Federal Court  Cour fédérale

Date: 20180523

Docket: IMM-4601-17

Citation: 2018 FC 532

Toronto, Ontario, May 23, 2018

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

EMIL CONKA

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is the judicial review of the decision of a Senior Immigration Officer ("Officer") denying the Applicant's pre-removal risk assessment ("PRRA") application.

[2] For the reasons that follow I have found that the Officer's decision was unreasonable and, therefore, that this judicial review be allowed.

Background

[3] The Applicant is a citizen of Slovakia. His common law partner and four children are all citizens of the Czech Republic. The family entered Canada in November 2015 and the Applicant's wife and children were granted refugee protection in April 2016 based on their claim of persecution as persons of Roma ethnicity living in the Czech Republic. The Applicant, however, was found to be inadmissible to Canada on grounds of serious criminality stemming from an assault on his wife which occurred in the Czech Republic. The Applicant brought a PRRA application which was denied by a decision of the Officer dated August 25, 2017. That decision is the subject of this judicial review.

Decision Under Review

[4] Because the Applicant is a Slovak national, the Officer found that Slovakia was the country of reference for purposes of the PRRA. The Officer noted that the Applicant claimed he would face the same problems in Slovakia as he and his family had experienced in the Czech Republic where they had lived from 2003 to 2015. The Applicant claimed he feared persecution by police and organized racist groups because of his Roma ethnicity.

[5] The Officer referred to the affidavit of the Applicant, sworn on May 5, 2017. This recounted an attack on the Applicant, in Slovakia, by two skinheads when he was 19 years old. Although a passing police car stopped, the police made no effort to pursue the fleeing attackers, they did not take a report and told the Applicant that there was nothing they could do to help him. The Officer stated that this local failure to provide effective policing did not amount to a

lack of state protection and that the onus was on the Applicant to approach other members of law enforcement or other authorities if he was not satisfied with the local police response.

[6] The Officer then referred to the Applicant's evidence that his father was attacked by three police officers in 2009. The Applicant claimed that although his father sustained injuries, he was refused a medical report at the hospital. And, when he attempted to file a police report, he was met with indifference. With respect to that attack, as well as the Applicant's claim that his sister and her boyfriend were attacked in their apartment in 2011 or 2012, the Officer stated that it was the Applicant's family members who were targeted and there was no indication of a personalized risk to the Applicant. As to the Applicant's account of witnessing an attack by 20 police officers on a Roma settlement in Slovakia while he and his family were visiting family members there in July 2015, the Officer stated that he or she did not discount the facts presented in the Applicant's affidavit as to the police raid but afforded them little probative value in the absence of corroborating objective evidence.

[7] The Officer found that the Applicant had provided insufficient objective evidence to establish a well-founded fear of persecution. While the treatment the Applicant experienced could be considered insensitive and discriminatory in nature, the evidence adduced did not sufficiently satisfy an accumulation of events that threatened his means of subsistence. The Officer also found that there was insufficient objective evidence to corroborate that, on a cumulative basis, the Applicant had experienced marginalization such that his fundamental dignity as a human being had been violated. While unpleasant and unkind, the effect of the discriminatory treatment did not point to a sustained and systematic denial of the Applicant's

core human rights that would prevent his basic functioning in Slovakian society. The Officer acknowledged, having considered the supporting country condition documentation submitted by the Applicant, that Roma in Slovakia face societal attitudes that are inhospitable and intolerant, that discrimination in education, housing, employment and access to social services have been identified as areas of concern, that the rise of right wing nationalism has further fueled anti-Roma sentiment and violence, and that Roma have faced intimidation from police and radical national militants. However, the Officer found that the country conditions documents were generalized in nature, did not establish a direct link to the Applicant's personal circumstances, and alone were not sufficient to establish that the Applicant is personally at risk of harm.

Issues and Standard of Review

[8] The Applicant identifies three issues, namely, whether the Officer: applied an incorrect test for persecution under s 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA"); failed to reasonably engage with the objective evidence; and, whether the Officer's assessment of state protection was unreasonable.

