Federal Court  Cour fédérale

Date: 20220721

Docket: IMM-5088-20

Citation: 2022 FC 1081

Toronto, Ontario, July 21, 2022

PRESENT: Madam Justice Go

BETWEEN:

GIORGI KUNDUKHASHVILI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mr. Giorgi Kundukhashvili, a citizen of Georgia, made a refugee claim in Canada alleging that he suffered persecution based on his Ossetian ethnicity and his political activities in the United National Movement [UNM], an opposition party in Georgia.

[2] During the Applicant's childhood, his father, also Ossetian, was attacked several times by Georgia nationalists. The Applicant himself was subject of insults and assaults while in grade 8, leading to his departure from school after grade 9.

[3] The Applicant alleged several other incidents of assaults and insults that took place between 1999 and 2004 on account of his ethnicity. The Applicant received hospital treatment for the attack in 1999. The police took a report, but they later dismissed his allegations, accused him of fabricating the incident, and insulted his ethnicity.

[4] In May 2012, the Applicant was accosted by a group of Georgians but a local government official intervened, and later invited the Applicant to join his work in the UNM with other Ossetians. In September 2012, the opposing party, Georgian Dream [GD], threatened the Applicant and told him that Ossetians should stay away from politics.

[5] In 2016, the Applicant agreed to work for the UNM during the Georgian elections. A group of GD members insulted his ethnicity and attacked him for working with the UNM. He suffered a concussion, was hospitalized for ten days, and required psychological treatment for two months. When he asked the police for help, they refused and told him that Ossetians should not be involved in politics.

[6] The Applicant relocated to Batumi, but he was attacked again in June 2017 by a group of Georgians who realized he was Ossetian. The Applicant then hired an agent to help him get to Canada. The journey took him to Ukraine in June 2017, where he stayed for a year due to delays

in getting the passport, then through several European countries and Jamaica before finally reaching Canada.

[7] The Refugee Protection Division [RPD] rejected his refugee claim in June 2019, finding that he lacked subjective fear and that the objective evidence did not support his claim.

[8] On appeal to the Refugee Appeal Division [RAD], the Applicant sought to file a letter from his father recounting a recent threat the latter received about the Applicant. The RAD refused to admit the letter, finding it was not credible. The RAD also dismissed his refugee claim pursuant to s 96 and s 97 of the *Immigration and Refugee Protection Act* [*IRPA*], finding that (1) the Applicant could not identify an agent of persecution, (2) he was unlikely to be targeted in the future as a supporter of the UNM party, (3) the insults and discrimination he experienced as an Ossetian did not amount to persecution, and (4) he did not make an asylum claim in the countries which he travelled through on his way to Canada [Decision].

[9] The Applicant seeks judicial review of the Decision on several grounds. I grant the application as I find the RAD erred by dismissing the new evidence and by failing to consider the Applicant's combined profile based on his ethnicity and his political support for UNM.

II. Issues and Standard of Review

[10] The Applicant argues that the RAD erred by (1) dismissing the new evidence he sought to admit, (2) failing to consider his particular profile, (3) ignoring evidence and misconstruing his political risk, and (4) discounting his cumulative discrimination.

[11] The parties agree that the issues are reviewable on the reasonableness standard (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]).

[12] 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. The onus is on the Applicant to demonstrate that the Decision is unreasonable: *Vavilov*, at para 100. To set aside a decision on this basis, "the reviewing court must be satisfied 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": *Vavilov*, at para 100.

III. Analysis

[13] As noted above, my decision to allow the application is based on two of the issues the Applicant raises, namely:

A. The RAD erred by dismissing new evidence
B. The RAD failed to consider the Applicant's particular profile

A. *The RAD erred by dismissing new evidence*

[14] Before the RAD, the Applicant sought to file a letter from his father dated July 10, 2020 in which the Applicant's father stated he had mentioned at a party in his village that his son had fled Georgia after being attacked. The next day, unknown individuals had threatened him, ordered him to stop talking about his son, and said that his son could not return to Georgia.

