Federal Court Cour fédérale

**Date: 20220928**

**Docket: IMM-1014-21**

**Citation: 2022 FC 1357**

**Ottawa, Ontario, September 28, 2022**

**PRESENT: Mr. Justice Norris**

**BETWEEN:**

**LUBOMIR FERKO**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. OVERVIEW

[1] The applicant is a 36 year-old citizen of the Czech Republic who has sought refugee protection in Canada on the basis of his fear of persecution due to his Roma ethnicity. He arrived in Canada in April 2014 with his then common law spouse Erika Slepcikova and their two daughters.

[2] The family's first application for protection was rejected by the Refugee Protection Division ("RPD") of the Immigration and Refugee Board of Canada ("IRB") in July 2014. An application for judicial review of that decision was allowed on September 21, 2015. The reviewing court found that the decision was unreasonable because the RPD had failed to consider important evidence and testimony that supported the family's claims. The RPD's decision was set aside and the matter was remitted for reconsideration by the RPD. In the meantime, however, the applicant and Ms. Slepcikova had separated; as a result, their claims were severed and re-determined separately by the RPD.

[3] In a decision dated October 19, 2019, the RPD rejected the applicant's claim again. In separate proceedings, the RPD had accepted the claims of the applicant's spouse and their children. Earlier, the RPD had also accepted the claims of the applicant's parents and two of his siblings.

[4] The applicant appealed the rejection of his claim for protection to the Refugee Appeal Division ("RAD") of the IRB. The RAD dismissed the appeal in a decision dated January 14, 2021. The determinative finding by the RAD was that the discrimination the applicant would face in the Czech Republic on account of his Roma ethnicity did not rise to the level of persecution.

[5] The applicant now applies for judicial review of the RAD's decision under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*"). He contends that the RAD erred by failing to consider the cumulative effect of the discrimination he

would face in the Czech Republic. He also contends that the RAD erred by failing to consider the circumstances of similarly situated persons – in particular, his parents, siblings, and former spouse – in assessing his claim. Finally, the applicant contends that the RAD erred in refusing to admit new evidence on appeal.

[6] For the reasons that follow, I have concluded that the RAD's determinations with respect to the new evidence and the applicant's profile are unreasonable. Since this is sufficient to warrant the matter being reconsidered, it is not necessary to address the RAD's determination that the treatment the applicant experienced in the Czech Republic did not amount to persecution.

## II. BACKGROUND

[7] The applicant was born in the Czech Republic in October 1985. Ms. Slepcikova, his common law spouse at the material times, was born in April 1987. Together they had two daughters – Kamila, who was born in February 2005, and Daniela, who was born in January 2007.

[8] According to the applicant, throughout his life in the Czech Republic, he had been subjected to ethnic slurs, threats, and physical harassment. This happened at school, at work, on the street, in stores, and on public transit. He left school at the age of 16. He was often denied employment because of his Roma ethnicity. The applicant was particularly fearful of skinheads.

[9] During part of the material time, the applicant and Ms. Slepcikova lived with the applicant's parents and siblings. The families had to move homes frequently in order to avoid threats and harassment. In January 2004, they moved into a house in the town of Kynšperk nad Ohří. On the night of August 1, 2004, the house was set on fire while everyone inside was asleep. The occupants were all able to escape but the house was destroyed. Neighbours who witnessed the event said that skinheads had thrown a Molotov cocktail at the house. Police attended the scene. A police report on the incident indicated that the attack had been racially motivated. No arrests were ever made.

[10] In 2006, the applicant, Ms. Slepcikova, and their daughter Kamila moved to the town of Sokolov. After she started school, Kamila experienced discrimination and harassment by her classmates and teachers but school officials were unwilling to do anything. The applicant and Ms. Slepcikova also experienced constant threats and harassment in their daily lives.

[11] Ms. Slepcikova described being attacked by skinheads twice – once in June 2013, when she was attacked by a dog that was let loose on her, and again in February 2014, when she was badly beaten by skinheads in a park. The family decided to leave the Czech Republic for Canada shortly after the last incident.

