

Federal Court



Cour fédérale

**Date: 20230209**

**Docket: IMM-1961-22**

**Citation: 2023 FC 194**

[ENGLISH TRANSLATION REVISED BY THE AUTHOR]

**Ottawa, Ontario, February 9, 2023**

**PRESENT: Mr. Justice Sébastien Grammond**

**BETWEEN:**

**ALEKSANDRA SAVIT**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

[1] Ms. Savit is applying for judicial review of a decision by which the Refugee Appeal Division [RAD] rejected her refugee protection claim. She argues that the RAD breached procedural fairness by deciding issues that the Refugee Protection Division [RPD] had not addressed. I dismiss her application. In one case, the RAD gave notice of its intention, and the

alleged new issue arose from Ms. Savit's response to that notice. In the other cases, the issues addressed by the RAD were not truly new, as they were directly related to the RPD's reasons.

I. Background

[2] Ms. Savit is a citizen of Russia. In August 2017, she came to Canada and claimed refugee protection on the basis of the following events that occurred in February 2017. She was attending a party in a restaurant with co-workers. While she was smoking outside with her colleague Ekaterina, she witnessed an assault. She later learned that one of the victims dies of his injuries. She was summoned to the police station and gave her version of the facts. At the police station, she recognized one of the attackers, whose behaviour suggested that he was in a position of authority over the police officers who were present. In the following days, an unknown person came to her home to threaten her and demand that she withdraw her statement. Her colleague Ekaterina, who had also given a statement, disappeared in the following days. Her body was found a few months later.

[3] Ms. Savit's husband and two children remained in Russia and moved to another city. In August or September 2019, two unknown persons allegedly questioned the husband aggressively regarding Ms. Savit's whereabouts. Their son's arm was reportedly injured during this incident. In October 2019, the husband and the two children left Russia for the United States and then for Canada, where they claimed refugee protection.

[4] The RPD rejected the refugee protection claims of Ms. Savit, her husband and their children on the basis of an internal flight alternative [IFA] in Vladivostok. It accepted that

Ms. Savit had witnessed a criminal offence and had been harassed and threatened in order to pressure her into withdrawing her statement to the police. However, the RPD stated that there was no evidence that the criminals who were pursuing Ms. Savit had ties to the police or would have access to police databases in order to find her. Although the RPD believed that Ekaterina had died, it found that there was no evidence to link her death to the incident she and Ms. Savit had witnessed. Finally, the RPD noted significant contradictions in the testimony of Ms. Savit's husband regarding the August or September 2019 incident. For these reasons, the RPD concluded that Ms. Savit had an IFA in Vladivostok, since the people who were looking for her would not have the means to find her there.

[5] Because of the different circumstances in which the family members arrived in Canada, only Ms. Savit had a right of appeal to the RAD. On appeal, Ms. Savit argued that the RPD had erred in refusing to recognize that the man who had participated in the crime and whom she had seen at the police station was himself a policeman or a person with ties to the police. She also claimed that, because of the pervasiveness of corruption in Russia, it would be easy for criminals to bribe the police in order to obtain information that would enable them to trace her.

[6] Before deciding the matter, the RAD notified Ms. Savit of its intention to deal with issues that had not been addressed by the RPD. The RAD asked Ms. Savit to explain the inconsistencies between her Basis of Claim Form [BOC Form] and her testimony regarding the man who was at the police station. The RAD noted the fact that, in her initial BOC Form and testimony, Ms. Savit stated that the man was dressed in civilian clothes but, in her amended BOC Form, she wrote that he was "wearing some higher rank". In her response, Ms. Savit stated that the man

was dressed in civilian clothes, but that it was obvious from his behaviour that he was in a position of authority over the police officers. She further stated that she and her colleague were not at the police station at the same time but discussed their impressions afterwards.

