Federal Court  Cour fédérale

Date: 20231106

Docket: IMM-3166-22

Citation: 2023 FC 1472

Toronto, Ontario, November 6, 2023

PRESENT: Madam Justice Go

BETWEEN:

OLISA EMEKA ORAKPOSIM
NATALLIA ORAKPOSIM
DANIEL ORAKPOSIM
MARIA ORAKPOSIM

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. Olisa Emeka Orakposim [Principal Applicant or PA] is a citizen of Nigeria and permanent resident of Belarus, while his wife, Natallia Orakposim, and their minor children,

Daniel and Maria, [Associate Applicants or AA] are citizens of Belarus [together the Applicants]. The PA, a person of African descent, and his wife are a mixed-race couple.

[2] The Applicants sought admission into Canada on May 1, 2019, but were found ineligible to make a refugee claim per the *Canada-US Safe Third Country Agreement*. The Applicants were removed to the United States where they had previously arrived in March, 2019. The Applicants returned to Canada on May 14, 2019, and were again deemed ineligible for making a claim.

[3] The Applicants were invited to submit a Pre-Removal Risk Assessment [PRRA] which they did on June 18, 2019. The Applicants submitted three risks they face in Belarus: (1) physical attacks and ongoing racism, (2) discrimination in employment, and (3) discrimination against the minor applicants. In short, the Applicants submitted that the discrimination they experienced in Belarus amounts to persecution.

[4] The Officer refused the PRRA application on May 13, 2020 [Decision], but the Applicants were not notified of their refusal until March 21, 2022.

[5] The Applicants seek judicial review of the Decision. I grant the application based on the reasons set out below.

II. Preliminary Issue

[6] The Respondent never filed any written submissions. At the start of the hearing, I asked the parties to address whether or not I should grant the Respondent’s request to make oral

argument. The Applicants opposed to the Court accepting any oral argument, stating that other than an email communication from the Respondent indicating that they were unable to provide written submissions due to extenuating circumstances, the Applicants had received no prior notice as to what arguments the Respondent was going to make.

[7] Unlike the Applicants, the Court did not receive any prior notice from the Respondent about any extenuating circumstances or other explanations for not filing any written submission. Counsel for the Respondent indicated at the hearing that they would not make any substantive argument, but would simply ask the Court to confirm the Decision as reasonable.

[8] The jurisprudence establishes that a party cannot raise a new argument at a hearing on the basis that it would prejudice the other party: *Kabir v Canada (Citizenship and Immigration)*, 2023 FC 1123 at para 19, *Ali v Canada (Citizenship and Immigration)*, 2021 FC 731, at para 51; *Riboul v Canada (Citizenship and Immigration)*, 2020 FC 263, at para 43; *Abdulkadir v Canada (Citizenship and Immigration)*, 2018 FC 318, at para 81; *Del Mundo v Canada (Citizenship and Immigration)*, 2017 FC 754, at para 14; *Dave v Canada (Minister of Citizenship and Immigration)*, 2005 FC 510 at para 5; and *Coomaraswamy v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 153, para 39.

[9] In this case, the Respondent provided no explanation for not filing any written submission. I find no reason to allow them to make any oral argument. I would however note their position with respect to the application.

[10] By the same token, I also did not permit the Applicants to raise a new argument with respect to international law obligations on the part of the decision-maker, in light of the Supreme Court of Canada's recent decision in *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21. This argument was raised for the first time at the hearing, which gave no opportunity for the Respondent to respond.

III. Issues and Standard of Review

[11] The Applicants raise the following issues:

a. Did the Officer err in law in determining that state protection was available and that the Applicants' experience of continuing discrimination, racism, and violence did not constitute persecution?

b. Did the Officer deny the Applicants procedural fairness by failing to provide them with a hearing?

[12] The Applicants submit that the standard of review in this case is reasonableness, as per *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[13] 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. The onus is on the Applicants to demonstrate that the Decision is unreasonable: *Vavilov* at para 100. To set aside a decision on this basis, "the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it

cannot be said to exhibit the requisite degree of justification, intelligibility and transparency": *Vavilov* at para 100.

