Federal Court  Cour fédérale

Date: 20220228

Docket: IMM-314-20

Citation: 2022 FC 249

Ottawa, Ontario, February 28, 2022

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

RADOVAN RSTIC

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] Mr. Rstic [Applicant] applies for judicial review of a Senior Immigration Officer's refusal of the Applicant's application for a Pre-Removal Risk Assessment [PRRA] made on November 28, 2019 [Decision]. The Officer concluded that, if returned to Croatia, the Applicant will not face a reasonable possibility of persecution, a personalized danger of torture, risk to life,

or risk of cruel and unusual treatment or punishment pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001 c 27 [*IRPA*].

[1] The application for judicial review is dismissed.

II. Background

[2] The Applicant, a citizen of Croatia, entered Canada on November 17, 2012 with a visitor's visa that was extended until November 2014. He continued to remain in Canada beyond his authorized stay. In February 2013, the Applicant moved in with his common-law wife, Ivana, with whom he currently still resides. A few months later, she became pregnant with the Applicant's son. The Applicant is also the stepfather to four of Ivana's children from a previous marriage.

[3] In July 2011, the Applicant was charged under what was formerly paragraph 253(1)(b) of the *Criminal Code*, RSC, 1985, c C-48 for impaired driving. Following this, the Applicant and Ivana separated for a few years but later reconciled. The Applicant was convicted in February 2015. As a result, on April 25, 2019, a removal order was issued against him under paragraph 36(2)(a) of the *IRPA* for criminality. On or around May 13, 2019, the Applicant submitted his PRRA application. In mid-December 2019, Ivana sponsored the Applicant for permanent residency under the Spouse or Common-law Partner in Canada class.

[4] On January 2, 2020, the PRRA Decision was communicated to the Applicant. On January 9, 2020, the Applicant was issued a Direction to Report for Removal indicating that he would be

removed from Canada to Croatia on January 23, 2020. The Applicant submitted an unsuccessful deferral request based on the pending sponsorship application, humanitarian and compassionate grounds, and to pursue an application for judicial review.

[5] The Applicant filed this application for judicial review on January 17, 2020. He also filed a motion for a stay of his removal pending the outcome of this application. On January 23, 2020, the Applicant's stay motion was granted.

[6] The Applicant states that he will not earn enough money to sustain himself in Croatia. He has received a job offer as a general labourer that will pay him approximately $633 CAD per month. This amount will cover less than half of his expenses in Croatia. He also states that if removed, Ivana will not be able to sustain herself and the children and will be forced to go on social assistance. If she receives social assistance, she will be unable to sponsor the Applicant. Ivana is unable to move to Croatia with her four children without her ex-husband's consent. The Applicant fears he will be separated from his family indefinitely.

III. The Decision

[7] In his PRRA application, the Applicant claims to face a risk based on his Serbian ethnicity and his Orthodox Christian religion. He fears being a target of police harassment, attacked by Croatian nationalists, and discriminated against when seeking employment. In his narrative, the Applicant explains that he is psychologically traumatized from his childhood. He states that he was mistreated emotionally and physically at school for being a Serb and that the

military threatened to kill his family if they did not leave Croatia. He states that he left Croatia for a better life in Canada after struggling to find a job.

[8] The Officer found that the Applicant submitted insufficient evidence to demonstrate that he will face a risk if returned to Croatia. In assessing the evidence, the Officer noted that the research related to civil wars that the Applicant submitted had little probative value to the Applicant's present day risk. The Officer acknowledged that a 2018 Council of Europe document states that there are increasing instances of hate crimes committed against ethnic Serbs in Croatia. Furthermore, the Officer noted that there is hate speech on television; an appearance of discrimination towards ethnic Serbs in civil service employment; and discrimination in the construction of public infrastructure in areas where ethnic Serbs predominantly live. However, that same document also indicates positive developments including a government anti-discrimination plan; television watchdogs that have sanctioned television stations for engaging in hate speech; and a voluntary government program to train police and civil servants about bias and discrimination.

[9] The Officer found that despite instances of discrimination against Serbs in Croatia, the level of discrimination does not amount to persecution because there is a functional state that is able to respond to hate speech, discrimination, and violence with legal sanctions. The Officer noted that Croatia has a written constitution enshrining minority languages and freedom of religion; minorities are entitled to an education in their own language; there is a minimum number of seats for Serbs in the Croatian parliament; and there is well-developed legislation defining hate crimes that provides for legal recourse.

