Federal Court  Cour fédérale

Date: 20200124

Docket: IMM-6559-18

Citation: 2020 FC 125

Ottawa, Ontario, January 24, 2020

PRESENT: Mr. Justice Norris

BETWEEN:

SEVDIJE HASANI
(A.K.A ALBULENA DALIPI)

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] The applicant, Sevdije Hasani, seeks to set aside the November 29, 2018, decision of the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada [IRB] finding that she is excluded from refugee protection under section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], because she committed serious crimes before

coming to Canada to seek refugee protection. Before the RPD, the applicant admitted the substance of the conduct alleged against her but maintained that it did not constitute serious criminality. On this application for judicial review, she contends that the RPD's finding that she is excluded from refugee protection because of serious criminality is unreasonable. She also contends that the RPD erred by proceeding to reject her claim for refugee protection without first determining whether it had jurisdiction to deal with it.

[2] For the reasons that follow, this application for judicial review will be allowed. I do not agree with the applicant that jurisdiction was a live issue before the RPD. Although it had been raised by the Minister in his original notice of intervention before the RPD, the Minister abandoned this objection shortly thereafter. On the other hand, I do agree with the applicant that the RPD's determination that she is excluded from refugee protection because of serious criminality is unreasonable. The RPD's decision must, therefore, be set aside and the matter remitted for reconsideration.

II. BACKGROUND

[3] It is necessary to set out the background in some detail.

[4] The applicant is a citizen of Kosovo. She was born there in March 1975.

[5] The applicant first arrived in Canada with her parents in the spring of 1999 as part of the Operation Parasol Humanitarian Emergency Evacuation, a Canadian initiative to resettle refugees from Kosovo during the war there. However, about three months after arriving here,

the applicant's father decided to return to Kosovo. The applicant and her mother returned with him.

[6] At the time, the applicant was good friends with Bashkim Dalipi. Mr. Dalipi and a number of members of his extended family had also left Kosovo in 1999. They obtained refugee protection in the United States. This included his sister, Sanije Dalipi, and his sister-in-law, Albulena Dalipi.

[7] Bashkim returned to Kosovo in 2000 for a few months and a romantic relationship between him and the applicant developed. The two decided to get married. However, the applicant's father was vehemently opposed because Bashkim's mother was a Bosnian Serbian. Bashkim returned to the United States but he and the applicant remained in contact.

[8] At some point in 2001 or 2002, the applicant obtained a refugee travel document from the United States Citizenship and Immigration Services [USCIS] in the name of Sanije Dalipi. (Refugee travel documents are issued by signatories to the 1951 *United Nations Convention Relating to the Status of Refugees*, [1969] Can TS No 6 [*Refugee Convention*] to refugees lawfully staying in their territory in fulfilment of their duty under Article 28 of the *Convention*.) The applicant states that she used the services of an agent in Kosovo to obtain this document. She provided the agent with Sanije's documents and her own photograph. Some time later, the agent provided her with the refugee travel document. Although the travel document was obtained on the basis of misrepresentations (it was the applicant, not Sanije, who had applied and the accompanying photograph was of the applicant, not Sanije), there is no suggestion that it was

not a genuine document issued by the USCIS. (It is unclear whether Sanije knew that the applicant had used her documents or not. Before the RPD, the applicant claimed that she did and relied on this as a mitigating factor. However, when interviewed in April 2012 by US Customs & Border Protection [USCBP] officers – as described below – the applicant said that Sanije knew that someone had used her documents to obtain a refugee travel document but did not know that it was the applicant who had done so. The RPD member does not address this discrepancy in the evidence; instead, she simply proceeds on the basis that Sanije had given her consent to this use of her documents but finds that this was not a mitigating factor.)

[9] The applicant and Bashkim were married in a religious ceremony in Kosovo in June 2003. She did not tell her parents that they had married.

[10] The applicant used the travel document in Sanije's name to enter the United States on December 20, 2003. She explained that it was easier and faster to do it this way than to wait to be sponsored by her husband.

[11] The applicant and Bashkim reunited in Pittsburgh. The two lived together until November 2011, when they separated. They had two children together in the United States – a daughter born in 2006 and a son born in 2008.

