Federal Court

Cour fédérale

Date: 20210928

Docket: IMM-6021-19

Citation: 2021 FC 1005

Ottawa, Ontario, September 28, 2021

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

RUDOLF KARICKA
ANDELA KOVACOVA
RUDOLF KOVAC
ERIK KOVAC

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a decision by the Refugee Protection Division [RPD], dated September 11, 2019, [Decision]. The RPD allowed the Minister's application to vacate the Applicants' refugee claims and found Rudolf Karicka ["Principal Applicant"] was

excluded from protection under Article 1F(b) of the of United Nations Convention Relating to the Status of Refugees, 1951, CTS 1969/6; 189 UNTS 150 [Convention] and section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 [*IRPA*].

II. Facts

Events Surrounding the Claims for Refugee Protection

[2] The Applicants are citizens of the Czech Republic and of Roma ethnicity. The Principal Applicant and his spouse have two non-Canadian-born children. The Applicants also have Canadian-born children not included in these proceedings.

[3] In spring of 2007, the Applicants allege they were attacked by a group of young people while walking in downtown Prague. They went to the police station to report the incident but the police refused to speak to them.

[4] On November 11, 2008, the Adult Applicants allege they were verbally attacked on a bus by skinheads. Upon leaving the bus, the Principal Applicant says he was physically attacked by the skinheads. He went to the police station to make a complaint but the police refused to provide assistance. It is alleged that the police would not investigate and were dismissive.

[5] The Applicants fled to Canada from the Czech Republic and made claims for refugee protection upon arrival on December 26, 2008. The Principal Applicant and his spouse stated in their Personal Information Forms (PIF) they had never "been sought, arrested or detained by the

police or military or any other authorities in any country, including Canada." They also stated they had never "committed or been charged with or convicted of any crime in any country, including Canada."

[6] The Principal Applicant and his spouse repeated these statements in their respective Claims for Refugee Protection in Canada Forms. They stated at questions 32-33 that they had never "committed or been party to, charged with or convicted of a crime or an offence in Canada or another country"; and they had never "been sought, arrested or detained by the police, the army or any other authority."

[7] On May 25, 2011, the Applicants were granted refugee protection by the RPD.

Events Surrounding the Vacation Proceedings

[8] On an unknown date, the Canada Border Services Agency (CBSA) received information from the District Court for Prague that the Principal Applicant was alleged to have committed the following crimes in Prague:

A. January 1, 2007: The Principal Applicant and two accessories broke into a house in Prague and stole CZK 20,000 ($1,094 CAD) in cash and items with a total value of ($3,644) and caused damage to the entrance door and window;

B. January 18, 2007: The Principal Applicant and one accessory broke into the Brixton retail outlet in Prague, stole leather jackets and trousers with a total value of CZK 340,000 ($18,587.80 CAD), and caused damage to a wall; and

C. April 20, 2007: The Principal Applicant broke into the retail outlet of a company in Prague, stole electronics with a total value of CZK 20,750 ($1,135 CAD) and caused damage to the entrance door.

[9] On June 1, 2007, the Principal Applicant was questioned by the Czech police about one of the incidents of theft in Prague. The police handcuffed the Applicant and transported him to the police station where he was questioned. Police then transported the Principal Applicant to his home and searched his home for stolen goods where his spouse was also present. After conducting their search, police indicated they would be in contact again and left.

[10] The Applicants obtained passports, and left the Czech Republic arriving in Canada on December 25, 2008.

[11] On February 6, 2009, the Czech police declared a search for the Principal Applicant.

[12] On July 25, 2012, the Principal Applicant was convicted by a criminal court in Prague, *in absentia,* of theft in the Czech Republic and sentenced to two years' imprisonment. Czech law required he be represented by counsel at an *in absentia* hearing.

[13] On September 20, 2016, the Minister applied to the RPD to vacate the Applicants' refugee protection.

III. Decision under review

[14] On September 11, 2019, the RPD allowed the application by the Minister to vacate the refugee claims of the Applicants and their refugee status was vacated. The RPD further concluded the Principal Applicant was excluded from protection under Article 1F(b) of the *Convention,* and section 98 of the *IRPA*.

Misrepresentation of the Principal Applicant

[15] The RPD found the Principal Applicant committed three crimes in the Czech Republic prior to the Applicants' arrival in Canada and making their refugee claims. It is common ground these crimes and related convictions were not disclosed to the RPD.

[16] It is also common ground that neither the Principal Applicant nor his spouse, disclosed to the RPD or to immigration officers that the Principal Applicant had been sought, and arrested or detained by police, although this is now conceded. Neither did they disclose the police searched their home in the Czech Republic, although this they also admit.

[17] The Principal Applicant and his spouse in their respective PIFs and Claims for Refugee Protection in Canada Form also stated each had never "been sought, arrested or detained by the police or military or any other authorities in any country, including Canada." They also stated each had never "committed or been charged with or convicted of any crime in any country, including Canada."

