Federal Court Cour fédérale

**Date: 20220816**

**Docket: IMM-6659-20**

**Citation: 2022 FC 1203**

**Ottawa, Ontario, August 16, 2022**

**PRESENT: The Honourable Mr. Justice Roy**

**BETWEEN:**

**MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

**Applicant**

**and**

**SHKELQIM PROTODUARI**
**MUSA PROTODUARI**

**Respondents**

**JUDGMENT AND REASONS**

[1] The Minister of Public Safety and Emergency Preparedness (the Minister or Applicant) brings this judicial review application from a decision of the Refugee Protection Division (RPD) which determined that it was not appropriate to vacate one of its own decisions. That decision of the RPD of August 31, 1999 had confirmed that the Respondents were to be granted asylum, without holding a formal hearing. As we understand it, there was an expedited process in existence at the time. It appears that the Respondents benefited from that process.

[2] The judicial review application is made pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act or IRPA].

## I. Preliminary matter

[3] This judicial review application is the second one involving the attempt by the Minister to have the refugee protection granted to the Respondents vacated. The RPD vacated the refugee protection on June 10, 2014, which followed an application by the Minister in December 2011, more than twelve years after the Respondents had arrived in Canada and were granted refugee protection.

[4] The judicial review application of that decision was granted by our Court, on consent, on January 29, 2015. The order of the Court stipulates that the matter had to be sent back because of a violation of procedural fairness.

[5] The decision under review, dated December 18, 2020, constitutes the new determination ordered by this Court in 2015. The case was heard by the RPD over five days, on December 17, 2017, August 19, 2019, January 27, 2020, February 3, 2020 and February 10, 2020. This time around however, it is the Minister who seeks the judicial review of the final decision of December 2020. It appears that there have been before the RPD various motions and objections which helps account for the period of time between the order sending the matter back to the RPD and the final disposition close to six years later.

## II. The facts

[6] The Respondents arrived in Canada on two different dates in April 1999. They are father and son. Mr. Musa Protoduari, born on August 28, 1945 arrived in Canada on April 25, 1999. Mr. Shkelqim Protoduari was born on August 5, 1971 and he arrived in Canada on April 5, 1999. According to their respective Personal Information Forms (PIF), they traveled from Albania, their country of origin, to Spain by lorry, and by airplane to the United States. They then made their way into Canada. The RPD decision says that the father arrived in June 1999, but that does not appear to be right. Indeed that does not correspond to the date on the father's PIF. As a matter of fact, the two PIFs are date-stamped on two different days in May 1999 and the Court operated on the basis of the documentation in the Certified Trial Record. At any rate, there is nothing that rides on the date of their respective arrival.

[7] Since then, Mr. Shkelqim Protoduari became a Canadian citizen in May 2004 and his father has retained his permanent resident status in Canada.

[8] The Respondents fled Albania in April 1999 following incidents that took place in 1997.

[9] The record shows, and the Applicant concedes, that the Protoduari family was prominent in Albania, one of the richest of the country. However, the Second World War saw a communist regime become a satellite of the Soviet Union. Property owned by the Protoduaris was confiscated. Over the following years, Musa Protoduari was arrested on eight occasions.

[10] However, with the fall of the Berlin Wall, the situation began to change. A newly formed political party, the Democratic Union Party of Albania (also referred to as the "Democratic Party"), was elected to govern Albania in 1992. The Protoduari family were active supporters of that Party. They were able to claim back their property, including land, and they built profitable businesses in their hometown of Ura Vajgurore, in the county of Berat, a town of some 7,000 residents. It is not disputed that the family became again notorious, prosperous and very successful, employing some 200 workers. A villa was built in the main square of Ura Vajgurore.

[11] Another of Musa Protoduari's son, Edmond, ran in the parliamentary elections of 1996. His party, the Democratic Party of Albania, prevailed at that election. However, it was embroiled in financial scandals (pyramid schemes) which generated significant unrest in early 1997. The Applicant speaks of a civil war that irrupted. The government fell in March 1997 and elections were called for June 29, 1997. It is the successor of the Communist Party of Labour, the Socialist Party of Albania, which won the June 29, 1997 election.

[12] A number of events are relevant for our purpose. The existence of those events is not disputed (final submissions of the Minister before the RPD, March 6, 2020 at para 8) and they took place during the period of turmoil, leading up to the election:

- on April 22, 1997, gun shots were fired at Edmond Protoduari, who was a candidate again in the upcoming election. He was not injured;
- on May 8, 1997, while standing on the family villa's balcony, Edmond was hit above the waist by gunfire and was seriously wounded. He was directed to the local hospital

but then transferred to a hospital in Tirana, the capital, where he eventually took refuge at the house of his fiancée's uncle;

- it appears that Musa Protoduari took steps to guard the villa and the surrounding area. During the night of May 25, 1997, the villa was attacked with heavy weapons such as bazookas and rockets. It seems that one of the villa's four floors was destroyed. Shkelqim Protoduari recognized one of the assailants, one who was said to be a member of the "Nation Saving Committee"; a gunfight ensued;
- shortly thereafter, the Protoduaris chose to leave the villa for a different town; they were not present when the events of June 17, 1997 occurred;
- on June 17, 1997, two political rallies took place in Ura Vajgurore. Following one of the rallies, a convoy of some 10 to 15 vehicles, with occupants who were heavily armed, and accompanied by police vehicles crossed over the centre of Ura Vajgurore. At the Protoduari's villa were equally armed persons, as well as other armed persons elsewhere on the square. Situated in front of the villa was a tank. The evidence is not clear as to how the exchange of gunfire began, but such an exchange took place and it is said that it lasted between 20 and 30 minutes. Someone who was helping protect the villa was able to operate the tank which fired in the direction of the police armoured vehicle. Four policemen were killed; one of the villa's defenders was also killed. There were several individuals injured.