[10] The Officer also considered the Applicant's submissions that legal protection for minorities exists in the law, but not in practice. One article confirmed that perpetrators of an attack in Croatia were punished with legal sanctions. Likewise, an excerpt from the US Department of State indicated that a perpetrator of a hate crime was charged. The Officer found that both of these examples support the position that legal protection for Serbs does exist in practice. The Officer also noted that a Freedom House report states that freedom of religion in Croatia is "generally upheld in practice," contrary to the Applicant's assertion.

[11] The Officer gave little weight to other evidence supporting the position that state protection does not exist in practice because it was vague; biased, spoke to country conditions in countries other than Croatia, or discussed discrimination faced by different minority groups**.**

[12] With respect to section 97 of the *IRPA*, the Officer found that there was little evidence to show that the Applicant was personally at risk, as his evidence related only to a general risk. The Applicant's concerns stemmed from his school-aged experiences and he did not name any person or group that was specifically targeting him in Croatia.

[13] The Officer did not assess the Applicant's humanitarian and compassionate grounds because "they fall outside the purview of a PRRA because they do not address a personalized risk as defined by either section 96 or 97 of *IRPA*."

IV. Issues

[14] I agree with the parties that the main issue in this case is whether the Decision is reasonable. The relevant sub-issues include:

1. Did the Officer apply the appropriate test for state protection?
2. Did the Officer ignore critical evidence?

V. Standard of Review

[15] I agree with the parties that the appropriate standard of review is reasonableness. This case does not engage one of the exceptions set out by the Supreme Court in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. Therefore, the presumption of reasonableness is not rebutted (at paras 23-25, 53).

[16] A reasonableness review requires the Court to examine the decision for intelligibility, transparency, and justification. In conducting a reasonableness review, the reviewing court must look to both the outcome of the decision and the justification of the result (*Vavilov* at para 87). A reasonable decision must be "justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99). However, "a reviewing court must refrain from reweighing and reassessing the evidence considered by the decision maker" (*Vavilov* at para 125). If the decision-maker's reasons allow a reviewing Court to understand why the decision was made, and determine whether the decision falls within the range of acceptable outcomes defensible in respect of the facts and law, the decision will be reasonable (*Vavilov* at paras 85-86).

VI. Parties' Positions

A. *Did the Officer apply the appropriate legal test for state protection?*

(1) Applicant's Position

[17] The Applicant submits that the Officer inappropriately focused on whether Croatia had enacted laws to provide protection to Serbs. The Officer selectively referred to evidence, emphasizing Croatia's constitution, laws against hate crimes, and legal avenues for seeking restitution or punishment. Decision-makers must ask whether the state can actually provide protection on an operational level (*Toriz Gilvaja v Canada (Minister of Citizenship and Immigration)*, 2009 FC 598 at para 39 [*Gilvaja*]).

[18] The documentary evidence demonstrates that while there are laws in place, the Croatian state inadequately responds to violence and discrimination against Serbs. Unless it actually leads to state protection, the fact that an agent of persecution has been charged does not mean that protection is adequate (*Joseph v Canada (Minister of Citizenship and Immigration)*, 2013 FC 561 at para 37 [*Joseph*]). The Officer acknowledged that hate crimes are increasing, which logically indicates that state protection mechanisms are not adequate.

(2) Respondent's Position

[19] The Officer specifically addressed the Applicant's assertion that state protection does not exist in practice. The Officer considered the evidence the Applicant submitted to advance this position and concluded that it was of low probative value or contradicted the Applicant's

position. The Applicant has the burden of establishing that state protection is inadequate and he did not discharge this burden. It was reasonable for the Officer to conclude that state protection is adequate in Croatia and that the Applicant's evidence did not establish that Serbs in Croatia face discrimination amounting to persecution.

[20] The Officer can acknowledge evidence of discrimination while still reaching conclusions about the level of that discrimination and the availability of state protection. The fact that the Officer acknowledged that discrimination exists actually demonstrates that they understood the relevant legal test (*Cervenakova v Canada (Citizenship and Immigration)*, 2021 FC 477 at para 38 [*Cervenakova*]).

B. *Did the Officer ignore critical evidence?*

(1) Applicant's Position

[21] The Officer selectively referred to portions of the evidence that emphasize positive developments in Croatia. The Officer failed to acknowledge that the same evidence indicates negative trends. For example: despite constitutional protections, discrimination and violence against Serbs continues; proportional representation in the Croatian parliament is getting worse; positive developments are inadequate; intolerance towards Serbs is increasing; criminal acts and physical attacks against Serbs are increasing; judges are unfamiliar with anti-discrimination laws, meaning they are rarely applied; and defendants sanctioned under those laws are almost always given a symbolic sanction below the minimum fine.

