

Federal Court



Cour fédérale

Date: 20211018

Docket: IMM-4305-20

Citation: 2021 FC 1096

Ottawa, Ontario, October 18, 2021

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

EVA MARKU

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] Ms. Marku asks the Court to review and set aside an August 17, 2020 decision of the Refugee Appeal Division [RAD] dismissing her appeal of a decision of the Refugee Protection Division [RPD]. The RAD dismissed her appeal on the grounds that she had failed to establish her identity as a Roma on the balance of probabilities and without considering the issues she raised concerning persecution and lack of state protection.

[2] I am in agreement with the Applicant that the RAD's decision, based entirely on a credibility finding, is not reasonable and cannot be sustained.

[3] The Applicant, a Hungarian national, sought refugee protection from within Canada claiming that she faces persecution in Hungary as a result of her Roma ethnicity.

[4] The RPD denied the Applicant's claim. It had serious concerns regarding her credibility and questioned whether she was of Roma ancestry, although it did not make an explicit finding that she was not. The RPD proceeded to find that, even accepting that the Applicant was Roma, she had failed to establish that she faced persecution and failed to rebut the presumption of state protection.

[5] The Applicant appealed to the RAD. On appeal, she requested that the RAD consider new evidence and grant her an oral hearing. The evidence in question was a revised version of the National Documentation Package for Hungary released the day after the RPD issued its decision.

[6] The RAD conducted its own assessment of the evidence, including the recording of the hearing. The RAD considered the new evidence submitted by the Applicant to be new, credible, and reliable, and therefore admissible on appeal. However, it noted that it was tendered exclusively with respect to the issues of state protection and discrimination rising to the level of persecution. The RAD indicated that its decision was being made solely on the grounds of identity (as discussed below) and as such, these documents did not factor into its decision. The

RAD then rejected the Applicant's request for an oral hearing on the grounds that, because the RAD's decision did not consider state protection or persecution, the documents cited in support of the request did not justify allowing or rejecting the claim.

[7] The RAD found that the Applicant was not a credible witness. As a result, the RAD held that the Applicant had failed to establish that she was Roma on a balance of probabilities. As this was determinative of the Applicant's claim, the RAD did not consider the issues of persecution and state protection.

[8] The RAD made a number of observations regarding the Applicant's credibility.

[9] First, the RAD noted that the Applicant claimed to be of Roma descent, but, prior to the hearing, she advised the RPD panel that she was one-half Roma. When questioned about this change, she said that she had not thought it was necessary to inform the RPD that she was only half-Roma. She testified that her father was Roma. As for her mother, the Applicant first testified that she was Hungarian, then testified that her mother was mostly Hungarian, and then testified that she wasn't entirely sure about her mother's background but that her mother had claimed to be Hungarian but looked Roma.

[10] Second, the RAD noted that the Applicant claimed that she faced discrimination with respect to housing and lived in a wooden shed for a period of time. It noted that the Applicant was repeatedly asked for the names of the persons who let her live in their shed but never provided a reply and was selective in her language including referring to them as "his or her".

[11] The Applicant testified that because the shed had no address, she needed to use a friend's address for registration purposes. The Applicant claimed to have a letter from her friend authorizing her to use their address but did not provide it. The RAD noted that housing discrimination was a live issue before the RPD and that the failure to provide this corroborating document, despite claiming it was in her possession, was concerning. The RAD also drew an adverse inference from the Applicant's failure to provide documents from the Minority Self-Government (MSG), an organization supporting the Roma population in Hungary that the Applicant claimed to have received assistance from.

[12] Third, the RAD found the Applicant's testimony regarding employment discrimination to be conflicting, noting that at times she claimed she did not receive employment due to her ethnicity but at others claimed that it was because of her disability. The RAD also found her testimony regarding reporting discrimination to the police to be contradictory, with the Applicant's evidence conflicting on how often the police were called, whether the Applicant or her neighbours called them, and how many police reports were made.

[13] The RAD acknowledged that the Applicant's level of education and sophistication may have affected her answers. However, it noted that the Applicant's responses were not suggestive of such difficulties and that she asked for clarification when she was experiencing difficulties with understanding the questions asked of her. The RAD therefore found that issues with her testimony were not the result of the stresses of the hearing room or a lack of comprehension.

[14] As to her Roma identity, in addition to her testimony, the RAD noted that she provided the RPD with a letter from the President of the Toronto Roma Community Centre [TRCC], Mr. Butch. In his letter, Mr. Butch indicated he had been president of the TRCC for the past 5 years, that he had interviewed the Applicant at length, and certified that to the best of his knowledge the Applicant was an ethnically Romani individual.

[15] The RAD expressed concerns with the letter, noting that, apart from identifying himself as president of the TRCC, there was no indication of Mr. Butch's background, education, or qualifications to make his assessment. The RAD also noted that there was no information in the letter regarding the questions asked or the factors considered in reaching his conclusion. The Applicant testified generally as to the kinds of questions that she was asked and argued that this could be used to understand the methodology and factors. However, the RAD noted that accepting the Applicant's argument was "tantamount to simply accepting her testimony", which it was not prepared to do. It attached little or no weight to the letter.

[16] The RAD noted that, given it did not attach weight to the letter, the only evidence before it on the Applicant's identity was her testimony. The RAD noted that sworn testimony is presumed to be true unless there is a reason to doubt its truthfulness, citing *Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 (CA) [*Maldonado*]. The RAD held that the Applicant was not a credible witness and so the presumption of her truthfulness was rebutted. The RAD found that the Applicant had therefore not established she was Roma on a balance of probabilities.

[17] As a result of finding that the Applicant was not Roma, the RAD did not conduct a review of the issues of state protection and persecution.

