

Federal Court



Cour fédérale

Date: 20240822

Docket: IMM-12131-23

Citation: 2024 FC 1305

Ottawa, Ontario, August 22, 2024

PRESENT: The Honourable Madam Justice Turley

BETWEEN:

GULAMZHAN TURSUNOV
KHALOSBAY DODAYEV

Applicants

and

THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

Respondent

JUDGMENT AND REASONS FOR JUDGMENT

I. Overview

[1] The Applicants, citizens of Kazakhstan, seek judicial review of a decision by the Refugee Appeal Division [RAD] refusing their claim for refugee protection under sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] I am dismissing the application. The RAD's adverse credibility findings, based on the Applicants' failure to update their Basis of Claim [BOC] narratives to include allegations that were central to their refugee claims, are reasonable and consistent with this Court's jurisprudence. Furthermore, the RAD reasonably assessed the viability of an internal flight alternative [IFA] for the Applicants in Nur-Sultan (now known as Astana), the capital of Kazakhstan.

II. Background

[3] The Applicants are ethnically Tajik and lived in a small village in Kazakhstan. They claimed refugee protection in Canada because they feared persecution by members of local criminal gangs of Kazakh men.

[4] Starting in May 2014, the Applicants began selling farmer products twice a week at a local food market in Kazakhstan where most of the sellers were ethnically Kazakh. According to their BOC narratives, after a Kazakh woman was allegedly raped by a Tajik man in 2016, the market fee collectors raised the Applicants' fees for their stall. The gang members then began to threaten and harass the Applicants to leave the food market altogether. The Applicants finally left Kazakhstan in June 2019 and claimed refugee protection in August 2019.

[5] During their refugee hearing before the Refugee Protection Division [RPD], the Applicants also alleged fear at the hands of a district police officer, Boutour, whom they testified had instructed the criminal gangs to threaten them.

[6] By decision dated October 29, 2021, the RPD dismissed the Applicants' refugee claims finding that the Applicants had a viable IFA in Nur-Sultan. The RPD determined that the Applicants faced a localized threat specific to the food market, making it unlikely that the criminal gangs would be motivated to locate them in the proposed IFA or would have the means to do so through the national police. The RPD also found that the claims against Boutour were not credible because the Applicants had not mentioned Boutour in their BOC narratives. Finally, the RPD concluded that relocating to the IFA would not be unreasonable, given their relevant experiences and skills.

[7] The RAD dismissed the Applicants' appeal of the RPD decision. This Court subsequently granted the Applicants' judicial review of that RAD decision. In her decision, Justice Aylen held that the RAD had failed to consider the Applicants' argument that their agents of persecution had the means to locate them due to widespread corruption in Kazakhstan and sent the matter back for redetermination: *Tursunov v Canada (Citizenship and Immigration)*, 2023 FC 726.

[8] This judicial review application arises out of the RAD's decision on redetermination. By decision dated September 5, 2023, a differently constituted RAD panel dismissed the Applicants' appeal. The RAD agreed with the RPD that the Applicants had a viable IFA in Nur-Sultan. More specifically, the RAD found the Applicants had failed to establish that the criminal gangs had the motivation or means to find and harm them anywhere in Kazakhstan, including in the proposed IFA of Nur-Sultan. This finding was largely based on the localized nature of the gangs. The RAD also found that it would not be unreasonable in the circumstances for the Applicants to relocate to Nur-Sultan.

[9] With respect to the Applicants' allegations that gang members had visited their families inquiring about their whereabouts after they left Kazakhstan, the RAD held that the Applicants should have updated their BOCs to reflect this central allegation, and drew an adverse credibility inference based on their failure to do so.

[10] The RAD further determined the RPD was correct in finding that the Applicants did not establish Boutour as an agent of harm. This was based on the fact that neither Applicant had mentioned being targeted by Boutour in their BOC narratives, nor had they indicated that the criminal gangs acted under his direction. Instead, this claim was only advanced toward the end of the RPD hearing. The RAD, like the RPD, drew a negative inference from this omission. Ultimately, the RAD found the Applicants' evidence did not support their allegations against Boutour.

III. Issues and Standard of Review

[11] The Applicants raise two main issues on this judicial review application.

