Federal Court Cour fédérale

Date: 20220331

Docket: IMM-6133-20

Citation: 2022 FC 447

Montréal, Quebec, March 31, 2022

PRESENT: The Honourable Madam Justice Rochester

Docket: IMM-6133-20

BETWEEN:

LASZLONE BALOGH
LASZLO BALOGH

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants, Laszlone Balogh and Laszlo Balogh, are citizens of Hungary. They seek judicial review of a decision rendered by a Senior Immigration Officer [Officer] of Immigration, Refugees and Citizenship of Canada dated March 2, 2020 rejecting the Applicants' Pre-Removal Risk Assessment [PRRA] Application finding that they had not adduced evidence corroborating

that they would be subject to a risk of persecution or harm if they are to return to Hungary [PRRA Decision].

I. Background

[2] In January 2010, at the age of 18, Ms. Balogh entered Canada with her mother, and submitted a claim for refugee protection. In March 2010, at the age of 18, Mr. Balogh entered Canada and lodged a claim for refugee protection. The Applicants met in Canada while their claims were being processed. The Applicants subsequently withdrew their claims for refugee protection in 2012 and returned to Hungary.

[3] In 2016, the Applicants' son, Szantino, was born in Hungary.

[4] The Applicants allege that prior to their arrival in Canada in 2010, and following their return to Hungary in 2012, they have been victims of anti-Roma discrimination with respect to housing, healthcare, education and employment, and have experienced incidents of violence and harassment.

[5] In 2018, the Applicants and their son left Hungary for Canada, arriving on June 16, 2018. While they sought to file new refugee claims at the airport upon arrival, only their son Szantino was eligible.

[6] Szantino's refugee claim was heard on November 23, 2018, when he was under the age of two. The Applicants submitted evidence and Ms. Balogh provided testimony. Following the

hearing, the Refugee Protection Division [RPD] rendered a decision the same day [RPD Decision]. The RPD provided its reasons orally, found that Szantino was a Convention refugee, and accepted his claim for refugee protection in Canada.

[7] The Applicants' PRRA was initiated in December 2018. In January 2019, the Applicants submitted effectively the same evidence that was provided to the RPD for Szantino's claim. An oral hearing, however, was not held and Ms. Balogh did not testify. On March 2, 2020, the Officer denied the PRRA application in a lengthy decision in writing.

[8] The Applicants submit that the Officer committed a number of errors, including undermining the Applicants' credibility, failing to convoke an oral hearing, failing to coherently assess discrimination amounting to persecution in Hungary, erroneously finding that the Applicants would benefit from state protection in Hungary without properly examining the operational adequacy of the state protection, and failing to differentiate the Applicants' circumstances from those of their son Szantino.

[9] The Respondent submits that the Officer reasonably found that the Applicants failed to rebut the presumption of state protection in Hungary with clear and convincing evidence and failed to provide corroborative evidence of the alleged discrimination. The Respondent argues that the Officer appropriately considered the positive RPD decisions of Szantino and other members of Ms. Balogh's family. The Respondent submits that the 24-page Decision was thorough and engaged with all of the cumulative allegations raised by the Applicants.

II. II. Standard of Review

[10] Save for one issue, the parties agree that the applicable standard of review is one of reasonableness as set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[11] Where they diverge is with respect to the Officer's decision not to hold an oral hearing. In their written submissions for the PRRA application, the Applicants requested that an oral hearing be convoked should the evidence be insufficient, should the Officer require clarification, or should contradictions or inconsistencies require explanation. The request was as follows:

> These young parents firmly and sincerely believe that they will face a risk to their lives should they be forced to return to Hungary. While it is my position that the evidence included herewith is more than sufficient to justify granting protection to these Applicants, in the event that you believe otherwise, then I request that you convoke an oral interview, with counsel present, pursuant to section 113(b) of IRPA and section 167 of the *Immigration and Refugee Protection Regulations*.
>
> It is contrary to the rules of natural justice and fairness to come to a conclusion about credibility without giving Laszlo and Laszlone the opportunity to respond. An applicant must be given an opportunity to clarify the evidence and to explain any apparent contradictions or inconsistencies therein. [footnotes omitted]

[12] The Applicants submit that the applicable standard is one of correctness as the decision not to hold a hearing, and in particular when one was requested, is a breach of procedural fairness. The Respondent submits that, while the jurisprudence remains unsettled on this issue, the standard of reasonableness should apply.

