Federal Court Cour fédérale

Date: 20240903

Docket: IMM-5427-22

Citation: 2024 FC 1362

Ottawa, Ontario, September 3, 2024

PRESENT: Mr. Justice Pentney

BETWEEN:

RICHARD SEBOK

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Richard Sebok, seeks judicial review of the decision refusing his Pre-Removal Risk Assessment ("PRRA") application.

[2] The Applicant is a citizen of Hungary and is a member of the Roma ethnic minority. He has been in Canada since 2011, and says he fled Hungary after suffering prolonged discrimination and violence as a Roma. His refugee claim has followed an unusual and lengthy path, as explained in more detail below.

[3] In summary, the Applicant's refugee claim was dismissed in 2014, but that proceeding was tainted because his lawyer, Joseph Farkas ("Mr. Farkas"), was subsequently found to have failed to provide competent representation to a large number of Roma refugee claimants. After several procedural steps detailed below, the Applicant applied for a PRRA in 2021. The Officer denied the PRRA in March 2022, having found that the Applicant's evidence failed to show that he was at risk of harm in Hungary and that the Applicant had failed to rebut the presumption of state protection in that country.

[4] The Applicant seeks judicial review of this decision. He says that the PRRA Officer denied him procedural fairness by making veiled credibility findings without giving him the opportunity to respond and that the decision is unreasonable because the Officer ignored his sworn testimony. He also challenges the finding that he failed to overcome the Refugee Protection Division's ("RPD"), state protection findings.

[5] For the reasons set out below, I find the decision to be unreasonable. I will therefore grant the application for judicial review.

I. Background

[6] The Applicant fled to Canada from Hungary in 2011, and claimed refugee status. He said that he encountered various forms of discrimination as a member of the Roma ethnic minority, including several racially motivated attacks. This included an attack by Hungarian students while he was in a trade boarding school; an assault while he worked as a welder; an attack by Hungarian youth while he was at a public works program site for recipients of social assistance;

and an attack by members of the Hungarian Guard. He required medical treatment following several of these incidents, and tried to report the trade school incident to the police, but they refused to take his complaint.

[7] Following the attack by the Hungarian Guard, the Applicant fled to Canada with the financial support of his mother. He made a claim for refugee protection, with the assistance of his then counsel, Mr. Farkas, who was representing many Roma refugee claimants at that time.

[8] The RPD denied the Applicant's refugee claim, finding that his credibility was diminished by inconsistencies between the documents he filed in support of his claim – in particular, his Personal Information Form ("PIF") and his oral testimony at the hearing. The RPD also found he had not taken reasonable steps to seek state protection in Hungary.

[9] Under the system in place at that time, the Applicant could not appeal his case to the Refugee Appeal Division. His then counsel, Mr. Farkas, filed an application for leave to seek judicial review of the RPD decision, but leave was dismissed by this Court.

[10] The Applicant was scheduled for removal on February 10, 2016. He was not eligible for a PRRA at that time, because Hungary was listed as a Designated Country of Origin and he was thus subject to a three-year bar on submitting a PRRA. The Applicant sought – and was granted – a stay of removal on the basis that he would face irreparable harm if he was removed to Hungary.

[11] Several subsequent events set the stage for the current proceeding. First, Mr. Farkas, who represented the Applicant in preparing for and during his RPD hearing and in his application for leave, was found to have engaged in professional misconduct with respect to the services he provided to Roma refugee claimants: *Law Society of Upper Canada v Farkas*, 2016 ONLSTH 149; affirmed 2018 ONLSTA 2; appeal dismissed 2019 ONSC 2028 (Div. Ct). In particular, Mr. Farkas was found to have breached Ontario's *Rules of Professional Conduct* by preparing inadequate PIFs that were below the standards of a competent lawyer and failing to adequately supervise his staff in the preparation of these documents.

[12] Second, in 2019, the three-year PRRA bar on refugee claimants from Designated Countries of Origin was found to violate section 15 of the *Canadian Charter of Rights and Freedoms*: *Feher v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 335. Consequently, the three-year PRRA bar no longer applied to the Applicant. During this period, the Applicant remained in Canada under the authority of the stay of removal that he had been granted.