[12] The only other time the applicant used the travel document in Sanije's name was when she was arrested for shoplifting a small amount of makeup in Pittsburgh in June 2005. While the

applicant was apparently charged with retail theft, false identity to law enforcement and criminal conspiracy, she was only convicted of retail theft. She received a small fine.

[13] I pause to note that it is unclear from the information provided by US authorities what conduct gave rise to the "false identity to law enforcement" charge. Apparently the arrest record pertained to Sanije Dalipi, although an alias of Albulena Dalipi was also noted. Somehow the applicant was able to remain in the United States after this incident despite her lack of status there. In the present proceeding, the applicant did not dispute that she had presented the refugee travel document in Sanije's name as her own. It is unknown whether US authorities realized at the time that by doing so the applicant had committed identity fraud.

[14] In 2009, while still in the United States, the applicant obtained a second refugee travel document from USCIS, this time in Albulena's name. She explained that it was easier and faster to do this than to regularize her status in the United States. As she had done previously, the applicant used an agent to obtain the document for her. She provided the agent with Albulena's documents (with Albulena's knowledge and permission) and her own photograph. (Apparently Albulena had gone back to Kosovo, leaving her documents behind in the United States, and she had no intention of returning.) Some time later, the agent provided her with the travel document, which had been issued on June 2, 2009. (This travel document was eventually seized from Bashkim by US authorities on February 27, 2012. The circumstances under which this occurred are not disclosed in the record. A copy of this travel document is included in the Certified Tribunal Record [CTR].)

[15] As with the other one, while this travel document was also obtained on the basis of misrepresentations, there is no suggestion that it was not a genuine document issued by the USCIS.

[16] The evidence is not completely clear but the applicant does not dispute that in or around July 2009 she initiated an application for a Green Card using the travel document in Albulena's name. However, she did not attend for an interview as required and abandoned the application. Information from US authorities suggested that on September 7, 2010, the applicant filed a second application for a Green Card using this same travel document. While the applicant's testimony on this point was confusing, she did not dispute that she submitted the application or that this time she did appear for an interview (on May 10, 2011). The record does not disclose how this application was disposed of.

[17] The applicant also used this travel document to travel to Kosovo for about six weeks in 2009. She returned to the United States on October 19, 2009.

[18] Information from the US Department of Homeland Security suggested that, as of April 2012, the applicant was under investigation in the United States for identity theft and social security fraud. The precise allegations were not provided and nothing appears to have come of this. In her testimony before the RPD in 2018, the applicant denied ever using a false identity to obtain social security benefits. The RPD member does not make a finding on this point one way or the other.

[19] Following her separation from Bashkim, the applicant and her two children left the United States for Canada on December 25, 2011. The applicant made a claim for refugee protection for herself and her children. The claim was commenced in Windsor on January 18, 2012. The claimants' Personal Information Forms were submitted to the IRB on February 15, 2012. (The refugee claims on behalf of the applicant's American born children were abandoned at the hearing.)

[20] On April 2, 2012, the applicant inadvertently crossed into the United States via the Windsor/Detroit tunnel. She had been directed to report to the Canada Border Services Agency for fingerprinting that day in connection with her refugee claim but she did not get off the bus at the right place; instead, she found herself in the United States. Her three year old son was with her.

[21] Under questioning by USCBP officers, the applicant admitted to using the refugee travel document in Sanije's name to enter the United States on December 20, 2003, and to using the refugee travel document in Albulena's name to enter the United States on October 19, 2009. She provided a sworn statement to this effect. The applicant was not arrested or charged in connection with her admitted misuse of the two travel documents. Instead, she was served with an Expedited Removal and advised that she was barred from entering the United States for five years. The applicant and her son returned to Canada by bus.

III. ANALYSIS

A. *Preliminary Issue - Jurisdiction*

[22] After considerable delay due to the backlog of cases, on May 25, 2018, the applicant's hearing before the RPD was set for June 21, 2018. It was later re-scheduled to October 19, 2018 because of a change of counsel for the applicant.