[13] I acknowledge that the jurisprudence is divided on this issue, with certain decisions characterizing the matter as one of procedural fairness and/or correctness (see *Zmari v Canada (Citizenship and Immigration)*, 2016 FC 132 at paras 10–13; *Nadarajan v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 403 at paras 12–17; *Nur v Canada (Citizenship and Immigration)*, 2019 FC 951 at para 8; *Khan v Canada (Citizenship and Immigration)*, 2019 FC 534 at paras 16-20 [*Khan*]; *Mamand v Canada (Citizenship and Immigration)*, 2021 FC 818 at para 19).

[14] Other decisions have applied the standard of reasonableness on the basis that the question is one of mixed fact and law (*Kioko v Canada (Citizenship and Immigration)*, 2014 FC 717 at paras 17–19 [*Kioko*]; *Huang v Canada (Citizenship and Immigration)*, 2018 FC 940 at paras 12–17; *Hare v Canada (Citizenship and Immigration)*, 2020 FC 763 at paras 11–12 [*Hare*]; *Balog v Canada (Citizenship and Immigration)*, 2021 FC 605 at para 24 [*Balog*]).

[15] There is a third category of decision wherein the Court has applied the standard of review agreed to by the parties. In *Forbes v Canada (Immigration, Refugees and Citizenship)*, 2021 FC 1306 (at para 17), the parties agreed that the standard of correctness applied to an officer’s decision not to hold a hearing, and thus the Court applied it on that basis. In *Onyekweli-Ugeh v Canada (Citizenship and Immigration)*, 2021 FC 1138 (at paras 16-19), the parties both proposed the reasonableness standard, which was adopted by the Court on that basis.

[16] Having considered the jurisprudence, I find that the standard of reasonableness applies to the Officer's decision not to hold a hearing in the context of the Applicants' PRRA application. I agree with, and am guided by, the reasoning of my colleague Justice Strickland in *Hare*:

> [11] I acknowledge that the jurisprudence may remain unsettled as to the question of whether the granting of an oral hearing is one of procedural fairness, requiring correctness as the standard of review, or one of mixed fact and law, attracting the standard of reasonableness (see *Huang v Canada (Citizenship and Immigration)*, 2018 FC 940 at para 12 [*Huang* 2018]). However, I have previously held and remain of the view that the standard of reasonableness applies because, as found in *Ikechi v Canada (Citizenship and Immigration)*, 2013 FC 361 at para 26, a PRRA officer decides whether to hold an oral hearing by considering a PRRA application against the requirements in s 113(b) of the IRPA and the factors in s 167 of the IRP Regulations. Thus, applying s 113(b) is essentially a question of mixed fact and law (see, for example, *Chekroun v Canada (Citizenship and Immigration)*, 2013 FC 737 at para 40 and *Gjoka v Canada (Citizenship and Immigration)*, 2018 FC 292 at para 12).

[17] *Hare* has been followed recently by my colleague Justice Walker in *Balog*:

> [24] Ms. Balog also argues that the PRRA officer breached her right to procedural fairness by making veiled credibility findings and failing to hold an oral hearing. Ms. Balog submits that the Court must review the failure to hold an oral hearing for correctness but I disagree. The standard of reasonableness applies to an officer's determination of whether to hold an oral hearing as part of their consideration of a PRRA application. The officer makes the determination pursuant to paragraph 113(b) of the IRPA and the factors set out in section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Ha*re v Canada (Citizenship and Immigration)*, 2020 FC 763 at paras 11-12, citing *Huang v Canada (Citizenship and Immigration)*, 2018 FC 940 at para 12).

[18] I am further persuaded by the reasoning in *Kioko*, where Justice Leblanc explains that a decision whether to hold a hearing in the context of a PRRA application is a question of mixed

fact and law and one over which the Minister, being called upon to interpret his own statute, has expertise (para 18). Consequently, such decisions attract deference (para 19).

[19] In *Adetunji v Canada (Citizenship and Immigration)*, 2012 FC 708, Justice de Montigny addressed the issue of whether procedural fairness or reasonableness ought to apply, and found that the decision of whether or not to hold a hearing is reviewable on the standard of reasonableness:

> [27] Pursuant to these sections, the decision to hold a hearing is not taken in the abstract, according to what each Officer thinks is required by procedural fairness. On the contrary, the Officer is to determine this issue by applying the factors prescribed in s. 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*] to the particular facts of each case. Therefore this is clearly a question of mixed fact and law, and one over which a PRRA officer has expertise. As such, I find that the decision to hold or not to hold an interview, at least in the context of a PRRA, attracts deference and is reviewable on the reasonableness standard.

