Federal Court  Cour fédérale

Date: 20210520

Docket: IMM-392-20

Citation: 2021 FC 477

Toronto, Ontario, May 20, 2021

PRESENT: Justice Andrew D. Little

BETWEEN:

SARKA CERVENAKOVA
PATRICK CERVENAKOVA
RONALDO CERVENAKOVA
MICAHELA CERVENAKOVA
LILIANA CERVENAKOVA
MARKETA CERVENAKOVA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicants are a family of Roma ethnicity who are citizens of the Czech Republic. They requested a pre-removal risk assessment ("PRRA") under s. 112 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the *"IRPA"*). In a decision dated December 10, 2019, a senior immigration officer rejected their application, finding that they would not be subject to

persecution, torture, risk to life or risk of cruel and unusual treatment or punishment if returned to the Czech Republic.

[2] The applicants challenge that decision in this application for judicial review. They contend that the decision was unreasonable, because the officer relied on the wrong legal test for assessing state protection, ignored material evidence and failed to consider their profile and the systemic discrimination faced by Roma people in the Czech Republic, which they claim amounts to persecution.

[3] In my view, none of these submissions can succeed. Applying the standard of review described in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, the officer did not make a reviewable error in analyzing and applying the state protection doctrine. I also conclude that the officer did not fundamentally misapprehend the evidence in the record. The officer's decision is reasonable.

[4] The application is therefore dismissed.

I. Facts and Events Leading to this Application

[5] The applicants arrived in Canada in June 2010. They made claims for refugee protection under s. 96 and subs. 97(1) of the *IRPA*.

The RPD's Decision

[6] The Refugee Protection Division (the "RPD") denied their claims in a decision dated January 3, 2013. On November 14, 2014, this Court denied leave to seek judicial review of that decision.

[7] The determinative issues before the RPD were the credibility of the applicants, subjective fear of persecution, and the applicants' failure to rebut the presumption of state protection. In summary, the RPD found that the evidence presented by the applicants was internally inconsistent and raised credibility issues. The RPD did not believe the applicants' factual narrative. While the adult applicants claimed that they had been physically assaulted by skinheads because they are Roma, the RPD did not believe that there were ever any such assaults. The RPD found that the applicants made a planned departure from the Czech Republic, rather than fleeing to Canada following incidents of violence as they claimed. The RPD questioned the genuineness of their subjective fears of persecution under s. 96 of the *IRPA*.

[8] On state protection, the RPD found that there was no persuasive evidence that the applicants had tried to access any state protection in the Czech Republic. The RPD concluded that they had not rebutted the presumption of state protection with clear and convincing evidence. The RPD found that there was adequate state protection for Roma people in the Czech Republic.

The Applicants Obtain Temporary Resident Permits

[9] In November, 2014, the applicants obtained temporary resident permits valid for a period of three years less a day. They had until February 25, 2016, to submit an application for permanent residence based on humanitarian and compassionate ("H&C") considerations. However, they did not do so.

[10] In January, 2019, the applicants applied for a PRRA, claiming that they fear they will face discrimination tantamount to persecution if they return to the Czech Republic due to their Roma identity.

The PRRA Decision

[11] The officer's PRRA decision first set out the prominent conclusions of the RPD. The officer noted that the applicants had reiterated the events in their original refugee claim and took the position that the mechanisms for Roma people to challenge police inaction, or to pursue action against the perpetrators of violence against them, were not effective. The officer found that there was little evidence on the PRRA application that was not already before the RPD, noting that the RPD did not believe the events occurred as the applicants alleged, that there was no persuasive evidence that they had tried to access any source of state protection, and that the applicants did not provide credible evidence of discrimination against them amounting to persecution.

[12] The officer reviewed the chronology of events since the applicants received temporarily residence permits in Canada. The officer concluded that the failure of the applicants to apply for permanent residence on H&C grounds by the required deadline in February 2016 was not consistent with, or indicative of, a subjective fear of returning to the Czech Republic.

