Federal Court  Cour fédérale

Date: 20210205

Docket: IMM-6666-19

Citation: 2021 FC 117

Ottawa, Ontario, February 5, 2021

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

ISTVAN PINTYI
JUDIT KARADI
KIARA IBOLYA PINTYI

Applicants

and

THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants are Hungarian citizens of Roma ethnicity. Mr. Istvan Pintyi and Ms. Judit Karadi are a common law couple. Kiara is their minor daughter. They report that in Hungary, they faced persistent discrimination due to their Roma ethnicity.

[2] The Refugee Protection Division [RPD] found that the documentary evidence established that Roma in Hungary face discrimination in most aspects of life and that they also face harassment and physical abuse at the hands of racist Hungarians, some rogue police officers, and extremist groups. However, the RPD concluded that the discrimination did not amount to persecution and that the Applicants had failed to rebut the presumption of adequate state protection. The RPD concluded that the Applicants were neither Convention refugees nor persons in need of protection pursuant to sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. On October 11, 2019, the Refugee Appeal Division [RAD] upheld the RPD's decision.

[3] The Applicants now bring this Application under section 72 of the IRPA for judicial review of the RAD's decision. They submit that the RAD failed to engage in an independent assessment of the evidence and to assess the cumulative effect of the discrimination experienced. The Applicants also submit the RAD unreasonably concluded that the Applicants had failed to rebut the presumption of state protection.

[4] I am not persuaded that the RAD failed to undertake an independent assessment of the evidence. However, I am convinced that in denying the appeal the RAD failed to grapple with the issues raised in respect of the adequacy of the RPD's discrimination analysis. This aspect of the decision does not meet the requisite standard of justification, transparency, and intelligibility and in turn calls into question the soundness of the RAD's brief state protection analysis. The RAD's decision is therefore unreasonable. For the reasons that follow, the Application is granted.

II. Standard of Review

[5] The RAD's decision is reviewable against the reasonableness standard. A decision will be reasonable where it based on an internally coherent and rational chain of analysis and justified in relation to the facts and law (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 85 [*Vavilov*]).

[6] In conducting reasonableness review, a reviewing court must focus on the decision actually made, including the decision maker's reasoning process (*Vavilov* at para 83). The reasons must justify the decision to those subject to it—even a reasonable outcome cannot stand where it has been reached on an improper basis (*Vavilov* at para 86). In assessing reasonableness, a court must be alert to a decision maker's experience and expertise and also read a decision in light of the history and context of the proceedings, context which may explain an aspect of the decision maker's reasoning process (*Vavilov* at paras 93-94).

III. Analysis

[7] The Applicants' written submissions before the RAD were over sixty paragraphs in length. Twenty-eight paragraphs addressed the RPD's assessment of the discrimination the Applicants reported experiencing in Hungary. Specifically, the Applicants alleged: (1) that the RPD had failed to analyze each of the areas of discrimination raised; (2) that the RPD's findings in relation to the availability of stable employment were inconsistent with the evidence cited by the RPD; (3) that the RPD adopted too high a threshold in concluding discrimination in the education system did not rise to the level of persecution; (4) that the RPD failed to recognize that

unemployment impacted access to health care and housing; and (5) that the RPD had incorrectly failed to assess the cumulative effect of the discrimination.

[8] The RAD addresses these submissions in two short paragraphs:

> [28] With respect to housing, education and employment, the RPD analyzed the specific circumstances of the Appellants in these areas. The Panel concluded that, although the Appellants did face difficulties and discrimination in these areas, it did not rise to the level of persecution.
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> [29] Having listened to the recording of the RPD hearing, and having read the documentary evidence, I agree with the RPD that the Appellants did not suffer persecution in these areas.

