

CANADA / JUDGMENT

TB8-27017

COURT

Refugee Appeal Division

DECIDED

15 May 2020

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RAD File / Dossier de la SAR : TB8-27017 TB8-27018 / TB8-27019 / TB8-27020 Private Proceeding / Huis clos Reasons and decision ? Motifs et décision Persons who are the subject of the appeal XXXX XXXX XXXXXXXXXXX XXXX XXXX XXXX XXXXXXXXXXX XXXX XXXXXXXXXXX XXXX Personnes en cause Appeal considered / heard at Toronto, ON Appel instruit / entendu à Date of decision May 15, 2020 Date de la décision Panel G. Erauw Tribunal Counsel for the persons who are the subject of the appeal Rashid Khandaker Conseil des personnes en cause Designated representative XXXX XXXX XXXX XXXX Représentant(e) désigné(e) Counsel for the Minister N/A Conseil du ministre REASONS FOR DECISION OVERVIEW

- [1] This is the decision dismissing the appeal of XXXX XXXX (the "principal Appellant"), his wife XXXX XXXX XXXX XXXX, and their children XXXX XXXX and XXXX XXXX (the "associate Appellants").
- [2] The Appellants are citizens of Iran. They allege that the principal Appellant's former business partner (XXXX XXXX XXXX.) and his associates have threatened them with death and kidnapping after business projects they agreed to did not move forward and the principal Appellant refused to work with XXXX XXXX XXXX. They claim XXXX XXXX XXXX XXXX is well-connected with influential government officials in Iran, but they also allege that XXXX XXXX XXXX XXXX was imprisoned from 2016 to 2017 for misappropriation of funds and for importing expired baby milk. The principal Appellant further alleges that he is now on a list of suspects wanted by the Iranian government due to his past association with XXXX XXXX XXXX.
- [3] The Appellants appeal a decision of the Refugee Protection Division (RPD), rejecting their claim for refugee protection on the basis of credibility. As a preliminary issue, the Appellants submit an affidavit as new evidence and request an oral hearing. The Appellants argue the RPD erred in its decision by: not ensuring a fair hearing due to bias; basing its decision on speculation, minor inconsistencies, and ignoring credible evidence; failing to analyze their subjective fear; failing to find they established a serious possibility of persecution; and, not conducting a separate analysis under section 97 of the Immigration and Refugee Protection Act (IRPA).

- [4] I have rejected the Appellants' new evidence, and deny their request for an oral hearing. Having reviewed the entire record, I find the Appellants have not credibly established their allegations on a balance of probabilities, which is the determinative issue. They have also not established that the RPD was biased in the adjudication of their claim. Therefore, the appeal is dismissed. DECISION
- [5] I dismiss the appeal. The RPD was correct in finding that the Appellants are neither Convention refugees nor persons in need of protection. ADMISSIBILITY OF NEW EVIDENCE SUBMITTED ON APPEAL
- [6] According to the law, I can only accept new evidence that: (1) arose after the RPD decision; or (2) was not reasonably available at the time of the RPD decision; or (3) could not reasonably have been expected in the circumstances to have been presented to the RPD before its decision.¹ If one of these conditions is met, I must then decide if the evidence is credible, relevant, and new.² The affidavit presented by the Appellants is rejected
- [7] In this appeal, the Appellants submit an affidavit from the principal Appellant for the purposes of new evidence. The Appellants argue that this should be accepted because they did not receive a fair hearing at the RPD, so they did not get the opportunity to present all details to the RPD. For reasons provided below in assessing the merits of this appeal, I have found this bias argument unfounded. Mainly, I note that the Appellants have not established that the RPD was biased and failed to raise the issue of bias at the earliest opportunity. Furthermore, the Appellants had two RPD hearings where they were thoroughly questioned by the RPD about their allegations, as well as questioned by their own counsel in order to present the relevant details of their story.
- [8] Moreover, I note that the affidavit submitted merely repeats the Appellants' allegations, oral testimony, elaborate and clarifies their oral testimony, and criticizes the reasoning of the RPD. The Act expressly limits admissible evidence to new evidence or evidence that was not reasonably available or obtainable at the time the claim was rejected. I am ignoring the principal Appellant's repetition and explanation of their evidence presented at the RPD, as this could have been provided to the RPD prior to rejection. The Appellants had two RPD hearings where they were thoroughly questioned by the RPD about their allegations, as well as questioned by their own counsel. As a result, they had ample opportunity to present the relevant details of their story to the RPD. The new evidence provisions at the Refugee Appeal Division (RAD) are not the Appellants' opportunity to provide the evidence they could have, and should have, provided during their hearing. In effect, the Appellants are attempting to use the new evidence provisions of the RAD in order to repair their deficient record, which is not the purpose of the new evidence provisions. As well, I am ignoring the principal Appellant's comments on the RPD reasoning. All of the above parts of his affidavit are inadmissible, either because they are not new evidence or they are simply arguments that belong in the Appellants' Memorandum. Only the arguments made in the Appellants' memorandum will be considered.