[13] As already pointed out, the Respondents went into hiding following the attack on their villa in late May 1997. The Minister concedes that they were not present during the incident of June 17, 1997. That day, the Respondents claimed that they saw on television that there had been

what they referred to in their PIF as a "massacre" in Ura Vajgurore, but without details (PIF narrative). Nevertheless, the Respondents were able to meet with one of the villa's defenders the day after the encounter. Surely details of the gunfight, including the use of a tank, were discussed. The Respondents went into hiding in the mountains: they were terrified. It is not clear for how long they stayed in hiding. It would seem that it lasted the better part of two years, between mid-year 1997 and their departure for Canada in April 1999. With the crisis in Kosovo creating confusion in Albania with the arrival of thousands of refugees, the Respondents were able to leave the country. Their PIF speaks of travelling by lorry to Spain. They transited through Spain and the United States before arriving in Canada in April 1999. The two Respondents were granted asylum on August 31, 1999.

[14] Arrest warrants concerning the Respondents had been issued in Albania on March 14, 1998. A conviction judgment was rendered on January 31, 2000, long after the Respondents' arrival in Canada and the decision to grant them asylum on August 31, 1999. The conviction judgment from the Tirana District Court, composed of a panel of three judges, was, according to the new "Demande d'annulation du statut de réfugié" (Application to Vacate a Decision to Allow a Claim for Refugee Protection) of January 2018, issued by the Minister for the following offences:

Shkelqim Protoduari

> ° « The defendant Shkelqim PROTODUARI is declared guilty of the criminal offence of creating and participating in an armed gang and pursuant Article N. 333 of the Criminal Code he is sentenced with 10 years of imprisonment;
>
> ° The defendant Shkelqim PROTODUARI is declared guilty, as a member of an armed gang he committed the criminal offence of unlawful deprivation of freedom of the citizen Kastriot Bregu,

offence described in Article no. 110/2 of the Criminal Code and pursuant Article 110/2 and 334/1 of the Criminal Code he is sentenced with 6 (six) years imprisonment. […]

° Finally in Applying Article No. 55 of the Criminal Code of the totality of his sentencing the defendant Shkelqim PROTODUARI is sentenced to 13 years imprisonment. » (pièce M-13);

Musa Protoduari

° « The defendant Musa PROTODUARI is declared guilty of the criminal offence of creating and participating in an armed gang and pursuant to Article N. 333 of the Criminal Code he is sentenced with 15 years of imprisonment.

° The defendant Musa PROTODUARI is declared guilty, as a member of an armed gang he committed the criminal offence of intentional murder of the police officer Miltadh Koci as described in Article No. 79/c of the Criminal Code and pursuant Articles No. 79/c and 334/3 of the Criminal Code he is sentenced with life imprisonment.

° The defendant Musa PROTODUARI is declared guilty, as a member of an armed gang he committed the criminal offence of intentional murder of the police officer Arjan Shemuni as described in Article 79/c of the Criminal Code and pursuant Article N 79/c and 334/3 of the Criminal Code he is sentenced with life imprisonment.

° The defendant Musa PROTODUARI is declared guilty, as a member of an armed gang he committed the criminal offence of intentional murder of the police officer Asllan Selami as described in Article no. 79/c of the Criminal Code and pursuant Article N 79/c and 334/3 of the Criminal Code he is sentenced with life imprisonment.

° The defendant Musa PROTODUARI is declared guilty, as a member of an armed gang he committed the criminal offence of intentional murder of the police officer Ilia Bano as described in Article No. 79/c of the Criminal Code and pursuant Articles No. 79/c and 334/3 of the Criminal Code he is sentenced with life imprisonment.

° The defendant Musa PROTODUARI is declared guilty, as a member of an armed gang he committed the criminal offence of attempted intentional murder of the police officer Thimi Tanku as described in Article No. 79/c of the Criminal Code and pursuant

> Articles N 79/c, 22 and Article 334/3 of the Criminal Code he is sentenced with life imprisonment.
>
> ° The defendant Musa PROTODUARI is declared guilty, as a member of an armed gang he committed the criminal offence of attempted intentional murder of the police officer Ylli Dhano as described in Article No. 79/c and 22 of the Criminal Code and pursuant Articles N 79/c, 22 and Article 334/3 of the Criminal Code he is sentenced with life imprisonment.
>
> ° The defendant Musa PROTODUARI is declared guilty, as a member of an armed gang he committed the criminal offence of intentional murder of the police officer Ilir Bani as described in Article No. 76 of the Criminal Code and pursuant Articles No. 76 and 334/3 of the Criminal Code he is sentenced with 20 year imprisonment.
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> ° The defendant Musa PROTODUARI is declared guilty, as a member of an armed gang he committed the criminal offence of unlawful deprivation of freedom of the citizen Kastriot Bregu, offence described in Article no. 110/2 of the Criminal Code and pursuant Article 110/2 and 334/1 of the Criminal Code he is sentenced with 10 year imprisonment.
>
> ° Finally in Applying Article No. 55 of the Criminal Code and the totality of his sentencing the defendant Musa PROTODUARI is sentenced to life imprisonment. » (pièce M-13);

[15] The trial was held *in absentia*, without the Respondents being present; there was a state appointed counsel representing their interests, but it is not known what role was played. The judgment of January 31, 2000 refers to a number of accused, other than the Respondents, including Edmond Protoduari and Musa's wife, Fatbardha Protoduari. The first 10 pages of the 31-page document list the offences charged. The last seven pages constitute the Court's decision concerning the guilt, but also some acquittals, of the various accused persons. It is only from page 11 to page 24 that the Court recounts the events which led to the deaths of four policemen and one civilian. Is noted the availability of heavy weaponry for the taking throughout Albania and the extremely tense situation in the country, including of course in Ura Vajgurore. However,

the judgment is more declarative than it constitutes a demonstration of guilt. The reader never knows what the essential elements of the crimes charged are, nor what the precise evidence is to support the conclusion of guilt. There is no evidence of the presence of the Respondents on the site of the events of June 17, 1997.