[18] As such, the RPD found the Applicants failed to disclose the Principal Applicant had been sought, and arrested or detained by the police in the Czech Republic before coming to Canada and making a refugee claim.

[19] The RPD found it implausible the Principal Applicant did not have knowledge of police interest in him for the thefts. The Principal Applicant testified at the vacation hearing that he had been handcuffed, brought to the police station, had his home searched by the police, and that he knew the co-accused involved in the theft offences.

[20] The Principal Applicant's involvement in the thefts led Czech police to question him, and presumably led the Prague court eventually to convict. Therefore, the RPD reasoned the Principal Applicant must have known police were investigating him and the Applicants failed to disclose information regarding his criminality when they made their refugee claims.

[21] Based on the evidence adduced, the RPD found the Applicants' claims for refugee protection were obtained as a result of their misrepresenting or withholding significant material facts relating to their claim contrary to section 109, which provides the following:

Vacation of refugee protection	**Demande d'annulation**
109 (1) The Refugee Protection Division may, on application by the Minister, vacate a decision to allow a claim for refugee protection, if it finds that the decision was obtained as a result of directly or indirectly misrepresenting or	**109 (1)** La Section de la protection des réfugiés peut, sur demande du ministre, annuler la décision ayant accueilli la demande d'asile résultant, directement ou indirectement, de présentations erronées sur un fait important

withholding material facts relating to a relevant matter.	quant à un objet pertinent, ou de réticence sur ce fait.
Rejection of application	**Rejet de la demande**
(2) The Refugee Protection Division may reject the application if it is satisfied that other sufficient evidence was considered at the time of the first determination to justify refugee protection.	**(2)** Elle peut rejeter la demande si elle estime qu'il reste suffisamment d'éléments de preuve, parmi ceux pris en compte lors de la décision initiale, pour justifier l'asile.
Allowance of application	**Effet de la décision**
(3) If the application is allowed, the claim of the person is deemed to be rejected and the decision that led to the conferral of refugee protection is nullified.	**(3)** La décision portant annulation est assimilée au rejet de la demande d'asile, la décision initiale étant dès lors nulle.

Exclusion of the Principal Applicant under s. 98 of IRPA and Article 1(F)(b) of the Convention

[22] On July 25, 2012, the Principal Applicant was convicted in the Czech Republic of Theft pursuant to section 247 of the *Criminal Code of the Czech Republic*, (No. 140/1961) [*Czech Code*], for crimes committed in 2007. He was sentenced to two years in prison.

[23] The RPD found this offence is equivalent to section 348(1) of the *Criminal Code,* RSC, 1985, c. C-46 [*Canadian Code*]*,* Breaking and Entering with Intent to Commit Theft, which is punishable in Canada by imprisonment for a maximum term of ten years.

[24] The RPD found the Principal Applicant's allegations that he was only convicted for failing to appear in court, was not substantiated by any documentary evidence. The RPD found he was represented by defence counsel.

[25] Importantly, the RPD found the Principal Applicant's absence from the Czech Republic was not an excuse for not knowing the charges against him.

[26] The crime for which he was convicted is serious in the Czech Republic; the minimum sentence is two years. The crime is also serious in Canada; the maximum punishment is a term of imprisonment of ten years or more. The RPD found the seriousness of the crime was aggravated by the Principal Applicant's involvement in "organized crime", as he admitted at the vacation hearing to having accomplices or accessories, namely his spouse's brother-in-law. He was given the minimum sentence for persons in the Czech Republic who commit theft as part of an organized group, which is two years imprisonment.

[27] Based on the evidence, the RPD found there were serious reasons to believe the Principal Applicant committed the serious non-political crimes for which he was charged and convicted. If he committed these crimes in Canada, he would be liable to a maximum term of ten years or more. As such, the RPD concluded the Principal Applicant is excluded from refugee protection pursuant to section 98 of the *IRPA* and Article 1(F)(b) of the *Convention*.

Misrepresentations by the remaining Applicants

[28] The Applicants based their claims on the Principal Applicant’s narrative, and *in the case of* the children they based their claims on the claims of both the Principal Applicant and their mother.

[29] At the vacation hearing, the Principal Applicant’s spouse testified to knowing about her husband’s detention at the police station, she testified to knowing her husband was in trouble with the police, and admitted to knowing he was involved in criminal activities with her brother-in-law. Her testimony was she was home when the police searched their house.

[30] Based on the evidence adduced, the RPD found the spouse had full knowledge about the Principal Applicant’s criminal activities but chose not to disclose anything at or prior to their refugee hearing. Therefore, the RPD concluded the Principal Applicant’s spouse knowingly misrepresented significant facts and made material omissions that were material to determining her credibility and subjective fear of persecution in the Czech Republic. As such, the Minister’s request to vacate her refugee status was also granted.

