

CANADA / JUDGMENT

TB8-24570

COURT

Refugee Appeal Division

DECIDED

11 February 2020

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RAD File / Dossier de la SAR : TB8-24570 TB8-24571 / TB8-24572 Private Proceeding / Huis clos
Reasons and decision ? Motifs et décision Persons who are the subject of the appeal XXXX XXXX
XXXXXXXX XXXX XXXXXXXXXXX XXXX Personnes en cause Appeal considered / heard at Toronto,
ON Appel instruit / entendu à Date of decision February 11, 2020 Date de la décision Panel T. Card
Tribunal Counsel for the persons who are the subject of the appeal Anton Brunga Conseil des
personnes en cause Designated representative XXXX XXXX Représentant(e) désigné(e) Counsel
for the Minister N/A Conseil du ministre REASONS FOR DECISION

- [1] XXXX XXXX (the "Principal Appellant"), XXXX XXXX (the "Spousal Appellant"), and XXXX
XXXX (the "Minor Appellant") are citizens of Kosovo. They are appealing a decision of the
Refugee Protection Division (RPD) denying their claims for refugee protection.
- [2] The Principal Appellant is the father and the Designated Representative (DR) of the Minor
Appellant. The Spousal Appellant is married to the Principal Appellant and is the mother of
the Minor Appellant.

DETERMINATION

- [3] The Appeals are dismissed. BACKGROUND AND ALLEGATIONS
- [4] The Principal Appellant alleges to have been a member of the Movement for Self
Determination (MSD) since 2004. He organised a demonstration on 9 January 2016 at which
he was arrested, detained and beaten by police.
- [5] In August 2016, a friend of the Principal Appellant (XXXX) was arrested on suspicion of
involvement in terrorism. The Principal Appellant visited XXXX in jail in September 2016.
XXXX told the Principal Appellant he had been framed.
- [6] On a later visit, XXXX introduced the Principal Appellant to his cellmate, XXXX who had also
been jailed allegedly on false charges.
- [7] In mid-October 2016, the Appellants got Temporary Residence Visas (TRVs) for Canada. The
Principal Appellant has a sister (the Sister) in Canada who had a baby. The Sister had asked
the adult Appellants if they could help with caregiving around the time her parental leave
would come to an end.

- [8] In November 2016, the Principal Appellant was phoned by XXXX, XXXX brother, who said the Principal Appellant should visit XXXX in jail as soon as possible. The Principal Appellant visited XXXX, who told the Principal Appellant he feared the Kosovo authorities planned to kill him. XXXX was later found dead under suspicious circumstances.
- [9] The Appellants went to Canada in XXXX 2017. On 5 April 2017, the Principal Appellant was called by XXXX brother, XXXX, who said that XXXX had been picked up, and abused by the police, and that XXXX gave up the Principal Appellant's name to the police as someone who knew about XXXX murder. On 17 April 2017, the Principal Appellant received a phone call saying that XXXX had been murdered.
- [10] The Appellants made their refugee claim in May 2017, but were refused by the RPD on the grounds the Principal Appellant was found not to be credible. ADMISSIBILITY OF APPELLANT EVIDENCE SUBMITTED ON APPEAL
- [11] In support of this appeal, the Appellants proposed the admission of the following documents as new evidence:
- a. Article "XXXX XXXX family will accept the results of the investigation of the Swiss institute" dated 13 October 2018 with translation.¹
- [12] S.110(4) of the Immigration and Refugee Protection Act (IRPA) provides that the Appellants may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that they could not reasonably have been expected² in the circumstances to have presented, at the time of the rejection. It is for the Appellants to make full and detailed submissions in their Memorandum about how any proposed new evidence meets the requirements of s.110(4) and how that evidence relates to the Appellants.³
- [13] In addition, if the new evidence meets one of the explicit legislative factors in s.110(4), then the second step of the analysis is for the Refugee Appeal Division (RAD) to apply the adapted Raza factors endorsed in Singh.⁴ In Singh, the Federal Court of Appeal held that the RAD should assess the admissibility of the new evidence for its credibility, relevance and newness. The RAD is not to consider the fourth Raza factor of materiality to the admission of new evidence, which is a consideration for s.110(6) and the request for an oral hearing.⁵ Document rejected
- [14] Although the allegations arose before the RPD rejection, I note that the article itself about an ongoing contentious issue was not published until after the RPD rejection, and that therefore it was not reasonably available at the time of rejection. From that standpoint, I find that the document does meet the requirements of s.110(4) of the IRPA.