[15] While the proposed new evidence met the timeliness requirements in s 110(4) of *IRPA*, the RAD also applied the requirements for new evidence in *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 and found that the letter from the Applicant's father was not credible. The RAD found that the letter was not sworn, was not from a known source, was lacking detail, and failed to mention his ethnicity. Further, the RAD found the letter contradicted the Applicant's testimony that no one was "waiting for him with a weapon." Finally, the RAD found it "implausible that these people waited over two-and-a-half years after he left the country to target him in this manner, through his father, whether it be for political or other reasons."

[16] The Applicant submits that the RAD erred for rejecting the letter. I agree, for the following reasons.

[17] First, as the Applicant contends, in impugning the letter for not being an affidavit, the RAD ignored the Applicant's own statutory declaration stating that the COVID-19 pandemic precluded his father from obtaining an affidavit. Additionally, while the RAD is entitled to give less *weight* to an unsworn document, there is no requirement that a document be sworn in order to be admitted: *Mathieu v Canada (Citizenship and Immigration)*, 2021 FC 249 at paras 28-29; *Paxi v Canada (Citizenship and Immigration)*, 2016 FC 905 at para 52; and *Pilashvili v Canada (Citizenship and Immigration)*, 2022 FC 706 [*Pilashvili*] at para 27.

[18] The Respondent replies that the RAD did not reject the letter *solely* because it was unsworn, but rather this was one of several concerns identified by the RAD. That may be so, but the fact that the letter was unsworn still formed a key part of the RAD's decision not to admit the

evidence, which was unreasonable in light of the Applicant's statutory declaration. Also, just like *Pilashvili* (which also involved a RAD decision made by the same member), I find it unreasonable for the RAD to reject the letter because it "originates from a source not known to the panel" and "does not, for example, originate from a known non-governmental or government organization": *Pilashvili*, at paras 28-29. Not all documentary evidence refugee claimants rely on originates from a "known non-governmental or government organization." That, in and of itself, should not be the reason for dismissing the evidence. Further, in this case, the Applicant's father began his letter by stating his name, his identity number and date of birth. In so doing, he was making himself "known" to the RAD.

[19] Second, as the Applicant argued, the RAD's finding that the letter "fails to mention the ethnic ground of persecution" alleged by the Applicant was directly contradicted by the letter's explicit reference to the Applicant being a victim of "ethnic-political violence."

[20] Third, the Applicant argues that the RAD took issue with a lack of detail in the letter and failed to assess the information the letter did offer. In the Applicant's view, the event described by his father was not complex and did not require detail. I agree. As the Applicant points out, this is a case of the RAD assessing the evidence "based on what it does not say, rather than on what it says": *Sitnikova v Canada (Citizenship and Immigration)*, 2016 FC 464 at paras 22-24.

[21] Specifically, I find unreasonable the RAD taking issue with the father for not alleging any of his own issues because of his ethnicity. Since the letter was written to describe the incident that led to the father's fear for his son's safety, it was unreasonable for the RAD to

expect the father would use this letter to air his own grievances. In any event, whether or not the Applicant's father had any issue due to his ethnicity was irrelevant to assessing the Applicant's claim, particularly given both the RPD and RAD found credible the events of discrimination alleged by the Applicant based on his ethnicity.

[22] Fourth, the Applicant disputes the RAD's finding that the letter is inconsistent with his testimony that no one is waiting for him with a knife. The Applicant points out that his testimony on this point occurred during the RPD hearing and therefore predates the incidents described in his father's letter. I agree with the Applicant and find the RAD's reasoning was faulty. In the Respondent's view, because the Applicant's narrative was based on various isolated incidents spanning several years, and because he testified that there was no one person in Georgia wanting to harm him, it was reasonable for the RAD to find the letter inconsistent with the rest of his narrative. I reject the Respondent's submission because the reasons cited by the Respondent were not related to the RAD's finding on the issue of contradiction, but rather, its finding of implausibility, which I will address next.

[23] The Applicant disputes the RAD's finding that it was implausible for someone to be looking for him 2.5 years after he left Georgia. The Applicant argues that the RAD ignored the well-established need for caution in making implausibility findings: *Zaiter v Canada (Citizenship and Immigration)*, 2019 FC 908 [*Zaiter*] at para 8.

[24] In reply, the Respondent argues that although the Court has urged caution in making plausibility findings, such findings may still be made if an account is outside the realm of what is

expected, does not make sense, or is clearly unlikely: *Gebreselasse v Canada (Citizenship and Immigration)*, 2021 FC 865 at para 56.

