

Federal Court



Cour fédérale

**Date: 20240102**

**Docket: IMM-10661-22**

**Citation: 2024 FC 7**

**Ottawa, Ontario, January 2, 2024**

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

**BETWEEN:**

**RUDOLF TANCOS  
LUCAS TANCOS**

**Applicants**

**and**

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

**Respondent**

**JUDGMENT AND REASONS**

**I. Overview**

[1] The Applicants seek judicial review of the decision of the Refugee Protection Division (“RPD”) of the Immigration and Refugee Board, dated October 14, 2022, to vacate their refugee status pursuant to section 109 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (“*IRPA*”) and exclude them from status pursuant to section 98 of the *IRPA*.

[2] The Applicants submit that the RPD erred in ignoring contradictory evidence. Additionally, the Applicants submit that the evidence regarding alleged criminality was tainted and improperly obtained, thus breaching procedural fairness and their privacy and constitutional rights.

[3] For the reasons that follow, I find that the RPD's decision is unreasonable. This application for judicial review is granted.

## II. **Facts**

### A. *The Applicants*

[4] Rudolf Tancos (the "Principal Applicant") and Lucas Tancos (the "Minor Applicant") are citizens of the Czech Republic. The Principal Applicant is 57 years old. The Minor Applicant is 8 years old.

[5] The Applicants fled the Czech Republic in 2017. On February 28, 2017, the Applicants arrived in Canada and sought refugee protection. Before the RPD panel of first instance, the Principal Applicant stated he was persecuted in the Czech Republic due to his Roma ethnicity. The Minor Applicant relied on the Principal Applicant's narrative and refugee intake documents. The Principal Applicant stated he sought protection from the police on multiple occasions in the Czech Republic, but was always sent home without resolution until February 2017, whereupon he received a severe beating and faced a death threat.

[6] In a decision dated July 21, 2017, the RPD found that the Applicants were credible and belonged to the Roma population in the Czech Republic. The RPD found that the Principal Applicant's evidence and supporting documentary evidence amounted to a well-founded fear of persecution in the Czech Republic owing to his Roma ethnicity.

[7] The Respondent states that after the Applicants were granted refugee protection, it came to the government's attention that the Principal Applicant had been charged and convicted of multiple offences in the Czech Republic. On January 17, 2020, the Minister of Public Safety and Emergency Preparedness ("Minister") brought an application to vacate the Applicants' refugee protection status based on misrepresentation at their initial RPD hearing.

B. *Decision under Review*

[8] In a decision dated October 14, 2022, the RPD granted the Minister's application to vacate the Applicants' refugee protection status pursuant to section 109 of the *IRPA* and excluded the Applicants from refugee protection under section 98 of the *IRPA*.

[9] The Minister's submissions addressed how the Principal Applicant had misrepresented material facts relating to relevant matters pursuant to subsection 109 of the *IRPA*. The Minister submitted that the Principal Applicant misrepresented or withheld material facts about his history of criminality in the Czech Republic, facts which would have more likely than not resulted in a finding the Principal Applicant would have been excluded from protection under section 98 of the *IRPA*.

[10] During his initial intake with Immigration, Refugees and Citizenship Canada, the Principal Applicant indicated he had never been convicted of, charged with, on trial for, or subject to any criminal proceedings in any country. He similarly stated he had never been a member of an organization that is or was engaged in an activity that is part of a pattern of criminal activity.

[11] The Minister received two documents that indicate the Principal Applicant had been charged and convicted of multiple offences in the Czech Republic. The first document is a translated version of a Czech Republic Arrest warrant (the “Warrant”) for Rudolf Tancos, issued by a judge in Prague on December 5, 2017. The second document is an Interpol Red Notice (the “Notice”) published on April 9, 2018, in relation to a fugitive wanted for prosecution. The Notice contains a picture resembling the Principal Applicant and indicating that the wanted person is Rudolph Tancos, born November 12, 1966, in Preslov, Slovakia, a citizen of the Czech Republic.