[22] Additionally, the Officer unreasonably found that some of the Applicant's evidence conflicted with the Applicant's position. While the excerpt from the US Department of State does indicate an instance where the state took protective action, it does not amount to a discrepancy. The documents generally agree that the state does persecute hate crimes. However, that it is not an effective deterrent because punishments are below the mandatory minimums.

(2) Respondent's Position

[23] The Officer's assessment of the evidence was reasonable. It is not the role of the Court to reweigh the evidence before the decision-maker (*Cervenakova* at paras 45-46).

[24] The Officer concluded that historical evidence was not highly relevant and that articles from state-run news sources were likely biased. The Applicant points only to isolated parts of the documentary evidence suggesting that all ethnic Serbs are subject to discrimination amounting to persecution and that state protection is inadequate. However, the documentary evidence does not support this position. A full reading of the 2015 Response to Information Request shows that the evidence is conflicting: respect for minorities has improved, though Serbs continue to face discrimination; most complaints about discrimination are related to employment issues; the most frequent expression of anti-Serb intolerance is destruction of bilingual signs; reported instances of hate speech are declining; in 2014, one group reported fewer reports of assault and harassment against Serbs while other groups found that attacks and hate speech were increasing; while proportional representation of Serbs in parliament has not been realized, the government has appointed a number of Serb ministers, including deputy prime ministers; and there are examples

where the state was able to offer protection, including taking action against a teacher that failed to protect a Serbian student.

[25] The 2018 Council of Europe document does state that Croatia's response to racism is not "fully adequate", but this document is not specific to Serbs. It welcomes positive changes and notes that protection against hate crimes is improving. The report's recommendations reflect the types of steps Croatia is already taking. There are laws, investigations, and convictions.

[26] In light of this evidence, it was reasonable for the Officer to conclude that there is "a functional state that is able to respond to instances of hate speech, discrimination, and violence with legal sanctions."

VII. Analysis

A. *Did the Officer apply the appropriate legal test for state protection?*

[27] Absent a complete breakdown of the state apparatus, there is a presumption that the state is capable of protecting its citizens. To overcome this presumption, an applicant must present clear and convincing evidence of the state's inability to protect (*Ward v Canada (Minister of Employment & Immigration)*, [1993] 2 SCR 689 at 724-725, 103 DLR (4th) 1; *Glasgow v Canada (Citizenship and Immigration)*, 2014 FC 1229 at para 35).

[28] The evidence must also be relevant and reliable and satisfy the trier of fact on a balance of probabilities that state protection is inadequate (*Flores Carrillo v Canada (Minister of*

Citizenship and Immigration), 2008 FCA 94 at para 30). State protection will be adequate if the state is in effective control and makes serious efforts to protect its citizens (*Atakurola v Canada (Minister of Citizenship & Immigration)*, [1995] FCJ No 463 at 5-6, 54 ACWS (3d) 746). Adequate state protection need not be perfect but the state must be willing and able to protect (*Poczkodi v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 956 para 37).

[29] When assessing whether state protection is adequate, a decision-maker must consider protection at the operational level. As stated by Justice Gascon at paragraph 32 of *Galamb v Canada (Minister of Citizenship and Immigration)*, 2016 FC 1230 [*Galamb*]:

> The state protection test must focus not only on the efforts of the state but also on actual results: "[i]t is what state protection is *actually provided* at the *present time* that is relevant" (*Hercegi v Canada (Citizenship and Immigration)*, 2012 FC 250 at paras 5-6 [emphasis in the original]). A state protection analysis must not just consider governmental aspirations. Stated otherwise, for a protection to be adequate, it must amount to a protection that works at the operational level.

[30] While the Officer did not explicitly discuss the test for state protection, the Officer's reasons demonstrate that they applied the appropriate state protection test. The Applicant is correct that having laws on the books does not equate with actual, experienced state protection for citizens (*Gilvaja* at para 39). While the overall question is whether actual protection exists, the efforts of a government "to achieve state protection may, of course, be relevant to the question of whether operational adequacy has been achieved" (*Galamb* at para 33).

