Federal Court  Cour fédérale

Date: 20171110

Docket: IMM-732-17

Citation: 2017 FC 1032

Ottawa, Ontario, November 10, 2017

PRESENT: The Honourable Mr. Justice Gascon

BETWEEN:

ANITA BENKO
PETER VASZILY
BRENDA VASZILY
NOEL PETER VASZILY

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicants, Ms. Anita Benko, her husband, Mr. Peter Vaszily, and their two minor children, Brenda and Noel Peter, are all citizens of Hungary and members of the Roma ethnic group. When they arrived in Canada in March 2010, Ms. Benko and her family claimed refugee

protection based their fear of discrimination and violence in Hungary due to their Roma ethnicity. In April 2012, a panel of the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada dismissed their claim because of a lack of well-founded fear and their failure to provide sufficient proof that state protection was not available in Hungary.

[2] Ms. Benko and her family then made a Pre-Removal Risk Assessment [PRRA] application. In December 2016, a senior immigration officer [Officer] rejected their PRRA application on the basis that they would not be subject to risk of persecution, danger of torture, risk to life or of cruel and unusual treatment or punishment if returned to Hungary [Decision]. Despite the fresh evidence put forward by Ms. Benko and her family pertaining to deteriorating circumstances in Hungary, the PRRA Officer confirmed the RPD's findings on the lack of evidence of risk and the availability of state protection.

[3] Ms. Benko and her family now seek judicial review of the PRRA Officer's Decision. They argue that the Decision is unreasonable because the PRRA Officer erred in considering their new evidence and in conducting the state protection analysis. They ask this Court to quash the Decision and to send it back for redetermination by a different immigration officer. The determinative issue before the PRRA Officer was the availability of state protection in Hungary and, in this application for judicial review, Ms. Benko and her family focused their submissions on this point.

[4] Having considered the evidence before the PRRA Officer and the applicable law, I can find no basis for overturning the Officer's Decision. The Decision was responsive to the

evidence and the outcome is defensible based on the facts and the law. It falls within the range of possible, acceptable outcomes. There are no sufficient grounds to justify this Court's intervention, and I must therefore dismiss the application for judicial review.

II. Background

A. *The factual context*

[5] Ms. Benko and her family instituted refugee claims based on allegations that, due to their Roma ethnicity, they suffered discrimination in the areas of education, employment and entering public spaces in Hungary, and that such discrimination amounted to persecution.

[6] The catalyst of their flight from Hungary seems to have been the death (in 2009) of Ms. Benko's brother at the hands of Balog Tibor, an anti-Roma Hungarian Guardsman who was subsequently jailed for the crime following a police investigation. Ms. Benko was also purportedly threatened in January 2010 by an unknown person, who warned her not to get involved or to make a complaint to the authorities about the death of her brother. According to Ms. Benko's testimony before the RPD, she went to the police following this threat. This was the only time she sought help from the Hungarian authorities, as Ms. Benko and her family fled the country six weeks later.

[7] Ms. Benko and her family were originally represented before the RPD by counsel who was later found to have been negligent in his assistance to many Hungarian Roma claimants and was reprimanded by the Law Society of Upper Canada in 2015.

B. *The Decision*

[8] Having considered all the evidence, the PRRA Officer found that Ms. Benko and her family provided insufficient new materials to demonstrate that they will be persecuted in Hungary, or that state protection is not available to them.