[12] These documents outline criminal proceedings in the Czech Republic from June 1, 2013, to February 16, 2015. The Principal Applicant was alleged to have possessed and trafficked illicit substances, as well as possessed unauthorized firearms and ammunition. On November 3, 2016, a judgment was issued stating that the Principal Applicant was sentenced to seven years’ imprisonment. On January 25, 2017, this judgment was cancelled on appeal and the matter transferred for a new hearing. Additionally, the Warrant indicated the Principal Applicant subsequently ceased communication with his counsel, was unavailable at his telephone number, and that there was suspicion he went into hiding to avoid prosecution.

[13] Both documents indicate that, in addition to the above charges, the Principal Applicant was sentenced on December 14, 2009, to three years' imprisonment for illicit manufacturing and dealing with psychotropic substances and poisons pursuant to Section 238(I) of the Czech Criminal Code, having completed his sentence on August 19, 2011.

[14] In examining the Minister's application to vacate the Applicants' refugee status, the RPD considered the three elements under subsection 109(1) of the *IRPA*, as set out in *Canada (Public Safety and Emergency Preparedness) v Gunasingam*, 2008 FC 181 at paragraph 7:

- 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.

[15] The RPD reviewed the Applicants' evidence and submissions and determined that all three elements of the subsection 109(1) test were met. The RPD made the following findings:

- The Principal Applicant misrepresented himself and withheld facts about his history of criminal activity in the Czech Republic. His testimony in this proceeding and the Warrant and Notice indicate he has a criminal history in the Czech Republic, including his testimony of being twice arrested and convicted for food theft in 1992 and 1998, respectively, arrested and convicted in 2008 or 2009 for the possession and trafficking of heroin, and charged again in 2016 for trafficking heroin and Pervatin. In respect of the firearms offences, the Principal Applicant stated he had

purchased a vintage firearm to resell as a collector's item, receiving a seven-year sentence, which he successfully appealed on January 25, 2017. The RPD noted that the Principal Applicant was eventually sentenced *in absentia* on February 26, 2019. The RPD rejected the Principal Applicant's explanation for not disclosing this criminal history, as motive is irrelevant in determining misrepresentation or the withholding of material facts (*Canada (Minister of Citizenship and Immigration) v Pearce*, 2006 FC 492 at para 36).

- The misleading and withheld facts speak directly to the Principal Applicant's criminal history, which, if before the RPD panel, would have likely been considered in relation to the issue of exclusion prior to considering whether the Applicants should have been included.

[16] Under subsection 109(2) of the *IRPA*, the RPD examined whether there was other sufficient evidence considered at first instance to justify refugee protection. The panel of first instance found the Applicants to be credible. However, the RPD found that the new evidence, combined with the Principal Applicant's admissions of misrepresentation, was "so fundamental that the remaining evidence is thoroughly tainted, and that there remains no sufficient evidence on which to reject the Minister's application." The RPD concluded that the Applicants obtained refugee protection as a result of the Principal Applicant withholding the material fact of criminality, that the initial panel was precluded from determining exclusion, and that this likely would have led to a finding that the Principal Applicant's narrative of persecution was not credible.

[17] Furthermore, the RPD found that the Minister had established there were serious reasons to consider that the Applicants were excluded from protection under section 98 of the *IRPA* and Article 1F(b) of the *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137 (“*Convention*”).

[18] The RPD found that the Warrant and Notice established that the Principal Applicant’s activities were within the ambit of serious non-political crime and that a rebuttable presumption of seriousness arose, which the Applicants did not lead persuasive evidence to rebut. The RPD found that the Warrant and Notice satisfied the standard of proof under Article 1F(b) of the *Convention*, being valid evidence of crimes that were sufficiently comparable to Canadian crimes under the *Controlled Drugs and Substance Act*, SC 1996, c 19.

[19] The RPD rejected the Principal Applicant’s evidence of mitigating circumstances (including owing to discriminatory treatment as a Czech Roma), finding that the number of counts in the Warrant and Notice, the duration of his history of trafficking, his admission of a history of criminality, and the seriousness of the crime when viewed from the perspective of Canadian law, were such that the Minister had established serious reasons for considering that the Principal Applicant had committed excludable crimes.