- [9] Therefore, I find the principal Appellant's affidavit to be inadmissible because it does not meet the requirements of 110(4). The request for an oral hearing is denied
- [10] Since no new evidence is admissible in this appeal, there cannot be an oral hearing.³ Therefore, the request for an oral hearing is denied.

ANALYSIS

- [11] I have assessed whether the RPD's decision is correct.⁴ The RAD finds the Appellants received a fair hearing and that the RPD did not demonstrate bias
- [12] The Appellants provide a partial transcript of the RPD sitting on March 14, 2018 in order to support their allegation that the RPD member was biased against them. They submit the RPD demonstrated extreme hostility to their lawyer. While the Appellants note that there was no direct bias motion from their lawyer, they submit their lawyer alluded to the bias issue by stating an adverse inference was drawn based on the quality of the Appellants' Basis of Claim (BOC) form. Instead of properly dealing with the bias issue, they state the RPD only granted another hearing date upon their request. The Appellants feel the RPD already made its decision. Due to the strong presence of the RPD Member's bias, they claim the decision in their case is unfair.
- [13] I reject the Appellants' argument and find the allegation of bias is unfounded.
- [14] For an apprehension of bias to be founded, it "must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is 'what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.'⁵ It is an objective test and there needs to be substantial grounds to support a claim of a reasonable apprehension of bias, as the threshold for establishing such a claim is high. Whether a reasonable apprehension of bias arises will depend entirely upon the facts of the case.⁶ However, when a person alleges an appearance of bias on the part of a member, they must raise that apprehension at the earliest opportunity in order to allow the decision maker to recuse themselves, if necessary. The failure to meet that test generally amounts to an implied waiver of the right to invoke bias in subsequent proceedings.⁷
- [15] In this case, while the Appellants argue bias was "alluded to" in the March 14, 2018 hearing, I do not accept that this constitutes having raised the issue at the earliest opportunity. There was no bias motion made, nor a request for the member to recuse himself. Moreover, I note that the Appellants had subsequent RPD hearings on May 2 and September 13, where the Appellants had the opportunity to raise concerns over the RPD member's alleged impartiality. They failed to do so. As a result, I find the Appellants have failed to raise their bias concerns at the earliest opportunity, and have waived their right to raise this concern to the RAD. They were represented by counsel, and even though counsel and the member had

disagreements about how the RPD treated counsel's objections and some questions posed to the Appellants, no bias motion was ever made to the RPD. The Appellants do not explain why they could not have brought a bias motion in subsequent hearings and prior to the RPD's decision.

