

CANADA / JUDGMENT

TB9-34863

COURT

Refugee Appeal Division

DECIDED

30 November 2020

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RAD File / Dossier de la SAR : TB9-34863 TB9-34864 Private Proceeding / Huis clos Reasons and decision ? Motifs et décision Persons who are the subject of the appeal XXXX XXXX XXXXXXXX XXXX Personnes en cause Appeal considered / heard at Toronto, ON Appel instruit / entendu à Date of decision November 30, 2020 Date de la décision Panel Caitlin Maxwell Tribunal Counsel for the persons who are the subject of the appeal Howard Gilbert Barrister & Solicitor Conseil des personnes en cause Designated representative N/A Représentant(e) désigné(e) Counsel for the Minister N/A Conseil du ministre REASONS FOR DECISION OVERVIEW

- [1] These are my reasons for dismissing the appeal of XXXX XXXX ("Principal Appellant") and XXXX XXXX ("Associate Appellant"). I am upholding the determination of the Refugee Protection Division ("RPD") that the Appellants are neither Convention refugees nor persons in need of protection.
- [2] The Appellants are citizens of Albania. They allege their lives were threatened by associates of a well-connected businessman after the Principal Appellant reported XXXX activity at the XXXX XXXX where he worked to the prosecutor's office. The RPD found the Principal Appellant's testimony to be rehearsed and did not accept his allegations, noting a lack of corroborating evidence. The panel further found the Appellants had failed to rebut the presumption of state protection. On appeal, the Appellants argue that the RPD failed to put its concerns about a lack of corroborating evidence to them at the hearing and erred in its state protection analysis. SCOPE OF THE APPEAL
- [3] Generally, I must review a decision of the RPD on a standard of correctness.¹ The exception to this rule is where the RPD enjoys a meaningful advantage in assessing the credibility of oral testimony, which may attract deference in particular cases.² In this case, however, the RPD had no advantage. I have therefore considered whether its decision was correct.
- [4] The Appellants indicated in their written statement that they were not relying on any new evidence in support of their appeal.³ They did, however, submit an affidavit from the Principal Appellant with their record; in addition to recapping his allegations, he speaks to his efforts to obtain corroborating evidence from the prosecutor's office.⁴

- [5] In addition, I requested submissions on apparent inconsistencies between the Principal Appellant's testimony before the RPD and what was relayed in his Basis of Claim ("BOC") narrative and news articles on the record with respect to the timeline of the XXXX XXXX's bankruptcy and the ensuing investigation.⁵ The Appellants provided further written submissions from counsel as well as a further affidavit from the Principal Appellant in response.⁶
- [6] In assessing whether to admit new evidence, I must consider the statutory requirements of IRPA s. 110(4), i.e. whether the evidence arose after the rejection of the claim, or was not reasonably available, or could not reasonably have been expected in the circumstances to have been presented at the time of the rejection. I am also mindful of the Raza factors, which the Federal Court of Appeal confirmed in Singh are relevant to the assessment of new evidence before the Refugee Appeal Division ("RAD");⁷ namely, whether the evidence is new, credible, and relevant. Rule 29 imposes additional requirements on evidence submitted after the Appellant's record has been filed. In order for a document to be admitted, I must first consider its relevance and probative value; any new evidence the document brings to the appeal; and whether the person subject to the appeal could have, with reasonable effort, provided the document with the record.⁸
- [7] As discussed further below, I agree with the Appellants that the RPD failed to put its concerns about a lack of corroborating evidence to them at the hearing. For this reason, I accept the Principal Appellant's initial affidavit is new, in that his explanation could not reasonably have been expected to have been presented prior to the RPD's determination. I also find it is credible on its face, as it is a sworn affidavit, and relevant, as it goes to credibility.
- [8] The further submissions and affidavit were specifically requested and therefore meet the requirements of Rule 29. The further affidavit is new, in that it speaks to the issues specifically raised by the RAD; relevant to the determinative issues on appeal; and credible on its face, as a sworn document. It therefore meets the requirements of IRPA s. 110(4) as well as the Singh/Raza criteria.⁹
- [9] In the written statement filed with their record, the Appellants requested an oral hearing if credibility is at issue.¹⁰ The RAD can only hold a hearing in limited circumstances; namely, if there is new evidence that raises a serious issue with respect to the Appellant's credibility, which is central to the decision in the claim, and, if accepted, would justify accepting or rejecting the claim.¹¹ In this case, while credibility is determinative, my concerns were put to the Appellants in writing and they were given an opportunity to provide further submissions and an affidavit in response. I therefore do not find it necessary to convene a hearing.