[12] The applicant's parents and two of his younger siblings had left for Canada in 2009 and sought refugee protection here. Their claims were eventually accepted by the RPD in a decision dated July 31, 2013. Significantly, their claims were based on many of the same experiences as the applicant's – for example, the 2004 firebombing and the applicant's experiences in school.

As well, as noted above, by the time the RPD reconsidered the applicant's claim in 2019, the claims of his former spouse and their children had also been accepted. They, too, rested on many if not all of the same experiences as the applicant's claim.

[13] The re-hearing of the applicant's claim by the RPD took place on August 28, 2019. The RPD accepted into evidence the certified tribunal record that had been prepared in connection with the judicial review of the 2014 RPD decision. This included the original RPD decision, the Basis of Claim ("BOC") forms completed by the applicant and Ms. Slepcikova in April 2014 (including their respective personal narratives), the 2013 decision of the RPD accepting the claims of the applicant's parents and two of his siblings, country condition evidence, a transcript of the May 14, 2014, hearing before the RPD, and post-hearing written submissions from counsel. Both the applicant and Ms. Slepcikova testified at the May 14, 2014, hearing. Among other things, the applicant described his experiences living in the Czech Republic (including the 2004 firebombing of their home) and Ms. Slepcikova described the 2014 attack on her by skinheads. The 2015 decision of the Federal Court allowing the application for judicial review was also filed with the RPD.

[14] Only the applicant testified at the August 28, 2019, hearing. Once again, among other things, he described his experiences living in the Czech Republic, including the firebombing incident. He also related what he knew of the two attacks on Ms. Slepcikova.

[15] The RPD found that the applicant had failed to establish a well-founded fear of persecution for two main reasons. First, the applicant had failed to establish that the

discrimination and harassment he faced in the Czech Republic rose to the level of persecution. Second, while there was evidence indicating that some Roma people faced risks in the Czech Republic, the applicant had not provided sufficient evidence to link his personal circumstances to the discrimination or other harm experienced by other Roma individuals.

[16] On his appeal to the RAD, the applicant submitted that the RPD had erred in finding that he had not established a well-founded fear of persecution by ignoring relevant evidence (including evidence relating to his family members) and in finding that the discriminatory treatment the applicant had experienced in the Czech Republic did not amount to persecution.

[17] The applicant also sought the admission of new evidence in support of his appeal. In particular, the applicant tendered his own affidavit (sworn November 7, 2019) as well as a letter from his family physician, Dr. Ashfaq Saleem (dated October 31, 2019).

[18] In his affidavit, the applicant describes having been sexually assaulted by two male skinheads in the Czech Republic when he was 16 years old. The applicant explained that, until recently, he had not disclosed the incident to anyone except Ms. Slepcikova because of shame and embarrassment. Although he had been assessed by a psychologist, Dr. Pilowsky, in May 2014 in connection with his claim for refugee protection, the applicant did not disclose the incident to her. He explained in his affidavit that this was because there was insufficient privacy when he was being assessed and because he was ashamed and embarrassed to share the incident with Dr. Pilowsky and the female interpreter who was assisting with the assessment. Further, the applicant explained that he did not disclose the incident to the RPD because his mother and sister

were present at the hearing as observers and he was too ashamed and embarrassed to reveal the incident in their presence.

[19] The letter from Dr. Saleem states that the applicant "has recently mentioned that he was raped by two men when he was 16 years old when he was in the Czech Republic." According to Dr. Saleem, the denial of the applicant's refugee claim, his separation from his wife, and the rape incident had all "escalated" the applicant's anxiety and depression and, as a result, he "can't sleep, concentrate & also gets frequent flash backs [*sic*] of his rape."

## III. DECISION UNDER REVIEW

### A. *The Admissibility of the New Evidence*

[20] Although Dr. Saleem's letter was attached as an exhibit to the applicant's affidavit, the RAD assessed the admissibility of each document separately. It concluded that neither document was admissible as new evidence under subsection 110(4) of the *IRPA*, as interpreted in *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96.

