Federal Court  Cour fédérale

Date: 20200123

Docket: IMM-2275-19

Citation: 2020 FC 110

Ottawa, Ontario, January 23, 2020

PRESENT: Mr. Justice Russell

BETWEEN:

PETRA NOVAKOVA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], for judicial review of the decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada, dated March 18, 2019 [Decision], which dismissed the Applicant's appeal of the Refugee Protection Division [RPD]'s decision denying the Applicant's refugee and person in need of protection claim under ss 96 and 97 of the *IRPA*.

II. BACKGROUND

[2] The Applicant is a citizen of the Czech Republic. She is in a common-law relationship with Mr. Lukas Simonic, a Slovak citizen of Romani ethnicity. Together, the couple have three children who are half Czech, half Romani. Two of the children were born in the Czech Republic while the third was born in Canada following the RPD's hearing. In its Decision, the RPD found that the Applicant and her common-law spouse and their two Czech born children were not Convention refugees pursuant to s 96 of the *IRPA*.

[3] The Applicant claims that she fears persecution should she return to the Czech Republic as a person in a common-law relationship with a Romani partner and as the mother of children who are half Romani.

[4] The Applicant states that she has faced numerous instances of severe discrimination in Slovakia and the Czech Republic, which cumulatively rise to the level of persecution. She states that she was: (1) ostracized by her family for having children with a Romani person, (2) assaulted by three skinheads who spat on her children and objected to her relationship with a Romani; (3) denied help from the authorities; (4) consistently verbally abused by Czechs; (5) harassed by her landlord who did not want Mr. Simonic, her partner, on the premises; and (6) forced to watch her children be discriminated against at school. Given the widespread prejudice against Romani people in the Czech Republic, she submits that she does not believe she would be safe in any part of that country.

[5] The Applicant's claim was denied by the RPD on September 20, 2018, along with the claims of her partner and their two Czech born children. The RPD rejected Mr. Simonic's claim citing credibility concerns as well as finding that the challenges he faced in the Czech Republic did not rise to the level of persecution. Similarly, the Applicant's claim as well as her children's claims were rejected by the RPD as it found that the problems they faced in the Czech Republic rose to the level of discrimination, but not persecution.

[6] On March 18, 2019, the RAD allowed the appeal concerning Mr. Simonic's claim, as well as the appeal concerning the claims of their Czech-born children. However, the RAD dismissed the appeal regarding the Applicant's claim.

III. DECISION UNDER REVIEW

[7] The RAD dismissed the Applicant's appeal of the RPD's decision finding that the treatment the Applicant may face should she return to the Czech Republic would not likely rise to the level of persecution. Consequently, the RAD found that the Applicant was neither a Convention refugee nor a person in need of protection pursuant to ss 96 and 97(1) of the *IRPA*.

[8] The RAD found that the RPD had committed an error in not cumulatively considering the instances of discrimination faced by the Applicant. Consequently, the RAD reconsidered the evidence cumulatively but, nevertheless, agreed with the RPD's conclusion.

[9] The RAD noted that the Applicant is ethnically Czech and has not faced the marginalization and stigmatization throughout her life that many Romani persons have

encountered. Rather, the RAD noted, the discrimination the Applicant has faced derives instead from being related to Romani persons. Though the RAD acknowledged that she may well face acts of discrimination and racism were she to return to the Czech Republic, she is far less likely to face challenges related to education, health care, housing, employment, and state support as compared to an ethnic Romani person. In fact, the RAD noted that the Applicant had received an education and had rented housing on her own in the past.

[10] For these reasons, the RAD noted that a cumulative assessment of the evidence at hand, did not demonstrate that the Applicant would face more than a mere possibility of persecution if she were to return to the Czech Republic, even considering the hateful treatment she has faced from her family, or that she was a person in need of protection under s 97 of the *IRPA*.

IV. ISSUES

[11] The issues raised in the present matter are the following:

1. Did the RAD err in its assessment of the risk of persecution faced by the Applicant?

2. Did the RAD err by considering the Applicant's claim on the basis that she would be separated from her family?

3. Did the RAD provide adequate reasons for its Decision?

V. STANDARD OF REVIEW

[12] This application was argued prior to the Supreme Court of Canada's recent decisions in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] and *Bell Canada v Canada (Attorney General)*, 2019 SCC 66. This Court's judgment was taken under reserve. The parties' submissions on the standard of review were therefore made under the *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] framework. However, given the circumstances in this matter, and the Supreme Court of Canada's instructions in *Vavilov* at para 144, this Court found that it was not necessary to ask the parties to make additional submissions on the standard of review. I have applied the *Vavilov* framework in my consideration of the application and it does not change the applicable standards of review in this case nor my conclusions.

