

Federal Court



Cour fédérale

**Date: 20160203**

**Docket: IMM-2645-15**

**Citation: 2016 FC 123**

**Ottawa, Ontario, February 3, 2016**

**PRESENT: The Honourable Madam Justice Strickland**

**BETWEEN:**

**YURIY SHMIHELKYY**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**UPON** application for judicial review of a decision of the Refugee Protection Division (“RPD”) of the Immigration and Refugee Board of Canada dated May 7, 2015, in which the RPD determined that the Applicant is not a Convention refugee nor a person in need of protection pursuant to s 96 and s 97, respectively, of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (“IRPA”);

**AND UPON** reviewing the materials filed and hearing the submissions of counsel for the parties;

**AND UPON** determining that this application is granted for the following reasons:

[1] The Applicant is a citizen of Ukraine. In 1999 he left Ukraine and went to the United States (“US”) where he remained until he was deported in 2007. He claims that upon his return to Ukraine he noticed increased nationalist sentiment and anti-Semitism and that, because of his Jewish ethnicity, between 2008 and 2011 his home and car were vandalized and he was attacked by nationalists on three occasions. He fled to Canada on January 29, 2012 and claimed refugee status on February 24, 2012. He alleges that he cannot return to Ukraine because the authorities there cannot protect him from nationalists.

[2] The RPD rejected the Applicant’s claim for refugee status. It based its decision on the credibility of the Applicant’s account of persecution and his subjective fear in Ukraine and on state protection.

[3] In my view, the determinative issue in this matter is whether the RPD’s credibility findings were reasonable. The parties submit, and I agree, that the standard of review for determinations of fact and credibility is reasonableness (*Zhou v Canada (Citizenship and Immigration)*, 2013 FC 619 at para 26; *Rodriguez Ramirez v Canada (Citizenship and Immigration)*, 2013 FC 261 at para 32; *Wu v Canada (Citizenship and Immigration)*, 2009 FC

929 at paras 17-18; *Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 (Fed CA)).

[4] As I have previously stated, in *Ismaili v Canada (Citizenship and Immigration)*, 2014 FC 84 at para 41 [*Ismaili*], there is no doubt that the RPD's credibility analysis is central to its role as a trier of fact. As such, those findings are to be given significant deference by the reviewing court and should stand unless the RPD's reasoning was flawed and the resulting decision falls outside the range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47; *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at paras 19-33 [*McLean*]). The reviewing court should not re-weigh the evidence or substitute its own analysis (*Avagyan v Canada (Citizenship and Immigration)*, 2014 FC 1003 at para 23 ).

[5] However, as the Respondent notes "deference is not a blank cheque". Where the decision-maker acts arbitrarily or capriciously in making credibility findings, the court will intervene (*Ismaili* at para 42, citing *Mohacsi v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 429 at paras 18-19). And, where credibility findings rest on plausibility determinations, the implausibility must be clear and the RPD should provide a reliable and verifiable evidentiary base for its plausibility finding (*Aguilar Zacarias v Canada (Citizenship and Immigration)*, 2012 FC 1155 at paras 9-11 [*Aguilar*]; *Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 at para 7 [*Valtchev*]).

[6] This is a circumstance in which the Court will intervene.

[7] In this matter the Applicant claimed that he left Ukraine to escape persecution by non-state actors because of his Jewish ethnicity. The RPD found, on a balance of probabilities, that the Applicant's entire story of persecution was fabricated. The basis for this finding was that the Applicant's story was based on a "basic set of facts" from three news stories and that "through manipulation of these facts he concocted a story of personal persecution". Further, that he had concocted the story that he was being persecuted due to his Jewish ethnicity because he wanted to remain close to his family in the US until he could return to live with them.

[8] However, a review of the articles cited by the RPD demonstrates that they have little in common with the Applicant's claim. The first article "Ukraine Jews see alleged beating of Jewish man as symptom of mounting nationalism", dated October 22, 2013, details alleged extortion and violent mistreatment of a Ukrainian Jewish businessman by police following his arrest. The article states that, "this is a case of anti-Semitism by state officials". It also discussed the "ultranationalist" Svoboda political party as part of a broader discussion about anti-Semitism. The Applicant made no allegations of abuse by state officials and in his personal information form ("PIF") he referred to the Ukrainian National Assembly – Ukrainian People's Self-Defense ("UNA-UNSO"), not the Svoboda party. The second article, "Report: Ukrainian police tortured, urinated on Jewish man" dated October 8, 2013, details the same incident.