[9] The PRRA Officer gave the RPD's findings considerable weight and pasted extensive passages from the RPD's reasons into the Decision. More specifically, the Officer noted the following findings made by the RPD: 1) it solely relied on the amended narratives of Ms. Benko in light of their counsel's negligence in the preparation of their refugee claim; 2) it determined that discrimination against people of Roma ethnicity in terms of employment, education, housing and racially-motivated violence did not amount to persecution; 3) the Hungarian state offered protection to Ms. Benko and her family following the death of her brother, as a police investigation led to the arrest, detention, conviction and imprisonment of Balog Tibor; 4) regarding Ms. Benko's own complaint, it was made to the police but Ms. Benko rapidly left the country six weeks after the alleged threats against her, without exhausting all avenues open to her; and 5) the evidence on country conditions suggested that, although not perfect, state protection in Hungary was adequate for Roma who are victims of crime, police abuse or discrimination. The RPD thus found that Ms. Benko and her family had failed to rebut the presumption of state protection with clear and convincing evidence and that she had not taken all reasonable steps to avail herself of that protection before making a claim for refugee protection.

[10] In the Decision, the PRRA Officer did not consider some documents pre-dating the 2012 decision of the RPD, as these did not meet the definition of "new evidence" set out in subsection 113(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[11] On the issue of persecution and state protection, the PRRA Officer noted that, since Balog Tibor was released from jail in July 2014, Ms. Benko or her family members have not reported any incidents of harassment to the police. Ms. Benko's mother and sister-in-law claimed to be scared to go to the authorities because Ms. Benko had done so before without success in 2010. However, Ms. Benko had stated at the RPD hearing that the police had taken her report at the time and were investigating the case when she chose to leave the country and elected not to follow up. The Officer found the evidence insufficient to corroborate that the unknown individuals allegedly harassing Ms. Benko's family in Hungary were specifically related to the case against Balog Tibor.

[12] The PRRA Officer further observed that Ms. Benko enumerated the same risks previously presented to the RPD and provided insufficient evidence of new risk developments. The Officer acknowledged the mixed evidence with respect to the level of discriminatory acts the Roma community is exposed to and the effectiveness of state protection mechanisms. However, the Officer found that the condition and many avenues of recourse noted in the RPD's reasons of 2012 were consistent with the documentary evidence now provided by Ms. Benko.

[13] On the issue of state protection, the PRRA Officer determined that, in the absence of clear and convincing evidence to the contrary, the state of Hungary is presumed to be capable of

protecting its nationals. The documentary evidence did not indicate that there is a total breakdown of the state apparatus rendering the protection of individuals such as Ms. Benko and her family inoperable. The Officer observed that they have not lived in Hungary for over six and a half years and have provided insufficient evidence that they could not avail themselves of state protection should they be threatened by anyone.

[14] The PRRA Officer thus found that Ms. Benko's evidence did not show that she and her family sought, and were then subsequently denied, state protection. In addition, after having analyzed the evidence of general conditions in Hungary and the state's ability to protect its citizens, the Officer concluded that the claimants had failed to show that state protection would not be reasonably available to them if they returned to Hungary.

C. *The standard of review*

[15] It is well-recognized that PRRA applications involve questions of mixed facts and law, and that the standard of review applicable in such cases is that of reasonableness (*The Minister of Citizenship and Immigration v Flores Carrillo*, 2008 FCA 94 [*Flores Carrillo*] at para 36; *Hinzman v Canada (Citizenship and Immigration)*, 2007 FCA 171 [*Hinzman*] at para 38; *Fares v Canada (Citizenship and Immigration)*, 2017 FC 797 at paras 19-22; *Galamb v Canada (Citizenship and Immigration)*, 2016 FC 1230 [*Galamb*] at para 12). Since the IRPA is the enabling statute that PRRA officers are mandated to enforce, its interpretation and application thus fall within their core area of expertise. In such circumstances, a high degree of deference is owed to the PRRA officers' factual findings and assessment of the evidence.

III. Analysis

[16] Ms. Benko and her family claim that the PRRA Officer made numerous reviewable errors in his analysis of state protection. In essence, they argue that the PRRA Officer failed to make reference to specific evidence supporting his findings, ignored contrary evidence and erred in relying heavily on the conclusions of the RPD. They submit that the evidence did not allow the Officer to conclude to the effectiveness of state protection in Hungary. They contend that, while Hungary's efforts to protect its citizens are relevant, they are neither determinative nor sufficient, and that there is no adequate state protection at an operational level. They plead that extensive evidence reflected the inability of Hungary to provide state protection and that the PRRA Officer unreasonably overlooked it.

