Federal Court  Cour fédérale

Date: 20200423

Docket: IMM-2448-19

Citation: 2020 FC 548

Ottawa, Ontario, April 23, 2020

PRESENT: Mr. Justice Norris

BETWEEN:

SILVESTER MARINAJ

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] The applicant is a citizen of Albania. After arriving in Canada in December 2016 at the age of twenty, he made a claim for refugee protection on the basis of a fear of political persecution in Albania. After a hearing, the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada [IRB] rejected the claim in December 2017. The applicant appealed this decision to the Refugee Appeal Division [RAD] of the IRB. For reasons

dated March 20, 2019, the RAD confirmed the decision of the RPD that the applicant is neither a Convention refugee nor a person in need of protection.

[2] The applicant now applies for judicial review of the RAD's decision under section 74(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. He contends that the RAD's determinations with respect to the credibility of his claim and his failure to rebut the presumption of state protection are unreasonable.

[3] I agree with the applicant that the RAD's determination with respect to state protection is unreasonable. However, I do not agree that the RAD's determination with respect to the credibility of the applicant's claim is unreasonable. This is sufficient to uphold the RAD's decision, despite the fact that the RAD member characterized state protection as the "determinative" issue. As a result, this application must be dismissed.

II. BACKGROUND

[4] The applicant was born in Malësi e Madhe, Albania, in December 1996. He graduated from high school in July 2015.

[5] In January 2015, the applicant, who had just turned eighteen, began working on the electoral campaign of his cousin, Tonin Marinaj. Tonin was a Socialist Party of Albania candidate for mayor in Malësi e Madhe. The applicant claims that he was a "key part" of Tonin's campaign because he was able to rally the youth vote on behalf of his cousin. The applicant provided photographs of campaign events at which he was present but did not provide any evidence of prior political activities or engagement.

[6] The applicant claims that on February 1, 2015, he started receiving threats from members of the incumbent Democratic Party of Albania. They warned him to stay out of politics and campaigning, otherwise they would teach him a lesson by killing him and his family. He continued to receive messages ("eight to ten per month") warning him to stop campaigning or he and his family would be killed. The applicant did not take the threats seriously and continued to campaign for Tonin.

[7] The applicant claims that on March 13, 2015, he was nearly run over with a car and then seriously assaulted by two men, one of whom threatened him with a gun. The applicant was left unconscious after being beaten. The applicant recognized the men as members of the Democratic Party. (When asked at his examination by a Canada Border Services Agency officer whether he had ever been physically attacked, the applicant only mentioned that once members of the Democratic Party had tried to run him over with a car but he ran into a ditch on the side of the road. He did not mention the beating.)

[8] The applicant states in his Basis of Claim [BOC] narrative that he did not report the March 13, 2015, assault to the police because Albanian police are corrupt and they could have links to the Democratic Party. In his affidavit in support of his appeal to the RAD, he also mentions that the police "often refuse to assist in political crimes."

[9] Following this incident, the applicant reduced the scope of his work for Tonin's campaign. He tried to avoid going outside alone. He did not tell Tonin what had happened at the time because he was fearful that the Democratic Party would find out he had complained and would retaliate.

[10] Tonin was elected mayor on June 23, 2015.

[11] According to the applicant, he continued to receive threats even after the election was over.

[12] On December 4, 2015, the applicant finally told Tonin what had happened to him. Tonin told him he should go to the police. The applicant still did not want to do this because he did not want to escalate the situation. Nevertheless, Tonin spoke to some individuals from the Democratic Party. They told him that the applicant should mind his own business and avoid getting involved in party politics or he would face the consequences.

[13] According to the applicant, although he was now mayor, Tonin could not protect him because he (Tonin) was afraid that if he made the issue any bigger, it would exacerbate the problem and potentially lead to a greater conflict. On the other hand, Tonin stated in a letter provided in support of the applicant's refugee claim that he had "consistently offered protection" but the applicant had refused this offer because he (the applicant) did not want to aggravate the situation any further for Tonin.

[14] Tonin did not report any threats or violence directed against him or against any other campaign workers besides the applicant.

[15] According to the applicant, in March 2016, Tonin was "implicitly told by the Democratic Party of Albania" that the applicant would be killed because he got involved in the political campaign against them.

[16] The applicant states that he was “mostly” hiding in his home between September 2015 and December 2016.

[17] One exception to this was a trip he took to Italy in July and August 2016 for a holiday. The applicant stayed with his grandparents “for safety.” At one point he asked to stay with his uncle (who also lived in Italy) but he refused, apparently out of fear because of the danger the applicant was in.

