

Federal Court



Cour fédérale

Date: 20170223

Docket: IMM-3030-16

Citation: 2017 FC 230

Ottawa, Ontario, February 23, 2017

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

**MIKHEILI TSIKARADZE
IA REKHVIASHVILI**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicants, Mikheili Tsikaradze and Ia Rekhviashvili, are a married couple and citizens of Georgia. On November 25, 2015, they fled Georgia and arrived in New York. A few days later, they travelled to the Canadian border at Niagara Falls and made a claim for refugee protection, alleging persecution faced by Mikheili for his membership in a political party known as the United National Movement. However, in a decision dated June 23, 2016, the Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB] determined that the

Applicants' claim for protection had no credible basis pursuant to subsection 107(2) of the *Immigration and Refugee Protection Act, SC 2001, c-27 [IRPA]* and that they were neither Convention refugees nor persons in need of protection. The Applicants have now applied under subsection 72(1) of the *IRPA* for judicial review of the RPD's decision.

I. Background

[2] In January 2012, Mikheili joined the youth wing of the United National Movement [UNM] and worked for the party as a coordinator and election observer. He was approached by members of a rival political party, the Georgian Dream, in August 2012 and asked to switch parties, but he refused. The Georgian Dream members threatened Mikheili who, in turn, filed a police report but no action was taken by the police. In September 2013, Mikheili received an anonymous phone call, informing him that he would be killed if he did not join the Georgian Dream. He reported this incident to the police but, again, the police took no action. On May 30, 2014, Mikheili received another threatening phone call.

[3] On March 23, 2015, Georgian Dream members approached Mikheili at his house and assaulted him. Mikheili received hospital treatment and the police were notified. The police told Mikheili there was no sense in filing a report. The last incident occurred on October 19, 2015, when the Applicants were walking home from a political rally and members of the Georgian Dream assaulted Mikheili and threatened Ia. Mikheili was taken to the hospital for his injuries and later reported the incident to the police, again to no avail. As a result of the serious threats, assaults, and lack of police protection, the Applicants hired an agent to obtain a United States visa for them so they could flee Georgia.

II. The RPD's Decision

[4] In its decision dated June 23, 2016, the RPD found that there were several inconsistencies and omissions in the Applicants' evidence, leading it to draw negative inferences and conclude that the Applicants were neither credible nor trustworthy witnesses. The determinative issue for the RPD was credibility.

[5] The RPD noted that Mikheili had omitted from his Basis of Claim narrative that he went into hiding while waiting for the US visa. Mikheili explained he omitted this fact because he was merely staying in his own apartment and had not left his home city. The RPD rejected this explanation as not being reasonable and determined that this omission went to a central part of his claim, namely his subjective fear. The RPD noted that Mikheili did not volunteer this information and provided it only in response to a direct question. The RPD found that this omission undermined Mikheili's general credibility as did his inability to remember the exact date he went into hiding, despite knowing the precise date for other events in relation to his claim.

[6] The RPD also found that inconsistencies in Mikheili's travel history undermined his credibility. Mikheili claimed to have only ever left Georgia to travel to Turkey and to Azerbaijan, before departing for the United States. However, the US visa application indicated that he had travelled to Germany, France, Italy, and Greece. Mikheili explained that the agent filled out the visa application without his knowledge. The RPD rejected this explanation as not being reasonable, stating that:

it is reasonable to conclude that proof of the travel history of the claimants would have been requested by the USA authorities. The Panel finds that this undermines the general credibility of the claimants, undermines the claimants travel history, undermines whether the USA visa applications were submitted through an agent with fraudulent information and undermines the alleged reasons that the claimants fled from Georgia.

