Federal Court  Cour fédérale

Date: 20180629

Docket: IMM-5215-17

Citation: 2018 FC 678

Toronto, Ontario, June 29, 2018

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

DAVID KOTAI
VIOLETTA KALOCSAI
TIFANI KOTAI
MIRELLA VIOLETTA KOTAI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application under section 72(1) of the *Immigration Refugee and Protection Act*, SC 2001, c 27 [IRPA], seeking judicial review of the November 9, 2017 decision [Decision] of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada [IRB],

which dismissed the Applicants' appeal from a negative refugee determination by the Refugee Protection Division [RPD] of the IRB. The Applicants seek an order setting aside the Decision and remitting the matter for redetermination by a differently-constituted panel of the RAD.

[2] The Applicants are a family of Hungarian citizens of Roma ethnicity — a husband and wife, and their two minor children. They allege that they will face persecution if they return to Hungary in the areas of education, employment, and housing. Specifically with respect to education, it is alleged that the minor Applicants were discriminated against in school, where they were segregated from non-Roma students.

[3] The Applicants further allege that they experienced several incidents of racially-motivated violence in Hungary. They claim that a far-right extremist group attacked their home in 2010, that the male Applicant was racially-profiled, harassed, and nearly assaulted by the police in 2015, and that the male Applicant was attacked by far-right extremists in 2016. They further note that the male Applicant's father and sister, who lived in the same town as the Applicants in Hungary — even living with the male Applicant's father for a time — have been accepted as Convention Refugees in Canada.

[4] In this judicial review of the RAD's Decision, the Applicants raise several issues. They challenge the RAD's state protection analysis, submitting that the RAD applied the wrong test for adequate state protection, and that its analysis was, in any event, erroneous including for having ignored documentary evidence. The Applicants also argue that the RAD failed to reasonably consider the minor Applicants' claims.

[5] While the Applicants raised other issues, I agree that (a) the RAD's assessment of the minor Applicants' claims discloses a reviewable error, and (b) the RAD failed to grapple with inconsistencies in the state protection evidence. As a result, the Decision is unreasonable and must be set aside, and I need not address the other issues raised by the Applicants.

II. Analysis

(i) Minor Applicants

[6] In their appeal submissions to the RAD, the Applicants argued that the RPD had failed to consider the minor Applicants' claims that they would face persecution in Hungary as a result of segregated schooling. The Applicants noted before the RAD that the RPD had written only two paragraphs about the minor Applicants in its decision.

[7] The Applicants argued before the RAD that the RPD had failed to consider the minor Applicants' claims independently, relying on *Mohacsi v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 429 (at paras 13-16). They argued that, although the RPD had considered government initiatives to ensure that Roma children attend school, it had failed to consider the operational effectiveness of those initiatives. The Applicants also argued that the RPD's reasoning was limited to a generic "cut and paste", relying generally on *Gonzalez Aguilar v Canada (Citizenship and Immigration)*, 2009 FC 85.

[8] The Applicants contested the RPD's finding that one of the minor Applicants attended an "integrated" school, submitting instead that she was segregated within her Catholic school, being relegated to the back of the class with the only other Roma girl.

[9] The Applicants then referred at length to the documentary evidence in the record, which, in their submissions, demonstrated that the minister in charge of public education in Hungary supports segregation — notwithstanding that it is prohibited by law — and that the segregation of Roma children in education is worsening, and that no effective measures had been taken by the Hungarian government in response.

[10] Finally, the Applicants submitted to the RAD that school segregation could be a breach of the minor Applicants' human rights under Article 14 of the European Convention on Human Rights, which prohibits discrimination on the basis of race.

[11] In response, the RAD's entire analysis in response to the Applicants' arguments on the minor Applicants' claims is contained in the following paragraph:

> The Appellants submit that the RPD did not consider the claim of the Minor Appellants. After listening to the recording of the RPD sessions and reading the written evidence of the Appellants, the RAD concludes that the incidents of which the Minor Appellants complain of do not rise to the level of persecution.
>
> [Emphasis added]

[12] The Applicants argue that the RAD's one-sentence reasoning on the minor Applicants' claims demonstrates that the RAD did not actually analyse the issue before it. They submit that the RAD did not explain its rationale, did not cite any of the minor Applicants' circumstances,

did not cite any evidence from the RPD recording to which it had listened, did not cite any written or objective evidence, and did not indicate that a cumulative assessment had been undertaken.

[13] The Respondent counters that the RAD made no error in finding that the minor Applicants' experiences did not amount to persecution. The Respondent further argues that, on the facts of this case, the Applicants were not placed in segregated schools — a point which, it will be recalled, the Applicants disputed before the RAD. The Respondent also argues that the RAD in its Decision endorsed the RPD's analysis and findings on Hungary's initiatives to address discrimination and segregation in schools.

[14] In my view, the Applicants' arguments on this point require me to consider the sufficiency of the RAD's reasons, a point which their counsel emphasized during the judicial review hearing.

