Federal Court  Cour fédérale

Date: 20200309

Docket: IMM-4156-19

Citation: 2020 FC 346

Ottawa, Ontario, March 9, 2020

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

DANIEL HERAK

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION
THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

JUDGMENT AND REASONS

[1] This judicial review application, made pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the *Act*], is concerned with a negative pre-removal risk assessment (PPRA). Mr. Herak claims that he would be subject to persecution or risk of torture, risk to life or risk of cruel and unusual treatment or punishment if he were returned to his country

of nationality or habitual residence, Slovakia. The grounds raised are his Hungarian Roma origin and his homosexuality.

I. The facts

[2] For the purposes of this case, the facts can be summarized thus.

[3] The applicant has an uncle, an aunt and a cousin who reside in Canada. He claims that, starting in 1993, a police captain harassed him on account of his homosexuality in Slovakia; other police officers are said to have participated in the harassment over the years. The incidents reported in the PRRA decision are:

DATE	EVENT
1993	In the decision under review, one can read: In 1993, Stefan Bugan … a police captain who had heard that the applicant was homosexual, took him to a police station where he beat the applicant. Bugan warned that the applicant would never live in peace while he lived. Other police officers harassed the applicant at his home without warrant.
1996	Stephan Bugan again arrested Mr. Herak "and poured freshly brewed, hot coffee on Mr. Herak's left forearm."
2007	Mr. Herak continued being harassed by other police officials. In the decision under review, one can read: In 2007, another police officer struck the applicant

	on the head with a glass bottle calling him homophobic slurs. Despite several attempts to hide in other Slovakian cities, Mr. Herak experienced continued police harassment, arrests and detention. Stephan Bugan discovered Mr. Herak's location each time he fled and would send police officials to harass and harm him.
Nov. 2016	Bugan cut Mr. Herak's wrists. He also brought him into the woods, had him dig his own grave and left him there for two days. One of the officers involved in the incident released Mr. Herak. Following these occurrences, Mr. Herak continued being threatened. In the decision under review, one can read: More recently, Bugan arrested and transported the applicant to the police station in November 2016. Bugan cut Mr. Herak's wrists, causing the latter to faint. At the hospital, the applicant woke up to Bugan warning him to report the wounds as self-inflicted. Later that month, the applicant went to the Ministry of the Interior to submit a complaint against Bugan. During the filing of that complaint, Stefan arrived searching for Mr. Herak. With the assistance of two other police officers, Bugan transported the applicant to the woods in the outskirts of Kumarno.

	He was forced at gunpoint to dig his grave into which he was thrown and abandoned. Two days later, one of the officers involved arrived to release the applicant upon a promise not to mention his assistance in the release. After this instance, Bugan again threatened Mr. Herak at gunpoint to give up his home without payment. This was the final event that prompted the applicant to seek refugee protection abroad.
Feb. 1, 2017	Mr. Herak's son Julius Herak dies. Mr. Herak alleges his death was caused by doctors refusing him care unless he paid them large amounts of money. In the decision under review, one can read: The applicant indicates that his son died due as a result of doctors refusing to provide him care unless they were paid large sums of money. He suggests that his son's death reflects the type of treatment the Roma ("tziganes") experience in Slovakia. Upon careful review of supporting evidence, I find the death certificate confirms his son's death but does not demonstrate the cause of death. No other supplementary evidence on file suggests Julius' untimely death was caused by either unscrupulous medical professionals or anti-Roma

	sentiment denying him care. Such findings greatly minimize the weight given to this evidence in support of the applicant's risk in Slovakia.

[4] Several months later, on November 21, 2017, the applicant travelled to Montreal and sough refugee status on arrival. However, it was discovered that he has a criminal record in Slovakia, which made him inadmissible pursuant to paragraph 36(1)(b) of the *Act*. In fact, a visa to come to Canada had been denied earlier on account of a criminal record of fraudulent behaviour in Slovakia, which only made the applicant try again, but without disclosing this time the criminal record. Accordingly, once discovered, his refugee claim was suspended and a removal order was issued. A PRRA application was made on December 27, 2018 and it was rejected on May 21, 2019.

II. The PRRA decision

[5] Having reviewed the facts as presented in the application, the PRRA officer accepted that the applicant is homosexual and the discrimination that exists according to the documentary evidence in Slovakia is said to be "concerning". Nevertheless, the officer found little in the evidence to suggest that the applicant was denied in Slovakia access to benefits and services that would reach the level of serious violations of his human rights because of his sexual orientation: the discrimination is found to lack the severity and frequency that would bring it to the level of persecution.