[20] The application of the reasonableness standard is, in my view, further supported by the Supreme Court's guidance in *Vavilov*:

> [25]…In our view, it is now appropriate to hold that whenever a court reviews an administrative decision, it should start with the presumption that the applicable standard of review for all aspects of that decision will be reasonableness. While this presumption applies to the administrative decision maker's interpretation of its enabling statute, the presumption also applies more broadly to other aspects of its decision.

[21] I therefore find it appropriate that an officer's decision on whether or not to hold an oral hearing, in the context of a PRRA application, is reviewed on a standard of reasonableness. In

taking such a decision, an officer is applying the prescribed factors found in s. 167 of the *Regulations* to the particular facts of a case.

[22] Does the applicable standard of review change by virtue of an applicant requesting an oral hearing? In my view, no. As noted above, the Applicants requested an oral hearing in the event there was an issue with the sufficiency of evidence, issues with the evidence itself (contradictions or inconsistencies), and issues of credibility. The Applicants submit “that the Officer breached procedural fairness by ignoring the Applicants’ request for an oral hearing and by failing to convoke a hearing.” To be clear, an oral hearing is not available as of right in a PRRA application (Hare para 19). The simple fact of requesting an oral hearing does not give rise to a right to a hearing. Nor does such a request, if not granted, automatically result in (i) a breach of procedural fairness, or (ii) an unreasonable decision.

[23] The issue, in my view, is better framed as follows. Paragraph 113(b) of *Immigration and Refugee Protection Act*, SC 2001, c 27) [IRPA] provides the discretion to hold a hearing where the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required. The prescribed three factors to be considered are found in s. 167 of the *Regulations*, and are:

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	a) l’existence d’éléments de preuve relatifs aux éléments mentionnés aux articles 96 et 97 de la Loi qui soulèvent une question importante

related to the factors set out in sections 96 and 97 of the Act;	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.

[24] An oral hearing is therefore generally required if there is a credibility issue regarding evidence that is central to the decision and which, if accepted, would justify allowing the application (*Hare* at para 20). Section 167 of the *Regulations* becomes operative when credibility is at issue such that it could result in a negative decision (*Tekie v Canada (Minister of Citizenship and Immigration)*,2005 FC 27 at para 16). The question that must be asked is whether an officer had reason to turn their mind to the factors in s. 167 of the *Regulations*, and if so, they ought to be addressed. If credibility concerns are central to the decision such that s. 167 of the *Regulations* becomes operative, it would be unreasonable for an officer not turn their mind to the appropriateness of a hearing.

[25] A request for an oral hearing by an applicant does not trigger a hearing. The prescribed factors under s. 167 of the *Regulations* either exist on the facts of a particular case or they do not. If there is no issue of credibility, then it should not be unreasonable for an officer to decline to hold an oral hearing – regardless of whether there is a request for one or not. This Court has found that where credibility is not in issue, an officer is not obliged to explain why an oral hearing has not been provided (*Ghavidel v Canada (Citizenship and Immigration)*, 2007 FC 939

at para 25 [*Ghavidel*]; *Csoka v Canada (Citizenship and Immigration)*, 2016 FC 653 at para 14; *Forbes v Canada (Immigration, Refugees and Citizenship)*, 2021 FC 1306 at para 29–31 [*Forbes*]). Justice de Montigny has noted that to make it compulsory to explain why an oral hearing was not provided would add to the already heavy burden of PRRA officers (*Ghavidel* at para 25). This is especially the case "when a careful reading of the reasons makes it clear that credibility was not an issue" (*Ghavidel* at para 25). While addressing a request for a hearing in a decision may well be preferable (*Ghavidel* at para 25), the failure to address such a request, where a veiled credibility finding is not a determinative factor or credibility is not an issue, is insufficient to render a decision as a whole unreasonable or procedurally unfair (*Hare* at para 32–36; *Forbes* at para 31).

III. III. Analysis

[26] I will first address the Applicants' argument that once a request for an oral hearing is made, the Officer was required to consider the request, provide reasons justifying their decision not to proceed with a hearing, and that the failure to do so was a breach of procedural fairness. I find that the fact that the Applicants made the request quoted in paragraph 11 of my reasons above, in and of itself, did not trigger an obligation on the part of the Officer to respond to the request and/or to hold an oral hearing. As dealt with in detail in Section II of this judgment, above, such a request does not trigger a right to a hearing; rather, it is the list of factors set out in section 167 of the *Regulations* that would allow the Minister (or one of its representatives) to use their discretion to grant one. Furthermore, I disagree with the Applicants' argument that a failure to respond to such a request is a breach of procedural fairness.