[31] In this case, at page five of the Decision, the Officer explicitly considered whether Croatia offers adequate state protection in practice. The Officer reviewed the evidence the

Applicant submitted in support of the position that state protection does not exist on an operational level. The Officer acknowledged that this evidence establishes that discrimination exists against Serbs in Croatia. However, the Officer also noted that the same evidence, which the Applicant put before the Officer, demonstrates that Croatia responds to said instances of discrimination through the legal system. Overall, the Decision demonstrates that the Officer considered the material submitted by the Applicant and reasonably concluded that this evidence either contradicted the Applicant's position or was not relevant and should be assigned little weight**.** The Decision does not hinge on the mere existence of having laws on the books.

[32] Furthermore, I agree with the Respondent that the Officer applied the correct legal test, as demonstrated by the Officer's acknowledgement that discrimination exists (*Cervenakova* at para 38). An applicant has the burden of rebutting the presumption that state protection is adequate. The fact that the Officer turned their mind to the "operational shortcomings and gaps demonstrated by the evidence" indicates that the Officer understood that the relevant test was whether Croatian authorities could provide the Applicant with "necessary protection" (*Go v Canada (Minister of Citizenship and Immigration)*, 2016 FC 1021 at para 13).

[33] The Applicant cites *Gilvaja* and *Joseph*, where this Court found that the Refugee Protection Division and a PRRA officer erred by failing to assess the adequacy of state protection on an operational level. However, in both of those cases, female applicants fled their home countries due to a personalized risk of gender-based violence. This is different from the present context because the Applicant has only alleged a generalized risk applicable to all Serbs in Croatia. Those cases are also distinguishable because the female applicants had unsuccessfully

tried to obtain state protection prior to fleeing. In those cases, in light of past inadequate protection, this Court held that it was unreasonable for the decision-makers to conclude that operational protection existed in the Applicants' respective home countries. There is no such evidence in the present case. As previously noted, the Officer reviewed the evidence submitted by the Applicant and reasonably found that it demonstrated Croatia's ability and willingness to respond to discrimination.

[34] I am satisfied that the Officer considered Croatia's efforts to improve state protection and the results of those efforts in terms of investigations, prosecutions, and convictions (*Galamb* para 34).

B. *Did the Officer ignore critical evidence?*

[35] This case is similar to the situation in *Cervenakova*. *Cervenakova* concerned a PRRA application of Roma applicants from the Czech Republic. At paragraph 44, Justice Little noted:

> 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.

[36] In this case, I do not find that the Officer reached an untenable conclusion or fundamentally misapprehend the evidence. The Officer recognized the shortcomings and gaps in state protection in Croatia, noting increased instances of hate crimes against Serbs; cases of hate speech on television; the appearance of discrimination against Serbs in the public service; and discrimination in the construction of public infrastructure. Ultimately, the Officer concluded:

> While there are instances of discrimination towards ethnic Serbs in Croatia, based on the totality of the evidence before me, I find that the level of discriminatory behaviour does not reach the level of persecution as required by section 96 of IRPA. The documentary evidences [*sic*] shows that there is a functional state that is able to respond to instances of hate speech, discrimination, and violence with legal sanctions. I find the applicant has not shown he has more than the mere possibility of risk as defined by section 96 of IRPA.
>
> [Emphasis added.]

[37] In my view, this passage indicates that, contrary to the Applicant's submissions, the Officer did not require the Applicant to "demonstrate that he has or even would suffer persecution" for the purposes of section 96 of the *IRPA*.

[38] The Applicant also essentially submitted that all ethnic Serbs were subject to discrimination that rose to the level of persecution and that the Applicant was a similarly situated person. I agree with the Respondent that the documentary evidence does not support this submission.

[39] While the Officer did not make the specific factual conclusions on all the subjects set out in the documentary evidence (such as those listed at paragraph 22, above), the Officer did reach conclusions consistent with the contents of the country condition documents. The Officer found

that there is discrimination against Serbs in Croatia. Similar to *Cervenakova*, none of the documentary evidence in this case concludes that there is systemic persecution of all Serbs in Croatia. Accordingly, I find that the Officer's conclusions were reasonable. Keeping in mind the principles articulated in *Vavilov* and that the Applicant has the burden of adducing quality evidence that clearly and convincingly shows the inadequacy of state protection, I am of the view that the Officer made no reviewable error (*Cervenakova* at paras 45-46).

VIII. Conclusion

[40] The application for judicial review is dismissed. The Decision is intelligible, transparent, and justified. There is no question for certification.

JUDGMENT in IMM-314-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question for certification.

3. There is no order for costs.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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