Federal Court  Cour fédérale

Date: 20210119

Docket: IMM-1683-20

Citation: 2021 FC 65

Toronto, Ontario, January 19, 2021

PRESENT: Mr. Justice Alan Diner

BETWEEN:

LASHA MEKHASHISHVILI

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an Application for judicial review of a decision from the Refugee Appeal Division ("RAD") rejecting a claim on the basis that the Applicant could have obtained adequate state protection in his country of origin. I find the RAD's decision to have been reasonable and will accordingly dismiss this Application for the reasons that follow.

I. Background

[2] The Applicant is a Georgian citizen of mixed Ossetian nationality who alleges fear of radical nationalists in Georgia. In March 2014, the Applicant participated in a series of protests advocating for the protection of Ossetian rights. Counter-protestors, including members of the Georgian Veterans' Union ("GVU"), clashed with protestors and attacked them. Among the counter-protestors was a man to whom I will refer as Mr. X, who had served seven years in prison in relation to the death of the Applicant's uncle in 2002. Police intervened at the protest, and the Applicant was arrested. Upon learning of his nationality, the police officers involved called him a "traitor" and said he should be jailed.

[3] One week later, two individuals confronted the Applicant near his home in a Georgian village, and attempted to force him into a nearby vehicle. The ensuing struggle drew the attention of neighbours. Mr. X stepped out of the vehicle and confronted them, saying that the Applicant was a traitor and that he should die. The incident left the Applicant in the hospital, where police questioned him. The police opened an investigation, which they later closed due to a lack of evidence.

[4] Following the Applicant's release from the hospital, he fled to his uncle's home in a large city. There, the Applicant claims a number of radicals came to the home inquiring about his whereabouts, leading him to flee to another city in Georgia. Again, members of the GVU located the Applicant in June 2014 and attacked him. After another hospitalization, police questioned

him, and a second investigation was opened, but once again closed for a lack of evidence. Police later became aware that Mr. X was allegedly involved in the attacks.

[5] In July 2014, the Applicant fled to a town on the seaboard. There, in September 2014, he was approached again by Mr. X and threatened. He then fled to another town in the mountains. Individuals then came to that new residence in November 2014 and attacked him. He again required hospitalization, but did not report the November 2014 incident to the police. He fled to Canada in December 2014, where he filed his refugee claim.

[6] The Refugee Protection Division ("RPD") heard the original claim in August 2015, which it refused on grounds of credibility. The Applicant appealed to the RAD, which overturned the RPD and remitted the matter back for a new hearing.

[7] The subject of this judicial review is the second set of decisions that were both refused, first by the RPD on October 27, 2017, stating the Applicant failed to rebut the presumption of state protection. Though the RPD found some evidence of discrimination against Ossetians in Georgia, it found there to be adequate state protection, given that Georgian police were "attentive" and "responsive" to issues faced by Ossetians in the country. The Applicant appealed this second RPD decision to the RAD, which upheld it in November 2018. The Applicant applied for judicial review to this Court, which was granted by way of consent, resulting in a RAD redetermination, and the reason for which the matter now comes before the Federal Court once again.

II. Decision Under Review

[8] On February 19, 2020, the RAD dismissed the Applicant's claim (the "Decision"). The RAD accepted new evidence, which included: (i) a police report from the Tbilisi police dated May 8, 2019, detailing a complaint made by the Applicant's mother that two individuals came to her home on February 15, 2019, looking for the Applicant and threatening him harm; (ii) a letter from the Applicant's mother detailing the events that led to the police report; and (iii) letters from the Applicant's wife and a neighbour indicating the agents of persecution had a continued interest in finding the Applicant.

[9] Although the RAD accepted these new documents, it declined the Applicant's request for an oral hearing as it found the documents raised no credibility concerns. The RAD found the RPD made a clear credibility finding with respect to the Applicant when it deemed his testimony consistent with corroborating evidence presented in support of the claim, despite a passing comment that some of the testimony sounded rehearsed. Ultimately, the RPD expressly noted that it accepted the Applicant's testimony, and thus his credibility.