[13] Having reviewed numerous country condition reports and news articles submitted by the applicants concerning the treatment of individuals of Roma ethnicity in the Czech Republic, the PRRA officer acknowledged recent incidents of discrimination against Roma individuals. The officer found that "state protection for Roma individuals in the Czech Republic was, at times, imperfect". The officer also acknowledged that the reports indicated that Roma individuals experience "widespread societal discrimination" in the Czech Republic. The officer further found that some Roma people in the Czech Republic experience persecution.

[14] The PRRA officer found that the applicants' country condition reports and news articles indicated that there are "established systems of law enforcement" in the Czech Republic, and that the authorities and courts had recently investigated, charged, prosecuted and convicted individuals who have perpetrated crimes against Roma individuals. The officer found that the applicants' reports and articles indicated that the authorities in the Czech Republic were generally "willing and able to provide assistance to Roma individuals". Overall, "having carefully considered the applicants' reports and articles", the officer found that the documents indicated that the applicants "would be able to obtain state protection in the Czech Republic should they have need of it".

[15] To the officer, although it was "clear that the human rights situation in the Czech Republic is not without problems and that there is continuing discrimination against the Roma minority", recent documentation indicated that the Czech Republic was "taking action" to address discrimination against Roma people.

[16] The officer concluded that the applicants had not demonstrated that if they were to return to the Czech Republic, they would personally be at risk based on their profile or that any discrimination they may face would amount to persecution. Accordingly, having "carefully reviewed the evidence that the applicants have submitted, as well as publicly available documents concerning current country conditions in the Czech Republic", the officer found that the applicants had not demonstrated that they would face more than a mere possibility of persecution on any Convention ground under s. 96 of the *IRPA* and that, on a balance of probabilities, the applicants were unlikely to face risk as defined in *IRPA* s. 97. The PRRA application was therefore denied.

II. Issues and Standard of Review

[17] The applicant raised three issues for substantive review of the PRRA officer's decision:

a) the officer relied on the wrong legal test for assessing state protection, by applying a "best efforts" test rather than a test based on the operational adequacy and efficacy of the state's measures to protect the Roma people from persecution;

b) the officer ignored evidence submitted by the applicants that contradicted the officer's conclusions. The officer had an obligation to address that evidence in the reasons; and

c) the officer failed to consider the applicants' individual profiles and the systemic discrimination faced by Roma people, which the applicants claimed amounts to persecution in their case.

[18] The applicants submitted that the first issue should be reviewed on a standard of correctness, as it concerns a question of law. The respondent disagreed. The parties agreed that a standard of reasonableness applies to the other two issues.

[19] In my view, the standard of review is reasonableness for all three issues in accordance with *Vavilov*.

[20] Under *Vavilov* principles, a decision maker's determinations of law are reviewed on a standard of reasonableness, with certain exceptions: see *Vavilov*, at paras 23-25, 31-33 and 53-62. One exception is if the question of law is of central importance to the legal system – a question "with significant legal consequences for the justice system as a whole or for other institutions of government": *Bank of Montreal v Li*, 2020 FCA 22 (de Montigny JA), at paras 26-28, quoting *Vavilov*, at para 59. The applicants did not attempt to place the first issue into this category of exceptions to the general rule.

[21] In conducting a reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified: *Vavilov*, at para 15. The focus of reasonableness review is on the decision actually made by the decision maker, including both the reasoning process (i.e. the rationale for the decision) and the outcome: *Vavilov*, at paras 83 and 86; *Delta Air Lines Inc. v Lukács*, 2018 SCC 2, [2018] 1 SCR 6, at para 12. A reasonable decision is one that is based on an internally coherent and a rational chain of analysis and is justified in relation

to the facts and law that constrain the decision maker: *Vavilov*, at para 85. The onus is on the applicant to demonstrate that the decision is unreasonable: *Vavilov*, at paras 75 and 100.

III. Analysis

[22] I will address each of the applicants' three principal submissions in turn.

A. *Did the Officer make a reviewable error by applying the wrong legal test?*

[23] A state is presumed to be able to protect its citizens from persecution: *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 (La Forest J.), at p. 725. To rebut that presumption, the Supreme Court held in *Ward* that "clear and convincing confirmation of a state's inability to protect [that national] … must be provided": *Ward*, at p. 724.

