Federal Court  Cour fédérale

Date: 20160304

Docket: IMM-3552-15

Citation: 2016 FC 282

Ottawa, Ontario, March 4, 2016

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

VESELIN PEEV PAVLOV

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision of the Refugee Appeal Division of the Immigration and Refugee Board of Canada ("RAD"), dated July 13, 2015, in which the RAD confirmed the finding of the Refugee Protection Division ("RPD") that the Applicant is neither a Convention refugee nor a person in need of protection pursuant to s 96 or s 97, respectively, of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA").

Background

[2] The Applicant is a citizen of Bulgaria and of ethnic Roma heritage. He claims to fear persecution by Roumen Boyoukliev ("Roumen") and his associates in Bulgaria. In 2005 the Applicant's father accepted Roumen's offer of protection from ultranationalists in exchange for a monthly fee. Ultimately, when he stopped making those payments, the Applicant's father was attacked by Roumen's men. When he reported this to the police he was told to make the payments. He reported this to the Prosecutor's Office and was then summoned to the police station where he was assaulted and told that the police knew of his complaint against them. His father then withdrew his report to the Prosecutor's Office. When the attacks against them continued in 2013 and 2014, the Applicant's parents and brother fled to Canada. Their refugee claims were granted in 2014.

[3] Roumen then turned his attention to the Applicant who received a subpoena to attend at the police station. There the police asked of the whereabouts of his family who had fled and demanded 15,000 Euros to avoid the laying of fabricated charges against them. The Applicant was later attacked by three men who told him that if they did not receive the money they would force his wife into prostitution and kidnap his children. The Applicant claims that he did not report this to the police as he feared them. When he received a second subpoena to attend at the police station, he fled to Canada. His wife and two young children fled the town they lived in and remain in hiding.

[4] The RPD found that there was no nexus to a Convention ground and, therefore, the Applicant's claim failed under s 96 of the IRPA. The RPD then determined that the Applicant had an internal flight alternative ("IFA") in Sofia as the Applicant had failed to provide any persuasive evidence in support of his argument that Roumen and his associates in the Plovdiv police could find him and his family anywhere in Bulgaria and there was no evidence that the police in Sofia would not protect him. The RPD also found that the Applicant had failed to rebut the presumption of state protection, particularly since articles he submitted demonstrated that the police had been successful in prosecuting Roumen. Further, that the Applicant had made no efforts to seek police protection. For these reasons, the RPD determined that the Applicant was not a person in need of protection under s 97 of the IRPA.

Decision Under Review

[5] On appeal to the RAD, the Applicant submitted six documents post-dating the RPD's decision which were accepted by the RAD pursuant to s 110(4) of the IRPA. The RAD also determined that an oral hearing was necessary, pursuant to s 110(6), because the evidence raised issues of credibility and issues that were material to the RPD's decision, including the IFA finding. All of the Applicant's new evidence related to an event alleged to have occurred on January 30, 2015, two days after the RPD rendered its decision, specifically, the alleged rape of the Applicant's wife by Roumen's associates. The RAD questioned the Applicant about the new evidence during the oral hearing.

[6] In its decision the RAD discussed what it viewed as contradictions or implausibilities in the Applicant's testimony and generally found the new evidence not to be credible on that basis.

It also found the medical reports pertaining to the Applicant's wife to lack credibility. Further, that the Applicant's lack of knowledge of the details of, or his "indifference" to, his wife's attack was implausible as was his testimony regarding why his children were not attending school and were at home on the day of the rape. The RAD also found the medical report concerning the Applicant's son's stuttering, alleged to have developed after having witnessed the rape, to lack credibility.

[7] For these reasons, the RAD determined the new evidence was not credible and found that the Applicant's wife had not been a victim of rape. The RAD went on to discuss and agree with the RPD's determinations on the IFA to Sofia and state protection issues.

Issues

[8] The Applicant submits that the issues are as follows:

1) Did the RAD make unreasonable credibility findings?
2) In the alternative, did the RAD err by upholding the RPD's finding that the Applicant has an IFA in Sofia?
3) Did the RAD err by upholding the RPD's finding that the Applicant failed to rebut the presumption of state protection?