[9] The Applicants argue that a mere statement to the effect that the RAD agrees with the RPD shows that the RAD failed to conduct its own independent analysis. In *Gomes v Canada (Minister of Citizenship and Immigration)*, 2020 FC 506 Justice Peter Pamel addresses the question of whether adoption of the RPD's reasons, without more, rebuts the presumption that the RAD has engaged in an independent consideration of the evidence:

> [32] I appreciate that requiring the RAD to catalogue and expound upon each issue on appeal would frustrate the policy goals of administrative efficiency and access to justice, as well as the very purpose of the RAD (Huruglica at paras 79, 88, 98, 103; Kreishan v Canada (Citizenship and Immigration), 2019 FCA 223 at paras 41-42; Vavilov at para 128). And although brevity, in and of itself, is not problematic, I must admit that the paucity of any meaningful findings by the RAD on the issues raised by the Applicant in this case is remarkable.
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> [33] The Respondent recognizes the duty of the RAD to conduct its own independent analysis of the record, but submits that the RAD, in fact, did so, that it did not overlook any important factor, and did not misapprehend the circumstances of the Applicant's case.

> [34] In any event, on this first issue, I must agree with the Respondent. There is a presumption that the RAD has considered all of the evidence. The RAD is not required to restart the analysis from scratch (Huruglica at paras 79, 98, 103) in order for it to show that it conducted an independent review of the matter. I do not think that the length of the decision is itself indicative of any failure of the RAD to do so.
>
> [35] It is certainly open to the RAD to adopt the RPD's lengthy and reasoned treatment of the record, so long as the RAD itself does examine the record. The approach followed by the RAD in this case does not imply that it failed to conduct its own analysis of the evidence.
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> [36] Here, I am not convinced that the presumption that the RAD considered all of the evidence and undertook its own independent analysis of the record is rebutted. I therefore do not agree with the Applicant on this issue.

[10] I am similarly not convinced that brief reasons or the RAD's adoption of the RPD's analysis in any given circumstance is sufficient, on its own, to rebut the presumption that the RAD has independently considered all the evidence relevant to the issues raised on appeal. However, the RAD has an obligation to do more than consider the evidence independently. It must also deliver reasons that transparently and intelligibly justify its decision (*Vavilov* at para 85). In some circumstances, this standard may be met with a broad and general statement to the effect that the RAD agrees with the RPD but that is not the case in this instance.

[11] In this instance, the RAD's decision was unreasonable. The Applicants placed substantive issues before the RAD. They alleged the RPD had failed to consider all grounds of discrimination, that it had adopted too high a threshold in assessing when discrimination amounted to persecution and perhaps most importantly alleged that the RPD had failed to assess whether the cumulative effect of the discrimination experienced rose to the level of persecution.

In the face of these substantive issues it is not enough for the RAD to simply state "I agree with the RPD that the Appellants did not suffer persecution in these areas." How does agreement with the RPD address the allegation that areas of alleged discrimination were excluded from that analysis? How does agreement with the RPD address the allegation that the RPD failed to conduct an analysis of the cumulative effect of the discrimination the RPD acknowledged the Applicants had experienced? The RAD's failure to address these issues, even briefly, renders it impossible for a reviewing court to inquire into the reasonableness of the outcome. I also agree with the Applicants' submission to the effect that the decision leaves them guessing as to why the RAD has concluded the discrimination experienced individually or cumulatively does not rise to the level of persecution.

[12] The RAD's failure to provide transparent and justified reasons in support of its conclusion that the Applicants did not face persecution in Hungary also undermines the state protection analysis. As counsel for the Applicants noted in oral submissions a state protection analysis is not to be conducted in a vacuum, all the circumstances are to be considered, including the nature of the persecution faced (*Gonzalez Torres v Canada (Minister of Citizenship and Immigration)* 2010 FC 234 at para 37).

IV. Conclusion

[13] The Application is granted. The parties have not identified a serious question of general importance for certification and none arises.

JUDGMENT IN IMM-6666-19

THIS COURT'S JUDGMENT is that:

1. The Application is granted;

2. The matter is returned for redetermination by a different decision maker; and

3. No question is certified.

"Patrick Gleeson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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