[10] However, the Applicant was unsuccessful in convincing the RAD of its position on state protection: the RAD held that the RPD correctly found the Applicant failed to rebut the presumption of state protection.

[11] First, the RAD agreed that the "traitor" comment made by the police about the Applicant following his March 2014 arrest was not shown to be a view held by other police officers, as

evidenced by the Applicant's other interactions with police. Following the March and June 2014 attacks, police attended the hospital, questioned the Applicant and witnesses, filed reports and opened investigations.

[12] Second, the RAD agreed that the Applicant failed to take all reasonable steps to obtain protection from the police, given that he fled cities without providing them with updated contact information and without following up on the investigations. He also failed to report the November 2014 incident.

[13] Third, the RAD agreed with the RPD's assessment of the new evidence. It agreed the police report was trustworthy and demonstrated the police's ability to protect the Applicant. It also agreed that the letters from the Applicant's mother, wife and neighbour deserved little weight because they were vague, undated and made little reference to the availability or sufficiency of state protection. Further, the RAD noted that Mr. X's continued interest in finding the Applicant was not probative of the state protection analysis.

[14] Fourth, the RAD found the new National Documentation Package (NDP) contained no significant changes relevant to the Applicant's claim.

III. Issues and Analysis

[15] The Applicant claims that the RAD made unreasonable and erroneous state protection findings, which the Respondent rejects, saying his arguments before this Court mirror those that he made before the RAD.

[16] The substance of a RAD decision attracts reasonableness review: *AB v Canada (Citizenship and Immigration)*, 2020 FC 915 at para 14. To satisfy that standard, the RAD's reasons must be coherent, intelligible and justified in light of the facts and the law: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 15 [*Vavilov*]. While the decision must be reasonable in light of the evidentiary record, the factual matrix, and the submissions of the parties, the reviewing Court must refrain from reweighing and reassessing the evidence, absent exceptional circumstances (*Vavilov* at paras 125-8; *Harvey v Via Rail Canada Inc*, 2020 FCA 95 at para 11).

[17] The RAD, on the other hand, conducts a correctness review of the RPD's decision (*Kreishan v Canada (Citizenship and Immigration)*, 2019 FCA 223 at paras 43-44; *Canada (Minister of Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 103 [*Huruglica*]). This amounts to conducting its own analysis, focusing on errors identified by the appellant: *Fatime v Canada (Citizenship and Immigration)*, 2020 FC 594 at para 19 [*Fatime*]; *Huruglica* at para 103). In performing such a review, the RAD must reach its own conclusions supported by reasons demonstrating internally coherent and rational justification (*Fatime* at paras 19, 21; *Vavilov* at para 85).

[18] In this case, the RAD agreed with the RPD's state protection analysis for a number of reasons. First, the RAD found that the "traitor" comments made by police following the Applicant's March 2014 arrest was not a view held beyond the few individual officers involved. Furthermore, the RAD found no evidence the view could be attributed more broadly to other officers, particularly in light of the Applicant's interactions with police following the March and

June 2014 attacks (see description below). In the same light, the RAD noted that these comments were insufficient by themselves to infer that police would not arrest or target counter-protesters and radical nationalists whom the Applicant feared.

[19] The RAD additionally stated that, even if it accepted this incident as an example of local failures to provide effective policing, such failures did not necessarily amount to a lack of state protection "unless they [were] part of a broader pattern of state inability or refusal to provide state protection". This statement has been confirmed in cases including *Koky v Canada (Citizenship and Immigration)*, 2017 FC 1035 at para 8.

[20] Here, the Applicant contends the RAD did not reasonably apply the state protection principles to the facts and the evidence on the record. The Applicant acknowledges the RAD stressed that the incidents relating to the "traitor" comments were not reflective of his other experiences with police, in that after both the March and June 2014 attacks, the police attended to the Applicant at the hospital, questioned him and other witnesses, filed reports and opened investigations. However, he argues that those investigations bore no fruit, and relies on *Zatreanu v Canada (Citizenship and Immigration)*, 2019 FC 332 [*Zatreanu*] for the argument that the Georgian police never actually investigated the complaints or tried to resolve them, despite opening their so-called "investigations". This, he submits, demonstrates the unavailability of operationally effective state protection.

