Federal Court Cour fédérale

Date: 20200331

Docket: IMM-1304-19

Citation: 2020 FC 459

Ottawa, Ontario, March 31, 2020

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

BESIKI NUGZARISHVILI
BELA EUASHVILI
NITA NUGZARISHVILI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision by the Refugee Appeal Division ("RAD"), which upheld the Refugee Protection Division's ("RPD") decision to reject the Applicants' claims for refugee protection. The determinative issue for the RPD and RAD was state protection.

[2] The Applicants are Ossetian minorities who are Georgian citizens. The basis of their refugee claims was fear of persecution from non-state actors on the basis of their minority ethnicity and cumulative persecution.

[3] The Applicants' claims for refugee protection was heard by the RPD on April 12, 2018, and refused on May 2, 2018. The RPD found the Applicants to be credible, but rejected the claims for protection on the basis that they had failed to rebut the presumption of state protection.

[4] The RPD's decision was appealed to the RAD, and on January 31, 2019, the RAD dismissed the appeal. The RAD's decision is the subject of this application for judicial review.

[5] The Applicants make three submissions: a) the RAD erred by failing to consider objective country condition information regarding the risk faced by the Applicants as a member of a minority ethnic group in Georgia, the cumulative discrimination faced amounting to persecution, and the inability or unwillingness of the Georgian authorities to protect the Applicants; b) the RAD failed to consider the Principal Applicant's unwillingness to seek further state protection due to his past experiences of discrimination and failure of the police to offer protection; and c) the RAD applied an incorrect legal test for determining cumulative persecution.

[6] For the reasons that follow, the RAD decision is unreasonable. This application for judicial review is granted.

II. **Facts**

[7] Besiki Nugzarishvili (the "Principal Applicant"), Bela Euashvili (the "Associate Applicant"), and Nita Nugzarishvili (the "Minor Applicant") (collectively, the "Applicants") are citizens of Georgia, but Ossetian ethnic minorities. The Applicants are respectively 33, 45, and 8 years old. The Principal Applicant is of mixed Ossetian and Georgian ethnicity. He was raised in a small village in Georgia with a few Ossetian families, located close to the administrative border between Georgia and South Ossetia. The Principal Applicant and his family faced blatant discrimination over their mixed ancestry due to ethnic tensions between the majority Georgian ethnic group and the minority Ossetian population.

[8] As a child, the Principal Applicant was bullied, beaten, and ostracised from his peers and teachers. Under the tutelage of his father, who was a well-known athlete, the Principal Applicant devoted himself to martial arts, but was faced with the ethnically motivated abuse that his father had experienced, i.e. ethnic harassment and discrimination during his athletic career. The Principal Applicant was repeatedly told by officials, referees, competitors, and others that he did not deserve to participate in national judo competitions due to his ethnicity, and that he would never be allowed to represent Georgia. For his martial arts competitions, the Principal Applicant felt that he received lower marks than other competitors and pushed out of winning first place because of his ethnicity.

[9] Due to his experiences of overt discrimination at school, the Principal Applicant chose to complete his law degree from the University of Tbilisi through correspondence courses instead

of attending in-person classes. After graduating law school in 2007, the Principal Applicant sought employment at several government offices and private law firms, but was unsuccessful; the Principal Applicant attributed this to his minority ethnic background. Over the next four years, the Principal Applicant took menial jobs to support his family.

[10] In August 2008, a war broke out between Georgia and Russia, which inflamed long-standing ethnic tensions between ethnic Georgians and ethnic Ossetians, who were seen as pro-Russian. Human rights abuses were widely reported by international human rights organizations on both sides of the conflict. As a result, anti-Russian and anti-Ossetian sentiment became exacerbated in Georgia.

[11] In February 2012, the Principal Applicant obtained an internship with the Ministry of Culture in Tbilisi through a friend of his brother. Four other students were hired. The Principal Applicant claims that while the other interns were compensated for their work, he was unpaid. Throughout the internship, the Principal Applicant was ostracised and treated poorly by his colleagues. Before completing the internship, he was dismissed without an explanation.

[12] In 2010, the Principal Applicant began a common-law relationship with the Associate Applicant, who was an ethnic Georgian. After the Principal Applicant moved in with the Associate Applicant's family, she and her family were ostracised by some of their friends and neighbours. The neighbours frequently targeted the Principal Applicant with ethnic slurs, and vandalized his vehicle more than once.

