24 of the Decision, the RAD states:

I note that the Appellant's statement at para 144 of the Legal Memorandum that "the Board accepted that [the Appellant's] picture and name were attached to four articles featured in four Azerbaijani-language online news media outlets" misrepresents its findings. (Exhibit P-2, Appellant's Record, at p. 56). The RDP explicitly found that the Appellant "did not author those articles", and, as such, it did not need to engage in the consideration of the reliability of the websites they were meant to have been published on. (Exhibit RPD-1, RPD Record, p.17 para 37).

[45] Paragraph 37 of the RPD decision, referred to immediately above by the RAD, states:

The websites that these articles are published on have Russian emails and all appear to be located together somewhere in Baku. The Research Directorate provided a short memorandum on the reliability of these websites as news media, however, since I find on a balance of probabilities that the claimant did not author these articles, I am not going to assess the reliability of these websites.

[46] The statement at paragraph 144 of the Applicant's Legal Memorandum which the RAD indicates was a misrepresentation of the RPD finding states:

First, it is important to recall that the Board accepted that Mr. Khushiyeu's picture and name were attached to four articles featured in four Azerbaijani-language online news media outlets. The articles contained explicit anti-government material and were highly critical of the oppressive Aliyev regime. The Board also accepts that the articles can be found by way of Google searches.

[47] Returning to the RAD's footnote 24, it said in reference to the paragraph 144 statement, that "the Board accepted that [the Appellant's] picture and name were attached to four articles featured in four Azerbaijani-language online news media outlets" and then declared that such statement "misrepresents its findings."

[48] This statement by the RAD is factually inaccurate.

[49] Paragraph 37 of the RPD decision opens with "[t]he websites that these articles are published on" (my emphasis). This is a clear acknowledgement that the RPD accepts that the articles are in fact published online.

[50] The RAD notes that RPD declined to engage in an assessment of the reliability of the sites "as news media".

[51] The reliability of the websites as news sources is not relevant to the question of whether the articles are publicly available and could be seen by the Azerbaijani government. Nor, given that the applicant's name and photo appear online with the articles, is it relevant to the issue of the clear

potential for the Azerbaijani government to perceive the applicant as holding anti-government opinions.

[52] The applicant's thorough submissions to the RAD clearly referenced several official documents noting that the Azerbaijani government resorts to what the applicant refers to as "intense cyber surveillance" and that people have been detained, threatened and tortured in brutal conditions for simply posting Facebook messages in support of political prisoners or satirizing government policies.

[53] The applicant's reference for the foregoing statement is footnoted as "National Document Package (Azerbaijan). Document 4.6 "Revolving Doors": The Ongoing Persecution of Government Critics in Azerbaijan" *Amnesty International* (June 16, 2016); NDP Document 4.3, Gütersloh: Bertelsmann Stiftung, "I. Political Transformation. Bertelsmann Stiftung, BTI 2016 — Azerbaijan Country Report." 2016 at page 13.

[54] While this information and more was presented to the RAD there is no indication that it was considered.

[55] From all of the foregoing, it is clear to me that the RAD made two significant errors: (1) contrary to *Ejtehadian* it rejected the *sur place* claim due solely to the lack of credibility of the applicant, and (2) it failed to consider evidence relevant to the issue of whether the applicant was at risk of being perceived by the Azerbaijani government as a political dissident, thereby exposing him to persecution upon return to Azerbaijan.

VIII. **Conclusion**

[56] In misconstruing the finding of the RPD that the applicant's articles were in fact published online, the RAD based the *sur place* claim on an erroneous finding of fact that the articles were not so published and, it failed to consider the totality of the evidence.

[57] That led to the RAD not addressing the argument of the applicant on the issue of his risk of persecution based on a perception in Azerbaijan of his anti-government opinion in the published online articles.

[58] This error is significant. It renders the RAD's decision unreasonable for being based on a chain of analysis that is not justified in relation to the facts: *Vavilov* para 85.

[59] This application is granted.

[60] The matter is to be returned to a differently constituted panel of the RAD for redetermination.

[61] There is no question for certification.

JUDGMENT IN IMM-1239-20

THIS COURT'S JUDGMENT is that:

1. This application is granted and the matter is to be returned to a differently constituted panel of the RAD for redetermination; and
2. No question of general importance is certified.

"E. Susan Elliott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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