[20] Finally, the RPD found that the Minor Applicant’s refugee protection claim to be vacated and excluded. The RPD relied upon jurisprudence from this Court and the Federal Court of Appeal to find that the Principal Applicant’s misrepresentations were made not only in respect of his claim for refugee protection, but also on behalf of the Minor Applicant, and that the Minor

Applicant's "innocence" of his father's crimes were irrelevant to the vacation and exclusion determinations.

[21] For these reasons, the RPD granted the Minister's application to vacate the Applicants' status pursuant to section 109(3) of the *IRPA* and exclude them from protection pursuant to section 98 of the *IRPA*.

### III. Preliminary Issues

[22] Counsel for the Respondent raised the issue of amending the style of cause to name the Minister of Public Safety and Emergency Preparedness as the Respondent. Counsel for the Applicant agreed. The style of cause in this matter is amended, replacing the Minister of Citizenship and Immigration with the Minister of Public Safety and Emergency Preparedness as the proper respondent.

[23] In their memorandum of fact and law, the Applicants sought costs in this matter. At the hearing, counsel for the Applicants submitted that costs are no longer an issue. I agree.

[24] Counsel for the Respondent, in a further memorandum of fact and law, conceded that the portion of the RPD's decision excluding the Minor Applicant from refugee protection and vacating his status was unreasonable. I agree.



[25] Finally, I find that the procedural fairness, privacy, and constitutional issues are not properly before the Court. The Applicants did not raise the procedural issues before the RPD, despite being aware of the Notice and Warrant being tendered as evidence, and it would therefore be inappropriate to adjudicate this issue on judicial review (*Irving Shipbuilding Inc v Canada (Attorney General)*, 2009 FCA 116 at para 48; *Maritime Broadcasting System Limited v Canada Media Guild*, 2014 FCA 59 at paras 67-68). Additionally, the Applicants' leave application does not contain any grounds alleging breaches of privacy and constitutional rights.

#### IV. **Issue and Standard of Review**

[26] The sole issue in this application for judicial review is whether the RPD's decision is reasonable.

[27] The parties agree that the appropriate standard of review of the RPD's decision is reasonableness. I agree (*Ede v Canada (Citizenship and Immigration)*, 2021 FC 804 at para 7; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("Vavilov") at paras 10, 16-17).

[28] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). 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). Whether a decision is reasonable depends on the relevant administrative setting, the record

before the decision-maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[29] For a decision to be unreasonable, the applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). Not all errors or concerns about a decision will warrant intervention. A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125). Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a “minor misstep” (*Vavilov* at para 100). While a decision-maker is not required to respond to every line of argument or mention every piece of evidence, a decision’s reasonableness may be called into question where the decision exhibits a “failure to meaningfully grapple with key issues or central arguments” (*Vavilov* at para 28).

## V. Analysis

[30] Section 109 of the *IRPA* sets out the framework under which the RPD may, on application by the Minister, vacate a positive refugee protection decision:

### **Applications to Vacate**

#### **Vacation of refugee protection**

**109 (1)** The Refugee Protection Division may, on application by the Minister, vacate a decision to allow a claim for refugee

### **Annulation par la Section de la protection des réfugiés**

#### **Demande d’annulation**

**109 (1)** La Section de la protection des réfugiés peut, sur demande du ministre, annuler la décision ayant accueilli la demande d’asile

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.

### **Rejection of application**

(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.

### **Allowance of application**

(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.

résultant, directement ou indirectement, de présentations erronées sur un fait important quant à un objet pertinent, ou de réticence sur ce fait.

### **Rejet de la demande**

(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.