[13] In *Vavilov*, at paras 23-32, the majority sought to simplify how a court selects the standard of review applicable to the issues before it. The majority did away with the contextual and categorical approach taken in *Dunsmuir* in favour of instating a presumption that the reasonableness standard applies. However, the majority noted that this presumption can be set aside on the basis of (1) clear legislative intent to prescribe a different standard of review (*Vavilov*, at paras 33-52), and (2) certain scenarios where the rule of law requires the application of the standard of correctness, such as constitutional questions, general questions of law of central importance to the legal system as a whole and questions regarding the jurisdictional boundaries between two or more administrative bodies (*Vavilov*, at paras 53-64).

[14] In this case, both the Applicant and the Respondent submitted that the applicable standard of review was that of reasonableness. I agree.

[15] There is nothing to rebut the presumption that the standard of reasonableness applies in this case. The application of the standard of reasonableness to these issues is also consistent with the existing jurisprudence prior to the Supreme Court of Canada's decision in *Vavilov*. See *Iraqi v Canada (Citizenship and Immigration)*, 2019 FC 1049 at para 15 regarding the review of the RAD's assessment of an applicant's risk of persecution, and *Amadi v Canada (Citizenship and Immigration)*, 2019 FC 1166 at paras 30-31 regarding the review of the adequacy of the RAD's reasons.

[16] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with whether it "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). Reasonableness is a single standard of review that varies and "takes its colour from the context" (*Vavilov*, at para 89 citing *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59). These contextual constraints "dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt" (*Vavilov*, at para 90). Put in another way, the Court should intervene only when "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). The Supreme Court of Canada lists two types of fundamental flaws that make a decision unreasonable: (1) a failure of rationality internal to the decision-maker's

reasoning process; and (2) untenability "in light of the relevant factual and legal constraints that bear on it" (*Vavilov*, at para 101).

VI. STATUTORY PROVISIONS

[17] The following statutory provisions of the *IRPA* are relevant to this application for judicial review:

Convention refugee	**Définition de réfugié**
96 A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	96 A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays ;
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
Person in need of protection	**Personne à protéger**
97 (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not	97 (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle

have a country of nationality, their country of former habitual residence, would subject them personally

a la nationalité ou, si elle n’a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s’il y a des motifs sérieux de le croire, d’être soumise à la torture au sens de l’article premier de la Convention contre la torture ;

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d’autres personnes originaires de ce pays ou qui s’y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care

(iv) la menace ou le risque ne résulte pas de l’incapacité du pays de fournir des soins médicaux ou de santé adéquats.

VII. ARGUMENTS

A. *Applicant*

[18] The Applicant argues that the RAD's Decision was unreasonable given its failure to conduct a proper cumulative assessment of her future risk of persecution, and its erroneous assumption that the Applicant would be separated from her family upon return to the Czech Republic, as well as its failure to provide adequate reasons for its Decision. Consequently, the Applicant asks this Court to allow this application for judicial review.

(1) Risk of persecution assessment

[19] The Applicant submits that the RAD unreasonably assessed her risk of persecution in the Czech Republic. First, she argues that the RAD failed to conduct a proper cumulative assessment of her claims in accordance with the United Nations High Commissioner for Refugees Handbook's guidance on assessing the cumulative effects of discrimination, as endorsed by this Court in *Mohacsi v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 429 at para 34.

[20] Second, the Applicant submits that the RAD erred by considering the fact that she would have access to education in the Czech Republic without undertaking a forward-looking inquiry. The Applicant points out that it is unlikely she would be able to pursue any future education as she is 28 years old and the mother of three children.

[21] Third, the Applicant submits that the RAD overlooked the fact that her ability to pursue education and secure accommodation in the past occurred before she entered into a relationship with Mr. Simonic. She argues that whether or not she faced little stigma or discrimination before meeting Mr. Simonic is irrelevant in this case as her claim is based on her fear of future persecution due to her multi-ethnic relationship and family.

(2) Assumed separation of family

[22] The Applicant argues that it was an error for the RAD to assess her future risk of persecution in the Czech Republic on the assumption that she would be separated from her family. The Applicant says that her claim, along with her family's claim, should have been considered simultaneously. As such, it could not be assumed that the Applicant would not be living with her partner and children in the Czech Republic.

(3) Adequacy of reasons

[23] The Applicant also argues that the RAD unreasonably conducted a very brief analysis of her claim despite the fact that it accepted the large body of evidence submitted.

B. *Respondent*

[24] The Respondent argues that the Decision was reasonable as it assessed the Applicant's risk of persecution cumulatively, and on a personal basis, in accordance with Canadian refugee law principles, and provided justified, transparent and intelligible reasons for its conclusions. The Respondent therefore submits that this judicial review should be dismissed.

(1) Risk of persecution assessment

[25] The Respondent submits that the Decision was reasonable. Because the Applicant's claim was based on the persecution of other members of her family, it was reasonable for the RAD to find that she had failed to establish that she would face anything more than discrimination as an ethnically Czech woman.