[23] By letter dated June 1, 2018, the RPD advised the Minister that "[t]he claimant was charged with, among other things, identity fraud and social security fraud in the United States." (As is apparent from the evidence tendered at the hearing, this was not correct.) On this basis, the RPD provided notice to the Minister pursuant to Rule 26 of the *Refugee Protection Division Rules*, SOR/2012-256 [*RPD Rules*], that there was a possibility that the applicant may be excluded from refugee protection under Section F of Article 1 of the *Refugee Convention*. The RPD also provided notice to the Minister pursuant to Rule 28(1)(a) of the *RPD Rules* that the applicant may be inadmissible "on grounds of security, violating human or international rights, serious criminality or organized criminality" and, pursuant to Rule 28(1)(b) that there "may be an outstanding charge against the claimant for an offence under an Act of Parliament that may be punished by a maximum term of imprisonment of at least 10 years." Further, the RPD provided notice to the Minister pursuant to Rule 28(1)(c) of the *RPD Rules* that the applicant's claim may be ineligible to be referred to the RPD under section 101(1)(f) of the *IRPA* – namely, because "the claimant has been determined to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality, except for persons who are

inadmissible solely on the grounds of paragraph 35(10(c)." As will be seen immediately below, the Minister intervened on much narrower grounds than these.

[24] In a second letter from the RPD to the Minister, dated June 7, 2018, the RPD raised the further possibility that the applicant's claim may be ineligible for referral to the RPD under section 101(1)(a) of the *IRPA* – namely, because "refugee protection has been conferred on the claimant under this Act."

[25] By letter dated June 18, 2018, the Minister advised the RPD and the applicant that he intended to intervene before the RPD. Counsel for the Minister raised two issues. First, she had "concerns that the claimant has already been found to be a Convention Refugee by Canada during Operation Parasol in 1999 when Citizenship and Immigration Canada airlifted 5,000 Kosovars to Canada to escape the intense fighting and bombardment that was occurring at that time." Minister's counsel noted that this issue "is most important to verify as the RPD may be *functus officio*."

[26] Second, Minister's counsel submitted that the applicant's admission to USCBP officers on April 2, 2012, that she had obtained refugee travel documents in other people's names and had used them twice to enter the United States potentially excluded her from refugee protection on the basis of serious criminality under Article 1F(b) of the *Refugee Convention*. Specifically, Minister's counsel submitted that the applicant had "committed two (2) criminal offences" under the *Criminal Code*, RSC 1985, c C-46 – namely, forgery of or uttering forged passport contrary

to section 57(1) of the *Criminal Code* and identity fraud contrary to section 403 of the *Criminal Code*.

[27] In an Amended Notice of Minister's Intervention dated June 21, 2018, however, counsel for the Minister stated that the intervention would relate only to issues of program integrity, credibility, credible basis and exclusion under Article 1F(b) of the *Refugee Convention*. With respect to the issue of whether refugee protection had already been conferred upon the applicant, Minister's counsel provided additional background information concerning Operation Parasol which stated that, although persons selected under the program were treated as Convention Refugees and were to be given access to permanent residence in Canada on an expedited basis, if someone chose to repatriate him or herself, their temporary safe haven, refugee status, and/or permanent residence in Canada would be terminated.

[28] While not stated expressly in the Amended Notice of Intervention, it is certainly implicit that counsel for the Minister was satisfied that the applicant's brief stay in Canada in 1999 under the auspices of Operation Parasol had not rendered her claim ineligible for referral to the RPD under section 101(1)(a) of the *IRPA*. (Clearly, an officer had reached the same conclusion earlier when the refugee claim was referred to the RPD under section 100(1) of the *IRPA*.) The Minister's intervention was thus limited to the issues identified in the Amended Notice – most importantly, exclusion from refugee protection under Article 1F(b) of the *Refugee Convention*.

[29] The applicant did not seriously contest the RPD's jurisdiction to hear her new claim for refugee protection. While she had stated in her narrative in support of her refugee claim (signed

on February 14, 2012) that her family had been "accepted as convention refugees in Canada in 1999," she must have believed that even if this was correct at the time, she had lost this status in the interim. Otherwise, why would she be seeking refugee protection in Canada again? While counsel for the applicant submitted to the RPD that it was "unclear" what status had been conferred on the applicant as a result of Operation Parasol, in the absence of any evidence that refugee status had in fact been conferred on the applicant during her brief stay in Canada, and in light of the policy document stating in any event that any status conferred by Canada would have been terminated by the applicant's voluntary repatriation, this submission did not raise a genuine issue concerning the jurisdiction of the RPD to proceed.