[9] The Applicant submits that the standard of review applicable to the issue of whether the Officer applied the correct test is correctness as the legal test for the assessment of risk of persecution under s 96 is settled and clear. The reasonableness standard applies to how the Officer applied the test to the facts of the case and the Officer's assessment of the evidence.

[10] The Respondent submits that the standard of review is reasonableness for all of the issues. The question of whether the Officer used the proper test to assess persecution under s 96

is not of central importance to the legal system or outside the specialized areas of expertise of the Officer. Further, the Officer is interpreting his or her home statute and is therefore owed deference.

[11] I am inclined to agree with the Applicant that as the jurisprudence has developed a clear test for s 96 it is not open to the Refugee Protection Division of the Immigration and Refugee Board of Canada ("RPD") to deviate from it, thus, the standard of correctness applies to the RPD's identification of the test (*Ruszo v Canada (Citizenship and Immigration)*, 2013 FC 1004 at paras 20-23; *Dawidowicz v Canada (Citizenship and Immigration)*, 2014 FC 115 at para 23; *Kristofova v Canada (Citizenship and Immigration)*, 2016 FC 415 at para 30). However, I need not resolve the disagreement between the parties as to which of the correctness or reasonableness standard applies to the issue of whether the Officer applied an incorrect test when assessing the Applicant's risk of persecution under s 96 because, as seen from the reasons that follow, both the Officer's articulation of the choice and application of the test is unintelligible. In the result, neither the reasonableness standard nor the correctness standard is satisfied. I agree with the parties that the reasonableness standard applies to the remaining issues raised.

Preliminary Issue – Supporting Affidavit

[12] In its written submissions, the Respondent submitted that because the affidavit filed in support of the application for judicial review was that of Ms. Jovanna Stojkovic, a legal aid worker in the Refugee Law Office ("Stojkovic Affidavit"), and not the personal affidavit of the Applicant, this Court should afford little weight to the Applicant's evidence (*Zhang v Canada (Citizenship and Immigration)*, 2017 FC 491 at paras 13-14). I note that, other than one brief

paragraph providing undisputed background information, the Stojkovic Affidavit serves only to provide, as exhibits, copies of the PRRA application, supporting documents filed in that application including a personal affidavit of the Applicant dated May 5, 2017 and country conditions documents, written submissions made in the PRRA application, and excerpts from the Immigration and Refugee Board's National Documentation Package on Slovakia.

[13] The *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, set out what must be filed when perfecting an application for leave which includes one or more supporting affidavits verifying the facts relied upon by the Applicant in support of the application (Rule 10(2)(d)). Such affidavits cannot include legal argument and conclusions as to the merits of the case or, with limited exceptions, evidence that could have been placed before the administrative decision-maker (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 19).

[14] In this matter the Applicant has properly made arguments of fact and law in his written submissions, not in the Stojkovic Affidavit. He does not seek by way of the Stojkovic Affidavit to place new evidence before this Court based on an exception to the general rule precluding same. The Respondent provides no specifics as to what evidence of the Applicant should be afforded little weight and it is difficult to see why, based on the Respondent's generalized submission, little weight should be afforded to the documents submitted in the PRRA application as appended to the Stojkovic Affidavit, especially as they are also found in the certified tribunal record ("CTR"), the credibility of the evidence was not challenged by the Officer, and they form the factual backdrop to the application for judicial review. Indeed, when appearing before me

the Respondent conceded that in this matter little turned on the absence of a personal affidavit and the matter was raised more as a technical point.

[15] In my view, the failure to provide a personal affidavit is not fatal in these circumstances.

Analysis

[16] The Applicant submits that the Officer did not identify the correct test for persecution pursuant to s 96 of the IRPA. And, in determining that the Applicant had not adduced sufficient evidence to demonstrate that his experiences of discrimination and violence as a Roma in Slovakia had cumulatively risen to the level of persecution, the Officer elevated the test by requiring the Applicant to demonstrate a sustained and systemic denial of his core human rights that would "prevent his basic functioning in Slovakian society".