[13] In June 2021, the Applicant was provided with the opportunity to submit a PRRA application. He argued that the PRRA Officer should not rely on the RPD's credibility assessment in light of the misconduct findings made against Mr. Farkas, and he requested an oral hearing if the Officer had any credibility concerns. He submitted medical evidence documenting the various injuries he had sustained because of the attacks in Hungary, and filed an affidavit explaining the racist nature of these attacks and the injuries he suffered. In addition, the

Applicant filed country condition evidence to show how the situation in Hungary had changed since the RPD hearing, in particular the declining state of affairs for its Roma population.

II. Decision Under Review

[14] The PRRA Officer denied the Applicant's application. The Officer began by acknowledging the incompetent representation the Applicant had received before the RPD. Because of that, the Officer declared that they would accept all of the Applicant's evidence as new and that they would place no reliance on the RPD's credibility findings. The Officer stated they had not conducted a credibility assessment. Instead, the decision turned on the insufficiency of the Applicant's evidence and his failure to rebut the presumption of state protection.

[15] The PRRA Officer noted that the objective evidence showed that members of the Roma ethnic minority experience discrimination in a range of settings in Hungary, including from police and state authorities. However, the jurisprudence of this Court confirmed that the mere fact of being of Roma ethnicity in Hungary was not sufficient to establish a risk of harm on return: *Balogh v Canada (Citizenship and Immigration)*, 2016 FC 426 at para 19. The Officer noted that the Applicant had secured housing and found employment while he was in Hungary, although he had experienced discrimination while at work. The claim that the Applicant would be denied health care was contradicted by his evidence that he had previously received medical treatment. The Officer concluded that the potential discrimination faced by the Applicant in Hungary would not amount to persecution.

[16] In regard to the Applicant's claim that he suffered racist attacks, the PRRA Officer noted that the medical reports he submitted did not "sufficiently establish that the injuries were caused specifically from racist attacks." The Officer's treatment of this evidence is a key point of contention, and is worth citing at length:

> The applicant indicates that he was attacked on several occasions throughout his time in Hungary. I note that he has included several medical reports in the submissions. The first one from 2009 indicates that he fell down at work and had pain in his left wrist. The report from 2008 indicates that something went into his eye at work. The 2010 report shows that the applicant had an open wound on his scalp, which healed 5 days later. While I [*sic*] accept that the applicant required medical attention as per the reports, I find that they do not sufficiently establish that the injuries were caused specifically from racist attacks. Two of the medical reports suggest that the injuries were caused by accidents at work, while the third does not provide an explanation. There is no other evidence on file to support that the incidents were based on his Roma ethnicity.
>
> Based on this information, I find that the applicant has not provided sufficient evidence to suggest that the injuries were based on the applicant's Roma ethnicity.

[17] The Officer went on to discuss the question of state protection. This portion of the decision is also central to the analysis that follows, and the key passage is set out below:

> Even if the applicant had established that he was attacked, he has not overcome the state protection finding made by the RPD. The applicant never attempted to seek protection from the police other than one time in 2003 while he was in high school. However, he did not pursue the matter beyond the two officers who refused to take his complaint. As such, the applicant did not test the state mechanisms in place and were reasonably available to him in Hungary. The applicant has not provided any additional explanation for this beyond his subjective belief that the state protection agencies would not protect him. I note that the applicant has a duty to seek State protection before soliciting international

> protection (see Ward, supra). When the State in question is a democratic State, the applicant must do more than simply show that he or she went to see some members of the police force and that his or her efforts were unsuccessful. As a result, I find that the applicant has not overcome the findings made by the RPD.

[18] The Officer then reviewed the other evidence submitted by the Applicant, finding it not persuasive concerning his PRRA claim. Based on the analysis set out above, the Officer found that the Applicant had not established that he faced a risk on his return to Hungary, and denied his PRRA application.

[19] The Applicant seeks judicial review of this decision.

III. Issues and Standards of Review

[20] The Applicant submits that he was denied procedural fairness because the PRRA Officer made veiled credibility findings against him without giving the opportunity to respond. He also argues that the Officer's treatment of his evidence about the racist attacks was unreasonable, and that the state protection finding is misguided because the Officer never analyzed the evidence of the current situation in Hungary as opposed to that which existed many years previously when the RPD conducted its assessment.

[21] I find the determinative issues in this case concern the Officer's treatment of the evidence of the racist attacks and the assessment of state protection. I am not persuaded that the Officer made any veiled credibility findings, and there is no question of procedural fairness.