[18] The only issue in this application is whether the decision of the RAD is reasonable.

[19] The Respondent submits that the RAD's assessment was reasonable. The Respondent submits that the Applicant's arguments "amount to nothing more than providing alternate explanations for the evidence she provided at the RPD hearing." The Respondent further submits that it is not for the Court to reweigh evidence, including the letter from the TRCC.

[20] The Respondent submits that it was reasonable for the RAD to find that the presumption in *Maldonado* had been rebutted. The Respondent submits that the RAD reviewed the evidence and the implications of *Maldonado* and, after having done so, the RAD reasonably assessed the evidence and provided detailed explanations for why it did not demonstrate the Applicant's Roma identity.

[21] I am unable to accept the position of the Respondent. I find that the RAD's analysis was misguided in failing to give sufficient weight to the direct evidence of the Applicant and focusing on unrelated inconsistencies in the evidence.

[22] While it was open to the RAD to make adverse credibility findings and to not believe portions of the Applicant's testimony, it was unreasonable to make this credibility assessment

globally without taking the entirety of the evidence into account and to refuse to accept the parts of her testimony that were consistent and uncontradicted.

[23] In *Ruiz v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1339, the RPD made a negative global credibility finding with respect to the principal applicant based on “discreet features” of his testimony. After having done so, the RPD then proceeded to apply this negative finding in order to reject other cogent evidence that had been submitted. The Court found that this was unreasonable, saying at paragraph 9 that:

[I]t is only fair and reasonable for parties to litigation to expect that the decision-maker will consider the evidence in its entirety, with an open mind, before making findings about the value to be placed on critical elements of the evidence.

[24] In *Iqbal v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1219 [*Iqbal*], the RPD made a global negative credibility finding against the applicant. Having done so, the RPD then used this assessment to find that corroborative documents were inauthentic. The Court, at paragraph 6 found that “it was incumbent on the RPD to make its global credibility finding after considering all the evidence.” The global credibility finding was made in error of law because it was not reached on the basis of all of the admissible evidence.

[25] The RAD in this case has made a similar error to the one in *Iqbal*. The RAD’s reasoning in the decision under review demonstrates that it had already made a general credibility finding regarding the Applicant before considering the letter from the TRCC. This document was corroborative of the Applicant’s testimony regarding her Roma identity.

[26] The Respondent is correct that it is not the role of this Court to reweigh the evidence. However, a tribunal's weighing of the evidence must still be justified in light of the evidentiary record and factual matrix: see *Canada (Minister of Citizenship and Immigration) v Vailov*, 2019 SCC 65 at paras 125-126.

[27] The RAD gave little if any weight to the letter from the TRCC because the author had not established his credentials and because there was no information before it as to the methodology used in arriving in the opinion that the Applicant was Roma. However, at the hearing, the Applicant testified about the sorts of questions that she was asked about during her interview. The RAD found that “[t]o accept the Appellant’s argument on this issue would be tantamount to simply accepting her testimony.”

[28] This passage makes it clear that the RAD considered there to be no evidence before it whatsoever regarding the methodology and factors used to determine the Applicant’s identity because it was not prepared to accept the testimony of the Applicant. In doing so, the RAD was implicitly rebutting the presumption in *Maldonado* that her testimony was to be believed. The RAD provided no reason why the Applicant’s testimony on how the interview was conducted should not be believed. There was nothing to suggest that the Applicant had not been interviewed or that she was not asked the questions that she claimed to have been asked. Given the lack of justification, it is clear that the RAD was applying its global negative credibility assessment. However, it did so before considering all of the evidence, including the TRCC letter.

[29] If the approach of the RAD were to be accepted, it would be open to the RAD to disregard corroborating evidence whenever it had concerns with an applicant's testimony. For example, had the Applicant provided the letter authorizing the use of her friend's address for registration purposes, under the RAD's approach, and given its concerns with the Applicant's credibility, the RAD could have not accepted it because doing so would have required the RAD to accept the Applicant's testimony that it was an authentic document.

[30] There are other aspects of the decision that are troubling. One of the significant concerns relates to the Applicant's evidence of being at least one-half Roma.

[31] The Applicant testified that her father was Roma. The Applicant's testimony was consistent on this point and yet it was not accepted by the RAD. At no point in its reasons did the RAD express any concerns with the Applicant's testimony that her father was Roma, other than its general determination that the Applicant's testimony was not credible. Given that the RAD's global credibility assessment was unreasonable, the RAD could not disregard the evidence regarding the Applicant's father without providing reasons for doing so. The RAD offered no justification or rationale for not accepting the evidence before it that the Applicant was at least half Roma. This is particularly troubling as the RPD found that if she were half-Roma, she could experience persecution as if she were full Roma:

The panel acknowledges that a person who is half Roma may still be viewed as Roma and experience the same degree of discrimination as an individual who is completely Roma. It may very well be that the claimant's ethnicity as a person who is half Roma was perceived to be Roma and faced discrimination.

[32] If the RAD disagreed with the RPD and felt that the Applicant was required to establish that both her parents were Roma, it should have provided reasons as to why this was the case. It provided none.

[33] The RAD's reasons do not provide a justification for rejecting the Applicant's evidence that she was half Roma and do not justify why being half Roma would not establish identity. As a result, the RAD's decision is unreasonable.

[34] No question was proposed for certification.

JUDGMENT IN IMM-4305-20

THIS COURT'S JUDGMENT is that the application is allowed, the appeal to the Refugee Appeal Division is referred back to be decided by a different panel, and no question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4305-20

STYLE OF CAUSE: EVA MARKU v THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

DATE OF HEARING: SEPTEMBER 8, 2021

JUDGMENT AND REASONS: ZINN J.

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