[30] There being no issue of ineligibility before the member that could call into question the RPD's jurisdiction to hear the matter, there was nothing for the member to rule upon in this regard. While it would have been better if the RPD member had made this clear in her reasons, it was entirely proper for her to proceed directly to the issue of exclusion under Article 1F(b) of the *Refugee Convention*. I turn to this issue now.

B. *Exclusion Due to Serious Criminality*

(1) The Legal Framework

[31] Section 98 of the *IRPA* provides that "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." The specific part of Article 1 engaged here is subsection F(b), which provides that the provisions of the *Refugee Convention* shall not apply to any person with respect to whom "there are serious

reasons for considering that . . . he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee."

[32] The *Refugee Convention* serves twin purposes, representing a compromise "between the need to ensure humane treatment of the victims of oppression on the one hand and the wish of sovereign states to maintain control over those seeking entry to their territory on the other" (*R (European Roma Rights Centre) v Immigration Officer at Prague Airport*, [2004] UKHL 55, [2005] 2 A.C. 1, at para 15, adopted by the Supreme Court of Canada in *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68, [2014] 3 SCR 431 at para 30 [*Febles*]). Article 1F(b) in turn serves one main purpose – to exclude persons who have committed a serious crime (*Febles* at para 35).

[33] The *Refugee Convention* does not define what it is to be a "serious crime." As a result, this must be determined on a case-by-case basis. The Federal Court of Appeal has identified the following factors as pertinent to an assessment of the seriousness of a crime in a given case: the elements of the crime, the mode of prosecution, the penalty prescribed, the specific facts of the case, and the mitigating and aggravating circumstances: see *Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404, [2009] 4 FCR 164 at para 44 [*Jayasekara*]; see also the UNHCR *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* (4 September 2003), at para 14. (Of course, the availability of information concerning some of these factors depends on whether a claimant was actually prosecuted for the crime in question.) Applying these factors, it will be obvious that some types of offences are not serious in the requisite sense (e.g. petty theft)

while others (e.g. murder, rape and armed robbery) presumptively warrant exclusion from refugee protection. Crimes falling somewhere between these two ends of the scale must be assessed in light of their particular circumstances. Indeed, the circumstances of a given case can also be used to show that the commission of a crime that generally would be sufficiently serious to warrant exclusion is not sufficiently serious to warrant exclusion in that particular case (cf. *Febles* at para 62).

[34] Another relevant consideration is the available maximum punishment under Canadian criminal law. While previously it was presumed that any offence carrying at least a ten year maximum under Canadian law was a serious crime for purposes of Article 1F(b), the Supreme Court of Canada adopted a different approach in *Febles*. The Court held that "[w]hile consideration of whether a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada is a useful guideline, and crimes attracting a maximum sentence of ten years or more in Canada will generally be sufficiently serious to warrant exclusion, the ten-year rule should not be applied in a mechanistic, decontextualized, or unjust manner" (at para 62). See also *Tabagua v Canada (Citizenship and Immigration)*, 2015 FC 709.

(2) The RPD's Decision

[35] The presentation of evidence before the RPD was completed on October 19, 2018. Both parties provided post-hearing written submissions.

[36] The Minister had the burden of establishing serious reasons to believe that the applicant had committed serious crimes within the meaning of Article 1F(b) of the *Refugee Convention*.

As set out above, the Minister alleged that the applicant had committed crimes equivalent to two offences under Canadian criminal law – uttering a forged passport contrary to section 57(1) of the *Criminal Code*, and identity fraud contrary to section 403 of the *Criminal Code*. The parties proceeded on the basis that the applicant had never been prosecuted for the underlying conduct. However, as also noted above, the applicant admitted the substance of the conduct alleged against her. Thus, the determinative issue was whether that admitted conduct amounted to a "serious crime" within the meaning of Article 1F(b) of the *Refugee Convention*.

[37] To be clear, there was no suggestion on the applicant's part that any of her conduct came within the scope of section 133 of the *IRPA*.

[38] The applicant accepted that her conduct could constitute the offence of identity fraud if it had been committed in Canada and the RPD found accordingly.