[22] In light of my finding on the determinative issue, the only question in this case is whether the Officer's decision is reasonable. This is assessed under the framework for reasonableness review set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, and recently confirmed in *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 2.

[23] In summary, under the *Vavilov* framework, a reviewing court "is to review the reasons given by the administrative decision maker and determine whether the decision is based on an internally coherent chain of reasoning and is justified in light of the relevant legal and factual constraints" (*Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at para 2 (*Canada Post*)). The reviewing court must look for any "fatal flaws" in the reasons' overarching logic (*Vavilov* at para 102).

IV. Analysis

A. *The Racist Attacks*

[24] The Applicant argues that the PRRA Officer's treatment of the evidence about the racist attacks was either based on a veiled credibility finding (discounting his affidavit explaining the nature of the incidents), or it is flawed because the Officer ignored his affidavit and thereby failed to consider how the medical evidence corroborates his sworn testimony. The Respondent counters that the Officer's description of the medical evidence is accurate, and thus there is no basis to question the reasoning.

[25] As explained above, I am not persuaded that the Officer made any veiled credibility finding, because there is simply no discussion of the Applicant's evidence in this part of the decision. If anything, it appears that the Officer accepted the Applicant's narrative regarding his treatment in employment. In an earlier part of the decision, the Officer noted that the Applicant "indicated that he has encountered discrimination [in employment]…" Later, the Officer found that the Applicant received medical treatment "after suffering injuries from an attack." This indicates that the Officer was aware of the Applicant's narrative, and did not question his evidence about why he was attacked or the nature of injuries he suffered.

[26] However, the Officer's discussion of the evidence about the racist attacks is not intelligible, given the Applicant's sworn evidence about the nature of these incidents. I agree with the Respondent that the Officer's description of the medical evidence is accurate. The medical reports do not state that the Applicant was attacked because he is a member of the Roma ethnic minority. As the Applicant properly points out, there is ample case law noting that it is generally not persuasive for a medical report to comment on the cause of the injury or describe the context because the doctor did not witness the events: see, for example: *Tabatadze v Canada (Citizenship and Immigration)*, 2016 FC 24 at para 10; *Cortes Lobaton v Canada (Citizenship and Immigration)*, 2019 FC 1241 at para 16. It is therefore not reasonable to discount the medical reports for their failure to indicate that the injuries occurred during racist attacks.

[27] The main problem with the analysis is the following statement, which immediately follows the Officer's discussion of the medical reports: "There is no other evidence on file to support that the incidents were based on his Roma ethnicity." This statement cannot be squared

with the Applicant's sworn evidence describing the nature of the incidents in some detail. For example, the Applicant describes the attack by a co-worker that left metal shards in his eye (which is consistent with the medical report), the attack by Hungarian youth that resulted in his broken wrist (consistent with the medical report), as well as the assault by the Hungarian Guard during which he suffered a wound to his head (consistent with the medical report).

[28] The Officer appears to have mistaken the purpose of the medical reports, which were submitted to corroborate the Applicant's affidavit evidence. It was open to the Officer to find that the medical reports did not, in fact, corroborate the Applicant's evidence. On this point, the Officer would have to compare the dates of the reports and nature of the injuries with the details set out in the Applicant's narrative. If he said he had a broken wrist but the medical report was for a sprained ankle, it would not corroborate his story. On the other hand, if the dates of the reports and nature of the injuries line up, the medical reports could bolster his case. In addition, it was also open to find that the Applicant's affidavit evidence was not credible or persuasive for some reason. Either of those findings were open to the Officer, but they needed to be explained and justified, in light of the totality of the relevant evidence in the record.

[29] It was not open to the Officer to ignore the Applicant's evidence and conclude that there was "no other evidence" linking the injuries to racist attacks. That finding falls outside of the "factual matrix" that constrained the Officer's decision-making. That is unreasonable.

[30] With this, we turn to the second determinative issue: the finding on state protection.

B. *The State Protection Analysis*

[31] The Applicant's PRRA was based on his risks in Hungary as a member of the Roma ethnic minority. As noted above, the Officer rejected his PRRA, in part, because the Applicant had "not overcome the state protection findings made by the RPD." The problem with this conclusion is that it fails to account for two key factors: the RPD's findings were vitiated by the former counsel's incompetent representation, and the Officer failed to account for the significant passage of time between the date of the RPD's assessment and the PRRA determination.

[32] The Officer accepted the Applicant's claim that the RPD's findings were undermined by the subsequent ruling that his former counsel had failed to provide competent representation. Although the Officer focused on the RPD's credibility determination, it is difficult to understand how it could be limited to that aspect. The finding of counsel's incompetence rested in part on the lack of care and attention in preparing the PIF, and also on the failure to provide adequate supervision to the staff members who interacted with the claimants in preparing those forms. One aspect of that could have been a failure to draw out all of the individual's interactions with state authorities or any explanation for why the person did not seek help from the authorities, which would be relevant to the state protection analysis. It is not clear why the Officer discounted the RPD's credibility findings while giving full weight to its state protection analysis, without explaining the basis for treating them differently.

[33] Even setting that aside, a more significant problem relates to the Officer's reliance on the RPD's assessment, given the fact that it was related to the situation in Hungary in 2014 rather

than the state of affairs as presented in the current country condition evidence presented by the Applicant. That evidence showed, among other things, that Hungary was no longer considered a democracy and was now a “transitional” regime between democracy and dictatorship; several of the institutions the RPD relied on as offering avenues of protection had either been abolished or undermined through inadequate funding; and the police and authorities had failed to protect members of the Roma ethnic minority from attacks. Evidence about the change in conditions in Hungary was, in part, the basis for the grant of a stay of removal to the Applicant in February 2016.

[34] Once again, it was open to the Officer to assess the current evidence as a whole, and to determine which elements they found to be most persuasive. It was not open to the Officer to ignore it. I find the Officer’s statement that the Applicant had failed to overcome the RPD’s state protection finding to be a telling indication that the Officer failed to engage with the reasons why this case was different from others. I agree – to a point – with the Respondent’s argument that a PRRA is not an appeal or reconsideration of an RPD decision, and state protection findings made following a full and fair hearing are not to be re-examined: *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 at para 12. In that sense, a PRRA applicant usually needs to provide evidence of some change in their risk that arose subsequent to the RPD hearing.

[35] However, this is an unusual case, in part because of the lengthy period between the RPD hearing (2014) and the PRRA (2021-22). It is also noteworthy that the Applicant provided substantial evidence about the evolution of the situation in Hungary during the intervening period, in particular the worsening treatment of the Roma ethnic minority and the state’s failure

to provide reasonable protection for them. This was the key evidence the Officer needed to examine in carrying out the PRRA analysis. It bears repeating here that a PRRA Officer is tasked with examining the forward-facing risks a claimant faces at the time of their removal: *Demesa v Canada (Citizenship and Immigration)*, 2020 FC 135 at para 16.

[36] I find that the Officer's state protection analysis fails to demonstrate the hallmarks of reasonableness, namely justification, transparency and intelligibility: *Vavilov* at para 99. On this point, it should be recalled that the PRRA was, in effect, the first full and fair opportunity for the Applicant to have his risks assessed, in light of the shadow that the former counsel's incompetence cast over the RPD proceeding. The stakes for the Applicant were extremely high, and the Officer's burden of justification was correspondingly great: *Vavilov* at para 133.

V. Conclusion

[37] For the reasons set out above, I find the decision to be unreasonable.

[38] The PRRA Officer's treatment of the evidence on racist attacks appeared to overlook the Applicant's sworn testimony, and thereby failed to assess whether the medical evidence he submitted corroborated his narrative. In addition, the Officer's finding that the Applicant had failed to overcome the RPD's state protection analysis is unreasonable because it failed to account for the passage of time or the changing conditions in Hungary and their impact on the risks faced by the Applicant.

[39] While neither of these questions, on their own, may have warranted quashing the decision as a whole, their cumulative effect is sufficiently central and important as to call the entire decision into question: *Vavilov* at para 100.

[40] The application for judicial review is granted, and the decision is quashed and set aside. The matter is remitted back for reconsideration by a different Officer. In light of the passage of time, the Applicant shall be granted the opportunity to provide further evidence and make new submissions, should he wish to do so.

[41] There is no question of general importance for certification.

JUDGMENT in IMM-5427-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The PRRA decision is quashed and set aside. The matter is remitted back for reconsideration by a different Officer. The Applicant shall be provided with the opportunity to make further submissions, should he wish to do so.

3. There is no question of general importance for certification.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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