[31] Since the children’s claims were based on the Principal Applicant’s refugee claim (and, I should note, on the spouse’s refugee claim as well), the Minister’s request to vacate their refugee status in Canada was granted.

IV. Issues

[32] The only issue in this application is whether the Decision is reasonable.

V. Standard of Review

A. *Reasonableness*

(1) Statutory interpretation

[33] The Applicants submit the interpretation of sections 98 and 109 of the *IRPA* and Article 1F(b) of the *Convention* should be decided on a standard of correctness. The Applicants cite to pre-*Vavilov* case law; in *Hashi v Canada (Citizenship and Immigration),* 2020 FC 309. I concluded the standard of review should be reasonableness as per *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65 [Wagner CJ] at para 67, 91, and 102, which binds this Court.

(2) Reasonableness defined

[34] In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, majority reasons by Justice Rowe [*Canada Post*], which was issued at the same time as the Supreme Court of Canada's decision in *Vavilov*, the majority explains what is required for a reasonable decision, and importantly for present purposes, what is required of a court reviewing on the reasonableness standard:

> [31] 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). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48).

> The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
>
> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
>
> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).
>
> [Emphasis added]

[35] In the words of the Supreme Court of Canada in *Vavilov*, a reviewing court must be satisfied the decision-maker's reasoning "adds up":

> [104] Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise. This is not an invitation to hold administrative decision makers to the formalistic constraints and standards of academic logicians. However, a reviewing court must ultimately be satisfied that the decision maker's reasoning "adds up".
>
> [105] In addition to the need for internally coherent reasoning, a decision, to be reasonable, must be justified in relation to the constellation of law and facts that are relevant to the decision: *Dunsmuir*, at para. 47; *Catalyst*, at para. 13; *Nor-Man Regional Health Authority*, at para. 6. Elements of the legal and factual contexts of a decision operate as constraints on the decision maker in the exercise of its delegated powers.

> [Emphasis added]

[36] The Supreme Court of Canada in *Vavilov* at para 86 states, “it is not enough for the outcome of a decision to be justifiable. Where reasons for a decision are required, the decision must also be justified, by way of those reasons, by the decision-maker to those to whom the decision applies,” and provides guidance that the reviewing court review decide based on the record before them:

> [126] That being said, a reasonable decision is one that is justified in light of the facts: *Dunsmuir*, para. 47. The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them: see *Southam*, at para. 56. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. In *Baker*, for example, the decision maker had relied on irrelevant stereotypes and failed to consider relevant evidence, which led to a conclusion that there was a reasonable apprehension of bias: para. 48. Moreover, the decision maker’s approach would *also* have supported a finding that the decision was unreasonable on the basis that the decision maker showed that his conclusions were not based on the evidence that was actually before him: para. 48.
>
> [Emphasis added]

(3) Not to reweigh evidence

[37] Furthermore, *Vavilov* confirms the role of this Court is not to reweigh and reassess the evidence unless there are “exceptional circumstances”:

> [125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from “reweighing and reassessing the evidence considered by the decision maker”: *CHRC*, at para. 55; see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42. Indeed, many of

> the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen*, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.
>
> [Emphasis added]

[38] See also *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 [Binnie J]:

> [64] In this case, both the majority and dissenting reasons of the IAD disclose with clarity the considerations in support of both points of view, and the reasons for the disagreement as to outcome. At the factual level, the IAD divided in large part over differing interpretations of Khosa's expression of remorse, as was pointed out by Lutfy C.J. According to the IAD majority:
>
>> It is troublesome to the panel that [*Khosa*] continues to deny that his participation in a "street-race" led to the disastrous consequences. . . . At the same time, I am mindful of [*Khosa's*] show of <u>relative remorse</u> at this hearing for his excessive speed in a public roadway and note the trial judge's finding of this remorse . . . . This show of remorse is a positive factor going to the exercise of special relief. However, I do not see it as a compelling feature of the case in light of the <u>limited nature of [*Khosa's*] admissions</u> at this hearing. [Emphasis added; para. 15.]
>
> According to the IAD dissent on the other hand:
>
>> . . . from early on he [*Khosa*] has accepted responsibility for his actions. He was prepared to plead guilty to dangerous driving causing death . . . .
>>
>> I find that [*Khosa*] is contrite and remorseful. [*Khosa*] at hearing was regretful, his voice tremulous and filled with emotion. . . .
>>
>> . . .
>>
>> The majority of this panel have placed great significance on [*Khosa's*] dispute that he was

> racing, when the criminal court found he was. And while they concluded this was "not fatal" to his appeal, they also determined that his continued denial that he was racing "reflects a lack of insight." The panel concluded that this "is not to his credit." The panel found that [*Khosa*] was remorseful, but concluded it was not a "compelling feature in light of the limited nature of [*Khosa's*] admissions".
>
> However I find [*Khosa's*] remorse, even in light of his denial he was racing, is genuine and is evidence that [*Khosa*] will in future be more thoughtful and will avoid such recklessness. [paras. 50-51 and 53-54]

It seems evident that this is the sort of factual dispute which should be resolved by the IAD in the application of immigration policy, and not reweighed in the courts.