[17] I disagree with the submissions of Ms. Benko and her family.

[18] It is not disputed that the appropriate test in a state protection analysis commands an assessment of the adequacy of that protection at the operational level (*Galamb* at paras 32-37). The state protection test must focus not only on the efforts of the state but also on actual results: "[i]t is what state protection is *actually provided* at the *present time* that is relevant" (*Hercegi v Canada (Citizenship and Immigration)*, 2012 FC 250 at paras 5-6 [emphasis in the original]). A state protection analysis must not just consider governmental aspirations. Efforts made by a government to achieve state protection may, of course, be relevant to the question of whether operational adequacy has been achieved. However, actual results in terms of what is concretely

accomplished by the state must be assessed (*Kovacs v Canada (Citizenship and Immigration)*, 2015 FC 337 at paras 71-72).

[19] I am satisfied that, in this case, the PRRA Officer considered not only the efforts of Hungary to offer state protection to Ms. Benko and her family, but also the results of the measures undertaken in terms of investigations, prosecutions and convictions. Contrary to the submissions made by Ms. Benko, I am not convinced that the PRRA Officer selectively reviewed the documentary evidence. It instead appears from the Decision that the Officer considered Hungary's country documentation and the materials submitted by Ms. Benko and her family. I concede that the Officer's reasons are brief and do not contain references to specific portions of the evidence, but the PRRA Officer acknowledged that the evidence relating to the adequacy of state protection in Hungary is mixed. The PRRA Officer also concluded that the concerns of Ms. Benko and her family with the adequacy of state protection were speculative, as they had not sought such protection themselves. In the end, and on the basis of the evidence before him, the PRRA Officer gave more weight to the documentary evidence relating to the adequacy of state protection than to the concerns expressed by Ms. Benko and her family or to the documentary evidence singled out by their counsel. Further to my review of the Decision and of the record before the Officer, I am not convinced that this assessment was unreasonable.

[20] In this case, the PRRA Officer concluded that Ms. Benko and her family did not show that state protection was unavailable to them in Hungary. In my view, this conclusion was open to the Officer since the Hungarian police had been responsive to the complaints made by Ms. Benko regarding the death of her brother and the threats she had herself received. In a case where

state protection is an issue, the real question is whether, considering the whole of the evidence about the state's capacity to protect its citizens, the claimants will be exposed to a serious risk of persecution if returned to their home country. Given the evidence on the record, I find that the PRRA Officer reasonably concluded that Ms. Benko and her family had failed to satisfy that test.

[21] I find the PRRA Officer's reasoning to be transparent and intelligible. This is not a case where the PRRA Officer failed to consider the evidence provided or the contrary country conditions evidence. Quite the opposite, the reasons specifically recognized the existence of mixed evidence. I am mindful of the fact that the PRRA Officer did not refer to all the voluminous documentary evidence before it. However, looking at the reasons as a whole and having reviewed the record, I find that the Officer conducted a reasonably thorough and balanced assessment of the evidence. It is necessary to consider a particular claimant's specific circumstances, in combination with the general documentary evidence, in order to conclude whether that claimant faces a risk of persecution (*Olah v Canada (Citizenship and Immigration)*, 2017 FC 921 at para 15; *Csoka v Canada (Citizenship and Immigration)*, 2017 FC 651 at para 28). In this case, there was insufficient individualized evidence that related to the personal situation of Ms. Benko and her family in Hungary to support a conclusion of risk and absence of state protection.

