

Federal Court



Cour fédérale

Date: 20210317

Docket: IMM-6541-19

Citation: 2021 FC 233

Ottawa, Ontario, March 17, 2021

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

VASYL YELENYCH

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Vasyl Yelenych seeks judicial review of a decision by the Refugee Appeal Division [RAD] of the Immigration and Refugee Board [IRB]. The RAD confirmed a decision by the Refugee Protection Division [RPD] of the IRB that Mr. Yelenych is neither a Convention

refugee nor a person in need of protection under ss 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 [IRPA].

[2] Mr. Yelenych is a citizen of Ukraine. He claims to fear persecution or other harm in that country due to his Roma ethnicity.

[3] The RAD reasonably concluded that the evidence submitted by Mr. Yelenych to establish his Roma ethnicity was insufficient, and that his claim to be at risk of persecution or other harm in Ukraine lacked credibility. The application for judicial review is therefore dismissed.

II. Background

[4] Mr. Yelenych arrived in Canada with a visitor's visa on September 16, 2016, leaving his wife and two children in Ukraine. He sought refugee protection on December 1, 2016.

[5] Mr. Yelenych claims to have been the victim of vandalism, discrimination and physical abuse in Ukraine throughout his life. He says that his situation worsened after the Maidan Revolution of 2014.

[6] The RPD found that Mr. Yelenych was neither Roma nor perceived as such in Ukraine, and the incidents of violence and discrimination he recounted did not occur. It based these findings on a series of concerns regarding his credibility, including: (a) his testimony about whether he acquired his Roma ethnicity from his mother's side, his father's side, or both; (b) the

lack of acceptable documentation to establish his ethnicity or a satisfactory explanation for its absence; and (c) the ambiguity of photographic and other evidence to demonstrate his ethnicity. The RPD also found that Mr. Yelenych did not have a subjective fear of harm, noting his delay in making a refugee claim.

[7] Mr. Yelenych appealed the RPD's decision to the RAD, and sought to adduce new evidence. The RAD accepted Mr. Yelenych's birth certificate as new evidence. The RAD rejected the remainder of the new evidence tendered by Mr. Yelenych, and confirmed the RPD's decision on October 3, 2019.

III. Issues

[8] This application for judicial review raises the following issues:

- A. Did the RAD reasonably refuse to accept Mr. Yelenych's new evidence?
- B. Did the RAD reasonably conclude that Mr. Yelenych is neither Roma nor perceived as such in Ukraine?

IV. Analysis

- A. *Did the RAD reasonably refuse to accept Mr. Yelenych's new evidence?*

[9] Mr. Yelenych sought to adduce the following new evidence before the RAD:

- (a) a letter dated April 29, 2018 from K.G. Vanchulyak confirming that he is one of Mr. Yelenych's neighbours, that Mr. Yelenych is a person of Roma ancestry, that his grandfather settled in the town in the 1950s where his daughter was born, that very little is known about Mr. Yelenych's father, who passed away, and that Mr. Yelenych has a stepfather, who is not his biological father;
- (b) a letter dated April 30, 2018 from N.K. Kalenchuk confirming that he is a social worker and one of Mr. Yelenych's neighbours, and that Mr. Yelenych is of Roma descent by his maternal line, but Mr. Kalenchuk does not know his father; and
- (c) a Google map showing the location of the village of Lashkivka in relation to certain other towns and villages in Ukraine.

[10] The letters were intended to corroborate a report provided to the RPD titled "Inspection of living conditions of Yelenych, Vasyl Olegovych" dated November 8, 2016 [Commission Report]. The report was authored by a "Commission" comprised of N.K. Kalenchuk, K.G. Vanchulyak, and G.I. Bevtsik, and confirmed, among other things, that Mr. Yelenych is Ukrainian of Roma origin by maternal descent.

[11] The Google map was intended to address a concern expressed by the RPD respecting Mr. Yelenych's testimony regarding the Commission Report. Mr. Yelenych said the report was written by three neighbours, but the document indicated it was written by two neighbours and a social worker. Mr. Yelenych explained that his village is very small, and Mr. Kalenchuk was

therefore both a neighbour and a social worker. The purpose of the Google map was to buttress this assertion.

[12] Mr. Yelenych's explanation for not providing the letters to the RPD was that he did not think it was necessary to provide additional evidence to corroborate the Commission Report. The RPD gave little weight to the report, because Mr. Yelenych was unable to correctly name its authors despite the fact that they were allegedly his neighbours. The RAD also found the statement in the report that Mr. Yelenych is Roma by maternal descent to be inconsistent with the statement in his Basis of Claim [BOC] Form that he is of Roma origin on both his mother's side and his father's side.

[13] Pursuant to s 110(4) of the IRPA, new evidence in an appeal before the RAD is admissible only if it arose after the RPD's rejection of the claim, was not reasonably available, or could not reasonably have been presented at the time the RPD rejected the claim. The factors to be considered by the RAD are described in the Federal Court of Appeal's decisions in *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 at paragraph 13 and *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 [*Singh*] at paragraph 43.

