

Federal Court



Cour fédérale

Date: 20210412

Docket: IMM-6039-19

Citation: 2021 FC 313

Ottawa, Ontario, April 12, 2021

PRESENT: Madam Justice Pallotta

BETWEEN:

EVA BUDAI

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Eva Budai, is a citizen of Hungary who fears persecution based on her Roma ethnicity. Ms. Budai seeks judicial review of a decision of the Refugee Appeal Division (RAD), dismissing an appeal of the Refugee Protection Division's (RPD) refusal of her claim for refugee protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] Ms. Budai claims that she faced severe discrimination in education, employment, and health care as well as bullying and harassment due to her Roma ethnicity. She attended a “gypsy school” for Roma students where the teachers treated them poorly. Non-Roma Hungarian students would always call her names and spit at her for no reason. Ms. Budai states that she experienced racist attitudes against her ethnicity on a daily basis, was refused after-school jobs, and received second-class medical care. Her basis of claim (BOC) narrative also indicates that Ms. Budai suffered under her abusive and alcoholic father, who abused her mother and siblings as well. When neighbours would call the police, they did not always show up. When the police did come, Ms. Budai claims they would not do anything until “there was blood”. When Ms. Budai was 17 years old, her father threw her out of the house and told her not to return. She stayed with a friend but then had to return to her parent’s house.

[3] Ms. Budai decided that she could not bear to live in Hungary, and left for Canada in November 2017 to claim refugee protection. She was 18 years old at the time.

[4] The RPD denied Ms. Budai’s refugee claim in March 2018 on the basis that she had not rebutted the presumption of state protection. Ms. Budai appealed to the RAD, and the RAD dismissed the appeal in a decision dated September 13, 2019. That decision is the subject of this application for judicial review.

[5] The RAD noted that the RPD’s reasons properly focused on Ms. Budai’s ability to seek state protection upon return to Hungary as an adult, but found instances where the RPD erroneously faulted Ms. Budai for inaction in seeking state protection while she was in Hungary

as a minor. Ms. Budai was 20 years old at the time of the RAD’s decision. The RAD considered whether her specific profile, including her age, gender, and mental vulnerabilities, would prevent Ms. Budai from accessing adequate state protection should she return to Hungary as an adult. The RAD found there is a “relatively strong” presumption of state protection in Hungary, and agreed with the RPD’s analysis that Ms. Budai had not rebutted the presumption of state protection for Roma in Hungary.

[6] Ms. Budai submits that the RAD’s decision should be overturned because the RAD made reviewable errors by failing to conduct its own independent assessment of the evidence, and by failing to consider her specific profile and the evidence of similarly situated family members in its analysis of whether there was adequate state protection—the determinative issue.

[7] For the reasons below, I find that the RAD did not commit the reviewable errors alleged. Ms. Budai has not established that the RAD’s decision was unreasonable, and this application for judicial review is dismissed.

II. **Issues and Standard of Review**

[8] The issues on this application for judicial review are:

1. Did the RAD err by failing to conduct its own independent assessment?
2. Did the RAD err in its state protection analysis?

[9] Reasonableness is the presumptive standard for reviewing the merits of an administrative decision, according to the revised framework described in the Supreme Court’s decision in

Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65 [*Vavilov*]. See also: *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93, [2016] 4 FCR 157 [*Huruglica*] at para 35; *Ketchen v Canada (Citizenship and Immigration)*, 2016 FC 388 at para 20.

