Federal Court  Cour fédérale

Date: 20210427

Docket: IMM-3710-20

Citation: 2021 FC 366

Ottawa, Ontario, April 27, 2021

PRESENT: Madam Justice McVeigh

BETWEEN:

RIDVAN ADEMI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant, Ridvan Ademi, seeks judicial review of a decision dated August 1, 2020, by the Refugee Appeal Division [“RAD” & “RAD Decision”], confirming the June 7, 2019 decision by the Refugee Protection Division [“RPD” & “RPD Decision”], which found that Mr. Ademi was not a refugee or person in need or protection because he had not established that there was not adequate state protection available to him in his home territory of Kosovo.

[2] For the reasons below, I will grant this application.

II. Background

[3] Mr. Ademi, an ethnic Albanian, is a citizen of Kosovo and no other country. He is Muslim, but does not practice, and comes from a religiously moderate family. He has a wife and three children who remain in Kosovo.

[4] In his Basis of Claim Form ["BOC Narrative"], Mr. Ademi stated that he feared Muslim extremists in his home country. He said that he was threatened by people who he believes are involved with his third cousin, an extremist who has previously been arrested for radicalizing youth to fight in Syria.

[5] Mr. Ademi explained that the threats started when he questioned people who he believed were trying to vandalize or destroy the church next to his home. On December 22, 2017, he was leaving his house in the morning, and confronted two suspicious people looking at the church while holding a black bag. When he approached them, he was physically struck before the men fled. He phoned the police. There was a police report made, and the police stated that they were taking the incident seriously, however, as far as Mr. Ademi knows, nothing came of any investigation.

[6] In January 2018, Mr. Ademi's dog was poisoned and died, and his tires were slashed. Again, he reported the incident and the police took a statement, but nothing came of it.

[7] In late January 2018, his son described being followed to school by a man who said "…I would hate to see you grow up without your dad". He phoned the police after this incident, but the officer would not take an official statement, and he was told that the "police couldn't really help [him] with this problem". As a result, he fled the country temporarily, but while he was gone, his third cousin made inquiries about his whereabouts. This inquiry, he characterised as unusual. In addition, while he was gone, several people inquired about him at his workplace whom his co-workers told him "looked like 'jihadis'".

[8] He did not tell the police he suspected his third cousin Sabahudin Selimi, an imam who was arrested for radicalizing youth to fight in Syria and his neighbour, Blerim Syla who were both involved with the extremists were responsible. His evidence was that Blerim Syla "…returned to Kosovo after fighting for ISIS in Syria a few years ago". The Applicant indicated that he was afraid of telling the police he suspected these two people because he was afraid the police would not keep the information confidential. Overall, Mr. Ademi approached the police three times before fleeing.

[9] He left for the United States on March 14, 2018, and visited with his sister while always planning to go to Canada. He crossed into Canada on March 24, 2018.

[10] The RPD determined that Mr. Ademi was not a Convention refugee or a person in need of protection because he had not rebutted the presumption of state protection. In other words, the RPD found that there was insufficient evidence to support the idea that Kosovo could not protect Mr. Ademi from those who were threatening him.

[11] It is worth noting that there are no issues of credibility in this matter.

[12] The RAD held the RPD reasons were correct.

[13] Mr. Ademi submitted new evidence for the appeal, which was accepted by the RAD. The new evidence was a letter from his wife indicating that she had received a threatening phone call on May 30, 2020, and a police report regarding the threat. The RAD admitted the new evidence under section 110(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

[14] The decision focused on the fact that when the police did not help him, he did not attempt to "pursue the matter of obtaining protection assiduously through proper channels". When he was asked during the RPD hearing why he did not demand the police's help, he said that he believed that the police would not help him, and that he was afraid, and did not think of going any higher.

[15] The RAD confirmed the decision of the RPD, and found that Mr. Ademi is not a Convention refugee or a person in need of protection because "… there is insufficient evidence that the state would be unable or unwilling to adequately protect the Applicant".

III. Issues

[16] The issues are:

A. Did the RAD misstate its standard of review?

B. Did the RAD Member conduct an independent assessment of the RPD decision?

C. Was the decision of the RAD reasonable?

IV. Standard of Review

[17] Mr. Ademi contends that both correctness and reasonableness apply. Correctness for the question of whether the RAD misstated the standard of intervention and reasonableness on the other issues. He argues that because the misstatement is an error of law, it is reviewable on a correctness standard.

[18] I disagree. *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] does allow for correctness to be the applicable standard of review where the rule of law requires it, as Mr. Ademi argues. However, the categories as set out in *Vavilov* are: constitutional questions, general questions of law of central importance to the legal system as a whole, and questions regarding jurisdictional boundaries between administrative bodies (*Vavilov*, at para 53).