[26] The Respondent submits that membership in a family alone is not sufficient to establish persecution as there must be a personal connection between the persecution against one family member and the alleged persecution of another. In other words, persecution must be personal.

[27] With this is mind, the Respondent states that the Decision is clearly reasonable. The RAD considered all the evidence submitted and explicitly stated that it had assessed the Applicant's risk of persecution according to the cumulative effect of the instances of discrimination she had faced. In doing so, the RAD acknowledged the discrimination suffered by the Applicant as a result of being in a relationship with a Romani man and as a parent of Romani children.

However, the RAD concluded that these familial relationships do not mean that she would face any challenges firsthand as someone who is ethnically Czech.

(2) Assumed separation of family

[28] The Respondent also argues that the RAD made a reasonable assessment of the Applicant's individual situation consistent with the current state of the law. There is no fundamental right for a family to stay together under Canadian refugee law (*Nazari v Canada (Citizenship and Immigration)*, 2017 FC 561 at para 20). Though the Respondent admits that there can be compassionate reasons for keeping a family together, this is not a basis on which to assess an applicant's refugee claim. Rather, it is a relevant consideration in a humanitarian and compassionate application pursuant to s 25 of the *IRPA*.

[29] With this in mind, the Respondent says that the RAD's individualized assessment of the Applicant's risk of persecution was reasonable, as the identity and ethnicity of her partner and children are not visible to those around her.

(3) Adequacy of reasons

[30] Finally, the Respondent submits that the RAD's reasons were adequate in this case. The Respondent notes that brevity does not in itself signify that reasons are inadequate. The Supreme Court of Canada has clearly stated that reasons need not be perfect and are considered adequate so long as they satisfy the criteria of "justification, transparency and intelligibility"

(*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 14-18).

VIII. ANALYSIS

A. *Introduction*

[31] Having accepted all of the Applicant's evidence that she had experienced abuse and ostracism from her family, verbal abuse from others, and that she had been accosted by skinheads while she was out shopping with her children and was denied help from the staff, as well as severe harassment from a racial landlord, the RAD, nevertheless, found that these experiences, even when considered cumulatively, established that, if she were to return to the Czech Republic, there would be no more than a mere possibility that she would face persecution.

[32] Clearly, the incidents of abuse and ostracism that the Applicant has faced in the past were the result of her relationship with her partner and children who are ethnically Romani and who have been granted refugee protection in Canada.

B. *Grounds*

[33] The Applicant says that the RAD made several unreasonable errors in reaching its conclusion.

(1) Access to Education

[34] The Applicant complains that the RAD,

> … took into account the fact that the applicant had received an education, but did not acknowledge that she was 28 years old and a mother of three children, and therefore, on a forward looking inquiry, was unlikely to be seeking to be further educated.

[35] This complaint misses the point of the RAD's remarks about education. The RAD obviously had to look at whether the Applicant had experienced discrimination in her past education that should be part of its cumulative assessment. The fact that she had not was important because it indicates that the Applicant did not suffer past discrimination until she married a Romani man and had Romani children. If the Applicant does not intend to seek further education in the Czech Republic if she returns there, then this cannot be a ground for future persecution.

(2) Separation from Family

[36] The Applicant says that the RAD commits a reviewable error by considering "the prospects of future persecution on the basis that she would be separated from her family":

> While Mr. Simonic was simultaneously found to be a Convention refugee by the RAD, he was a citizen of Slovakia, not of the Czech Republic. It could therefore not be assumed that he would not be living with the applicant in the latter country in future.

[37] It is at this point, I think, that the RAD commits reviewable errors.

[38] First of all, the conclusory paragraph 16 of the Decision, when read as a whole, does not make it clear whether the RAD is basing its persecution assessment upon the Applicant's returning to the Czech Republic alone or with her family. Because she has suffered acts of discrimination in the past as a result of her association with her partner and children, that discrimination is likely to diminish or cease if she returns alone. However, if she returns with her family those acts are likely to continue indefinitely so that, in assessing future persecution, the RAD would have to take into account the fact that the time would come when being attacked and insulted by skinheads and having to defend her children, as well as other acts of discrimination, could amount to persecution. It is noticeable that, in looking at future discrimination, the RAD mentions education, health care, housing, accessing the workforce, seeking state support, but does not consider that if she has her children with her she may well also be subject to an indefinite period of racism and violence from skinheads and the public of a kind she has experienced in the past. These are crucial issues. At the very least, there is a lack of clarity on this point that renders the Decision unintelligible so that reconsideration is required.

[39] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT IN IMM-2275-19

THIS COURT'S JUDGMENT is that

1. The application is allowed. The Decision is quashed and the matter is returned for reconsideration by a differently constituted RAD.
2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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