[18] The applicant states that he did not claim refugee status in Italy because someone told him Italy did not accept Albanian refugees. He also states that he was fearful in Italy because it has a large Albanian population, there could be individuals there who had ties to the Democratic Party, and Italy is too close geographically to Albania.

[19] While the applicant was in Italy, he encountered a “local guy” who offered to help him obtain a fraudulent Italian passport. The applicant purchased a fraudulent passport with money from his family. He had a valid Albanian passport which he had used to travel within Europe. The applicant does not explain why he required an Italian passport, although at some point he had resolved to try to seek refugee protection in Canada, where he has family.

[20] After paying for the Italian passport, the applicant did not have enough money to buy a ticket to Canada so he returned to Albania to try to raise the money he needed. He had been in Italy for about two months.

[21] In November 2016, the applicant heard from friends that they had been told by the Democratic Party that he better not still be involved with the Socialist Party and, if he was, he should stop or he would be killed.

[22] The applicant was eventually able to purchase airline tickets with money from his parents and his two brothers.

[23] Using the fraudulent Italian passport, the applicant departed Albania for Canada on December 8, 2016. He travelled via Italy, Spain and Mexico. The applicant claimed refugee protection upon arrival in Canada on December 16, 2016.

[24] The RPD rejected the applicant's claim on December 4, 2017.

[25] The RPD member found that the applicant's claim was not credible for three main reasons:

(a) The applicant's failure to give a reasonable explanation for not seeking refugee protection at the first reasonable opportunity (i.e. in Italy), for returning to Albania in August 2016, and for the delay in leaving Albania again undermined the credibility of his allegations and the credibility of his claim to be fearful of returning to Albania now.

(b) The applicant failed to rebut the presumption that state protection would be available to him in Albania if he returned.

(c) The applicant's narrative of events "was not credible and was not supported by the national documentation evidence about the political climate in Albania." Further, the applicant "did not fit the profile of a person at risk of political violence."

[26] The RPD member concluded that, despite the presumption that a refugee claimant is being truthful, there was "ample reason . . . to find that this claim is not credible." Consequently, the member found, on a balance of probabilities, that the alleged violence against the applicant "did not likely occur" and that "there is not likely a threat facing [the applicant] in Albania." Accordingly, the member concluded that the applicant did not have a well-founded fear of persecution in Albania and that he "does not face a risk of harm, nor a risk of cruel or unusual punishment, nor torture." The applicant was therefore neither a Convention refugee nor a person in need of protection.

III. DECISION UNDER REVIEW

[27] The applicant appealed this decision to the RAD. He contested many if not all the RPD's adverse factual determinations. He also sought the admission of another statement from his cousin Tonin and articles concerning the political situation in Albania as new evidence.

[28] The RAD member refused to admit the new evidence because it did not meet the requirements of section 110(4) of the *IRPA*. The applicant does not challenge this determination on judicial review so there is no need to consider it further.

[29] The RAD did not accept the applicant's challenges to the RPD's factual determinations. The RAD agreed with the RPD that the applicant's failure to seek protection in Italy or elsewhere in Europe, his return to Albania, and the delay in leaving again all raised concerns regarding the credibility of the applicant's allegation of persecution. In addition, the RAD agreed with the RPD that other factors also undermined the credibility of the allegation, including the vagueness of his testimony, his very limited period of involvement with his cousin's mayoral campaign before the death threats began, and objective documentary evidence on the political situation in Albania suggesting that the applicant's experiences were inconsistent with the prevailing conditions.

[30] The applicant argued that the RPD had erred in its assessment of the risk that he would be caught up in a blood feud. The RAD was not persuaded and agreed with the RPD's findings. The RAD added that the applicant had "failed to provide sufficient trustworthy and credible evidence of a personalized risk of a blood feud."

[31] In the RAD's view, the "determinative" issue was the availability of state protection in Albania. The RAD rejected the applicant's argument that the RPD had failed to turn its mind to relevant information in the National Documentation Package. The RAD concluded that the RPD was correct to give greater weight to the objective country documents as compared to the applicant's "vague and speculative response that the authorities would not assist him because of general corruption." The RAD noted that a refugee claimant from a democratic country "has a heavy burden when attempting to show that they should not have been required to exhaust all the recourses available domestically before claiming refugee status." Further, the police "cannot be

faulted for not offering protection when crimes are not reported to them" (original emphasis). According to the RAD member, refugee protection is only available "in those situations where the refugee claimant has unsuccessfully sought the protections of his home state" and refugee claimants "must give the authorities sufficient opportunity to respond to the request for assistance." Since the applicant had made no effort to seek protection in Albania, he failed to rebut the presumption that it would be available to him there. This was "determinative" of his claim.