[22] When reviewing a decision on the standard of reasonableness, the analysis is concerned "with the existence of justification, transparency and intelligibility within the decision-making process", and the PRRA Officer's findings should not be disturbed as long as the decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and

law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at para 47). In conducting a reasonableness review of factual findings, it is not the role of the Court to reweigh the evidence or the relative importance given by the decision-maker to any relevant factor (*Kanthasamy v Canada (Citizenship and Immigration)*, 2014 FCA 113 at para 99). Under a reasonableness standard, as long as the process and outcome fit comfortably with the principles of justification, transparency and intelligibility, and the decision is supported by acceptable evidence that can be justified in fact and in law, a reviewing court should not substitute its own view of a preferable outcome (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*] at para 17).

[23] The question is not whether another outcome or interpretation might have been possible. The question is whether the conclusion reached by the PRRA Officer falls within the range of acceptable, possible outcomes. A decision is not unreasonable because the evidence could have supported another conclusion. Under the reasonableness standard, deference to the decision-maker is a legal obligation for the reviewing court. The test for reasonableness dictates that the reviewing court must start from the decision and the recognition that the administrative decision-maker has the primary responsibility to make the determination. The Court shall look at the reasons, the record and the outcome and, if there is a justifiable explanation for the outcome reached, it shall refrain from intervening.

[24] Ms. Benko claims that the PRRA Officer's reasons can hardly fall within the range of acceptable outcomes considering how vague they are, especially in the face of abundant documentation allegedly contained in the record and contradicting the Officer's findings. She

contends that the Officer's findings are clearly unreasonable given the amount of evidence proving that conditions have worsened for Roma in Hungary. Ms. Benko argues that it is an error for a decision-maker not to explain why some evidence is preferred over others (*Dimitrijevic v Canada (Citizenship and Immigration)*, 2014 FC 719 at paras 32-33), especially when there is clearly contradictory evidence to that relied upon in the reasons (*Cech v Canada (Citizenship and Immigration)*, 2016 FC 1312 at para 20; *Abdillahi v Canada (Citizenship and Immigration)*, 2015 FC 1202 at para 10; *Aziz v Canada (Citizenship and Immigration)*, 2015 FC 694 at paras 13-15).

[25] I do not share the views expressed by Ms. Benko and her family. Given that the state has prosecuted, convicted and sentenced the agent of persecution, Balog Tibor, it was reasonable for the PRRA Officer to determine that Ms. Benko and her family benefited from state protection. Regarding the family members' allegation of harassment by supposed henchmen of Balog Tibor, the Officer was entitled to weigh the evidence and to take into account that Ms. Benko's family members were speculating as to who was behind the threats. There is nothing unreasonable with the PRRA Officer's finding that Ms. Benko and her family had not submitted sufficient objective evidence of new risk developments (*Rangel Gomez v Canada (Citizenship and Immigration)*, 2013 FC 786 at paras 22-23). Besides, the purpose of the PRRA is not to re-argue the basis of the refugee claim. Rather, it is premised on respect for the negative refugee determination "unless there is new evidence of facts that might have affected the outcome of the RPD hearing if the evidence had been presented to the RPD" (*Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 at para 13).

[26] Moreover, contrary to Ms. Benko's submissions, the documentary evidence on the record does report some improvements for Roma in Hungary while describing continuing problems; it was thus reasonably open to the PRRA Officer to arrive at his conclusion (*Galamb* at paras 38-51). The fact that there is also evidence which continues to discuss problems faced by Roma Hungarians does not render the Officer's assessment of the evidence unreasonable.