ANALYSIS

- [10] The determinative issue on appeal is credibility. For this reason, it is not necessary for me to address the Appellants' arguments on state protection. I agree with the RPD that the Appellants' allegations have not been credibly established, for the following reasons. RPD made adverse credibility findings
- [11] To begin, the Appellants' assertion that the RPD made no adverse credibility findings is not made out. A review of the RPD's reasons indicates the panel found the Principal Appellant's testimony lacked spontaneity, appeared to be rehearsed, and that his allegations were not supported by any objective documentation.¹² On a balance of probabilities, the panel determined the allegations had not been established. While I agree with the Appellants that the RPD should have questioned them about their efforts to obtain corroborating evidence from the prosecutor's office, I am able to rectify this error on appeal by considering the Principal Appellant's affidavit evidence. Inconsistencies in Principal Appellant's evidence undermine credibility
- [12] In my independent assessment, there were important inconsistencies in the Principal Appellant's evidence which go to heart of the claim. The Principal Appellant alleged that as a XXXX for XXXX XXXX, which ran XXXX XXXX XXXX XXXX XXXX, he came across XXXX irregularities showing XXXX XXXX.¹³ He brought the issue to the company's general manager, XXXX XXXX, in 2016, and was told not to worry about it.¹⁴ In XXXX 2018, the company abruptly closed XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX without the XXXX XXXX XXXX XXXX XXXX, a situation which led to significant public protests.¹⁵
- [13] Government investigators visited the Principal Appellant's workplace and the following day, he attended a meeting with prosecutors.¹⁶ He alleges that in addition to information on the XXXX scheme, he also provided information about the earlier XXXX XXXX he had witnessed.¹⁷ He indicated that while his testimony was under oath, it was not recorded; the prosecutors took notes.¹⁸ He was told he may be called upon for further evidence.¹⁹
- [14] In his BOC narrative, the Principal Appellant indicates that the company ceased its operations on XXXX XXXX, 2018,²⁰ that the government investigators attended at his workplace on XXXX XXXX, 2018,²¹ and that he met with the prosecutor's office the following day, XXXX XXXX, 2018.²² He alleges that on the evening of XXXX XXXX, 2018, he was threatened by armed men, accompanied by a police officer, who were connected to the company's manager and knew the details of the information he provided to the prosecutor's office. He was warned not to divulge anything further or he would be killed and was told it would be best if he disappeared.²³
- [15] The timeline of events presented in the BOC is consistent with news articles the Appellants submitted into evidence before the RPD, which reference the company's bankruptcy and the ongoing investigation as early as XXXX XXXX, 2018.²⁴ However, the Principal Appellant provided a different timeline in his testimony before the panel: MEMBER: Does XXXX XXXX, does it still operate now, as of today? PRIMARY CLAIMANT: No, is not operating now.