[32] In sum, on the basis of the RPD's findings and the RAD's own assessment of all the evidence in the record, the RAD agreed with the RPD that the applicant "failed to credibly establish his claim *and* also failed to rebut the presumption of state protection" (original emphasis). Accordingly, the RAD confirmed the decision of the RPD and dismissed the appeal.

IV. STANDARD OF REVIEW

[33] It is well-established that the substance of the RAD's decision is reviewed on a reasonableness standard (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35).

[34] Shortly after the hearing of this application, the Supreme Court of Canada set out a revised approach 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. Reasonableness is now the presumptive standard, subject to specific exceptions "only where required by a clear indication of legislative intent or by the rule of law" (*Vavilov* at para 10). In

my view, there is no basis for derogating from the presumption that reasonableness is the applicable standard of review here.

[35] The majority in *Vavilov* also sought to clarify the proper application of the reasonableness standard (at para 143). The principles the majority emphasized were drawn in large measure from prior jurisprudence, particularly *Dunsmuir v New Brunswick*, 2008 SCC 9. Although, as already noted, 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 RAD's decision is consistent with the *Vavilov* framework. I have applied that framework in coming to the conclusion that the RAD's decision is reasonable; however, the result would have been the same under the *Dunsmuir* framework.

[36] An assessment of the reasonableness of a decision must be sensitive and respectful yet robust (*Vavilov* at paras 12-13). Reasonableness review focuses on "the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome" (*Vavilov* at para 83). 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). On review, "close attention" must be paid to a decision maker's written reasons and they "must be read holistically and contextually, for the very purpose of understanding the basis on which a decision was made" (*Vavilov* at para 97).

[37] The burden is on the applicant to demonstrate that the RAD's decision is unreasonable. He must establish 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) or that the decision is "untenable in light of the relevant factual and legal constraints that bear on it" (*Vavilov* at para 101).

V. ANALYSIS

A. *The Role of the RAD*

[38] Before addressing the merits of this application, it may be helpful to review the role of the RAD briefly.

[39] Section 110(1) of the *IRPA* provides that a person or the Minister "may appeal, in accordance with the rules of the Board, on a question of law, of fact or of mixed fact and law, to the Refugee Appeal Division against a decision of the Refugee Protection Division to allow or reject the person's claim for refugee protection." Section 110(2) states that there is no appeal to the RAD in certain classes of cases; however, where there is a right of appeal to the RAD, no other limitations are placed on the grounds of appeal that may be advanced.

[40] An appeal to the RAD is not a true *de novo* proceeding (*Huruglica* at para 79). It is, as the name suggests, an appeal of the RPD's decision. That decision is the initial point of reference for the appellant and for the RAD.

[41] Rule 3(3)(g) of the *Refugee Appeal Division Rules*, SOR/2012-257, specifically requires an appellant to provide a memorandum that includes "full and detailed submissions" regarding,

inter alia, "the errors that are the grounds of the appeal." The RAD is not required to consider potential errors that an appellant did not raise: see *Dhillon v Canada (Citizenship and Immigration)*, 2015 FC 321 at paras 18-20; *Ilias v Canada (Citizenship and Immigration)*, 2018 FC 661 at para 39; *Broni v Canada (Citizenship and Immigration)*, 2019 FC 365 at para 15; *Canada (Citizenship and Immigration) v Chamanpreet Kaur Kaler*, 2019 FC 883 at paras 11-13; and *Castro Lopez v Canada (Citizenship and Immigration)*, 2020 FC 197 at para 46.

[42] After "carefully considering" the RPD's decision, the RAD should carry out "its own analysis of the record to determine whether, as submitted by the appellant, the RPD erred" (*Huruglica* at para 103).

[43] Section 110(3) of the *IRPA* provides that generally an appeal to the RAD "must proceed without a hearing, on the basis of the record of the proceedings of the Refugee Protection Division." Section 110(4), which governs the admission of new evidence from the person who is the subject of the appeal, creates an exception to this general rule. (The Minister is not subject to the same restrictions – see section 110(5).) So, too, does section 110(6), which permits the RAD to hold a hearing provided certain preconditions are met. As the Federal Court of Appeal explained in *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96, placing restrictions on the admissibility of new evidence on appeal helps to preserve the integrity of the process by promoting finality with respect to the factual record at the first level of decision-making (with limited exceptions) and encourages the narrowing of issues as matters move up the appellate ladder (at paras 43 and 50).