Standard of Review

[9] While neither party specifically addresses standard of review, both apply the reasonableness standard. A standard of review analysis need not be conducted in every instance. Where the standard of review applicable to a particular issue before the Court is well-settled by

past jurisprudence the reviewing Court may accept that standard of review (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 62 [*Dunsmuir*]). While prior jurisprudence determining the standard of review for the RAD's credibility determinations on oral testimony has not been identified, in my view, the circumstance is analogous to RPD decisions which make credibility findings based on oral testimony. It is well established that such decisions are reviewable on the reasonableness standard (*Behary v Canada (Citizenship and Immigration)*, 2015 FC 794 at para 7; *Zhou v Canada (Citizenship and Immigration)*, 2013 FC 619 at para 26; *Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 (Fed CA)). Accordingly, I find that the reasonableness standard also applies in this matter.

[10] Because I have determined below that the RAD's credibility findings are determinative of this application, the standard of review for the Applicant's alternate arguments need not be addressed.

[11] In applying the standard of reasonableness, the Court will be concerned with the justification, transparency and intelligibility of the decision-making process and also with whether the decision falls within a range of possible, acceptable outcomes in respect of the facts and the law (*Dunsmuir* at para 47; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59; *Mrda v Canada (Citizenship and Immigration)*, 2016 FC 49 at para 25).

Submissions of the Parties

[12] The Applicant submits that the RAD's credibility assessment of the new documentary evidence was unreasonable because it was wholly speculative. The RAD speculated about what

the Applicant should have done, felt and asked following the attack on his wife. The RAD also failed to consider the "claimant's milieu" (*Valtchev v Canada (Minister of Citizenship and Immigration)*, [2001] FCJ No 1131 [*Valtchev*]) as it disregarded the fact that the Applicant was not in Bulgaria at the time and, without an evidentiary basis, found that the Applicant and his wife should have spoken in greater detail about the rape. The Applicant's alleged indifference to the rape is mentioned several times in the RAD's reasons, however, it is unclear how the Applicant could have shown sufficient concern about his wife's ordeal. The Applicant also submits that, in considering the medical evidence, the RAD engaged in conjecture by finding it to be implausible. And, because its unreasonable credibility findings also informed the RAD's IFA and state protection analysis, the application should be allowed on the basis of its unreasonable credibility findings alone. The Applicant also raised two arguments in the alternative regarding the RAD's IFA and state protection analysis.

[13] As to the Respondent, its submissions summarized the RAD's decision and stated that there were reasonable grounds upon which the RAD could conclude that the evidence was not credible based on contradictions, lack of detail and implausibilities. Because Roumen's actions were central to the Applicant's claim, the Respondent submits that it was reasonable to expect that the Applicant would seek out details of the rape and recall them at the hearing and that any discrepancy in the documentary evidence would be explained. Because the Applicant did not do so, the RAD's decision to reject the evidence was open to it. The Respondent also addressed the RAD's IFA and state protection analysis.

Analysis

[14] While the Court owes deference to the credibility findings of a tribunal tasked with fact-finding (*Aguilar Zacarias v Canada (Citizenship and Immigration)*, 2012 FC 1155 at para 9 [*Aguilar*]), "[D]eference is not a blank cheque. There must be reasoned reasons leading to a justifiable finding" (*Njeri v Canada (Citizenship and Immigration)*, 2009 FC 291 at para 12). And, where credibility findings rest on plausibility determinations, the implausibility must be clear and the RPD should provide a reliable and verifiable evidentiary base against which the plausibility of the Applicant's evidence may be judged (*Aguilar* at para 11; *Cao v Canada (Citizenship and Immigration)*, 2012 FC 694 at para 20; *Valtchev* at para 9). In my view, for the reasons set out below, the credibility findings and plausibility determinations made by the RAD in this case do not accord with these principles.

[15] The new evidence comprised six documents. The first is a letter is from the Applicant's wife in Bulgaria stating that Roumen's men had found her and that they had raped her in front of the children and threatened to have the children kidnapped and forced into prostitution. It is of note that the Applicant testified that, on the advice of the local Roma Council in Plovdiv, the Applicant's wife and children were hiding in a house located in Kalevishte, in the district of Smolyan, at the time of the alleged rape.