[24] The Federal Court of Appeal has described the burden on a claimant to rebut that presumption as a "difficult task" (*Flores Carrillo v Canada*, 2008 FCA 94, [2008] 4 FCR 636 (*per* Létourneau JA), at para 25) and a "heavy burden" (*Hinzman v Canada*, 2007 FCA 171 (*per* Sexton JA), at para 46). This is particularly so when the state is a democratic country: *Hinzman*, at para 46; *Canada (Citizenship and Immigration) v Kadenko*, FCA Court File No A-388-95, (1996) 143 D.L.R. (4th) 532 (*per* Décary JA), at p. 534.

[25] In *Flores Carrillo*, Létourneau JA described the quality of the evidence that must be adduced by a claimant to rebut the presumption of state protection:

> [30] The evidence must not only be reliable and probative, it must also have sufficient probative value to meet the applicable standard of proof. The evidence will have sufficient probative value if it convinces the trier of fact that the state protection is inadequate. In

> other words, a claimant seeking to rebut the presumption of state protection must adduce relevant, reliable and convincing evidence which satisfies the trier of fact on a balance of probabilities that the state protection is inadequate.
>
> [Emphasis added.]

See also the answer to the certified question in *Flores Carrillo*, at para 38.

[26] Both parties submitted (and I agree) that this Court's decisions have established that the adequacy of state protection is assessed on the basis of the "operational" adequacy of the protection, not merely the state's efforts: *Magonza v Canada (Citizenship and Immigration)*, 2019 FC 14 (Grammond J.), at paras 71-75; *A.B. v Canada (Citizenship and Immigration)*, 2018 FC 237 (Grammond J.), at para 17; *Poczkodi v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 956 (Kane J.), at paras 36-37; *Galamb v Canada (Citizenship and Immigration)*, 2016 FC 1230 (Gascon J.), at para 32; *Beri v Canada (Citizenship and Immigration)*, 2013 FC 854 (Strickland J.). While the state's efforts are relevant to an assessment of state protection, they are neither determinative nor sufficient; any efforts must have actually translated into adequate state protection at the operational level: *Meza Varela v Canada (Citizenship and Immigration)*, 2011 FC 1364 (Mosley J.), at para 16; *Molnar v Canada (Citizenship and Immigration)*, 2015 FC 273 (O'Keefe J.), at para 46. In other words, "a state protection analysis must not just consider governmental aspirations"; the protection must "work at an operational level": *Galamb*, at para 32. To measure the adequacy of state protection, one must consider the state's capacity to implement measures at the practical level for the persons concerned: *Galamb*, at para 32. A state's efforts may be relevant to the assessment but efforts are not sufficient; whether operational adequacy has actually been achieved must be

considered: *Galamb*, at para 33; *Kovacs v Canada (Citizenship and Immigration)*, 2015 FC 337 (Kane J.) at para 71.

[27] Adequate state protection does not mean perfect state protection, but the state must be both willing and able to protect people who seek its protection: *Poczkodi*, at para 37, citing *Bledy v Canada (Citizenship and Immigration)*, 2011 FC 210 (Scott J.), at para 47.

[28] The state protection analysis also inquires into the adequacy of state protection for someone in circumstances similar to those of the claimant: *Go v Canada (Citizenship and Immigration)*, 2016 FC 1021 (Gleeson J.), at para 13. It is not necessary for the claimant to have sought protection personally from the state if the claimant can show, by reference to similarly situated individuals, that such efforts would be ineffective due to state indifference: *Ward*, at p. 724-725.

[29] In this case, the applicants submitted that in assessing the adequacy of state protection, the officer erroneously applied a test of "serious efforts", rather than considering the "operational adequacy" of state protection. Specifically, the applicants submitted that the officer could not rely on the government's actions without showing evidence of the operational adequacy of government measures aimed at reducing discrimination against and persecution of Roma people. The applicants criticized the officer for believing that the Czech Republic was acting to address systemic discrimination against the Roma, even though there was no evidence that its actions had "resulted in tangible improvements for the Roma population". The applicants submitted that the officer relied on evidence of efforts and initiatives that have yet to yield any operational results, and the officer failed to cite any evidence demonstrating that systemic discrimination against

Roma people has abated or that the government of the Czech Republic has put in place measures that have brought about actual change.