[6] In support of his contention that retuning to Slovakia would pose a serious risk, the applicant had submitted a letter signed “Pista” which threatens the applicant. However, the surrounding circumstances make it significantly dubious; the letter is dated shortly after the applicant made his PRRA application and it is sent to the institution where the applicant was held; it is internally incoherent and it lacks clarity and consistency: the probative value is significantly diminished. As for pictures showing scars, it is impossible to identify who that person in the photographs is.

[7] The links to the Roma community are also considered: anti-Roma discrimination is found to be deep-seated and widespread in Slovakia: it may affect employment, education, housing, loan practices, public transportation, healthcare, etc. But the applicant was never specific with evidence in support of his allegation of discrimination he suffered. Thus, in support of his contention of discrimination on the basis of his ethnic origin, the applicant contended that his son’s death in 2017 was the result of health practitioners having requested large sums of money to provide care, which resulted in a lack of adequate medical attention. However, the officer found that the death certificate presented in support of that allegation was of little use, as it did not state what the cause of death was. There was no other evidence provided that could support unscrupulous medical practices on some anti-Roma sentiment which would have resulted in care being denied.

[8] On the contrary, the evidence tended to show that the applicant had accessed various health-care services throughout his life. There is no evidence that he was personally the victim of

anti-Roma discrimination in employment or education. Anti-Roma discrimination amounting to persecution was not proven according to the officer.

[9] Slovakia being a functioning democratic state following largely the rule of law, there exist avenues of recourse: the officer finds that the applicant can avail himself of the protection of the state, be it the police or other institutional bodies. The officer finds "little supporting evidence on file that demonstrates that Mr. Herak faces a serious possibility of persecution given his sexual orientation or ethnic origins. I also find he has not established the probability of forward-looking risks at the hands of corrupt officials or any other person else [*sic*] upon a return to Slovakia" (PRRA decision, p. 7).

III. Arguments and analysis

[10] I have provided a rather elaborate exposé of the reasons given by the officer in the PRRA decision because of the grounds raised by the applicant in his judicial review application. They are two: were the rules of procedural fairness violated in view of the decision not to conduct a hearing and is the decision reasonable.

(a) *a hearing*

[11] Regulations have been adopted to regulate whether a hearing is required in cases like these involving a PRRA application. Subsection 113(b) of the *Act* allows the Minister to prescribe factors to be considered in matters of this nature:

Consideration of application **Examen de la demande**

113 Consideration of an application for protection shall be as follows:	**113** Il est disposé de la demande comme il suit :
(b) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;	**b)** une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires;

Those prescribed factors are listed in rule 167 of the *Immigration and Refugee Protection Regulations* (SOR/2002-227) [IRPR]:

Hearing — prescribed factors	**Facteurs pour la tenue d'une audience**
167 For the purpose of determining whether a hearing is required under paragraph 113(b) of the Act, the factors are the following:	**167** Pour l'application de l'alinéa 113b) de la Loi, les facteurs ci-après servent à décider si la tenue d'une audience est requise :
(a) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act;	**a)** l'existence d'éléments de preuve relatifs aux éléments mentionnés aux articles 96 et 97 de la Loi qui soulèvent une question importante en ce qui concerne la crédibilité du demandeur;
(b) whether the evidence is central to the decision with respect to the application for protection; and	**b)** l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection;
(c) whether the evidence, if accepted, would justify allowing the application for protection.	**c)** la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.

[12] The applicant speaks in terms of rule 167 at the same time as he argues there was a violation of procedural fairness. Nevertheless, it appears that the applicant sees the standard of

review of the decision not to hold a hearing as one of reasonableness (Memorandum of fact and law, para 17). He is right.

[13] The matter of the appropriate standard of review for a decision by a PRRA officer to deny an oral hearing was addressed by my colleague Gascon J. in *Huang v Canada (Citizenship and Immigration)*, 2018 FC 940, at paragraphs 10 to 16. I share his view. The standard of review ought to be reasonableness as Parliament has spoken, giving the Minister the power to prescribe regulations where the factors to be considered in making such decision are listed. A standard being established in legislation, the decision to be made becomes an application of the factors to the facts. If the application of the factors to the facts, a question of mixed fact and law, is reasonable, I can see no reason why a court should intervene.

