Federal Court  Cour fédérale

Date: 20161128

Docket: IMM-1118-16

Citation: 2016 FC 1312

Ottawa, Ontario, November 28, 2016

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

LUKAS CECH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [the Act or IRPA], of a Senior Immigration Officer's [Officer] February 9, 2016 negative pre-removal risk assessment [PRRA] decision [Reasons].

I. Background

[2] On November 3, 2011, the Applicant, a Slovakian citizen of Roma ethnicity, arrived in Canada and filed a refugee claim on the basis that he would be subject to physical violence upon return to his home country.

[3] The Applicant says that his fear of violence is based on three main events that occurred in Slovakia:

(i) in 2002, the Applicant (age 10) was shot by a police officer in a playground, for which he spend two months in hospital, and for which the attacker was never prosecuted;
(ii) in 2006, the Applicant (age 14) was attacked by a skinhead and suffered a concussion. The incident was investigated, but no criminal charges were laid; and
(iii) in 2011, the Applicant was attacked by a group of skinheads with baseball bats.

[4] The Applicant states that he terminated his studies because of racially-motivated violence, discrimination and harassment at school. In addition, he also alleges discrimination in employment in Slovakia based on his race.

[5] The Refugee Protection Division [RPD or the Board] rendered a negative decision on August 31, 2012. While the Board did not question the Applicant's credibility, it found on a balance of probabilities that Slovakian authorities dealt with the incidences in accordance with the law. Relying heavily on Slovakia's recent efforts and state-run initiatives and programs to counter violence and discrimination against the Roma, the Board dismissed the refugee application. The Applicant did not perfect his judicial review application of the RPD's decision because he says he was unsuccessful in receiving legal aid funding.

[6] For his PRRA, the Applicant submitted fresh evidence alleging that country conditions had deteriorated for the Roma in Slovakia. The Applicant also submitted two pieces of previously untendered evidence, both relating to the 2006 incident: a medical report documenting his 2006 injuries, and a criminal police report, documenting the decision not to prosecute the assailant.

[7] In the PRRA refusal, which occurred three and a half years after the negative RPD decision, the Officer concluded that the Applicant failed to provide sufficient objective country condition evidence of new risk developments that had occurred since the RPD decision.

[8] Furthermore, the Officer found that the medical and police reports did not constitute new evidence as they were "materially the same" as those provided to the RPD, based on the analysis in *Raza v MCI*, 2007 FCA 385 [*Raza*].

II. Issues

[9] The parties agree that PRRA decisions, absent procedural unfairness, attract the deferential standard of reasonableness, as they are a highly fact-driven exercise by nature (*Subramaniam v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1405 at para 11), such that this Court will not intervene unless the Officer's Reasons lack justification, transparency and intelligibility: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47.

[10] The parties, however, disagree on the reasonability of the Reasons. The Applicant contests two of the Officer's findings, in (i) overlooking key objective evidence, and (ii)

excluding key subjective evidence on the basis of materiality. The Respondent counters that Officer made reasonable findings. I agree with the Applicant for the following reasons.

III. Analysis

(i) Objective (Country Condition) Evidence

[11] The Officer found Romani conditions in Slovakia to be "far from perfect". Yet he found that they remain "materially the same as they were at the time of the RPD's rejection" (Applicant's Record at 12 [AR]). In arriving at this conclusion, the Officer failed to consider several pieces of evidence that were inconsistent with this statement.

[12] It is well established that administrative decision-makers, including PRRA Officers, need not expressly reference every piece of documentary evidence in the record (*Pusuma v Canada (Minister of Citizenship and Immigration)*, 2015 FC 658 at para 56; *Botros v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1046 at para 25). However, when referring in some detail to evidence, one cannot remain silent on relevant contradictory evidence pointing to the opposite conclusion (*Varadi v Canada (Minister of Citizenship and Immigration*, 2013 FC 407 at para 15, citing *Cepeda-Gutierrez v Canada (Minister of Citizenship & Immigration)*, [1998] FCJ No 1425 (FCTD) at para 17).

[13] Here, the Officer accepts that "the situation for the Roma in Slovakia is poor", but unchanged from 2012 (AR at 12). While the Officer says that he considered all documentary

evidence, the only document the Officer specifically quotes is the 2014 U.S. Department of State [DOS] Report, and footnotes the 2011 U.S. DOS Report.