MEMBER: What happened? Why isn't it operating? PRIMARY CLAIMANT: After the testimony that I gave to the prosecutor's office in Tirana, it was closed by the general auditor. Also, my testimony in the prosecutor's office served as a starting point for investigating the person XXXX XXXX for XXXX XXXX.²⁵

- [16] He repeats these allegations in the affidavit he submitted on appeal: In the face of public protests, the Auditor General's office commenced an 'investigation' into XXXX XXXX and some of its primary figures, including XXXX XXXX. My incriminating evidence formed a significant part of this investigation. XXXX XXXX was arrested and then placed under house arrest. Charges against him are pending. XXXX XXXX has since declared bankruptcy (which seemed to be their plan all along) and there have been no convictions or penalties levied against XXXX XXXX or its directors.²⁶
- [17] The Appellants were asked to respond to these apparent inconsistencies on appeal.²⁷ They acknowledge that the correct date of XXXX XXXX's bankruptcy is in fact XXXX XXXX, 2018.²⁸ They submit that the Principal Appellant misstated the timeline for bankruptcy in his initial affidavit on appeal, because he did not appreciate the temporal nuance of the word "since."²⁹ They note his earlier reference to the correct date in the same affidavit as well as in his BOC narrative, and submit that, overall, he provided a consistent version of events.³⁰ With respect to his testimony before the RPD cited above, Principal Appellant acknowledges he misspoke;³¹ the Appellants maintain it was inadvertent and that the XXXX and XXXX investigations, together with the arrest of the company's manager, all occurred after his meeting with the prosecutor, and so his testimony before the RPD was largely accurate.³²
- [18] I am not persuaded by the Principal Appellant's explanation. While he has claimed to have been unaware of the meaning of the word "since," his initial affidavit was accompanied by a sworn affidavit of interpretation, which states the affidavit was fully interpreted to him and he confirmed to the interpreter that he fully understood and appreciated its contents.³³ Additionally, the Principal Appellant indicates in his most recent affidavit that he fully understands English;³⁴ he did not actually use an interpreter for his most recent affidavit. (He actually referenced his role in the bankruptcy a further time in the initial appeal affidavit as well, when he later states, "I believe that my testimony contributed to the investigation into XXXX XXXX and its subsequent declaration of bankruptcy."³⁵) As for the timing of the XXXX and XXXX investigations, a news article submitted by the Appellants to the RPD makes it clear that an investigation into XXXX XXXX was already ongoing when the Principal Appellant spoke to the prosecutor's office.³⁶
- [19] According to another news article filed by the Appellants, the company's manager, Mr. XXXX, was placed under house arrest in XXXX 2018.³⁷ There is no further objective evidence on file about the outcome of the proceedings, although the Principal Appellant indicates in his affidavit on appeal that charges remain pending and no convictions or penalties have resulted to date.³⁸

- [20] Regardless of the ultimate outcome of the proceedings, the pending case and the manager's house arrest suggest that there was sufficient evidence for the prosecutor to proceed in the absence of the Principal Appellant, who fled Albania in XXXX 2018. This is particularly true given that his evidence to the prosecutor's office was not recorded and could not be tested in court. The Principal Appellant has not alleged that he provided incriminating documents or swore an affidavit; rather, he answered questions under oath while investigators took notes.³⁹
- [21] On a balance of probabilities, I find that the Principal Appellant has embellished his importance to the investigation and that his evidence was not as central as alleged. Lack of corroborative documents further undermines credibility
- [22] The Principal Appellant's evidence regarding his inability to get any documentation from the prosecutor's office further supports this finding. In his initial affidavit on appeal, he alleges that he was unable to get any documentation of his role in the investigation from the prosecutor's office, because he could not remember the names of the people he had spoken to and was not available to attend the office in person.⁴⁰ His mother-in-law, to whom he provided a power of attorney, was also unable to obtain any documentation.⁴¹ With respect, this is not consistent with the Principal Appellant's allegation that he was central to investigation. The prosecutor's office would have remembered him and been keen to reconnect with him to secure his participation going forward if he was as central as he alleges.
- [23] The jurisprudence is clear that while the Board cannot draw negative inferences solely on a claimant's failure to provide corroborating evidence, where there are valid reasons to doubt a claimant's credibility, the Board "may validly consider the failure to provide such documentation in making its credibility determination if it does not accept the claimant's explanation for that failure."⁴² In this case, given the material inconsistencies between the Principal Appellant's BOC narrative and news articles and his allegations at the RPD hearing and in his initial affidavit on appeal, there are valid reasons to question his credibility. His failure to provide any corroboration of his key role in the investigation as alleged further undermines the credibility of the claim. As the Court has held, "it is trite law that the applicant bears the onus of establishing the elements of [their] claim for protection."⁴³ In this case, the Appellants have failed to do so. Remaining supporting evidence does not rehabilitate claim
- [24] The remaining supporting documentation does not overcome my credibility concerns. I acknowledge the Appellants' neighbour's declaration that the police told her in late XXXX 2018 that the Principal Appellant was to report to the prosecutor's office for further questioning.⁴⁴ Even if the police were seeking the Appellant to provide further evidence, this does not establish that the Principal Appellant was central to the investigation. In fact, it suggests that the information he initially provided to the prosecutor was not sufficient.