[Emphasis added]

(4) Credibility is the heartland of the expertise of the RPD

[39] Because this case involves credibility findings and findings of implausibility, it is worthwhile summarizing the principles. First of all, an applicant is presumed to tell the truth: *Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 F.C. 302 (FCA); [1979] F.C.J. No. 248 (CA). However, this presumption is rebuttable: where the evidence is inconsistent with the applicant's sworn testimony, the presumption may be rebutted: *Su v Canada (Citizenship and Immigration)*, 2015 FC 666 at para 11, Fothergill J [Su], citing *Adu v Canada (Minister of Employment and Immigration)* (1995), 53 ACWS (3d) 158, [1995] FCJ No 114 (FCA).

[40] Additional authorities on the assessment of credibility and plausibility are summarized as follows. First, the RPD has broad discretion to prefer certain evidence over other evidence and to determine the weight to be assigned to the evidence it accepts: *Medarovik v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 61 at para 16, Tremblay-Lamer, J; *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 867 at para 68, Blais J.

[41] Second, the Federal Court of Appeal confirms that findings of fact and determinations of credibility fall within the heartland of the expertise of the RPD: *Giron v Canada (Minister of Employment and Immigration)* (1992), 143 NR 238 (FCA) [*Giron*].

[42] Third, the RPD is recognized to have expertise in assessing refugee claims and is authorized by statute to apply its specialized knowledge: *Chen v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 805 at para 10, O'Reilly, J; and see *Siad v Canada (Secretary of State)*, [1997] 1 FC 608 at para 24 (FCA), where the Federal Court of Appeal said that the RPD, "… is uniquely situated to assess the credibility of a refugee claimant; credibility determinations, which lie within the heartland of the discretion of triers of fact", are entitled to considerable deference upon judicial review and cannot be overturned unless they are perverse, capricious or made without regard to the evidence.

[43] Fourth, it is well-established the RPD may make credibility findings based on implausibility, common sense and rationality, although adverse credibility findings "should not be based on a microscopic evaluation of issues peripheral or irrelevant to the case": *Haramichael v Canada (Minister of Citizenship and Immigration),* 2016 FC 1197 at para 15, Tremblay-Lamer

J, citing *Lubana v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 at paras 10-11, Martineau J [*Lubana*]; *Attakora v Canada (Minister of Employment and Immigration)*, [1989] FCJ No 444 (FCA).

[44] Fifth, the RPD may reject uncontradicted evidence if it "is not consistent with the probabilities affecting the case as a whole, or where inconsistencies are found in the evidence": *Lubana*, above at para 10.

[45] Sixth, the RPD is entitled to conclude that an applicant is not credible "because of implausibilities in his or her evidence as long as its inferences are not unreasonable and its reasons are set out in 'clear and unmistakable terms'": *Lubana*, above at para 9.

B. *Jurisprudence regarding exclusion pursuant to s 98 of the IRPA and Article 1F(b) of the Convention*

[46] In *Abbas v Canada (Citizenship and Immigration),* 2019 FC 12, I summarized jurisprudence on judicial review regarding exclusion pursuant to section 98 of the *IRPA* and Article 1F(b) of the *Convention*:

> [18] The Federal Court of Appeal confirms that the Minister merely has to show, on a burden *less* than the civil standard of balance of probabilities, that there are serious reasons to consider the applicant committed the alleged acts. In *Zrig v Canada (Minister of Citizenship and Immigration)*, 2003 FCA 178 [*Zrig*] Nadon JA confirms the following principle at para 56:
>
> > [56] The Minister does not have to prove the respondent's guilt. He merely has to show - and the burden of proof resting on him is "less than the balance of probabilities"-that there are serious reasons for considering that the respondent is guilty.

> [Emphasis added]

[19] As to what constitutes a "serious" crime, the Supreme Court of Canada in *Febles v Canada (Minister of Citizenship and Immigration)*, 2014 SCC 68, per McLachlin CJ [*Febles*], instructs at para 62:

> [62] The Federal Court of Appeal in *Chan v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 17150 (FCA), [2000] 4 F.C. 390 (C.A.), and *Jayasekara* has taken the view that where a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada, the crime will generally be considered serious. I agree. However, this generalization should not be understood as a rigid presumption that is impossible to rebut. Where a provision of the Canadian *Criminal Code*, R.S.C. 1985, c. C-46, has a large sentencing range, the upper end being ten years or more and the lower end being quite low, a claimant whose crime would fall at the less serious end of the range in Canada should not be presumptively excluded Article 1F(b) is designed to exclude only those whose crimes are serious. The UNHCR has suggested that a presumption of serious crime might be raised by evidence of commission of any of the following offences: homicide, rape, child molesting, wounding, arson, drugs trafficking, and armed robbery (Goodwin-Gill, at p. 179). These are good examples of crimes that are sufficiently serious to presumptively warrant exclusion from refugee protection. However, as indicated, the presumption may be rebutted in a particular case. While 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.
>
> [Emphasis added.]