IV. Analysis

[14] The determinative issue in this case was the Officer's findings with respect to the availability of state protection.

[15] In support of their PRRA application, the Applicants recounted various attacks on the PA from skinheads which include the following:

a. In June 2007, the PA alleges a skinhead gang attacked him while on his first date with Natallia, who was also attacked.

b. In July 2007, the PA alleges he was attacked twice:

    i. The first attack, which the PA reported to his university dean, was uninvestigated.

    ii. The second attack, on July 20, 2007 took place when the PA and his friend were involved in an unprovoked altercation, where his friend was attacked first. The investigator refused to press charges against the attackers, finding that there were inconsistencies between the PA and his friends' statements and that he could not confirm the PA's injuries. One of the perpetrators asked the investigator to charge the PA and his friend, but the investigator determined that witness statements and the perpetrator's light injuries refuted his testimony. The investigator also acknowledged that the PA acted in self-defence.

c. In August 2007, the PA alleges skinheads ambushed him and stole his phone, but the police did not pursue an investigation.

d. In July 2009, the PA alleges that Natallia's stepbrother and members of his gang attacked him outside their apartment, prompting Natallia to call the police.

[16] The Applicants also submitted that they are at an increased risk of discrimination and racism, and specifically, that anti-discrimination laws regarding employment and occupation, are not entrenched in the law of Belarus.

[17] Lastly, the Applicants submitted that Daniel, the minor applicant and now 11 years-old, has faced discrimination, bullying, and violence at his school. The Applicants submitted that Daniel's teacher mistreated him, and that once, Daniel was left with a broken finger for an entire day. The Applicants submitted that because of the discrimination, Daniel developed suicidal depression, and they feared that Maria, the youngest minor applicant, would come to the same fate.

[18] The Officer found that the discrimination the Applicants allege did not amount to persecution, and that Belarus has taken the initiative to target racism and promote equality. The Officer also found there is available state protection.

[19] The Decision read in part:

> It is of note that in order to be successful at seeking protection abroad, the applicant must provide "clear and convincing" evidence that state protection is not available in the country of return. The applicant must provide clear and convincing evidence to show that the state is unwilling or unable to provide protection or that the state in question has completely broken down. In general, state protection is considered adequate if the state is in effect control of its territory which means that it demonstrates that it has a viable police and/or military, and makes serious efforts to protect its citizens.
>
> [Emphasis added]

[20] The Officer also referred to the two submitted police reports - one regarding the August 2007 theft and the investigation into the July 20, 2007 attack - and found them indicative of the fact that state protection was available to the PA when he required it.

[21] In making these findings, I find the Officer made several reviewable errors.

[22] The Officer's first error was to equate the presence of "state control" with the availability of "state protection." By this logic, the more "control" that the state asserts on its citizenry through the police and military, the more "protection" its citizens are presumed to receive. As the Applicants point out, this means authoritarian regimes with a poor human rights record would be considered those best placed to protect their people. Such reasoning is perverse and is clearly in contradiction with well-established jurisprudence.

[23] Second, the Officer erred by focusing on the measures adopted by the state, as opposed to the effectiveness at the operational level, contrary to the teachings of this Court. While the onus is on an applicant to demonstrate that state protection is unavailable: *Flores Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, at para 30, state protection must be effective at the operation level; it is not enough for officers to point to efforts made by a state to address shortcomings: *Magonza v Canada (Citizenship and Immigration)*, 2019 FC 14, at para 72, and *Rahman v Canada (Citizenship and Immigration)*, 2022 FC 516, at para 39.

[24] In this regard, I note that the Officer quoted extensively from the submissions made by representatives of Belarus to the United Nations [UN] as indication of the measures undertaken

by the state, without considering whether these measures were in fact adopted, let alone analysing their efficacy to combat discrimination.