[16] As to the medical evidence, this was comprised of a medical certificate dated February 6, 2015 stating that the Applicant's wife attended for an examination on that date accompanied by relatives. She had reported that on January 30, 2015 she had been attacked,

beaten and raped by two men. Immediately after this she developed severe anxiety. Medication was prescribed and it was recommended that she attend a sanitarium for an extended period of time. A second medical report is dated March 25, 2015. It describes the Applicant's wife's attendance for a secondary examination and that she described continuing acute anxiety from the January 30, 2015 incident and physical and psychological suffering due to secondary tension related to being sought by the same individuals. The third medical report is also dated March 25, 2015 and it concerns the Applicant's youngest son. It states that the Applicant's wife described her son's development of a stutter after an incident involving her. The doctor described the Applicant's son as tense and unstable emotionally and advised that the son seek help from a speech pathologist. The next document is an undated certificate issued by a school which states that the Applicant's son would attend speech therapy sessions during the 2014/2015 school year for psychotraumatic stuttering treatment. The final document is a certificate from a doctor at a wellness spa noting a diagnosis of post-traumatic stress disorder and prescribing a medical examination and several relaxation treatments for the Applicant's wife.

[17] The RAD found that if the Applicant's wife had been raped and treated at a hospital, it would have been incumbent on the hospital to conduct a medical investigation to assess physical injury and also to explore the possibility of sexually transmitted diseases, but that this was not referenced in the medical report. The RAD also found it implausible that a hospital would not conduct a gynaecological examination following a reported rape. However, in reaching this conclusion the RAD did not refer to any national documentation describing the sexual assault protocol of Bulgarian hospitals, nor did it refer to any other evidentiary basis for this finding.

[18] It is also of note that the March 25, 2015 medical certificate appears to have been issued by Dr. Lubka Ilieva "Dispensary for individual practice for psychiatric aid". The February 6, 2015 certificate was issued by the same doctor but the interpretation reads "for individual…", perhaps due to a legibility issue with the original. The point being that if the Applicant's wife was seen by a psychiatrist, as he testified, it is unlikely that a gynecological examination or assessment for sexually transmitted diseases would have been conducted by that attending physician. Thus, the facts as presented are not outside the realm of what could reasonably be expected (*Valtchev* at para 9).

[19] When questioned by the RAD as to the conduct of a medical examination of his wife, the Applicant's testimony was that, he only knew that she had seen a psychiatrist. Asked why she did not have a gynecological examination, the Applicant stated that he did not know. When asked if he did not think this was unusual, he stated that he did not know. The RAD then pressed on saying that, regarding the description of the rape, the RAD assumed that the "perpetrator penetrated". The Applicant confirmed this at which point the RAD asked if it were therefore not logical to be concerned that "something might have happened". The Applicant stated this was probably true but he didn't know. When asked what he did know about the rape he stated only what was described in his wife's letter and that he would not know any further details. The RAD then stated that it did not see "a big description of the rape". When asked if he had spoken to his wife, the Applicant responded that when he had spoken with her she was incoherent, which was why she sent the letter. The RAD stated that the letter suggested that two men raped her, but sought clarification from the Applicant on this point. The Applicant confirmed that it was two men. The RAD then asked him to clarify if this was two separate rapes, he confirmed this. The

RAD then noted that he was hesitating and instructed him not to guess. The Applicant then stated that he did not know.

[20] The RAD later returned to this line of questioning:

> MEMBER: I just want to…I just want to come back…I'm almost finished, and then I guess we'll take a break…to the actual incidents of rape. I asked you this already, but I'm going to ask again. Did your wife not describe anything that happened?
>
> APPELLANT: She said that she was found, and they starting to slap her around, to beat her. And afterwards, she was raped in front of the children?
>
> MEMBER: How many times?
>
> APPELLANT: Twice.
>
> MEMBER: Twice by…by how many people?
>
> APPELLANT: Two people.
>
> MEMBER: So once each person?
>
> APPELLANT: Yes.
>
> MEMBER: And at no time did your wife even discuss any possible physical - medical side effects?
>
> APPELLANT: As far as I know, she said that she feels ok as far as her physicality.
>
> MEMBER: So she did not feel the need to be physically examined after the rapes?
>
> APPELLANT: Yes.
>
> MEMBER: I don't understand. Did she…did she even express to you any concern about the physical damage to her?
>
> APPELLANT: No, she didn't say, and I simply didn't ask her.