[39] On the other hand, the applicant did contest the allegation that her conduct was legally equivalent to the Canadian offence of uttering a forged passport. She argued that section 57(1) of the *Criminal Code* applies only to Canadian passports and the refugee travel documents were not Canadian passports. She also argued that in any event the travel documents were validly issued by the competent authority in the United States. They were not physically altered or otherwise forged. The RPD member rejected these arguments, finding that section 57(1) of the *Criminal Code* applies to any passport, not only Canadian ones, and that the "issue is not whether the claimant forged a passport but that she knowingly used a forged passport." The

RPD member therefore concluded that the applicant's conduct would also constitute the offence of uttering a forged passport if it had been committed in Canada.

[40] The parties framed their written submissions to the RPD member in terms of the factors from *Jayasekara* set out above, as modified by *Febles*. The member in turn organized her reasons around these factors.

[41] With respect to the penalty prescribed, the RPD member noted that since the applicant had not been prosecuted for the impugned conduct, this information was not available. The member did note, however, that under Canadian law uttering a forged passport carries a maximum sentence of fourteen years' imprisonment and identity fraud carries a maximum sentence of 10 years' imprisonment (if prosecuted by indictment). The member recognized that the length of the maximum sentence under Canadian law alone was not determinative of the seriousness of the criminal conduct.

[42] With respect to the mode of prosecution, the RPD member again noted that since the applicant had not been prosecuted for either offence, this information was not available. That being said, the member specifically rejected the applicant's argument that the fact that under Canadian law identity fraud is a hybrid offence prosecutable either by indictment or by summary conviction was a relevant consideration, stating that this "does not put this particular case of identity fraud out of the range of seriousness."

[43] Turning to the "elements of the crimes," the RPD member does not examine the constituent legal elements of the offences. Instead, she identifies the specific conduct she relates to each of the offences in issue. Thus, with respect to uttering a forged passport, she notes that the applicant admitted to having used one false travel document to enter the United States in 2003 and another one for her return trip to Kosovo in 2009. With respect to identity fraud, the member finds that the applicant used the refugee travel document in Albulena's name when she was arrested for shoplifting and when she applied twice for permanent residence in the United States. (While nothing turns on this, in fact it was the travel document in Sanije's name that the applicant presented when she was arrested for shoplifting in 2005. The travel document in Albulena's name was not issued until 2009.) This may not have been exactly what the Federal Court of Appeal meant by "the elements of the crime" in *Jayasekara* but these findings do demonstrate how the member mapped the Canadian offences onto the impugned conduct.

[44] The RPD member was not persuaded by the applicant's submission that the decision by US authorities not to charge and prosecute her in April 2012 "reduce[d] the seriousness of the crimes." She concluded that the officials had simply exercised their discretion and adopted the most expedient solution in the circumstances, especially considering that the applicant had her son with her at the time.

[45] The RPD member did not find any mitigating circumstances to be present.

[46] On the other hand, the RPD member expressly found the following to be aggravating factors:

- The applicant had not taken responsibility for her actions.
- The applicant minimized the seriousness of her misconduct.
- The applicant did not provide a credible explanation for why she did not make arrangements to travel legally to the United States in 2003.
- The applicant decided to use another fraudulently obtained refugee travel document in 2009 rather than be sponsored by her husband, who was by that time a US citizen.
- The applicant misused the refugee travel documents on more than one occasion.
- Sanije's and Albulena's interests could have been adversely affected by the applicant's actions.
- The applicant knew that she was breaking the law.

[47] The RPD member did not venture an opinion as to the range of sentence the applicant might have received had she been prosecuted for these offences in Canada. Instead, in a more qualitative way having regard to the considerations set out above, the member simply concluded that the applicant's conduct constituted a serious crime within the meaning of Article 1F(b) of the *Refugee Convention* and, as a result, she was excluded from refugee protection under section 98 of the *IRPA*.