[10] Ms. Budai submits that one of the RAD's errors in respect of the state protection issue was the RAD's application of an incorrect test, and submits the applicable standard of review for such an error is correctness: *Buri v Canada (Citizenship and Immigration)*, 2014 FC 45 [*Buri*] at para 17, citing *Ruszo v Canada (Citizenship and Immigration)*, 2013 FC 1004 [*Ruszo*] at paras 17-23. I disagree. The presumption of reasonableness review regarding the merits of an administrative decision is rebutted only when the legislature has indicated that a different standard should apply (by legislating the standard or by providing a right to appeal the tribunal's decision to a court) or when the rule of law requires correctness review (i.e. for constitutional questions, general questions of law of central importance to the legal system as a whole, and questions regarding the jurisdictional boundaries between two or more administrative bodies): *Vavilov* at paras 33 and 53. Neither exception is applicable to the issues in the present case. Furthermore, Ms. Budai's submissions on the state protection issue relate to whether the RAD erred in its application of the test for state protection to the facts of her case, which would have been reviewable according to the reasonableness standard even prior to the decision in *Vavilov*. In *Ruszo* (as cited in *Buri*) the Court held that the standard of review applicable to the assessment of state protection depends on whether the conclusion reached by the tribunal turned on its understanding of the proper test for state protection, which would be reviewed on the

correctness standard, or on its application of that test to the facts of the case, which would be reviewed on the reasonableness standard: *Ruszo* at paras 22-23.

[11] Reasonableness is the applicable standard of review for both issues on this application.

III. Analysis

A. *Did the RAD err by failing to conduct an independent assessment?*

[12] Ms. Budai submits the RAD erred by conducting its appeal on a standard resembling reasonableness rather than correctness, contrary to the principles set out in *Huruglica*. Despite stating that the correctness standard would be applied, Ms. Budai submits the RAD showed deference to the findings of the RPD. She points to the RAD's statement to "confirm the decision of the RPD" that Ms. Budai is neither a Convention Refugee nor a person in need of protection, even though the RAD found that the RPD had erred by faulting her failure to seek state protection as a minor child, and by failing to consider whether the state's measures to combat hate crimes against Roma in Hungary were operationally effective. Furthermore, Ms. Budai submits that the RAD's reasons demonstrate that the RAD did not conduct an independent analysis of the issues and evidence or properly assess whether the RPD made correct findings of fact, law, and mixed fact and law, beyond considering the evidence referred to by the RPD and the points raised in Ms. Budai's arguments on appeal. According to Ms. Budai, the RAD's analysis amounted to summarizing and then re-weighing the RPD's analysis, contrary to the principles in *Huruglica*. For example, after agreeing that the RPD erred by failing to adequately focus on the effectiveness of measures taken by the state to combat hate crimes against Roma,

Ms. Budai states the RAD merely balanced the RPD's error with the RPD's other findings, writing:

When I weigh this aspect of the RPD's analysis against its overall analysis summarized above, I find that the RPD did, generally speaking, pay adequate attention to the effectiveness of the measures taken in Hungary to improve the situation in Roma.

[13] As another example, Ms. Budai argues the RAD relied on the RPD's research and simply summarized the RPD's findings on the Roma in Hungary. She submits the RAD did not cite any country condition documentation that was not in the RPD's decision or in her memorandum of fact and law filed in the appeal.

[14] I am not persuaded that the RAD erred by failing to conduct an independent analysis.

[15] The RAD's confirmation of the RPD's final determination does not suggest that the RAD reviewed the RPD's decision according to the deferential reasonableness standard. The Federal Court of Appeal in *Huruglica* stated, at paragraph 103 (emphasis added):

[103] I conclude from my statutory analysis that with respect to findings of fact (and mixed fact and law) such as the one involved here, which raised no issue of credibility of oral evidence, the RAD is to review RPD decisions applying the correctness standard. Thus, after carefully considering the RPD decision, the RAD carries out its own analysis of the record to determine whether, as submitted by the appellant, the RPD erred. Having done this, the RAD is to provide a final determination, either by confirming the RPD decision or setting it aside and substituting its own determination of the merits of the refugee claim. It is only when the RAD is of the opinion that it cannot provide such a final determination without hearing the oral evidence presented to the RPD that the matter can be referred back to the RPD for redetermination. No other interpretation of the relevant statutory provisions is reasonable.

[16] In my view, the RAD's reasons demonstrate that the RAD conducted its analysis according to the principles in *Huruglica*. The RAD's findings that the RPD had made errors were based on a correctness review, not a deferential review. The fact that the RAD agreed with certain findings and conclusions of the RPD and agreed with Ms. Budai that other findings were made in error does not demonstrate that the RAD failed to conduct an independent review of the RPD's decision.