- [15] However, I find that while the article is credible on its face, it relates to the uncontested fact that XXXX died in custody and that the circumstances around the death itself are still suspicious. I find the article does not deal with the central issue of the relationship between the Principal Appellant and XXXX, as discussed below. It is therefore not sufficiently relevant or new in the sense of proving something unknown to the Appellants, contradicting a finding of fact by the RPD or proving an event that took place after the RPD Hearing.
- [16] I therefore find the documents do not meet all three Singh and Raza factors and reject them.
NO ORAL HEARING
- [17] The RAD may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection 110(3) of the IRPA that raises a serious issue with respect to the credibility of the person who is the subject of the appeal, is central to the decision with respect to the refugee protection claim, and, if accepted, would justify allowing or rejecting the refugee protection claim.⁶
- [18] As no new evidence has been accepted, the requirements of subsection 110(6) of the IRPA have not been met, and an oral hearing cannot be held. ISSUES IN APPEAL
- [19] The Appellants argued the following issue in their appeals:
- (a) The RPD erred in its finding that the Appellants delayed in leaving Kosovo and delayed in claiming in Canada and drawing an adverse credibility finding as a result.
 - (b) The RPD erred in finding the Principal Appellant demonstrated a lack of subjective fear when visiting Macedonia and re-availing back to Kosovo afterwards.
 - (c) The RPD erred by overemphasising the misleading answers provided in their TRV applications and drawing a negative credibility finding.
 - (d) The RPD erred in its analysis of the Appellants' documentary evidence, particularly the support letter from the MSD7 and the evidence regarding the uncertainty over the true nature of XXXX death.
 - (e) The RPD erred in drawing a negative credibility finding from the lack of photos of the Principal Appellant with XXXX, XXXX or XXXX.
 - (f) The RPD erred in drawing a negative credibility inference from the omission of the murderers' names from the Principal Appellant's Basis of Claim (BOC) form.
 - (g) The RPD erred in drawing a negative credibility inference from the Principal Appellant's evolving testimony regarding informing people in Kosovo about the prison deaths.
 - (h) The RPD erred in drawing a negative credibility finding regarding the omission of XXXX disappearance from the Principal Appellant's BOC.
 - (i) The RPD erred in its assessment of the Principal Appellant's Facebook account printouts⁸ with the pictures of Edward Norton showing a swastika tattoo.

[20] I find that the determinative issues in this appeal are:

- (a) Credibility.
- (b) Whether the Principal Appellant genuinely had a close relationship with XXXX as claimed. If the answer to this is yes, then it goes some way to establishing the risk of persecution at the hands of the Kosovan authorities. If the answer to this is no, then the Principal Appellant's claim collapses, as that alleged close relationship is supposed to be the whole reason the Principal Appellant was trusted with information, and why XXXX and XXXX later trusted him.

ANALYSIS

- [21] I have conducted an independent analysis of the evidence concerned, including reviewing the RPD hearing, as well as considering the Appellants' Memorandum,⁹ the RPD Decision,¹⁰ and the Principal Appellant's BOC,¹¹ amongst other documents. Uncontested facts
- [22] Before going into the main analysis, and given the large number of issues raised, I feel it helpful to list a number of the uncontested facts in this case:
- (a) The identities of the Appellants, including Kosovan citizenship, are established.
 - (b) The Principal Appellant was an MSD member.
 - (c) The Principal Appellant had been in jail after being at an MSD protest.
 - (d) XXXX was an MSD member.
 - (e) XXXX and XXXX did die in jail, although the circumstances around their deaths is disputed in general. Principal Appellant did not have a close relationship with XXXX as claimed
- [23] One of the major reasons the RPD rejected the Appellants' claims was in relation to the lack of evidence regarding the alleged close relationship with XXXX.
- [24] It is important to remember that at the core of the Principal Appellant's claim is the allegation that because he was close to XXXX, who was a key MSD member, it was that close relationship which has brought him to the attention of the Kosovan authorities. The close relationship between XXXX, XXXX and XXXX was what led XXXX and XXXX to also be killed.
- [25] The RPD Member asked the Principal Appellant if he had any pictures with him and XXXX, XXXX and/or XXXX.
- [26] In relation to XXXX and XXXX, the Principal Appellant has stated that he was never good friends with them, and that they could not take pictures in jail. I accept this argument. This therefore leaves the issue regarding XXXX.