[16] The Respondents have been steadfast that an interview of at least 45 minutes took place with a hearing officer at the time their refugee claim came before the RPD; they answered, they claimed, every question. That evidently satisfied the decision maker as they were granted refugee status without a formal hearing. Their PIF (the Respondents had nearly identical personal information forms) contained the answer “yes” to question 20 which reads “Are you, or were you, wanted by police or military or any other authorities in any country?”. Question 21 asked “Have you ever committed or been convicted of any crime or offence in any country?”. Both Respondents answered “no”. The PIF specifies at question 21 that “If you answered yes to question 20 and/or 21, please explain”. Neither of the Respondents offered any further explanation. We do not have on this record the questions and answers between the hearing officer and the Respondents. What we have however are their PIFs, which contain the answers to questions 20 and 21, and a narrative, three pages long, which explains the events of March to June 1997, but does not provide the details of the June 17 “massacre” and why the Respondents were wanted by the police. Ultimately, after an interview lasting between 45 minutes and one hour, the Respondents were granted refugee status without a hearing.

## III. The decision under review

[17] The Minister sought to vacate the decision of August 31, 1999, in accordance with section 109 of the Act. Section 109 reads as follows:

| **Applications to Vacate** | **Annulation par la Section de la protection des réfugiés** |
| --- | --- |
| **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 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. |

The first RPD decision granting the Minister's application to vacate the asylum claims was set aside by this Court (January 29, 2015), with the parties agreeing to the Court Order, because of procedural fairness violations.

[18] Although the convictions in Albania came in late January 2000, it is only on December 14, 2011 that a first application to vacate the decision to allow a claim for refugee protection was filed by the Minister. Following the judgment of this Court setting aside the first RPD decision in January 2015, a new application was made, but only in January 2018.

[19] It may be useful to review briefly the new Application to vacate the decision of August 1999 which allowed the claim for refugee protection, to appreciate better the allegations and the context in which the decision under review was made.

A. *Application to vacate*

[20] With respect, it cannot be said that the Application to vacate is a model of clarity. The Minister claims that the decision of August 1999 was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter. These are the words taken from section 109(1) of the Act. The Application to vacate goes on to state that the Application includes ("comporte" in the original) a request for an exclusion based on Section 1F(b) of the *United Nations Convention Relating to the Status of Refugees*. It reads:

| | |
|---|---|
| **F** The provisions of the 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 outside the country of refuge prior to his admission to that country as a refugee; | **b)** Qu'elles ont commis un crime grave de droit commun en dehors du pays d'accueil avant d'y être admises comme réfugiés; |
| … | […] |

That is not enlightening either. Section 98 of the Act provides that "(a) person referred to in Section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection". Thus, if a person has committed (no conviction is required) a serious crime before the admission to Canada, the person is excluded from being able to claim refugee status by operation of section 98 because he is not a Convention refugee or a person in need of protection. In effect, the Minister is asking the RPD to vacate its order of August 1999 and to declare that the Respondents do not have access to the refugee process because they have committed a serious crime.

[21] There is then a recital of the facts, in the course of 19 paragraphs, and the convictions entered in Albania against the Respondents. The paragraphs are concerned with the refugee protection process from their arrival in Canada in April 1999.

[22] Out of those 19 paragraphs, the Minister discloses the following:

- the RCMP disclosed on June 12, 2002 to immigration officials that an arrest warrant out of the Appeal Court of Tirana is outstanding for Musa Protoduari for "voluntary homicide and creation of an armed band" for which he was sentenced to imprisonment for life;

- on January 3, 2007, an internet search produced an "Interpol warrant" against Musa Protoduari for murder and organized crime;
- on November 2007, the Canada Border Security Agency (CBSA) received the January 31, 2000 judgment which is described by the Minister's representative as a detailed description of the events on which the asylum claim was based;
- the writer claims that attempts have been made to ascertain developments since the January 31, 2000 judgment; it appears that the judgment has not been quashed. The Respondents are invited in the Application to vacate to supply information as it is said that it is reasonable to believe that they have access to the latest developments about the Albanian court case.

[23] I have looked in vain in the Application for an articulation of what the precise misrepresentations alleged by the Minister may be. The only submissions that appear to relate to Section 1F(b) speak of offences, if committed in Canada, punishable by at least 10 years' imprisonment. Not having disclosed the events leading to the convictions prevented the RPD from assessing properly the asylum claim: the Minister assumes the commission of the offences. There is no indication of what the misrepresentation is. At its highest, the Minister suggests that it is reasonable to believe that the Respondents omitted important information in their narrative which, had it been known by the RPD, would not have resulted in an expedited process. The outcome would have been quite different, says the Minister's representative. Faced with evidence that the Respondents were not present on June 17, 1997, the Application to vacate states that the evidence offered by the Respondents also corroborates some elements found in the Albanian decision. The Application does not reveal what they may be. The Application goes so

far as suggesting that the fact that Edmond Protoduari was acquitted tends to confirm that the trial was fair. Indeed, other court decisions have since been favorable to the Respondents. It remains unclear what that shows. In the end, the reader is left with an allegation that the Respondents did not disclose their involvement in the events of June 17, 1997, even though they had been absent from the site for the three weeks preceding.

