

Federal Court



Cour fédérale

**Date: 20200121**

**Docket: IMM-2527-19**

**Citation: 2020 FC 85**

**Ottawa, Ontario, January 21, 2020**

**PRESENT: The Honourable Mr. Justice Manson**

**BETWEEN:**

**BERTALAN ALADAR GALAMB**

**Applicant**

**and**

**MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

I. Introduction

[1] This is an application for judicial review of a decision of the Refugee Appeal Division of the Immigration and Refugee Board [RAD] confirming the decision of the Refugee Protection Division [RPD] that the Applicant is neither a Convention refugee nor a person in need of protection pursuant to section 96 and subsection 97(1) of the of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

II. Background

[2] The Applicant is a Hungarian citizen of Romani ethnicity. He has a grade eight education, and a history of part-time employment. Before coming to Canada, he lived in Miskolc, Hungary, and claims that he suffered discrimination when looking for employment based on his ethnicity.

[3] In 2011, three individuals attacked the Applicant such that he needed medical attention. He received the necessary medical attention, and filed a police report, but the police were not able to identify his attackers.

[4] The Applicant claims that when his daughter gave birth to her child in Hungary, she was placed in a segregated maternity ward and given little attention.

[5] The Applicant separated from his wife in 2014, and subsequently had difficulty finding housing. He temporarily lived with his sister in Miskolc from 2014 to 2015, but the government evicted them in preparation for demolition of their housing complex as part of an upgrade to a nearby football stadium.

[6] The Applicant came to Canada in 2016, and submitted a claim for refugee protection.

[7] The RPD rejected the Applicant's claim on November 20, 2016, finding that the Applicant is neither a convention refugee nor a person in need of protection. The RPD found that

the Applicant was not a credible witness because he testified before the RPD that he visited the Minority Ombudsman in Hungary to seek assistance, but neglected to state this in his basis of claim form [BOC]. The RPD found that this amounted to a material omission that undermined his credibility.

[8] The Applicant appealed to the RAD. In a decision dated June 7, 2017, the RAD endorsed the RPD's negative credibility finding, and confirmed the RPD decision pursuant to paragraph 111(1)(a) of the IRPA [2017 RAD Decision].

[9] The Applicant applied for judicial review of the RAD decision. In a decision dated February 6, 2018, Justice Campbell granted the application and remitted the matter back to the RAD for redetermination by a differently constituted panel (*Galamb v Canada (Citizenship and Immigration)*, 2018 FC 135 [*Galamb*]). Justice Campbell found that the RAD made an invalid negative credibility finding, and set the decision aside as unreasonable on this basis alone.

### III. Decision Under Review

[10] In a decision dated March 26, 2019, a different member of the RAD reconsidered the Applicant's appeal in accordance with the Court's reasons in *Galamb* [2019 RAD Decision]. The RAD again confirmed the RPD's decision pursuant to paragraph 111(1)(a) of the IRPA.

[11] The RAD considered the Applicant's request to admit the following additional documents:

1. An affidavit of the Applicant, dated April 18, 2018, including country condition documents attached as exhibits.
2. An affidavit of the Applicant's sister, dated April 18, 2018, with a translated copy of the eviction notice from her housing in Miskolc attached as an exhibit.

[12] The RAD admitted the Applicant's affidavit and the documents attached thereto. The attached documents were all dated after November 20, 2016—the date on which the RPD rejected the Applicant's claim—and therefore were admissible pursuant to subsection 110(4) of the IRPA.

[13] The RAD did not admit the affidavit of the Applicant's sister. The information contained in the affidavit pertaining to matters that occurred before the RPD rejected the Applicant's claim was inadmissible for non-compliance with subsection 110(4) of the IRPA. The RAD found the Applicant reasonably could have presented this information before the RPD, but did not.

[14] The information in the sister's affidavit that arose after November 20, 2016—namely that the sister's son was found to be a convention refugee in Canada in 2018—complied with subsection 110(4) of the IRPA. However, the RAD found that this information was not relevant to the Applicant's claim, as each refugee claim is decided on its particular facts. Therefore, this information was inadmissible for irrelevance (*Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 at para 38 [*Singh*]).