[17] As the respondent correctly notes, the RAD is required to respond to arguments that have been put forward on appeal: Rule 3(3)(g) of the *Refugee Appeal Division Rules*, SOR/2012-257; *Dahal v Canada (Citizenship and Immigration)*, 2017 FC 1102 [*Dahal*] at para 30. An appeal before the RAD is not a true *de novo* proceeding, and the RAD is only required to consider the alleged errors as submitted: *Huruglica* at paras 79 and 103. Throughout the decision, the RAD acknowledged Ms. Budai's arguments, made findings on the alleged errors, and made its own findings on the evidence. The RAD did not simply adopt the RPD's findings. In my view, the RAD's decision in Ms. Budai's case reflects its assessment of the RPD's alleged errors that she raised: *Kanawati v Canada (Citizenship and Immigration)*, 2020 FC 12 at para 24.

[18] In summary, I am not persuaded that the RAD committed a reviewable error by conducting an assessment of the RPD's alleged errors according to a deferential standard of review, or by failing to conduct an independent analysis of the issues that were raised.

B. *Did the RAD err in its state protection analysis?*

(1) Did the RAD fail to consider Ms. Budai's specific profile?

[19] Ms. Budai alleges that the RAD's state protection analysis is unreasonable. She argues that the RAD did not clearly articulate a test or cite any case law regarding the test for state protection, rendering the decision ambiguous regarding the test that the RAD applied. In fact, she argues, the reasons indicate the RAD applied the wrong test because the RAD described the determinative issue to be the existence of state protection for Roma in Hungary. According to Ms. Budai, it was an error for the RAD to approach the issue of state protection as a general question of state protection for all Roma; Ms. Budai submits the RAD should have assessed her specific situation and whether there would be adequate state protection in view of her profile as a young, single woman who was abused by her father, exhibits symptoms consistent with Post Traumatic Stress Disorder (PTSD), and has mental challenges.

[20] The respondent submits the RAD considered the evidence regarding whether Ms. Budai's age and mental health issues would impede her ability to pursue state protection, and determined that Ms. Budai was in a position to seek state protection upon return to Hungary should she need it. The RAD found a 2014 medical report from Hungary and a psychotherapist's report to be of limited value, and explained these findings in its reasons. The respondent submits the RAD reasonably gave little weight to the 2014 report, as the report dated back five years and there was no evidence that Ms. Budai continued to suffer from a learning disability. The respondent further submits the RAD reasonably gave little weight to the psychotherapist report because it was based on a single assessment of 60-90 minutes and did not provide any indication that PTSD would impede Ms. Budai's ability to seek state protection. Also, the respondent submits the

RAD reasonably considered whether Ms. Budai had suffered discrimination and harassment based on gender, and found no evidence to establish that her father's violence or the discrimination and harassment suffered based on her Roma ethnicity were gender-based. The RAD found that domestic violence would only be relevant if there was evidence of a serious possibility that her father would continue to abuse the applicant if she returned to Hungary.

[21] It is well established that the test for state protection requires operational adequacy: *Canada (Attorney General) v Ward*, [1993] 2 SCR 689; *Flores Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 at para 30. The focus should be on evidence of actual or operational protection as an empirical reality—efforts to address the problem, a state's willingness to improve, or steps being taken that some day may result in adequate state protection are not determinative of the adequacy of state protection: *Beri v Canada (Citizenship and Immigration)*, 2013 FC 854 at paras 36-37; *Kovacs v Canada (Citizenship and Immigration)*, 2010 FC 1003 at para 66; *Burai v Canada (Citizenship and Immigration)*, 2013 FC 565 at para 28. Although not a standard of perfection, adequate state protection requires more than “making serious efforts” to address issues and protect citizens: *Garcia v Canada (Minister of Citizenship and Immigration)*, 2007 FC 79 at para 15.

[22] Ms. Budai has not established that the RAD incorrectly applied the test for state protection to the facts of her case.