[20] The Federal Court of Appeal's decision of *Jayasekara* identifies factors to evaluate whether a crime is "serious" for the purposes of Article 1F(b), at para 44:

> [44] I believe there is a consensus among the courts that the interpretation of the exclusion clause in Article 1F(*b*) of the Convention, as regards the seriousness of a crime, requires an evaluation of the elements of the crime, the mode of prosecution, the penalty prescribed, the facts and the mitigating and aggravating circumstances underlying the conviction: see *S v. Refugee Status Appeals Authority*, (N.Z. C.A.), *supra; S and Others v. Secretary of State for the Home Department*, [2006] EWCA Civ 1157 (Royal Courts of Justice, England); *Miguel-Miguel v. Gonzales*, no. 05-15900, (U.S. Ct of Appeal, 9th circuit), August 29, 2007, at pages 10856 and 10858. In other words, whatever presumption of seriousness may attach to a crime internationally or under the legislation of the receiving state, that presumption may be rebutted by reference to the above factors.
>
> [Emphasis added]

VI. Analysis

Relevant Legislation

[47] Article 1F(b) of the *Convention* provides:

Article 1F(b)	**Article 1F(b)**
F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:	**F.** Les dispositions de cette Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser:
(b) he has committed a serious non-political crime	**b)** Qu'elles ont commis un crime grave de droit commun en dehors du

outside the country of refuge prior to his admission to that country as a refugee;	pays d'accueil avant d'y être admises comme réfugiés;

[48] Section 98 of the *IRPA* provides:

Exclusion-Refugee Convention	**Exclusion par application de la Convention sur les réfugiés**
98 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.	**98** La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.

[49] Section 109 of the *IRPA* provides:

Vacation of refugee protection	**Demande d’annulation**
109 (1) The Refugee Protection Division may, on application by the Minister, vacate a decision to allow a claim for refugee protection, if it finds that the decision was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter.	**109 (1)** La Section de la protection des réfugiés peut, sur demande du ministre, annuler la décision ayant accueilli la demande d’asile résultant, directement ou indirectement, de présentations erronées sur un fait important quant à un objet pertinent, ou de réticence sur ce fait.
Rejection of application	**Rejet de la demande**
(2) The Refugee Protection Division may reject the application if it is satisfied that other sufficient	**(2)** Elle peut rejeter la demande si elle estime qu’il reste suffisamment d’éléments de preuve, parmi

evidence was considered at the time of the first determination to justify refugee protection.	ceux pris en compte lors de la décision initiale, pour justifier l'asile.
Allowance of application	**Effet de la décision**
(3) If the application is allowed, the claim of the person is deemed to be rejected and the decision that led to the conferral of refugee protection is nullified.	**(3)** La décision portant annulation est assimilée au rejet de la demande d'asile, la décision initiale étant dès lors nulle.

A. *Was the decision to vacate the Principal Applicant's refugee protection reasonable?*

[50] The RPD found there to be serious reasons to believe the Principal Applicant committed serious non-political crimes and his claim to innocence not credible. The Applicants submit the RPD's credibility assessment of the Principal Applicant's testimony was unreasonable.

[51] Based on the documentary evidence, the RPD found it implausible that the Principal Applicant was unaware of his criminality. I agree this Court has warned against making findings of implausibility. See *Chen v Canada (Citizenship and Immigration),* 2015 FC 225 [Rennie J as he then was] at para 15. The Applicants also submit it was unreasonable for the RPD to require corroborating evidence, and their sworn testimony should be afforded the presumption of truthfulness. See *Maldonado v Canada (Minister of Employment and Immigration),* [1980] 2 FC 302 [Heald JA].

[52] With respect, while not disputing these points, they do not assist the Applicants.

[53] The Principal Applicant had a duty of candour to disclose his criminal history. Instead, in my view he made multiple material misrepresentations and withheld material information when he stated in his Claim for Refugee Protection Form and his PIF, that he had never committed, been a party to, or charged with a crime or offence.

[54] The Principal Applicant does not dispute his failure to disclose to the RPD that in June 2007 he was handcuffed, detained and questioned at a police station, had his home searched for stolen goods, and was acquainted with his co-accused. The documentary evidence also indicated he had been photographed by police at some point. Therefore, the RPD reasonably found the testimony of the Principal Applicant to be implausible. On this testimony and that of his spouse reported above, the RPD was well within its remit to find the Principal Applicant had misrepresented and withheld material information when he said on his PIF that (1) he had never "been sought, arrested or detained by the police or military or any other authorities in any country, including Canada." Likewise he withheld or misrepresented material facts when he stated on his Claim for Refugee Protection in Canada Form that (2) he had never "committed or been charged with or convicted of any crime in any country, including Canada."