[44] The RAD was part of Bill C-11, the bill that ultimately became the *IRPA* (although it was not until several years later that the RAD became operational). As the Federal Court of Appeal has noted, the Minister responsible for Bill C-11 stated that "[t]he whole purpose [of the RAD] is to ensure that the correct decision is made" (*Huruglica* at para 87; *Kreishan v Canada (Citizenship and Immigration)*, 2019 FCA 223 at para 41). The RAD has "robust powers of error-correction consistent with its statutory purpose" (*Kreishan* at para 42). Its mandate is to intervene when the RPD is wrong in law, in fact, or in fact and law (*Huruglica* at para 78). An appeal to the RAD can thus lead to a different outcome on the merits of the refugee claim (*Kreishan* at paras 45 and 68).

[45] The RAD reviews the RPD's decisions for correctness (*Huruglica* at para 78; *Kreishan* at para 44). Under this standard, no deference is shown to the original decision maker; the reviewing body conducts its own analysis of the question (*Dunsmuir* at paras 34 and 50). The reviewing body must determine whether it agrees with the answer given by the decision maker; if not, it will substitute its own view and provide the correct answer (*Dunsmuir* at para 50). That is to say, a tribunal applying the correctness standard "is ultimately empowered to come to its own conclusions on the question" (*Vavilov* at para 54). For the RAD, this can entail reweighing the evidence that was before the RPD, either in and of itself or in light of new evidence admitted on the appeal. The RAD is not required to defer to the RPD's findings, including factual ones (*Huruglica* at paras 59-60).

[46] There may, however, be cases where "the RPD enjoys a meaningful advantage over the RAD in making findings of fact or mixed fact and law, because they require an assessment of the

credibility or weight to be given to the oral evidence it hears" (*Huruglica* at para 70). In such cases, the RAD "should sometimes exercise a degree of restraint" before substituting its determination for that of the RPD (*ibid.*). Whether the circumstances warrant such restraint must be determined on a case-by-case basis. In each case, "the RAD ought to determine whether the RPD truly benefited from an advantageous position, and if so, whether the RAD can nevertheless make a final decision in respect of the refugee claim" (*ibid*.).

[47] This is not a matter of applying a different standard of review; rather, it is simply a matter of bearing in mind that the RPD may have had access to more information than the RAD and, as a result, may be in a better position to make the most accurate determination. As noted above, a hallmark of review for correctness (as opposed to reasonableness) is that the reviewing tribunal must ask whether it agrees with the original decision maker's determination. This requires asking what decision it would have made in place of the original decision maker (*Dunsmuir* at para 50; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61-62). In determining whether or not to agree with the RPD, the RAD should consider whether any additional information the RPD had access to by virtue of having received oral evidence first-hand would allow it to make a better determination than the RAD could given the information available to it. In this respect, the RAD should be cautious or, in the words of *Huruglica*, "exercise a degree of restraint" (at para 70), before it decides to substitute its determination for that of the RPD. Nevertheless, under the correctness standard, it would never be appropriate for the RAD to uphold a determination by the RPD that it did not agree with.

[48] Similarly, applying the correctness standard, the RAD should take the RPD's reasoning into account; indeed, it may find that reasoning persuasive and adopt it (cf. *Vavilov* at para 54). This does not change the fact that the RAD must come to its own conclusion on the question.

[49] Section 111(1) of the *IRPA* states that after considering the appeal, the RAD "shall make one of the following decisions:

> (a) confirm the determination of the Refugee Protection Division;
>
> (b) set aside the determination and substitute a determination that, in its opinion, should have been made; or
>
> (c) refer the matter to the Refugee Protection Division for re-determination, giving the directions to the Refugee Protection Division that it considers appropriate."

[50] Thus, "the RAD is to provide a final determination, either by confirming the RPD decision or setting it aside and substituting its own determination of the merits of the refugee claim" (*Huruglica* at para 103). "It is only when the RAD is of the opinion that it cannot provide such a final determination without hearing the oral evidence presented to the RPD that the matter can be referred back to the RPD for redetermination" (*ibid.*; see also *IRPA* section 111(2)). Even if it finds an error, the RAD can still confirm the determination of the RPD on another basis (*Huruglica* at para 78), although this power must be exercised in accordance with the principles of natural justice and procedural fairness (*Xu v Canada (Citizenship and Immigration)*, 2019 FC 639 at para 33 and cases cited therein).

