

Federal Court



Cour fédérale

**Date: 20210625**

**Docket: IMM-173-17**

**Citation: 2021 FC 666**

**Ottawa, Ontario, June 25, 2021**

**PRESENT: Madam Justice Pallotta**

**BETWEEN:**

**KHATIRA GAYRAT  
BASIR AKRAM  
ARASH AKRAM  
LAILA AKRAM  
NELLI AKRAM**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION AND THE  
MINISTER OF PUBLIC SAFETY  
AND EMERGENCY PREPAREDNESS**

**Respondent**

**JUDGMENT AND REASONS**

**I. Introduction**

[1] Khatira Gayrat, her spouse Basir Akram, and their children, Arash Akram, Laila Akram, and Nelli Akram, are citizens of Afghanistan and Russia who allege a fear of persecution in

Russia due to their Afghan ethnicity. The applicants seek judicial review of a decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada, rejecting their claim for refugee protection under sections 96 and 97 of the *Immigration and Refugee Protection Act, SC 2001, c 27 [IRPA]* on the basis that they have a viable internal flight alternative (IFA) in Rostov-on-Don, Russia.

[2] The applicants submit the RPD's IFA determination is unreasonable. First, they argue that the RPD erred in assessing the serious possibility of persecution in the proposed IFA location. Second, they argue that the RPD erred in assessing whether it would be reasonable for the applicants to relocate to the proposed IFA, in view of their specific circumstances.

[3] For the reasons below, I find that the RPD's determination is unreasonable. Accordingly, this application for judicial review is allowed.

## II. **Background**

[4] Mr. Akram and Ms. Gayrat were born in Afghanistan. They met in Russia and lived in Moscow since their marriage in 2004.

[5] The applicants allege that for years prior to leaving Russia in 2013, they were subjected to racist comments and racially motivated threats and violence amounting to persecution. These included acts of racism against the children. In their basis of claim (BOC) narrative, the applicants recounted a number of incidents that occurred between 2001 and 2013.

[6] In the months immediately preceding their departure in April 2013, the family received threatening calls and visits by unknown men, who also extorted money in exchange for the

family's safety. The applicants believe that the father of one of the children's schoolmates is the agent of persecution (Moscow AOP) behind these events, in retaliation for Mr. Akram having reported a bullying incident to the police. Also during this timeframe, Ms. Gayrat was advised to undergo an emergency Caesarean section when she was 5 months pregnant. The applicants believe the Russian doctor's unsound advice was racially motivated.

[7] The applicants decided to move from Russia to Indonesia, as they feared for their safety in both Russia and Afghanistan. The applicants were able to extend their Indonesian visas for three years. In July 2016, they left Indonesia, travelled to the United States, and then crossed from the U.S. into Canada at a land port of entry to claim refugee protection in Canada.

### III. Issues and Standard of Review

[8] As the applicants entered Canada under the family exception to the *Agreement between the Government of Canada and the Government of the United States of America For Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries* (known as the Safe Third Country Agreement), they were barred from appealing the negative RPD decision to the Refugee Appeal Division: paragraph 110(2)(d) of the *IRPA*. The applicants raised a constitutional challenge to paragraph 110(2)(d) of the *IRPA* on this application for judicial review. In view of the Federal Court of Appeal's decision in *Kreishan v Canada (Citizenship and Immigration)*, 2019 FCA 223 dismissing a similar constitutional challenge to the statutory provision (leave to appeal to the Supreme Court of Canada denied: *Reem Yousef Saeed Kreishan, et al. v Minister of Citizenship and Immigration*, 2020 CanLII 17609 (SCC)), the applicants withdrew this issue at the hearing.

[9] The remaining issues are whether the RPD's determination of a viable IFA in Rostov-on-Don is unreasonable due to: (i) a reviewable error in assessing whether the applicants would face a serious possibility of persecution in Rostov-on-Don; or (ii) a reviewable error in assessing whether it would be reasonable in all of the circumstances for the applicants to relocate there.

[10] The applicable standard of review is reasonableness, in accordance with the principles set out in the Supreme Court's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. Reasonableness is a deferential but robust standard of review: *Vavilov* at paras 12-13, 75 and 85. In applying the reasonableness standard, the Court must ask whether the decision bears the hallmarks of reasonableness—justification, transparency and intelligibility: *Vavilov* at para 99. A reasonable decision is based on an internally coherent and rational chain of analysis, and it is justified in relation to the facts and law that constrain the decision maker: *Vavilov* at para 85. The party challenging the decision bears the onus of demonstrating that it is unreasonable: *Vavilov* at para 100.