[55] The RPD was acting reasonably in finding the answers in point (1) above were misrepresentations and withholding of material information.

[56] In my respectful view, the RPD was equally entitled on this record and in light of constraining jurisprudence to find material misrepresentation and withholding with respect to point (2) as well. On this point, the Applicant raised several objections, basically to the effect

that there can be no misrepresentation or withholding of material information because the Applicant did not know of the charge, the trial *in absentia*, the sentence, or other aspects of criminal proceedings after the family left the Czech Republic. In my view, there is no merit in these objections.

[57] First, I agree the RPD was best placed to observe the Principal Applicant's testimony and to assess his credibility. All his assertions on point (2) turn on his credibility. The RPD's findings are supported by the evidence, mostly undisputed, and by plausibility findings which fall within the RPD's jurisdiction.

[58] Thus, in my respectful view, this Court should defer to the RPD's defensible factual findings. See *Omoijade v Canada (Citizenship and Immigration),* 2019 FC 1533 [Kane J] at para 32. In my respectful view, the RPD's assessment of the credibility of the Applicant's explanation that he was not aware of any criminality in the Czech Republic, was reasonable on the record before it and constraining jurisprudence.

[59] In response to the Applicants' submission that sworn testimony is to be afforded the presumption of truthfulness, it is well known that this presumption is rebuttable. See *Braveus v. Canada (Citizenship and Immigration)*, 2020 FC 1153 [Roussel J] at para 10-12. This presumption was rebutted because the Applicant did not tell the truth when he said he had not been sought, arrested or detained by the police.

[60] The Applicants submit the evidence provided by the Minister was not a “reliable source having no interest in the outcome of the [Applicants’] refugee claim” because the evidence was adduced by the Czech Republic, a country where the Applicants allege to have no state protection available. As such, the RPD’s assessment of their testimony was not reasonable.

[61] However the Applicants led no evidence the Czech state had a reason to fabricate a conviction against the Principal Applicant. In *Abdulrahim v Canada (Public Safety and Emergency Preparedness),* 2020 FC 463 [Favel J] at para 19, the Court dismissed the claimant’s submission that the crime committed may have been politically trumped up. Justice Favel found there was no evidence to support such an assentation and the RPD is not bound to consider every possible line of argument and hypothetical (*Vavilov* at para 128). Likewise, in the case at bar, the Applicants adduced no evidence to suggest the Czech state was biased against the Principal Applicant. Therefore, it was reasonable for the RPD to find no merit to this submission.

[62] The Applicants submit the conviction was not genuinely obtained because the trial was held *in absentia.* They argue the RPD failed to conduct an equivalency assessment comparing the fairness of Canada’s legal system to the Czech Republic’s legal system. The Applicants submit the RPD further failed to assess how each country deals with convictions *in absentia*. See *Tomchin v Canada (Citizenship and Immigration),* 2011 FC 231 [Snider J] at para 15:

> [15] The facts of the case before me and the short-comings of the Officer’s analysis are similar to those before Justice Gibson in *S.A. v Canada (Minister of Citizenship and Immigration)*, 2006 FC 515, 54 Imm LR (3d) 18. In concluding that the analysis of the officer was fatally flawed, Justice Gibson, at paragraph 15 stated as follows:
>
> > The decision maker provides no analysis of the similarity or lack thereof between the Israeli legal

> system and that of Canada. While the decision maker would appear to have examined the aim, content and effect of the relevant Israeli law, the similarity or lack of similarity between that aim, content and effect to the aim, content and effect of Canada's pardon law is only very indirectly addressed in the decision under review. Finally, with great respect, the decision maker would appear to provide no valid reason not to recognize the effect of the relevant Israeli law.

[63] There is no merit in these submissions. The onus was on the Applicants to establish the Czech judicial process was not fair which they failed to do. Failing to meet their burden in this respect triggers *Feimi v Canada (Citizenship and Immigration),* 2012 FC 262 [Martineau J] at para 37, where this Court upheld the presumption of judicial processes in a foreign country being fair:

> [37] The mode of prosecution and the fairness of the process are important. In the absence of exceptional circumstances established by a refugee claimant, the Board must assume a fair and independent judicial process in the foreign country (*Canada (Minister of Employment and Immigration v Satiacum*, [1989] FCJ 505 (FCA)). Here, the Board considered the documentary evidence and the testimony of the applicant before concluding that the judicial process in Greece was fair in the circumstances, a factual conclusion which should not be disturbed by the Court.

[64] In my view there is no basis to the Applicant's assertion the conviction was not genuine because it was obtained *in absentia.* There are many examples in our jurisprudence where convictions *in absentia* are considered genuine. See as one example, *Simkovic v Canada (Citizenship and Immigration),* 2014 FC 113 [Shore J] at para 16. In my view, there is no merit to the submission that all convictions obtained *in absentia* are not genuine.