B. *The closing argument*

[24] The Minister's closing argument before the RPD is not much more enlightening. Having acknowledged that the Respondents were tried *in absentia*, the Minister's representative offers this startling proposition at paragraph 12 of their written closing submissions: "Since many co-accused were present in Court, it gives more probative value to this versions (sic) of the events of 1997 than to the one found in the PIF which is, in the Minister's opinion more self-serving". The suggestion is not further explained. The Court is still very much unclear as to what this may mean since the Minister had announced at paragraph 8 of the submissions that "The point that is contested is that they were aware of the Court proceedings at the time of the initial determination". There is no evidence that appears to have been offered in support of the statement. Paragraph 12 is under the rubric of "probative value of exhibit M-13", which is nothing other than the Court decision of January 31, 2000. Under that same rubric is paragraph 16, where we read that "the Minister's (sic) is of the opinion that the respondents have not established that their trial was not fair or did not respect natural justice. If it had been politically motivated, it is hard to explain that the most involve (sic) in politics was found not guilty". That appears to be a puzzling reference to Edmond Protoduari, who was shot on May 8, 1997, some

38 days before the tragic events of June 17. How that relates to the awareness of proceedings at the time of the initial determination is not explained.

[25] The lack of precision is telling in my view. The Minister's representative announces that the central issue is that the Respondents knew of court proceedings before the August 31, 1999 determination, yet the judgment on which the Minister relies came four months later. Hence, what is it that the Minister claims ought to have been disclosed before August 31, 1999, but was not? The final written submissions do not tell.

[26] Under the rubric "misrepresentations/withholding of facts", one may expect to have a clear articulation of what precisely the misrepresentation or withholding is alleged to have occurred. Instead, the Minister's representative seeks to suggest that it is doubtful that the Respondents did not know about proceedings against them since Musa Protoduari's mother, then 77 years of age, appears to have stayed around Ura Vajgurore after the Respondents went into hiding. It is not known when that communication would have taken place. As a matter of fact, nothing is known about the mother and the ability to communicate with her son in view of the quality of communications in Albania.

[27] The Minister's representative seems to speculate that Mr. Musa Protoduari would have found out about his trial from his mother, presumably before August 31, 1999. However, even if there was some communication concerning the existence of proceedings, there is no indication of what precisely would have been communicated before August 31, 1999. Thus, the submissions are silent as to what it is that was known and when that was known, such that it would be

possible to ascertain what was misrepresented or withheld. In effect, the Minister's representative challenges the credibility of the Respondents who claimed they found out about the trial later, but does not say what it is that constitutes the misrepresentation or withholding prior to August 31, 1999. That may end up being a red herring if the Respondents' disclosure about the events of June 17, 1997 in their PIF was supplemented by the interview with a hearing officer. There is no indication in the written submissions about what was known in August 1999 to argue that there was some misrepresentation in spite of the fact that the Respondents' respective PIFs reported that they were wanted by the police, that the narrative spoke of the events of June 17, 1997 (without addressing the policemen's death, but referring directly to a massacre having taken place) and that a hearing officer received answers from the Respondents for 45 to 60 minutes.

[28] Probably in an attempt to bolster what may appear to be more speculation than hard facts that the Respondents knew of proceedings, the Minister's representative submits that Musa Protoduari's mother met with the court appointed counsel representing the Respondents. It was confirmed during the hearing of this case that the date of that meeting, if it took place, is unknown. Neither is known what would have been discussed.

[29] In fact, the submissions on misrepresentation and withholding read more like speculations that the Respondents had to know about something, which is never articulated, and then trying to put the burden on the Respondents to convince that they did not know what ever it is that they should have disclosed. Nowhere can it be found that the Minister's representative

dealt with the PIF and more importantly the hearing before the hearing officer which led to the granting of asylum.

[30] It is with those submissions about the case for vacating the granting of refugee protection that the RPD had to contend.

[31] The Minister's representative then moved on to her submissions about what was called "Exclusion 1F(b)". Once again, it is not easy to follow the golden thread through the submissions and, in particular, what is the interplay between the vacation of the refugee protection pursuant to section 109 of the Act and section 98 which gives effect to Section F of Article 1 of the Convention.

[32] The submissions seem to assert that the judgment of January 31, 2000 constitutes credible evidence that the Respondents "were convicted of offences that support the application of section 1F(b)" (submissions before the RPD, para 39). The submissions quote three short paragraphs from the judgment, which refer to the defence of the villa, and sentences taken from affidavits about the gun battle on June 17, 1997. None of the extracts chosen by the Minister's representative puts the Respondents on the site. In fact, the extracts appear to confirm that the Respondents were not present.

[33] The short submissions still dedicate two paragraphs to the issue of whether or not the prosecution was politically motivated. That may seem more germane than when considering section 109, although Section F(b) speaks of a serious crime not being political as contrasted

with a trial being politically motivated. At any rate it is argued that the prosecution was not politically motivated because Edmond Protoduari, who is presented as “the main source of all these political problems” (para 37), was acquitted of the charges. The Minister’s representative did not elaborate. Relying exclusively on the January 31, 2000 judgment, the submissions described “steps taken by the Protoduari family to defend their villa” (para 40). That constitutes the long and short of the argument submitted to the RPD. There is no indication, neither in the judgment nor in the Minister’s submissions, of any participation by the Respondents in the events of June 17, 1997, other than steps taken to protect the villa after son Edmond was shot on the balcony on May 8, 1997 and the villa was attacked with bazookas and rockets in the middle of the night of May 25, 1997. Without more, the Minister represents that “These extracts of the decision, taken into conjunction with several affidavits gives (sic) lots of credibility to the descriptions of the event of June 1997 of exhibit M-13” (para 44). Not only is that statement perfectly circular, but it does not address the central issue: whether or not the Respondents took part in some fashion or another (perhaps as parties to the offences) in the events of June 17, 1997.

[34] That constitutes the argument offered to the RPD to vacate the decision to allow the claim for refugee protection granted in August 1999 and to decide that the Respondents are caught by section 98 of the Act, such that they cannot be Convention refugees or persons in need of protection.

C. *The Refugee Protection Division decision*

[35] The RPD was not satisfied that the Minister had discharged his burden to show that the decision to allow a claim for refugee protection ought to be, some twenty years later, vacated.

[36] After a brief history of the case, the RPD notes that the initial preparatory conference, after the matter had been returned to the RPD by our Court, was held in December 2017, with a new Application to Vacate with a Notice of Intervention for an Exclusion under Article 1F(b) of the Convention filed on January 26, 2018. There were various motions on behalf of the Respondents, including a motion to postpone the hearing *sine die* to allow litigation before our Court of unsuccessful motions and a similar motion in order to retain a new counsel. There was even an unsuccessful motion seeking the recusal of the panel member. The test for recusal (*Committee for Justice and Liberty et al v National Energy Board et al*, [1978] 1 SCR 369) not having been met, the matter was finally heard.

[37] In reviewing submissions made, the RPD notes that the Respondents (Musa Protoduari was represented by his son, Gentjan Protoduari, who was his designated representative) testified that there was a hearing, which was not the formal hearing, after they applied for asylum. It is said that "they reiterated in their written arguments that they had a '40-60 minutes hearing' where they had 'elaborated in more detail and responded to all question'" (RPD Decision, para 38). The Respondents denied having armed guards in their villa or that they had a tank to protect them. In fact, they had left the premises some three weeks before the tragic events. They contended that the judicial apparatus in Albania is corrupt. The January 31, 2000 judgment

continues to be the subject of contestation, including before the Strasbourg Court (the European Court of Human Rights) which was said to have accepted the case to be heard, but the matter had not yet been heard as of at least April 2020, the date on which the Respondents' final submissions were made.

[38] Simply put, the Respondents argued that they answered questions before their refugee claim was granted without a hearing, they have nothing to do with the tragic events of June 17, 1997 and the verdict against them, after a trial *in absentia*, was politically motived before a "corrupt judicial structure". The submissions before the RPD, signed by the Respondents, run for 36 single spaced pages. In view of the RPD decision, there is no need to consider them in any great details.

[39] As for the Minister's submissions, they are summarized by the RPD as an application "based on the facts in that judgment that the Minister made the first Application to vacate, in December 2011, and the present de novo. The Minister also asked this Tribunal to exclude the Respondents Musa and Shkelqim under Article 1F(b) of the Convention" (RPD decision, para 32). In spite of not having been convicted as of August 1999, when they were granted refugee protection, the Minister contended that the Respondents have nevertheless committed the offences for which they were convicted five months later, and they have omitted important information in the narrative portion of their PIF. As already said, the submissions were short on precise facts that are alleged to have been omitted or misrepresented.

[40] The RPD had the equivalent of a decision tree. The first issue to consider is whether the decision of August 1999 was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter (section 109(1) of the Act). If the answer is "no", that is the end of the matter as the Application must be rejected. If the answer is "yes", the RPD would then consider the exclusion pursuant to section 98 of the Act: "A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection". The third decision, if that point is reached, would be whether the RPD is satisfied that there is not other evidence sufficient to justify refugee protection (section 109(2) of the Act).

[41] The RPD found that the Minister had not proven the misrepresentation or the withholding of material facts. That was the burden to be supported by the Minister. The panel also considered whether the Respondents had committed a serious non-political crime before their admission to Canada.

[42] The RPD did not ignore the incidents leading to the events of June 17, 1997. The January 31, 2000 judgment is fairly reviewed (paras 63 to 71 of the RPD decision).

[43] The conclusion that the granting of the refugee protection should not be vacated turns on whether or not the RPD was satisfied that the Respondents not only provided a faithful account of the events of June 17, 1997, as well as the various attacks in the Spring of 1997, but that the PIFs were supplemented through the interview conducted by a hearing officer where the Respondents testified that they said "everything". Were there misrepresentation or withholding

of material facts when the Respondents applied for asylum before a decision to grant them the status was made in August 1999?

[44] The RPD assessed the testimony of Gentjan Protoduari, his father's accepted representative, as being convincing, at paragraph 80 of the decision:

> [80] They also testified that they had a hearing in 1999, Gentjan, the designated representative of Musa, was also a claimant in 1999. He was about 15 years old at the time of the events in Albania and 17 years old at the time of the asylum claim. He testified convincingly, and he told the Tribunal that they had a hearing just like this one at the time of the first determination and explained everything to the IRB. Shkelqim testified to the same effect.

There is no evidence of a record of the hearing before a hearing officer having been completed and kept. As the panel wrote at paragraph 82, "(t)here is no recording or written transcript to corroborate their testimony, and we do not know what additional information they had provided".

[45] That appears to have prompted the panel to examine the *Immigration Refugee Board Rules*, SOR/93-45, sections 9, 18 and 19 at the time of the determination. The panel concludes that a conference with a hearing officer most likely happened. Here is how the process is described by the RPD:

> [83] A thorough examination of the IRB *Rules* at the time of the initial determination and the Respondents' credible testimony confirm that they were most likely invited for a Conference with a Hearing Officer (HO). Under the said *Rules*, when examining a file, the HO was responsible:
>
>> The HO could summon the parties to "attend and participate in a preliminary conference with a

> refugee hearing officer regarding any matter concerning the claim”.
>
> To notify the Minister if he is of the opinion that matters involving Article 1E or F (exclusion).
>
> During that Conference, the HO assessed the documents and the PIF of the person and “discuss any other matter with the person concerned that could assist in expediting the claim”, among other things.
>
> At the end of the Conference, the HO made a report where he suggested holding a hearing or *if the HO is of the opinion that the person could be determined to be a Convention refugee without a hearing, shall forward to a member* for final decision.

[46] That is not all. The Board member who received a file for determination without a hearing was not to accept without any question. According to the RPD, the Board member “must again verify if there is no need to notify the Minister or to make sure that the Minister was not invited before taking the final decision” (para 84).

[47] Thus, the RPD notes that the Respondents, in their PIFs, indicated unequivocally that they were wanted in 1999 and they provided the basic facts in their narrative. The panel is also satisfied that a hearing took place. One reads in the decision:

> [85] Based on these observations, after the Tribunal’s thorough examination of the IRB *Rules* at the time of the first determination, and after hearing the Respondents’ testimonies and their written arguments where they said that they had a 45-60 minutes ‘hearing’, the Tribunal concludes that they at least participated in a Conference with a Hearing Officer, where they had provided additional information and the HO recommended that their claim be accepted without a hearing, and after verification, the member also concurred.

[48] To conclude the syllogism, the panel recognizes that, given what had already been disclosed in the PIFs and that a fairly long interview with a hearing officer took place, what needed to be disclosed was disclosed:

> [88] The HO and the member are two professionals with a knowledge of the refugee laws. Both of them decided that it was not necessary to notify the Minister of a possible exclusion under section 98 of the IRPA, after examining the files and the declarations of the Respondents. There is no evidence that the Respondents misled the Tribunal at the time of the first determination, because the IRB had all the facts needed when deciding the case and did not see the need to notify the Minister regarding a possible 1F*(b)* exclusion.
>
> [89] These findings lead us to conclude that the first decision was not obtained as a result of misrepresentation because they did divulge all material facts regarding their claims. This would suffice to reject the application to vacate, but the Tribunal will address the exclusion on as a subsidiary issue.

In effect, the PIFs called for further questions to be asked about the events of June 17, 1997 and the disclosure that the Respondents were wanted by the police. These questions, once answered, led to the granting of the asylum claim without a hearing.

[49] As indicated at the end of paragraph 89 of the RPD decision, the panel chose to address the exclusion issue. The RPD is satisfied that “the Respondents’ file was assessed by the Hearing Officer and by the IRB member and both did not find it necessary to notify the Minister for a possible exclusion under Article 1F(b), though the Respondents indicated that they were wanted by the authorities in their country and provided all pertinent details” (para 100). The RPD concludes by saying it would have arrived at the same conclusion as in 1999 because it would have considered, among other things, the conditions in a country at the time.

[50] The RPD also commented in a section of the decision addressing "politic and corruption" in the following fashion:

- the country of Albania was in turmoil prior to the elections of June 1997. The government had fallen in March of that year;
- the Respondents had been attacked in April and May, with Edmond Protoduari being seriously injured by gunfire, and their villa was attacked by heavy artillery such as bazookas and rockets, and was partially destroyed;
- the Minister highlighted that the Protoduaris had hired guards to protect their villa. The RPD states that they were entitled to hire guards in a country on the brink of civil war, with chaos all around;
- media reports contemporaneous to the trial state that the trial was politically motivated. The RPD decision speaks of news articles, one of which indicates "that the trial was ordered and controlled by the politicians in power in Albania, and the accused were not interrogated by the investigators and many were called as witnesses, but they refused to be manipulated" (para 105);
- the Albanian court relied on witness statements of witnesses who were abroad or dead. An expert witness declared that his expertise was incomplete;
- the presiding judge of the three-member panel that heard the case was dismissed in 2019 for his contacts with organized crime. The lead investigator in the case was arrested in 2001 and charged with drug offences.

The accumulation of that evidence makes the RPD conclude about the corruption and unreliability of the judicial system in Albania. That, says the RPD, "corroborates the

Respondents' allegation regarding possible manipulation and corruption in the police and judicial system (in) Albania there and now" (para 110).

[51] Probably with a view to adding to the unreliability of the Albanian justice system, the RPD also notes that, according to a notation, in August 2006, in the system then in place for the purpose of recording all actions taken in immigration cases, the following is found in FOSS (Field Operations Support System):

> NOTE THAT CANADA WILL NOT BE PROCEEDING FUTHER (SIC) WITH EXTRADITION IN THIS MATTER. THE EVIDENCE SUBMITTED DOES NOT MEET CANADIAN LEGAL REQUIREMENTS FOR EXTRADITION AS TO THE SUBSTANCE AND FORM. FURTHER <u>ALBANIA'S JUDICIAL SYSTEM IS NOT ADEQUATE TO MEET CHATER</u> (SIC) <u>REQUIREMENTS</u>.

The underlined portion of the text came from the RPD and the complete notation is found as such at paragraph 112 of its decision.

[52] The Minister had relied exclusively on the January 31, 2000 for the Application pursuant to section 109(1) of the Act. That was found to be insufficient. The decision maker states that it "cannot rely solely on the January 2000 judgment to conclude that the Respondents would have been excluded under article 1F(b) at the time of first determination" (para 115).

[53] In essence, the application to vacate the decision to allow the claim for refugee protection was dismissed because the Minister had not established that the Respondents had failed "to disclose all relevant facts related to a relevant matter at the time of the first determination…" (RPD decision, para 116).

## IV. Arguments and analysis

[54] The Minister challenges on judicial review the RPD decision which “found that the Respondents had not obtained their status as a result of directly or indirectly withholding material facts relating to a relevant matter pursuant to paragraph 109(1) of the Immigration and Refugee Protection Act (Tribunal’s Reasons, paragraph 89)” (Applicant’s written case, para 2). The same point is made again at paragraph 37 of the Applicant’s written case: “The sole issue in this case is whether the Respondents obtained refugee status as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter, the whole pursuant to subsection 109(1) of the IRPA”. It will be recalled that the RPD had itself considered the threshold issue as being the misrepresentation or withholding of material facts relating to a relevant matter. Accordingly, the Court will address this issue. In my view, it is determinative of the judicial review application.

[55] It is not disputed that the standard of review is that of reasonableness. There is a presumption that reasonableness applies whenever a court reviews administrative decisions (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653 [*Vavilov*] at para 16). It can be rebutted (*Vavilov*, at para 17), but none of the situations recognized as rebutting the presumption has been raised. In fact, the parties agree and the Court concurs.

[56] The burden is on the Minister to show that the decision maker’s decision is unreasonable. An applicant must satisfy a reviewing court “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).

[57] It was the Minister’s burden, in the first place, to show that the decision to allow a claim of refugee protection ought to be vacated because of misrepresentation or withholding of material facts. The Minister had to convince the Court that the refugee protection should have been vacated in spite of evidence before the RPD that, between the PIFs and the further disclosure before a hearing officer, the misrepresentation or withholding of material facts had been established: to put it simply, the Minister has to show that the decision to refuse to vacate is unreasonable.

[58] As instructed by the Supreme Court of Canada, the focus must on judicial review be the decision actually made; the role of the Court is to review the reasonableness of the decision made, not to decide the matter on its merits. The courts are to refrain from deciding the issues themselves (*Vavilov*, at para 83). It has been abundantly repeated that the reviewing court has as a starting point the principle of judicial restraint (*Vavilov*, at para 13) and that the reviewing court must adopt a posture of respect (*Vavilov*, at para 14).

[59] In my estimation, the Applicant is asking the Court to take a different view of the merits of this case. He stresses some elements, suggesting that they were ignored by the decision maker, while not engaging with the crux of the decision made. For instance, the Applicant faults the PIFs at paragraphs 52 and 54 of his written case for not referring to the killing of four policemen or to the arrest warrants of March 1998. However, the RPD came to the conclusion that the

interview with the hearing officer provided more information which was sufficient to avoid claims of misrepresentation or withholding. It was not hidden from the officials who reviewed the Respondents' asylum claims that the Respondents were wanted by the police: that mention can hardly be missed as it is rather prominent in the PIF. Similarly, the narrative is very explicit, especially as it refers to the "massacre of Ura Vajgurore". Surely that would attract the attention of professional immigration officers, reasoned the RPD. Having examined carefully the IRB Rules in existence at the time, the decision maker is satisfied that the conference referred to by the Respondents took place and infers that, during a 45 to 60 minute interview, these issues must have been addressed. The Minister does not engage with what is at the heart of the RPD decision. Indeed, there is nothing on this record to suggest otherwise.

[60] The Court in *Vavilov* stresses that the decision must be read in light of the record and the administrative setting. Thus, a reviewing court will take into account the institutional expertise and experience of an administrative decision maker. At paragraph 94, the majority in *Vavilov* states that "the reviewing court might consider the evidence before the decision maker, the submissions of the parties, publicly available policies or guidelines that informed the decision maker's work, and past decisions of the relevant administrative body". Here the submissions did not present a clean path to finding any kind of misrepresentation or withholding of material facts, and the Court must give respectful attention to a decision maker's demonstrated expertise in making the decision.

[61] In the same vein, the Minister argues that the reference by the panel to the Respondents being entitled to hire guards to protect their property is a non-issue. I disagree. The reference to

guards is in line with the circumstances in the Spring of 1997 which are a relevant factor; it explains why there were armed individuals following the attacks of April and May 1997. Instead, the Applicant speculates that the "issue is whether these guards hired by the Protoduari family killed four policemen by using a tank and firearms and the fact that the IRP was not aware of this story when it granted asylum to the Respondents in 1999" (written case, para 56). That does not explain why the Respondents, who had left three weeks earlier, would be responsible for the confrontation resulting in many deaths. As pointed out earlier, the record did not show that the Minister identified what the misrepresentation or withholding of material facts was. Furthermore, the issue is the disclosure in August 1999 about the events of June 1997, not whether the Respondents were guilty of anything, as that could not have been disclosed before a verdict came down. The focus has to be on the decision under review which found that, on a balance of probabilities, a 45 to 60 minute interview with a professional immigration officer, based on the PIFs, resulted in a decision to allow the claim for refugee protection. The Applicant fails to demonstrate how the decision is unreasonable: he never engages with the decision and in particular the interview which evidently was decisive. As the *Vavilov* Court found, an internally coherent decision, with a rational chain of analysis, that is justified in relation to the facts and the law will be reasonable and "(t)he reasonableness standard requires that a reviewing court defer to such a decision" (at para 85).

[62] It seems to me that this case boils down to a simple proposition. It is trite law that section 109(1) requires, in the words of the Court in *Canada (Public Safety and Emergency Preparedness) v Gunasingam*, 2008 FC 181 at para 7, that "a) there must be a misrepresentation or withholding of material facts; b) those facts must relate to a relevant matter; and c) there must

be a causal connection between the misrepresenting or withholding on the one hand and the favourable result on the other". First and foremost, there must be a misrepresentation or withholding of material facts. In this case, we do not know what the misrepresentation or withholding might have been in August 1999 on what was a weak record. Indeed, that issue appears to have been carefully avoided. As Justice de Montigny, then of this Court, wrote in *Mansoor v Canada (Citizenship and Immigration)*, 2007 FC 420 [*Mansoor*], the finding of misrepresentation or withholding is "entitled to the highest level of deference, as it was based on an assessment of Mr. Mansoor's credibility and on the weighing of the evidence submitted by both parties" (at para 24). The Applicant has not shown how the weighing of the evidence was unreasonable.

[63] As I have tried to show, the evidence was less than stellar and the submissions to the RPD lacked articulation as to what was the actual misrepresentation or withholding, in view of the evidence that there was an interview which lasted close to one hour, the purpose of which had to be to expand on the reasons justifying a refugee claim in view of PIFs which disclosed that the Respondents were wanted by the police and that there was "a massacre" in June 1997.

[64] The Applicant's theory of the case seems to have been that there was, after the Respondents came to Canada, a judgment from an Albanian court which found them criminally responsible for offences committed allegedly on June 17, 1997. But there was no direct responsibility established by the judgment. These offences would have been committed by others who were present at the villa. The Applicant wished the RPD would infer from that judgment something. It is not clear what that something ought to be in August 1999. That the Respondents

knew about an arrest warrant that was pending against them? They declared in their PIFs that they were wanted by the police. That called for a follow-up and there was a hearing before a hearing officer. That there had been deaths on June 17, 1997? Their narrative, as part of the PIFs, referred to a massacre in Ura Vajgurore. The issue for the reviewing court is not that the decision constitutes the only possible solution (that would turn the standard of review into a correctness standard), or that the Court agrees with the merits of the case (that would usurp the role of the decision maker). It is rather to be satisfied that the Applicant has shown that the decision is lacking in terms of reasonableness. In spite of the valiant effort of counsel for the Applicant, the burden was not discharged on this record.

[65] What ever is claimed was not disclosed in the PIF was, in the view of the RPD, countered by an interview which must have addressed the facts disclosed by the Respondents that they were wanted by the police and that “a massacre” occurred on June 17, 1997. The RPD decision, although not perfect, is based on an internally coherent and rational chain of analysis. It is intelligible and transparent; it is justified in relation to the facts and the law that constrain the decision maker. With respect, the Minister never demonstrated how the RPD decision was unreasonable. That was his burden. Expressing a disagreement with a decision does not make it unreasonable.

[66] The RPD found that there was no violation of section 109(1) of the Act and that, therefore, there was *stricto sensu* no need to consider further Section F of Article 1 of the *United Nations Convention Relating to the Status of Refugees* and section 98 of the Act. This is in my estimation the right approach. The decision on a section 109 application does not require that it

be associated with the exclusion decision under section 98. The cases of *Mansoor* and *Otabor v Canada (Citizenship and Immigration)*, 2020 FC 830, among others, confirm that proposition. Conversely, it is possible to seek the vacation of refugee protection and then to have the exclusion in accordance with section 98 (*Aleman v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 710; *Hersy v Canada (Citizenship and Immigration)*, 2016 FC 190). Here the Minister concluded his written case by stating that "there is no need to canvass any subsidiary issues in this case". Counsel for the Minister repeated that position unequivocally at the hearing of the judicial review application. The judicial review application was to be dealt with on the basis of section 109 of the Act. That was appropriate.

[67] The Minister failed to satisfy the Court that the decision to refuse to vacate the decision granting refugee protection was unreasonable. It follows that refugee protection continues to operate.

[68] It is unnecessary to consider other possible arguments offered by the Respondents as the sole basis for challenging the refusal to vacate as being unreasonable has failed. That is dispositive of the issue before the Court. Other issues raised by the Respondents on this judicial review need not be addressed on the Minister's application concerned with section 109.

## V. Conclusion

[69] The judicial review application must be dismissed. The Respondents have not only sought costs against the Applicant, but they ask that they be ordered on the solicitor-client basis.

[70] The *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 provide specifically that no costs shall be awarded to or payable to any party on an application for judicial review. An exception exists if there are “special reasons”.

[71] The Respondents argue that the case suffered from unreasonable delay and that it should have never been commenced. As I understand it, they rely on the note in FOSS, reproduced at paragraph 51 of these reasons. The note reports on a decision taken, presumably at the Department of Justice, that an extradition request for the Respondent Musa Protoduari did not meet Canadian requirements for extradition as to evidence and Albania’s judicial system is not adequate to meet Charter requirements. There is no other information that could enlighten the Court further.

[72] I am not satisfied that the delay, some of which is the responsibility of the Respondents, justifies costs in this case (*Law Society of Saskatchewan v Abrametz*, 2022 SCC 29), let alone costs on the solicitor-client basis. I say the same thing concerning the extradition angle. There is nothing novel in saying that extradition and immigration proceedings operate on the basis of different rules and principles. In the case at hand, the information concerning an extradition request is next to non-existent. In fact, there was no need to consider the issue as the Applicant did not satisfy his initial burden of showing the decision under review, which found that there was no misrepresentation or withholding of relevant facts, to be unreasonable. There is no way of ascertaining on this record the extradition request itself, and the reasons for not proceeding with it from a note inserted in an information system operated by the immigration department.

[73] The basis for the judicial review application by the Minister was the RPD decision to refuse to vacate its decision of August 1999. The RPD decision to refuse to vacate a decision to allow a claim for refugee protection by reason of misrepresentation or withholding of material facts was not shown to be unreasonable. I do not see “special reasons” within the meaning of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules* that would warrant an award of costs. Accordingly, there will not be an adjudication on costs.

[74] The parties have been canvassed and they stated that they do not suggest any question for certification pursuant to section 74 of the Act. Thus, no question is certified.

**JUDGMENT in IMM-6659-20**

**THIS COURT'S JUDGMENT is:**

1. The judicial review application is dismissed;

2. There is no question for certification.

"Yvan Roy"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-6659-20 |
| **STYLE OF CAUSE:** | MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPARDNESS v SHKELQIM PROTODUARI ET AL |
| **PLACE OF HEARING:** | HELD BY VIDEOCONFERENCE |
| **DATE OF HEARING:** | NOVEMBER 3, 2021 |
| **JUDGMENT AND REASONS:** | ROY J. |
| **DATED:** | AUGUST 16, 2022 |

**APPEARANCES:**

| | |
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| Lorne Waldman | FOR THE RESPONDENTS |

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