[30] During oral submissions, counsel for the applicants submitted that there was a fundamental contradiction in the officer's decision between, on one hand, the crucial finding of "widespread societal discrimination" against the Roma, compared with, on the other hand, a finding of an adequate system of law enforcement, investigations and prosecutions, and a conclusion that the state was "willing and able" to provide its Roma citizens with assistance. The applicants' counsel further argued that the officer only identified state measures that would address harm to the applicants *after* it occurred; instead, the state must have mechanisms to *prevent* persecution and discrimination against the Roma through legal measures with demonstrable operational efficacy. The applicants did not refer to any decision of this Court or the Federal Court of Appeal to support their position.

[31] The respondent submitted that the onus was on the applicants to rebut the presumption of adequate state protection. The respondent emphasized that the documentary evidence supported the officer's finding that the legal systems in the Czech Republic have been used effectively to prosecute and convict those who have perpetrated crimes against Roma people. The respondent noted that the officer made reference to educational measures designed to benefit Roma children, the existence of an official ombudsperson to whom complaints could be made under anti-discrimination legislation, changes to the legal aid system and advances in employment opportunities designed to assist Roma individuals, and financial assistance for Roma students to complete their schooling. According to the respondent, these references demonstrated that the

officer did more than assess efforts by the Czech Republic as to state protection; the officer considered ongoing steps the state was taking to ameliorate the circumstances of its Roma population. As a result, the respondent concluded that the officer applied the correct legal test.

[32] Reading the officer's reasons as a whole, it is clear that the officer did not set out the test for state protection, or the rebuttal of it, nor did the officer expressly refer to operational adequacy. The applicants essentially ask the Court to infer that the legal test applied by the officer was wrong based on the documents expressly considered by the officer and the contents of the block quotations from them that the officer put in the decision. In particular, they point to the officer's use of lengthy excerpts from the Czech Republic's own submission to the United Nations Human Rights Council, entitled *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Czechia*. The applicants' counsel did not take the position that the Czech Republic's document was irrelevant or that the officer was not permitted to consider it. Wisely, counsel instead referred to the contents in the excerpts and submitted that the officer was unreasonably influenced by a report that was not prepared by an objective observer of the Czech Republic, but rather by the state itself.

[33] To determine whether the officer's reasons reveal a reviewable error under *Vavilov* principles, it is appropriate first to consider the officer's own words and findings.

[34] The officer stated:

- There are "established systems of law enforcement in the Czech Republic, and the authorities and courts in the Czech Republic have recently investigated,

> charged, prosecuted and convicted individuals who have perpetrated crimes against Roma individuals";
>
> - "[W]hile … there have been incidents … where the authorities were reluctant to provide assistance to individuals of Roma ethnicity, I find that the applicants' reports and articles indicate that the authorities in the Czech Republic are generally willing and able to provide assistance to Roma individuals";
> - "… state protection for Roma individuals in the Czech Republic is, at times, imperfect";
> - "some Roma people in the Czech Republic experience persecution";
> - the "human rights situation in the Czech Republic is not without problems"; and
> - "… although the Roma face discrimination in the community in the Czech Republic, the State is taking action against it".

The officer expressly based several of these conclusions on the country condition documents supplied by the applicants.

[35] It is true that in the longer excerpts quoted by the officer in the reasons, there are numerous references to the objectives, strategies and goals of the Czech government concerning issues that affect the Roma population, such as unemployment, discrimination, lack of access to social services and the fact that Roma children are not fully integrated into the education system. However, the officer's excerpts also referred to the Czech Republic as a "multiparty parliamentary democracy" in which voters had recently participated two elections that observers considered "free and fair" (source: United States Department of State, *2018 Country Reports on Human Rights Practices – Czech Republic*). Other quoted excerpts from the same report described the existence of hate crimes against Roma and that the Roma were the most frequent

targets of hate speech on the Internet. The report also referred to the conviction of one person for posting threatening comments on the Internet below a photograph of children, including Roma children, posing outside a school. The report noted that the "supreme prosecutor requested a further investigation [by the police] that led to the conviction". The officer also referred to a description, published by Freedom House (entitled *Freedom in the World 2018 – Czech Republic*), of laws, policies and practices that guarantee the equal treatment of various segments of the population in the Czech Republic. The Freedom House report referred to both outstanding issues of discrimination and persecution against the Roma minority, and a court-ordered apology to Roma students after a school discriminated against them by refusing to register them as students.