[65] More fundamentally, the Applicants complain they had no notice of the charge, no notice of the trial, nor of other criminal steps against them. Accepting that is true, the explanation is obvious, namely that the Applicants chose to leave the Czech Republic. They left after the thefts took place, after he was arrested and interrogated and after police searched their home. In my view, merely leaving one’s country of nationality does not immunize these Applicants from the consequences of criminal proceedings taking place after their departure. This is particularly the case given there is no rule that all *in absentia* legal proceedings are invalid and irrelevant because they are not “genuine”.

[66] In this case, nothing suggests the trial *in absentia* was unfair or abusive; it was also open for the RPD to find as it did, that the Czech state provided the Principal Applicant with defence counsel at the *in absentia* hearing. That the Applicant was not present to instruct is a reason to question the genuineness or fairness of the trial or conviction, without evidence to that effect which the Applicants did not present. Notably, the Applicants do not point to country condition materials to support their arguments in this respect.

[67] I also wish to note both the PIF and the Claim for Refugee Protection in Canada Forms completed by both the Principal Applicant and his spouse, assert the contents are complete, true and correct (in the case of the PIFs), and that they are truthful, complete and correct (in the case of the Claim for Refugee Protection in Canada Forms):

> 1. The PIF form states among other things:
>
> I declare that the information I have provided in this form and all attached documents is <u>complete, true and correct</u>. My declaration has the same force and effect as if made under oath.

> 2. The Claim for Refugee Protection in Canada Form states among other things:
>
> I, (print full name clearly) (name), do solemnly declare that the information I have given in the foregoing application is truthful, complete and correct, and I make this solemn declaration conscientiously believing it to be true and knowing that it is of the same force and effects as if made under oath.
>
> I understand that any false statements or concealment of a material fact may result in my exclusion from Canada and may be grounds for my prosecution or removal.
>
> I understand all the foregoing statements, having asked for and obtained an explanation on every point that was not clear to me.
>
> I will immediately inform Citizenship and immigration Canada and the Canada Border Services Agency if any of the information or the answers provided on this form change.
>
> [Emphasis added]

[68] Both documents are on the record, signed by the Principal Applicant and his spouse.

[69] As noted above, it was open on the record for the RPD to reasonably find both the Principal Applicant and his spouse provided information that, to say the least, was not "complete" and reasonably gave rise to findings of withholding and misrepresenting material information.

[70] In my view, the RPD was acting reasonably in concluding the Principal Applicant withheld material information, which amounted to a misrepresentation justifying the vacation of his refugee status.

B. *Was the decision to vacate the family members' refugee status reasonable?*

[71] The RPD found the Principal Applicant's spouse knowingly misrepresented significant facts and her omissions were material to determining her credibility and subjective fear of persecution in the Czech Republic. Therefore, her refugee status in Canada was vacated, and since her children's claims were based on the Principal Applicant's claim and also on hers, their status was also vacated.

[72] The Applicants submit the RPD was unreasonable to conclude her fear of persecution was not well founded because they fled the Czech Republic to avoid prosecution for the Principal Applicant's crimes. The Applicants submit the RPD relied on non-conclusive facts and essentially found the Principal Applicant's spouse's testimony of being unaware of her husband's criminality, implausible. The Applicants do not expand on their submissions nor have they cited to case law. I find there is no merit in this submission.

[73] The Applicants further submit the Principal Applicant's spouse did not misrepresent on her PIF and the Claim for Refugee Protection in Canada Form because the forms only asked about her criminality, not her husband's. I answer, with respect, her evidence was not complete because in my view she withheld information she knew of her husband's criminal activities, some of which he engaged in with her brother-in-law.

[74] It is clear she chose not to disclose material facts prior to and at their refugee hearing. Specifically, she testified to knowing that her husband was questioned at a police station and suspected of theft:

> **MINISTER'S COUNSEL:** Were you aware that your husband was questioned at the police station and that – in Czech Republic – and that they had – the police had suspected him of theft?
>
> **CO-CLAIMANT:** I did know about it, yes.

[75] She conceded to being aware of the police investigation of her husband:

> **MEMBER:** Did you know that your husband had legal problems before you left Czech Republic?
>
> **CO-CLAIMANT:** Yes

[76] She testified to knowing about her husband's involvement in criminality before leaving the Czech Republic:

> **MEMBER:** […] Now, your husband was involved in some criminal activity when you were still in Czech. Correct? Correct?
>
> **CO-CLAIMANT:** Yes

[77] These facts were relevant to the issue of whether the Principal Applicant could be excluded from refugee protection for criminality, whether he had sought state protection after the persecutory event in 2008, and whether the Applicants had left the Czech Republic for fear of persecution or to avoid prosecution. The RPD was entitled to consider them accordingly.

