Federal Court  Cour fédérale

Date: 20200403

Docket: IMM-4345-19

Citation: 2020 FC 484

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, April 3, 2020

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

VYACHESLAV TALANOV
DILBARA TALANOVA
RENAT TALANOV

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This Court has before it an application for judicial review of a decision rendered by the Refugee Appeal Division [RAD] on June 17, 2019, in which it determined that the applicants are not refugees within the meaning of the *United Nations Convention Relating to the Status of*

Refugees, 28 July 1951, 189 UNTS 137 [Convention], nor persons in need of protection under section 97 of the *Immigration and Refugee Protection Act*, S C 2001, c 27 [IRPA].

[2] For the following reasons, the application for judicial review is dismissed.

II. Facts

[3] The applicants are citizens of Kazakhstan. The principal applicant, Renat Talanov, is the son of the other two applicants, his father Vyacheslav Talanov and his mother Dilbara Talanov.

[4] The principal applicant and a friend of his were shot by an officer of the Republic of Kazakhstan's National Security Committee (NSC or KNB) nicknamed "Kalauov" on March 22, 2009. The principal applicant was shot in the head. His friend, a man named Pavel, suffered brain damage from a bullet that passed through his right eye.

[5] The principal applicant and the mother of his friend Pavel filed a criminal complaint with the regional department of the Ministry of Internal Affairs (ROVD), but the ROVD reportedly did not act on it.

[6] However, Officer Kalauov was arrested on April 25, 2009, following a complaint filed with the military prosecutor.

[7] At the trial, several witnesses testified about the events of the evening of March 22, 2009. The principal applicant was one of those witnesses. Video evidence was also produced to illustrate the events leading up to the shooting of Pavel and the principal applicant.

[8] On August 11, 2009, the officer was sentenced to four years in prison for a criminal offence by a judge of the court of military justice. This decision was upheld by three members of the criminal division of the court of military justice on September 22, 2009.

[9] In October 2009, the principal applicant apparently received an anonymous call threatening him. On May 15, 2010, the principal applicant was abducted by Kalauov's friends. They beat him and threatened him with death, demanding that he withdraw his complaint against Kalauov.

[10] After that last incident, the principal applicant went into hiding for seven months in the family dacha (cottage) with his uncle Vladmir. The parents of the principal applicant reportedly received threatening calls.

[11] On January 28, 2011, the principal applicant decided to travel to the United States on a student visa to study.

[12] On March 14, 2011, Uncle Vladmir was found murdered in the family dacha. The police closed the investigation because they found no suspects.

[13] On May 6, 2011, two unidentified men grabbed the mother of the principal applicant and tried to push her into their vehicle. Following this incident, the parents of the principal applicant quit their jobs.

[14] In December 2011, Kalauov was released from prison.

[15] In February 2012, the principal claimant entered Canada and made a claim for refugee protection.

[16] With U.S. tourist visas in hand, the principal applicant's parents left Kazakhstan for the United States on April 26, 2012, and entered Canada on May 1, 2012. The applicants made a claim for refugee protection with Canadian authorities pursuant to section 96 and subsection 97(1) of the IRPA. The applicants based their claims on a fear for their lives because of Kalauov and his friends in Kazakhstan.

[17] The RPD held a hearing on all three claims on August 29, 2018.

[18] After the hearing, the Minister of Public Safety and Emergency Preparedness (the Minister) intervened to argue that the principal applicant should be excluded from Canadian protection under Article 1F(b) of the Convention (serious non-political crimes).

[19] According to the Minister, while in the United States, the principal applicant was charged by U.S. authorities with mail fraud, wire fraud and money laundering. An arrest warrant was issued for the principal applicant on September 20, 2013.

[20] The Minister alleges that these crimes are punishable under Canadian law by terms of imprisonment of at least 10 years: 14 years for mail and wire fraud and 10 years for money laundering.

[21] The RPD held a second hearing on November 18, 2018, this time on the issue of exclusion under Article 1F of the Convention. At the hearing, the principal applicant admitted that he had participated in the criminal activities of which he was accused by the Minister. However, the principal applicant claimed that an agent of the Federal Bureau of Investigation (FBI) nicknamed “Fred” had offered him protection because he had acted as an informant for the U.S. authorities.

[22] A third hearing was held on August 23, 2019, focusing on the threat posed by Kalauov, including the role that the principal applicant played in his trial.

III. The RPD decision

[23] The RPD denied the applicants’ claim for protection.

[24] With respect to the principal applicant, the RPD found that he is excluded from Canadian protection under Article 1F(b) of the Convention because of his involvement in criminal activity

in the United States. After setting out the charges against the principal applicant in the U.S. and their equivalents in Canadian law, the RPD found that the principal applicant fell within the scope of Article 1F(b) of the Convention. The RPD did not accept the applicant's explanations regarding the assurance of protection because of the lack of corroborating evidence.