### **Effet de la décision**

(3) La décision portant annulation est assimilée au rejet de la demande d'asile, la décision initiale étant dès lors nulle

[31] Pursuant to section 109 of the *IRPA*, the RPD has the discretion to vacate a positive refugee determination if it finds that: 1) the decision was obtained through the refugee claimant directly or indirectly misrepresenting or withholding material facts relevant to their claim; and 2) leaving the misrepresentation aside, the remaining evidence before the panel that decided the refugee claim was insufficient to justify refugee protection (*Canada (Public Safety and Emergency Preparedness) v Bafakih*, 2022 FCA 18 (“*Bafakih*”).

[32] Section 98 of the *IRPA* sets out the framework under which the RPD may exclude an individual from refugee protection: “A person referred to in Section E or F of Article 1 of the Refugee Convention is not a Convention refugee or person in need of protection.” Article 1 F(b)

of the *Convention* states that: “The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that ... he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee.”

[33] The Supreme Court of Canada has interpreted section 98 to include, generally, crimes with a maximum sentence of ten years or more if committed in Canada. They included the example of “drug trafficking” as sufficiently serious to presumptively warrant exclusion for refugee protection (*Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68 at para 62). As Justice Ayles found, “when assessing the seriousness of an offence, the RPD must consider the elements of the offence, the mode of prosecution, the penalty prescribed, the facts of the offence and the mitigating and aggravating circumstances underlying the conviction” (*Jain v Canada (Citizenship and Immigration)*, 2023 FC 539 at para 30). The Minister must 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 (*Abbas v Canada (Citizenship and Immigration)*, 2019 FC 12 at para 18).

[34] The Applicants submit that the RPD ignored contradictory evidence and erred in law in vacating the Principal Applicant’s refugee status and excluding him from refugee protection. I agree. The RPD committed several reviewable errors.

[35] The Applicants maintain that the RPD erred in ignoring the panel of first instance’s findings concerning the persecutory attack on the Applicants, instead using the Principal

Applicant's misrepresentation to prevent an assessment of the "untainted" evidence that would justify refugee protection. On the RPD's exclusion finding, the Applicants submit that the RPD erred in its treatment of the mitigating circumstances, which tended to rebut the presumption of the seriousness of the Principal Applicant's offence. The Applicants maintain there is ample evidence of severe discrimination against Roma people in the Czech Republic, which corroborated the Principal Applicant's testimony. They contend that, if the Principal Applicant should not have been excluded, the facts he withheld are immaterial, and his status should not have been vacated.

[36] The Respondent submits that the RPD did not err. The Respondent maintains that the RPD, in finding the Principal Applicant to be not credible, was entitled to find the allegations underlying the police report corroborating the attack to be unsound. The Respondent disagrees with the Applicants that the RPD did not consider mitigating factors, as the RPD weighed their Roma ethnicity and found there was "no persuasive evidence" supporting the Principal Applicant's testimony that he sold drugs to provide his partner with them so that she would not suffer withdrawal or due to limited employment access. The Respondent notes that the RPD considered the equivalent potential sentence in Canada, the Principal Applicant's history of drug trafficking, his admission of a history of criminality, the number of counts included in the Warrant and Notice, and engaged with the Applicants' submissions in evaluating the Principal Applicant's circumstances.

[37] I agree with the Applicants. The Principal Applicant has conceded that he withheld the facts surrounding his criminal history in the Czech Republic. The question becomes, leaving this

misrepresentation aside, whether the remaining evidence before the RPD was insufficient to justify refugee protection (*Bafakih* at para 2).

[38] The RPD found that the misrepresentation was “so fundamental that the remaining evidence is thoroughly tainted,” including the Principal Applicant’s testimony and supporting documents provided. These supporting documents include a police report corroborating the Principal Applicant’s testimony about when he was attacked and was subject to racist abuse and a death threat.

[39] In my view, the RPD erred in concluding that the Principal Applicant’s misrepresentation was such that the remaining evidence was “thoroughly tainted.” I find that the reasons disclose that the RPD unduly discarded documentary evidence (namely, the police report) to focus on the *plausibility* of the Principal Applicant’s testimony, rather than its credibility. I further find that this represents the RPD implicitly and thus impermissibly deeming the document to be fraudulent. This represents the RPD’s decision stepping outside its legal constraints (*Vavilov* at paras 99-101).