(3) The Standard of Review

[48] The parties framed their submissions on this application for judicial review in accordance with jurisprudence that had established a hybrid standard of review in a case such as this –

correctness for the interpretation of Article 1F(b) of the *Refugee Convention* and reasonableness for its application to a specific set of circumstances: see *Hernandez Febles v Canada (Citizenship and Immigration)*, 2012 FCA 324 at para 24 (affirmed by the Supreme Court of Canada without specific reference to this point); *Cho v Canada (Citizenship and Immigration)*, 2013 FC 45 at para 7; and *Guerra Diaz v Canada (Citizenship and Immigration)*, 2013 FC 88 at paras 18-21. This approach may need to be reconsidered in light of the Supreme Court of Canada's revised framework for determining the standard of review with respect to the merits of an administrative decision in *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 10 [*Vavilov*]. However, it is unnecessary to resolve this issue here. Assuming for the sake of argument that the RPD member's interpretation of Article 1F(b) is correct, as I will explain below, her application of this provision to the particular circumstances of this case is unreasonable.

[49] The majority in *Vavilov* also sought to clarify the proper application of the reasonableness standard (at para 143). The principles the majority emphasizes were drawn in large measure from prior jurisprudence, particularly *Dunsmuir v New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9 [*Dunsmuir*]. Although the present application was argued prior to the release of *Vavilov*, the footing upon which the parties advanced their respective positions concerning the reasonableness of the RPD's decision is consistent with the *Vavilov* framework. I have applied that framework in coming to the conclusion that the decision of the RPD is unreasonable; however, the result would have been the same under the *Dunsmuir* framework.

[50] Reasonableness review "aims to give effect to the legislature's intent to leave certain decisions with an administrative body while fulfilling the constitutional role of judicial review to ensure that exercises of state power are subject to the rule of law" (*Vavilov* at para 82). The exercise of public power "must be justified, intelligible and transparent, not in the abstract but to the individuals subject to it" (*Vavilov* at para 95). For this reason, an administrative decision maker has a responsibility "to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion" (*Vavilov* at para 96). Accordingly, on judicial review the court focuses on "the decision actually made by the decision maker, including both the decision maker's reasoning and the outcome" (*Vavilov* at para 83). A reviewing court "must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable" (*Vavilov* at para 99).

[51] 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). Where the decision maker has provided reasons, the reviewing court must begin its inquiry into the reasonableness of the decision "by examining the reasons provided with respectful attention and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion" (*Vavilov* at para 84, internal quotation marks deleted). The reasons must be read in light of the record as a whole and with due sensitivity to the administrative setting in which they were given (*Vavilov* at paras 91-94). Unless the decision is unreasonable, the reviewing court must defer to the administrative decision maker's determination.

[52] A court applying the reasonableness standard "does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the 'range' of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the 'correct' solution to the problem" (*Vavilov* at para 83). Absent exceptional circumstances, the reviewing court will not interfere with the administrative decision maker's factual findings (*Vavilov* at para 125).

[53] An assessment of the reasonableness of a decision must be sensitive and respectful yet robust (*Vavilov* at paras 12-13). Here, the onus is on the applicant to demonstrate that the RPD's decision is unreasonable. Before the decision can be set aside on this basis, I 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).

(4) Is the RPD's Decision Unreasonable?

[54] The RPD member concluded that the applicant's conduct was equivalent to the Canadian offences of uttering a forged passport and identity fraud. She also concluded that this criminal conduct was sufficiently serious to exclude the applicant from refugee protection. In my view, the RPD's decision is unreasonable.

(a) *Uttering a forged passport*

[55] The applicant submitted to the RPD member that the offence of uttering a forged passport under section 57(1) of the *Criminal Code* could not apply to her use of the refugee travel documents because that offence applied only to Canadian passports. In support of this submission, the applicant pointed to section 57(5) of the *Criminal Code*, which states the following:

Definition of passport	**Définition de passeport**
(5) In this section, passport has the same meaning as in section 2 of the *Canadian Passport Order*.	(5) Au présent article, passeport s'entend au sens de l'article 2 du *Décret sur les passeports canadiens*.