[15] It is well-established that the adequacy of reasons is not a stand-alone basis for setting aside a decision — rather, what matters is whether the reasons offered permit the reviewing court to determine why the tribunal made its decision, and whether the conclusion falls within the range of acceptable outcomes (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 14, 16 [*Newfoundland Nurses*]).

[16] However, as the Supreme Court of Canada recently clarified in *Delta Air Lines Inc v Lukács*, 2018 SCC 2 [*Delta Air*], "reasons still matter" (at para 27). To meet the reasonableness

standard set out in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*], reasons must still be intelligible, justified, and transparent (*Delta Air* at para 27).

[17] Similarly, the Federal Court of Appeal has held that *Newfoundland Nurses* is not an "open invitation" for a reviewing court to provide reasons that were not given, or to guess at the findings that may have been made, or to speculate on what the tribunal was thinking (*Lloyd v Canada (Attorney General)*, 2016 FCA 115 at para 24 [*Lloyd*], citing *Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431 at para 11 [*Komolafe*]). *Newfoundland Nurses* simply allows reviewing courts to "connect the dots" in a decision where the lines, and the direction they are headed, may be readily drawn (*Lloyd* at para 24).

[18] I agree with the Applicants that the RAD's analysis of the minor Applicants' claims was unreasonable, having regard to the authorities canvassed above. This is not to say that the RAD's analysis needed to be extensive — in *Vancouver International Airport Authority v Public Service Alliance of Canada*, 2010 FCA 158 [*VIAA*], the Federal Court of Appeal noted that, even a sentence or two, sitting alongside a record, can be enough to disclose why a tribunal decided the way it did (at para 25). But in this case, as can be seen in the extract reproduced in paragraph 11 above, the RAD offered no explanation at all for its conclusion that the minor Applicants' experiences did not amount to persecution, even though the issue was squarely argued before the RAD in the Applicants' appeal submissions, with extensive reference to the documentary record.

[19] Simply put, the RAD's reasons do not permit me to understand why it decided the way it did, and are therefore not transparent, intelligible, or justified, as required by *VIAA* (at para 16)

and *Dunsmuir* (at para 47). In *Morrisey v Canada (Attorney General)*, 2018 FCA 26 [*Morrisey*], the Federal Court of Appeal recently held that the tribunal's limited analysis on a critical issue "demonstrate[d] that it failed to grapple with [the] substantive live issue put forward by the Appellants and which was necessary to dispose of the matter" (at para 21). On the basis of the above-referenced authorities, a similar deficiency has been established in this case.

(ii) State Protection

[20] I further agree with the Applicants that the RAD failed to engage with the documentary evidence which contradicted its conclusions on the issue of adequate state protection. This is not to say that the Decision was necessarily wrong with respect to state protection — only that there was a duty, given inconsistent evidence on the subject, for the RAD to independently address the Applicants' submissions.

[21] Specifically, the Applicants had submitted to the RAD that the RPD had ignored relevant documentary evidence in concluding that adequate state protection was available in Hungary. The RAD decided this issue as follows:

> [36] The RAD would be remiss if it did not acknowledge and consider that there is information in the documentation, both the Board's own documentation and the arguments submitted by the Appellant to indicate that there is widespread reporting of incidents of intolerance, discrimination, and persecution of Romani individuals in Hungary. The RAD finds that the RPD conducted a very lengthy and proper analysis of the documentary evidence and considered all of the relevant factories with respect to the treatment of Roma in Hungary, including issues which had not been raised by the Appellants.

[22] The Respondent argues in this judicial review that it was open to the RAD to simply adopt the RPD's analysis of the documentary evidence in the manner it did.

[23] I disagree. *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 makes it clear that the RAD is required to review the RPD's findings of fact, which do not involve credibility, on a standard of correctness (at para 106). It was unreasonable for the RAD, when faced with the Applicants' specific arguments that the RPD ignored relevant evidence, to acknowledge that certain information before it supported the Applicants' positions, but fail to explain why it nevertheless upheld the RPD's analysis of the evidence in the record. Once again, similar to the issue of the minor Applicants' schooling, the RAD's reasons demonstrate that it did not grapple with the substantive issue put before it by the Applicants (*Morrisey* at para 21), and this Court is unable to connect the dots (*Lloyd* at para 24).

III. Conclusion

[24] The Applicants' submissions to the RAD squarely challenged the RPD's inadequate assessment of the minor Applicants' claim, as well as documentary evidence on the adequacy of state protection. The RAD's analysis was highly cursory and failed to reasonably address these central issues. The Decision will therefore be set aside and remitted for reconsideration by a differently constituted panel. No questions for certification were argued, and I agree that none arise.

JUDGMENT in IMM-5215-17

THIS COURT'S JUDGMENT is that:

1. The application is granted.

2. The RAD's Decision is set aside and the matter remitted for reconsideration by a differently constituted panel.

3. No questions for certification were argued, and none arose.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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