[13] In May 2015, the Principal Applicant returned to his village to help his mother install new water pipes in the family home. When the installation accidentally caused a flood in an adjacent ethnic Georgian cemetery, five upset villagers threatened and beat the Principal Applicant after accusing him of desecrating their ancestors' graves.

[14] The Principal Applicant was hospitalized due to the attack, and had to undergo an emergency cholecystectomy surgery to remove his gall bladder. He identified his attackers to the police when they visited the hospital, but the police took no action, and instead advised him to stay away from the village.

[15] On November 23, 2015, the Applicants came to Canada to visit the Associate Applicant's wife. On July 29, 2016, the Principal Applicant's brother returned to their village to visit his mother and was attacked by three of the five men who had earlier attacked the Principal Applicant. The Principal Applicant's brother was seriously injured, and their mother was verbally abused and threatened. After the attack, the Principal Applicant's mother fled and moved to Tbilisi.

[16] Fearing for their safety upon their return to Georgia, the Applicants submitted their claims for refugee protection in Canada on April 17, 2017.

[17] On April 12, 2018, the Applicants' claims were heard by the RPD, and by decision dated May 2, 2018, the RPD rejected the claims for refugee protection. The RPD found the Applicants

to be credible, but rejected the claim for protection on the basis that the Applicants failed to rebut the presumption of state protection. This decision was appealed to the RAD.

[18] By decision dated January 31, 2019, the RAD dismissed the appeal and confirmed the decision of the RPD that the Applicants are neither Convention refugees nor persons in need of protection, pursuant to section 111(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*").

III. **Issues and Standard of Review**

[19] There are two issues on this application for judicial review:

A. Whether the RAD failed to properly consider evidence in determining that the RPD did not err in its conclusion on state protection;

B. Whether the RAD failed to properly apply the legal test for cumulative discrimination amounting to persecution.

[20] Prior to the Supreme Court's recent decision in Canada *(Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (CanLII) [*Vavilov*], the standard of review on the issue of state protection was conducted on the reasonableness standard: *Mendez v Canada (Minister of Citizenship and Immigration)*, 2008 FC 584 (CanLII) at paras 11-13; *Tetik v Canada (Citizenship and Immigration)*, 2009 FC 1240 (CanLII) at para 25. There is no need to depart from the

standard of review followed in previous jurisprudence, as the application of the *Vavilov* framework results in the same standard of review: reasonableness.

[21] Issues relating to the application of the correct legal test to be applied are reviewable on the correctness standard. The Applicants argue the issue of whether the RAD applied an incorrect test for cumulative discrimination amounting to persecution is subject to a correctness standard of review.

[22] I disagree. The substance of what the Applicants appear to be arguing, in fact, is whether the RAD failed to properly apply the test for cumulative discrimination amounting to persecution to the facts of this case, for which the applicable standard of review is reasonableness *(Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 (CanLII); *Ruszo v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1004 (CanLII) [*Ruszo*] at paras 20-22). This approach remains the same post-*Vavilov*.

[23] As noted by the majority in *Vavilov*, "a reasonable decision 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). Furthermore, "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," (*Vavilov* at para 100).

IV. **Analysis**

A. *State Protection*

[24] In the decision under review, the RAD found that the RPD had adequately assessed the country condition evidence in finding that state protection was reasonably forthcoming to Ossetians. The Applicants submit that the RAD erred in upholding the RPD's decision because the RPD misapplied the test for state protection. The Applicants also submit that the RAD and RPD's assessment of state protection and country condition information was perverse and made without regard to the material.

(1) **Democratic Spectrum**

[25] The Applicants argue that the RAD erred in concluding that the RPD properly assigned Georgia a high place on the "democracy spectrum", was "mindful of the limitations or problems in Georgia's state protection mechanisms and calibrated the objective country document information in that context", and considered the Applicants' ethnicity in the context of state protection mechanisms. The Applicants argue that the country information about Georgia's democratic ranking is inherently flawed because it groups a region of Eastern European and Central Asian countries that are mostly newly formed democracies with the exception of Turkey.

[26] The Respondent submits that an elevated standard of proof was not applied by RPD or the RAD.

[27] In my view, the RAD did not err in its finding on Georgia's level of democracy. The RAD held that the RPD examined evidence on the rule of law, relevant state institutions such as the police, but also recognized that some issues remain with respect to state protection mechanisms. Although the RPD observed that Georgia ranked high regionally on the 2016 WJP Rule of Law Index, it did not elevate the burden of proof on the Applicants.

[28] The documentary evidence did not suggest that Georgia is a failed state, or that it was not a functioning democracy despite some limitations or problems in its state protection mechanism. For state protection to be adequate, perfection is not the standard (*Moya v Canada (Citizenship and Immigration)*, 2016 FC 315 (CanLII) at para 73; *Bledy v Canada (Minister of Citizenship and Immigration)*, 2011 FC 210 (CanLII) at para 47).

(2) **Test for State Protection**

[29] The RAD upheld the RPD's conclusion that the Principal Applicant did not "demonstrate that state protection in Georgia is inadequate overall, or that he has exhausted the course of action to him which would have included following up with the police". The Applicants argue that "exhausting the course of action available" or "demonstrating that state protection is inadequate overall" are not requirements to rebut the presumption of state protection, and read the RAD's decision to be a misapplication of the test for state protection.

[30] The Applicants instead submit that the requirement to rebut the presumption is for "the claimant to demonstrate on a balance of probabilities, that a state is unable or unwilling to provide protection in a real or adequate way, based on a claimant's individual circumstances".

[31] In contrast, the Respondent submits that neither the RPD nor the RAD misapplied the legal test for state protection by using the word “exhaust”.

[32] The test to rebut the presumption of state protection is well-established: “A claimant seeking to rebut the presumption of state protection must adduce relevant, reliable and convincing evidence which satisfies the trier of fact on a balance of probabilities that the state protection is inadequate,” *(Flores Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 (CanLII) at para 30). This is essentially the same test that the Applicants put forward.

[33] However, the jurisprudence also states that, “[t]he more democratic the state’s institutions, the more the claimant must have done to exhaust all the courses of action open to him or her,” *(Kadenko v Canada (Minister of Citizenship and Immigration)*, 1996 CanLII 3981 (FCA), [1996] FCJ No 1376 at para 5 (FCA)). In this case, the RAD upheld the RPD’s finding that Georgia was a parliamentary democracy.

[34] As such, to rebut the presumption of state protection, the Applicants would have had to demonstrate that they exhausted objectively reasonable avenues to obtain state protection or that it would have been objectively unreasonable for them to do so *(Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171 (CanLII) at para 46).

[35] Therefore, assessing whether the Applicants had exhausted the course of action available or whether they had demonstrated that state protection is inadequate is not a misapplication of the test for rebutting state protection.

(3) **Consideration of the Evidence**

[36] The Respondent submits that the Principal Applicant failed to establish on his evidence that the state was unable to provide effective protection. Notably, the Respondent argues that the Principal Applicant did not follow up with police after contact at the hospital, and that he relied on his subjective belief that help would not be forthcoming if he did follow up for police assistance.

[37] The Respondent relies on this Court's decision in *Ruszo* at paras 32-33 for the proposition that subjective belief is not sufficient to rebut the presumption of state protection.

[38] Furthermore, the Respondent submits that the RPD and RAD considered relevant and current country condition evidence on the availability of state protection for Ossetians in Georgia and reasonably concluded that the objective evidence weighed in favour of the adequacy of state protection. The Respondent also argues that the RPD considered the operational effectiveness from the country condition documentation.

[39] Although the RAD's (and RPD's) assessment in itself was not a misapplication of the test to rebut state protection, in my view, the consideration of the evidence within the assessment concerning the country conditions is unreasonable.

[40] I agree with the Applicants that it was not a reasonable course of action for the Principal Applicant to pursue the matter with police after the incident in 2015. After being assaulted by the five men from the village on the accusation that the Principal Applicant had desecrated their ancestral burial sites, and being hospitalized, the police visited the Principal Applicant at the hospital, but instead of investigating the matter, told him to stay away from the village to avoid conflict. At the very least, this interaction appears to have been an implicit messaging that the police were unwilling to assist the Principal Applicant in pursuing the matter any further.

[41] It was not the Principal Applicant's "personal belief" that the police would not pursue an investigation or charges. It is evident in the record: the police told the Principal Applicant to leave the area, even after he suffered such serious injuries that he was hospitalized for five days and underwent an emergency surgery. The evidence shows a lack of operational effectiveness of state protection. It was unreasonable for the RAD, and the RPD to have concluded that the Principal Applicant should have followed up with police—the evidence shows a "follow-up" would only have resulted in disappointment, frustration, and inaction.