[23] The fact that the RAD described the determinative issue to be “the existence of state protection for Roma in Hungary”, rather than for Ms. Budai in particular, does not amount to a

reviewable error. The RAD's reasons do not support Ms. Budai's argument that the RAD approached the issue of state protection as a general question, instead of assessing Ms. Budai's specific situation and profile. Ms. Budai had asserted that she faced persecution due to her Roma ethnicity, and she supported her claim with evidence in country documentation about the discrimination faced by the Roma population generally. In response to arguments Ms. Budai raised, the RAD addressed the alleged errors by the RPD in assessing country documentation. Ms. Budai had also alleged that the RPD erred in assessing her own ability to seek state protection, as her minor age and psychological makeup were impediments to receiving effective state protection. The RAD considered Ms. Budai's arguments, and held that her particular profile would not prevent her from seeking state protection upon return to Hungary, should it be necessary.

[24] The RAD specifically noted that one of the issues on appeal was whether the RPD assessed the objective documentation on state protection "without having regard to its effectiveness at the operational level". The RAD considered Ms. Budai's arguments on the issue of operational effectiveness. The RAD summarized the RPD's findings regarding government actions to protect Roma from discrimination with respect to housing, social inclusion, education and training, employment, racism, hate crimes, and discrimination by the police. With the exception of measures taken to combat hate crime, the RAD found that the RPD had regard to the effectiveness of these measures. The RAD found that, considering the objective documentation as a whole, the RPD paid adequate attention to the effectiveness of measures taken in Hungary to assist its Roma population, despite not having addressed the operational effectiveness of measures to combat hate crime.

[25] At the hearing of this application for judicial review, Ms. Budai argued that the RAD conflated the issues of state protection and discrimination, and the RAD only considered the operational effectiveness of measures related to discrimination. I disagree. Ms. Budai's claim was based on discrimination, as well as the abuse she suffered at the hands of her father. With respect to discrimination, the RPD noted that Ms. Budai alleged "she has faced discrimination that amounts to persecution and that there is no state protection for her anywhere in Hungary". The RPD found, however, that Ms. Budai had not established that she faced discrimination amounting to persecution. The RPD acknowledged that, being Roma, Ms. Budai likely experienced discriminatory acts at points throughout her life; however, the RPD found that Ms. Budai had experienced sporadic incidents of discrimination that did not reach the level of persecution, and that she did not adduce evidence that her fundamental human rights were violated. Ms. Budai did not challenge these findings on appeal to the RAD.

[26] Also at the hearing before this Court, Ms. Budai argued that the RAD, after criticising the RPD for its failure to consider the adequacy or operational effectiveness of state protection, fell into the same error. However, as noted above, the RAD found that the RPD paid adequate attention to the effectiveness of Hungary's measures to improve the situation of Roma generally, despite the RPD's failure to focus adequately on the effectiveness of measures to combat hate crimes. The RAD found that Ms. Budai did not rebut the presumption that adequate state protection exists for Roma in Hungary with clear and convincing evidence.

[27] Finally, Ms. Budai submits that the RAD was required to consider the entire record. However, Ms. Budai did not refer the Court to specific evidence in the record regarding the adequacy of state protection that the RAD failed to consider.

[28] When the RAD's decision is read in the context of the record, including the RPD's decision and Ms. Budai's written submissions to the RAD regarding the RPD's alleged errors, I am not persuaded that the RAD's analysis of the operational effectiveness of state protection measures was unreasonable.

- (2) Did the RAD err by failing to consider evidence of similarly situated family members?

[29] Ms. Budai submits the RAD failed to explain why her profile differs from those of her sister, brother-in-law, nephews, and cousins who were previously found to be Convention refugees. She relies on *Mendoza v Canada (Citizenship and Immigration)*, 2015 FC 251 [*Mendoza*] at paragraphs 25-26, where the Court held it is incumbent on a panel of the RPD to explain the basis for reaching a different conclusion from a claim made by a family member under similar circumstances, so as to maintain the integrity of Board decisions. In particular, Ms. Budai points to the findings in a November 14, 2017 decision regarding her cousins' refugee claims, referring to state protection for Roma generally:

...on a balance of probabilities, the panel is of the opinion that State protection would not be reasonably forthcoming in light of your particular past experiences, those of your own family and the experiences that the Roma community is facing. Moreover, the internal documentary evidence demonstrates that with respect to State protection, the police is engaged in ethnic targeting and profiling and does not adequately investigate or protect against racially motivated assaults and hate crimes affecting Roma people. To this effect, the refusal, omission or negligence to act in order to

serve and protect all citizens, is in evidence that by association, the State has become the agent of persecution and therefore the panel finds that the presumption of State protection is therefore refuted.

