Federal Court  Cour fédérale

Date: 20221003

Docket: IMM-1150-21

Citation: 2022 FC 1370

Ottawa, Ontario, October 3, 2022

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

ZSOLT SANDOR BITO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a decision by a Senior Immigration Officer of the Humanitarian Migration Office, dated June 23, 2020 [Decision]. The Officer rejected the Applicant's application for a Pre-Removal Risk Assessment [PRRA] by finding he would not be at risk under either sections 96 or 97 of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 [*IRPA*]. The application is granted because the Officer did not refer to, consider or apply the

established test for assessing state protection, namely whether Hungary provides adequate state protection at the operational level.

II. Facts

[2] The Applicant is a 27-year-old Hungarian national. He entered Canada in April 2014 and submitted a claim for refugee protection. His narrative is as follows.

[3] He is a Roma and suffered persecution, abuse and harassment on the basis of his ethnic origin. As a student, he was subject to repeated bullying, which often lead to racist and hurtful comments and physical assault. He was punished by teachers because he was Roma. Teachers allegedly told the Applicant to stop attending school because they did not want Roma children to "pollute" the school environment. The Applicant was forced to sit in the back row with other Roma students, or alone when there were no other Roma in class. As a result, the Applicant alleges that he did not finish school and had to drop out. Since then, as a Roma individual with few marketable skills, the Applicant notes that he had not been able to find a job before coming to Canada.

[4] The Applicant has been subject to physical assault from the Hungarian Guard. On one instance, the Applicant ran into fascists on the street and was hit and slapped while racist slurs were shouted at him.

[5] Another time, in June 2013, the Applicant alleges that several Guardists attacked his home and shouted "all of you will die, you stinky Gypsies. All of you will be exterminated". The

group threw stones and bricks, shattering windows while shouting profanities. The Applicant and his family were extremely fearful and upset. The Applicant's father called the police, but was simply told to stay inside. The police promised to send someone, but no one ever arrived. The family had also experienced a similar incident a few years earlier.

[6] Despite receiving help and offers to live with relatives, the racists incidents continued. The Applicant decided to return to his home and leave for Canada. In the few months following, the Applicant purchased an airline ticket for this purpose. Even during this time, the family's home was attacked on three separate occasions.

[7] The Applicant then fled Hungary and arrived in Canada in April, 2014. The Applicant applied for refugee status the day he arrived.

[8] In October 2017, the Applicant's brother experienced another attack at their family home. The Guardists present at that time stated that they were looking for the Applicant.

[9] The brother similarly fled to Canada and had his PRRA application approved in March 2018 as did other family members allegedly similarly situated.

[10] Because neither the Applicant nor his Counsel attended the RPD hearing on September 2, 2014, his refugee application was deemed abandoned. He attempted to have the matter reopened without success.

[11] The Applicant's removal order came into force and the Applicant was given an opportunity to submit a PRRA and did so.

[12] His risk had not previously been assessed; that task fell to the PRRA officer.

[13] His PRRA was dismissed leading to this judicial review.

[14] There are other facts and other issues, but they are not reported nor dealt with here because judicial review will be ordered.

III. Issues

[15] The only issue is whether the state protection analysis is reasonable; I find it is not because it fails to comport with constraining law.

IV. Standard of Review

[16] The parties agree the relevant standard of review on this application is reasonableness. In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, issued at the same time as the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 [*Vavilov*], the majority per Justice Rowe explains what is required for a reasonable decision, and what is required of a court reviewing on the reasonableness standard:

> [31] 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). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
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> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
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> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).
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> [Emphasis added]

[17] Moreover, *Vavilov* requires the reviewing court to assess whether the decision subject to judicial review meaningfully grapples with the key issues:

> [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. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning: *Baker*, at para. 39.

V. Analysis

A. *State Protection*

[18] The Applicant has the burden of rebutting the presumption of state protection with clear and convincing evidence. That said, a PRRA officer - just as the RPD, the RAD and other agencies assessing state protection - must apply jurisprudence defining state protection, i.e., constraining law. The PRRA failed to do this.