[21] The RAD found that, despite the requirement under Rule 3(3)(g)(iii) of the *Refugee Appeal Division Rules*, SOR/2012-257, that an appellant's memorandum should include "full and detailed submissions" regarding any documentary evidence an appellant is submitting under subsection 110(4) of the *IRPA*, "there has been no argument whatsoever as regards the admissibility of the affidavit." On this basis alone, the RAD concluded that the affidavit did not meet the requirements of subsection 110(4) and, consequently, is inadmissible.

[22] In the alternative, the RAD found that the affidavit is not admissible because it was not credible (as required by *Singh*). Specifically, the RAD did not believe that Dr. Pilowsky would have interviewed the applicant in the manner the applicant describes – that is, with the door to her consultation room open and "chatting" with a third party who was standing in the doorway.

[23] Turning to the letter from Dr. Saleem, the RAD noted that Dr. Saleem had stated only that the applicant had "recently" disclosed the sexual assault incident to him. This lack of precision as to the date of the disclosure left the RAD unable to determine whether the disclosure occurred before or after the rejection of the claim by the RPD and, as a result, whether it was genuinely new or not. Accordingly, the RAD concluded that the letter is not admissible under subsection 110(4) of the *IRPA*.

B. *The Merits of the Claim*

[24] The RAD found that the RPD had erred by minimizing the impact of the arson attack on the applicant simply because he was not personally the target and by conducting a perfunctory analysis of why the abuses suffered by the applicant in the past did not amount to persecution. However, upon conducting its own independent analysis of the evidence, the RAD reached the same conclusion, finding that the past discrimination did not amount to persecution.

[25] The RAD also found that the RPD had failed to properly consider the country condition evidence; however, upon conducting its own independent analysis of the evidence, the RAD agreed with the RPD that the applicant did not face a serious possibility of persecution in the Czech Republic. The RAD found that although the treatment of Roma people in the

Czech Republic raises "serious human rights concerns," the evidence did not establish that every person of Roma ethnicity faces discrimination or persecution. The applicant had failed to provide sufficient evidence to establish a link between his particular circumstances and the country condition evidence. Further, the RAD found there to be no evidence that the applicant shared the personal profiles of his family members, whose claims for protection had been accepted. The mere fact of their common Roma ethnicity was an insufficient basis on which to find that they all shared a similar profile that would support a positive finding in the applicant's case.

[26] Accordingly, the RAD dismissed the appeal and confirmed the RPD's finding that the applicant is not a Convention refugee or a person in need of protection.

## IV. STANDARD OF REVIEW

[27] The parties agree, as do I, that the substance of the RAD's decision (including its determination concerning the admissibility of the new evidence) is to be reviewed on a reasonableness standard: see *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35, and *Singh* at para 29. That this is the appropriate standard of review has been reinforced by *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 10.

[28] A reasonable decision "is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). A decision that displays these qualities is entitled to deference from the reviewing court (*ibid.*). When applying the reasonableness standard, it is not the role of the

reviewing court to reweigh or reassess the evidence considered by the decision maker or to interfere with factual findings unless there are exceptional circumstances: see *Vavilov* at para 125. At the same time, reasonableness review is not a rubber-stamping process; it remains a robust form of review: see *Vavilov* at para 13. The reasonableness of a decision may be jeopardized where the decision maker "has fundamentally misapprehended or failed to account for the evidence before it" (*Vavilov* at para 126).

[29] The onus is on the applicant to demonstrate that the RAD's decision is unreasonable. To set aside a decision on this basis, the reviewing court must be satisfied that "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).

## V. ANALYSIS

[30] As stated above, the applicant challenges the RAD's determination that the new evidence he tendered is inadmissible. He also challenges the RAD's determination that his profile was not sufficiently similar to that of his family members or his ex-spouse to ground a well-founded fear of persecution.

[31] As I will explain, in my view the RAD's decision is unreasonable in both of these respects.

A. *The Admissibility of the New Evidence*

[32] Looking first at the new evidence, I have concluded that the RAD's determination that it is inadmissible is unreasonable for the following reasons.

[33] First, it was unreasonable for the RAD to find that there had been "no argument whatsoever" as to the admissibility of the applicant's affidavit. Counsel's written submissions in support of the appeal clearly address the requirements of subsection 110(4) of the *IRPA* and *Singh* in relation to both the applicant's affidavit and Dr. Saleem's letter. The RAD has misapprehended the record in this material respect.