[25] As for his parents, the RPD found that they had not established a well-founded fear of persecution or a risk in the event of their return to Kazakhstan. The RPD identified a number of credibility issues surrounding the applicants. In its decision, the RPD found the overall testimony of the principal applicant's parents to be vague, exaggerated and confusing. In addition, the RPD member observed omissions, inconsistencies and contradictions, for which the parents did not provide satisfactory explanations.

IV. Issue

[26] The issue in this case is as follows: is the RAD's decision reasonable?

V. Standard of review

[27] The issue is subject to review on a standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 73–142). Under the standard of reasonableness, a decision must be based on inherently coherent reasoning and be justified in light of the applicable legal and factual constraints (*Vavilov* at paras 99–101).

VI. Discussion

[28] I should first point out that the applicants are not challenging the RPD's finding that their claims do not involve any of the criteria set out in section 96 of the IRPA, and that if they were in fact victims of anything, it was non-state criminal activity, such that their claims should only be considered under section 97 of the IRPA.

A. *Article 1F(b) of the Convention*

[29] Although in his factum the principal applicant attacks the RPD's finding that he is excluded from Canadian protection under Article 1F(b) of the Convention, in the hearing before me he withdrew his arguments pertaining to the RPD's decision on this issue. According to the applicants, it is in fact the discussion regarding the parents that renders the RPD's decision unreasonable.

[30] The principal applicant is therefore excluded from Canadian protection under Article 1F(b) of the Convention and section 98 of the IRPA.

B. *Assessing the credibility of the principal applicant's parents*

[31] The parents of the principal applicant argue that the RPD was inflexible in assessing their credibility.

(1) Absence of evidence of a complaint filed by the principal applicant against Kalauov

[32] The applicants argue that the RPD was too rigid in concluding that it was doubtful that the claimant was attacked by friends of the agent of persecution. The applicants believe that the

RPD did not lend sufficient weight to the role played by the principal applicant in the legal proceedings against the agent of persecution.

[33] The parents claim that they were targeted because the principal applicant did not withdraw his complaint against Kalauov. The filing of a criminal complaint is at the core of their case: they were targeted precisely because their son filed such a complaint and refused to withdraw it.

[34] On a balance of probabilities, the RPD doubted that such a criminal complaint against Kalauov was ever filed by the principal applicant.

[35] First, the RPD pointed out that Kalauov's conviction related only to the assault and life-threatening injuries to Pavel, not the principal applicant. Moreover, there was no evidence of any criminal proceedings against Kalauov in relation to the principal applicant's injuries.

[36] Second, the RPD noted that the parents of the principal applicant never produced a copy of such a complaint, and their reasons for not making efforts to obtain one did not satisfy the RPD that reasonable efforts had been made in this regard.

[37] At the hearing, there was discussion as to whether the evidence showed that the principal applicant was named in Kalauov's trial as a victim or only as a witness.

[38] Counsel for the applicants argued that, since the principal applicant was named as a victim in Kalauov's trial, it followed that he must have filed a criminal complaint against Kalauov; that, generally speaking, it takes a complaint to be named as a victim.

[39] I must say that I do not follow this reasoning. There is no doubt that the principal applicant appeared as a witness in Kalauov's trial concerning the shooting of Pavel, and it may very well be that he himself was a victim in that he was wounded by Kalauov's shots. However, it does not necessarily follow from his designation as a victim in the decision of the court in Kazakhstan that the principal applicant had also filed a criminal complaint against Kalauov.

[40] In addition, the applicants claim that Kalauov was not tried for the damages suffered by the principal applicant because the latter's injuries were not serious or fatal and therefore, as the principal applicant himself testified at the RPD hearing, he was [TRANSLATION] "reclassified' from victim to mere witness.

[41] This may explain why the RPD did not receive evidence of a trial pertaining to the injuries suffered by the principal applicant, but it does not address the RPD's main concern, i.e. that no copy of the complaint was submitted, and furthermore, that the principal applicant's parents made no effort to obtain a copy of the complaint allegedly filed by the principal applicant against Kalauov.

[42] Although the principal applicant was one of the witnesses at Kalauov's trial, the RPD found that Kalauov's conviction related solely to Pavel, and that the lack of effort on the part of

the principal applicant's parents to obtain a copy of the complaint allegedly filed by the principal applicant indicated that no such criminal complaint against Kalauov had ever been filed by him.

[43] In any event, even if the principal applicant had filed such a complaint against Kalauov in respect of the incident of March 22, 2009, he was "reclassified" to a mere witness in the trial pertaining to Pavel's injuries. Moreover, the threats made against the applicants and other witnesses in an attempt to discourage them from testifying in Kalauov's trial would have been matters of concern prior to the trial itself. However, the trial took place and Kalauov was released from prison. The testimony of the principal applicant's father showed that they had not been threatened since the principal applicant had travelled to the United States to study, which is an indication that the agent of persecution no longer has a genuine interest in finding the principal applicant.