[42] The evidence presented before the RPD and RAD states that Ossetians pursue the Public Defender's Office when seeking redress for real or perceived discrimination or instances of violence. The RPD noted the Public Defender's Office as an option that the Principal Applicant could reasonably have approached to obtain state protection, and thus concluded that it is not reasonable "for someone in the claimant's shoes to not have approached the authorities."

[43] However, it is unclear what kind of adequate state protection or redress the Public Defender's Office could or would have been able to provide. It is further suspect whether help would be reasonably forthcoming, given the mixed reports on its efficacy. One source described the Public Defender's Office as "not always effective", and a different source stated that it is "mostly effective". Additionally, there is no indication as to what the "effectiveness" translates to on the operational adequacy of state protection.

[44] In fact, one of the reports relied on by the RPD (and the RAD), "RIR-GEO 105102", notes that the Public Defender's Office can make "non-binding recommendations to law enforcement to investigate particular human rights cases", and "can recommend to the General Inspection Department that it investigate a case where the police do not react to a human rights violation or abuse their power, but that the decision of the Public Defender is not binding." The reports goes on further to state:

> [T]he Public Defender is authorized to request relevant investigating authorities to start an investigation and/or criminal prosecution, if, after examining the case, he/she comes to the conclusion that there are elements of crime in the case; though the proposal is only of a recommendatory nature and does not hold mandatory powers.

[45] Given that the police were disinterested in pursuing the assault on the Principal Applicant in 2015, and did not even interview or investigate the subsequent attacks on the Principal Applicant's brother, whether a non-binding recommendation from the Public Defender's Office—should one be provided—would offer a proper and adequate recourse for the Applicants is tenuous.

[46] The Respondent relies on this Court's decision in *Kerdikoshvili v Canada (Citizenship and Immigration)*, 2018 FC 1265 (CanLII) [*Kerdikoshvili*] at paras 13 to 17 as being instructive. In *Kerdikoshvili*, the applicant was a Georgian national of Ossetian ethnicity whose refugee claim was refused by the RPD and RAD. The RPD and RAD in that case had found the issue of state protection to be determinative, and found that the applicant had failed to pursue further recourse available to him. The Court noted that the weighing of evidence is at the heart of the RAD's expertise and agreed with the RAD that the applicant failed to rebut the presumption of state protection given the documentary evidence.

[47] However, the decision in *Kerdikoshvili* can be distinguished on the facts. Unlike in *Kerdikoshvili*, where there were police efforts to intervene and commence investigations on the incidents alleged by the applicant, in the case at bar, the police remained disinclined to offer assistance to the Applicant and no investigations were undertaken, despite the assailants having been identified to the police when they visited the Applicant in the hospital.

[48] In addition, although the Court in *Kerdikoshvili* described the Public Defender's Office as having the power to hear cases of discrimination, and make recommendations to reinstate the violated equality, as I have stated above, I am not convinced that the Public Defender's Office would be an avenue of obtaining adequate state protection on the facts and documentary evidence provided in the case at bar.

[49] Furthermore, in the present case, the RPD does not discuss the adequacy of state protection with regard to the Public Defender's Office, but merely tossed the idea as a suggestion

that the Principal Applicant could have considered as an "objectively reasonable avenue of state protection". Given the evidence on the record, the Public Defender's Office is entirely unconvincing as one such option.

[50] Also, in other parts assessing country condition evidence, it appears that the RPD and RAD failed to properly consider the evidence before them. The RPD at one point noted that the evidence suggests, "Ossetians are not in the same category as other groups when it comes to mistreatment," because according to a report in the RIR, "Ossetians have been generally better integrated in to [sic] Georgian society than any other ethnic group," since the Soviet period. However, as the Applicants' counsel aptly pointed out, being "better integrated" does not necessarily mean someone is "better treated". With an exodus of Ossetians from Georgia since 1991, Ossetians who once accounted for 3% of the population—around 166,000 people—had been reduced to 0.4% of the country's population, around 14,000 people. Sometimes, groups become integrated because they are forced to survive. In fact, a review of the history of Ossetians in Georgia reveals the ill-treatment of the Ossetian minorities.

[51] Therefore, in my view, it was unreasonable for the RAD, and the RPD, to find that the Principal Applicant had not exhausted the objectively reasonable avenues of obtaining state protection. The RAD failed to properly consider country condition evidence in its decision.