[9] The third article, "Ukraine and the "Politics of Anti-Semitism": The West Upholds Neo-Nazi Repression of Ukraine's Jewish Community", dated May 7, 2014, discusses alleged US and European Union support for two Ukrainian neo-Nazi parties, Svoboda and the Right Party. It also discusses, in general terms, the threat against Ukrainian Jews from nationalist and neo-

Nazi groups, although it does not refer to UNA-UNSO specifically and does not refer to specific instances of violence upon which the Applicant could construct a story.

[10] The RPD in its reasons provided no clarification as to the specific aspects of the three news articles on which the Applicant might have based his story, nor did it provide any explanation as to how it reached its conclusion that the Applicant concocted his entire claim based on these three specific news reports. Nor am I able to discern a basis for that conclusion on the record and having reviewed the reports.

[11] More significantly, all of the articles were published after the Applicant submitted his PIF in March 2012, including his narrative. For that reason, the RPD's conclusion that the Applicant, through manipulation of the facts contained in the articles, concocted a story of personal persecution is entirely unfounded. The conclusion is also therefore perverse. This alone would be a sufficient basis on which to return the matter for redetermination.

[12] However, the RPD also made a negative credibility finding based on the Applicant's motivation for coming to Canada, ultimately finding that he did so simply to be closer to his family in the US, not because of persecution. In reaching this conclusion, the RPD states that because the Applicant is Jewish and had stated that he started thinking about leaving Ukraine in 2011, he was asked if he considered going to Israel. In its decision, RPD noted that the Applicant responded "At that point no, I was looking for any option [panel's emphasis] to leave that country. My sister and wife reside in the States so I wanted to leave as soon as possible". The RPD stated that this showed "the lengths he would go to to make sure that if he could not be

in the US, he would at least be as close as possible to his wife” until they could be reunited.

However, it is difficult to see how looking at any option and wanting to leave as soon as possible led to the RPD’s conclusion as to the unspecified lengths the Applicant would go to reunite with his family.

[13] Further, and more significantly, the RPD’s question about why he didn’t consider Israel is found on page 13 of the hearing transcript. The Applicant was asked why he didn’t move to Israel in 1999 to which he responded that he did not have plans to immigrate at that time. He had gone to the US to make money because he had the opportunity to do so and planned to return to Ukraine. The discussion that the RPD relies on concerning reuniting with his family is found on page 20 of the transcript and is given in answer to a completely different question about when, where and how often he sought medical attention for alleged beatings in 2010 and 2011. Further, a review of that portion of the transcript makes it clear that the Applicant was explaining that it was only after the 2011 beating that he started thinking about leaving. This explanation speaks to persecution as his motivation for fleeing, rather than family unification. The RPD appears to have misapprehended the Applicant’s evidence. For these reasons, the RPD’s negative credibility findings based on a “concocted story” are unreasonable.

[14] I would also note that the Respondent submits that the Applicant was found to not be credible based on the RPD’s finding of numerous inconsistencies, contradictions and omissions in his evidence. However, in my view, this is not supported by the RPD’s reasons or the record, including a review of the transcript from the hearing. The only discrepancy noted by the Respondent in its submissions was in the Applicant’s marital status as reported on his visa

application and in his PIF. This discrepancy was not noted in the RPD's decision, nor was it discussed during the hearing. The Respondent does not specify any other inconsistencies, contradictions or omissions.

[15] In any event, any inconsistencies should have been put to the Applicant to provide him with an opportunity to address them (*Vorobieva v Canada (Solicitor General)*, (1994) 84 FTR 93 at para 9; *Kumara v Canada (Citizenship and Immigration)*, 2010 FC 1172 at para 5) particularly if used to impugn his credibility, which was the issue central in this matter (*Ongeldinov v Canada (Citizenship and Immigration)*, 2012 FC 656 at paras 21-22).