[40] The RPD relied upon *Kallab v Canada (Citizenship and Immigration)*, 2019 FC 706 (“*Kallab*”) for the proposition that the Principal Applicant’s testimony reflects a “coincidence” without objective corroboration (at paras 188-189). But there is objective corroboration: the police report. The RPD does not provide any reasons for discarding this evidence other than reliance upon *Kallab* and the finding that the Principal Applicant’s circumstances in February 2017 amount to “concurrence” (*i.e.*, coincidence). In my view, such a finding unduly discounts

corroborative, contradictory evidence without providing any reason for discounting it, instead focusing only on that evidence that supports their finding (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 FC 8667 (CanLII) at para 17).

[41] Furthermore, the reasons demonstrate that the RPD found the Principal Applicant's credibility to be damaged vis-à-vis the circumstances surrounding his persecution, questioning the timing of the attack and the police heeding his complaints at the same time he was awaiting re-trial on serious criminal charges, as well as the main reason for fleeing the Czech Republic to protect the Minor Applicant from being taken into foster care.

[42] However, these reasons impugn the likelihood of the events having occurred, rather than evaluate whether the Principal Applicant was to be believed. This is thus evaluating plausibility, not credibility. I rely upon my colleague Justice McHaffie's rulings that implausibility findings are limited to situations where "it is 'clearly unlikely' that the events occurred in the asserted manner, based on common sense or the evidentiary record" (*Al Dya v Canada (Citizenship and Immigration)*, 2020 FC 901 ("Al Dya") at para 32, citing *Zaiter v Canada (Citizenship and Immigration)*, 2019 FC 908 at para 8, *Aguilar Zacarias v Canada (Citizenship and Immigration)*, 2012 FC 1155 at paras 9-10) and that "[i]f the evidence shows that a particular occurrence never occurs or is clearly unlikely, this may form a reasonable basis for an adverse credibility finding, particularly if there is nothing to explain or corroborate the clearly unlikely occurrence" (*Al Dya* at para 39).

[43] Here, the police report corroborates the Principal Applicant's testimony. The RPD could not challenge this corroboration without explicitly doubting the report's authenticity. The RPD did not make such an explicit finding. In my view, the RPD's skepticism about the Principal Applicant's version of events was based on implicitly doubting the police report's authenticity. This is an example of a decision-maker impermissibly making a veiled fraudulence finding (*Oranye v Canada (Citizenship and Immigration)*, 2018 FC 390 ("*Oranye*") at para 27. Coupled with the misguided reliance upon *Kallab* above, in my view *Al Dya* and *Oranye* show that the RPD unreasonably doubted the plausibility of the Principal Applicant's testimony and implicitly found the police report to be fraudulent. I find that this analysis is not justified in relation to this jurisprudence and therefore unreasonable (*Vavilov* at paras 99-101).

## VI. **Conclusion**

[44] This application for judicial review is granted. The RPD's decision is not justified in relation to the law constraining it. No questions for certification were raised, and I agree that none arise.



**JUDGMENT in IMM-10661-22**

**THIS COURT’S JUDGMENT is that:**

1. This application for leave and judicial review is granted. The decision under review is set aside, and this matter is returned to different panel for redetermination.
2. The style of cause is amended such that the Respondent named is “The Minister of Public Safety and Emergency Preparedness”.
3. There is no question to certify.

“Shirzad A.”

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Judge

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

**DOCKET:** IMM-10661-22

**STYLE OF CAUSE:** RUDOLF TANCOS AND LUCAS TANCOS v THE  
MINISTER OF PUBLIC SAFETY AND EMERGENCY  
PREPAREDNESS

**PLACE OF HEARING:** BY VIDEOCONFERENCE

**DATE OF HEARING:** NOVEMBER 30, 2023

**JUDGMENT AND REASONS:** AHMED J.

**DATED:** JANUARY 2, 2024

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