[14] I find further solace in the fact that, close to 15 years ago, Justice Strayer, then of this Court, came to the same conclusion in *Beca v Canada (Minister of Citizenship and Immigration)*, 2006 FC 566. He wrote:

> [9] With respect to whether the Officer should have ordered an oral hearing by virtue of paragraph 113(b) of the Act and section 167 of the Regulations, I believe the standard of review is that of reasonableness, a matter of applying the standards established by the Regulations to the facts of the situation. I believe the Officer's conclusions were reasonable. The factors to be taken into account in determining if a hearing on the new evidence is required are cumulative: there must be "a serious issue of the applicant's credibility"; the evidence must be central to the decision; and the evidence if accepted would justify allowing the application for protection. It appears to me that the first factor was not present in this case. The applicants argue that because the Officer gave little weight to statements and letters from members of the applicants' family, or to a copy of a newspaper article reporting that their father and husband was in hiding from a blood feud, this amounted to a finding of credibility against the applicant Lumturi Beca and

> therefore came within paragraph 167(a) of the Regulations. But the credibility of the principal applicant had been found w-ng by the IRB. The new evidence submitted, presumably to provide a new basis for a favourable finding, was not the evidence of the principal applicant but was from third parties and it was their authenticity and weight which the Officer found wanting. Therefore in my view it was reasonable for her to proceed without a hearing.

[15] The applicant insists that the officer neglected to conclude that the decision was made on credibility findings which are central to the decision. It seems to me that we are faced, once again, with the dichotomy between sufficiency of the evidence and credibility findings. It may very well be that a lack of credibility may lead to evidence being found to be insufficient to satisfy a decision maker. But it is not true that the insufficiency of the evidence requires that there be a lack of credibility. The proposition was aptly articulated in *Ahmed v Canada (Citizenship and Immigration)*, 2018 FC 1207:

> [31] Decision makers who are required to make findings of fact are often required to weigh the evidence presented and, against the backdrop of the burden and standard of proof, determine its sufficiency in relation to the matters in issue. Credibility assessments can be an important consideration when weighing evidence. However, a decision maker can also find evidence to be insufficient without any need to assess its credibility. One useful test in the present context is for the reviewing court to ask whether the factual propositions the evidence is tendered to establish, assuming them to be true, would likely justify granting the application for protection. If they would not, then the PRRA application failed, not because of any sort of credibility finding, but simply because of the insufficiency of the evidence. On the other hand, if the factual propositions the evidence is tendered to establish, assuming them to be true, would likely justify granting the application and, despite this, the application was rejected, this suggests that the decision maker had doubts about the veracity of the evidence. See *Liban v Canada (Citizenship and Immigration)*, 2008 FC 1252 at paras 13-14; *Haji v Canada (Citizenship and Immigration)*, 2009 FC 889 at para 16; *Horvath v Canada (Citizenship and Immigration)*, 2018 FC 147 at paras 23-25 [*Horvath*].

[16] In the case at bar, the officer accepted the evidence and operated on the basis that he did not challenge the applicant's credibility. It is the weight of the evidence offered in support of the claim that was deficient: the threatening letter, on the heels of the PRRA application, does not have much plausibility, if any; the applicant did not offer evidence of how he was discriminated against that would take his case to the level of persecution; the son's death certificate did not even mention the cause of death, such that it would be possible, perhaps, to infer a lack of medical care based on discriminatory reasons. The credibility of the applicant is irrelevant as there is not otherwise enough evidence to find a serious risk. To put it another way, the credibility of the applicant was not in issue: it is the sufficiency of the evidence which was lacking. There was no basis to find the decision unreasonable. In my view, the result would have been the same had a correctness standard been applied: the issue is not credibility, but rather sufficiency.

[17] As I understand the argument, it boils down to having an opportunity to have a dialogue with the PRRA officer in an attempt to convince him. If such were the test for an oral hearing before a PRRA officer to be ordered, there would be such hearing in every case. That would negate the prescribed factors at rule 167 of the IRPR. The applicant had to put his best case forward, not wait for an opportunity to appear in person in the hope that his advocacy skills might change the result.

(b) *reasonableness of the PRRA decision*

[18] As for the reasonableness of the decision, obviously the insufficiency of the evidence must also be factored in. The applicant had to challenge the conclusion that risk is forward-

looking and that, in this case, the evidence does not show more than a mere possibility of persecution. It is not contested by the officer that the applicant is a homosexual, but the officer finds on the other hand that the applicant lives in a country that does not criminalize homosexuality and does prohibit discrimination based on sexual orientation, yet there exists homophobic violence. Moreover, the evidence did not suggest that his sexual orientation denied him access to benefits and services; in effect, the evidence did not rise to a level of severity and frequency that would equate with persecution. It is equally recognized that being a Roma is the source of difficulties in Slovakia. But that, in and of itself, does not suffice in the view of the officer, a conclusion not successfully challenged by the applicant in view of the evidence presented. That has not been shown to be a decision that has the hallmarks of lack of reasonableness.