[27] I turn now to the Applicants' submissions that the Officer made numerous veiled credibility findings, and given the credibility findings, an oral hearing ought to have been held. The Respondent pleads that there was no "serious issue of credibility" rather the Officer's conclusions were based upon insufficient evidence and not credibility.

[28] To address the issue, one must determine whether a credibility finding was made, and if so, whether it was central to or determinative of the decision (*Hare* at para 21). In other words, on the facts of this case and taking into account the factors in section 167 of the *Regulations*, was the possible need for an oral hearing triggered?

[29] A factor in the present case is the RPD Decision as to Szantino's claim. As noted in paragraph 6 of my reasons above, the RPD accepted the refugee claim of the Applicants' son, who was a toddler at the time. The Applicants submitted effectively the same evidence for Szantino's claim, as they submitted with their PRRA application, save for the fact that at the RPD, an oral hearing was held where Ms. Balogh testified.

[30] In the RPD Decision for Szantino's claim, which is short and was rendered orally, the member noted "irregularities and credibility concerns with your evidence" but did not provide further details as what the concerns were. The member mentioned the credibility concerns twice. As to Szantino's subjective fear, the RPD member relied on the testimony of Ms. Balogh and inferred it from the evidence. Despite the stated "irregularities and credibility concerns", the member found that:

> In considering the subjective and objective bases for the claimant's fear of persecution, with respect to its ethnicity, in relation to a

> lack of adequate State protection or internal flight alternative, ultimately, I find that the claimant has established a serious possibility of persecution in Hungary, and therefore, I find that he is a Convention refugee and I accept his claim for refugee protection in Canada.

[31] Szantino's claim was accepted, but it is clear from the RPD Decision that there were credibility concerns with the evidence provided.

[32] In the PRRA Decision, the Officer noted the positive notices of decisions from the RPD for the Applicants' son and Ms. Balogh's sister and brother-in-law. The Officer stated, and I agree, that a PRAA is to be decided on its own individual merits and the Applicants' personal circumstances.

[33] The Applicants rely on *Pardo Quitian v Canada (Citizenship and Immigration)*, 2020 FC 846 [*Pardo Quitian*], where no explanation was provided for treating the claims differently:

> [52]… [the RPD] did not discuss the refugee claims of the Principal Applicant's brother, mother, or sister, despite their similarity to the claim advanced by the Applicants. While each claim must be assessed on its own merits, and the acceptance of the claims of other family members does not automatically lead to success for a claimant, the decision-maker must give some explanation for treating the claims differently. [references omitted]

[34] I agree with the Respondent that, unlike in *Pardo Quitian*, the Officer did acknowledge the relatives' claims and provided an explanation, albeit brief, for the different outcomes. The Officer provided a number of distinctions, including the specific circumstances of the Applicants and the independent documentary sources consulted in the PRRA Decision. In fairness to the

Officer, it would have been a challenge to compare and contrast the RPD's Decision in much detail given the brevity of the reasons provided orally by the RPD.

[35] Where I find there to be an issue, however, is with respect to credibility. Knowing that the RPD found there to be issues of credibility with effectively the same evidence, and ultimately granted Szantino's claim having heard Ms Balogh's testimony, raises a concern that credibility also was at issue in the PRRA Decision. This concern is justified when one considers a number of the Officer's findings. I pause here to note that section 167 of the *Regulations*, as quoted above, refers to a "serious issue" of a claimant's credibility. The mere possibility that an officer considered a claimant's credibility does not convert credibility into a "serious issue" or constitute a veiled credibility finding as understood in this Court's jurisprudence (*Gandhi v Canada (Citizenship and Immigration),* 2020 FC 1132 at para 41). There must be a serious issue of credibility.

[36] The Respondent's position is that the Officer never came to a conclusion about the Applicants' credibility, veiled or otherwise; rather, there was simply insufficient evidence. The distinction between a finding of insufficient evidence and a finding of credibility is not always clear cut (*Ahmed v Canada (Citizenship and Immigration)*, 2018 FC 1207 at para 30 [*Ahmed*]; *Forbes* at para 24). Moreover, there have been instances where a conclusion of insufficient evidence was in reality a manner of disguising an unexplained or "veiled" credibility finding (*Magonza v Canada (Citizenship and Immigration)*, 2019 FC 14 at para 35). I find Justice Norris comments in *Ahmed* as to the distinction between credibility and sufficiency to be instructive:

> [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. [references omitted]

[37] In the matter at hand, on numerous occasions the Officer appears to have had doubts bearing directly on the Applicants' credibility. In other words, the Officer appears to doubt the veracity of certain evidence.