[78] I also note the vacation provision under section 109 of the *IRPA* does not require a claimant to intend to misrepresent facts. See *Frias v Canada (Citizenship and Immigration),*

2013 FC 753 [Martineau J] at para 12. In the case at bar, the RPD reasonably determined the misrepresentations of the Principal Applicant and his spouse precluded a proper assessment of the credibility of the family's claim. As such, it was reasonable for the RPD to vacate the status of all the Applicants.

C. *Was the decision to exclude the Principal Applicant from Refugee Protection reasonable?*

[79] Pursuant to section 98 of the *IRPA* and Article 1F(b) of the *Convention,* refugee protection shall not be conferred on a claimant if there are serious reasons for considering whether "he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee".

[80] As per *dicta* in *Chan v Canada (Minister of Citizenship and Immigration),* [2000] 4 FC 390 [Robertson JA] at para 9, a non-political crime is "serious" if the equivalent offence under Canadian law is an offence with a maximum prison term of ten years or more. As per *Jayasekara v Canada (Minister of Citizenship and Immigration),* 2008 FCA 404 [Létourneau JA] at para 44, the question of a serious crime in the context of Article 1F(b) should take into consideration: the elements of the crime, the mode of prosecution, the penalty prescribed, the facts, and the mitigating and aggravating circumstances underlying the convictions.

[81] In the case at bar, the RPD found the Principal Applicant was involved in serious criminality and organized crime. The Applicants submit the RPD had no evidence to come to such a conclusion, making this finding unreasonable. However, the Applicants have not provided any further reasoning or case law to support their submissions.

[82] In my view, the RPD's findings were reasonable. The evidence indicated the Principal Applicant committed criminal offences on three separate occasions accompanied by accomplices, he was convicted pursuant to section 247(3) of the *Czech Code,* and he was sentenced to two years' imprisonment.

[83] The Applicants submit the lack of notice, the conviction *in absentia*, and the appointment of duty counsel should have been considered by the RPD when determining the seriousness of the crime. I have already discussed this point and with respect, it has no merit.

[84] In addition, the RPD noted Czech legislation allows fugitives to be prosecuted in their absence and they are provided with defence at court proceedings in their absence. As such, the evidence indicated the Principal Applicant's mode of prosecution was indeed addressed as part of the RPD's exclusion analysis.

[85] Lastly, the Applicants submit pursuant to *Febles v Canada (Citizenship and Immigration),* 2014 SCC 68 [McLachlin CJ] at para 33, the Court is required to consider mitigating and aggravating circumstances when assessing the seriousness of a crime in the context of exclusion. The Applicants submit the RPD did not consider the mitigating circumstances in their case; however, they have failed to identify what mitigating factors should have been considered.

[86] Despite the Applicants' failure to identify mitigating factors, the RPD is not required to list all mitigating factors when assessing exclusion, so long as the record demonstrates the RPD

considered all relevant circumstances. See *Abu Ganem v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1147 [Rennie J as he then was] at para 29:

> [29] The above analysis is the legal framework in which the RPD's decision that there were insufficient mitigating circumstances must be reviewed by this Court. I am not persuaded that the RPD failed to consider the mitigating factors in this case. While the RPD did not specifically address all the mitigating factors in its reasons, the reasons indicate that "the circumstances that led to the act and the factors" were considered but concluded that these mitigating factors did not point away from an exclusion finding. The transcript also indicates that the RPD member fully canvassed all of the mitigating factors at the hearing and explored and understood the relevant circumstances surrounding the offence. When the reasons are read in conjunction with the transcript of the hearing, I am satisfied that the RPD member understood correctly all of the facts relating to the commission of the offence and fully considered the mitigating factors, as required by the jurisprudence.

VII. Conclusion

[87] In my respectful view, the Applicants have not shown the decision of the RPD was unreasonable. The RPD's decision to vacate the Principal Applicant's refugee status was reasonable. The RPD's decision to vacate the other Applicants' refugee status was also reasonable. Finally, I have determined the RPD's decision to exclude the Principal Applicant from protection was also reasonable. The factual determinations made were open to the RPD on the record, and were made in accordance with constraining jurisprudence. In my respectful view, the Decision is transparent, intelligible and justified based on the facts and law before the decision maker. Therefore, this application must be dismissed.

VIII. Certified Question

[88] Neither party proposed a question of general importance, and none arises.

JUDGMENT in IMM-6021-19

THIS COURT'S JUDGMENT is that this application is dismissed, no question is certified, and there is no order as to costs.

"Henry S. Brown"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6021-19
STYLE OF CAUSE:	RUDOLF KARICKA, ANDELA KOVACOVA, RUDOLF KOVAC, ERIK KOVAC v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY WAY OF VIDEOCONFERENCE
DATE OF HEARING:	SEPTEMBER 21, 2021
JUDGMENT AND REASONS:	BROWN J.
DATED:	SEPTEMBER 28, 2021

APPEARANCES:

Peter G. Ivanyi	FOR THE APPLICANTS
Nicole Rahaman	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Rochon Genova LLP Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT