

Federal Court



Cour fédérale

Date: 20221123

Docket: IMM-2208-22

Citation: 2022 FC 1609

Ottawa, Ontario, November 23, 2022

PRESENT: The Honourable Madam Justice Rochester

BETWEEN:

GEG KINAJ

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Context

[1] The Applicant, Geg Kinaj, is a citizen of Albania. He seeks judicial review of a decision rendered on February 14, 2022, by the Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada. In that decision, the RAD upheld the decision of the Refugee Protection Division [RPD] finding that the Applicant was not a Convention refugee or a person

in need of protection within the meaning of sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

[2] The Applicant submits that the RAD erred by: (i) failing to conduct an independent analysis of the evidence and employing a reasonableness standard; (ii) failing to employ the correct legal test when making credibility and plausibility findings; and (iii) conducting an unreasonable analysis of the internal flight alternative [IFA].

[3] For the reasons that follow, this application for judicial review is allowed.

II. Standard of Review

[4] The parties agree that the applicable standard of review is one of reasonableness as set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. A reasonable decision is one that is justified in relation to the facts and the law that constrain the decision maker (*Vavilov* at para 85). It is the Applicant who bears the onus of demonstrating that the RAD's decision is unreasonable (*Vavilov* at para 100). For the reviewing court to intervene, the challenging party must satisfy the 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", and that such alleged shortcomings or flaws "must be more than merely superficial or peripheral to the merits of the decision" (*Vavilov* at para 100).

III. Analysis

[5] The Applicant raises a number of credibility findings made by the RPD and the RAD. It is worthwhile recalling that credibility determinations are part of the fact-finding process, and are afforded significant deference upon review (*Fageir v Canada (Citizenship and Immigration)*, 2021 FC 966 at para 29 [*Fageir*]; *Tran v Canada (Citizenship and Immigration)*, 2021 FC 721 at para 35 [*Tran*]; *Azenabor v Canada (Citizenship and Immigration)*, 2020 FC 1160 at para 6). Such determinations by the RPD and the RAD demand a high level of judicial deference and should only be overturned “in the clearest of cases” (*Liang v Canada (Citizenship and Immigration)*, 2020 FC 720 at para 12).

[6] Credibility determinations have been described as lying within “the heartland of the discretion of triers of fact ... and cannot be overturned unless they are perverse, capricious or made without regard to the evidence” (*Fageir* at para 29; *Tran* at para 35; *Edmond v Canada (Citizenship and Immigration)*, 2017 FC 644 at para 22, citing *Gong v Canada (Citizenship and Immigration)*, 2017 FC 165 at para 9).

[7] The Applicant alleges that he and his wife, who did not accompany him, ran a small family-owned dairy business from their home, selling cheese and yoghurt products in and around Shkoder. In his Basis of Claim form he alleged that his business came to the attention of two large cheese producers (Klegen and Lufra), which resulted in threats to him and his family if he continued to sell his dairy products. He alleged the tires of his delivery truck were slashed

numerous times, and that the police told him to stop working and confiscated the cheese he had in his car. As a result, the Applicant fled to Canada.

[8] The RPD and the RAD found that the Applicant was neither a *Convention* refugee nor a person in need of protection due to his lack of credibility. Both the RPD and the RAD found that the Applicant's testimony that he had to close his business of 35-40 customers due to intimidation and threats from the two largest producers, with over 50,000 customers, was not credible. The RPD and the RAD noted the lack of corroborative evidence. The RAD also did not believe the Applicant's allegations that the truck drivers for the two large companies were his agents of persecution, as it found it was not substantiated by any evidence.

[9] Based on the record before the RAD, it was open to the RAD to find the Applicant's allegations with respect to his agents of persecution not credible. Those findings are owed significant deference and I have not been persuaded that this Court's intervention is warranted.

[10] The difficulty with the decision arises from the RAD's analysis of state protection. The starting point of the analysis of state protection is the presumption that states are capable of protecting their own citizens. The RAD rightly references the Supreme Court of Canada in *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 [*Ward*], where it was confirmed that "[a]bsent a situation of complete breakdown of state apparatus...it should be assumed that the state is capable of protecting a claimant" and "clear and convincing confirmation of a state's inability to protect must be provided" (*Ward* at 724-725).

[11] It is clear from the record that the Applicant did not lodge a complaint with the police or seek the assistance of the authorities. The Applicant testified it was because he did not trust the police officers as they had stopped him, previously seized his products, and threatened to make him disappear. When asked about filing a complaint with the anti corruption unit or the ombudsman, the Applicant testified that he had not complained because he thought it would aggravate the situation.

[12] The RAD found that “the RPD’s finding that the failure by the [Applicant] to file a complaint with the police, the ombudsman or the anti-corruption unit undermines his credibility is correct”.

[13] The Applicant pleads that it is unclear from the decision how failing to complain results in an adverse credibility finding in the context of an analysis on state protection. I note that there is no indication whatsoever that either the RPD or the RAD did not believe that the Applicant failed to lodge a complaint with the authorities. In short, the RPD and the RAD appear to have believed the Applicant when he confirmed that he did not complain to the authorities.

[14] The Respondent submits that it was open to the RAD to find that the Applicant’s reasons for not seeking state protection were not credible. It may potentially be open to the RAD to make that finding, however, the difficulty is – that is not what the decision states.

[15] It is unclear why, in the present matter, the Applicant’s statement that he did not file a complaint, in and of itself, resulted in an adverse credibility finding. The RAD does not explain

why. Moreover, this differs from the situation where the failure of an applicant to disclose in a timely manner that a complaint had been filed with the police is a credibility concern. In such circumstances, the failure to disclose that a complaint was made may undermine the credibility of the applicant when raising it later or the credibility of a document that is tendered late (*Lostin v Canada (Citizenship and Immigration)*, 2013 FC 1098 at para 20). Alternatively, a complaint made to the police may be found not to be credible based on the issues with the documentation itself or an applicant's testimony. That differs, however, from the present situation where the Applicant states that he never lodged a complaint. The result of the Applicant not having lodged a complaint is simply that he has no personalized evidence as to how the police, anti-corruption unit or ombudsman would have treated him and his complaint.

[16] For this reason, I find that the RAD's adverse credibility finding in the context of its state protection analysis is not intelligible and transparent. On this basis, the RAD's decision is unreasonable.

[17] The Applicant also raises arguments as to the RAD's alleged failure to conduct an independent analysis with respect to the police certificates that were obtained in 2018 and 2019 by the Applicant's family after the Applicant arrived in Canada. Having considered the Applicant's submissions, including the submissions made by the Applicant to the RAD, I find no error that warrants this Court's intervention. I equally find, having considered the parties' submissions, that the RAD committed no reviewable error in its analysis of the proposed IFA.

[18] To conclude, I find the RAD's analysis on state protection failed to meet the requirements set out in *Vavilov*.

IV. Conclusion

[19] For these reasons, the application for judicial review is therefore allowed. The RAD's decision is remitted back to a differently constituted panel for redetermination. No question of general importance was submitted for certification, and I agree that none arise.

JUDGMENT in IMM-2208-22

THIS COURT'S JUDGMENT is that:

1. The Applicant's application for judicial review is allowed;
2. The RAD's decision is set aside and the matter is remitted back to a differently constituted panel for redetermination; and
3. No question of general importance is certified.

"Vanessa Rochester"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2208-22

STYLE OF CAUSE: GEG KINAJ v THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

DATE OF HEARING: NOVEMBER 15, 2022

JUDGMENT AND REASONS: ROCHESTER J.

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