[7] The RPD made a further negative credibility finding because both Applicants had obtained new passports just prior to their departure for the United States and neither one of them could find their previous passport. The loss of the previous passports seemed fortuitous to the RPD as it prevented it from determining whether Mikheili had in fact travelled to the countries listed on the US visa application. The RPD also found inconsistencies in the Applicants' plan to leave Georgia for a democratic country where they could be safe and avoid the Georgian Dream party. The RPD questioned why the Applicants waited four months to receive a visa for the United States when they could have immediately left Georgia for a democratic country which did not require a visa, such as Israel, Ukraine, Antigua and Barbuda, Bahamas, Turkey, Moldova, or Brazil. Furthermore, the Applicants did not adequately explain why they never made a claim in the United States. The RPD held that this undermined their general credibility, their subjective fear, and their claim that Mikheili was sought out for recruitment and beaten by the Georgian Dream party.

[8] The RPD also noted several inconsistencies between the Applicants' work history and Mikheili's education as stated in the US visa application and the documents submitted at the time of the claim for protection. The Applicants again explained that they were unaware of the information that the agent included in their US visa application. The RPD found this explanation as not being reasonable, noting that:

The claimants signed this documents [*sic*] attesting to the truth of it, were interviewed by a USA Official and signed the USA visa applications declaring that no one aided them in completing them. The Panel finds that this undermines the claimants general credibility, specifically undermines their employment history, specifically undermines whether the principal claimant [Mikheili] was employed with the UNM and was ever sought for recruitment, threatened and beaten by the Georgian Dream party and undermines their purpose in coming to Canada.

[9] The RPD considered the Applicants' delay and failure to make a claim during the four months they were waiting for the US visa and their time spent in the United States. The RPD found that the Applicants' delay in leaving Georgia undermined their general credibility, subjective fear, and whether Mikheili was ever sought for recruitment or beaten and whether both claimants had been threatened with death by the Georgian Dream party. The RPD further found that the Applicants' failure to make a claim in the United States undermined these same claims. The Applicants explained they were confused and under stress when they arrived in the United States and did not know what to do; so Mikheili called his uncle living in Canada who suggested he come to Canada to make a claim for protection. The RPD rejected this explanation, stating that:

[26] The Panel does not find this explanation reasonable. The claimants were fleeing from threats of death. The principal claimant [Mikheili] had been in hiding for approximately four months before he and the claimant left Georgia. These would seem to be dire circumstances. The Panel has also considered that the principal claimant stated that all he wanted was to leave Georgia and find a safe, democratic country. He did not care which country he went to. The USA is a democratic country that would have afforded the claimants access to a protection process and safety from the death threats. The Panel finds that in these circumstances this is not a reasonable explanation for not making a claim for protection in the USA.

[27] It is reasonable to assume that persons fleeing for their lives would make a claim for refugee protection at the first available

opportunity. The Panel draws a negative inference from the failure to make a claim for protection in the USA and finds that this undermines the claimants overall credibility, undermines their reason for leaving Georgia and is not consistent with a subjective fear.

[10] The RPD concluded that the Applicants were not credible and trustworthy witnesses, finding, on a balance of probabilities, that the claimants were in fact the persons as set out in the US visa applications and that Mikheili was not employed by or active in the UNM, was not sought by the Georgian Dream party for recruitment nor threatened and beaten by members of that party, and that the claimants were not being threatened with death by the Georgian Dream. The RPD further concluded that there was no credible or trustworthy evidence upon which it could have determined that either Applicant was a Convention refugee or person in need of protection; the RPD therefore found there was no credible basis for the claim in accordance with subsection 107(2) of the *IRPA*.

III. Issues

[11] The issues raised by the Applicants boil down to the following two questions:

1. Did the RPD reasonably assess the Applicants' credibility?
2. Was the RPD's finding that the Applicants' claim had no credible basis reasonable?