- [25] I also acknowledge the evidence of the Principal Appellant's parents. They confirm that the Appellants stayed with them after they left their apartment in XXXX 201845 and state they were visited by unknown persons on two occasions, in XXXX 2018 and XXXX 2019, who issued death threats against the Principal Appellant in relation to the evidence he provided to the prosecutor's office.⁴⁶ Their evidence about the threats is contained in a handwritten letter, unlike their prior notarized statement about the Appellants' living arrangements. Given that it is not a sworn document, I give it less weight. I do not find it sufficient to establish the Appellants' allegations on a balance probabilities.
- [26] On a balance of probabilities, I do not accept that the Principal Appellant was threatened as alleged. DECISION
- [27] For the reasons set out above, I dismiss the appeal. The RPD was correct in finding that the Appellants are neither Convention refugees nor persons in need of protection. (signed) "Caitlin Maxwell" Caitlin Maxwell November 30, 2020 Date 1 Canada (Minister of Citizenship and Immigration) v Huruglica, 2016 FCA 93, at para. 103. 2 Ibid., at para. 70. 3 Exhibit P-2, Appellants' Record, Written Statement, p. 251. 4 Ibid., Affidavit of the Principal Appellant, 15 January 2020, pp. 12-20. 5 Exhibit RAD-2, Member's Direction, 28 October 2020. 6 Exhibit P-3, Response to Member's Direction, 23 November 2020. 7 Canada (Citizenship and Immigration) v Singh, [2016] 4 FCR 230, 2016 FCA 96, at para. 74. 8 Refugee Appeal Division Rules (SOR/2012-257), Rule 29(4). 9 Immigration and Refugee Protection Act ["IRPA"], SC 2001, c 27, as amended, s. 110(4); Canada (Citizenship and Immigration) v Singh, 2016 FCA 96, at para. 74. 10 Exhibit P-2, Appellants' Record, Written Statement, p. 251. 11 IRPA, s. 110(6). 12 Exhibit RPD-1, RPD Record, Reasons and Decision, at paras. 15-16. 13 Exhibit RPD-1, RPD Record, Exhibit 2.1, BOC Narrative, pp. 19-20, paras. 5-7. 14 Ibid., p. 20, para. 8. 15 Ibid., p. 20, paras. 9-11. 16 Ibid., pp. 20-21, paras. 12-13. 17 Ibid. p. 21, para. 14. 18 Ibid., para. 13; see also, Exhibit RAD-1, Transcript of RPD hearing, at p. 10. 19 Ibid., para. 14. 20 Ibid., p. 22, para. 20. 21 Ibid., p. 20, para. 12. 22 Ibid., pp. 20-21, para. 13. 23 Ibid., p. 21, paras. 15-17. 24 Exhibit RPD-1, RPD Record, Exhibit 5, Claimants' evidence, XXXX XXXX, "XXXX/ XXXX XXXX; XXXX XXXX XXXX XXXX XXXX XXXX XXXX," XXXX XXXX XXXX, p. 285. 25 Exhibit RAD-1, Transcript of RPD hearing, p. 13. 26 Exhibit P-2, Appellants' Record, Affidavit of the Principal Appellant, 15 January 2020, at pp. 17-18, para. 21. 27 Exhibit RAD-2, Member's Direction, 28 October 2020. 28 Exhibit P-3, Response to Member's Direction, Counsel's written submissions, 23 November 2020. 29 Ibid.; see also, Exhibit P-3, Response to Member's Direction, Affidavit of the Principal Appellant, 20 November 2020, at para. 10. 30 Exhibit P-3, Response to Member's Direction, Counsel's written submissions, 23 November 2020. 31 Exhibit P-3, Response to Member's Direction, Affidavit of the Principal Appellant, 20 November 2020, at para. 10. 32 Exhibit P-3, Response to Member's Direction, Counsel's written submissions, 23 November 2020. 33 Exhibit P-2, Appellants' Record, Affidavit of the Principal Appellant, 15 January 2020, at p. 20. 34 Exhibit P-3, Response to Member's Direction, Affidavit of the Principal Appellant, 20 November 2020, at para. 12. 35 Exhibit P-2, Appellants' Record, Affidavit of the Principal Appellant, 15 January 2020, at p. 20, para. 26. 36 Exhibit RPD-1, RPD Record, Exhibit 5, Claimants' evidence, XXXX XXXX, "XXXX/