[19] Mr. Ademi has not shown that there are constitutional or jurisdictional elements to this issue, and so it seems that he is arguing that there is a general question of law of central importance to the legal system as a whole. As the majority said in *Vavilov*, this category is for questions that "'require uniform and consistent answers' as a result of 'their impact on the administration of justice as a whole'…with significant legal consequences for the justice system as a whole…" (*Vavilov*, at para 59).

[20] The majority in *Vavilov* goes on to give examples of proper general questions of law, such as when an administrative proceeding will be barred by *res judicata*, the scope of the state's duty of religious neutrality, and the appropriateness on the limits or scope of solicitor-client privilege or parliamentary privilege (*Vavilov*, at para 60). Wider public concern is not sufficient (*Vavilov*, at para 61).

[21] One RAD Member allegedly misstating the standard of review they have for the decision-maker below does not come close to rising to this level. This particular question does not even go beyond this particular instance, and comes down to the wording that the RAD Member used in their decision.

[22] The standard of review on all issues in this matter is one of reasonableness.

V. Analysis

A. *Did the RAD misstate its standard of review?*

[23] In my opinion, the RAD did not misstate their standard of review. *Canada (Minister of Citizenship and Immigration) v Huruglica*, 2016 FCA 93 [*Huruglica*] sets out that the standard of review as one of correctness (*Huruglica*, at para 103). The RAD Member stated that their job was to ensure that the decision of the RPD is correct. I fail to see how Mr. Ademi arrived at the conclusion that this means they are conducting a reasonableness review.

[24] In submissions, Mr. Ademi brings up *Allen v Canada (Minister of Citizenship and Immigration)*, 2015 FC 994 [*Allen*] and reproduces paragraph 14, which deals with whether the RAD conducted an independent analysis. This line of reasoning is relevant to the second issue, and I will deal with it there.

B. *Did the RAD Member conduct an independent assessment of the RPD decision?*

[25] The Respondent has submitted several examples of when the RAD's reasons showed evidence that they conducted an independent assessment. I agree.

[26] A RAD appeal is not a true *de novo* proceeding where a "second decision-maker starts anew [and] the record below is not before the appeal body and the original decision is ignored in all respects" (*Huruglica*, at para 79). While there are undoubtedly many references to the RPD Decision, that is to be expected in an appeal without a hearing, especially when some issues (such as credibility) *are* to be given deference to the prior proceedings.

[27] As the Respondent points out, there is detailed analysis in the reasons about why the RAD agrees with the findings of the RPD. The RAD agreed not because they were giving them deference, but because they, when looking at the evidence, determined the analysis to be correct. They looked to the record that was before the decision-maker, including National Documentation Packages. This is not what deference looks like—there is no deference, only agreement.

[28] Simply because the RAD agrees with the conclusions of the RPD does not mean that there was not an independent analysis. A physicist might agree with Einstein on the Theory of

Relativity, and for the same reasons. That does not mean that she has not also done the math. In the reasons provided by the RAD Member, there is ample evidence to suggest that an independent review was conducted. This satisfies the requirements stated by Justice Diner in *Allen*; that is, it is clear that an independent analysis was conducted based on the reasons of the RAD (*Allen* at para 18).

C. *Was the decision of the RAD reasonable?*

[29] In order for an applicant to rebut the presumption of adequate state protection, they must, on a balance of probabilities, show with clear and convincing evidence, that the state protection is inadequate or non-existent (*Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 at para 38). It is also the case that the more democratic the country, the more the claimant must do to exhaust the avenues (*Canada (Minister of Citizenship and Immigration) v Kadenko*, [1996] FCJ No 1376 (FCA)). In doing so, they must show that they have exhausted reasonable avenues to obtain state protection (*Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171 at para 46). A reasonable decision, on the basis of state protection, must be justified, transparent, and intelligible.

[30] In the context of the current case, the question is whether it was reasonable for the RAD to conclude that Mr. Ademi had exhausted all reasonable avenues open to him in order to obtain state protection. It is important in this case to remember that there was no issue regarding credibility and the new evidence was accepted.

[31] In my opinion, the RAD Member did not properly address the main factor in the state protection claim by Mr. Ademi. This is that he went to the police three times before fleeing, and that his wife went an additional time after he had left. Even after all this reporting to the police nothing was done to stop the threat that he was facing, and, in fact, he was told that the police could not help him.

[32] This argument could also be approached, as the Applicant did, by saying that it was unreasonable to silo the old and the new evidence. In the decision, I too read that the RAD concluded that the RPD had been correct - full stop. Then the RAD continued on and assessed the new evidence seemly on its own merits rather than assessing all the evidence it had before it old and new together. All the evidence on this point should have been considered cumulatively.