[27] Ms. Benko and her family argue that evidence pointing to deteriorating conditions for Roma in Hungary was not properly acknowledged by the PRRA Officer. They rely on the finding of the Court in *Djubok v Canada (Citizenship and Immigration)*, 2014 FC 497 stating that the more important the evidence that is not specifically mentioned and analyzed in a decision-maker's reasons, the more willing a court may be to infer that they made an erroneous finding of fact without regard to the evidence. I accept that. However, it is well-recognized that a decision-maker is presumed to have weighed and considered all the evidence presented to it unless the contrary is shown (*Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (FCA) (QL) at para 1). A failure to mention a particular piece of evidence does not mean that it was ignored (*Newfoundland Nurses* at para 16), and a decision-maker is not required to refer to each and every piece of evidence supporting its conclusions. There is also no need for decision-makers to specifically refer to general documentary evidence (as opposed to evidence personalized to the applicants' situation) and explain how they dealt with it (*Vargas Bustos v Canada (Citizenship and Immigration)*, 2014 FC 114 at paras 35-38; *Shen v Canada (Citizenship and Immigration)*, 2007 FC 1001 at paras 4-6). It is only when a tribunal is silent on evidence clearly pointing to an opposite conclusion that the Court may intervene and infer that the tribunal overlooked the contradictory evidence when making its finding of fact (*Ozdemir v*

Canada (Minister of Citizenship and Immigration), 2001 FCA 331 at paras 9-10; *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 (QL) [*Cepeda-Gutierrez*] at paras 16-17). However, *Cepeda-Gutierrez* does not stand for the proposition that the mere failure of a tribunal to refer to an important piece of evidence that runs contrary to the tribunal's conclusion necessarily renders a decision unreasonable and results in the decision being overturned. To the contrary, *Cepeda-Gutierrez* says that it is only where the non-mentioned evidence is critical and squarely contradicts the tribunal's conclusion that the reviewing court *may* decide that its omission means that the tribunal did not have regard to the material before it.

[28] This is not the case here. Contrary to the submissions of Ms. Benko and her family, I do not find that this is a case where evidence on the record directly contradicts an essential element of a finding or where a decision is made without regard to the material before it (*Sanchez Mestre v Canada (Citizenship and Immigration)*, 2015 FC 375 at para 15; *Hernandez Montoya v Canada (Citizenship and Immigration)*, 2014 FC 808 at para 36).

[29] Ms. Benko and her family had the legal burden of providing clear and convincing evidence that Hungary was unable to provide adequate state protection (*Flores Carillo* at paras 18-19). It is settled law that Canadian courts must presume that state protection is available in the country of origin of the refugee claimant, particularly when the state is democratic, as is the case for Hungary. Clear and convincing evidence is needed to rebut this presumption of state protection (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at 724-725), and it requires

more than showing that state protection is not perfect or not always effective (*Canada (Minister of Employment and Immigration) v Villafranca*, [1992] FCJ No 1189 (FCA) (QL) at para 7).

[30] As stated by the Federal Court of Appeal in *Hinzman*, "refugee protection is meant to be a form of surrogate protection to be invoked only in those situations where the refugee claimant has unsuccessfully sought the protections of his home state" (*Hinzman* at para 41). As such, "the fundamental requirement in refugee law that claimants seek protection from their home State before going abroad to obtain protection through the refugee system" (*Hinzman* at para 62). In the case of a developed democracy, the claimant is faced with the burden of proving that he or she exhausted all the possible protections offered in the country of origin. It is also trite law that applicants seeking refugee protection cannot simply claim that they believe that state protection will not be forthcoming (*Moya v Canada (Citizenship and Immigration)*, 2016 FC 315 at para 75; *Ruszo v Canada (Citizenship and Immigration)*, 2013 FC 1004 at para 33). This claim must be supported by evidence.

[31] Ms. Benko also invokes *Newfoundland Nurses* to argue that reasons are adequate only if they permit a reviewing court to understand why the decision-maker decision made their decision. She submits that the Officer did not explain why there was not enough information to show how country conditions have worsened since 2012. Ms. Benko goes on to list in great detail a number of documents that would support a negative finding of state protection.