[25] For instance, the Officer quoted, among other things, that representatives of Belarus to the UN noted that “Belarus was a multi-confessional and multi-ethnic country that did not have any religious or inter-ethnic conflicts,” and that Belarus “had managed to avoid conflicts thanks to its tradition of multi-culturalism.” The Officer also noted that the Government of Belarus had “requested technical assistance from the Office of the High Commissioner for Human Rights” to adopt “a plan of action” to implement recommendations from the UN. The Officer further noted amendments to the Labour Code in 2020 as indication of state protection even though the amendments deal primarily with the employment rights of workers and not with the issue of racism. None of the quoted statements made by Belarus point to any actual implementation of anti-discrimination law. Indeed, by their own admission, the Belarus mission to the UN confirmed that their country has not passed any anti-discrimination and anti-racism law.

[26] Yet somehow, the Officer concluded that overall the report from Belarus to the UN “indicates that the State has taken measures to ensure the manifestations of racism and racial discrimination will not be tolerated.” The Officer’s conclusion is devoid of any meaningful analysis and justification.

[27] Third, the Officer’s finding is contradicted by some of the same evidence that they quoted from, including reports from the UN and the US Department of State that demonstrated serious racial discrimination in Belarus, specifically against people of African descent. Rather

than addressing the evidence to the contrary, the Officer relied on the statements made by representatives of the Belarus government, as quoted above, to support their conclusions. The Officer's selective analysis of the evidence undermined the reasonableness of the Decision.

[28] Fourth, I find that the Officer failed to read the July 20, 2007 police report [Police Report] in its context, and drew a unreasonable conclusion based on an illogical and perverse reading of the Police Report.

[29] As the Applicants points out, the Police Report is difficult to read, and disturbingly laced in racist slurs, it nevertheless confirms the following facts as alleged by the Applicants:

- The PA and his friend were confronted by aggressors (total strangers) who used offensive racist language;
- The main aggressor chased down the PA's friend because he was "provocatively dressed African";
- The main aggressor admitted to the police to attacking the PA and his friend, stating "the 'n' began running away, he began catching up with him and they got into a fight. Then another 'n' appeared and they struck him several times in various parts of the body, then passing citizens pulled them apart."

[30] While the Police Report confirms that the PA acted in self-defence, it also confirms the police decided not to press criminal charges against the aggressors despite their admission to the assault, which was motivated by the fact that they did not like the African attire of the PA's friend. In the face of such inaction on the part of the police, the Officer somehow managed to conclude as follows:

> The evidence persuades me that State protection was available to the PA when he required it; police officers attend the scene when called, launched an investigation and interviewed the parties involved as well as several witnesses. The investigator wrote an extensive,

> detailed report providing his reasons and did not appear to be biased in his findings. When the perpetrator asked that the PA be held accountable for his beating, the investigator let logic prevail and said that the man's injuries were caused by committing unlawful acts and that the PA was not in the wrong.

[31] That the police decided not to lay charges against the PA, who was the victim in an unprovoked, racially motivated attack, can hardly be described as effective state protection, when the same evidence shows that the police refused to press criminal charges against the perpetrators who caused serious injuries to the PA and his friend. Contrary to the Officer's finding, there is nothing logical about the police's failure to lay criminal charges against someone who openly admitted to having committed a racially motivated crime.

[32] As I find the Officer erred in their analysis of state protection, I need not address the other issues raised by the Applicants. I will note, however, that my reasoning with respect to state protection are also applicable in determining whether or not discrimination faced by the Applicants in Belarus would amount to persecution. I note in particular the personal evidence about the race-based violence, harassment, and bullying experienced by the Applicants, as well as the extensive country condition evidence demonstrating the systemic nature of racism in Belarus, as factors to be considered in assessing the Applicants' claim.

V. Conclusion

[33] The application for judicial review is allowed and the matter is referred back for redetermination by a different decision-maker.

[34] There is no question for certification.

JUDGMENT in IMM-3166-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.
2. The matter is referred back for redetermination by a different decision-maker.
3. There is no question for certification.

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3166-22
STYLE OF CAUSE:	OLISA EMEKA ORAKPOSIM, NATALLIA ORAKPOSIM, DANIEL ORAKPOSIM, MARIA ORAKPOSIM v MINISTER OF CITIZENSHIP AND IMMIGRATION
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