Federal Court  Cour fédérale

Date: 20181001

Docket: IMM-5238-17

Citation: 2018 FC 972

Ottawa, Ontario, October 1, 2018

PRESENT: The Honourable Mr. Justice Norris

BETWEEN:

MARK SZALAI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] The applicant is a young man of Roma ethnicity from Hungary. He has sought protection in Canada twice – first in 2011, as a fourteen year old child included in his family's claim for refugee protection, and again in 2016, under section 112(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. Both of these efforts failed.

[2] After the Refugee Protection Division [RPD] rejected their original claim, the applicant and his family were deported to Hungary in 2014. However, as a result of further experiences there, they decided to return to Canada and renew their claims for protection.

[3] The applicant's father, mother and sister arrived on September 16, 2016. They submitted pre-removal risk assessment applications under section 112(1) of the *IRPA* (commonly known as PRRA applications). These applications were all denied. Leave to challenge the denials on judicial review was refused in April 2017.

[4] The applicant returned to Canada slightly later than the others – on October 14, 2016. He was found to be ineligible for referral to the RPD because his earlier claim for refugee protection had been rejected (see section 101(1)(b) of the *IRPA*). A removal order was issued but the applicant was invited to make a PRRA application. He submitted this application on November 24, 2016.

[5] A Senior Immigration Officer refused the application on September 13, 2017. The officer gave lengthy reasons for her decision but she stated the principal ground for refusing the application succinctly: "This application fails for the same reasons as the RPD rejected the original refugee claim. The applicant has failed to provide sufficient evidence to rebut the presumption of state protection."

[6] The applicant now applies for judicial review of this decision under section 72(1) of the *IRPA* on the ground that the officer's assessment of the adequacy of state protection is unreasonable.

[7] I have concluded that this application should be allowed. In considering whether or not the applicant had discharged the burden of rebutting the presumption of state protection, the officer unreasonably increased that burden by expecting the applicant to displace the RPD's finding that there is adequate state protection available to the applicant in Hungary and to persuade her to reach a different conclusion. As a result, the PRRA application must be reconsidered.

II. BACKGROUND

[8] In 2011, when the applicant was 13 years of age, he and his immediate family arrived in Canada and made claims for refugee protection on the basis of their experiences in Hungary. The applicant's father was the principal claimant and acted as the designated representative of the minor children, including the applicant. Later, the applicant's grandfather and step-grandmother also arrived in Canada and made refugee claims. All the claims were eventually joined and dealt with in a single proceeding before the RPD.

[9] On April 11, 2013, the RPD denied the claims, principally because of negative credibility findings with respect to the applicant's father but also on the basis that the presumption of adequate state protection had not been rebutted. In brief, the RPD did not believe the applicant's father's allegations of persecution but, in any event, there were forms of adequate state

protection to which the applicant's father could have had recourse but did not and to which he could have recourse if necessary if he returned to Hungary. The RPD concluded that the applicant's father was not a Convention refugee. Since the other claims depended entirely on the father's, they were rejected as well.

[10] The applicant and his family were deported from Canada in 2014.

[11] When they returned to Hungary, the applicant and his family lived briefly in Martonyi and then moved to Edeleny. The applicant entered school but states that he was placed in a Grade Six class with students who were 12 years old, nearly five years younger than himself. He also states that most of the students in the school were white. Other students would beat him every day between classes. The applicant states that his gym teacher would also beat him and abuse him verbally with ethnic slurs. The gym teacher did not let Roma students change with white Hungarians or shower after gym class. The applicant states that when he complained to the school principal, she accused him of lying. When the applicant complained again, the principal and teacher said that if he wanted to shower he could stand in the rain.

[12] The applicant states that he stopped attending school after Grade Eight because he did not want the abuse he had suffered in elementary school to continue.

[13] The applicant's father prepared an affidavit in support of his own PRRA application. In it, he describes harassment by neighbours and neo-Nazis while the family was living in Edeleny.

One night in the summer of 2015, unknown people dressed in black attempted to break into the family's home. The applicant adopted his father's evidence in his own affidavit.

[14] The applicant also states that in the summer of 2015 his girlfriend's ex-boyfriend began coming by their home demanding money and, on several occasions, beating him. The applicant's father states that he called the police three or four times because of these incidents but they never helped. According to the applicant's girlfriend (whose evidence the applicant also adopted), her ex-boyfriend threatened to kill the applicant if he called the police.