- [27] In reviewing the RPD hearing record,¹² I note that the Principal Appellant was asked if he had any photographs of him, XXXX, XXXX and XXXX as evidence of a close relationship. The Principal Appellant then replied that photos were not allowed to be taken in jail. Counsel for the Appellant then interrupted to point out that the Principal Appellant was not close friends with XXXX and XXXX.
- [28] The RPD Member then went on to ask again, in relation to XXXX, if the Principal Appellant had any documents to substantiate his allegation that they were close before XXXX arrest. The Principal Appellant never answered the question properly, and instead kept talking about doctors' reports about XXXX death.
- [29] In relation to the Appellants' argument in their memorandum, reference is made to questions asked by the Appellants' counsel about a lack of photographs taken. The quotation is given as follows: "Principal Claimant: I don't know that he was photographed. Counsel: Well, do you know what XXXX disposition was with respect to being photographed? Principal Claimant: He was not a person that wanted to appear too much on the public or especially in the pictures of the media. Counsel: Why not? Principal Claimant: Usually public figures they get a lot of attention from the media papers and that's why he was more drawn back. He didn't want to be in the spotlight. ..."13
- [30] What the Appellants have failed to outline in their argument is that the original question to the Principal Appellant by his Counsel was "Okay, so...Now, do you know whether XXXX...whether XXXX was regularly photographed by others?" [emphasis added]. In other words, Counsel's questions do not address the RPD Member's earlier question about evidence of the relationship. Instead, Counsel's questions are about general publicity pictures of XXXX, which was not what the RPD Member was asking about.
- [31] I find that the Principal Appellant was evasive when questioned about evidence about his supposed close relationship with XXXX, and that when this is combined with the actual lack of evidence, and the lack of explanation for the lack of evidence, I find the RPD Member did not err in finding the Principal Appellant not credible about his relationship with XXXX. I uphold the RPD's finding on this issue.
- [32] The effect of this finding is that it then undermines the Principal Appellant's account of being wanted by the Kosovan authorities on account of that relationship. The Principal Appellant's allegation is that he was wanted because he had knowledge of how XXXX, XXXX and XXXX died. XXXX allegedly told the Principal Appellant his suspicions and fear of being murdered by the authorities because of their close relationship. This relationship is now not credible. XXXX and XXXX trust in the Principal Appellant allegedly came from XXXX telling them the Principal Appellant could be trusted because they had a close relationship. These relationships are also now not credible.

- [33] The defining event that the Principal Appellant alleges drove him to making his refugee claim was being informed that XXXX had given the Principal Appellant's name to the authorities as someone who knew what happened to XXXX. However, as the relationship with XXXX is now also not credible, it follows that the Principal Appellant's allegation of XXXX divulging his name to the authorities is also not credible. TRV misleading answers adversely affects Principal Appellant's credibility
- [34] The RPD also found that as the Appellants had misled the Canadian authorities about the duration and purpose of the Appellants' visit to Canada on their TRV forms, this adversely affected their credibility.
- [35] The Appellants have argued that the RPD Member was asking leading questions about whether or not the Appellants were being untruthful in their answers to certain questions in the TRV applications, and that in any case, it was the Principal Appellant's sister who suggested the answers.
- [36] In reviewing the RPD record, I find that the Appellants arguments are unconvincing. The RPD Member was entitled to ask if the Principal Appellant was being untruthful in some of the answers on his form about the purpose of the trip. Furthermore, the Appellants have misconstrued the RPD Member's questions. The Appellants ask if the presence of some questions being answered untruthfully "make the entire visa application untruthful".¹⁴ However, what the RPD Member was getting at was whether or not the Appellants had lied on any part of their application, and particularly, the important questions of purpose and duration of the visit.
- [37] Furthermore, I find that the Appellants have completely underplayed the importance of the questions to which the false answers were being given. Questions about purpose and duration of the visit are central, and not just little white lies that they are making them out to be.
- [38] The Appellants have argued that "the only feasible and legitimate way for the claimants to come to Canada, from a timing, financial, and personal circumstances point of view, was to apply for a visitor visa and that is what they did....the only element of the visa application that was not appropriately disclosed was the eventuality of the Appellants to visit for longer than ten days in case the Principal [Appellant's] sister would not have been able to find a caregiver for her daughter before the termination of her maternity leave." I find it shocking that implying that lying on these sections is somehow "legitimate" and "the only" way to get a visitor visa.
- [39] The circumstances in which subterfuge can be taken into account is where a refugee claimant is fleeing for their lives and that such deception is required for such flight. This is not the allegation here. By the Appellants' own accounts and argument in the Memorandum regarding delay in claiming, the Appellants did not feel they were in danger until after they arrived in Canada. There is therefore no good reason for the Appellants' deception on the TRV, and it raises serious questions about the trustworthiness of the Appellants on more

serious applications such as these refugee claims, if they are willing to lie on less urgent TRV applications.

