

Federal Court



Cour fédérale

**Date: 20181101**

**Docket: IMM-761-18**

**Citation: 2018 FC 1102**

**Ottawa, Ontario, November 1, 2018**

**PRESENT: The Honourable Mr. Justice Boswell**

**BETWEEN:**

**GYUAL GASPAR,  
ERIKA HORVATINE GASPAR,  
GYULANE GASPAR**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

[1] The Applicants are citizens of Hungary. They arrived in Canada on May 26, 2016 and claimed refugee protection. Mr. Gyula Gaspar and his wife, Gyulane, and their adult daughter Erika Horvathne, claim they will face persecution as Roma if they return to Hungary. In a decision dated May 3, 2017, the Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB] rejected their claims, with credibility being the determinative issue. The

Applicants appealed the RPD's decision to the Refugee Appeal Division [RAD] of the IRB. The RAD dismissed the appeal in a decision dated January 22, 2018 and, pursuant to paragraph 111(1) (a) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [IRPA], confirmed the RPD's decision. The Applicants have now applied under subsection 72(1) of the IRPA for judicial review of the RAD's decision. They ask the Court to set aside the RAD's decision and return the matter for redetermination by another member of the RAD.

I. Background

[2] The Applicants base their fear of persecution on a series of incidents dating back to 2014 and general mistreatment throughout their lives. They claim they were forcibly evicted from their home in May 2014 with only eight days' notice, and later that year were attacked by the Hungarian Guard. They reported the attack to the police, but the police refused to investigate. The Applicants claim they were attacked again by members of the Hungarian Guard in January 2015. Once again, they reported this attack to the police, but again the police did not investigate.

[3] The RPD found the Applicants' "testimony was exceptionally poor. It was internally inconsistent, laboured, and at times unresponsive to questions asked". Before the RPD, Mrs. Gaspar attributed her inconsistent testimony about the eviction to the medication she was taking at the time to treat her blood pressure. The RPD noted that there was no independent medical evidence for this claim, and that the other Applicants had similarly inconsistent testimony about the eviction while not taking the same medication. Ultimately, the RPD concluded that the Applicants were "devoid of credibility" and that their "key allegations were subject to a raft of credibility issues".

## II. The RAD's Decision

[4] After summarizing the Applicants' claims, the RAD noted that subsection 110 (4) of the *IRPA* limits the admission of evidence in an appeal before the RAD by allowing only:

(1) evidence that arose after the RPD's rejection of the claim; (2) evidence that was not reasonably available at the time of the RPD's rejection of the claim; or (3) evidence that an appellant could not reasonably have been expected in the circumstances to have presented at the time of the RPD's rejection of the claim. The RAD then considered the Applicants' request to accept as evidence documents about their health conditions and the medications taken for them. The Applicants conceded that this evidence arose prior to the RPD's rejection of their claims and was reasonably available at the time the RPD rejected their claims. They submitted to the RAD, though, that this evidence could not reasonably have been expected to have been presented when the RPD rejected their claims because, although they had provided the documents to their counsel, he had neglected to provide them to the RPD. The RAD rejected this argument because, if accepted, any claimant who changed counsel would be entitled to submit new evidence merely by claiming that counsel before the RPD was remiss in not submitting it. The RAD thus found that the Applicants had not shown that the new documents fell within one of the exceptions for new evidence set out in subsection 110(4).

[5] The RAD then proceeded to assess the Applicants' arguments that the RPD had: (a) made a contradictory finding when it found there was widespread discrimination and harassment against Roma throughout Hungary, while, at the same time, finding the Applicants had not been persecuted; (b) erred in finding that only past mistreatment could amount to persecution;

(c) ignored medical evidence in arriving at its findings; and (d) erred in its assessment of the documentary evidence.

[6] The RAD determined that the RPD had not made a contradictory finding in determining that the Applicants had not been subject to persecution. The RAD examined evidence related to the potential for future persecution of the Applicants and rejected their argument that the RPD had erred by focusing solely on past mistreatment.

[7] With respect to the Applicants' argument that the RPD had ignored medical evidence in arriving at its findings, the RAD found this was misleading, and noted that the RPD had observed there was a lack of independent medical evidence to explain Mrs. Gaspar's inconsistent testimony, and that the other two Applicants had similarly inconsistent testimony without suffering from the same medical issues. The RAD determined that the RPD had no duty to assess the Applicants' other health issues as disclosed in the new documents because, at the time of the RPD hearing, they had not claimed that these issues affected their testimony.

[8] As to the Applicants' argument that the RPD had erred in assessing the documentary evidence, notably letters from a Roma self-government organization and a letter from a shelter, the RAD found the evidentiary value of these documents did not outweigh the cumulative credibility findings made by the RPD; those findings, the RAD noted, had not been challenged by the Applicants in the appeal.

### III. Analysis

[9] This application for judicial review raises one primary issue: was the RAD's decision reasonable?