[15] During the night of August 20, 2016, the family heard gunshots outside their home. Later, they found their two pet dogs had been shot to death. They called the police at once but the police did not arrive until the following day. As a result of this event, the applicant and his family left Edeleny and moved to back to Martonyi, where the applicant's paternal grandparents lived.

[16] The applicant's father states that after their dogs were shot the family feared for their lives and they decided to flee to Canada again.

[17] The police closed their investigation into the shooting of the dogs after a month because they could not identify the perpetrator(s).

III. DECISION UNDER REVIEW

[18] As noted above, the principal ground on which the officer refused the PRRA application was that the applicant had "failed to provide sufficient evidence to rebut the presumption of state protection."

[19] The officer addressed the specific grounds relied on by the applicant as follows.

A. *Mistreatment in School*

[20] The officer appears to have accepted that the mistreatment at school described by the applicant had happened. The officer found, however, that the applicant did not provide sufficient evidence that he or his family sought redress for this mistreatment. The officer commented that the RPD had noted various avenues of redress available, such as the Equal Treatment Authority. The documentary evidence did not suggest that these avenues were no longer available yet neither the applicant nor his family had had recourse to them.

B. *Threats from Girlfriend's Ex-partner*

[21] The officer noted that the applicant described being assaulted by his girlfriend's ex-partner on three occasions. The officer also noted that the applicant's father recalls calling the police three or four times but they never assisted. While the officer appears to accept that these events occurred, she found that the applicant had failed to provide evidence that he himself had filed a complaint with police for any of the assaults, or that he filed a complaint regarding the lack of response from the police. The officer concluded that the applicant "failed to provide

evidence that he pursued the matter with the avenues of redress available within the security forces or with other authorities mandated to protect minorities' rights."

C. *Killing of the Family's Dogs*

[22] The officer reviewed the evidence concerning the killing of the family's two dogs. She appears to accept that the event occurred. She noted that the police had responded to the request for assistance. The officer also noted that the police had closed the investigation because they could not identify the perpetrator(s). The officer concluded that this incident and the police response were not evidence of a failure of state protection.

D. *Systemic Police Discrimination*

[23] The officer noted that while the applicant did not allege that he personally had experienced mistreatment by the police, he did allege that the police had not responded appropriately to his requests for assistance. The applicant relied on documentary evidence of police corruption and racism against Roma people in Hungary. The applicant also relied on documentary evidence showing that complaint bodies were led by government loyalists who were biased against complainants. Further, he maintained that there was a systemic failure to prosecute hate crimes. While the officer acknowledged the evidence of corruption and police performance, she was persuaded by the documentary evidence that "mechanisms are effective and that disciplinary measures are undertaken including criminal prosecutions where warranted."

[24] With regard to the failure of the authorities to investigate or prosecute hate crimes, the officer found that the documentary evidence suggested that low prosecution rates were due to institutional problems rather than overt racism. For example, the officer cites a Council of

Europe report describing the "high workload and turnover among those who are trained to investigate hate crimes" in Hungary and a results-oriented approach that deters employees from investigating more complex cases. The officer concluded that the evidence did not show "the authorities unwillingness to provide protection from criminal acts, but instead that they may rely on simply criminal code statues instead of pursuing the more challenges hate crimes [*sic* throughout]."

E. *Evidence that Conditions had Deteriorated since the RPD Decision*

[25] The officer's decision ultimately turned on her conclusion that, while there have been some changes in the conditions in Hungary since the family's refugee claim was denied, these changes were not of such a degree as to warrant displacing the RPD's earlier finding of adequate state protection. In her decision, the officer set out the RPD's discussion of state protection at some length. The officer stated that "the responsibility to discharge the presumption of state protection with clear and convincing evidence continues to rest with the applicant." The officer found that the applicant's evidence failed to meet this burden. In particular, while the officer acknowledged "that state protection and avenues of redress are not perfect [. . .], the documentary evidence does not persuade me that conditions in Hungary have changed to a degree that the mechanisms relied on by the RPD in their rejection are no longer adequate." Later in the reasons, the officer reiterated that conditions in Hungary had not "changed to such a degree to displace the RPD's finding that there is adequate state protection available to this applicant in Hungary."