[7] The RAD dismissed Ms. Savit's appeal. It concluded that Ms. Savit had not satisfactorily explained the inconsistencies pointed out in the notice it had sent her. In addition, the RAD noted that Ms. Savit stated in her response that she had spoken to Ekaterina after going to the police station, although she testified at the hearing that she had not contacted Ekaterina after the night of the crime. The RAD also agreed with the RPD's findings regarding the incident in which Ms. Savit's son had been injured. It added that the medical report regarding the injury was dated September 2019, even though Ms. Savit had told the RPD that this incident had occurred in August 2019. The RAD confirmed the RPD's conclusion on the IFA. In addition to the reasons identified by the RPD, the RAD noted that it was unlikely that the agents of harm would still be looking for Ms. Savit five years after the incidents.

[8] Ms. Savit is now seeking judicial review of the RAD's decision.

## II. Analysis

[9] Ms. Savit raises two types of arguments in seeking review of the RAD's decision. She argues that the process followed by the RAD was unfair, since the RAD based its decision on grounds that had not been addressed by the RPD. Although the RAD gave notice of its intention to raise new issues, it relied on issues that were outside the scope of the notice. Moreover, she

argues that the RAD rendered an unreasonable decision by ignoring rampant corruption in Russia.

[10] I am dismissing Ms. Savit's application. Since the RAD had notified Ms. Savit that it intended to address the events at the police station, it did not have to give a new notice when it found that Ms. Savit's response contradicted her testimony. The other issues it addressed were not truly new. Moreover, Ms. Savit has not demonstrated that the decision was unreasonable on the merits.

A. *Principles Governing the RAD's Consideration of New Issues*

[11] With respect to procedural fairness, "the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond": *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69, [2019] 1 FCR 121 at paragraph 56. This principle must be applied taking into account two characteristics of the RAD. First, the RAD must carry out its own analysis of the record: *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93, [2016] 4 FCR 157 at paragraphs 58, 59, 103. In doing so, it may consider new issues or rely on reasoning different from that of the RPD. Second, the RAD usually decides matters without holding an oral hearing. It therefore cannot take this opportunity to ask the appellant to respond to new grounds it intends to raise.

[12] Because of these particularities, this Court has held that procedural fairness requires that the RAD give notice to the parties if it intends to raise issues that were not decided by the RPD. Therefore, "[t]he RAD cannot give further reasons based on its own review of the record, if the

refugee claimant had not had the chance to address them”: *Kwakwa v Canada (Citizenship and Immigration)*, 2016 FC 600 at paragraph 22 [*Kwakwa*].

[13] In order to implement this principle, this Court relies on *R v Mian*, 2014 SCC 54, [2014] 2 SCR 689 [*Mian*], even though it deals with an appeal in the criminal context. In that case, the Supreme Court of Canada defined the concept of a new issue as follows, at paragraph 30:

An issue is new when it raises a new basis for potentially finding error in the decision under appeal beyond the grounds of appeal as framed by the parties. Genuinely new issues are legally and factually distinct from the grounds of appeal raised by the parties . . . and cannot reasonably be said to stem from the issues as framed by the parties. It follows from this definition that a new issue will require notifying the parties in advance so that they are able to address it adequately.

[14] For example, applying the *Mian* test, this Court concluded that the RAD cannot, without giving notice, grant refugee status on a ground of persecution that the RPD did not address: *Aghedo v Canada (Citizenship and Immigration)*, 2021 FC 450; *Canada (Citizenship and Immigration) v Alazar*, 2021 FC 637. Nor can it dismiss the claim on a legal ground that was not raised before the RAD, such as the absence of prospective risk or the existence of an IFA: *Ojarikre v Canada (Citizenship and Immigration)*, 2015 FC 896; *Gonzalez Jimenez v Canada (Citizenship and Immigration)*, 2022 FC 479.