[19] The Officer reasonably noted the purpose of the PRRA is the assessment of forward-facing risk and, as such, they would rely on recent and subjective evidence. In the Officer's view, the documentary evidence did not establish, on a balance of probabilities, that all Roma in Hungary faced discrimination tantamount to persecution.

[20] However and with respect, the Officer conducted an unreasonable and unduly selective review of the record in relying on IRB Response to Information Requests [RIR] item HUN106145. E. The Officer's takeaway from this article is that while the RIR "indicates the presence of racism within police institutions" and "crimes against Roma may not be pursued as hate crimes", "police respond to criminal complaints, and these are investigated…as 'regular' crimes."

[21] The full passage from the RIR establishes the Officer's analysis was well out of context. The PRRA officer omitted the following bolded and underlined sentences in quoting from the RIR:

> Minority Rights Group International (MRG) reports that Roma face "continued hostility" from police forces in Hungary, which includes a "failure to protect" them from attacks (MRG Jan. 2018). Amnesty International indicates that the state's response to violence against Roma "has been feeble" and that the police "regularly" treat hate crimes against Roma as "ordinary crimes" (Amnesty International 25 Jan. 2017). The same source describes a crime in 2015 that was recorded as "merely 'illegal entry'" by the police, although the assailants broke into the house of a Roma family and shouted '"Filthy Gypsy, you will die'" (Amnesty International 25 Jan. 2017).
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> [Emphasis added]

[22] With respect, I agree with the Applicant that the Officer omits key information that contradicts its own conclusions on state protection. This includes the underlined portion above where the article states that Roma face "continued hostility" from Hungarian police forces which includes "a failure to protect them from attacks". No explanation is provided for this truncation of adverse information from the officer's quotation from the RIR.

[23] The Decision is also flawed by inaccurately stating the Applicant had not sought state protection when, in the next sentence the PRRA correctly states, as noted above, that the police were contacted in 2013 but without results.

[24] These issues raise a concern about the PRRA's treatment of state protection.

[25] However, fundamentally and determinatively in my view, the Decision fails to comply with constraining law which requires an assessment of state protection *at the operational level*. This Court has enunciated and applied this test on a great number of occasions over the years, which was not disputed at the hearing. That the adequacy of state protection must be *measured at the operational level* is confirmed in the following: *Zapata v Canada (Citizenship and Immigration)*, 2022 FC 1277 per Favel J at paras 15, 25; *Mejia v Canada (Citizenship and Immigration)*, 2022 FC 1032 per McVeigh at paras 25-26, 28; *Rstic v Canada (Citizenship and Immigration)*, 2022 FC 249 per Favel J at paras 18, 30-31; *Kotai v Canada (Citizenship and Immigration)*, 2020 FC 233 per Elliott at paras 34, 42; *Asllani v Canada (Immigration, Refugees and Citizenship)*, 2020 FC 645 per Crampton CJ at para 25; *Newland v Canada (Citizenship and Immigration)*, 2019 FC 1418 per McHaffie at paras 23-25; *Dawidowicz v Canada (Citizenship and Immigration)*, 2019 FC 258 per Brown J at para 10; *Gjoka v Canada (Citizenship and Immigration)*, 2018 FC 292 per Strickland J at para 30; *Moya v Canada (Citizenship and Immigration)*, 2016 FC 315 [*Moya*] per Kane J at para 68; *Hasa v Canada (Citizenship and Immigration)*, 2018 FC 270 per Strickland J at para 7; *Eros v Canada (Citizenship and Immigration)*, 2017 FC 1094 per Manson J at para 45; *Benko v Canada (Citizenship and Immigration)*, 2017 FC 1032 per Gascon J at para 18; *Koky v Canada (Citizenship and Immigration)*, 2017 FC 1035 per Gascon J at para 14; *Mata v Canada (Immigration, Refugees and Citizenship*), 2017 FC 1007 per McDonald J at paras 13-15; *Poczkodi v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 956 per Kane J at para 37; *Paul v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 687 per Boswell J at para 17; and *John v Canada (Citizenship and Immigration)*, 2016 FC 915 at para 14.