[21] The RAD found the Applicant's lack of knowledge or "indifference" to his wife's attack implausible. The RAD was of the view that if the alleged rapes had taken place, the Applicant ought to have shown more concern and have been able to provide more detail of what had allegedly transpired. However, the RAD does not explain the basis for its expectation that the Applicant would or should know further details of his wife's rape and expressed his concern differently. This is troubling because individuals likely respond in different ways to traumatic events. Further, it is unclear exactly what further details the RAD thought the Applicant's wife should have disclosed given that the date, time and place of the rape, the number of attackers, who sent them, and the witnesses were all specified. In my view, the RAD became unreasonably fixated on the failure to share further details of the rape and failed to consider that, for cultural or other reasons, this may not have been a reasonable expectation for the Applicant and his wife. It was unreasonable for the RAD not to have considered the Applicant's circumstances or "milieu" (*Valtchev* at paras 7-11), and the physical distance between them.

[22] On this point I would note in passing that the RAD made no mention of the Chairperson Guideline 8: Procedures With Respect to Vulnerable Persons Appearing Before the IRB. These state that the definition of vulnerable persons may apply to close family members of the vulnerable person because of the way in which they have been affected by their loved one's condition. An identification of vulnerability does not result in acceptance of the alleged underlying facts, nor does it predispose a member to make a particular determination of the case on its merits. It is made for the purpose of procedural accommodation only. Whether or not the Applicant would qualify as a vulnerable person, in my view, the RAD's approach in this case lacked sensitivity to the Applicant's situation.

[23] The RAD also found the medical certificate describing the Applicant's son's stutter not credible as it did not contain the son's birthdate. Further, that the certificate stated that the stuttering was caused by the son's stress from incidents related to his mother, but does not specify the incidents. I would note, however, that the Applicant's wife's medical reports, issued by the same physician, also do not contain her date of birth and that this was not commented on by the RAD. Further, that the certificate does contain an identification number and the child's name and address. The RAD discounts the report for what it does not say, specifically that the child witnessed his mother's rape, rather than considering what it does say, being that the stuttering arose from stress caused by incidents related to his mother. Further, the certificate was issued by the same physician who issued the medical reports concerning the rape of the Applicant's wife. It is unclear why the RAD would expect the physician to repeat this level of detail in the report concerning the son's stuttering. I would also note that the certificate from the school schedules special therapy for "psychotraumatic stuttering". This would appear to corroborate the medical certificate, but the RAD does not address that document in its reasons.

[24] The RAD also found the Applicant's testimony regarding his children's presence during the rape to be implausible, given that the rape occurred on a Friday and school was, by the Applicant's own admission, mandatory for children in Bulgaria. The RAD stated that the Applicant first testified that there was no school in Kalevishte where his family was hiding, but, after further questioning, indicated there was no transportation to the school.

[25] However, upon review of the transcript of the hearing before the RAD, it is not clear that the Applicant's statements are contradictory or implausible. When originally questioned about

why the children were not in school on Friday, January 30, 2015, the date that the Applicant's wife was allegedly raped, the Applicant explained that the children did not attend school because where his wife was situated there was no possibility for them to do so. The RAD then asked why his wife would go to a place where the children could not attend school. The Applicant explained, as he had previously, that his wife was in hiding in a place that had been suggested to them by the Roma Council. When asked if there were schools there, the Applicant responded that "Yeah, there is school, but they are further".

[26] The RAD retuned to the issue, but each time the Applicant explained that there was no school where the family was hiding, no transportation to a school further away and that, given the family's circumstances, it would be unsafe to attend school. In my view, the exchanges simply demonstrate that while in hiding the children did not have safe access to a nearby school, they do not represent a contradiction or a reasonable basis for the RAD's implausibility finding.

[27] Finally, as to the wellness spa document, this was not addressed in the RAD's reasons. When the RAD asked the Applicant about it during the hearing, he stated that after the attack his wife went there for treatment, which her parents paid for, to which the RAD responded "Well, interesting treatment, counsel, right? Spa?".

[28] In my view, for the reasons stated above, the RAD's credibility and implausibility findings were unreasonable. That issue is determinative because the content of the new evidence found not to be credible by the RAD speaks to issues relevant to the RAD's IFA and state

protection determinations. Therefore, it is unnecessary to address the Applicant's alternative arguments.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted. The decision of the RAD is set aside and the matter is remitted for redetermination by a different panel;
2. No question of general importance is proposed by the parties and none arises; and
3. There will be no order as to costs.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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