[15] The RAD did not reconsider whether the RPD's credibility finding was incorrect, noting "Justice Campbell of the Federal Court has, in effect, ruled that it was." Accordingly, the RAD

considered all of the Applicant's testimony as true. However, the RAD went on to state that a finding that the Applicant is a credible witness does not mean that the RAD must accept all of his evidence as accurate. Rather, the Applicant's testimony on certain issues may represent his perception rather than the objective truth.

[16] The RAD considered the aspects of life where the Applicant claimed to suffer discrimination because of being a Roma. The evidence established that the Applicant suffered discrimination in employment, housing, and generally, but did not suffer discrimination in education, healthcare, or social security. After considering the distinction between discrimination and persecution as described in the United Nations High Commission for Refugees Handbook [UNHCR Handbook], the RAD concluded that the Applicant's treatment in relation to his employment, housing, and generally was discriminatory and deeply regrettable, but did not rise to the level of persecution.

[17] Finally, the RAD considered whether there was a serious possibility that the Applicant would suffer persecution in Hungary based on his profile as a Roma. The RAD adopted the state protection analysis from the 2017 RAD Decision as part of its decision, finding the analysis to be thorough, clear, and accurate. However, because that analysis was undertaken in 2017, the RAD went on to consider whether any of the more recent documents submitted by the Applicant affected the state protection analysis.

[18] The RAD gave a brief overview of the supplementary documents, and concluded that these new documents, like those considered by the previous RAD panel, were mixed. The RAD

found there was no evidence that the Hungarian Prime Minister's discriminatory rhetoric had led to an increase in discrimination or persecution against Hungarian Roma, or a reduction in the level of democracy in Hungary.

[19] Accordingly, the RAD concluded that there was no serious possibility that the Applicant would be persecuted upon return to Hungary, and that on a balance of probabilities, the Applicant would not be subjected to harm as described in subsection 97(1) of the IRPA.

#### IV. Issues

[20] The issues are:

- (1) Did the RAD err in excluding the affidavit of the Applicant's sister?
- (2) Did the RAD err in assessing whether the Applicant's experiences of discrimination cumulatively amount to persecution on a forward-looking basis?
- (3) Was the RAD's state protection analysis reasonable?

#### V. Standard of Review

[21] The parties filed their memoranda prior to issuance of the Supreme Court of Canada's decisions in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65

[*Vavilov*] and *Bell Canada v Canada (Attorney General)*, 2019 SCC 66.

[22] In their initial submissions, the parties agreed that the standard of review for all of the issues raised is reasonableness (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35 [*Huruglica*]).

[23] The Court sent a direction to the parties giving them the opportunity to submit additional written representations on the standard of review and application of that standard. Counsel for the parties made additional representations having regard to *Vavilov* on January 10, 2020.

[24] Pursuant to *Vavilov*, when a court is reviewing the merits of an administrative decision, the presumptive standard of review is reasonableness (*Vavilov*, above at para 23). The Supreme Court identified two types of situations where this presumption can be rebutted (*Vavilov* at para 32). In the present case, neither situation applies. The presumption of reasonableness governs for the issues before this Court.

[25] The focus on review is the “decision actually made by the decision maker including both the decision maker’s reasoning and the outcome” (*Vavilov* at para 83).

[26] A decision is reasonable if it “is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker” (*Vavilov* at para 85).

[27] Subsection 110(4) of the IRPA defines what evidence may be presented to the RAD on appeal:

110 (4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.

VI. Analysis

A. *Did the RAD err in excluding the affidavit of the Applicant's sister?*

[28] Before the RAD, the Applicant was entitled to introduce evidence that arose after the RPD rejected his claim, or evidence that he could not reasonably have been expected to have presented at the time of the rejection (IRPA, s 110(4)). To be admissible, evidence must also be credible and relevant (*Singh*, above at paras 38-49).

[29] With respect to the information in the sister's affidavit that pre-dates the RPD hearing, the Applicant argues that he could not reasonably have been expected to provide this information at the RPD hearing. The Applicant's argument appears to be that in the first judicial review before this Court, Justice Campbell found that the RPD and the RAD did not have valid reasons to doubt the Applicant's credibility and require corroborative evidence for aspects of his claim. To support his claim, the Applicant submitted his testimony, BOC narrative, and country condition evidence. Because he submitted this evidence, he could not have reasonably been expected to also provide corroborating evidence from his sister. Therefore, in refusing to admit these aspects of the sister's affidavit, the RAD effectively required corroborating evidence from the Applicant.