[19] The applicant claims that the PRRA officer did not consider all of the evidence and that, therefore, the decision was unreasonable. I cannot agree with that submission.

[20] The recent decision of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] establishes, once again, that it is an applicant's burden to establish the proposition that a tribunal's decision is not reasonable (para 100). As the Court noted at paragraph 13 "(r)easonableness review is an approach meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. It finds its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers".

[21] But the Supreme Court puts the focus also on the justification that must be present for a decision to be seen as being reasonable. The decision under review is amply justified: it is also intelligible and transparent. The allegation that the decision maker did not consider all the evidence is not sustained. It is rather that the applicant contends that a different conclusion ought to have been reached on this record. The applicant would seek to convince the Court that another decision would be preferable: it is understandable that the applicant would attempt to sway the Court on the merits but that is not the Court's role on judicial review. The courts "are, at least as a general rule, to refrain from deciding the issue themselves" (para 83). Indeed, the Supreme Court reminds us that the shortcomings of a decision under review, if any, must be serious:

> [100] The burden is on the party challenging the decision to show that it is unreasonable. Before a decision can be set aside on this basis, the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision. It would be improper for a reviewing court to overturn an administrative decision simply because its reasoning exhibits a minor misstep. Instead, the court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable.

Furthermore, such an approach does not accord with the methodology found in the jurisprudence of the Federal Court of Appeal and confirmed in *Vavilov* citing *Delios v Canada (Attorney General)*, 2015 FCA 117 [*Delios*], according to which, "as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did" (*Delios*, para 28, at *Vavilov*, para 83). That would turn a reasonableness analysis into one where the "correct" solution is reached.

[22] In the case at bar, the decision is internally coherent and it is justified in light of the factual and legal constraints. The PRRA officer considered the evidence in its entirety to conclude that it did not rise to the level of the required persecution. In fact, the evidence falls well short of the mark.

[23] The PRRA officer noted that multiple extensions were granted to the applicant to provide supporting evidence. That supporting evidence was largely useless, if not counter productive. A good example would be a letter from “Pista” sent on January 3, 2019. The letter appeared made to be threatening and insulting, but the translation offered by the applicant is less than faithful and shrouded in mystery with additions not to be found in the original. The PRRA officer showed restraint in concluding that the letter is of little value in saying that the “lack of clarity, consistency and cohesion observed in this letter significantly lessen the letter's probative value in support of the applicant's risks from Stefan Bugan or police in Slovakia” (PRRA decision, p. 5). A negative inference could have been drawn but was not. Actually, the applicant’s story seems to evolve over time, with references to “Bugan”, the applicant’s principal tormentor appearing very late. Indeed, this whole episode of alleged police harassment over many years, but not in a continuous manner, is less than clear about the actions and motivations. It also lacks granularity. The evidence offered in support is for all intents and purposes non-existent. As for the finding that there exists in Slovakia adequate state protection, it was not disturbed by clear and convincing evidence, as required. As the PRRA officer said “(w)ere Mr. Herak to require assistance from any perpetrator, I find that he can avail himself of the protection of police services and institutional bodies” (PRRA decision, p. 7). That conclusion has not been shown to be unreasonable.

[24] Other examples are photos taken of someone's arms, to suggest torture, without connecting the arms to the applicant. The photographs "do not include identifiable features to confirm these limbs belong to the applicant". Falls in the same category the applicant's son's death certificate offered as "corroboration" of a lack of appropriate treatment with a view to alleging discrimination against Romas in Slovakia. That is not corroboration in that it does not constitute "independent evidence that confirms other evidence before it is relied upon" (*The Law of Evidence*, by Paciocco and Stuesser, (Toronto: Irwin Law, 2015), p. 566). The death certificate corroborates the unfortunate death of the applicant's son: no more.

[25] The PRRA officer dealt with, as he should, the evidence that was presented. It is not particularly difficult to understand why the story of persecution going forward fails on the record before him. The applicant sought to convince the Court that a different outcome ought to be reached. Such is not the task at hand. Rather, the applicant had to apply himself to show that the decision was unreasonable: he failed.

[26] The parties were in agreement that this matter does not generate a question that ought to be certified. That is a view that is equally shared by the Court.

JUDGMENT in IMM-4156-19

THIS COURT'S JUDGMENT is that:

1. The judicial review application is dismissed.

2. There is no serious question of general importance that ought to be certified.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4156-19
STYLE OF CAUSE:	DANIEL HERAK v THE MINISTER OF CITIZENSHIP AND IMMIGRATION, THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
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