B. *The Member's Understanding of the Role of the RAD*

[51] Under the heading "Role of the RAD", the member begins by citing *Huruglica* and the correctness standard. After noting that the RPD may have a meaningful advantage over the RAD in assessing the credibility of oral evidence because it elicited that evidence (at least in part) and heard it first-hand, the member goes on to state that "significant deference" is due to the findings of the RPD and that the RAD's role is "a very limited one because the tribunal had the advantage of hearing the witnesses testify, observed their demeanor and is alive to all the factual nuances and contradictions in the evidence." The member takes these latter propositions from *Hadi v Canada (Citizenship and Immigration)*, 2018 FC 590 at para 12. That case, however, concerned the role of the Federal Court on judicial review of a decision of the RPD, not the role of the RAD. The member's reliance on it is entirely misplaced (cf. *Huruglica* at para 37, where the Federal Court of Appeal observes that "the role of the RAD is not to review RPD decisions in the manner of a judicial review").

[52] The member then goes on to note that "an appeal to the RAD is not a *de novo* hearing, as the appellant has argued many of the same submissions already made to the RPD" (original emphasis). Later, the member adds that "the role of the RAD is not to reconsider the refugee claimant/appellant's submissions. The appellant is essentially asking the Board to reweigh the evidence in his favour. That is not the role of the RAD."

[53] It is true that in written submissions on the appeal, counsel for the applicant before the RAD (not Mr. Levinson) challenged most if not all of the RPD's adverse findings. It is also true,

however, that there can be a fine line between re-arguing a claim and attempting to demonstrate error on the part of the RPD. Challenging many – let alone all – of the RPD's findings is not necessarily the most effective advocacy but doing so is not inconsistent with the role of the RAD. Moreover, the member's blanket statement that it is not the role of the RAD to reweigh the evidence is inconsistent with the application of a correctness standard to the RPD's findings, as that has been explained in *Huruglica* and as discussed above.

[54] The foregoing could certainly give rise to the question of whether the member took an unreasonably narrow view of how the applicant's grounds of appeal should be assessed and of what it means to conduct an "independent review" of the evidence. However, it is not necessary to resolve this question here, essentially for two reasons. First, the applicant did not challenge this aspect of the member's decision directly in this application for judicial review. And second, it appears that the member assessed the RPD's findings on their merits; at no point are those findings upheld on the basis of deference to the RPD's more advantageous position as a fact-finder or because the RAD member refused to reweigh the evidence. Thus, I am prepared to accept at face value the member's statement that the evidence and the RPD's findings were independently reviewed and that the applicant's main arguments on appeal were assessed without deference to the RPD's determinations.

[55] The question on this application is whether, having conducted this review, the RAD member's determinations are unreasonable. I turn to this now.

C. *The RAD's Disposition of the Appeal*

[56] The RAD agreed with the RPD's conclusion that the applicant's claim was not credible as well as with its state protection analysis. As set out above, the RPD considered the applicant's failure to seek state protection in Albania in concluding that his claim was not credible. For reasons that will become apparent in my discussion of remedy, below, I will address the RAD's findings concerning the credibility of the claim apart from the issue of state protection before turning to the question of state protection as a separate issue.

(1) The Credibility of the Applicant's Claim

[57] On the basis of what is described as an "independent" review of the evidence, the RAD member agreed with the RPD's conclusion that the applicant's claim was not credible. The RAD member agreed that the applicant's failure to seek refugee protection in Italy while he was there, his return to Albania, and the delay before he left Albania again all raised questions about the credibility of the applicant's allegations of persecution. As did the RPD, the RAD member found that, considering the experiences he claimed had befallen him and the fears he claimed to have as a result, the applicant's failure to provide reasonable explanations for his behaviour raised doubts about whether the events said to have caused those fears ever occurred. The applicant has not persuaded me that it was unreasonable for the RAD member to so conclude.

[58] The applicant submits that it was unreasonable for the member to dismiss his relative youthfulness by mischaracterizing his argument on appeal as one concerning why he should not be "held accountable" for his actions. While I agree that the member's reference to

accountability is misplaced, it is clear from the reasons given that the reason the member did not find the applicant's young age to be a salient consideration in trying to understand his actions included the fact that he had had the wherewithal to obtain a fraudulent passport while he was in Italy. This is not unreasonable. Similarly, it is not unreasonable for the RAD member to agree with the RPD that, if the applicant was as fearful as he claimed to be, he would not have spent €3000 on a fraudulent passport but then have to go back to Albania to try to raise more money to travel to Canada when he could have saved this money and used his Albanian passport to go elsewhere in Europe if he did not want to remain in Italy.