- [16] I have also had the opportunity to review the transcript provided by the Appellants, including the recordings of their RPD hearings. While the RPD unfortunately told the Appellants on March 14 that their BOC was the worst he had ever seen, the fact that a comment may have been inappropriate does not in itself show that the decision-maker was biased.⁸ Nevertheless, it is the RPD's duty to put its concerns to the Appellants in order to give them an opportunity to explain. In this case, concerns were put to the Appellants and they failed to provide an adequate explanation and failed to take the opportunity provided by the RPD on two occasions to repair deficiencies with their BOC. The Appellants were advised by the RPD prior to March 14 to clarify sections of their BOC that did not make sense and were unclear. They failed to do so in advance of March 14. On March 14, the RPD allowed a request for an adjournment and gave the Appellants further opportunity to specifically clarify and amend their BOC. Again, the Appellants failed to do so by their next hearing on May 2. Based on my review of the recording of the hearing on May 2, this appeared to be a strategic decision on the part their counsel, who was concerned that there would be inconsistencies held against them if it was amended. Yet, the Appellants do not provide evidence that they believe their RPD counsel provided inadequate representation.
- [17] Finally, I note that the RPD's questioning of the Appellants at their hearing on May 2 and September 13 does not demonstrate any bias. The RPD was professional and respectful to the Appellants throughout, even if the RPD and counsel disagreed on some matters. In my view, the RPD was correct to highlight in response to counsel's objections that it is the RPD's duty to question the Appellants regarding their allegations and put credibility concerns to them. This included issues related to their BOC, which the RPD gave the Appellants ample opportunity to remedy. It does not demonstrate that the RPD predetermined their case, especially considering there were two RPD hearings after March 14 where the Appellants could make their case. The RPD was not partial or easily dismissive of their claim given the length of their hearing and the thorough questioning by the RPD. Also, the RPD provided thorough reasons in its decision for why it found the Appellants lacking in credibility, which notably (discussed below) the Appellants' submissions fail to specifically identify how the RPD erred in making those credibility findings. They have not linked any of the RPD's particular credibility findings to its bias allegations. I fail to see how and where the RPD demonstrated they had pre-conceived notions of the facts and issues in the claim.

- [18] For the above reasons, I reject the Appellants' allegation they did not receive a fair hearing and that the RPD was biased. It is unfounded. An informed person, viewing the matter realistically and practically-and having thought the matter through-would not think it is more likely than not that the RPD, whether consciously or unconsciously, would not decide fairly. The RAD finds the Appellants have failed to credibly establish their allegations on a balance of probabilities
- [19] As mentioned above, the Appellants fail to specifically identify how and where the RPD erred in its credibility findings, which is the determinative issue. Instead, the Appellants vaguely argue that the RPD rejected their claim "by only pointing out the inconsistencies instead of assessing the principal Appellant's explanation relating to BOC and threat issues, but such relatively minor inconsistencies should not be used for negative credibility finding." They go on to argue "the RPD's reliance upon speculation, ignoring all credible evidence, made its decision unreasonable."
- [20] I find the RPD did not err in its credibility findings. The Appellants' arguments are wholly without merit and fail to comply with Rule 3(3)(g)(i)-(ii) of the Refugee Appeal Division Rules⁹ in identifying where and how the RPD erred. In effect, the Appellants' submissions raise an issue or a concern and expect the RAD to find evidence to support their argument. The RAD has no obligation to do the Appellants' work of looking for such evidence for them.¹⁰
- [21] Having reviewed the record, I find the RPD did not speculate, ignore credible evidence, or base its decision on minor inconsistencies. The RPD's credibility findings are on material aspects of their claim. The RPD also put its concerns to the Appellants and allowed them an opportunity to explain the credibility issues with their evidence. The RPD provided fulsome and comprehensible reasons for why it rejected the Appellants' explanations and why it rejected their claim. The RPD found several credibility concerns with their allegations. For the reasons below, I find the RPD was correct in these credibility findings.
- [22] First, the RPD did not err in finding the Appellants made a material omission from their BOC. It was noted that the Appellants did not mention in their BOCs any threats having occurred in 2017. This includes phone call threats from XXXX XXXX XXXX, about killing the principal Appellant or any threats of kidnapping the son Appellant. The absence of these details of being threatened in 2017, means that the allegations in their BOC indicate they last had any problems with XXXX XXXX XXXX, in 2013, which is four years before they left Iran. The RPD correctly rejected the Appellants' explanation for the omission. The Appellants explained that they did mention it and that he did not know he had to provide every small detail, and their counsel argued that this information was not omitted, but mentioned in paragraph 24 of their BOC. I agree with the RPD that the Appellants do not adequately explain the omission. The BOC is written in chronological order, the context of paragraph 24 is about having not paid him the \$350,000, which in his testimony occurred in 2013. Furthermore, the last sentence of the paragraph mentions the principal Appellant no longer worked for XXXX XXXX XXXX XXXX and stopped showing up at his office, which according