[30] According to Ms. Budai, the evidence to establish a lack of effective state protection for similarly situated individuals is relevant to whether she would have access to effective state protection. She states such evidence is especially relevant in her case since the RAD found that Ms. Budai should not be faulted for her past inaction in seeking state protection as a minor in the determination of whether she is likely to be afforded state protection upon return to Hungary as an adult.

[31] Ms. Budai submits that the RAD's failure to refer to the evidence of similarly situated family members offends the well-known principle in *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC) at paragraph 17 that "the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact 'without regard to the evidence'". While she acknowledges that the failure to mention a particular piece of evidence does not necessarily mean the RAD did not take it into account, "a decision of the Board will be vitiated if the Board fails to mention evidence that is central and probative to the applicant's claim, and in contradiction to the Board's own conclusion,": *Lingeswaran v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1061 at para 9. Ms. Budai also relies on *Bledy v Canada (Citizenship and Immigration)*, 2011 FC 210 at paragraphs 48-50, where the Court faulted the RPD for the complete absence of any recognition of objective evidence pointing towards a potential inadequacy in state protection.

[32] The respondent submits that Ms. Budai is raising a new issue that was not before the RAD. In any event, the respondent submits that risk is assessed on a case-by-case basis, and persecution against one family member does not automatically entitle all other family members to be considered refugees: *Aoutlev v Canada (Citizenship and Immigration)*, 2007 FC 111 at para 26; *Mantilla Cortes v Canada (Citizenship and Immigration)*, 2008 FC 254 at para 10, citing *Bakary v Canada (Citizenship and Immigration)*, 2006 FC 1111 at para 10 [*Bakary*]; *Marinova v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 178 at para 18. The respondent submits each case is unique and considered on its own merits: *Perez Mendoza v Canada (Citizenship and Immigration)*, 2010 FC 119 at para 33 [*Perez Mendoza*]. In the case at bar, the respondent argues that Ms. Budai's allegations were all considered, and the RAD provided adequate explanations for the denial of her claim.

[33] I agree with the respondent. Each claim is assessed on a case-by-case basis and on the underlying facts: *Bakary* at para 10; *Perez Mendoza* at para 33. Moreover, the RAD did not address the refugee claims of Ms. Budai's family because this issue was not raised. The memorandum of law and argument before the RAD merely noted that Ms. Budai's sister was accepted as a Convention refugee, and did not raise any error with the RPD's determination that the positive determinations on the claims of Ms. Budai's family members were insufficient to imply that she should also be found a Convention refugee under the *IRPA*.

IV. Conclusion

[34] For the reasons above, Ms. Budai has not established that the RAD's decision is unreasonable, and the application for judicial review is dismissed.

[35] The parties did not propose a question for certification. No question for certification arises in this case.

JUDGMENT in IMM-6039-19

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.
2. There is no question to certify.

"Christine M. Pallotta"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6039-19

STYLE OF CAUSE: EVA BUDAI v THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO BY WAY OF
VIDEOCONFERENCE

DATE OF HEARING: NOVEMBER 10, 2020

JUDGMENT AND REASON: PALLOTTA J.

DATED: APRIL 12, 2021

APPEARANCES:

David Vago FOR THE APPLICANT

David Joseph FOR THE RESPONDENT

SOLICITORS OF RECORD:

David Vago FOR THE APPLICANT
Barrister and Solicitor
Toronto, Ontario

Attorney General of Canada FOR THE RESPONDENT
Toronto, Ontario