IV. Analysis

[12] In this case, the determinative issue for the RPD was the Applicants' credibility. Credibility findings by the RPD have been described as "the heartland of the Board's

jurisdiction” since they are essentially pure findings of fact and, consequently, are reviewable on a reasonableness standard (*Zhou v Canada (Citizenship and Immigration)*, 2013 FC 619 at para 26, [2013] FCJ No 687; *Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 at para 4, 160 NR 315 (CA); *Singh v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 486 at para 3, 169 NR 107 (CA); and *Cetinkaya v Canada (Citizenship and Immigration)*, 2012 FC 8 at para 17, 403 FTR 46). The Court must respect and cannot interfere with a credibility assessment by the RPD unless it is satisfied that the RPD’s reasons are not justified, transparent or intelligible, and that the result does not fall “within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190).

A. *Did the RPD reasonably assess the Applicants’ credibility?*

[13] The Applicants argue that the RPD’s credibility findings are unreasonable for several reasons. First, the RPD unreasonably inferred negative credibility based on Mikheili’s failure to mention he was hiding in his Basis of Claim form because such form is supposed to be a brief recitation of the claim, not a documentation of the whole case; the fact he stayed in his apartment is not central to his claim but, rather, merely an elaborative detail that could reasonably be expected to come out during oral testimony. Second, the RPD impugned the Applicants’ credibility on the basis that their testimony was inconsistent with the information contained in the US visa applications prepared by the agent, yet the Applicants were unaware of what information the agent provided in the applications. Third, the RPD made various negative credibility findings against the Applicants without addressing corroborating evidence; in particular, the RPD discredited Mikheili’s claim that he was assaulted by the Georgian Dream

party without reviewing the letters from the Rustavi City Police Chief Administration and the Rustavi Central Hospital which corroborated that Mikheili was indeed assaulted. Similarly, the RPD erroneously concluded that Mikheili was not a member of the UNM without reviewing a letter from the UNM confirming Mikheili's membership in the party. Lastly, the RPD's negative credibility finding due to the Applicants' failure to claim refugee protection elsewhere was not reasonable because, while a failure to seek refuge in a third country may be considered by the RPD, it is not determinative of a claim and they were not obliged to make refugee claims at the first possible opportunity.

[14] The Respondent defends the RPD's assessment of the Applicants' credibility since it was based on the inconsistencies, omissions, and negative inferences in their evidence. According to the Respondent, the RPD should be afforded deference because it had the benefit of hearing the Applicants' testimony and the Court should not substitute its own findings for those of the RPD where the conclusions it reached were reasonably open to it. The Court should not intervene, the Respondent says, because the RPD specifically considered the Applicants' explanations for the inconsistencies and omissions but ultimately rejected them. The Respondent further says the RPD did not ignore evidence because it failed to specifically mention certain documents such as the police reports, medical reports, and letters. In the Respondent's view, the RPD is presumed to have considered all of the evidence before it, including the police reports, medical reports, and letters, and these documents do not provide independent and credible documentary evidence capable of supporting a positive disposition of the claim.

[15] In my view, the RPD's assessment and determination of the Applicants' credibility in this case cannot be justified and its decision does not constitute an acceptable outcome defensible in respect of the facts and law. Consequently, the RPD's decision must be set aside and the matter returned to the RPD for redetermination by a different member of the RPD.

[16] It was not reasonable for the RPD to conclude that Mikheili was not employed by or active in the UNM, that he was not threatened and beaten, and that the Applicants were not being threatened by members of the Georgian Dream party. This conclusion is unreasonable in the face of the police reports, medical reports, and letter from the UNM. The RPD made no assessment, let alone any mention of, this independent and objective corroborating evidence which contradicted its findings. The RPD rejected the credibility of Mikheili's claim that he was assaulted and threatened by the Georgian Dream party without analysing the two letters from the Rustavi City Police Chief Administration and the two letters from the Rustavi Central Hospital which supported the claim. It also rejected the credibility of Mikheili's claim that he was a member of the UNM without assessing the letter from the UNM which clearly and explicitly confirmed Mikheili's membership. The RPD's complete failure to address these documents was unreasonable. This is not a case where the Court can supplement the RPD's reasons because its decision is devoid of any analysis of why these documents were not credible.

