Federal Court Cour fédérale

Date: 20240122

Docket: IMM-6878-22

Citation: 2024 FC 97

Ottawa, Ontario, January 22, 2024

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

ADRIAN CIURON, PAULINA MARKOWSKA-CIURON, NATAN MARKOWSKI, AND JONASZ CIURON

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The principal applicant [PA], his spouse, and their two children [the Applicants] are citizens of Poland. They report a fear of persecution in that country because of their Roma ethnicity. They allege both government discrimination amounting to persecution and persecution

at the hands of a segment of the Polish population. They assert that adequate state protection is not available to them.

[2] The Refugee Protection Division [RPD] rejected their claims, finding they had failed to rebut the presumption of adequate state protection. The refusal decision was upheld on appeal to the Refugee Appeal Division [RAD]. The Applicants seek judicial review of the RAD's June 24, 2022 decision under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[3] I am not persuaded that the RAD's decision is unreasonable. My reasons follow.

II. Background

[4] The PA reports that he and his family have experienced discrimination that has resulted in the PA's application for higher education being refused, difficulties securing housing from the government despite its availability, struggles to find employment when an employer is aware of their Roma ethnicity, and the PA having been excluded from field trips and excursions when he was in school.

[5] The PA also outlines a specific incident in which he was assaulted while walking in a park in July 2019 with his wife. He submits that four young men used degrading anti-Roma names, spat at them, and assaulted him, leaving him unconscious. The PA's spouse called the police and an ambulance. His spouse explained what happened to the police who told them that they would look into it. The PA was then taken to the hospital where he stayed for three days as

he had suffered a serious concussion. In following up with the police, they were advised no suspects had been found.

III. Decision under review

[6] Although the RAD was of the view that the RPD had erred in parts of its analysis, it found the RPD had correctly concluded that the Applicants had failed to establish that state protection would not be available to them.

[7] The RAD first addressed whether the state was an agent of persecution in Poland, noting that, if the evidence established this to be so, it would be unreasonable to expect the Applicants to seek protection.

[8] The RAD found that the objective evidence disclosed the Roma people experience discrimination in Poland in areas of health care, education, housing, and employment. The RAD then considered the Applicants' personal experiences, finding them to be important in shedding light on the daily realities for the Roma community in Poland. In considering the PA's assertion that he had been excluded from his education program of choice, the RAD found that it was more likely than not that the PA was not admitted to the program due to his insufficient grades, rather than on the basis of his Roma ethnicity. The RAD also found that, while housing standards were not ideal, they were adequate, providing necessities such as electricity, plumbing and heating.

[9] In considering health care, the RAD accepted the Applicants' subjective fears that Roma women were at risk of non-consensual sterilization. However, the RAD found that the belief was not supported by objective evidence and that the objective evidence disclosing discrimination against Roma individuals within the Polish healthcare system was dated. The RAD preferred the Applicants' own evidence regarding the 2019 attack in the park, indicating the PA was cared for and taken to the hospital by ambulance, received immediate treatment, had numerous tests/examinations, received medication, was kept for observation, received a diagnosis and was told to return in two weeks.

[10] In considering employment, the RAD noted that the PA was employed 30-50% of the time and acknowledged his explanation that he would get job interviews, but would later be informed the job was not available to him when his employer realized he was Roma.

[11] The RAD concluded that the discrimination the Applicants faced and experienced did not, when considered cumulatively, rise to a level of persecution because the treatment did not threaten their basic human rights in a fundamental way.

[12] The RAD then reviewed treatment from some segments of the population, in particular the attack the PA experienced in a park, and concluded that such treatment did amount to persecution. However, the RAD was of the view that the evidence revealed the Polish state had taken concrete actions that were demonstrated to be operationally effective in the investigation of hate crimes, including those against Roma people, and had prosecuted about one third of such crimes. In considering the Applicants' experiences with the police, the RAD noted that, when the

PA contacted the police, they responded and made reports, which it found to be concrete evidence of the police taking action in response to hate crimes. Although there was a lack of communication between the police and the Applicants, the RAD found this did not mean that the police had not investigated. The RAD concluded that the Applicants could have done more in terms of following up with the police.

[13] The RAD concluded that the Applicants "failed to meet the high threshold, as it is their onus to do so, and did not rebut the presumption of state protection […]." The RAD dismissed the appeal.