#### IV. Analysis

[11] The two-prong test for an IFA requires that: (i) a refugee claimant would not face a serious possibility of persecution in a proposed IFA, or be personally subject to a risk to life or a risk of cruel and unusual treatment or punishment or a danger of torture; and (ii) it would not be unreasonable in all the circumstances, including those particular to the claimant, for the claimant to seek refuge in the proposed IFA: *Rasaratnam v Canada (Minister of Employment and Immigration)* (1991), [1992] 1 FC 706 (CA); *Thirunavukkarasu v Canada (Minister of Employment and Immigration)* (1993), [1994] 1 FC 589 (CA) [*Thirunavukkarasu*]. A refugee

claimant bears the onus of establishing that a proposed IFA is not viable, and can discharge the onus by defeating at least one prong of the two-prong test.

[12] The RPD found the applicants' evidence of the events that they experienced, as well as their subjective fear of persecution in Russia and Afghanistan, to be credible. However, the RPD was not satisfied that there was an objective basis to support a serious possibility of persecution in Rostov-on-Don—either by the Moscow AOP, or arising from racially motivated violence and discrimination in Rostov-on-Don. The RPD also found it would be reasonable for the applicants to seek refuge there.

[13] The applicants submit that the RPD's decision is unreasonable with respect to both prongs of the IFA test, as noted above. At the hearing before this Court, the applicants restricted their oral submissions to the second prong. They rely on their written submissions in respect of the first prong.

A. *First prong: Did the RPD err in assessing whether the applicants would face a serious possibility of persecution in Rostov-on-Don?*

(1) Did the RPD err in assessing whether the applicants would face a serious possibility of persecution by the Moscow AOP?

[14] The applicants challenge the RPD's finding that the Moscow AOP lacks the means and motivation to locate and persecute them in Rostov-on-Don.

[15] First, the applicants submit the RPD's finding was made without regard to contradictory evidence: *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC) [*Cepeda-Gutierrez*] at para 17. According to the applicants, the Moscow AOP

engaged in intense intimidation and extortion until the applicants left Russia in April 2013, and the fact that he knew of the police report and was able to locate the applicants demonstrates an ability to gather intelligence. The applicants believe the Moscow AOP is connected with the Mafia, which has the influence and ability to exploit corrupt government sources. The applicants allege that they will be required to register their place of residence in Rostov-on-Don in order to access government services and obtain employment, allowing the Moscow AOP to track them there.

[16] Second, the applicants assert that the RPD's finding of a lack of motivation, based on a lack of further interaction after March 2013, was an implausibility finding. They rely on *Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 at paragraphs 7-8 for the proposition that implausibility findings must receive special attention on judicial review because they are inherently subjective assessments that depend on the decision-maker's perceptions. The applicants submit that the lack of further interaction is only indicative of the Moscow AOP's inability to locate the applicants outside of Russia.

[17] I am not persuaded the RPD erred in assessing the serious possibility of persecution by the Moscow AOP. The RPD found the applicants' fear that the Moscow AOP would pursue them to Rostov-on-Don to be speculative, not implausible. The RPD did not ignore contradictory evidence. While the RPD accepted the applicants' evidence of threats, intimidation, and extortion directed by the Moscow AOP, it remained open to the RPD to find the evidence insufficient to support a serious possibility of persecution in the proposed IFA. The applicants' belief that the Moscow AOP was connected to the Mafia was based on bare assertions that he is wealthy and powerful and travels with a bodyguard, and that wealthy people

in Russia “usually” have connections to the police or to the Mafia. The allegation that the Moscow AOP has access to information about the family was tied to the belief that he is involved with the Mafia. The applicants have inferred that the lack of ongoing interaction with the Moscow AOP after March 2013 stems from his inability to locate them outside of Russia, but they point to no evidence that would suggest he has an ongoing interest in pursuing them. In my view, the RPD reasonably found that there was insufficient evidence to establish the Moscow AOP’s means and motivation to pursue the applicants in Rostov-on-Don.

- (2) Did the RPD err in assessing whether the applicants would face a serious possibility of persecution due to racially motivated violence and discrimination?