#### A. *Standard of Review*

[10] The standard of review for the RAD's decision is reasonableness (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35, [2016] 4 FCR 157). The reasonableness standard tasks the Court with reviewing an administrative decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determining "whether 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 at para 47, [2008] 1 SCR 190).

[11] Those criteria are met if "the reasons 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 and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708). So long as "the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome"; nor is it "the function of the reviewing court to reweigh the evidence" (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61, [2009] 1 SCR 339).

B. *The Parties' Submissions*

[12] The Applicants contend it was unreasonable for the RAD not to accept the new evidence, asserting that this could amount to a denial of procedural fairness and that it was an appropriate situation to apply subsection 110(4) of the *IRPA* flexibly. According to the Applicants, the RAD's decision is unintelligible and unreasonable since it insufficiently explained why facing harassment and discrimination throughout Hungary does not equate to persecution.

[13] In the Applicants' view, the RAD failed to provide intelligible reasons for upholding the RPD's decision which assessed their fear of persecution based on past persecution. According to the Applicants, the RAD unreasonably confirmed the RPD's findings on several pieces of documentary evidence, notably letters from a Roma organization and a shelter.

[14] The Applicants say the RPD should have taken into consideration the medical evidence in question since it related to their credibility; and in view of *Hassan v Canada*, [1999] FCJ No 1359, 174 FTR 288, (FC) [*Hassan*], there is no obligation on claimants to disclose medical conditions which could affect their credibility, and that the RPD must consider available evidence about medical conditions which could affect a claimant's credibility. According to the Respondent, however, it was reasonable for the RAD to find the RPD's determination on credibility correct because the Applicants did not explicitly mention that their medical conditions could adversely affect their testimony.

[15] It was reasonable for the RAD in this case not to accept the Applicants' new evidence. The evidence was readily available at the RPD stage, and it was reasonable for the RAD to find that the Applicants could have submitted this evidence to the RPD. The RAD explained the process for accepting new evidence under subsection 110(4) of the *IRPA* and the nature of the Applicants' argument. It described how the Applicants' evidence could not be accepted because it did not fall within any of the exceptions under subsection 110(4). This was a transparent, justifiable, and intelligible conclusion.

[16] I disagree with the Applicants' argument that the RAD insufficiently explained why facing harassment and discrimination throughout Hungary did not equate to persecution. The RAD clearly explained that an acknowledgement of widespread discrimination and harassment against Roma does not mean that these harms are repetitive and systematic. The RAD went on to describe how a finding of persecution depends on factors such as the seriousness of the harassment and discrimination, and the circumstances of the individual or individuals. This line of reasoning is justifiable, transparent, and intelligible. The RAD was reasonable in upholding the RPD in this regard.

[17] I also disagree with the Applicants' argument that the RAD failed to provide intelligible reasons for upholding the RPD's decision which assessed their fear of persecution based on past persecution. The RAD found that the RPD had in fact considered the risk of persecution upon return of the Applicants to Hungary and explained that both past and future harm are potentially relevant. It is not correct to say that the RPD and the RAD in this case focused exclusively on past mistreatment. The RAD's reasoning in this regard is clear and logical.

[18] As to the Applicants' argument that the RPD must consider available evidence about medical conditions which could affect a claimant's credibility, I begin by noting that, since *Hassan*, several decisions of this Court have held that refugee boards must expressly address medical evidence that could explain a claimant's lack of credibility (see, e.g.: *Lozano Pulido v Canada (Citizenship and Immigration)*, 2007 FC 209 at paras 34 and 35, 155 ACWS (3d) 648 [*Lozano Pulido*]; *Gaymes v Canada (Citizenship and Immigration)*, 2010 FC 801 at para 16, 191 ACWS (3d) 587 [*Gaymes*]; *Mubiala v Canada (Citizenship and Immigration)*, 2011 FC 1105 at para 10, 208 ACWS (3d) 161 [*Mubiala*]; *Lahpai v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 88 at para 11, 103 ACWS (3d) 798 [*Lahpai*]).

[19] The Applicants are correct that *Hassan* does not impose an obligation on claimants to disclose medical conditions which could affect their credibility. In *Hassan*, a medical report had been submitted which stated that the claimant was "performing below expectations on tests of verbal fluency, psycho-motor speed, cognitive flexibility, and verbal learning and memory" and that the claimant performed poorly on cognitive tests. The Court found (at para 20) that:

... in making its finding the panel did not come to grips in its reasons with the content of the medical report that had been submitted to it. In my opinion this report was both cogent and relevant to the finding of credibility. The deficiencies in the applicant's testimony that led the panel to find that it was not credible are also consistent with the psychiatric and other problems from which the report states that Mr. Hassan suffers, the treatment that he is receiving for them and the results of the tests administered to Mr. Hassan by the psychologist.

[20] Similarly, in *Lahpai*, the RPD was presented with a psychologist's letter which spoke directly to the claimant's inability to effectively engage in an interview process. Although not



dispositive in the case, the Court stated that “the Board should have referred to that letter in its decision and explain why it rejected it” (at para 19).