[30] The Applicant's argument conflates the test on credibility with the rule on admitting new evidence before the RAD. The evidence that pre-dated the RPD rejecting the Applicant's claim was reasonably available to him, but he decided not to submit an affidavit from his sister at that time, despite bearing the onus to establish his claim. If the Applicant felt his sister's affidavit would assist in making out his claim, he reasonably could have presented it before the RPD. In considering new evidence, the RAD is not required to provide the Applicant with an opportunity to correct deficiencies in the record submitted before the RPD (*Singh* at para 54).

[31] The RAD also found the information that post-dated the RPD hearing was irrelevant, and therefore inadmissible. Specifically, the RAD found the fact that the sister's son became a Convention refugee in Canada on March 23, 2018 was not relevant to the Applicant's claim. While the sister's son also had difficulty obtaining employment, and was evicted from the sister's home in Miskolc, the RAD found this was an insufficient link to the Applicant's situation to establish relevance.

[32] I find that the RAD reasonably excluded the post-RPD hearing evidence. The only evidence in the sister's affidavit related to her son was that he was evicted from her house, had faced difficulty in securing employment, and had received a positive refugee determination in Canada in 2018. While the affidavit states that authorization to access the son's Canadian refugee file is attached as an exhibit, no such exhibit is attached. Because the RAD must consider each claim individually, the RAD reasonably found the facts related to the sister's son were irrelevant to the Applicant's claim. Evidence of similarly situated individuals is contained in the

National Documentation Package [NDP] documents and the additional objective evidence submitted by the Applicant.

[33] The RAD's exclusion of the sister's affidavit was reasonable.

B. *Did the RAD err in assessing whether the Applicant's experiences of discrimination cumulatively amount to persecution on a forward-looking basis?*

[34] The Applicant makes two main arguments on this issue. First, the Applicant argues that the RAD failed to explain why the discrimination he faced did not amount to persecution, and therefore the decision lacks transparency. The Applicant's position is that the RAD merely stated the difference between discrimination and persecution as described in the UNHCR Handbook, and then concluded that the Applicant's treatment did not meet the threshold for persecution. Absent a more fulsome analysis, the Applicant argues that the RAD failed to explain why the discriminatory incidents he experienced did not amount to persecution.

[35] When read as a whole, the RAD's reasons for finding that the discrimination experienced by the Applicant did not rise to the level of persecution are transparent and intelligible. The RAD considered each aspect of the Applicant's life in which he claimed to have experienced hardship. The RAD found that the Applicant's difficulty finding a job was in part due to his Roma ethnicity, but found that his limited education was also a factor. Therefore, while discrimination was a factor, the fact that the Applicant only worked intermittently was not solely attributable to discrimination.

[36] The RAD also found that the Applicant's difficulty finding housing was in part attributable to discrimination. However, other factors also contributed to the Applicant's unstable housing situation, including the breakdown of his marriage, a lack of steady employment, and the government decision to demolish the housing unit where his sister lived.

[37] The RAD found that the Applicant did not establish that he experienced discrimination in education, health care, and social security.

[38] The Applicant submitted evidence that he was insulted and followed in public on the presumption he was a thief, and that police in Hungary target dark-skinned people. In 2011, he was attacked by three individuals who used anti-Roma slurs. The RAD found that the attack was a one-off incident that did not form part of a larger pattern, but that nonetheless the Applicant had established that he suffered general discrimination by non-Roma in Hungary.

[39] The RAD's detailed consideration of each aspect of the Applicant's discrimination claim shows that the RAD was alive to the relationship between discrimination and persecution, and considered the cumulative effects of the discrimination the Applicant suffered. However, the RAD also found that factors other than discrimination contributed to the hardships suffered by the Applicant in Hungary, and that his treatment did not meet the threshold for persecution. When read as a whole, the RAD's consideration of the Applicant's past experiences in Hungary was reasonable.