[44] In addition, the RPD found that the applicants' testimony exaggerated the role of the principal applicant in Kalauov's trial.

[45] I see nothing unreasonable in the RPD's findings, and I see no evidence that the RPD engaged in a critical analysis of the evidence on this issue. The RPD simply drew the conclusions from the evidence that it was entitled to draw.

[46] In the absence of an impending trial pertaining to the injuries suffered by the principal applicant, I therefore see nothing unreasonable in the RPD's finding that the parents of the principal applicant had not established, on a balance of probabilities, that they would be

subjected to a personal risk as defined in subsection 97(1) of the IRPA if they were to return to Kazakhstan. The task of this Court is not "reweighing and reassessing the evidence considered by the decision maker" (*Vavilov* at para 125).

[47] Moreover, I would point out that the notion of credibility must first be distinguished from that of probative value (*Henry v Canada (Citizenship and Immigration)*, 2019 FC 1594 at para 38). As Justice Grammond explained, the notion of credibility refers to whether a source of information is "trustworthy," while probative value refers to the "strength" of the "inferences" (*Magonza v Canada (Citizenship and Immigration)*, 2019 FC 14 at paras 16–26 [*Magonza*]).

[48] It is important to distinguish between these concepts because "the criteria used to assess credibility and probative value are fundamentally different" (*Magonza* at para 24). I note this distinction because the applicants' arguments appear to confuse the two concepts.

[49] In essence, the applicants' arguments challenge the probative value of the evidence. They maintain that the RPD lacked flexibility in minimizing the risk arising from the principal applicant's involvement in legal proceedings against the agent of persecution. While the RPD analyzed these elements as a component of the applicants' "credibility," these findings in fact relate to the probative value of that evidence.

[50] On this point, I am of the view that the RPD's analysis of the probative value of the evidence, and conclusions it drew from it, are not unreasonable. The RPD was mindful of the role of the principal applicant and repeatedly emphasized that he was a witness to the attack by

the agent of persecution. The RPD explained why it did not accept the applicants' inferences. The RPD observed that the principal applicants' parents did not present any evidence regarding the complaint against Kalaunov.

[51] Finally, the parents of the principal applicant argue that their sworn testimony must be presumed to be truthful (*Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 (CA)). The RPD considered unjustifiable the lack of corroborating evidence in support of their claim that a criminal complaint had been filed against Kalauov by the principal applicant and that they were being persecuted for that reason.

[52] I accept the proposition that there is no general requirement of corroboration, and as Justice Norris observed in *He v Canada (Citizenship and Immigration)*, 2019 FC 2 [*He*], "a panel errs if it makes an adverse credibility finding on the basis of the absence of corroborative evidence alone (*Ndjavera v Canada (Citizenship and Immigration)*, 2013 FC 452 at para 6)" (at para 24).

[53] But that is not what the RPD did. In this case, the evidence militated against the testimony of the principal applicants' parents that a formal criminal complaint had been filed by the principal applicant against Kalauov.

[54] In this case, there were valid reasons to question the sincerity of the applicants, and the Court may take into account the applicants' failure to produce supporting evidence and to provide reasonable explanations for that failure (*He*; *Dundar v Canada (Citizenship and*

Immigration), 2007 FC 1026 at paras 21–22, citing *Amarapala v Canada (Minister of Citizenship and Immigration)*, 2004 FC 12 at para 10).

[55] I therefore find that the presumption of the truthfulness of the applicants' testimony has been rebutted due to the inconsistency of their testimony.

(2) The bribe

[56] In its decision, the RPD noted that the applicants had not indicated in their narrative that officers had offered to pay them a bribe if they withdrew their complaint against the agent of persecution. The principal applicant's father indicated in his Basis of Claim (BOC) form that he met with Kalauov and two officers on March 28, 2009, and that the officers told him that they were taking over the investigation, which would prove that it was the principal applicant and his friend who had shot Kalauov, and not the other way around.

[57] The BOC also indicates that money was offered, but only after Kalauov's arrest on April 25, 2009. The BOC does not specify who made the offer.

[58] However, the father of the principal applicant testified at the RPD hearing that on March 28, 2009, the three police officers offered him a bribe to withdraw the complaint against Kalauov. According to the RPD, the failure to specify in their narrative that this offer was made by police officers undermined the applicants' credibility.

[59] The applicants argue that this conclusion is unreasonable, and that in their view, the hearing before the RPD was the appropriate time for them to mention this detail.