[17] The Respondent asserts that the Court must read the decision in its entirety to ascertain whether or not the wrong test has been applied. In that regard, the Officer's statements that the evidence did not point to a sustained and systemic denial of the Applicant's core human rights that would prevent his basic functioning in Slovakian society, and that he had not established a linkage to his personal circumstances, were not articulating the test but were making findings of fact. The Officer elsewhere stated the correct test.

[18] It is true that at the conclusion of the decision the Officer stated that, based on his or her prior analysis and his consideration of the submissions and the evidence, he or she found that the Applicant would not face more than a mere possibility of persecution or was not more likely than

not to face a danger of torture, a risk to life, or a risk of cruel and unusual treatment or punishment if returned to Slovakia. However, the stated approach taken by the Officer in his or her analysis was to consider the application against the "consolidated protection grounds". The Officer made no distinction between his or her s 96 and s 97 analyses. Nor is it clear how the Officer reconciled the concluding statement of the test with his or her statement that the cumulative evidence did not demonstrate a sustained and systemic denial of the Applicant's core human rights, which tracks the *Ward* wording, but would not "prevent his basic functioning in Slovakian society" (see *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at 734). I simply cannot glean from the reasons whether the Officer applied the correct test or whether, as the Applicant submits, the Officer elevated the test. Accordingly, as the decision is unintelligible, it is also unreasonable (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 ("*Dunsmuir*")).

[19] The Applicant also submits that the Officer erred by conflating the tests under s 96 and s 97 of the IRPA and that this is apparent by his or her statement that the objective evidence regarding persecutory treatment of Roma in Slovakia is generalized in nature and does not establish a direct link to the Applicant's personal circumstances. Thus, the Officer imported to the s 96 analysis the requirement of personalized risk that is only relevant to a s 97 assessment of risk.

[20] In that regard I note that an applicant seeking refugee status must establish that they are being targeted for persecution in some way, either "personally" or "collectively". Persecution under s 96 can be established by examining the treatment of similarly situated individuals, and the applicant does not have to show that he himself has been persecuted in the past or would be

persecuted in the future (*Fi v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1125 at paras 13-14). Thus, in the context of an allegation of conflating the s 96 and s 97 tests, mere use of the term "personally", or other similar terms, is not necessarily indicative of conflation.

[21] As stated by Justice Mosley in *Raza v Canada (Citizenship and Immigration)*, 2006 FC 1385 at para 29, ss 96 and 97 require the risk to be personalized in that they require the risk to apply to the specific person making the claim: "[t] his is particularly apparent in the context of section 97 which utilizes the word "personally". In the context of section 96, evidence of similarly situated individuals can contribute to a finding that a claimant's fear of persecution is "well-founded"" (also see *Pillai v Canada (Citizenship and Immigration)*, 2008 FC 1312 at paras 42, 44; *Kaur v Canada (Citizenship and Immigration)*, 2014 FC 505 at paras 37-39; *Somasundaram v Canada (Citizenship and Immigration)*, 2014 FC 1166 at paras 21-25).

[22] Thus, an error may not arise by merely referencing personalized risk to the Applicant. In this case, however, and as noted above, the s 96 and s 97 analyses are indistinguishable. Accordingly, it cannot be ascertained whether the Officer was evaluating a personalized risk as part of the s 96 analysis or was addressing the requirements of s 97. That said, in my view, it is apparent that the Officer erred in the manner in which he or she assessed the Applicant's evidence that his father, and separately his sister, had been attacked. The Officer found that it was the Applicant's family members who had been attacked and that there was no indication of a personalized risk to the Applicant. I agree with the Applicant that this was credible evidence concerning similarly situated persons and had to be considered as such in the context of the s 96

analysis. And although the Respondent submits that this evidence was not afforded weight because it was dated, this reasoning does not appear in the Officer's decision.