[26] The officer therefore concluded that there was less than a mere possibility that the applicant will face a risk of persecution in Hungary on account of his ethnicity and, further, that

he is unlikely to face a risk of cruel and unusual treatment, punishment or risk to life. The officer also found no substantial grounds that the applicant will face a risk of torture upon return to Hungary. Accordingly, the PRRA application was refused.

IV. STANDARD OF REVIEW

[27] It is well-established that PRRA decisions are generally reviewed on a reasonableness standard (*Lakatos v Canada (Immigration and Citizenship)*, 2018 FC 367 at para 13 [*Lakatos*]). Applying this standard, the reviewing court examines the decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determines "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). This includes any state protection analysis (*Canada (Citizenship and Immigration) v Neubauer*, 2015 FC 260 at para 11). The jurisprudence has established a clear test for state protection, however, and it is not open to a decision-maker to apply a different test. As a result, the issue of whether the proper test was applied is reviewable on a standard of correctness (*Ruszo v Canada (Citizenship and Immigration)*, 2013 FC 1004 at para 22; *Kina v Canada (Citizenship and Immigration*), 2014 FC 284 at para 24). A conclusion will not be rational or defensible if the decision-maker has failed to carry out the proper analysis (*Lake v Canada (Minister of Justice)*, 2008 SCC 23 at para 41).

V. ISSUE

[28] The determinative issue in this case is whether the officer's assessment of the adequacy of state protection for the applicant in Hungary is reasonable.

VI. ANALYSIS

[29] In *Lakatos*, Justice Diner observed that this Court "has repeatedly held that whether a state protection analysis will withstand scrutiny on judicial review is case-specific, and depends on how the decision-maker conducted its analysis in light of the evidence tendered with respect to the claimant's particular circumstances" (at para 23). See also, among other cases, *Molnar v Canada (Citizenship and Immigration)*, 2012 FC 530 at para 105; *Poczkodi v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 956 at para 42; *Olah v Canada (Citizenship and Immigration)*, 2016 FC 316 at paras 35 and 37; and *Ruszo v Canada (Citizenship and Immigration)*, 2018 FC 943 at para 28. As these cases demonstrate, this principle applies whether the issue of state protection was decided by the RPD, the Refugee Appeal Division [RAD], or a PRRA officer.

[30] The present case, of course, concerns a decision made by a PRRA officer under subsection 112(1) of the *IRPA*. This provision reads in relevant part as follows:

112. (1) A person in Canada […] may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force […]	112. (1) La personne se trouvant au Canada […] peut, conformément aux règlements, demander la protection au ministre si elle est visée par une mesure de renvoi ayant pris effet […]

[31] Generally speaking, absent concerns about security, criminality, and the like, an application under subsection 112(1) will be allowed if, at the time it is made, the applicant meets the definition of "Convention refugee" in section 96 of the *IRPA* or the definition of "person in need of protection" in section 97 of the *IRPA* (see *IRPA* sections 112(3) and 113(c)). A successful PRRA application confers refugee protection on the applicant (see *IRPA* section 114(1)).

[32] A failed refugee claimant may apply for a PRRA. The PRRA application is not an appeal or a reconsideration of the decision to reject the claim for refugee protection, but it may require consideration of some or all of the same factual and legal issues that were considered in the earlier, unsuccessful claim. As the Federal Court of Appeal observed in *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 [*Raza*], this potential for overlap creates "an obvious risk of wasteful and potentially abusive relitigation" in the PRRA application (para 12).

[33] The *IRPA* attempts to mitigate this risk by limiting the evidence that a failed refugee claimant may rely on in support of a PRRA application. Specifically, section 113(a) of the *IRPA* provides as follows:

113. Consideration of an application for protection shall be as follows:	113. Il est disposé de la demande comme il suit :
(*a*) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the	*a*) le demandeur d'asile débouté ne peut présenter que des éléments de preuve survenus depuis le rejet ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'il n'était pas raisonnable, dans les

circumstances to have presented, at the time of the rejection; […] .	circonstances, de s'attendre à ce qu'il les ait présentés au moment du rejet; […] .

[34] The Federal Court of Appeal held in *Raza* that this provision is "based on the premise that a negative refugee determination by the RPD must be respected by the PRRA officer, unless there is new evidence of facts that might have affected the outcome of the RPD hearing if the evidence had been presented to the RPD" (at para 13). To similar effect, in the context of a discussion of the rules of admissibility of evidence on appeals to the RAD, the Federal Court of Appeal stated with respect to applications under section 112(1) of the *IRPA* that "the PRRA officer must show deference to a negative decision by the RPD and may only depart from that principle on the basis of different circumstances or a new risk" (*Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 at para 47 [*Singh*]).