[21] Despite counsel's earnest advocacy for his client, I am not persuaded by these arguments. In *Zatreanu*, a Roma family had fled Romania to Ireland to escape persecution. There, facing

continued harassment and violence without the assistance of Irish police, the family then sought protection in Canada. The RAD upheld the RPD's negative determination, finding the applicants failed to rebut the presumption of state protection because local police had opened investigations into the alleged incidents of persecution.

[22] On judicial review, Justice Elliott found the RAD erred by (i) ignoring conflicting evidence that the applicants could have obtained state protection in Ireland, and (ii) conflated the investigations with the availability of state protection, failing to turn its mind to whether the Irish police had actually conducted an investigation (*Zatreanu* at paras 51-52). In light of these factors, Justice Elliott found the state protection analysis deficient, and ultimately found the RAD's decision unreasonable.

[23] During the hearing, the Applicant reiterated that the factual circumstances in this case were similar to those in *Zatreanu*: in both cases, the applicants' repeated attempts to obtain police assistance produced no results because police did not legitimately investigate the various complaints. As in *Zatreanu*, the Applicant argued that the RAD here failed to look beyond the fact of the police investigations to determine whether state protection was genuinely available in the country of origin.

[24] Conversely, the Respondent distinguished *Zatreanu* at the hearing on two grounds. First, the RAD in *Zatreanu* had focused only on the seriousness of the police's efforts rather than the adequacy of state protection, unlike the present case. Second, the applicant in *Zatreanu* had undertaken multiple steps to follow up with the police investigations and try to move them along,

whereas the Applicant in this case has not demonstrated any active efforts to follow up with police.

[25] I agree with the Respondent that *Zatreanu* is distinguishable. First, the Applicant in this case did not maintain regular contact with police, but moved from city to city without informing police of his whereabouts or his contact information. I recognize that the Applicant changed locations out of an alleged fear of persecution; still, he failed to maintain a regular contact with police in the process. This meant that he was not available should police require his assistance. In contrast, as Justice Elliott describes, the applicants in *Zatreanu* demonstrated consistent efforts to advance the police investigations:

> 48 The transcript of the RPD hearing shows that Mr. Zatreanu did not just contact the police. He testified that in addition to going to the police many times, he hired a lawyer to help with his housing problem, he went to court, he contacted local councillors and he went to organizations that 'help people who are humiliated, terrorized, abused.' In addition to his testimony, there are documents in the record substantiating those activities.

[26] Second, Justice Elliott found the RAD's state protection analysis in *Zatreanu* deficient because it did not explain why the RAD concluded that there was no evidence the applicants were denied protection (at paras 43-44). Notwithstanding the extensive evidence before the RPD, the RAD simply stated its conclusion without a clear justification, and relied on the proposition that a state's inability to provide protection in every case was not enough to justify a claim.

[27] Here, however, the RAD did not accept the police investigations at face value, but examined how the police conducted itself in each of its two interactions with the Applicant. In both instances after the Applicant's arrest, the RAD noted the police interviewed the Applicant

and witnesses, filed reports and opened investigations. This demonstrates that the RAD considered whether the police in Georgia took legitimate steps to investigate the complaints.

[28] Third, in the present case, the RAD accepted the February 16, 2019 police report and the undated letter from the Applicant's mother, finding that these elements further evidenced the police's willingness to look into complaints, despite their decision to close investigations due to a lack of evidence. The report indicated that police examined and processed her complaint, and closed the case two months later. While the Applicant's mother wrote that she received no response from police, the letter did not indicate whether she had followed up with the investigation. In contrast with *Zatreanu*, the tribunal engaged with this evidence and justified its conclusions in light of it and the relevant legal principles.