[56] Section 2 of the *Canadian Passport Order*, SI/81-86, states the following:

passport means an official Canadian document that shows the identity and nationality of a person for the purpose of facilitating travel by that person outside Canada;	***passeport*** désigne un document officiel canadien qui établit l'identité et la nationalité d'une personne afin de faciliter les déplacements de cette personne hors du Canada;

[57] The applicant argued that since the refugee travel documents were not official Canadian documents, section 57(1) of the *Criminal Code* could not apply to her use of them. The RPD member rejected this argument on statutory interpretation grounds, reasoning as follows: "Section 57(5) of the *Criminal Code* specifically indicates that in "**this section**" [emphasis added [by the member]], that is section 57(5), the meaning of passport indicates a Canadian passport. Such a specification regarding the definition of passport is not found in section 57(1)." The

member therefore concluded that section 57(1) "refers to any passport" and not only to Canadian passports.

[58] With respect, this interpretation of section 57(5) of the *Criminal Code* is completely untenable. To read this provision as referring only to itself is to render it pointless and meaningless, contrary to basic principles of statutory interpretation (cf Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis, 2014) at p 211). Standing on its own, the provision does nothing. The only purpose it has is to define the term "passport" as it appears elsewhere in section 57. That is why the provision states "In this section . . . ." Reading section 57(1) in the context of section 57 as a whole, by definition, an offence under that provision can only be committed in relation to a Canadian passport.

[59] That being said, the nationality of a passport is a red herring when it comes to determining whether conduct that occurred elsewhere would be captured by section 57(1) of the *Criminal Code* if it had occurred here. The issue is not whether the applicant actually committed an offence under section 57(1) but whether, if her conduct had occurred in Canada, it would constitute an offence under that provision. Obviously, for this test to work, some adjustments to the actual facts must be made when constructing this hypothetical scenario, as long as the gravamen of the misconduct is preserved. For purposes of determining equivalency under Canadian law, what matters is whether the document in question was a forged passport, not its nationality.

[60] The RPD member concluded that the refugee travel documents were forged passports. In my view, this conclusion is unreasonable for two reasons. First, it is patently obvious that they are not passports. Indeed, they state on their face: "This is NOT a United States Passport." This is not surprising. Passports are issued only to citizens of the issuing country (cf. sections 4(1) and (2) of the *Canadian Passport Order*). They serve as proof of citizenship in the issuing country. Holders of refugee travel documents are not citizens of the issuing country. Refugee travel documents are not passports in any sense of the word.

[61] Second, in any event, there is no evidence that the refugee travel documents were forged. "Forgery" has a specific meaning in Canadian law. It is to make a false document for certain prohibited purposes (see section 366(1) of the *Criminal Code*). To make a false document includes making material changes to a genuine document (see section 366(2) of the *Criminal Code*). Although the applicant obtained the refugee travel documents fraudulently, they were genuine documents and they had not been altered in any way. The applicant put this point to the RPD member in her submissions. The member's response – "The issue is not whether the claimant forged a passport but that she knowingly used a forged passport" – simply begs the question. In the absence of any evidence that the documents were not genuine or, if genuine, had been altered in a material way, it is unreasonable for the RPD member to have concluded that they were forged. If the documents were not forged, using them cannot constitute the specific offence of uttering a forged document, whether they are passports or not.

[62] Given the rights and privileges associated with holding a passport, it is not surprising that Canada treats the forgery of a passport or uttering a forged passport as a distinct offence carrying

a significant maximum punishment. As such, it would generally be considered a serious crime for purposes of Article 1F(b) of the *Refugee Convention*. This is not to suggest that it would not be open to a decision maker, in the circumstances of a given case, to find that the misuse of a refugee travel document, as opposed to a passport, is also a serious crime. The point is simply that these are two different questions. The RPD member answered the wrong one.

[63] For these reasons, the determination that the applicant's conduct was equivalent to the Canadian criminal offence of uttering a forged passport is unreasonable.

[64] Given this conclusion, it is not necessary to address the member's assessment of the significance of the decision by US authorities in April 2012 not to prosecute the applicant for her misuse of the refugee travel documents.

(b) *Identity fraud*

[65] The respondent contends that even if there were reviewable errors in the RPD member's decision concerning the offence of uttering a forged passport (which was not conceded), the decision with respect to the offence of identity fraud is reasonable and this is sufficient to uphold the result.

[66] For two main reasons, I cannot agree.

[67] First, the member's ultimate determination rests on her findings in relation to both offences. The analysis of the offence of uttering a forged passport cannot simply be disregarded.