[32] As I explained in *Canada (Citizenship and Immigration) v Abdulghafoor*, 2015 FC 1020 at paras 30-36, *Al-Katanani v Canada (Citizenship and Immigration)*, 2016 FC 1053 [*Al-*

Katanani] at para 32 and *Nguyen v Canada (Citizenship and Immigration)*, 2016 FC 1207 at paras 34-39, the law relating to the sufficiency of reasons in administrative decision-making has evolved substantially since *Dunsmuir*. It is now trite law that the adequacy of reasons is no longer a stand-alone basis for quashing a decision. In *Newfoundland Nurses*, the Supreme Court provided guidance on how to address situations where decision-makers provide brief or limited reasons. Reasons need not be fulsome or perfect, and need not address all of the evidence or arguments put forward by a party or in the record (*Newfoundland Nurses* at paras 16, 18).

[33] Reasonableness, not perfection, is the standard. Even when the reasons for the decision are brief, or poorly written, the Court should defer to the decision-maker's weighing of the evidence, as long as it is able to understand why the decision was made (*Al-Katanani* at para 32). Reasons do not need to be lengthy either. Even a sentence or two can be enough to provide adequate reasons (*Vancouver International Airport Authority v Public Service Alliance of Canada*, 2010 FCA 158 at para 25). Short as they may be, reasons will be sufficient if they "allow the reviewing court to assess the validity of the decision" (*Lake v Canada (Minister of Justice)*, 2008 SCC 23 at para 46).

[34] In other words, sufficiency of reasons is not measured by the pound. No matter the number of words used by a decision-maker or how concise a decision may be, the test is whether the reasons are clear and intelligible, and explain to the Court and the parties why the decision was reached. The reasons for the decision need merely be comprehensible, not comprehensive. Reasons are sufficient if they "allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable

outcomes" (*Newfoundland Nurses* at para 16). In order to provide adequate reasons, "the decision maker must set out its findings of fact and the principal evidence upon which those findings were based", as well as "address the major point in issue" and "reflect consideration of the main relevant factors" (*VIA Rail Canada Inc v Canada (National Transportation Agency)*, [2001] 2 FC 25 (FCA) at para 22). This is exactly what, in my opinion, the PRRA Officer did.

[35] The reasons "must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes" (*Newfoundland Nurses* at para 14). Reviewing courts may also look to the record for the purpose of assessing the reasonableness of the outcome. In *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 [*City of Edmonton*], the Supreme Court has even recently posited that a tribunal's failure to provide *any reasons* does not, in itself, breach procedural fairness, and a reviewing court may consider the reasons which *could be offered* in support of the decision being reasonable (*City of Edmonton* at paras 36-38). As such, the current state of the law on reasonableness review and the adequacy of reasons was set out in the Federal Court of Appeal's recent decision in *Canada (Transport) v Canadian Union of Public Employees*, 2017 FCA 164 [*CUPE*]. In that decision, the Court restated that a reviewing court must have regard to both the reasons given by the decision-maker and the record before the decision-maker; furthermore, "for a decision to be upheld as being reasonable, it may not even be necessary for the decision-maker to have provided any reasons at all if the record allows the reviewing court to discern how and why the decision was reached and the decision-maker's conclusion is defensible in light of the facts and applicable law" (*CUPE* at para 32).

[36] In this case, the reasons enable me to understand how the PRRA Officer reached his conclusion, and there is factual foundation for reaching it. There is therefore no inadequacy of reasons.

IV. Conclusion

[37] For the above reasons, the Decision of the PRRA Officer represents a reasonable outcome based on the law and the evidence before it. In my view, the Officer reasonably concluded that state protection is available to Ms. Benko and her family in Hungary, and that they would not be exposed to a serious risk of persecution if they returned to Hungary. On a standard of reasonableness, it suffices if the decision subject to judicial review has the required attributes of justification, transparency and intelligibility. This is the case here. Therefore, I cannot overturn the PRRA Officer's Decision and must dismiss this application for judicial review.

[38] Neither party has proposed a question of general importance for me to certify. I agree there is none.

JUDGMENT in IMM-732-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed, without costs.

2. No question of general importance is certified.

"Denis Gascon"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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