[18] The applicants submit the RPD found Rostov-on-Don to be a viable IFA based largely on a 2013 report of the European Commission against Racism and Intolerance (ECRI Report). While the ECRI Report suggests that Rostov-on-Don maintains positive race relations, the applicants argue that other information in the ECRI Report, as well as other country condition evidence such as a U.S. Department of State’s 2015 report on human rights practices in Russia (US DOS Report), cast doubt on the probative value of that evidence. The applicants argue that “inconvenient information” about Rostov-on-Don may have been suppressed, and point to: (i) information in the US DOS Report that a journalist was imprisoned for allegedly making false claims of police misconduct and publicly insulting representatives of the law; (ii) accusations made by a public prosecutor in Rostov-on-Don against the “extremism” of a political activist preparing a report on “Xenophobia and Discrimination in the Region of Rostov in 2008”; and (iii) a statement in the ECRI Report that it was “surprising” that authorities in Rostov-on-Don reported there were no employment-related complaints of ethnic discrimination under Labour Code provisions aimed at combatting racial discrimination. The applicants argue there was

evidence of racially motivated violence in Rostov-on-Don in the past (including xenophobic attacks in 2011) as well as an increase in radical nationalism in Russia, particularly towards those from Central Asia such as the applicants, which the RPD failed to address in its analysis.

[19] The respondent argues the RPD reasonably concluded that the applicants would not face a serious possibility of persecution in the IFA due to findings that: there are over 20 million Muslims living in Russia without facing persecution; there is an atmosphere of tolerance for distinct ethnic communities in Rostov-on-Don; and there is no objective evidence to support the allegation that the applicants would become targets of ethnic violence in Rostov-on-Don.

[20] In my view, the RPD erred by failing to properly consider the applicants' own experiences, as well as the objective country condition documentation supporting the applicants' subjective fears that they would face a risk of racial violence, discrimination, and harassment in the proposed IFA location.

[21] The applicants alleged that they were subjected to "countless" acts of racism in Moscow. In addition to the 2013 events described above, the applicants included the following examples in their BOC narrative:

- in 2001, Mr. Akram and his friend were mocked, called names, and physically assaulted by "skinheads" on the subway;
- in 2002, Ms. Gayrat was punched for holding onto a handle on the subway, and told the handle was for Russians only;
- on the streets, people splashed dirty water on the applicants with their cars while yelling "blackheads";
- in 2005, Ms. Gayrat was bitten by a stranger's dog, released while he called her "blackhead"; she reported the incident to the police, but they did not take any action;



- in 2009, at a park, Ms. Gayrat and her daughter, Laila, were followed by “skinheads” carrying bats; she reported the incident to the police but they did not take any action;
- the school board ignored the applicants’ objections to Christian teachings; and
- persistent name-calling led one of the children, Laila, to attempt to lighten the colour of her skin and hair with bleach.

[22] The RPD found the applicants’ evidence of the events that they experienced to be credible. Furthermore, the RPD accepted the applicants’ belief that they would face risks of ethnic targeting in cities throughout Russia to be credible—effectively finding they had established a subjective fear of persecution. However, the RPD determined the applicants had not established a serious possibility of persecution in the IFA location because there was “no objective basis for this belief with respect to Rostov-on-Don”.

[23] In my view, the RPD failed to justify the finding that there was no objective basis for the applicants’ belief with respect to Rostov-on-Don.

[24] It should be noted that the RPD identified three IFA locations at the RPD hearing—Saint Petersburg, Rostov-on-Don, and Novosibirsk. Thus, the applicants’ evidence and submissions at the RPD hearing mainly addressed why the applicants’ skin colour and ethnicity would make them targets of racism and discrimination anywhere in Russia (although the applicants did point to a report of neo-Nazi groups convicted of racist violence in Rostov-on-Don in February 2015), and that they did not believe any of the proposed IFAs were different from Moscow in this regard.

[25] It was certainly open to the RPD to consider specific evidence of efforts to address racism in Rostov-on-Don, and in this regard, the RPD noted that the ECRI Report stated that an

Advisory Committee on Inter-ethnic Issues in the Rostov-on-Don region “effectively and rapidly diffused tensions between the ethnic groups” and that authorities and representatives of the ethnic groups on the Committee reported “an atmosphere of tolerance and respect between the different communities in the region”. However, addressing tensions between various ethnic communities through conversation and dialogue is not the same as addressing targeted acts of violence, harassment, and discrimination against individuals like the applicants, and whether there would be protection from such acts in Rostov-on-Don. The ECRI Report notes “with concern that there is a high incidence of racially motivated violence in the Russian Federation, directed predominantly against non-Slavs” and that “[r]adical nationalism is on the rise and there is a high incidence of racist violence, directed predominantly against persons of ‘non-Slav appearance’, in particular North Caucasians and Central Asians”. The ECRI Report also notes that it is “virtually impossible to assess the extent of crime committed on racist grounds” since law enforcement authorities do not make special efforts to investigate aggravating circumstances, such as racial hatred.