to his testimony was also in 2013. Also, paragraph 25 talks of the principal Appellant going back to his own business "XXXX", which according to his Schedule A Form he left XXXX XXXX XXXX's company for XXXX in May 2013. In addition, paragraph 26 of his BOC mentions that XXXX XXXX XXXX. was sentenced to prison in 2016, further indicating that paragraph 24 is speaking about threats chronologically in 2013, not 2017. I find the omission of any threats of death, kidnapping, and failure to mention threatening phone calls in 2017 are significant and core aspects of their claim. They are not mere elaborative details of their claim because they claim the threats in 2017 caused them to flee Iran. It is a critical event that caused them to seek international protection. Therefore, I find the RPD did not err in finding the omission of the threats seriously undermined their credibility.

- [23] Second, the RPD did not err in finding the Appellants were inconsistent about the threats. The principal Appellant testified that the threats started in February 2017 after XXXX XXXX XXXX. was released from prison and contacted him. However, in a subsequent hearing he testified the threats started in April 2017, his wife only received the phone calls, and that this was the first time since ending communication with XXXX XXXX XXXX. in 2013, that they had problems with him. When the RPD put this inconsistency to the principal Appellant about when the threats started and if he was personally contacted, his testimony was contradictory, saying XXXX XXXX XXXX. was in contact with him. When the principal Appellant's counsel put this discrepancy to him, he did not explain the contradiction by saying XXXX XXXX XXXX. told him he would kill him and that XXXX XXXX XXXX. called him after XXXX XXXX XXXX XXXX was released from prison. I agree with the RPD that the principal Appellant does not explain why he stated in one hearing that he was called in February 2017, and in another hearing April 2017, he simply reverted back to his initial testimony. Therefore, I find the RPD did not err. The principal Appellant's inconsistent testimony about the threats undermines the credibility of the allegations they received threatening calls in 2017.
- [24] Third, the RPD did not err in finding the Appellants were inconsistent about XXXX XXXX XXXX.'s intention of involving them in a money laundering scheme. The RPD correctly noted that the information in the principal Appellant's BOC states that XXXX XXXX XXXX. wanted to "use and abuse" him and involve him in the dirty job of "money laundering." However, during the RPD hearing when the principal Appellant was asked if XXXX XXXX XXXX. wanted to get him involved in any criminal activities, he said he did not. When confronted with this inconsistency with his BOC, the principal Appellant's explanation simply referred to XXXX XXXX XXXX. wanting to cause him financial problems and use the principal Appellant for personal financial gain, which is what he meant by "use and abuse" him. I agree with the RPD that this explanation does not resolve the discrepancy. The BOC mentions the criminal activity of money laundering. The principal Appellant's explanation does not explain why his BOC says XXXX XXXX XXXX. wanted him to be involved in criminal activities, such as money laundering, but yet he denied at his hearing any intent to involve him in criminal activities. Therefore, I find the RPD did not err. The inconsistency about whether XXXX XXXX XXXX. wanted to involve the principal Appellant in money laundering

or any criminal activity seriously undermines the credibility of their allegations that they had problems with XXXX XXXX XXXX.