[14] The RAD found that the letters from Mr. Vanchulyak and Mr. Kalenchuk, as well as the Google map, were tailored to address the concerns identified by the RPD with respect to Mr. Yelenych's testimony. The information contained in the letters and the map did not arise after the RPD's rejection of the claim, and was reasonably available before the RPD issued its decision. The new evidence was intended only to supplement and repair deficiencies in the record.

[15] The role of the RAD is to provide an opportunity to address errors of fact, errors of law, or mixed errors of fact and law, not to complete a deficient record before the RPD (*Singh* at para 54). It was incumbent upon Mr. Yelenych to provide sufficient evidence to establish his claim, and to do so before the RPD (*Da Costa Soares v Canada (Citizenship and Immigration)*, 2007 FC 190 at para 22). The RAD's refusal to accept Mr. Yelenych's new evidence on appeal was reasonable.

B. *Did the RAD reasonably conclude that Mr. Yelenych is neither Roma nor perceived as such in Ukraine?*

[16] The RAD's decision is subject to review by this Court against the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov] at para 10). The Court will intervene only if "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). These criteria are met if the reasons allow the Court to understand why the decision was made, and determine whether the decision falls within the range of acceptable outcomes defensible in respect of the facts and law (*Vavilov* at paras 85-86, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[17] Mr. Yelenych says that the RAD's rejection of his credibility was based on just two adverse findings: (a) the minor inconsistency between the statement in his BOC Form and his subsequent testimony; and (b) his failure to adduce any proof of his membership or participation in Roma organizations.

[18] Mr. Yelenych does not dispute that he stated in his BOC Form that he acquired his Roma ethnicity from both his mother and his father. However, he says that he voluntarily clarified before the RPD that his mother was full Roma, while his father was half Roma. He also says that he never claimed to be a member of Roma organizations, and it was therefore unreasonable for the RPD and the RAD to require proof of this.

[19] The Respondent denies that Mr. Yelenych voluntarily clarified his origins before the RPD; rather, Mr. Yelenych acknowledged that he acquired his Roma ethnicity primarily from his mother only when confronted with the apparent inconsistency between his BOC Form and the Commission Report. The RAD's decision contains the following excerpt from the transcript of proceedings before the RPD:

Q: ... is [your Roma ethnicity] from your maternal or paternal or both sides?

A: It's by my mother's side.

Q: Are both of your ah ... so only your mother is Roma?

A: Yes. My father is not pure Roma.

Q: On your BOC you say that you are Roma from both sides and that your father has problems because of his Roma nationality. Why is that different?

A: Well the point is that the mother of my father was Roma and his father was not Roma.

Q: Why don't you make that distinction in your story?

A: Well, I did not know it would have such big significance, such importance.

[20] Contrary to Mr. Yelenych's assertions, the RAD's rejection of his credibility was based on more than just two adverse findings. In addition to the admitted inconsistency between his BOC Form and subsequent testimony, the RAD also noted Mr. Yelenych's inability to correctly identify the neighbours who authored the Commission Report.

[21] The RAD conducted its own analysis of the Commission Report, but shared the RPD's doubts regarding its status as an official document:

While the document is signed and sealed, it is not clear whether or not the document was commissioned. The Appellant's counsel describes the document as looking like a commissioned document from the head of the village administration; however, there is no evidence to this effect. Nor is it clear from the evidence on what basis the three signatories are said to be "Commission members" or what the purpose of the "Commission" is – other than to prepare and sign the document in this particular case.

[22] Mr. Yelenych's birth certificate was issued after 1991, and therefore did not confirm his ethnicity. He did not claim that he had never been involved in Roma organizations, but rather that he had considered joining them and then failed to do so. The Respondent notes the following excerpt from the transcript of proceedings before the RPD:

Q: What about in Toronto have you sought any Roma groups or associations?

A: No, you know here in Toronto I met a Roma guy and we became friends ah ... he wanted to bring me to some place but we failed and we tried to meet other people from organizations for the second time we failed but in church I met a lot of Roma people and I have friends, many friends Roma people.

[23] The RAD reasonably found that Mr. Yelenych's ability to count to ten in the Roma language provided little in the way of evidence that he could speak the language or was of Roma ethnicity. Photographs depicting people attending a wedding with Christian iconography and flowers worn by men on their lapels, a photograph of a woman and a young boy dressed in what appeared to be traditional ethnic clothing, and photographs showing bold patterns on carpets and upholstery were reasonably found by the RAD not to constitute objective evidence of Mr. Yelenych's ethnicity.

[24] Ultimately, there was only one document purporting to be official that confirmed Mr. Yelenych's Roma ethnicity: the report of the "Commission" dated November 8, 2016. The RAD reasonably concluded that the evidence submitted by Mr. Yelenych to establish his Roma ethnicity was insufficient, and that his claim to be at risk of persecution or other harm in Ukraine lacked credibility.

V. Conclusion

[25] The application for judicial review is dismissed. Neither party proposed that a question be certified for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"Simon Fothergill"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6541-19

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