[26] As noted above, the country condition documentation included evidence of radical nationalism and racial violence against ethnic minorities and individuals of a non-Slav appearance. In my view, the RPD erred by failing to explain why the objective evidence of discrimination, harassment, and violence throughout the country—supporting the applicants’ personal experiences—did not offer relevant evidence of an objective risk of persecution in the proposed IFA.

B. *Second Prong: Did the RPD err by misstating the applicants' fear and by failing to consider the applicants' specific circumstances when assessing the reasonableness of the proposed IFA?*

[27] The applicants' main submission is that the RPD failed to consider, in the context of the second prong of the IFA test, the applicants' specific profile as individuals who have endured years of racism. While the RPD accepted that the applicants had been subjected to a series of persecutory events without police protection, they submit the RPD failed to assess whether it would be reasonable to relocate to Rostov-on-Don in view of these specific circumstances. The applicants rely on *Karim v Canada (Citizenship and Immigration)*, 2015 FC 279 at paragraph 26, where the Court set aside a decision of the RPD, based in part on the RPD's failure to consider the applicant's emotional state in deciding whether it would be reasonable to seek refuge in the proposed IFA. Similarly, the applicants assert the RPD erred by failing to consider the psychological impact of returning to Russia and relocating in Rostov-on-Don, in light of these incidents of past persecution.

[28] The applicants also argue the RPD overlooked their concerns that they would continue to experience discrimination in Rostov-on-Don on the basis of their ethnicity. They submit the RPD misstated their fear as being restricted to "ordinary crime and corruption", when they had specifically expressed concerns with racially motivated crimes and persecutory acts, and the negative perceptions of Afghans in Russia. The applicants argue that a failure to consider central components of the reasonableness prong of the IFA test, such as discrimination and social ostracism, is an error: *Rodriguez Diaz v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1243, [2009] 3 FCR 395 at paras 35-36. They submit the RPD was focused on the

applicants' employability and economic profile in assessing whether it would be reasonable to relocate to Rostov-on-Don.

[29] The respondent submits the RPD did not err in assessing the reasonableness of the proposed IFA based on findings such as: the applicants' residence in Russia for many years, Mr. Akram and Ms. Gayrat's education and years of working experience in Russia; the applicants' resourcefulness and adaptability; and the country condition evidence that ethnic minorities have been well integrated into Rostov-on-Don. The respondent argues the RPD found no documentary evidence of economic issues to indicate that the applicants would be unable to establish a livelihood in Rostov-on-Don, and that the concerns over crime and corruption were generalized and applicable to all citizens of Russia.

[30] There is a high threshold for establishing that a proposed IFA is unreasonable under the second prong of the IFA test: if there is a safe haven for claimants in their own country, where they would be free of persecution, they are expected to avail themselves of it unless they can show that it is objectively unreasonable for them to do so: *Thirunavukkarasu* at para 12. Hardship resulting from the loss of employment, loss of status, reduction in quality of life, loss of aspirations, loss of beloved ones, and frustration of one's wishes and expectations is not sufficient: *Ranganathan v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 164, [2000] FCJ No 2118 at para 15. However, the test is flexible, and takes into account the particular situation of the claimant and the particular country involved: *Thirunavukkarasu* at para 12. Even though the RPD found that the applicants would not face a serious possibility of persecution due to racially motivated violence and discrimination in Rostov-on-Don, I agree with the applicants that the RPD did not take into account the applicants' particular history of racism

and its impact, which were accepted as credible, in considering whether it would be objectively reasonable for them to seek refuge in Rostov-on-Don under the second prong of the IFA test.

V. **Conclusion**

[31] The applicants have established that the RPD's decision is unreasonable. Accordingly, this application for judicial review is granted. The RPD's decision is set aside, and the matter shall be referred back for redetermination.

[32] Neither party proposed a question for certification, and in my view, there is no question to certify.

**JUDGMENT in IMM-173-17**

**THIS COURT'S JUDGMENT is that:**

1. This application for judicial review is granted. The RPD's decision is set aside, and the matter shall be referred back for redetermination.
2. There is no question for certification.

"Christine M. Pallotta"

Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-173-17

**STYLE OF CAUSE:** KHATIRA GAYRAT, BASIR AKRAM, ARASH AKRAM, LAILA AKRAM, NELLI AKRAM v THE MINISTER OF CITIZENSHIP, AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

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