[12] First, they argue that the RAD erred in basing adverse credibility findings on omissions in their BOC narratives, asserting that there is no obligation on a refugee claimant to amend their BOC. On this issue specifically, the Court issued a Direction prior to the hearing requesting that counsel for the parties be prepared to address this Court's decisions in *Figarola Ahumada v Canada (Citizenship and Immigration)*, 2023 FC 246 [*Figarola Ahumada*] and *Gholami v Canada (Citizenship and Immigration)*, 2022 FC 1732 [*Gholami*].

[13] In their written submissions, the Applicants also argued that the RAD erred in failing to give them an opportunity to address its adverse credibility finding concerning their allegation that gang members visited their families because this constituted a new finding not made by the RPD: Applicants' Memorandum at paras 14-27. At the hearing, however, Applicants' counsel conceded that if the Court finds the RAD reasonably drew an adverse inference from the Applicants' failure to amend their BOCs, then this argument "does not go very far". I agree. Given my determination below, it is unnecessary for me to consider whether the RAD erred in failing to give the Applicants an opportunity to address this adverse credibility finding.

[14] Second, the Applicants argue that the RAD erred in finding they had a viable IFA in Nur-Sultan.

[15] There is no dispute that the applicable standard of review for both issues before this Court is that of reasonableness. 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": *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 85 [*Vavilov*]; *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 8 [*Mason*]. A decision should only be set aside if there are "sufficiently serious shortcomings" such that it does not exhibit the requisite attributes of "justification, intelligibility and transparency": *Vavilov* at para 100; *Mason* at paras 59-61.

IV. Analysis

A. *The RAD's adverse credibility findings are reasonable*

[16] I find that the RAD reasonably drew negative inferences from the Applicants' failure to update their BOC narratives. This Court has consistently held that a refugee claimant's failure to amend their BOC to include central allegations is a reasonable basis for an adverse credibility finding: *Figarola Ahumada* at para 50; *Gholami* at para 25; *Ajibua v Canada (Minister of Citizenship and Immigration)*, 2022 FC 903 at paras 12-13.

[17] In this case, the RAD made an adverse credibility finding based on the Applicants' failure to amend their BOCs to mention that criminal gang members had been looking for them or inquiring about them with their families after they left Kazakhstan. While these alleged visits occurred after the Applicants filed their BOCs, the RAD reasonably found that this was a "serious allegation" central to their refugee claims. Furthermore, the RAD noted that the Applicants "were represented by able Counsel; that refugee claimants are mandated by the instructions in the BoCs to include all events central to their claim, and that at the beginning of the RPD hearing, the Appellants had confirmed that their BoCs we [sic] up to date, complete and correct": Refugee Appeal Division Reasons and Decision dated September 5, 2023, at para 23 [RAD Decision].

[18] Applying the same reasoning, the RAD also drew a negative inference about the Applicants' failure to amend their BOCs to include that Boutour had inquired with their families about their whereabouts three months before the RPD hearing: RAD Decision at paras 44, 52.

[19] Both of these omissions were unquestionably central to the Applicants' refugee claims. As Justice Southcott determined in *Gholami*, allegations that the agent of persecution was contacting family members to look for a claimant is "clearly not a peripheral detail": *Gholami* at para 25. It was reasonably open to the RAD to make adverse credibility findings based on the Applicants' failure to amend their BOC narratives to include these core allegations.

B. *The RAD's determination that the Applicants have a viable IFA is reasonable*

[20] In my view, the RAD's determination that the Applicants had a viable IFA in Nur-Sultan is reasonable. The RAD thoroughly canvassed all of the Applicants' arguments in comprehensive reasons that are intelligible, justified, and transparent. Furthermore, the Applicants reiterate the very same arguments before this Court that were considered and rejected by the RAD.

[21] It is well established that a refugee claim should be dismissed where the claimant has a viable IFA in their country of nationality: *Sadiq v Canada (Citizenship and Immigration)*, 2021 FC 430 at para 38; *Olusola v Canada (Citizenship and Immigration)*, 2020 FC 799 at para 7 [*Olusola*].

[22] A two-pronged test is applicable to determining the viability of an IFA. The first prong considers whether a claimant would be subject to a serious possibility of persecution under section 96 or to a risk of harm under subsection 97(1) of the IRPA in the proposed IFA. Under this prong, the agent of persecution's "means" and "motivation" to locate the claimant in the proposed IFA are considered: *Singh v Canada (Citizenship and Immigration)*, 2023 FC 996 at para 8 [*Singh*]; *Adeleye v Canada (Citizenship and Immigration)*, 2022 FC 81 at para 21 [*Adeleye*].

[23] The second prong assesses whether it would be reasonable, in all the circumstances, to expect the claimant to seek safety in the IFA: *Singh* at para 10; *Olusola* at para 8.

(1) First prong – The Applicants failed to establish motivation and means

[24] To satisfy the first prong of the IFA test, it is incumbent on a claimant to establish that they are at risk from the same agent of persecution in the proposed IFA. In assessing this risk, the agent of persecution’s “motivation” and “means” to locate the claimant in the proposed IFA are considered: *Singh* at para 8; *Adeleye* at para 21. This assessment is a prospective analysis considered from the agent of persecution’s perspective rather than the claimant’s: *Aragon Caicedo v Canada (Citizenship and Immigration)*, 2023 FC 485 at para 12; *Adeleye* at para 21.

(a) *Local criminal gangs*

[25] In this case, the RAD reasonably assessed both the motivation and means of the criminal gangs to locate the Applicants in Nur-Sultan.

[26] Based on the Applicants’ evidence, the RAD concluded that the gangs were local in nature and thus would not be motivated to find and harm them in Nur-Sultan, which is 1700 km from their village:

[19] [...] This is because I do not find that the Appellants have established with sufficient and credible evidence that the local criminal gangs would be motivated to find and harm them if they relocate outside of their village to the proposed IFA of Nur-Sultan. I reach this conclusion for a number of reasons. To begin with, the Appellants have testified that these criminal gangs are local in nature, referring to them as street gangs. When the RPD inquired if they are part of an organization, the Principal Appellant responded

that “NO they are not part of an organization; they are street gangs.” In response to more questions from the RPD, he also testified that he did not know their name, and whether or not they are organized criminals. This, I find, supports the RPD’s conclusion that their interests are local in nature, I also note that the Appellants testified that these gangs began harassing them after the alleged rape incident in 2016 in a neighboring village, and that two of their members appeared to harass the Principal Appellant “after I wrote a complaint to local police officers [emphasis added].”

[Citations omitted]

[27] With respect to means, the RAD found inadequate evidence that the criminal gangs could influence police authorities elsewhere in Kazakhstan, including in the proposed IFA. While the RAD accepted the Applicants’ arguments with respect to police corruption, the requirement to register one’s residence, and that local police authorities may have the same shared interests as the criminal gangs, it found the evidence of the local criminal gangs’ means was simply insufficient:

[36] [...] it is one thing for the Appellants to allege that local criminal gangs are able to bribe police authorities, to advance their objectives and harm “enemies” of these gangs, in the Appellants’ village, and another thing to establish with sufficient and persuasive evidence that these local criminal gangs have the influence and means to bribe police authorities elsewhere across the country, including in the proposed IFA, to work to advance their interests, including of harming the Appellants. I find insufficient evidence that this is the case. [...]

[28] Further, in considering the means of the local criminal gangs to locate the Applicants due to widespread corruption in Kazakhstan, the RAD specifically addressed the error identified in the prior RAD decision by Justice Aylen.

(b) *District police officer Boutour*

[29] The RAD upheld the RPD's determination that the Applicants had not established, on a balance of probabilities, that Boutour was an agent of harm. The RAD agreed with the RPD that the Applicants' allegations of being targeted by Boutour for filing a complaint against him lacked credibility because the Applicants had not mentioned this in their BOC narratives, nor had they indicated that the criminal gangs threatening them acted under Boutour's direction. Rather, this claim was only made toward the end of the RPD hearing by one of the Applicants.

[30] The RAD did not accept the Applicants' argument that this additional evidence simply expanded on evidence they had already provided. While the RAD acknowledged that the Applicants had made reference in their BOCs to Boutour being hostile towards them and accusing them of being liars, it found that this reference was insufficient evidence to establish Boutour as an agent of persecution who sought to harm them. The RAD thus found that the Applicants' evidence did not support their allegations against Boutour and concluded that Boutour lacked the motivation to locate the Applicants in Nur-Sultan. Given this determination, the RAD did not assess whether Boutour had the means to locate them in the IFA.

[31] I find no reviewable error in the RAD's determination that the Applicants' claims of persecution by Boutour lacked credibility. The jurisprudence is clear that a failure to include material facts and details in a BOC, without a reasonable explanation, is a justified basis for a negative credibility finding: *Ahmed v Canada (Citizenship and Immigration)*, 2023 FC 830 at para

40; *Manan v Canada (Citizenship and Immigration)*, 2020 FC 150 at para 44; *Ogaulu v Canada (Citizenship and Immigration)*, 2019 FC 547 at paras 18-20.

[32] Despite this finding, the RAD nevertheless considered whether the local police would have the means to find and harm the Applicants in Nur-Sultan. The RAD acknowledged that the Immigration and Refugee Board of Canada's National Documentation Package [NDP] for Kazakhstan states that there is one national police force. However, the RAD found there was insufficient evidence that the local police would have access to a national database where they could find information about the Applicants' location, and that it would be "searchable or accessible by police authorities, including in remote areas, or operating locally from anywhere in Kazakhstan": RAD Decision at para 62. The Applicants argue that it is not unreasonable to assume that the police can access such a database from anywhere. However, I agree with the RAD that it was incumbent on the Applicants to establish this assumption with credible and sufficient evidence, which they failed to do.

- (2) The Applicants failed to establish a serious possibility of persecution as ethnic Tajiks

[33] Under the first prong of the test, the RAD also considered the Applicants' argument that they would face a serious possibility of persecution if they relocated to Nur-Sultan based on their profile as ethnic Tajiks.

[34] Based on a detailed review of the objective country condition evidence in the NDP, the RAD accepted that there are human rights issues in Kazakhstan, as well as a number of groups

(e.g., transgender persons and persons with disabilities) who face discrimination. However, it found no evidence supporting the Applicants' allegation that Tajiks are persecuted in Kazakhstan:

[76] Hence, while I do accept that the NDP does mention that there are inadequate mechanisms of redress for allegations of racism in Kazakhstan, the NDP related evidence does not lead me to conclude that the discrimination that Appellants may face in the future would on a serious possibility standard amount to persecution. I also underscore that while it is important to examine the situation of ethnic minorities in general, I have examined whether the Appellants because of their identity as ethnic Tajiks, would face a serious possibility of persecution, given the general country conditions or their particular profile and circumstances, if they relocate to Nur-Sultan, and found that the NDP evidence does not support such a conclusion.

[Emphasis added]

[35] The RAD thus reasonably found that the Applicants had failed to establish that they would face a serious possibility of persecution in Nur-Sultan.

- (3) Second prong – The Applicants failed to establish that their lives would be in jeopardy in the IFA

[36] A claimant's burden to satisfy the second prong of the IFA test is high. Proving undue hardship is not enough: *Fashola v Canada (Citizenship and Immigration)*, 2023 FC 1671 at para 44; *Haastrup v Canada (Citizenship and Immigration)*, 2020 FC 141 at para 30. A claimant must establish with "actual and concrete evidence" that their life and safety would be in jeopardy in the IFA: *Olusola* at para 9; *Hamdan v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 643 at para 12. Here, the Applicants failed to meet this high evidentiary burden.

[37] The RAD found that it would not be objectionably unreasonable for the Applicants to seek refuge in Nur-Sultan in their particular circumstances. More specifically, the RAD determined that there was a lack of information that ethnic minorities, including Tajiks, experience widespread or severe discrimination in obtaining health services, education or housing. In addition, the RAD found no evidence to suggest that the Applicants would have difficulty finding employment in Nur-Sultan given their extensive work experience in Kazakhstan, the skills they learned from their work experience in construction in Canada, and their fluency in the Kazakh language.

[38] I am unable to find that the RAD made any reviewable errors in assessing the second prong of the IFA test. The Applicants, in essence, disagree with the RAD's weighing and assessing of the evidence. It is not the role of a reviewing court, however, to reweigh and reassess the evidence: *Vavilov* at paras 125-126.

V. Conclusion

[39] Based on the foregoing, the RAD did not err in basing adverse credibility findings on the Applicants' failure to update their BOCs with allegations that were central to their refugee claims. Furthermore, the RAD reasonably determined that the Applicants failed to satisfy the two-pronged test for determining the viability of an IFA, and that they had a viable IFA in Nur-Sultan.

[40] The parties did not propose a question for certification and I agree that none arises in this case.

JUDGMENT in IMM-12131-23

THIS COURT'S JUDGMENT is that:

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

"Anne M. Turley"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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