[14] The Applicant submitted significant documentary evidence supporting his subjective fears, an eight-page summary of which was provided to the Officer in PRRA submissions. For instance, a 2014 report for the UN Human Rights Council noted the rise of physical and verbal violence against the Romani, citing specific examples of attacks, including by police officers, and the feeble response of the criminal justice system. These observations were all post-2012 (AR at 113). Another article submitted by the Applicant points to the 2013 beheading of a Roma man and murder by crossbow of another (AR at 136-137). None of this evidence was mentioned by the Officer. The new evidence also noted the failure to implement the much-touted 2012 National Roma Integration Strategy, which was a central pillar of the RPD decision.

[15] In this case, it was not certainly unreasonable for the Officer to rely on the 2014 and 2011 DOS Reports. What was unreasonable was the Officer's failure to address the contradictory evidence, having specifically and only cited those two DOS Reports in support of the unchanged country conditions finding.

(ii) Subjective (Medical and Police) Evidence

[16] The Reasons with respect to materiality of the new police and medical reports under subsection 113(a) of the Act are also problematic. The evidence reveals that the Applicant's 2006 attacker was identified by police, but no criminal charges were pursued because the Applicant's injuries were not serious enough (under Slovakian law, injuries need to last for at

least seven days for criminal proceedings to ensue). Similarly, the Applicant produced a hospital report relating to the injuries, which had not been before the RPD.

[17] The Respondent contends that the Officer's rejection of the reports on materiality grounds was reasonable for the following two reasons. First, the Board did not take issue with the credibility of the Applicant, and thus the incident was implicitly accepted. Second, the police report (based on the medical documentation) simply confirms the RPD's opinion that the Slovakian authorities would have probably addressed the attack against the Applicant in accordance with the law.

[18] I disagree with the Respondent. Specifically, I find the Officer's Reasons to be problematic in that the Officer wrote:

> I find that these [medical and police] reports were either considered by the RPD, or they are materially the same as the evidence that was accepted by RPD (AR at 12).

[19] This finding lacks transparency. The evidence was either before the Board, or it was not material. Or perhaps it was both. But the Officer does not make a finding either way. I find this rationale unreasonable for the following reasons.

[20] The Officer cannot hedge all bets and reject the evidence, because of one or the other. To do so amounts to equivocation, and a therefore unreasonable decision. Similarly, in *Britz v Canada (Attorney General)*, 2016 FC 1286 at paras 54-60 [*Britz*], this Court held that the Minister cannot base its decision on "maybe this or maybe that" findings. While the context in *Britz* was different than the present case (i.e. a security certificate for the transportation industry),

I nevertheless agree with Justice Brown's rationale that such findings amount to an equivocation, not a reasonable decision.

[21] The flaw in the Officer's reasoning is especially relevant when one breaks it down, because each of these binary findings needs further explanation were they to be justified.

[22] First, the Officer's finding that the reports may have been considered by the RPD is factually incorrect. Indeed, both counsel for the Applicant and Respondent agree that they were not placed before the RPD.

[23] Second, the Officer cannot simply write a general statement that the reports are not admissible because they are materially the same as evidence presented before the RPD, without providing any further justification or explanation. *Raza* holds that evidence that could have, on a balance of probabilities, changed the RPD's finding should be admitted (at para 13). For instance, the police report could have impacted the Board's finding on how the Slovakian criminal justice system addresses assaults against Roma, including children.

[24] Furthermore, the Officer writes: "I find that this incident [the 2006 incident] is referred to in the above narrative that the applicant provided to the RPD for consideration" (AR at 12). However, the mere fact that an issue was raised before the RPD does render new evidence inadmissible under subsection 113(a) of the Act, such that the medical and police reports should not be discounted simply because the 2006 incident was considered by the Board in 2012 (*Chen*

v Canada (Minister of Citizenship and Immigration), 2015 FC 565 at para 15). Again, the Officer's Reasons lack transparency in this regard.

IV. Conclusion

[25] This Court's role is not to usurp that of PRRA Officers, but on the other hand, it must return their decisions if unreasonable. Here, the Court will do just that due to a lack of justification and transparency, particularly with respect to the failure to properly address (i) contradictory objective and (ii) new subjective evidence. This application is accordingly granted and the PRRA will be sent back for reconsideration by a different officer.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed and the matter is to be sent back for redetermination by a different PRRA officer;

2. There is no question for certification; and

3. No costs will be issued.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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