[36] From these passages and quotations from the officer's reasons, I observe the following.

[37] First, the officer made several express statements about the operational adequacy of state protection in relation to discrimination against Roma individuals in the Czech Republic. One was that authorities are "willing and able" to provide assistance to Roma individuals (the phrase used by Kane J. in *Poczkodi*, at para 37). Another referred to established systems of law enforcement and recent investigations and convictions of persons who had committed crimes against Roma people. A further example was that although the Roma continue to face discrimination, the state was "taking action against it."

[38] Second, the officer recognized the gaps and shortcomings in the state protection offered by the Czech Republic to Roma peoples. This factor may support the Court's confidence in the officer's understanding of the relevant legal test for state protection: *Go,* at para 13.

[39] Third, while the PRRA decision certainly made references to state efforts, goals and strategies being undertaken to assist the Roma minority (taken largely from the Czech Republic's own report to the UN Human Rights Council), the decision also included references to concrete actions taken by the state – mostly law enforcement methods including investigations and prosecutions of hate crimes, anti-discrimination laws, and a court order related to education.

[40] It is unfortunate that the officer did not make an express statement as to the legal standard for state protection to be applied. However, reading the officer's reasons as a whole, I am unable to conclude that the officer made a reviewable error by failing to apply the proper legal test for state protection.

B. ***Did the Officer ignore critical evidence?***

[41] The applicants submitted the officer ignored two Responses to Information Requests ("RIR"s) published by the Immigration and Refugee Board. The first RIR was entitled *"Czech Republic: Government response to neo-Nazi groups in the country, including political parties and gangs"*. The applicants directed the Court to passages concerning extremist ideas in politics, racist intimidation, and increased levels of hate speech against the Roma minority in 2014 and 2015, including by political figures. It also described criminal laws against hate crimes, but

mentioned a lack of tangible state progress on integrating Roma people into mainstream society and a lack of political will to improve the situation of minorities, including Roma persons.

[42] The second RIR document is called *"Czech Republic: Situation of access to education, employment, housing and health care for Roma; Government efforts to integrate Roma into Czech society* (2013 – February 2016)*"*. This document refers to sources indicating that Roma communities continue to face discrimination in the Czech Republic and that Roma people are treated as "second-class citizens" there. In addition, violence against Roma and societal discrimination continued to be a "serious problem". In relation to employment, most Roma individuals experienced discrimination when looking for work and nearly half experienced discrimination at work in the Czech Republic. The report also refers to children attending segregated schools and facing discrimination, resulting in ongoing poverty and marginalization.

[43] The applicants contended that the contents of these documents were critical to their position and had to be addressed expressly and explained by the officer before coming to conclusions inconsistent with them. The applicants argued that the increase in hate speech, particularly by politicians, demonstrated that state protection was not available to them as Roma people and therefore that the officer came to an unreasonable conclusion on that issue.

[44] In my view, the applicants' submissions cannot succeed. The standard for a reviewable error was set out in *Vavilov*, at paras 99-101, 105 and 125-126 and may be stated concisely: Did the documents contain factual constraints upon the officer? Did they so constrain the officer that by ignoring them, the officer reached untenable conclusions or fundamentally misapprehended

the evidence? Put another way, the decision may be set aside if the non-mentioned evidence is critical, contradicts the decision reached by the officer, and the Court infers that the officer must have ignored the material before it: *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1999] 1 F.C. D-53, [1998] FCJ No 1425 (Evans J.)*; Ozdemir v Canada* (Citizenship and Immigration), 2001 FCA 331 (Evans JA), at paras 7 and 9-11. See my discussion in *Khir v Canada (Citizenship and Immigration)*, 2021 FC 160, at paras 36-50.