[60] We know from *Zeferino v Canada (Citizenship and Immigration)*, 2011 FC 456 at paragraph 31 and *Selvakumaran v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 623, 2002 FCT 623 at paragraphs 20–21 that a claimant's testimony cannot be used to cast doubt on his or her credibility unless the incident omitted has a significant impact on the outcome of the claim for refugee protection.

[61] However, it has been recognized that the RPD may take note of omissions between the BOC and the testimony at the hearing (*Ogaulu v Canada (Citizenship and Immigration)*, 2019 FC 547 at paras 18–20 [*Ogaulu*]).

[62] *Ogaulu* is an example of the application of this rule. In that case, the applicant stated in his BOC that none of his family was present with him during the attack. However, this was directly contradicted by his oral testimony that his brother was present. At the hearing, the applicant explained that he was referring to members of his immediate family. The RAD did not accept this explanation as the applicant made mention of a friend who was present at the attack in his BOC but failed to mention his brother who, according to his testimony, played a more central role in this event (*Ogaulu* at paras 16–17). This Court found that the RPD's analysis was reasonable because the applicant's omission went to "the very core of the Applicant's claim" (*Ogaulu* at para 20).

[63] In this case, one of the applicants failed to identify the individuals who offered him a bribe. This omission is significant because it is a detail that is central to the claim for refugee protection, namely, the fear of persecution from Kalauov and his colleagues. Therefore, this omission from the BOC is not a minor detail or collateral information, but rather, is important to the applicant's claim.

[64] As such, the RPD reasonably concluded that the refugee claimant lacked credibility (*Ogaulu* at para 20; *Jele v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 24 at para 50).

(3) The probative value of the two death certificates for the uncle

[65] The applicants argue that the RPD committed a reviewable error in assigning little probative value to the two death certificates for the principal applicant's uncle that were submitted by the applicants. According to the applicants, the certificates establish the death of the principal applicant's uncle and demonstrate that the applicants could be targets of violence if they were to return to Kazakhstan.

[66] I reject this argument.

[67] In paragraph 33 of its decision, the RPD explains that the two death certificates produced by the applicant are not evidence that the applicants face persecution at the hands of Kalauov if they were to return to Kazakhstan:

> The male Claimant testified that he did not face any problems from Kalauov or his friends after the principal Claimant travelled to the

> United States in January 2011. With regard to the murder of the male Claimant's brother, the Claimants did not establish that it has something to do with Kalauov's case, on a balance of probabilities. Two death certificates were submitted. One of them, issued on March 16, 2011, states the cause of death: "Edema and brain swelling". The other, which does not indicate a date of issue, states the cause of death: "Homicide/Edema and brain swelling". The Claimants testified that the police told them they will investigate by themselves because they had multiple versions about what happened. Allegedly, one month later they closed the file saying that they found no suspect.

[68] Both death certificates show that the principal applicant's uncle was the victim of violent injuries or homicide, which the RPD did not question. However, the RPD had doubts about the link between the uncle's death and the threat posed by Kalauov. The certificates did not establish such a link.

[69] Accordingly, I find that it was reasonable to assign little probative value to them.

(4) The letters

[70] The applicants argue that the RPD was inflexible in not giving probative value to two letters from individuals in Kazakhstan (Ms. Ira, Ms. Galyushecka) because they were undated and lacking in detail. The applicants explain that these shortcomings are due to the fact that the letters are from Kazakhstan and that the agent of persecution is particularly violent.

[71] In my view, it was reasonable not to give any probative value to these documents since they were vague and did not establish a link between the alleged fear and the inquiries described therein.

[72] The first letter was written by Ms. Ira. It states that she had to move out of her apartment because of the numerous inquiries about the applicants' situation. The letter is not dated, does not name the people asking questions and does not specify the nature of the questions asked.

[73] The second letter was written by "Galyushechka." It states that Galyushechka received several calls from a "strange" man identifying himself as the manager of Internal Affairs, in addition to a visit from an individual who was looking for the principal applicant. This letter is undated, does not name the people asking questions and does not specify the nature of the questions asked.

[74] In its decision, the RPD did not assign any probative value to these letters because they were vague and did not corroborate the principal applicant's testimony that those around him were aware of his problems associated with the threat posed by Kalauov.

[75] I find nothing unreasonable about that conclusion.

VII. Conclusion

[76] For these reasons, the RPD's decision is reasonable. The application for judicial review is dismissed.

JUDGMENT in IMM-4345-19

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial control is dismissed.

2. No question is certified.

"Peter G. Pamel"
Judge

Certified true translation
This 21st day of May 2020

Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4345-19
STYLE OF CAUSE:	VYACHESLAV TALANOV, DILBARA TALANOVA, RENAT TALANOV v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	March 5, 2020
JUDGMENT AND REASONS:	PAMEL J.
DATED:	April 3, 2020

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