[25] Before I review the RAD's implausibility finding, it is worth repeating what Justice Norris instructed in *Zaiter*:

> [8] Adverse credibility determinations can be drawn from the implausibility of a claimant's account but the law is clear that such inferences are inherently dangerous and caution is required before they are drawn. The need for caution is obvious. Implausibility determinations based on common sense or common experience can be entirely erroneous when that "common sense" or "common experience" is grounded in social or cultural norms that may have no application to the case at hand (*Leung v Minister of Employment and Immigration* (1994), 81 FTR 303 at 307 (TD); *Bains v Minister of Employment and Immigration* (1993), 63 FTR 312 at 314 (TD); *Santos v Canada (Citizenship and Immigration)*, 2004 FC 937 at para 15). As well, when an inference is drawn from past experience, it must be presumed that the likelihood of the event in question can be determined from the frequency of similar events in the past. Whether this yields an accurate result will depend on many factors including the representativeness of the sample and whether conditions may have changed. Moreover, the mere fact that an event is unlikely given past experience does not entail that it did not (or could not) occur. Thus, in *Valtchev v Canada (Citizenship and Immigration)*, 2001 FCT 776 [*Valtchev*], Justice Muldoon suggested in oft-cited remarks (at para 7) that an adverse credibility finding based on the implausibility of the claimant's account "should be made only in the clearest of cases, i.e. if the facts as presented <u>are outside the realm of what could reasonably be expected</u>, or where the documentary evidence demonstrates that the events <u>could not have happened</u> in the manner asserted by the claimant" (emphasis added). As Justice Gleason put the same point in *Zacarias v Canada (Citizenship and Immigration)*, 2012 FC 1155 at para 10 [*Zacarias*], "this Court has often cautioned that such determinations are best limited to situations where events are <u>clearly unlikely</u> to have occurred in the manner asserted, based on common sense or the evidentiary record" (emphasis added). Thus, an allegation may be found to be implausible "when it does not make sense in light of the evidence before the Board" (*Zacarias* at para 11).
>
> [emphasis in original]

[26] Justice Norris continued in *Zaiter*:

> [9] It is important to remember that the ultimate question for the decision-maker is not whether the events in question occurred but whether the claimant is to be believed when he or she says that they did. Adverse credibility determinations based on implausibility should not be made simply on the basis that is it unlikely that things happened as the claimant contends. Individual experiences need not always follow the norm. Unlikely events can still happen. Something more is required before a claimant may be found not to be credible on the basis of implausibility alone. Importantly, this restriction on this type of fact-finding helps mitigate the risk of error if a claimant's account is rejected.

[27] Applying *Zaiter* to this case, I start my review with the July 10, 2020 letter from the Applicant's father which stated:

> I was at a New Year's party with my neighbors, where I told them that my son had been beaten and forced to flee Georgia, and that I had not seen him for a long time and was very worried about his future. The next day, on January 16, I was met at the entrance by three strangers, who insulted me and threatened to make me disabled if I continued to talk about my son. They also referred to my son in bad words. I was told that Giorgi could not return to Georgia.

[28] In rejecting the father's account as implausible, the RAD stated:

> Finally, while considering that the [Applicant] is not obligated to explain the actions of others, in this case, the three unknown individuals who allegedly threatened him, it still seems implausible that these people waited over two-and-a-half years after he left the country to target him in this manner, through his father, whether it be for political or other reasons.

[29] I would note, however, later in the Decision, the RAD accepted as credible that the assaults, threats and insults recounted by the Applicant occurred over the course of the electoral campaigns in 2012 and 2016. These incidents, as described by the Applicant in his Basis of

Claim [BOC], all took place in the Applicant's village. During the May 2012 incident, the Applicant and his fellow Ossetians were in the village attending an Ossetian religious celebration when some nearby Georgians came up to them and tried to start problems. The local UNM official intervened and that was how the Applicant became involved with the party. Also in 2012, GD members came to the Applicant and threatened him, stating Georgian politics were not Ossetian business. During the 2016 event, the Applicant was attacked by GD members while he was helping the UNM campaign in his village district. In all of these incidents, the attackers were unknown to the Applicant.