[40] Second, the Applicant argues that the RAD ignored country condition evidence that supported his claim of a forward-looking risk. The Applicant submits that the RAD failed to adequately consider the country condition evidence to determine whether his subjective fear of persecution had an objective evidentiary basis. The RAD did not refer to the country condition evidence in its reasons, and did not explicitly discuss the interdependence of discrimination in employment, housing, social security, and education.

[41] The Applicant also argues that the RAD erred by failing to consider evidence of indirect discrimination, such as severe underemployment of the Roma population, and the government eviction policy that indirectly discriminated against the high percentage of Romani living in the condemned housing.

[42] The Applicant further submits that the RAD concluded that his experience looking for housing was not discriminatory, and was merely the result of enactment of a government policy. However, the RAD's reasons explicitly state that the Applicant's inability to find a rental unit was in part attributable to discrimination.

[43] The Applicant also alleges the RAD found his perception that most police officers were racist against Roma people was not credible, and that the RAD criticised him for not having specialized knowledge of systemic discrimination in Hungary. However, the RAD stated that while the Applicant was accepted as a credible witness, his testimony that most police were racist against Roma people did not necessarily represent the objective truth, as the Applicant did not have any specialized knowledge or objective evidence to support his claim. This was a

reasonable observation. It does not amount to a finding that the Applicant was not credible, or a criticism of his knowledge.

[44] Both panels of the RAD considered that the determinative issue in the prospective persecution analysis was the availability of state protection. The RAD's failure to mention objective evidence or discuss the interdependence of different types of discrimination at an earlier point in its reasons does not indicate that the RAD did not consider the objective evidence in question.

[45] I find that the determinative issue in this application is whether the RAD's state protection analysis was reasonable.

C. *Was the RAD's state protection analysis reasonable?*

[46] The Applicant submits that the RAD's state protection analysis was unreasonable because it erred in rejecting his sister's affidavit evidence, and because the RAD failed to conduct an independent assessment of the record on the state protection issue. Given that I find that the RAD reasonably excluded the sister's affidavit, the remaining issues are whether the RAD failed to conduct an independent assessment of the record, and if not, whether the RAD reasonably concluded that adequate state protection in Hungary would be forthcoming should the Applicant seek it.

[47] The RAD adopted the state protection analysis from the 2017 RAD Decision as part of its decision, finding the analysis to be thorough, clear, and accurate. The Applicant submits that by

doing so, the RAD failed to conduct an independent assessment of the record, instead deferring to the impugned 2017 RAD Decision. The Applicant argues that the RAD is required to conduct an independent assessment of the record, based on the RAD's role as an appellate tribunal (*Huruglica*, above at para 103).

[48] While *Huruglica* speaks to the standard of the review when the RAD is reviewing decisions of the RPD, it does not preclude the RAD from adopting an analysis from a prior panel on redetermination. The 2019 RAD Decision clearly states that the RAD was not deferring to the 2017 RAD Decision, and was not bound by the previous state protection findings. Rather, the new RAD panel was "struck by the thoroughness, clarity and accuracy" of the earlier state protection analysis, and accordingly adopted it as part of the 2019 RAD Decision.

[49] The RAD conducted an independent analysis, adopting what it found to be a thorough analysis of the objective evidence as of 2017. So long as the invalid negative credibility finding did not taint that analysis, and the state protection analysis in the 2017 RAD Decision itself was justified, transparent, and intelligible, the RAD reasonably exercised its discretion to adopt the previous panel's reasoning.

[50] Dealing with the substance of the RAD's state protection analysis, the focus should be on "operational effectiveness, rather than a state's good intentions, best efforts and/or aspirations to protect its citizens" (*Sokoli v Canada (Citizenship and Immigration)*, 2018 FC 1072 at paras 18-19). The experiences of similarly situated individuals can provide evidence that state protection

will not be forthcoming on a forward-looking basis (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689).

[51] I find that the RAD failed to consider whether Hungary's efforts have translated into operationally adequate state protection, and failed to consider objective evidence of systemic problems contained in the record. After adopting the 2017 RAD Decision's state protection analysis, the RAD merely summarized the new articles submitted without providing any analysis or conclusion on what impact the information in the articles would have on his future risk of persecution.