[34] Second, the RAD's determination with respect to the affidavit (in the alternative) is unintelligible. The RAD states that it "will consider the affidavit with a view to determining if its content self-evidently meets the requirements of subsection 110(4) and the *Singh* test" yet the requirements of subsection 110(4) are never addressed.

[35] Subsection 110(4) of the *IRPA* provides as follows:

| **Evidence that may be presented** | **Éléments de preuve admissibles** |
|---|---|
| **(4)** On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances | **(4)** Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, |

| | |
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| to have presented, at the time of the rejection. | dans les circonstances, au moment du rejet. |

[36] The applicant's affidavit post-dates the RPD decision so in this sense it is evidence that arose after the rejection of the claim. However, what is important is the event sought to be proved by the affidavit: see *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 at para 16. The sexual assault described by the applicant when he was 16 years old obviously pre-dates the rejection of his claim. Consequently, the determinative issues under subsection 110(4) are whether this evidence about the incident was reasonably available to the applicant or, if it was, whether he could not reasonably have been expected in the circumstances to have presented it to the RPD. The applicant sought to address these questions by explaining why he had not disclosed the incident earlier: he had been too ashamed and embarrassed to bring it up. The RAD never engages with this explanation; indeed it never engages with the requirements of subsection 110(4) at all. Instead, it focused exclusively on the collateral issue of the credibility of one part of the applicant's explanation for why he did not disclose the incident to Dr. Pilowsky (the lack of privacy). This calls into question whether the RAD was actually alert and sensitive to the matter before it: see *Vavilov* at para 128. The failure to address the applicant's explanation for the late disclosure of the incident leaves a significant gap in the RAD's assessment of the evidence and undermines the reasonableness of the inadmissibility determination.

[37] Third, even assuming for the sake of argument that the RAD could reasonably doubt the credibility of the applicant's account of his meeting with Dr. Pilowsky, it was unreasonable for the RAD to reject the applicant's affidavit as a whole as lacking credibility for this reason alone.

Without further analysis, which the RAD does not provide, it does not follow from the applicant's lack of credibility about this particular meeting that his claim that he was sexually assaulted when he was 16 years old but, until now, he had been too ashamed and embarrassed to bring it up in connection with his refugee claim is not credible.

[38] Finally, while the letter from Dr. Saleem could certainly have been more precise about the date when the applicant first disclosed the sexual assault to him, read in its proper context, the term "recently" cannot reasonably be considered to be as ambiguous as the RAD took it to be. The clear import of the applicant's affidavit was that, apart from Ms. Slepcikova, he had not told anyone about the sexual assault until after the RPD had rejected his claim for a second time. The letter from Dr. Saleem served only the limited purpose of corroborating the applicant's assertion in his affidavit that he had disclosed the incident to him. By reading the letter in isolation from the affidavit to which it was attached as an exhibit, the RAD failed to assess its contents – and its admissibility as new evidence – reasonably.

[39] It is also noteworthy in this connection that the RAD mistakenly refers to Dr. Saleem's letter as being dated October 19, 2019, when in fact it is dated October 31, 2019. When the correct date is considered, there is less room for the RAD's concern that a "recent" disclosure could have occurred before the date the RPD rejected the claim (i.e. September 30, 2019) than the RAD must have thought. Standing on its own, this error may not have been determinative; however, it does add further support to the conclusion that the RAD's interpretation of Dr. Saleem's letter is unreasonable.

B. *The Applicant's Well-Founded Fear of Persecution*

[40] The applicant grounded his claim for protection on his own experiences in the Czech Republic, the experiences of family members (including his ex-spouse), and, more broadly, on the experiences of other Roma people in the Czech Republic. Significantly, the experiences of his family members were not merely similar to his own; in several respects – for example, the firebombing of their home in 2004 and the applicant's experiences in school – they were identical. There was also a direct personal nexus between the applicant and the attacks Ms. Slepcikova suffered when they were together and the treatment their daughter experienced at school.

[41] Given these overlaps between his claim and the claims of his family members, it is understandable that the applicant placed significant weight before the RPD and then before the RAD on the fact that his family members had been recognized by Canada as Convention refugees.

[42] The RAD dealt with this issue as follows:

> The RPD was not persuaded by the evidence regarding the treatment of the Appellant's relatives. It noted that "each claim . . . must be determined independently based on the facts and evidence relevant to the particular claimant" [footnote omitted] and that it ultimately fell to the Appellant "to establish that he has good grounds for fearing persecution" should he return to the Czech Republic.
>
> I agree with the RPD's assessment. The finding that the Appellant's relatives and common-law wife would face a serious possibility of persecution if they returned to the Czech Republic due to their Roma ethnicity was based on their particular circumstances. In the absence of evidence that the Appellant

> shares, at least in part, those circumstances, I am not in a position to find that he shares their profile. That the Appellant, like his relatives and common-law wife, is of Roma ethnicity is not a sufficient basis to find that they share a similar profile. To find otherwise would be to find that all Roma in the Czech Republic may be said to face a serious possibility of persecution. As noted, this is not supported by the country condition evidence.

[43] The applicant contends that this assessment of the relationship between his claim and the claims of his family members is unreasonable. I agree.

[44] There is no question that every claim for protection must be determined on its own merits. Nor can there be any suggestion that the RPD (or the RAD) is bound by the determination of another panel in another matter, even a matter involving members of a claimant's family. See *Ruszo v Canada (Citizenship and Immigration)*, 2019 FC 296 at para 11 and the cases cited therein. However, where, as is the case here, there are substantial similarities between the circumstances of the claimant and those of others whose claims have been accepted, if a different outcome is to be reasonable, the decision maker must provide a reasoned explanation distinguishing the earlier positive decisions: see *Ruszo* at paras 12-18 and the cases cited therein. That did not happen here. Instead, the RAD finds that the sole common element between the applicant's claim and those of his family members is their Roma ethnicity. This completely disregards the fact that all of the claims rested in part on the 2004 firebombing incident along with several other significant common experiences. The RAD failed to consider that the applicant and his family members were not merely similarly situated by virtue of their Roma ethnicity; they all also relied to a significant degree on the very same experiences to support their claims.

[45] As *Vavilov* emphasizes, “the exercise of public power must be justified, intelligible and transparent, not in the abstract, but to the individuals subject to it” (at para 95). Where, as in the determination of a claim for refugee protection, the impact on an individual’s rights and interests is severe, “the reasons provided to that individual must reflect the stakes” (*Vavilov* at para 133). A party before the RAD (or the RPD, for that matter) is “entitled to expect that like cases will generally be treated alike and that outcomes will not depend merely on the identity of the individual decision maker” (*Vavilov* at para 129). If there is a reasoned basis for distinguishing the claims of the applicant’s family members from his, the RAD did not provide it. This leaves the decision lacking in justification, transparency and intelligibility on a central and significant matter.

## VI. CONCLUSION

[46] For these reasons, the application for judicial review must be allowed and the matter remitted for reconsideration by the RAD.

[47] While I have found that it is not necessary to address the RAD’s determination that the treatment the applicant experienced in the Czech Republic did not amount to persecution, this should not be taken as suggesting that I would have found that determination to be reasonable. Should the applicant continue to pursue this ground of appeal when the matter is reconsidered, it will be for the RAD to determine it anew, on the whole of the record before it.

[48] Finally, the parties have not suggested any serious questions of general importance for certification under paragraph 74(d) of the *IRPA*. I agree that none arise.

**JUDGMENT IN IMM-1014-21**

**THIS COURT'S JUDGMENT is that**

1. The application for judicial review is allowed.
2. The decision of the Refugee Appeal Division of the Immigration and Refugee Board of Canada dated January 14, 2021, is set aside and the matter is remitted for redetermination by a different decision maker.
3. No question of general importance is stated.

"John Norris"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-1014-21 |
| **STYLE OF CAUSE:** | LUBOMIR FERKO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | HELD BY VIDEOCONFERENCE |
| **DATE OF HEARING:** | FEBRUARY 28, 2022 |
| **JUDGMENT AND REASONS:** | NORRIS J. |
| **DATED:** | SEPTEMBER 28, 2022 |

**APPEARANCES:**

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