[30] The RAD did not explain why - having accepted that the Applicant was targeted by unknown persons in his village in 2012 and 2016 - it would be so "clearly unlikely" and "outside the realm of what could reasonably be expected" that unknown individuals would accost his father after he mentioned to his neighbours the Applicant had fled the country due to the attacks he had endured.

[31] Further, as the Applicant points out, the events as recounted by his father, were triggered by his father talking about him at a gathering, as opposed to suddenly occurring out of nowhere. I note the father was not suggesting that these individuals were waiting around for two-and-a-half years to target the Applicant. In view of the Applicant's past experiences of random attacks by unknown Georgians in his own village, in my view, this is not one of the "clearest of cases" that the events as alleged by his father could not have taken place.

[32] Given that the RAD unreasonably rejected the letter because it was unsworn, ignored the actual content of the letter while discrediting it for what it did not say, and made a finding of implausibility without it being the "clearest of cases", I find the RAD erred by refusing to admit the new evidence.

B. *The RAD failed to consider the Applicant's particular profile*

[33] While the above-stated error of the RAD was sufficient to warrant a review from the Court, I want to opine on the RAD's treatment of the Applicant's particular profile, so as to provide some guidance to the RAD when the matter is being reconsidered by a new panel.

[34] The Applicant contends that the RAD erred by assessing his ethnic profile separately from his political profile. In doing so, the RAD ignored a central issue in his submissions on appeal, which is that his risk stems from the combination of his political support (or perceived political support) *and* his ethnicity. As such, the Applicant argues that the RAD's reasons were not responsive as required by *Vavilov* at paragraphs 127-128.

[35] According to the Applicant, his combined profile is more than the sum of its parts. He points out that while the RAD referred to a document stating that Ossetians who keep low profiles are not at risk, that is not *his* profile. Rather, he is an Ossetian who was engaged in the UNM. While the RAD found that neither the political profile nor the ethnic profile on their own supported a risk, the Applicant argues that the RAD was obliged to assess their *combined* effect. He cites *Djubok v Canada (Citizenship and Immigration)*, 2014 FC 497 [*Djubok*] at paras 18-19, in which the RPD had "approached the various aspects of [the claimant's] risk profile as if they

existed in discrete silos", and Justice Mactavish concluded that the failure to address risk intersectionally was an error.

[36] According to the Respondent, *Djubok* is distinguishable because the claimant in that case was a Roma woman who had suffered domestic abuse, and thus she possessed profiles which raised distinct risks of discrimination and persecution. Additionally, the Respondent notes that the Member in that case had accepted documentary evidence establishing ethnicity-based risk. Specifically, the Immigration and Refugee Board had prepared a specific Request for Information Report dealing with the unique vulnerability of female Roma victims of domestic violence: *Djubok* at paras 20-21.

[37] The Respondent argues that the RAD was not obligated to assess cumulative risk because the evidence was lacking on the individual grounds of ethnicity and political profile. The Respondent highlights the RAD's findings that there was no evidence of past supporters of UNM being targeted nor was there any evidence the Applicant would continue to support the UNM party if he returned to Georgia. Further, the Respondent relies on the RAD's finding that the incidents of political abuse occurred during the 2012 and 2016 elections when the Applicant was an active supporter of the UNM. With respect to the Applicant's ethnicity, in the Respondent's view, the RAD reasonably found that the documentary evidence did not support a generalized risk of persecution for Ossetians in Georgia.

[38] According to the Respondent, if the evidence had shown that former UNM supporters or Ossetians generally faced discrimination in Georgia, there would be some merit to the

Applicant's argument. As such, the Respondent argues that it would be incongruous to overturn the RAD's decision on this point when neither of the Applicant's profiles carry the possibility of discrimination or persecution.

[39] Finally, the Respondent relies on Chief Justice Crampton's statement that "the Board is not required to specifically address each of the five potential grounds set forth in section 96, and all theoretically possible "social groups", in each and every case, without regard for the evidentiary record": *Montoya Casteneda v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1012 at para 19.

[40] Despite counsel's able submission, I reject the Respondent's arguments.

[41] I note, as a starting point, that the Applicant's dual profile as a victim of ethno-political violence was a central part of his BOC narrative. In the opening paragraph of his narrative, the Applicant stated:

> I had to flee Georgia because I was persecuted due to my Ossetian ethnicity. I also had problems because of my support of the United National Movement (UNM).