[15] The right to receive notice becomes particularly important when the new issue concerns the applicant’s credibility. Since appellants do not testify before the RAD, the RAD cannot question them to clarify apparent contradictions in their testimony. In contrast, “[t]he RPD is under a general duty to confront claimants with inconsistencies in their evidence, and to give

them an opportunity to respond”: *Mohamed v Canada (Citizenship and Immigration)*, 2015 FC 1379 at paragraph 21. Failure to do so may, depending on the circumstances, render the procedure unfair: *Gracielome v Canada (Minister of Employment and Immigration)* (1989), 9 Imm LR (2d) 237 (FCA); *Guo v Canada (Minister of Citizenship and Immigration)*, 1996 CarswellNat 1420; *Shaiq v Canada (Citizenship and Immigration)*, 2009 FC 149 at paragraph 77; *Ananda Kumara v Canada (Citizenship and Immigration)*, 2010 FC 1172.

[16] Therefore, notice must be given if the RAD intends to make negative findings regarding an applicant’s credibility when the RPD has not doubted it; otherwise, the applicant will be deprived of the opportunity to respond: *Ching v Canada (Citizenship and Immigration)*, 2015 FC 725; *López Santos v Canada (Citizenship and Immigration)*, 2021 FC 1281. The same is true if the RAD makes findings on evidence that the RPD did not address: *Daodu v Canada (Citizenship and Immigration)*, 2021 FC 316; *Ali v Canada (Citizenship and Immigration)*, 2022 FC 442.

[17] However, the case law takes a realistic approach and recognizes that the RAD is not required to give notice when it merely supports a negative credibility finding with facts that were already in the record: See, for example, *Sary v Canada (Citizenship and Immigration)*, 2016 FC 178 at paragraph 31 [*Sary*]; *Oluwaseyi Adeoye v Canada (Citizenship and Immigration)*, 2018 FC 246; *Bari v Canada (Immigration, Refugees and Citizenship)*, 2022 FC 896 at paragraph 28. As summarized in *Corvil v Canada (Citizenship and Immigration)*, 2019 FC 300 at paragraph 13:

... when the credibility of a refugee protection claimant is at the heart of the RPD’s decision and the grounds for appeal before the

RAD, the RAD is entitled to make independent findings in this regard, without having to question the applicant or giving the applicant another opportunity to make submissions.

[18] Similarly, an applicant cannot raise an argument and then complain that the RAD is responding to it. For example, if the applicant draws the RAD's attention to certain documents, the RAD may assess their credibility: *Ahmad v Canada (Citizenship and Immigration)*, 2022 FC 14; *He v Canada (Citizenship and Immigration)*, 2022 FC 744. The same rule applies when the applicant submits new evidence to the RAD: *Uddin v Canada (Citizenship and Immigration)*, 2022 FC 117.

B. *Application to this Case*

[19] Based on these principles, I can now review the three RAD findings that Ms. Savit argues were not addressed by the RPD.

(1) Communication with Ekaterina

[20] Ms. Savit challenges the RAD's finding that she contradicted herself about when she last spoke to Ekaterina. She states that the RAD did not identify this issue in the notice it sent her. It was therefore unfair for the RAD to base its decision on this contradiction without giving her an opportunity to explain herself. On his part, the Minister argues that the RAD was not even required to give notice, since the general issue of Ms. Savit's credibility was at issue before the RAD.



[21] In my view, the RAD was required to give the notice it sent to Ms. Savit. Indeed, in its decision, the RPD did not question Ms. Savit's credibility, even though it expressed doubts about her husband's credibility. In short, the RPD believed her story, but found that the nexus between the criminals and the police was speculative. Questioning Ms. Savit's credibility because of contradictions between her BOC Form and her testimony was therefore an issue that was factually distinct, to use the language in *Mian*. It was therefore necessary for the RAD to notify Ms. Savit of its intention to address this issue.

[22] Once the notice had been given, however, the time of her last contact with Ekaterina was no longer a distinct issue. In this regard, it must be recalled that the RAD informed Ms. Savit of its doubts about her credibility and stated that it was focusing on the man she saw at the police station. Ms. Savit then volunteered the additional fact that she had spoken with Ekaterina "afterwards" and that Ekaterina had had the same impression about the man.