[45] In my view, the officer did not reach an untenable conclusion or fundamentally misapprehend the evidence in this case. As has been mentioned already, the officer recognized the shortcomings and gaps in state protection in the Czech Republic. In addition to recognizing the existence of discrimination against Roma individuals, the officer found that state protection for Roma individuals was, "at times, imperfect". The officer expressly concluded that Roma individuals experience "widespread societal discrimination" in the Czech Republic and that some also experience persecution. While the officer did not make the specific factual conclusions on all the subjects set out in the two documents (such as hate speech), the officer did reach conclusions consistent with the documents' contents, and those conclusions favoured the positions advanced by the applicants. (The officer did also address hate speech issues in other country condition documents.) The officer found that there is discrimination, and indeed widespread societal discrimination, against Roma people, and persecution of some Roma individuals. However, neither of the two documents concludes that there existed systemic *persecution* of *all* Roma people in the Czech Republic and the officer did not reach that conclusion either.

[46] The conclusions reached by the officer were therefore reasonable. Applying *Vavilov* principles, and recognizing the quality of the evidence the applicants must adduce to show clearly and convincingly that state protection was inadequate (as described in *Flores Carrillo)*, the officer did not make a reviewable error.

C. ***Did the Officer fail to consider the applicants' individual profiles as Roma and the systemic discrimination they would face?***

[47] As already mentioned, the officer summarily concluded, near the end of the reasons, that the applicant had not demonstrated that if they were to return to the Czech Republic, they would personally be at risk "based on their profile", or that any discrimination they may face would amount to persecution. The applicants submitted that the officer failed to do any analysis of the applicants' profile and did not explain how the conclusion was reached.

[48] The applicants have a point about an absence of express justification near the end of the officer's reasons. However, two points have persuaded me not to lose confidence in the officer's conclusion: *Vavilov*, at paras 106 and 194.

[49] First, having found adequate state protection, the officer was not required to continue on to make findings on the individualized risk allegedly faced by the applicants (i.e., whether their profiles fit with similarly-situated persons who were subject to persecution in the Czech Republic). The state protection analysis was determinative in this case: *Turan v Canada (Citizenship and Immigration)*, 2018 FC 1258 (Southcott J.), at para 12; *Lakatos v Canada (Citizenship and Immigration)*, 2018 FC 367 (Diner J.), at para 16; *Poczkodi*, at paras 33-34; *Dawidowicz v Canada (Citizenship and Immigration)*, 2014 FC 115 (O'Keefe J.), at para 27.

[50] Second, the rationale for the officer's conclusion was obvious, given the rest of the officer's reasons leading up to the conclusion on this issue. The officer considered the RPD's conclusions as to the (lack of) credibility of the applicants, the non-existence of alleged incidents of violence and the absence of subjective fear of persecution owing to the finding of a planned departure from their homeland. The officer found little new evidence emanating from the applicants themselves since the RPD's decision, which was important because a PRRA is designed to assess new risks arising since the RPD's decision: *Kreishan v Canada (Citizenship and Immigration)*, 2019 FCA 223 (Rennie JA), at paras 4 and 116. The officer also doubted the applicants' subjective fear of returning to the Czech Republic based on their failure, without reasonable explanation, to apply for permanent residence in Canada based on an H&C application by the February 25, 2016 deadline. In these circumstances, and given the officer's conclusions about widespread discrimination (but not persecution) of Roma people as a group in the Czech Republic, it is apparent why the officer reached the stated conclusion on the applicants' profiles. The officer's decision is reasonable on the *Vavilov* standards.

[51] Accordingly, the applicants' third submission must also be dismissed.

IV. Conclusion

[52] For these reasons, the application for judicial review is dismissed. Neither party proposed a question for certification and I agree that there is none. This is not a case for costs.

JUDGMENT in IMM-392-20

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.
2. No question is certified under paragraph 74(*d*) of the *Immigration and Refugee Protection Act*.
3. There is no costs order.

"Andrew D. Little"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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