[42] Throughout the narrative, the Applicant recounted the assaults and insults he faced in Georgia. In particular, when describing the attacks on him while campaigning for UNM, the Applicant recalled being threatened by Georgians who declared, "Georgian politics were not Ossetian business", and "Ossetians have no place in Georgian politics."

[43] Further, I note counsel for the Applicant made extensive submissions to the RPD on the intersecting nature of the Applicant's ethnic identity and political involvement.

[44] In the RPD decision, the member rejected the claim because the Applicant did not identify a specific agent of persecution, stating the Applicant's answers "do not support the claimant's fear with respect to potential forward-looking harm due to his political opinion ***or*** his ethnicity" [emphasis added]. The RPD did not consider the cumulative effect of the Applicant's combined profile.

[45] On appeal, the Applicant's then counsel highlighted the RPD's error of "assessing the Applicant's ethnic and political profiles in separate silos, when it was obliged to assess their combination and whether that places him at risk", citing *Djubok*.

[46] Yet in the Decision, the RAD analyzed the Applicant's ethnic and political profiles separately, in the same way it treated the country condition documents with respect to each profile, without once considering the compounding effect of both. Doing so, the RAD left unaddressed the Applicant's key submission on appeal.

[47] As the Supreme Court of Canada explained in *Vavilov*:

> [127] The principles of justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties. The principle that the individual or individuals affected by a decision should have the opportunity to present their case fully and fairly underlies the duty of procedural fairness and is rooted in the right to be heard: *Baker*, at para. 28. The concept of responsive reasons is inherently bound up with this principle, because reasons are the

> primary mechanism by which decision makers demonstrate that they have actually *listened* to the parties.
>
> [128] Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis" (*Newfoundland Nurses*, at para. 25), or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (para 16). To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. However, a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it….

[48] In this case, the Applicant's intersecting claim based on his ethnicity and political profile was a central issue and concern, both in his BOC and on appeal. The RAD's failure to "meaningfully grapple" with this central issue calls into question whether it was alert and sensitive to the matter before it.

[49] Further, contrary to the Respondent's submission, there was some amount of evidence based on both the Applicant's narrative and certain objective evidence, as accepted by the RAD, to support the Applicant's claim of ethnic discrimination. Moreover, while the RAD did not consider the Applicant a member of the UNM, and as such rejected his claim in that respect, there was some more recent documentary evidence not considered by the RAD demonstrating increasing political violence in Georgia: 2019 United States Department of State Report on Georgia.

[50] While it may well be the case that, considered separately, the evidence of ethnic discrimination and that of political violence would not be sufficient to ground the Applicant's

claim, the RAD was obligated to consider whether the evidence of discrimination, considered alongside the Applicant's political profile, and *vice versa*, may amount to persecution.

[51] As Justice Mactavish explained in *Djubok,*:

> [18] The difficulty with the Board's assessment is that it appears to have approached the various aspects of Ms. Djubok's risk profile as if they existed in discrete silos, never considering whether or how her various risk factors intersected or combined in a way that could affect her level of risk. The Board looked at her risk as a Roma and her risk as a victim of domestic violence, but never really engaged with, or assessed the risk that she faced in Hungary as a female Roma victim of serious domestic violence.
>
> [19] While the Board acknowledged and accepted counsel's argument that the risk factors in this case had to be considered cumulatively, it did not actually do so. The failure to address the intersectionality of Ms. Djubok's risk grounds is an error: see Gorzsas v. Canada (Minister of Citizenship and Immigration), 2009 FC 458, at para. 36, 346 F.T.R. 169.

[52] The intersecting profile of the claimant in *Djubok* might be different from that of the Applicant, but the teaching of that case remains relevant. The RAD in this case did not even acknowledge counsel's argument that the Applicant's case should be considered cumulatively, let alone considering it, and thereby committing a reviewable error.

[53] For these reasons, the Decision must be set aside.

IV. Conclusion

[54] The application for judicial review is granted.

[55] There is no question for certification.

JUDGMENT in IMM-5088-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted and the matter sent back for redetermination by a different member of the RAD.
2. There is no question for certification.

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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