It carries significant weight in the member's overall analysis. Uttering a forged passport is a straight indictable offence. The maximum sentence for this offence – fourteen years' imprisonment – is greater than that for identity fraud prosecuted by indictment (and significantly greater than the maximum sentence for identity fraud prosecuted by way of summary conviction). This is an important indication that uttering a forged passport is inherently more serious than identify fraud. Further, several of the member's findings in relation to aggravating factors were made specifically with respect to the conduct she found to constitute uttering a forged passport (i.e. travelling to and from the United States).

[68] I recognize that it may be possible to treat the conduct found to constitute instances of uttering a forged passport as instances of identity fraud instead. However, the member did not do this. It is not my role "to supply the reasons that might have been given and make findings of fact that were not made" (*Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431 at para 11, quoted with approval in *Vavilov* at para 97). As the Supreme Court of Canada held in *Vavilov*, where the reasons given by an administrative decision maker "contain a fundamental gap or reveal that the decision is based on an unreasonable chain of analysis, it is not ordinarily appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision" (at para 96). As the majority went on to explain (at para 96):

> Even if the outcome of the decision could be reasonable under different circumstances, it is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome: *Delta Air Lines*, at paras. 26-28. To allow a reviewing court to do so would be to allow an administrative decision maker to abdicate its responsibility to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion. This would also amount to adopting an approach to reasonableness

> review focused solely on the outcome of a decision, to the exclusion of the rationale for that decision.

[69] Second, even assuming for the sake of argument that it would be appropriate to reconstruct the member's reasons, either by limiting them solely to the offence of identity fraud or by viewing all the impugned conduct as instances of identity fraud, the decision would still be unreasonable. The member's findings with respect to the aggravating factors she relied on to increase the seriousness of the offences are replete with errors. For example, treating the absence of remorse and the failure to accept responsibility as aggravating factors (as opposed to the absence of mitigating factors) is a fundamental error in principle (see, for example, *R v Gavin*, 2009 QCCA 1 at paras 24-29; *R v Alasti*, 2011 BCCA 824 at para 18; *R v Hawkins*, 2011 NSCA 7 at para 34; and *R v JCS*, 2017 BCCA 87 at paras 85-91). Finding that the applicant lacked sufficient insight into the seriousness of her conduct and then treating this as an aggravating factor which increased the seriousness of her conduct is circular reasoning. At least some of the aggravating factors identified by the member are actually elements of the offences (e.g. using the fraudulently obtained refugee travel documents rather than travelling legally) and cannot be aggravating factors in and of themselves (cf. *R v Araya*, 2015 ONCA 854 at paras 24-26). Another aggravating factor identified by the member – that the applicant knew she was breaking the law – finds no support in the jurisprudence and sits uncomfortably with the principle that everyone is presumed to know the law. Finally, the decision is completely silent about what is arguably one of the most important mitigating factors in this case – the applicant's voluntary admission of her wrongdoing to the USCBP officers on April 2, 2012, upon which the Minister's entire case depended. In short, the decision exhibits failures of rationality internal to

the reasoning process and is untenable in light of the relevant factual and legal constraints that bear on it (*Vavilov* at para 101).

[70] Given these serious flaws in the RPD member's reasoning, the determination that the conduct amounting to identity fraud was sufficiently serious to exclude the applicant from refugee protection cannot stand either.

IV. CONCLUSION

[71] For these reasons, I find that the RPD's decision dated November 29, 2018, is unreasonable and must be set aside.

[72] The parties did not suggest any serious questions of general importance for certification under section 74(d) of the *IRPA*. I agree that none arise.

JUDGMENT IN IMM-6559-18

THIS COURT'S JUDGMENT is that

1. The style of cause is amended to correct the misspelling of the name by which the applicant is also known.
2. The application for judicial review is allowed.
3. The decision of the Refugee Protection Division dated November 29, 2018, is set aside and the matter is remitted for redetermination by a different decision maker.
4. No question of general importance is stated.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6559-18
STYLE OF CAUSE:	SEVDIJE HASANI (AKA ALBULENA DALIPI) v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	AUGUST 28, 2019
JUDGMENT AND REASONS:	NORRIS J.
DATED:	JANUARY 24, 2020

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