[59] The applicant also submits that it is unreasonable for the RAD member to make an adverse credibility finding on the basis of the vagueness of the applicant's evidence without giving examples. I do not agree that the member's reasons suffer from this flaw. The member found that the RPD had "correctly considered a number of intersecting factors in assessing the credibility of the appellant and his allegations." Among these factors was "the appellant's vague testimony." The RPD gave a specific example: "The claimant testified that he was not the only one affected by violence during the campaign, but his testimony about this other violence was vague." Given that the RAD member was adopting the RPD's analysis as correct, it was unnecessary for the member to give any additional examples.

[60] Further, the applicant submits that the RAD member unreasonably adopted the RPD's view that his involvement in the campaign was too short-lived to make his allegations of persecution likely. The RPD had found that, "[f]rom a common sense view of the narrative, the claimant's two months of work on the campaign would hardly have been sufficient to make such

a lasting impact that he actually invoked death threats and a potential blood feud against him." The applicant contends that the RPD misapprehended the evidence because in fact he was involved in the campaign for six months (i.e. from January to June) and, thus, "the RAD should not have relied on the RPD's conclusion." I do not agree. The RPD's finding was specifically in relation to the alleged attack on March 13, 2015. By that point, the applicant had only been involved in the campaign for something over two months (we do not know how much because the applicant says only that he began campaigning in January 2015, not the exact date). The fact that he claimed to have continued to campaign until June is irrelevant to his targeting in March. If anything, the applicant's allegations are even more tenuous than the RPD or the RAD found given that he claimed the death threats began on February 1, 2015 – that is, at most a month after he began helping his cousin with his campaign.

[61] For the most part, the applicant urges me to find that the RAD member should have weighed the evidence – including country condition evidence – differently. My role is limited to determining whether the RAD's weighing of the evidence is unreasonable. On the issue of the credibility of his claim, the applicant has not demonstrated that this is the case.

(2) State Protection

[62] Apart from speaking to his cousin, the applicant did not attempt to obtain the protection of any state agent in Albania before claiming refugee protection in Canada. This admitted fact is potentially probative of two distinct issues. One is the question of fact of whether the applicant had established that the events which he claimed had given rise to his fear of persecution actually occurred. The other is the question of mixed fact and law of whether the applicant had rebutted

the presumption of state protection. The RPD member somewhat conflated these two questions but mainly focused on the former; the RAD member focused on the latter question.

[63] The RAD member's analysis in support of the conclusion that the applicant had failed to rebut the presumption of state protection rests on the premises that "refugee protection is meant to be a form of surrogate protection to be invoked only in those situations where the refugee claimant has unsuccessfully sought the protections of his home state" (emphasis added) and that refugee claimants "must give the authorities sufficient opportunity to respond to the request for assistance" (emphasis added). This is unreasonable as it is contrary to binding authority (cf. *Vavilov* at para 112). The determination concerning state protection is also unreasonable as the RAD member fails to provide any analysis of why the applicant's explanation for not seeking out state protection was rejected as unreasonable. This leaves the decision lacking justification, transparency, and intelligibility.

[64] It is the duty of all states to protect their nationals, including from persecution. Refugee protection is "surrogate or substitute protection" (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at 709, quoting James Hathaway, *The Law of Refugee Status* (1991)). International refugee law "was formulated to serve as a back-up to the protection one expects from the state of which an individual is a national. It was meant to come into play only in situations when that protection is unavailable, and then only in certain situations" (*Ward* at 709). Persecuted individuals, therefore, are "required to approach their home state for protection before the responsibility of other states becomes engaged" (*ibid.*).

[65] The RAD member quotes these passages from *Ward* but then appears to treat the applicant's failure to seek state protection as determinative of the issue of state protection. This is unreasonable. To the extent that refugee claimants are "required" to seek state protection, this is not a legal requirement such that anyone who fails to seek protection is, by definition, not a refugee. Rather, this "requirement" goes to whether a refugee claimant has met his or her onus of rebutting the presumption of state protection (*Lakatos v Canada (Immigration and Citizenship)*, 2018 FC 367 at para 20; *Orsos v Canada (Citizenship and Immigration)*, 2015 FC 248 at para 18). Even so, a claimant's failure to approach his or her home state for protection will defeat the claim only if it was objectively unreasonable for the claimant not to have sought such protection (*Ward* at 724). This is because "it would seem to defeat the purpose of international protection if a claimant would be required to risk his or her life seeking ineffective protection of a state, merely to demonstrate that ineffectiveness" (*ibid.*). The member does not note this important qualification in *Ward*. Contrary to what the RAD member states, unsuccessfully seeking the protection of one's country of nationality is not a precondition for refugee protection.