[52] The RAD also appears to have ignored evidence in the record that demonstrates that the rule of law in Hungary has eroded (August 31, 2017 NDP for Hungary, Item 9.2). This report, dated November 2016, concludes that the constitutional and judicial system are no longer able to effectively respond to threats to the rule of law in Hungary, due to systematic weakening of these counterbalances by the state. This Court has held that strong language such as this deserves full consideration and analysis by decision makers; systematic erosion of the rule of law implies that anti-discrimination laws may not be followed, and the democratic institution from which state protection arises may be compromised (*Olah v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 899 at para 22).

[53] The Minister argues that the Applicant failed to provide sufficient evidence that he faced a prospective risk of persecution based on his profile as a Roma. The Minister relies on recent jurisprudence of this Court for the principle that "the mere fact of being of Roma ethnicity in

Hungary is not, in and of itself, sufficient to establish that an applicant faces more than a mere possibility of persecution upon return” (*Bozík v Canada (Citizenship and Immigration)*, 2019 FC 1469). The RAD concluded that there had not been an increase in discrimination or persecution against Hungarian Roma, and the Applicant did not provide a sufficient link between the documentary evidence and his specific circumstances.

[54] The RAD claimed to have accepted the Applicant’s testimony as credible, with the qualification that at times his testimony reflected his perception, rather than the objective truth. However, in adopting the 2017 RAD Decision state protection analysis, the RAD adopted a finding that if the Applicant were to return to Hungary and encounter problems in education, employment, healthcare, housing, or access to business establishments, recourse would be available to him. This finding contradicts the Applicant’s testimony that he sought assistance from the Minority Ombudsman to address police misconduct, and did not receive help. Once the RAD accepted the Applicant’s testimony as credible, there should have been some explanation of why recourse would be available in future, despite this not being the case in the Applicant’s past experience.

[55] The RAD was also “struck by the thoroughness, clarity and accuracy” of the earlier state protection analysis. However, parts of the adopted state protection analysis contain nonsensical sentence fragments that are unintelligible (2017 RAD Decision, at paras 50-51). The 2017 RAD Decision details homicide rates, including those committed using firearms, in Hungary and Canada, noting that in 2009, the rate of homicides committed using firearms was lower in Hungary than in Canada. That comparison is irrelevant to the Applicant’s claim.



[56] The RAD further commented on a report that indicates that discrimination against Roma in Hungary continues, largely by satellites of the Jobbik party. However, during the 2018 parliamentary election, while support for the Jobbik party “fizzled”, as the Jobbik party attempted to moderate its behaviour and move away from xenophobic and hateful messaging, the ruling Fidesz party successfully pandered to nationalists through increasingly racist rhetoric. Rather than establish that Jobbik, the political party formerly backed by extremist groups, had lost power in the 2018 election, the article actually describes how Fidesz, the current governing party, successfully used a nationalist campaign to attract these same supporters.

[57] Finally, the 2019 RAD Decision does not mention any documents from the NDP for Hungary that post-date the 2017 RAD Decision. Although the RAD member did indicate that documents in the NDP for Hungary were already before him, no such documents are mentioned in the state protection analysis.

[58] The RAD is under a duty to consider the most recent country conditions and while the RAD is not required to refer to every piece of evidence, and is presumed to have considered all the evidence before it unless demonstrated otherwise, the RAD’s failure to mention any of the important contradictory evidence contained in the most recent NDP for Hungary constitutes a reviewable error (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 at paras 14-17).

[59] The RAD merely states the “new documents” are mixed, and concludes there is no evidence of an increase in discrimination or persecution against Hungarian Roma or a diminution

in the “level of democracy” of the state. The objective evidence in the August 31, 2017 NDP for Hungary suggests that the rule of law in Hungary has been systematically eroded by the current government, and the RAD specifically found that the current Prime Minister has engaged in discrimination rhetoric. Accordingly, as in *Olah*, above, a reasonably justified decision would have addressed the specific evidence pointing towards a decrease in the level of democracy in the country. The RAD failed to do so.

**JUDGMENT in IMM-2527-19**

**THIS COURT'S JUDGMENT is that**

1. The application is allowed and the matter is referred to a different RAD member for reconsideration.
2. There is no question for certification.

**"Michael D. Manson"**

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-2527-19

**STYLE OF CAUSE:** BERTALAN ALADAR GALAMB v MINISTER OF  
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