[26] For example in *Moya*, Justice Kane states at paras 73-76:

> [73] To be adequate, perfection is not the standard, but state protection must be effective to a certain degree and the state must be both willing and able to protect (*Bledy v Canada (Minister of Citizenship and Immigration)*, 2011 FC 210 at para 47, [2011] FCJ No 358 (QL)). State protection must be adequate at the operational level (*Henguva v Canada (Minister of Citizenship and Immigration)*, 2013 FC 483 at para 18, [2013] FCJ No 510 (QL); *Meza Varela v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1364 at para 16, [2011] FCJ No 1663 (QL)).
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> [74] As noted by the applicant, democracy alone does not ensure effective state protection; the quality of the institutions providing protection must be considered *(Sow v Canada (Minister of Citizenship and Immigration)*, 2011 FC 646 at para 11, [2011] FCJ No 824 (QL) [*Sow*]).
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> [75] The onus on an applicant to seek state protection varies with the nature of the democracy and is commensurate with the state's ability and willingness to provide protection (*Sow* at para 10; *Kadenko v Canada (Minister of Citizenship and Immigration)*, 1996 CanLII 3981 (FCA), [1996] FCJ No 1376 (QL) at para 5, 143 DLR (4th) 532 (FCA)). However, an applicant cannot simply rely on their own belief that state protection will not be forthcoming (*Ruszo v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1004 at para 33, [2013] FCJ No 1099 (QL)).

[27] The Respondent submitted no such detailed analysis is required because the evidence was insufficient to warrant such analysis. I disagree on that general issue. With respect, I am unable to see how any reasonable state protection analysis may proceed considering what is meant by state protection and how it must be measured.

[28] In any event, the PRRA found ample evidence of persecution and discrimination against Roma in Hungary, which with respect, was supplemented by the evidence of the Applicant in this case.

[29] On the record in this case, the Decision cited to the US DOS 2019 Country Reports on Human Rights Practices:

> I accept that there is a preponderance of objective documentation reporting on the challenges encountered by Roma in Hungary in many aspects of heir lives, including education, housing, employment and access to social services. l also acknowledge that acts of violence and discrimination targeting Roma do occur. However, in totality, the documentary evidence does not establish, on a balance of probabilities, that all Roma in Hungary face discrimination, and that the discrimination faced amounts to persecution.
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> [Emphasis added]

[30] In this context, I conclude that the principles set out by Justice Rennie (as he then was) in *Orsos v Canada (Citizenship and Immigration)* 2015 FC 248 at para 18 apply, namely that where persecution is widespread and indiscriminate, as in Hungary, a failure to report mistreatment to the authorities is of doubtful evidentiary significance. Moreover, in such cases the tribunal must assess whether seeking state protection was, given the applicant's circumstances, a reasonable option. This did not happen, as it should have:

> [18] The state protection analysis, broadly speaking, is directed to an assessment of the institutional capacity and willingness of a state to provide an adequate level of physical protection to its nationals. An applicant need not seek state protection if the evidence indicates it would not reasonably have been forthcoming: *Canada (Attorney General) v Ward*, [1993] 2 SCR 689. In *Muntyan v Canada (Minister of Citizenship and Immigration)*, 2013 FC 422 at para 9, Justice Russel Zinn reiterated that there is no legal requirement on refugee claimants to seek state protection, although in most cases it may be practically necessary to do so in order to provide "clear and convincing evidence" that the state is unwilling or unable to protect. However, "where persecution is widespread and indiscriminate, a failure to report mistreatment to the authorities is of doubtful evidentiary significance". In the present case, the Board did not analyze whether seeking state protection was, given the applicant's circumstances, a reasonable option.

VI. Conclusion

[31] In my respectful view, the Decision fails to comply with constraining law and fails to reasonable come to grips with the adequacy of state protection at the operational level, and is therefore unreasonable. Therefore, judicial review will be granted.

VII. Certified Question

[32] Neither party proposed a question of general importance, and none arises.

JUDGMENT in IMM-1150-21

THIS COURT'S JUDGMENT is that judicial review is granted, the Decision is set aside, no question of general importance is certified and there is no Order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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