[66] The RAD member cites the decision of Justice Dawson (as she then was) in *Montemayor Romero v Canada (Citizenship and Immigration)*, 2008 FC 977, as authority for the proposition that refugee claimants "must give the authorities sufficient opportunity to respond to the request for assistance." Unsurprisingly, Justice Dawson did not say anything so broad. *Montemayor Romero* concerned a refugee claimant who, unlike the present case, had engaged the protection of the state. The state had brought legal proceedings against the agent of persecution but the claimant departed the country while those proceedings were still ongoing. Relying on *Carillo v*

Canada (Minister of Citizenship and Immigration), 2008 FCA 94, Justice Dawson noted that where an initial effort to seek state protection was unsuccessful, a claimant was obliged to make "determined efforts to seek protection" and an "additional effort" may well be required (at para 25). But as Justice Dawson also noted: "This is not to say that in every case repeated or determined efforts must be made to access state protection. Such a result would be contrary to the teaching of the Supreme Court of Canada in *Canada (Attorney General) v. Ward*, [citation omitted] that a refugee claimant is only obliged to seek protection where such protection might be reasonably forthcoming" (*ibid.*). The member's reliance on *Montemayor Romero* is both incomplete and misplaced.

[67] Further, even if the RAD member did not find against the applicant on the issue of state protection simply because he failed to seek protection in Albania, the member was still required to determine that it was not objectively unreasonable for the applicant to seek protection from Albania before concluding that he had not rebutted the presumption of state protection. While noting that the applicant bore a heavy burden in this respect given current political conditions in Albania, the RAD member resolved the issue by simply adopting the RPD's findings without further analysis. The difficulty with this is that, as noted above, the RPD's assessment of this issue was focused on the factual question of the credibility of the applicant's claim as opposed to the question of mixed fact and law of whether the applicant had rebutted the presumption of state protection. The lack of any further analysis by the RAD supporting its conclusion with respect to the latter question – which it considered to be determinative of the appeal – leaves this aspect of the decision lacking in justification, transparency, and intelligibility.

D. *Remedy*

[68] The respondent submits that even if the RAD's determination with respect to state protection is unreasonable (which is not conceded), this is immaterial in this case because it is really only an alternative basis for confirming the RPD's decision to reject the claims. The RAD upheld the RPD's conclusion that the applicant's narrative was not credible and this alone was sufficient to dispose of the appeal. If the applicant has not demonstrated that the RAD's determination regarding the lack of credibility of his narrative is unreasonable, then there is no basis to set aside the decision.

[69] I agree with the respondent.

[70] It is well settled that "the relief which a court may grant by way of judicial review is, in essence, discretionary" (*Canadian Pacific Ltd. v Matsqui Indian Band*, 1995 CanLII 145 (SCC), [1995] 1 SCR 3 at para 30). As Chief Justice Lamer went on to observe in that decision, the use of permissive, as opposed to mandatory, language in section 18.1(3) of what is now the *Federal Courts Act*, RSC 1985, c F-7 (as amended), "preserves the traditionally discretionary nature of judicial review" (at para 31).

[71] In *Vavilov* the majority emphasised that where a court reviews an administrative decision, "the question of the appropriate remedy is multi-faceted" (at para 139). Among the considerations that are engaged is that where the reasonableness standard is applied in conducting a judicial review, "the choice of remedy must be guided by the rationale for applying

that standard to begin with, including recognition by the reviewing court that the legislature has entrusted the matter to the administrative decision maker, and not to the court, to decide" (*Vavilov* at para 140).

[72] One of the reasons which may lead a court not to grant the relief sought on judicial review even though an error has been demonstrated is the futility of reconsidering the matter. As the majority noted in *Vavilov*, "[d]eclining to remit a matter to the decision maker may be appropriate where it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose" (at para 142). This principle guides the exercise of discretion to quash a decision that is flawed as well as that to remit a matter for redetermination (*ibid.*). It applies where a procedural defect has been found (*Mobil Oil Canada Ltd. v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202 at 228) and where there are flaws going to the substance of the decision (*Cartier v Canada (Attorney General)*, 2002 FCA 384 at para 33).