[33] The decision of the RAD attempted to address the point regarding the Applicant's attempts for state protection, but in my opinion, did not "connect the dots". In the RAD Decision, the Member spends a great deal of time on statistics on policing in Kosovo, but that does not address the undisputed fact that on the three (or four) occasions where the Mr. Ademi or his wife sought help, he was not given any. The Member does purport to address Mr. Ademi's personal experience with the police in paragraph 25 of the RAD Decision. However, in answering the submissions of Mr. Ademi, the Member simply states the statistics on the population's trust of the police, which again, does not address the fact that he has not received any assistance from the police.

[34] The RAD also asserts that the police are the most trusted institution upholding the rule of law (RAD Decision at para 24). This does not, however, establish that Mr. Ademi would be on the reciprocal end of the public trust, especially since he is a religious minority

[35] The RAD gave much weigh to the country conditions, and how the police are trusted and competent, but the fact remains that after four visits to the police (including the one by his wife), there was no concrete action by the police to stop the harassment.

[36] The RAD affirmed that the RPD had addressed the fact that Mr. Ademi should have pursued further recourse. This, in my opinion, assumes that the average person will have the knowledge and wherewithal to understand technical processes and the internal structure of the country's police force. Most people would think that going to the police three times (or 4 times) was attempting to do all they could to stop the threats, and that running might be the only option when that did not work. Especially after being told that the police could not do anything.

[37] The RAD Decision does say that Kosovars are aware of different ways to seek redress if the police are not fulfilling their mandates (RAD Decision at paras 28-29). However I read these statistics as showing under 30 percent of the populace aware of their recourse, and there is nothing to suggest that Mr. Ademi was one of them. This does not show that it was reasonable to require him to report police misconduct, all the while being under personal threat.

[38] Justice Ahmed, in *Nugzarishvili v Canada (Minister of Citizenship and Immigration)*, 2020 FC 459 [*Nugzarishvili*] ruled on a similar case. In that decision, the evidence before the

RPD suggested that the claimant should have pursued further recourse at the public defender's office. Justice Ahmed noted that:

> [g]iven that the police were disinterested in pursuing the assault on the Principal Applicant in 2015, and did not even interview or investigate the subsequent attacks on the Principal Applicant's brother, whether a non-binding recommendation from the Public Defender's Office — should one be provided — would offer a proper and adequate recourse for the Applicants is tenuous.
>
> (*Nugzarishvili*, at para 45)

[39] In that case, one difference was that the claimant did provide the name of the suspected persecutor to the police, but I do not think that distinguishes the relevant parts of the facts. In both cases, there was a clear inaction of the police to pursue justice for the claimant, and I would suggest that in the instant case, inaction of the police on four occasions would mitigate any idea that further pursuit of the matter be considered.

[40] Further, the fact that Mr. Ademi did not tell the police that he suspected his relative and neighbour does not show that the police were willing or able to help him, just that he was hesitant to "name names" because he was not convinced of the confidentially of the information. (see para 8 above).

[41] I find the decision of the RAD to be unreasonable. I would grant the application for judicial review, and remit the matter back to a different decision-maker.

D. *Certified Question*

[42] The Applicant presented the following question for certification:

> What is the role of the RAD and what deference should be provided to the RPD decision when material new evidence is accepted into the RAD record? Upon receipt of the material new evidence does the RAD move from a supervisory role in correcting errors from the RPD to a more *de novo* role as is the case when a hearing is convened as per 110(6) of the IRPA?

[43] The Respondent argues against certification because the question is not dipositive of the issue on this application. They say that the dipositive issue is whether the RAD conducted an independent assessment by reasonably applying the correctness standard, and that whether the role of the RAD changes when new evidence is admitted will not affect the judicial review. The Respondent maintained that there is no novel issue raised because the role of the RAD is well established in the case law. This is because the legislation contemplates specific circumstances for new evidence, and because the RAD hearings are *de novo*, the role of the RAD does not change upon the introduction of new evidence. In support of this, they cite *Canada (Minister of Citizenship and Immigration) v Singh*, 2016 FCA 96 [*Singh*] which states that "[w]hen the RAD finds that all of the evidence should be heard again in order to make an informed decision, it must refer the case back to the RPD" (*Singh*, at para 51).

[44] I agree with the Respondent and I will not grant certification of the question as it is not dipositive of the matter. The decision of the RAD is unreasonable with or without the additional evidence, and regardless of where it is a true *de novo* hearing upon submission of new evidence.

JUDGMENT IN IMM-3710-20

THIS COURT'S JUDGMENT is that:

1. The application is granted;

2. The decision is quashed and sent back to be redetermined by a different decision-maker.

3. No question is certified.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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