[16] I would also note that the RPD's treatment of some of the corroborative documentary evidence was also unreasonable. For example, the Consultative Conclusion by a Specialist dated March 16, 2010 was prepared by a physician, it describes the Applicant's injuries and refers the Applicant for a forensic examination. A Forensic Examination Report, dated March 17, 2010, ("2010 Report") indicates that it is made in accordance with a reference from the police. It addresses three questions put to the experts, being, what were the injuries, what caused them, and, if they could have been sustained by a beating, with what object and how. The report itemises and replies to all three questions, finding that the injuries were caused by hitting with blunt objects. It is issued by the Ministry of Health of Ukraine.

[17] The RPD describes the 2010 Report as a "police/medical forensic report" and concludes, contrary to the Applicant's claim that the police had not helped him, that the police did take action by referring the Applicant for a medical examination. The RPD also found that the report

did not discuss who caused the injuries. Further, that if the injuries had been the result of racially motivated violence, then on a balance of probabilities, the report would have said so. The RPD then refers, by way of example, to news articles chronicling the “problems facing Jews in Ukraine” and, in particular, the article entitled “Jews feel increasingly targeted by nationalists”. As noted above, that article described a Jewish businessman who was beaten by two detectives. The RPD states that the assault on the businessman was addressed at a conference by the president of the Ukrainian Jewish Committee who is also a member of parliament. This, however, does not explain how the article supports the RPD’s conclusion that the 2010 Report should have stated that the attack was racially motivated. It also ignores that the report lists three specific questions to be answered, none of which required identification of the perpetrators or their motivation.

[18] Having found that the 2010 Report would have stated the attack’s ethnic motivation if that were the case, the RPD then inferred that the attack was, therefore, not ethnically motivated. In further support of this inference, the RPD also cites an article which states that “Anti-Semitic assaults are rare in Ukraine” which it preferred to the Applicant’s testimony.

[19] It is not the role of this Court to re-weigh the evidence and the RPD is entitled to draw inferences from the evidence. However, as noted above, when credibility findings result from plausibility determinations, the implausibility must be clear and there must be a reliable and verifiable evidentiary base for the plausibility finding (*Aguilar* at paras 9-11; *Valtchev* at para 7; *Gjelaj v Canada (Citizenship and Immigration)*, 2010 FC 37 at para 4). Here, however, the RPD provides no discernable evidentiary foundation upon which it bases its inference that, if the



March 2010 attack was racially motivated, the 2010 Report would have included that information. Nor is the implausibility clear given that the 2010 Report responds to three specific stated questions which do not address motivation. The finding is therefore unreasonable.

[20] I note here that while the RPD's analysis of the 2010 Report was made in the context of its consideration of the availability of state protection, in effect, it amounts to a credibility analysis.

[21] Although I also have concerns with the RPD's analysis of delay which was made in the context of credibility and subjective fear, my conclusions above are sufficient to warrant returning the matter for redetermination.

[22] As to state protection, the RPD's analysis hinged on its unreasonable treatment of the corroborating medical report and its unreasonable credibility findings to discount the Applicant's testimony regarding the alleged attacks and his three unsuccessful efforts to obtain police protection. Aside from these unreasonable findings, much of what remains of the RPD's state protection analysis focuses on general facts regarding Jewish-Ukrainian citizens. The RPD noted, amongst other things, that there were "no reports of religious persecution by the government" and that in 2012 "the largest Jewish community centre in the world was opened" in Ukraine. The RPD's state protection analysis was therefore also unreasonable.

[23] It is not for this Court to substitute its own credibility assessment (*McLean* at paras 19-33) or to determine whether, on the evidence, the Applicant has fulfilled its onus in establishing the inadequacy of state protection. Accordingly, a new hearing is required.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that**

1. The application for judicial review is granted. The decision of the RPD is set aside and the matter is remitted for redetermination by a different member;
2. No question of general importance is proposed by the parties and none arises; and
3. There will be no order as to costs.

“Cecily Y. Strickland”

---

Judge

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

**DOCKET:** IMM-2645-15

**STYLE OF CAUSE:** YURIY SHMIHELKYY v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** JANUARY 26, 2016

**JUDGMENT AND REASONS:** STRICKLAND J.

**DATED:** FEBRUARY 3, 2016

**APPEARANCES:**

Arthur I. Yallen

FOR THE APPLICANT

Suzanne M. Bruce

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Yallen Associates  
Barristers and Solicitors  
Toronto, Ontario

FOR THE APPLICANT

William F. Pentney  
Deputy Attorney General of  
Canada  
Toronto, Ontario

FOR THE RESPONDENT