[17] In this case, it was incumbent upon the RPD to assess the documentary evidence which contradicted its negative credibility findings against the Applicants' claim. While the RPD is not required to refer to every piece of evidence before it, if there is evidence which contradicts its findings, "more than a blanket statement will be required to demonstrate that the RPD considered

the evidence”; otherwise it may be open to the Court to infer that the decision was made without regard to the evidence (*Eze v Canada (Citizenship and Immigration)*, 2016 FC 601 at para 22, 267 ACWS (3d) 681 [*Eze*]; also see *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 at paras 16-17, 157 FTR 35). Indeed, in this case the RPD did not even acknowledge that it had considered all the documentary evidence before it. While it may be the case that a statement by the RPD “that it considered the documentary evidence before it is a sufficient indication ...it considered the totality of the evidence in rendering its decision” (see *Antrobus v Canada (Citizenship and Immigration)*, 2012 FC 3 at para 5, [2012] FCJ No 24), there is no such statement or indication in this case. The Court is thus left to speculate and wonder as to whether the RPD in this case even considered the documentary evidence which corroborated and supported the Applicants’ claim.

B. *Was the RPD’s finding that the Applicants’ claim had no credible basis reasonable?*

[18] The Applicants argue that the RPD conflated its general findings about their lack of credibility with a “no credible basis” finding, and ignored their credible corroborating evidence which supported the claim. The Respondent says the RPD reasonably determined that the Applicants’ claim had no credible basis and it was reasonably open for the RPD to make such a determination.

[19] I agree with the Applicants that the RPD conflated its credibility findings about the Applicants with a no credible basis finding. The RPD failed to properly consider whether there was any credible evidence to support the Applicant’s claim. In advance of reaching a conclusion of no credible basis, the RPD must look to any objective documentary evidence for any credible

or trustworthy support for an applicant's claim (see: *Eze* at para 26). Moreover, the RPD can only make a finding that a claim has no credible basis under subsection 107(2) of the *IRPA* where "the only evidence before the RPD is the testimony of the claimant"; hence, if a claimant before the RPD adduces independent and credible evidence capable of supporting the claim, "then his or her claim will have a 'credible basis' even if the claimant's testimony is found not to be credible" (see: *Chen v Canada (Citizenship and Immigration)*, 2015 FC 1133 at paras 16-17, [2015] FCJ No 1191).

[20] The RPD's finding that the Applicants were not credible does not automatically result in a "no credible basis" finding (see: *Foyet v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 1591 at paras 23-26, 187 FTR 181 (FC)). The threshold for a no credible basis finding is a high one because it precludes the possibility of an appeal to the Refugee Appeal Division [RAD] of the IRB by virtue of paragraph 110(2)(c) of the *IRPA*. Claimants who seek judicial review of a negative RAD decision benefit from an automatic stay of removal under section 231 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, as am, unless they are from countries designated under subsection 109.1 (1) of the *IRPA*. The RPD must look to the objective documentary evidence before making a no credible basis finding in respect of a refugee claim. As noted in *Behary v Canada (Citizenship and Immigration)*, 2015 FC 794, at para 53, 483 FTR 252: "Only if there is no independent or credible documentary evidence, or if any such evidence cannot support a positive decision, can the RPD make such a finding."

[21] In this case, there was documentary evidence before the RPD which corroborated and supported the Applicants' claim. However, the RPD determined that the Applicants' claim had

no credible basis without first assessing whether the police reports, medical reports, and letter from the UNM constituted independent or credible documentary evidence capable of supporting the claim. The RPD's determination in this regard was not reasonable.

V. Conclusion

[22] For the reasons stated above, the Applicants' application for judicial review is allowed and the matter is returned for redetermination by a different panel member of the RPD. Neither party suggested a question for certification; so, no such question is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that: the application for judicial review is allowed and the matter returned for redetermination by a different panel member of the Refugee Protection Division of the Immigration and Refugee Board in accordance with the reasons for this judgment; and no serious question of general importance is certified.

"Keith M. Boswell"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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