[21] In *Lozano Pulido*, the psychological report which had been submitted on behalf of the claimant stated that “the stress of the hearing setting could lead Mr. Lozano to succumb to elevated anxiety, which would affect his ability to concentrate and to recall details”. An additional psychological report stated that the first day of the hearing had exacerbated Mr. Lozano’s mental health issues, leading to a disorganized thought process as well as poor concentration. The Court found it was: “patently unreasonable for the Board to reject Mr. Lozano’s testimony as not credible, without properly addressing Dr. Diaz’ opinion with respect to the effect that Mr. Lozano’s untreated bipolar disorder had on his ability to testify on the first day of his refugee hearing” (at para 35).

[22] In *Mubiala*, the Court found (at para 14) that it is not necessary for the RPD to explicitly address a medical report if the medical condition is considered in relation to a claimant’s ability to recollect certain facts. Similarly, in *Gaymes*, the Court found (at para 18) that a failure to explicitly mention a medical report does not necessarily mean that the relevant medical conditions have been ignored.

[23] The decisions in *Gaymes*, *Hassan*, *Lahpai*, *Lozano Pulido*, and *Mubiala* establish that the RPD must consider evidence about a medical condition which interferes with a claimant’s ability to provide credible testimony. Although specific medical reports do not need to be explicitly or specifically considered, it must still be apparent from the decision-maker’s reasons that the

medical condition and its potential effect upon a claimant's credibility were evaluated. As stated by the Court in *Lahpai* (at para 21):

The Board is assumed to have considered all the documents placed before it and does not always have to refer specifically to them in its decision, but, when the evidence is omitted, not only from the decision, but from consideration at the hearing, and such evidence squarely contradicts the findings of the Board on a central issue, the latter must clearly refer to that material and state why it did not rely on it. ...

[24] *Hassan, Lahpai, and Lozano Pulido* each involved claimants whose medical evidence struck at the heart of the issue of their credibility. In this case, however, the medical evidence is varied and does not directly touch upon issues of credibility. The RAD summarized the Applicants' medical conditions by stating that the RPD record indicated that:

...Mr. Gaspar is hard of hearing, has anxiety, has a sleep disorder, is under psychiatric care and needs regular medical treatment; that Mrs. Gaspar can only sleep with sleeping pills and is afraid of coming out [of] the house; and that Ms. Horvathne Gaspar has been anxious and subject to fear and nightmares.

[25] These are not ailments which immediately appear to be related to credibility. In this regard, the RAD found:

...it is true that the various health conditions of each of the Appellants, as outlined above, are not discussed by the RPD in arriving at its credibility findings; however, these maladies were not relied upon by the Appellants to explain their inconsistent testimony. The RAD has reviewed the recording of the hearings and notes that in each instance where the RPD found inconsistency in the testimony of one of the Appellants, the particular Appellant was given the opportunity to provide an explanation. Aside from Mrs. Gaspar claiming that her blood pressure pills had impaired her memory in relation to her testimony about the family's eviction, the Appellants did not claim that their medical conditions, or the medicines taken in relation thereto, impacted on their ability to testify. In the absence of a claimed link between the various

illnesses (other than high blood pressure) and the testimony of the Appellants, the RPD had no duty to take these conditions into account when assessing the credibility of the Appellants.

[26] Although the medical evidence in this case was not explicitly or specifically considered by the RPD, that evidence does not squarely contradict the RPD's credibility findings but, rather, only shows the array of physical and mental issues affecting the Applicants.

[27] Lastly, the Applicants' argument that the RAD unreasonably confirmed the RPD's findings on several pieces of documentary evidence is not persuasive. In my view, the RAD reasonably concluded that, since the Roma self-government organization could not be categorized as "a competent foreign public officer," the letters from that organization could not be accepted as evidence of their content. Moreover, it was reasonable for the RAD to find that, even if the letters from the Roma self-government organization should be treated as being akin to a document from a competent foreign public officer and accepted as evidence of their content, they should still be disregarded, because the RPD had made uncontested credibility findings about them based on the fact that the information contained in them was self-reported and due to Mr. Gaspar's inability to indicate when the letters were requested. In short, the RAD's confirmation of the RPD's treatment of this documentary evidence was reasonable and its reasons in this regard were transparent and justifiable.

#### IV. Conclusion

[28] In conclusion, I find that the RAD reasonably conducted its own independent analysis of the record before it. The RAD's reasons provide an intelligible and transparent explanation for

its decision to dismiss the Applicants' appeal, and the outcome is defensible in respect of the facts and the law.

[29] Neither party proposed a question of general importance for certification; so, no such question is certified.

**JUDGMENT in IMM-761-18**

**THIS COURT'S JUDGMENT is that:** the application for judicial review is dismissed;  
and no question of general importance is certified.

"Keith M. Boswell"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-761-18

**STYLE OF CAUSE:** GYUAL GASPAR, ERIKA HORVATINE GASPAR,  
GYULANE GASPAR v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** SEPTEMBER 13, 2018

**JUDGMENT AND REASONS:** BOSWELL J.

**DATED:** NOVEMBER 1, 2018

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