IV. Issues and Standard of review

[14] The following issues are raised in the present matter:

A. The RAD erred by requiring the Applicants to meet a "high threshold" to rebut the presumption of state protection.

B. The RAD unreasonably concluded that:

i. The presumption of state protection had not been rebutted; and

ii. Discrimination, when considered cumulatively, did not rise to the level of persecution.

[15] The Applicants argue that the standard of correctness is to be applied when considering whether the RAD applied the correct state protection test. I disagree, but am of the view that,

where a decision maker applies an incorrect legal test, the result is the same whether a correctness standard of review or a reasonableness standard of review is adopted.

[16] In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10 and 17 [*Vavilov*]), the Supreme Court instructs that reasonableness is the standard of review presumed to apply, subject to specific and identified exceptions, when reviewing administrative decisions. None of the exceptions arises here.

[17] In conducting a reasonableness review, the reviewing court must consider whether the decision is appropriately justified, transparent and intelligible, and determine “whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law” (*Vavilov* at paras 86 and 97). A justified, transparent and intelligible decision is one that reflects “an internally coherent and rational chain of analysis,” “is justified in relation to the facts and the law that constrain the decision maker” and should reflect that the decision maker “meaningfully grapple[d] with key issues or central arguments raised by the parties” (*Vavilov* at paras 85 and 128).

[18] The adoption of an incorrect legal test by a decision maker will render the decision unreasonable on the basis that it cannot be justified in light of the legal constraints that bear upon it.

[19] It is not in dispute that the reasonableness standard is to be applied to the review of the RAD’s persecution and state protection analysis.

V. Analysis

A. *The RAD did not err by applying an incorrect test*

[20] The Applicants submit that the RAD erred by requiring the Applicants meet a “high threshold” to establish that adequate state protection would not be forthcoming in Poland, which echoed the RPD’s assertion that the Applicants had a “high burden” to establish that state protection would not be available to them. In discussing the standard of proof, the Applicants rely on *Flores Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 [*Carrillo*] to submit that they were required to establish that state protection is inadequate or non-existent on a balance of probabilities (at para 38).

[21] The Respondent submits that, when read in context, the RAD’s reference to a “high threshold” was a reference to the Applicants’ onus to rebut the presumption of state protection with clear and convincing evidence that protection would be inadequate or ineffective if they were returned to Poland. It was not a statement by the RAD of the legal burden of proof the Applicants had to meet. The Respondent argues the RAD demonstrably applied the correct legal test.

[22] In *Carrillo*, where the Federal Court of Appeal [FCA] was considering the burden on an applicant seeking to establish inadequate state protection, the FCA notes that the burden of proof, standard of proof, and quality of evidence necessary to meet the standard of proof are three different legal concepts “which should not be confused” (at para 16).

[23] The burden of proof is on an applicant to rebut the presumption of inadequate state protection. The burden consists of (1) the evidentiary burden of adducing evidence of inadequate state protection, and (2) the legal burden of persuading the trier of fact that the evidence adduced establishes that the state protection is inadequate (*Carrillo* at para 17-19). The standard of proof describes the threshold an applicant must satisfy in discharging the legal burden of persuasion. In this case, the threshold or standard of proof is on a balance of probabilities.

[24] The third legal concept addressed in *Carrillo* – the nature or quality of the evidence needed to satisfy the standard of proof, describes the probative quality of the evidence required to meet the applicable standard (para 30). Reliable evidence versus convincing evidence versus clear and convincing evidence each describe differing degrees of probative value. However, the quality of the evidence required to satisfy a standard of proof does not alter the applicable standard of proof.

[25] In *Hinzman v Canada (Citizenship and Immigration)*, 2007 FCA 171 at para 57 [*Hinzman*], it was stated that. "a claimant coming from a democratic country will have a heavy burden when attempting to show that he should not have been required to exhaust all of the recourses available to him domestically before claiming refugee status." The Court in *Carrillo* found this to be a reference to the quality of the evidence needed to convince the trier of fact of inadequate state protection. In some instances, it may be more difficult to rebut the presumption than others, but this does not change the standard of proof (*Carrillo* at para 26).

[26] In this instance, as was the case in *Hinzman*, the RAD did not impose a higher standard of proof or apply an incorrect legal test. The RAD found that "the Appellants failed to meet the high threshold, as it is their onus to do so, and did not rebut the presumption of state protection with clear and convincing evidence that state protection would be inadequate or ineffective if they were to return to Poland" [emphasis added]. When read in context, the RAD's statement is a reference to the nature and quality of the Applicants' evidence and is consistent with the jurisprudence that binds the RAD.