XXXX XXXX; XXXX XXXX XXXX XXXX XXXX XXXX XXXX," XXXX XXXX XXXX, pp. 285-286. 37 Exhibit RPD-1, RPD Record, Exhibit 5, Claimants' evidence, XXXX XXXX, "XXXX XXXX XXXX XXXX XXXX: XXXX XXXX XXXX XXXX," XXXX XXXX XXXX, pp. 290-291. 38 Exhibit P-2, Appellants' Record, Affidavit of the Principal Appellant, 15 January 2020, at pp. 17-18, para. 21; see also, Exhibit P-3, Response to Member's Direction, Affidavit of the Principal Appellant, 20 November 2020, at paras. 6, 10. 39 Exhibit RPD-1, RPD Record, Exhibit 2.1, BOC Narrative, p. 21, para. 13; see also, Exhibit RAD-1, Transcript of RPD hearing, at p. 10. 40 Exhibit P-2, Appellants' Record, Affidavit of the Principal Appellant, 15 January 2020, at p. 19, para. 25. 41 Ibid; see also, Exhibit RPD-1, RPD Record, Exhibit 5, Claimants' evidence, Email from Associate Appellant's mother, 9 October 2018, p. 266. 42 Magyar v Canada (Citizenship and Immigration), 2015 FC 750, at para. 36, citing Ismaili v Canada (Citizenship and Immigration), 2014 FC 84 at paras. 36-56, Dundar v Canada (Citizenship and Immigration), 2013 FC 452, at paras. 21-22; Samseen v Canada (Minister of Citizenship and Immigration), 2006 FC 542, at para. 30. 43 Samseen, supra, at para. 14, citing Gill v Canada (Minister of Citizenship and Immigration), 2004 FC 1498. 44 Exhibit RPD-1, RPD Record, Exhibit 5, Claimants' evidence, Notarized statement from the Appellants' neighbour, 25 September 2019, pp. 259-262. 45 Exhibit RPD-1, RPD Record, Exhibit 5, Claimants' evidence, Notarized statement of the Principal Appellant's parents, 18 September 2019, pp. 254-257. 46 Exhibit RPD-1, RPD Record, Exhibit 5, Claimants' evidence, Handwritten letter from the Principal Appellant's parents, 3 October 2019, pp. 272-273.

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Prepared on 28 October 2026 · Esheria