[29] Fourth, the Applicant here chose not to report the November 2014 attack to Georgian police. The RAD recognized that the protection offered by the police may not have been perfect, but that adequacy, not perfection, was required. The Applicant's failure to report the November 2014 attack, combined with the lack of follow-ups and contact with the police, signalled to the RAD that the Applicant failed to take all reasonable steps to obtain police protection.

[30] This is markedly different from *Zatreanu*, where the applicants regularly followed up with police, to no avail. As Justice Grammond held in *AB v Canada (Citizenship and Immigration)*, 2018 FC 237 at para 19, "[i]ndividual policing failures do not prove that state protection is inadequate, and neither does the fact that the police took some action in an individual case prove the adequacy of state protection".

[31] Here, by contrast, the RAD adopted the RPD's statement that "state protection must be assessed on the basis of whether the state has the capacity to provide protection rather than whether the local apparatus provided protection in a given circumstance", which requires a forward-looking analysis (*Al Bardan v Canada (Immigration, Refugees and Citizenship)*, 2020 FC 733 at para 26). The RAD acknowledged that the record suggested some level of discrimination against Ossetians in Georgia. However, it found that none of the (i) evidence before the RPD, (ii) Applicant's new evidence, or (iii) updated NDP, showed a lack of state protection at the time he was there, nor were he to return to Georgia. Rather, it found that the Applicant simply failed to give state authorities a reasonable opportunity to protect him.

[32] The Applicant must rebut the presumption of state protection on a balance of probabilities, providing clear evidence that protection is inadequate: *Flores Carrillo v Canada (Minister of Citizenship & Immigration)*, 2008 FCA 94 at paras 17-21, 24-25. The Applicant would thus need to demonstrate either that he sought state protection but it was not forthcoming, or that the person did not try to obtain it because of a well-founded fear that it would not be provided (*Pava v Canada (Citizenship and Immigration)*, 2019 FC 1239 at para 37).

[33] Here, the RAD accurately summarized the principles of state protection, including the fact that mere efforts of protection are insufficient. What is critical is the state's ongoing capacity to provide protection. Further, the RAD appears to have considered the updated NDP, but found no significant changes relevant to the Applicant's claim. The RAD canvassed the Applicant's attempts to obtain state protection and found that the police were ready and willing to intervene,

but the Applicant dissociated himself from their investigations as he went from city to city without updating them, and finally omitting to report the November 2014 attack altogether.

[34] Overall, the RAD determined that the Applicant failed to rebut the presumption of state protection. In a case such as this, the reviewing Court's role serves not to determine whether police assistance in specific instances was adequate. Rather, the Court must determine whether the RAD's reasons and conclusion that the Applicant failed to rebut the presumption of state protection were reasonable. Based on the RAD's reasons, and in light of the relevant facts and law, I find that it was indeed reasonable for the RAD to conclude that the Applicant failed to discharge that burden.

IV. Conclusion

[35] The RAD's reasons are justified under the facts and law, and responsive to the submissions made to it. The tribunal identified the proper standard of review, enunciated the relevant legal principles, and made no reviewable error in applying them to the material facts. Accordingly, the Decision is reasonable. I must therefore dismiss this Application for judicial review. The parties proposed no question of general importance for certification.

JUDGMENT in IMM-1683-20

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.

2. No questions for certification were argued and I agree none arise.

3. There is no award as to costs.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1683-20
STYLE OF CAUSE:	LASHA MEKHASHISHVILI v MINISTER OF CITIZENSHIP AND IMMIGRATION

HEARING HELD BY VIDEOCONFERENCE ON JANUARY 14, 2021 FROM TORONTO, ONTARIO (COURT) AND VANCOUVER, BRITISH COLUMBIA (PARTIES)

JUDGMENT AND REASONS:	DINER J.
DATED:	JANUARY 19, 2021

APPEARANCES:

Dorab Colah	FOR THE APPLICANT
Robert Gibson	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Embarkation Law Corporation Vancouver, British Columbia	FOR THE APPLICANT
Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT