Federal Court  Cour fédérale

Date: 20200211

Docket: IMM-2937-19

Citation: 2020 FC 233

Ottawa, Ontario, February 11, 2020

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

BEATA KOTAI
SZABOLCS BALOG
GYULA BALOG
GERGO BALGO
SZILVIA BALOG
TIBOR KOTAI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants are Hungarian citizens of Roma ethnicity. The Principal Applicant, Beata Kotai, sought refugee protection along with her father and her four children. Their refugee claim was denied on April 15, 2019 by the Refugee Protection Division [the RPD] on the basis

that there was adequate state protection and that the harassment they faced did not amount to persecution [the Decision].

[2] The Decision was a redetermination. Mr. Justice Mosley set aside and returned the first decision of the RPD on May 9, 2014.

[3] For the reasons that follow I have found that the RPD reasons show that the Decision is not based on an internally coherent chain of reasoning nor is it justified in light of the relevant legal and factual constraints. The result is that the reasons do not enable the Applicants or the reviewing Court to understand how and why the RPD arrived at the outcome it did.

[4] The Decision will be set aside and the matter returned for redetermination by a new panel that has not previously considered the claims made by the Applicants.

II. **Issues and Standard of Review**

[5] The RPD found that the discrimination and harassment suffered by the Applicants did not rise to the level of persecution. It also found that the Applicants had not rebutted the presumption of state protection. The Applicants challenge both findings as being unreasonable.

[6] There is now a presumption that the standard of review for an administrative decision is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 10. The presumption can be rebutted where the legislature indicates it intends a different standard to apply or the rule of law requires a correctness review. Neither is the case in this application. The standard of review for the Decision is reasonableness.

III. **The Decision**

[7] The RPD accepted the identity of the Applicants and reviewed the allegations of discrimination amounting to persecution that led them to seek refugee protection when they believed that state protection would not be forthcoming.

[8] The RPD began by stating that the legal question to be determined was whether the alleged persecution threatened the basic human rights of the Applicants in a fundamental way.

[9] The RPD considered whether there was evidence of persecution by reviewing the allegations of discrimination in Employment and Housing and in Education, and found that their past treatment did not rise to the level of persecution.

[10] The RPD also found there was adequate state protection in Hungary for the Applicants.

IV. **Analysis**

A. *Reasonableness Review*

[11] In *Canada Post Corp. v Canadian Union of Postal Workers*, 2019 SCC 67 which was released the day after *Vavilov*, the Supreme Court gave further guidance on conducting reasonableness review. In doing so, the Supreme Court referred to *Vavilov* to explain what is considered when conducting reasonableness review:

> "Where reasons for a decision are required, the decision must also be justified, by way of those reasons, by the decision maker to those to whom the decision applies.[…] Where reasons are provided but they fail to provide a transparent and intelligible

> justification, the decision will be unreasonable": *Vavilov* at paras 86 and 136.

[12] The Supreme Court noted two types of fundamental flaws that will make a decision unreasonable: (1) a failure of rationality internal to the decision-maker's reasoning process; and (2) untenability "in light of the relevant factual and legal constraints that bear on it": *Vavilov* at para 101.

B. *Persecution and State Protection*

[13] Throughout the Decision the RPD refers to jurisprudence of this Court and others regarding the principles of both state protection and persecution. There are extensive footnotes and, in some cases, pinpoints to the United States Department of State Country Report on Human Rights Practices for Hungary being part of the National Documentation Package (NDP) for Hungary dated August 31, 2018. This appears to be the only source document consulted other than the legislation.

[14] The RPD considered the discrimination experienced by the Applicants and found that while it threatened their quality of life in Hungary, it did not threaten their fundamental rights. The RPD concluded that while Roma people face discrimination in Hungary, the documentary evidence does not show that the entire Roma population is persecuted.

[15] The RPD found that because the Hungarian constitution and laws prohibit discrimination based on race, the Principal Applicant's husband and father likely experienced employment difficulties because of the limited and inferior education they received. However, this conclusion

is speculative and fails to recognize that the inferior education is itself discriminatory, as it is based on them being Roma. Further, the operational adequacy of the laws prohibiting discrimination is not examined anywhere in the reasons. If it had been examined, the RPD would have noted that the NDP indicates at page 36 that while the constitution and laws prohibit discrimination based on race, the government has failed to enforce the regulations under the Labour Code, and fines have been generally inadequate to deter violations.

[16] The RPD also found that while the discriminatory treatment of Roma people in the Hungarian school system is well-documented, the state has intervened to address some of these problems. However, the RPD failed to consider that other problems with the Hungarian school system, documented in the NDP, still exist and ought to have been examined, particularly with respect to the adequacy of the state's solutions addressing the problems.

[17] The RPD's finding that there was no persuasive evidence on the record to conclude that Roma people cannot, and do not, pursue higher education opportunities in Hungary, if desired, does not demonstrate a rational or coherent chain of analysis. The RPD's finding is inconsistent with its previous findings, and with information in the NDP. The RPD already recognized that the education of Roma was a well-documented problem. However, the RPD does not engage with page 28 of the NDP, which states that NGOs reported the frequent segregation of Romani children in schools and the frequent misdiagnosis of Romani children as mentally disabled, despite the fact that school segregation is prohibited. The NGO concluded that this "limited their access to quality education and increased the gap between Romani and non-Romani society."

[18] In addition, the NDP at page 29 states:

> A report prepared during the year by Romani and pro-Romani NGOs stated that half of Romani students drop out of the education system. Only 24 percent of Romani students finish high school, compared to 75 percent of non-Romani students. Only 5 percent of Romani students entered university, compared to 35 percent of non-Romani students. The report noted that segregation of Romani children in schools and lowering the mandatory school age to 16 years contributed to high dropout rates. (emphasis added).

[19] The RPD relied on the NDP as its only source of country condition documentation. Although the RPD is taken to have considered all the evidence in the record and is not required to comment on each piece of evidence in its reasons, it did not address the above-noted evidence that contradicts the finding of the RPD regarding the ability of Roma to pursue higher education: *Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (FCA). The failure to refer to this contrary evidence leads to a concern that the RPD made an erroneous finding of fact without regard to the evidence: *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] ACS no 1425 at para 17.

[20] In its assessment of persecution, the RPD compares the acts of discrimination faced by Roma people to the discrimination faced by Indigenous people and racialized people in Canada, concluding that it would be unreasonable to generalize about how these communities are treated. The meaning of the RPD's statement on this point is unclear, and it is also unclear how this observation is relevant to an analysis of persecution. Mr. Justice Grammond expressed "serious concerns" with this "troublesome" line of reasoning in a similar case, stating that this reasoning obscured the real issue to be decided, which was, in that case and in this, the availability of

adequate state protection in Hungary: *A.B. v Canada (Minister of Citizenship and Immigration)*, 2018 FC 237 at paras 33-36.

[21] As demonstrated above, the reasons provided to support the finding that the Applicants would not face more than a mere possibility of persecution upon return to Hungary do not demonstrate an internally coherent and rational chain of analysis, particularly given the facts in the record. It is therefore unreasonable: *Vavilov* at para 85.

C. *Oversight Agencies*

[22] The RPD found that claimants must access police oversight agencies when they are not satisfied with the protection they receive from the police. In doing so, the RPD relied on the decision of Mr. Justice Annis of this Court in *Mudrak v Canada (Minister of Citizenship and Immigration)*, 2015 FC 188 [*Mudrak*] where he said that "suggesting that police oversight agencies have no role in demonstrating adequate state protection is like saying senior policing management has no role in policing due to their oversight function, or saying that policing is a short-term operational exercise." The *Mudrak* decision goes on to elaborate on the importance of oversight agencies.

[23] I will return to discussing *Mudrak* after outlining the parts of the Decision that dealt with the various oversight agencies in Hungary.

[24] The RPD reviewed incidents of violence alleged in the Applicants' refugee claim. In 2006, the father had been attacked by 15 to 20 Guardists. In 2011, Guardists threw rocks and Molotov cocktails at the Roma residences in Miskolc. The RPD said it was clear that in the 2011

instance, the police failed to adequately protect the Roma residents, but that the Applicants' overall experience with the police was insufficient evidence to conclude there was a lack of state protection. The RPD noted that the failure by some police to provide protection is not indicative of a lack of police protection in the country as a whole. The RPD found that there were no current reports of nationalists in Hungary targeting Roma people. In the next two paragraphs, the RPD considered the presence of police oversight agencies in arriving at the conclusion that there was adequate state protection available to the Applicants in Hungary.

[25] The RPD in paragraphs 48 to 59 referred to several bodies the government has put in place to address complaints against the police. In addition to detailing the methods employed by the Independent Police Complaints Board, the RPD mentioned that Hungarian authorities have taken action against the Hungarian Guard Association and have initiated processes for banning the Civil Guard Association.

[26] The RPD noted that the Hungarian Supreme Court held police officers responsible for discriminatory conduct against Roma people, banned them from committing similar acts in the future and barred the police from breaching rights to equal treatment.

[27] The RPD also mentioned: (1) the work of the Equal Treatment Authority to receive complaints about violations under the *Equal Treatment Act*; (2) the Commissioner for Fundamental Rights; (3) the new powers given to the police in Hungary to deal with hate crimes; (4) the establishment of the Roma Affairs Council (CET) to address the inclusion of Roma and make recommendations to the Government; and, (5) the Anti-Segregation Roundtable.

[28] With respect to the Equal Treatment Authority, the RPD outlined that it was specifically entrusted with the fight against racism and has been functioning since 2005. It became an independent body through legislative amendments in 2011 and 2013. It is a quasi-judicial body tasked with making legally binding decisions in cases of violations of the Act.

[29] After describing these various bodies and their mandates, the RPD concluded that "the government has enacted legislation, and put in place many strategic initiatives across several departments that are producing results on the ground." It found that the documentary evidence demonstrates that Hungary continues to provide protection for all its citizens, including Roma and other ethnic minorities. It went on to say that the evidence demonstrates that Hungary's progressively evolving measures/actions to provide protection for its citizens, including Roma, are actually having an impact operationally on the ground. The evidence demonstrates the police do investigate crimes against Roma, and the perpetrators are being held responsible when there is sufficient evidence.

[30] It is at this point in the Decision that the RPD turned to *Mudrak*. After setting out the text of paragraphs 81 – 83 of *Mudrak*, the RPD concluded the state protection analysis by reiterating that the burden is on the claimants to provide clear and convincing evidence that the state is either unwilling or unable to provide them with adequate protection and the claimants bear the legal burden of rebutting the presumption. It concluded that the claimants had not rebutted the presumption of state protection "after careful consideration of all of the evidence". The basis upon which this conclusion was drawn was not stated, although given the wording of the Decision and the juxtaposition of the paragraphs it would appear to be based on the presence of oversight bodies and the statements in Mudrak.

D. *Mudrak*

[31] In *Mudrak,* Mr. Justice Annis certified two questions. While the Court of Appeal found that the questions were not proper for the purpose of certification, it reviewed and made comments on each of the proposed certified questions: *Mudrak v Canada (Minister of Citizenship and Immigration),* 2016 FCA 178 [*Mudrak FCA*].

[32] For the purpose of this application, the first certified question in *Mudrak* is important. That question was:

> Whether the Refugee Protection Board commits a reviewable error if it fails to determine whether protection measures introduced in a democratic state to protect minorities have been demonstrated to provide operational adequacy of state protection in order to conclude that adequate state protection exists?

[33] The Court of Appeal confirmed that the RPD is required to properly address in their reasons the issue of state protection. The example provided by the Court of Appeal of how this is to be done is found at paragraph 32 of *Mudrak FCA*:

> [32] For example, in *Hercegi v. Canada (Citizenship and Immigration)*, 2012 FC 250, [2012] F.C.J. No. 273 (QL), it was determined that the Board failed to turn its mind to the question of state protection:
>
> > [5] The reasons do not address the issue of state protection properly. They do not show whether, and if so, what, the Member considered as to provisions made by Hungary to provide adequate state protection now to its citizens. It is not enough to say that steps are being taken that some day may result in adequate state protection. It is what state protection is actually provided at the present time <u>that is relevant</u>. In the present case, the evidence is overwhelming that Hungary is unable presently to provide adequate protection to its Roma citizens.

[Emphasis in the original]

[34] This Court has frequently held that when determining whether adequate state protection exists, a decision-maker must focus on actual, operational adequacy, rather than on a state's "efforts" to protect its citizens: *Lakatos v Canada (Minister of Citizenship and Immigration)*, 2019 FC 864 at para 58. It is an error for a decision-maker to focus on evidence of government efforts without examining the operational effectiveness of the police response: *Pava v Canada (Minister of Citizenship and Immigration)*, 2019 FC 1239 at para 48 (emphasis added). The fact that alternate institutions exist does not constitute state protection, even if these institutions are responsible for investigating complaints of discrimination: *Tanarki v Canada (Minister of Citizenship and Immigration)*, 2019 FC 1337 at para 45.

[35] I have carefully reviewed the Decision and find that the reasons do not show what the RPD considered in determining that Hungary would presently be able to provide adequate state protection to the Applicants if they returned.

[36] The RPD discussion of state protection is found from paragraphs 33 to 64 of the Decision. It begins by outlining various principles of state protection such as that the evidence to rebut the presumption must be clear and convincing and must satisfy the panel on a balance of probabilities that state protection is inadequate. It is a form of surrogate protection and the onus is on the claimant to approach the state for protection where it might reasonably be forthcoming. The claimant's burden of proof is directly proportional to the level of democracy in the state in question. Local failures by authorities does not mean that the state as a whole fails to protect citizens unless it is part of a broader pattern of the state's inability or refusal to provide

protection. Less than perfect protection is not a basis to determine the state is unwilling or unable to offer reasonable protection.

[37] The Applicants submit that the assessment of state protection was superficial. I agree.

[38] Simply repeating existing general principles of state protection without relating those principles to the personal situation of the Applicants and the evidence in the record is not an analysis. It is a series of bald assertions. The assertions do not support a stark conclusion, particularly in the face of conflicting evidence in the NDP.

[39] In the Decision, the RPD notes that in rural villages and towns of northeastern Hungary, anti-Roma sentiment has often manifested itself in the form of police indifference to the plight of the country's largest ethnic minority. At another point in the reasons the RPD "acknowledges that the issue of corruption remains problematic, however, the documentary evidence demonstrates that steps are being taken to prosecute officials and individuals when such abuse occurs."

[40] The RPD states that it recognizes that it "is required to determine the state protection *actually provided* at the *present time* that is relevant". It then concludes that such protection is operationally adequate for the Roma in Hungary, today based on reasons that do not demonstrate a rational chain of analysis.

[41] The RPD specifically states that "the panel finds the government's efforts to have actually translated into adequate state protection at the operational level." The panel then states

that it read the documentary materials, human rights monitoring group reports, customary annual reports that the Board references, and diverse media sources, from which it finds that "there are no current reports of right wing and nationalist marches or gatherings in Hungary that are targeting, harassing, and threatening Roma. While discriminatory attitudes persist among some groups and people in Hungary today, there is no documented evidence before the panel to suggest, or to establish, that other nationalist or right-wing groups have been targeting Roma today as they were in the years leading up to the claimant's departure, or that these groups are supported by the state."

[42] Unfortunately, the RPD does not provide the basis upon which it concluded that the government's efforts have translated into adequate state protection at the operational level. It is not clear how the activity level of right-wing groups relates to the efficacy of government efforts. Does the RPD find that government efforts have caused right-wing groups to become less active? Or does the RPD find that the previous level of state protection is now adequate because it is less likely that the Applicants would be attacked by a right-wing group upon return? It is not possible to follow the chain of analysis that leads to the RPD's finding that there is currently adequate state protection in Hungary for these Applicants.

[43] As articulated by Mr. Justice Barnes in *Zhang v Canada (Minister of Citizenship and Immigration)*, 2020 FC 53, the Court must strike a balance between the obligations of respectful deference and the requirement that decision-makers provide "responsive reasons":

> [128] Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis" (*Newfoundland Nurses*, at para. 25), or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (para 16). To impose such expectations

> would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. However, a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning: *Baker*, at para. 39 (emphasis added).

[44] The reasons provided by the RPD, when reviewed alongside the record, do not permit this Court to determine how and why it reached the conclusion that the Hungarian government's efforts have led to adequate state protection. The decision is unreasonable.

[45] No question was proposed for certification by either party.

JUDGMENT in IMM-2937-19

THIS COURT'S JUDGMENT is that:

1. The application is allowed and the decision of the Refugee Protection Division is set aside.
2. The matter is returned for redetermination by a new panel that has not previously considered the claims made by the Applicants.
3. There is no serious question of general importance for certification.
4. No costs.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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