[73] If the particular "inevitable" outcome is not the one arrived at in the decision under review, the reviewing court may substitute its opinion for that of the body whose decision is under review. This can be done either directly (e.g. *Groia v Law Society of Upper Canada*, 2018 SCC 27 at para 161, citing with approval *Giguère v Chambre des notaires du Québec*, 2004 SCC 1 at para 66, per Deschamps J (dissenting)) or indirectly (e.g. by setting aside the decision but not ordering any other relief, as discussed in *Canada (Citizenship and Immigration) v Tennant*, 2019 FCA 206 at para 78, and as occurred in *Vavilov* itself – see paras 194-95).

[74] Similarly, "[w]here the reviewing court concludes that in any redetermination the administrative decision-maker could not reasonably reach a different outcome on the facts and the law, the decision should not be quashed" (*Maple Lodge Farms Ltd v Canadian Food Inspection Agency*, 2017 FCA 45 at para 51; see also *Vavilov* at para 142). Thus, if the administrative decision maker actually reached that "inevitable" result and the decision demonstrates a sound basis for that outcome notwithstanding the presence of reviewable errors, the reviewing court may dismiss the application for judicial review. In applying the latter principle, it is essential that the reviewing court not substitute its reasons for the outcome for those given by the decision maker (cf. *Delta Air Lines v Lukacs*, 2018 SCC 2 at paras 24-28; *Vavilov* at para 96). As well, the court "must exercise caution" before dismissing an application for judicial review on this basis and "should resolve any doubt in favour of quashing the decision and sending the matter back for redetermination" (*Maple Lodge Farms* at para 52).

[75] In *Vavilov*, the majority emphasized that, to be reasonable, "a decision must be based on reasoning that is both rational and logical" (at para 102). The reviewing court "must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that 'there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived'" (*ibid.*, quoting *Law Society of New Brunswick v Ryan*, 2003 SCC 20 at para 55). In this same paragraph, the majority also cites *Canada (Director of Investigation and Research) v Southam Inc.*, [1997] 1 SCR 748 at para 56, where the Court held that "a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it." On the other hand,

a decision will be unreasonable "where the conclusion reached cannot follow from the analysis undertaken" (*Vavilov* at para 103).

[76] In the present case, I have concluded that the rejection of the applicant's claim by the RAD is reasonably supported by its analysis of the credibility of the claim. Having agreed with the RPD that the applicant had failed to establish with credible evidence that the events which he said had given rise to his fear of persecution likely occurred, this was a sufficient basis to dismiss the appeal. In saying this, I do not mean to suggest that the RAD was not required to address all the grounds of appeal the applicant raised. Given the decision under appeal, these grounds were properly raised and had to be addressed. However, from the vantage point of this application for judicial review, I am able to determine that the outcome of the appeal is a reasonable one notwithstanding the flaws in the member's analysis of state protection. More particularly, the RAD member's agreement with the RPD's determination with respect to the lack of credibility of the claim is not tainted by the unreasonableness of the member's state protection analysis. The RAD's determinations with respect to the credibility of the claim provide a sound line of analysis leading to the conclusion that the RPD correctly determined that the claim should be rejected.

[77] I have given careful consideration to the fact that the RAD member considered the state protection issue to be "determinative." In the end, I am not persuaded that the unreasonableness of the member's determination on this issue entails that there must be new hearing. This is mainly because I cannot understand why the RAD member thought the state protection issue was determinative of the appeal. The member offered no explanation for this assessment. As a

matter of logic, if the applicant had not established a credible foundation for his fear of persecution, the question of whether he has rebutted the presumption of state protection simply does not arise. In short, it is immaterial. Finally, the member's statement that the issue of state protection is "determinative" is difficult to reconcile with the member's ultimate conclusion that the applicant "failed to credibly establish his claim *and* also failed to rebut the presumption of state protection" (original emphasis). Both determinations seem to be treated as equally determinative of the appeal.

[78] Having found that the applicant has not demonstrated that the RAD's assessment of the credibility of his claim is unreasonable, there is no basis for me to set aside its ultimate determination and order that the appeal be considered again. Put another way, if the applicant has not shown any reviewable error with respect to the credibility of his claim (and he has not), he is not entitled to a redetermination of this issue. And if this issue is not on the table, a redetermination of his appeal would serve no useful purpose because an adverse outcome for the applicant is legally inevitable.

VI. CONCLUSION

[79] For these reasons, the application for judicial review is dismissed.

[80] 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-2448-19

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. No question of general importance is stated.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2448-19
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PLACE OF HEARING:	TORONTO, ONTARIO
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