- [40] I find the RPD did not err in its assessment of this evidence and in drawing adverse credibility findings against the Appellants. Principal Appellant not credible in omission of murderers' names
- [41] The RPD also drew an adverse credibility finding against the Principal Appellant in relation to failing to disclose the alleged murderers' names, as to the alleged murders of XXXX and XXXX.
- [42] The Appellants have argued that the RPD erred, as the Principal Appellant did provide the six names at the 9 May 2018 sitting, and explained he was reluctant to disclose the names initially.
- [43] However, I note that the Appellants' have failed to address the RPD Member's point which was not just that the names had been omitted from the BOC, but that the Principal Appellant had changed his explanation for the omission from saying he did not know what to do with the information, and was also afraid of the information getting out at the 31 July 2017 sitting, to saying at the 9 May 2018 sitting that his lawyer had told the Principal Appellant not to write them.
- [44] The Appellants have also argued that two of the names provided at the 9 May 2018 hearing are corroborated in a news article provided on 27 November 2017. However, I also note that none of the names were given at the 31 July 2017 sitting, and were only given after the news article was provided. This calls into doubt whether the Principal Appellant in fact knew any names at the 31 July 2017 sitting, and only referred to names memorised from the news article afterwards at the 9 May 2018 sitting.
- [45] I find that the Principal Appellant's explanation for the omission is not convincing, and find the RPD did not err in its assessment of this issue and its subsequent adverse credibility finding. Other issues do not impact on the overall credibility finding
- [46] I have also considered the other findings made by the RPD Member contested by the Appellants but find that these are issues that are too peripheral. Even if the Appellants show the RPD made errors on these issues (which is not established), such errors would not be enough to overturn the correct credibility findings already established and change the outcome of this case.

CONCLUSION

- [47] At this point I should note that the other Appellants' claims are entirely reliant on the Principal Appellant's claim.

- [48] After making my independent analysis, I find that the RPD did not err in finding the Principal Appellant not credible. The Principal Appellant was not involved with XXXX in the manner described, which means he also was not involved with XXXX or XXXX in the manner described, and therefore does not face a serious possibility of persecution from the Kosovan authorities as described.
- [49] Accordingly, the other Appellants also do not face a serious possibility of persecution.
- [50] Pursuant to s.111(1)(a) of the IRPA, the RPD's decision that the Appellants are neither refugees nor persons in need of protection is confirmed.
- [51] The appeals are dismissed. (signed) "T. Card" T. Card February 11, 2020 Date 1 Exhibit P-2, Appellant's Record, Page 8. 2 In the French version of the IRPA, this phrase is instead the equivalent of "normally have been expected;" see Singh, Parminder v. M.C.I. (F.C., no. IMM-6711-13), Gagné, October 28, 2014, 2014 FC 1022, Paragraph 51. 3 Rule 3(3)(g)(iii), Immigration and Refugee Board of Canada, Refugee Appeal Division Rules, SOR/2012-257. 4 Raza, Syed Masood v. M.C.I. (F.C.A., no. A-11-07), Linden, Sharlow, Ryer, December 6, 2007, 2007 FCA 385, cited in M.C.I. v. Singh, Parminder (F.C.A., no. A-512-14), Nadon, Gauthier, de Montigny, March 29, 2016, 2016 FCA 96, Paragraph 64. 5 M.C.I. v. Singh, Parminder (F.C.A., no. A-512-14), Nadon, Gauthier, de Montigny, March 29, 2016, 2016 FCA 96, Paragraph 64. 6 Immigration and Refugee Protection Act, S.C. 2001, c. 27, subsection 110(6) 7 Exhibit RPD-1, RPD Record, Exhibit 13, Pages 343-344. 8 Exhibit RPD-1, RPD Record, Exhibit 14, Pages 326-332. 9 Exhibit P-2, Appellants' Record, Tab 13, Pages 1-28. 10 Exhibit RPD-1, RPD Record, RPD Decision, Pages 3-29. 11 Exhibit RPD-1, RPD Record, Exhibit 2, Pages 30-45. 12 RPD Hearing Audio, 31 July 2017 at 1:26:10-1:32:10. 13 Exhibit P-2, Appellants' Record, Memorandum, Tab 13, Page 16, Paragraph 45. 14 Exhibit P-2, Appellants' Record, Memorandum, Tab 13, Page 10, Paragraph 32.
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