[27] In reply submissions the Applicants seek to distinguish *Heinzman* on the basis that the objective country evidence in this case demonstrates that Poland is ineffective at protecting its Roma population. In advancing this view, the Applicant takes issue with the RAD's assessment of the evidence including the weight assigned. It is not the Court's role to engage in a re-weighing of the evidence on judicial review (*Vavilov* at para 125).

B. *The decision is reasonable*

(1) No reviewable error in the RAD's state protection analysis

[28] The Applicants submit that the RAD's state protection analysis ignored evidence from the PA relating to his interactions and experience with the police. It is submitted that the analysis also ignored corroborative documentary evidence, evidence contradicting the RAD's conclusion that the Polish state is taking concrete, operationally effective actions to address the persecution, and demonstrating leading public figures, including politicians and media officials, are frequently the source of racist hate speech against minority groups, such as the Roma. The

Applicants further submit the RAD's failure to address this evidence renders the state protection analysis unreasonable. I disagree.

[29] An administrative decision maker must grapple with the central arguments raised by a party but need not address every piece of evidence or every argument advanced (*Vavilov* at para 128, *Maalaoui v Canada (Citizenship and Immigration)*, 2021 FC 1444 at para 20, citing *Boulos v Canada (Public Service Alliance)*, 2012 FCA 193 at para 11).

[30] The PA's interaction with the police was considered by the RAD. The RAD specifically addressed the PA's single interaction with a police officer following the PA's attack and it is on this basis that the RAD found more could have been done to follow up. This finding was reached after the RAD noted that both times the police had been contacted they responded and prepared reports. Although the RAD did not address the experience of the PA's cousin, this does not render the decision unreasonable. The incident was not referenced in the submissions to the RAD or addressed in the basis of claim documentation – it was not central to the claim.

[31] The RAD engaged with and addressed the objective country condition evidence within the context of the Applicants' personal experiences in seeking help from the police. In considering the objective evidence, the RAD acknowledged that state protection was not perfect, noted that discrimination against Roma people remains an issue in Poland and that, despite legislative efforts; laws are not enforced in all areas. However, the RAD also noted the evidence relating to the investigation and prosecution of hate crimes and concluded concrete and effective actions had been undertaken by the state.

[32] The RAD reasonably concluded the presumption of state protection had not been rebutted.

(2) No reviewable error in the RAD's discrimination analysis

[33] The Applicants submit that the RAD's assessment of the evidence supporting their claims of having been subjected to pervasive discrimination cumulatively amounting to persecution is unreasonable. They submit the RAD compromised its analysis of the issue through repeated misstatements and minimization of the Applicants' evidence.

[34] The issues raised by the Applicants, while framed in terms of minimization and misstatements, essentially amount to disagreement with the RAD's interpretation and weighing of the evidence. For example, in concluding the PA's refused admission to an education program was more likely than not due to insufficient grades as opposed to Roma ethnicity, the RAD recognized the PA's evidence of mistreatment while in school but also noted the PA's acknowledgment that his grades were not good enough to get into the program. The RAD did not misstate, minimize or ignore evidence but rather considered and weighed the evidence and justified the conclusions reached.

[35] I am similarly satisfied that the RAD's consideration of the issue of state discrimination in the areas of housing, healthcare and employment was reasonable. The RAD again acknowledged the country condition evidence revealing that discrimination against the Roma in the healthcare system has occurred, but noted the objective evidence was dated and reasonably preferred the Applicants' own more recent experiences as indicative of the situation for Roma

people. While the RAD may have engaged in speculation in identifying the practice of triaging as a possible explanation for the Applicants having had to wait for medical care, any error in this regard is peripheral and does not justify intervention.

[36] Having considered the treatment of Roma people within specific government controlled contexts, the RAD then undertook a global assessment. The RAD concluded that discrimination existed and that the Applicants had experienced discrimination. However, the RAD found that the discrimination did not threaten basic human rights in a fundamental way, and on this basis, concluded that the discrimination, when considered cumulatively, did not rise to the level of persecution. This conclusion, supported by a reasonable analysis, is justified, transparent and intelligible.

VI. Conclusion

[37] For the above reasons, the Application is dismissed. The parties have not identified a question of general importance and none arises.

JUDGMENT IN IMM-6878-22

THIS COURT'S JUDGMENT is that:

1. The Application is dismissed.

2. No question is certified.

"Patrick Gleeson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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