[23] In these circumstances, Ms. Savit cannot fault the RAD for noting the contradiction between this new statement and her testimony before the RPD. She also could not have expected the RAD to send her a second notice. The contradiction noted by the RAD relates to facts identified in the initial notice. In fact, if Ms. Savit contradicted her initial testimony in responding to the concerns raised by the RAD, she cannot criticize the RAD for having noticed it. As my colleague Justice Simon Noël noted in *D'Amico v Canada (Citizenship and Immigration)*, 2013 FC 470 at paragraph 51, "[a]n applicant, whose obligation is to be truthful in his answers, does not have to be confronted with his own inconsistencies". The duty to give

notice does not require the RAD to engage in a dialogue with Ms. Savit: *Bouchra v Canada (Citizenship and Immigration)*, 2020 FC 1063 at paragraph 41.

(2) Assault on the Son

[24] As noted above, the RPD noted significant contradictions in Ms. Savit's husband's testimony regarding the alleged assault on her son. The RAD agreed with the RPD's reasons. It added that the medical report regarding the son's injuries was dated September 2019, but Ms. Savit stated that the incident took place in August. The RAD had not notified Ms. Savit that it would make such a finding.

[25] Contrary to Ms. Savit's submission, I find that the RAD did not reach such a conclusion in an unfair manner, not because Ms. Savit was supposed to be "familiar with the content of the documents that she herself submitted as evidence", as the RAD stated, but rather because the issue raised by the RAD was not new under the *Mian* test.

[26] This is because the RPD had expressed serious doubts about this incident. In highlighting the inconsistency regarding the date of the medical report, the RAD "simply made reference to another piece of evidence in the tribunal's file which supported the RPD's findings on [the] lack of credibility": *Sary* at paragraph 31.

[27] In any event, in her submissions to the RAD, Ms. Savit did not challenge the RPD's findings in this regard. It is therefore difficult to understand how she can complain that the RAD set out an additional ground to substantiate an unchallenged finding.

(3) Motivation of the Agents of Persecution

[28] Ms. Savit also takes issue with the RAD's statement that the agents of persecution would not be interested in finding her five years after the events. Again, she faults the RAD for drawing a conclusion on a matter that the RPD had not addressed.

[29] This, however, is not the case. The impugned passage is part of a section of the RAD's reasons that deals with the motivation and capacity of the agents of persecution to find Ms. Savit anywhere in Russia. This issue was addressed by the RPD when assessing the first prong of the IFA test. The RPD referred to several other pieces of evidence to support its conclusion that Ms. Savit would not face a serious risk in Vladivostok. In adding that the passage of time further reduced this risk, the RAD did not raise an issue that was legally and factually distinct, to use the wording in *Mian*.

C. *Reasonableness of the Decision*

[30] Although her memorandum of fact and law deals solely with issues of procedural fairness, Ms. Savit stated at the hearing that she also challenged the reasonableness of the RAD's decision on the issue of corruption. If I understand correctly, Ms. Savit is claiming that anyone could bribe Russian police officers in order to gain access to databases that would enable them to find her.

[31] Ms. Savit made this argument before the RAD. The RAD found that, even if corruption was rampant in Russia, it was unlikely that the agents of persecution would try to bribe police

officers, since they had not taken any steps to find Ms. Savit in her hometown or by contacting family members.

[32] It is trite law that the RAD “may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings”: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653 at paragraph 125. On judicial review, it is not enough to reiterate submissions made before the RAD. Rather, it must be shown that the RAD fundamentally misapprehended the evidence. Yet, Ms. Savit did not try to demonstrate this.

### III. Conclusion

[33] For the foregoing reasons, I find that the RAD did not breach procedural fairness by making findings on issues that the RPD had not addressed. The application for judicial review is therefore dismissed.

**JUDGMENT in IMM-1961-22**

**THIS COURT'S JUDGMENT is as follows:**

1. The application for judicial review is dismissed.
2. No question is certified.

“Sébastien Grammond”

Judge

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

**DOCKET:** IMM-1961-22

**STYLE OF CAUSE:** ALEKSANDRA SAVIT v THE MINISTER OF  
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**PLACE OF HEARING:** MONTRÉAL, QUEBEC

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