[23] Similarly, the Applicant's affidavit evidence was that he witnessed a police raid on a Roma community in Slovakia while visiting his family in 2015. The Officer did not question the Applicant's credibility and his affidavit evidence is presumed to be true absent contradictory evidence (*Maldonado v Canada (Minister of Employment and Immigration)* (1979), [1980] 2 FC 302 (CA); *Durrani v Canada (Citizenship and Immigration)*, 2014 FC 167 at para 6; *Duroshola v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 518 at para 22). The Officer points to no contradictory evidence but afforded the Applicant's evidence little probative value on the basis that there was no corroborating objective evidence. In my view, it was unreasonable to afford the evidence little weight on this basis without further explanation. Further, the evidence should have been considered in the context of similarly situated persons when assessing whether the Applicant had a well-founded fear of persecution under s 96 of the IRPA, as well as in the context of forward-looking risk.

[24] Finally, the Applicant submits that the Officer's state protection analysis was unreasonable. While the Officer did not conduct a full analysis of whether there is adequate state protection for Roma in Slovakia, the Officer unreasonably found that the police failure to protect the Applicant after an attack was a local failure and not indicative of the state's inability or unwillingness to protect Roma. The Officer failed to engage with the objective evidence that the police are not only incapable of protecting Roma but are complicit in their abuse. The Officer did not consider this evidence when assessing the Applicant's interaction with the police and did

not refer to any of the country condition evidence related to state protection for Roma. Here the Applicant had previously been refused protection and the objective evidence supported his claim that adequate protection would not be forthcoming to him as a Roma in Slovakia.

[25] The Respondent submits that it was not necessary for the Officer to discuss every piece of conflicting evidence found in the country conditions. Rather, all that was required was that the Officer review the evidence and reasonably ground his or her finding in the materials before him or her. In my view, the Officer did not do so in this case.

[26] The Officer referred to the 102 pages of supporting documentation submitted by the Applicant which he or she stated included reports and articles from a variety of sources on human rights and social justice "vis-a-vis the plight of Roma in Slovakia". The Officer states that, having considered these, he or she acknowledged adverse societal attitudes towards Roma, discrimination and racially motivated violence but that the documentation was generalized in nature and did not establish a link to the Applicant's personal circumstances. The Officer makes no finding as to the adequacy of state protection based on the documentary evidence. The only finding being that if the Applicant was not satisfied with the response of the local police after his attack then the onus was on him to approach other law enforcement or other authorities for assistance. The Officer did note that attack occurred when the Applicant was 19 years old, which would have been at least 15 years ago, and that the Applicant had been living in the Czech Republic since 2003. But the Officer did not assess the Applicant's affidavit evidence that his father was attacked in 2009 by the police and that when his family attempted to file a complaint at the police station they were threatened with jail unless they left the station. Nor that

after the July 2015 raid by police, at which Roma were verbally abused, beaten and the police threatened to call the skinheads to do “their thing”, community members who were beaten went to the police to complain but the police would not assist them and again threatened to jail them if they did not leave.

[27] Thus, the Officer failed to engage with the acknowledged country condition documentation and the Applicant’s evidence to assess whether there would be adequate state protection available to the Applicant, on a forward-looking basis, should he be returned to Slovakia. The Officer also failed to explain why, given the undisputed evidence of the discrimination suffered by the Applicant and the Officer’s seeming acceptance of the country conditions concerning discrimination, his evidence did not amount, cumulatively, to persecution (*Bledy v Canada (Citizenship and Immigration)*, 2011 FC 210 at paras 31, 34).

[28] In judicial review, reasonableness is concerned with the existence of justification, transparency and intelligibility within the decision-making process and also whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir* at para 47). For the reasons set out above, I find the Officer’s decision to be unreasonable.

JUDGMENT IN IMM-4601-17

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted. The decision of the Officer is set aside and the matter is remitted for redetermination by a different officer;
2. No question of general importance is proposed by the parties and none arises; and
3. There will be no order as to costs.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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