[38] First, the Officer questioned Mr. Balogh's evidence that he left Canada and abandoned his refugee claim in 2012 due to Ms. Balogh's father being ill. The Officer questioned why the Applicants would move to a city located such a distance from Ms. Balogh's father when taking care of him was the reason they withdrew their refugee claim. The Officer found that if the Applicants feared persecution or harm in Hungary, they would not have returned to Hungary despite Ms. Balogh's father's health condition.

[39] Second, Ms. Balogh submitted that she, along with members of her family and friends, had been attacked by skinheads while at a club resulting in a number of injuries, that the police became involved, and that she attempted to receive treatment at the hospital but was denied

treatment on the basis that the police had indicated that the injuries were not serious enough. The Officer stated that she had not provided corroborating evidence (copy of police report, medical reports, court documents or affidavits from those involved) or explained how the police would have communicated to the hospital staff not to treat her or why the hospital would deny treatment based on a police officer's assessment.

[40] Third, the Officer noted Ms. Balogh's evidence that their car was vandalised on "multiple occasions" in 2016 and in certain instances an anti-Roma note was left. In her affidavit she describes the vandalism to the car and explains that they did not bother going to the police given that Mr. Balogh had previously reported a similar incident and the police did not believe him or file a report. The Officer stated that copies of the anti-Roma notes were not provided, nor was it stated how many times the incidents occurred or how the perpetrators knew the owner of the car was Romani. The Officer found that it was reasonable to assume that if the Applicants felt threatened they would have made reasonable attempts to report the incident(s) from 2016.

[41] Fifth, Ms. Balogh's evidence stated that in 2015 that the Applicants were subject to the housing evictions that took place in Miskolc, Hungary, and submitted a letter from a representative of the Roma Nationality Self-government of Miskolc. The letter named Mr. and Ms. Balogh and their son Szantino. The Officer noted that Ms. Balogh had not taken her husband's name until 2018 when they married and that her son was not born until December 29, 2016. Moreover, the Officer noted evidence that the evictions largely occurred prior to the date of birth of the Applicants' son. The Officer found that the evidence contradicted Ms. Balogh's statement in her affidavit concerning the eviction.

[42] Finally, in the conclusion section of the PRRA Decision, the Officer states that “while the applicants have relayed these incidents which they endured in Hungary, with the exception of the most recent incident, they have not adduced objective evidence to substantiate these events.” The Officer further states that “the applicants have not adduced evidence which corroborates that they would be currently subject to a risk of persecution or harm if they are returned to Hungary today.” Effectively, the Officer appears to be seeking corroborative evidence on the basis of doubts regarding the Applicants’ credibility. This is a theme that runs through much of the PRRA Decision.

[43] The Officer’s statements indicate that the Officer had concerns about the Applicants’ credibility. I find that the Officer’s treatment of a significant portion of the evidence amounted to an adverse assessment of the Applicants’ credibility, and specifically, doubts about the truthfulness of the statements in the Applicants’ affidavits. I consider this against the backdrop of the RPD’s findings for the Applicants’ son’s claim. By the time the matter came before the Officer, the RPD had found that there were credibility issues with the evidence, and this finding was based on effectively the same evidence as the PRRA application, save for Ms. Balogh’s testimony. The RPD, having heard Ms. Balogh’s testimony, granted Szantino’s claim. I repeat that the acceptance of Szantino’s claim does not automatically lead to success for the Applicants’ PRRA application (*Pardo Quitian* at para 52). Nevertheless, given the veiled adverse credibility findings made by the Officer and the RPD Decision which had expressed concerns surrounding the credibility of the evidence in the record, I find that the possible need for an oral hearing had been triggered. Accordingly, it was incumbent upon the Officer to consider the prescribed factors in s. 167 of the *Regulations* and either (i) indicate why he is of the opinion that an oral hearing is

not required, or (ii) exercise the discretion granted under section 113(b) of IRPA and hold a hearing. The Officer’s failure to do so renders the PRRA Decision unreasonable. Having so found, I find it unnecessary for me to address the remaining issues raised by the Applicants.

JUDGMENT in IMM-6133-20

THIS COURT'S JUDGMENT is that

1. This judicial review is allowed;
2. The PRRA Decision is set aside and the matter is remitted to a different officer for reconsideration;
3. No questions for certification were argued, and I agree that none arise.

"Vanessa Rochester"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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