[35] Section 113(a) of the *IRPA* limits the evidence that a failed refugee claimant may offer in support of a PRRA application to evidence that is "new" in one of three possible senses: (1) the evidence arose after the refugee claim was rejected (e.g. because it relates to events that occurred after the rejection); (2) the evidence was not reasonably available when refugee protection was claimed; or (3) the evidence was reasonably available but the person could not reasonably have been expected in the circumstances to have presented it when refugee protection was claimed. Absent such new evidence, the negative refugee determination must be "respected" by the PRRA officer (*Raza* at para 13). Indeed, the rejection of the claim for refugee protection would presumably be determinative of the PRRA application. What I also take from the passages from *Raza* and *Singh* quoted above, however, is that when new evidence of material facts is properly before the PRRA officer under section 113(a) of the *IRPA*, no such respect is required. This is

because, in these circumstances, there is no risk of wasteful and potentially abusive relitigation. While broadly speaking the issues may be the same, the records are different.

[36] In the present case, no issue was raised about the admissibility of the evidence offered by the applicant in support of his PRRA application. This is not surprising. His evidence pertained to circumstances that arose after the refugee claim was rejected in 2013 – namely, the first-hand experiences of the applicant and his family after they returned to Hungary and what the applicant maintained were deteriorating conditions for Roma there since 2013. The new evidence related directly to the issues the PRRA officer had to determine. In such circumstances, the officer should have considered afresh, on the record before her, the question of whether the applicant had rebutted the presumption of state protection. Instead, the officer treated the RPD's finding that adequate state protection was available to the applicant in Hungary as something the applicant had to "displace." The RPD's finding, however, was made on the basis of a different record in the context of a refugee claim advanced primarily by the applicant's father, someone about whom the RPD had serious credibility concerns with respect to both his claims of persecution and the steps he claimed to have taken to seek redress for that persecution in Hungary before the family fled to Canada in 2011.

[37] This flaw in the officer's approach is similarly evident in her conclusion that the evidence relied on by the applicant had not "persuade[d]" her that the conditions in Hungary had "changed to a degree that the mechanisms relied on by the RPD in their rejection are no longer adequate." It is not disputed that the appropriate test in a state protection analysis requires an assessment of the adequacy of that protection at an operational level (*Lakatos* at para 21; *Galamb v Canada*

(Citizenship and Immigration), 2016 FC 1230 at paras 32-33; *Benko v Canada (Citizenship and Immigration)*, 2017 FC 1032 at para 18). The analysis must focus not only on the efforts of the state but on the actual results being achieved at the time of the application for protection (*Hercegi v Canada (Citizenship and Immigration)*, 2012 FC 250 at paras 5-6). While the burden rested on the applicant to rebut the presumption of state protection in these terms, in the circumstances of this case the officer should not have framed this as a matter of the applicant having to persuade her to come to a different conclusion than the RPD did over four years earlier.

[38] As noted above, whether the presumption of state protection has been rebutted in a given case, and whether that determination survives judicial review, depends on the evidence before the decision-maker in that particular case and how he or she has assessed it. Here, the officer required the applicant not only to rebut the presumption of state protection but also to overcome the RPD's earlier finding that the applicant benefited from adequate state protection in Hungary. That finding, however, was made in a separate proceeding and on the basis of a different record. By factoring the RPD's finding on state protection into her analysis as she did, the officer committed a reviewable error. As a result, her decision cannot stand.

VII. CONCLUSION

[39] For these reasons, the application for judicial review of the decision of the PRRA officer dated September 13, 2017, is allowed, the decision is set aside, and the matter is remitted for reconsideration by a different immigration officer.

[40] The parties did not suggest any questions of general importance for certification. I agree that none arise.

JUDGMENT IN IMM-5238-17

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed.
2. The decision of the Senior Immigration Officer dated September 13, 2017, is set aside and the matter is remitted for reconsideration by a different immigration officer.
3. No question of general importance is stated.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5238-17
STYLE OF CAUSE:	MARK SZALAI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JUNE 13, 2018
JUDGMENT AND REASONS:	NORRIS J.
DATED:	OCTOBER 1, 2018

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