B. *Cumulative Discrimination amounting to Persecution*

[52] The Applicants submit that the RAD misapplied the test for persecution pursuant to section 96 of the IRPA. In particular, the Applicants maintain that the RPD failed entirely to

consider the cumulative nature of discrimination on the Applicants' well-founded fear of persecution, and failed to explain why the continuous acts of discrimination had not amounted to persecution.

[53] The Respondents submit that the RAD did not apply the wrong legal test for cumulative persecution: the RAD considered the Principal Applicant's evidence regarding the alleged discriminatory incidents and reasonably found that they did not cumulatively amount to persecution. The Respondent notes that the RAD found "there was limited evidence from which to conclude the motivations attributed to others, including persons in authority".

[54] The Respondent recites the RAD's listing of incidents, such as failing to achieve first place in sport competitions, living at home while attending university, not securing an internship, and experiencing a discontinued internship, and argues that the RAD reasonably found insufficient evidence to establish persecution. The Respondent goes as far to state that these incidents did not even amount to discrete discriminatory attacks.

[55] In my view, the RAD misapplied the test for cumulative discrimination tantamount to persecution.

[56] In the RAD decision, finding that the issue of cumulative discrimination amounting to persecution was argued before the RPD mainly in relation to the internal flight alternative and briefly referred to in closing, the RAD undertook an examination of this issue in more detail, but

concluded that "the limited circumstance where [the issue of cumulative discrimination amounting to persecution] might apply have not been established in this case".

[57] Although the RAD makes references to the concept of cumulative discrimination amounting to persecution as defined in the UNHCR Handbook being applicable to cases "where discrimination leads to consequences of a substantially prejudicial nature," it is evident from the decision that the RAD lacked an appreciation for the test for cumulative discrimination amounting to persecution, and failed to apply the test to the facts before them.

[58] Through the analysis, the RAD continually refers to the Principal Applicant's experiences of discrimination as having been formed out of his "personal belief" that others had discriminatory motives. It is as if the RAD perceived the acts and experiences of discrimination to have been some figment of the Principal Applicant's imagination. I note that the Applicants' credibility was not in issue, as the RPD had found the Applicants to be credible.

[59] Although it was reasonable for the RAD to point out that some of the events that transpired were based on the Principal Applicant's speculation involving ethnic discrimination, for example—"failing to achieve first place finishes in his sport competitions, living at home while attending university, not securing an internship, and later having a non-paid and subsequently discontinued internship"—the RAD erred by rendering itself oblivious to the fact that some of the listed examples were direct results of or events linked to previous discriminatory acts or remarks thrust upon the Principal Applicant:

- the Principal Applicant testified being repeatedly told by officials, referees, and competitors that he did not deserve to participate in national judo competitions because of his ethnicity;

- the Principal Applicant was ostracized at school by peers and teachers over many years; as a result, he opted to attend school remotely by the time he was pursuing his law degree;

- the Principal Applicant was subject to ethnic slurs by his neighbours because he was in a relationship with an ethnic Georgian; and

- the Principal Applicant had his vehicle vandalized on more than one occasion.

[60] Not only did the RAD fail to properly consider the evidence with regard to discrimination experienced by the Principal Applicant, but by concluding that examples of the discriminatory acts were borne out of the Principal Applicant's "personal beliefs", the RAD made no attempt to consider the cumulative aspect of such discriminatory experiences.

V. **Certified Question**

[61] Counsel for each party was asked if there were any questions requiring certification. They each stated that there were no questions for certification and I concur.

VI. **Conclusion**

[62] The RAD failed to properly consider the country conditions concerning the rebuttal of the presumption of state protection. It was unreasonable for the RAD to find that the Principal Applicant had not exhausted the objectively reasonable avenues of obtaining state protection.

[63] Furthermore, the RAD erred by failing to properly apply the test for cumulative discrimination tantamount to persecution. On this issue, the RAD again failed to regard the evidence before it, and did not consider whether the cumulative nature of the Principal Applicant's past experiences of discrimination could amount to persecution.

[64] The RAD decision is unreasonable. This application for judicial review is allowed.

JUDGMENT IN IMM-1304-19

THIS COURT'S JUDGMENT is that:

1. The decision is set aside and the matter is to be returned for redetermination by a different decision-maker.
2. There is no question to certify.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Michael Sherritt	FOR THE APPLICANTS
Maria Green	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Sherritt Greene Immigration Law Barristers and Solicitors Calgary, Alberta	FOR THE APPLICANTS
Attorney General of Canada Calgary, Alberta	FOR THE RESPONDENT