- [25] Finally, I agree with the RPD that the Appellants did not provide any evidence to establish they were in business with XXXX XXXX XXXX. Furthermore, the information they provided about XXXX XXXX XXXX. does not provide any link to the Appellants. While the documentation submitted about XXXX XXXX XXXX. may be credible, it has no probative value to establishing their allegations that they were in business with him or that he has threatened them. Moreover, I note that the Appellants have not provided any corroborating evidence that the principal Appellant is wanted by Iranian authorities, as he alleges. Therefore, I find the RPD did not err in its assessment of the Appellants' documentary evidence.
- [26] In light of the above, I find the RPD was correct in its credibility findings and that these are sufficient to conclude on a balance of probabilities that the Appellants failed to credibly establish their allegations.
- [27] I note that the Appellants also advance an argument that the RPD did not consider their subjective fear and did not consider their claim under section 97.
- [28] With respect to the subjective fear argument, this is not accepted. Just because the Appellants have a subjective fear, this does not make their allegations credible. As discussed above, the RPD and RAD have provided sufficient reasons for finding their claim not credible, simply saying they are fearful does not establish a claim for protection.
- [29] In regard to their section 97 argument, this too is rejected. While an adverse credibility finding may not necessarily be conclusive of a section 97 claim, it is conclusive in the present case. The principal Appellant's unproven allegations surrounding his relationship and threats from XXXX XXXX XXXX. are central to the Appellants' allegations, and therefore, any subsequent risk in Iran.¹¹ Nor do the Appellants identify what supporting evidence the RPD ignored that would ground a separate section 97 claim. I find that the Appellants' argument is unresponsive to the facts before it, and therefore irrelevant.
- [30] Having reviewed the record and conducted my own independent assessment, I find the RPD did not err in its credibility findings. The issue of credibility is determinative of the claim. The Appellants omitted critical events from their BOC, which caused them to flee Iran, they were inconsistent about the threats received from XXXX XXXX XXXX., and they were inconsistent about XXXX XXXX XXXX XXXX's intention to have them involved in any criminal activities. They have also failed to establish that the RPD was biased in assessing their claim. As a result, the RPD's determination that the Appellants are not Convention refugees or persons in need of protection is correct.

CONCLUSION

[31] I dismiss the appeal and confirm the decision of the RPD that the Appellants are neither Convention refugees nor persons in need of protection. (Signed) "G. Erauw" G. Erauw May 15, 2020 Date 1 Subsection 110(4) of the Immigration and Refugee Protection Act (IRPA). 2 M.C.I. v. Singh, Parminder, 2016 FCA 96; Canada (Citizenship and Immigration) v. Raza, 2007 FCA 385. 3 Abdi v. Canada (Citizenship and Immigration), 2019 FC 54, at para. 29. 4 Canada (Citizenship and Immigration) v. Huruglica, 2016 FCA 93; Rozas del Solar v. Canada (Citizenship and Immigration), 2018 FC 1145. 5 Committee For Justice v. National Energy Board, [1978] 1 SCR 369, March 11, 1976, at p. 394. 6 R. v. S (R.D), [1997] 3 S.C.R. 484 at pp. 531-532. 7 Keita v. Minister of Citizenship and Immigration., 2015 FC 1115, at para. 27. 8 Marcelin v. Minister of Citizenship and Immigration, 2019 FC 1516, at para. 19. 9 Immigration and Refugee Board, Refugee Appeal Division Rules, SOR/2012-257. 10 Huang v. Minister of Citizenship and Immigration, 2017 FC 1090, at para. 7. 11 Ikheola v. Canada (Citizenship and Immigration), 2019 FC 1161 at para. 33.

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Prepared on 29 October 2026 · Esheria