Federal Court  Cour fédérale

Date: 20220706

Docket: IMM-5088-21

Citation: 2022 FC 993

Toronto, Ontario, July 6, 2022

PRESENT: Madam Justice Go

BETWEEN:

OLIVER KOKENY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mr. Oliver Kokeny, is a citizen of Hungary. He and his family experienced discrimination as Roma in Hungary. As a teenager living in Budapest, the Applicant was excluded in school, harassed by police, and physically attacked, all due to his Roma ethnicity. Once, his family's house was hit by a Molotov cocktail. The Hungarian police attended

briefly and left. After this incident, the family fled to Canada and made a refugee claim in April 2009.

[2] After the family's refugee claim was rejected, they returned to Hungary in September 2012, relocating to Miskolc.

[3] The family returned to Canada in August 2016 and applied for a Pre-Removal Risk Assessment [PRRA] with new evidence. Their application - prepared negligently by their former lawyer, Joseph Farkas - was rejected in January 2017 but was subsequently reopened. During that time, Applicant's common-law partner, who was awaiting her refugee hearing date, was advised by Mr. Farkas to withdraw her claim as nothing could be done for the Applicant and she should return to Hungary if she wanted to be with him. As a result, the Applicant's claim was separated from his family's claim and his common law partner withdrew her claim. The Applicant's family then had their removal stayed and eventually their PRRA was approved in 2018, but the Applicant was not part of either decision.

[4] In March 2017, the Applicant returned to Hungary with his partner but without his family. After being refused for several jobs, the Applicant eventually obtained a job at a fast-food restaurant, but he left after his pay was being deducted for no apparent reason.

[5] On March 15, 2018, a national holiday in Hungary, the Applicant and his partner were confronted by a group of men on the street for wearing the Hungarian national emblem (a cockade pin) and told they were not "true Hungarians." One of the men kicked the Applicant's

partner. When the Applicant attempted to protect her, the group began to beat them both. The Applicant's attempt to report the incident to the police was dismissed.

[6] The next month, while on a bus, the Applicant witnessed other passengers speak degradingly about Roma people. These passengers also called the Applicant a "stinking gypsy."

[7] In February 2019, the Applicant and his partner encountered a march of Betyar Sereg, a right-wing extremist group, which was shouting "don't hurt the Hungarians, gypsies get lost!"

[8] In November 2019, the Applicant obtained authorization to travel to the United States of America. From there, he crossed the border into Canada and applied for a PRRA.

[9] In a decision dated March 30, 2021, a Senior Immigration Officer [Officer] refused the Applicant's PRRA [Decision]. The Officer noted the positive PRRA of the Applicant's family, but found there were key differences with his case. Further, while noting that the documentary evidence showed "clear discrimination towards Roma at a societal and governmental level", the Officer found that the Applicant's own experiences of discrimination and encounters with extremists did not rise to the level of persecution and that there was insufficient evidence that the Applicant could not receive state protection.

[10] The Applicant seeks judicial review of the Decision. I grant the application as I find the Officer erred in assessing whether the Applicant's cumulative experiences of discrimination amounted to persecution.

II. Issues and Standard of Review

[11] The Applicant argues that the Decision is unreasonable on the grounds that the Officer (1) erred in assessing the PRRA application of his family; (2) erred in assessing whether discrimination amounted to persecution, and (3) conducted an unreasonable state protection analysis.

[12] The parties both submit that the reasonableness standard applies, per *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[13] 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). The onus is on the Applicant to demonstrate that the decision is unreasonable (*Vavilov* at para 100). To set aside a decision 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" (*Vavilov* at para 100).

III. Analysis

[14] The Applicant raises several issues in this application. In my view, the determinative issue is with respect to the Officer's assessment of the Applicant's experiences with discrimination and far-right extremism as a Roma.

[15] The Applicant argues that the Officer misapplied the test for whether discrimination amounts to persecution. He highlights the following principles in the case law:

- Where the evidence establishes a series of actions characterized to be discriminatory, and not persecutory, there is a requirement to consider the cumulative nature of that contact. This requirement reflects the fact that prior incidents are capable of forming the foundation of present fear (*Canada (Citizenship and Immigration) v. Munderere*, 2008 FCA 84 [*Munderere*] at para 41)
- It is an error for decision makers not to consider the cumulative nature of the conduct directed against a claimant (*Munderere* at para 41).
- It is insufficient for a decision-maker to simply say that it considered discriminatory incidents cumulatively; an applicant is entitled to know why they did not rise to the level of persecution. *Ruszo v Canada (Citizenship and Immigration)*, 2019 FC 397 [*Ruszo*] at para 26.
- Harassment in some circumstances may constitute persecution if sufficiently serious and it occurred over such a long period of time that it can be said that a claimant's physical or moral integrity is threatened. *Kallab v Canada (Citizenship and Immigration)*, 2019 FC 706 at para 200.

[16] The Applicant argues that his case is similar to *Ban v Canada (Citizenship and Immigration)*, 2018 FC 987 at para 28, where the Court found the RPD did "not engage in any real analysis relating to the cumulative impact of discrimination" and "omitted from its sequential consideration of incidents one of the more serious reports of violence linked to ethnicity." The Applicant argues that the Officer did not consider "events which, if taken individually, do not amount to persecution, but if taken together, may justify a claim to a well-founded fear of persecution" (*Munderere* at para 42).

[17] I agree.

[18] While acknowledging that the working definition of persecution has "at its core a component of persistence, repetition and severity of action", the Officer, in my view, treated each of the incidents of discrimination experienced by the Applicant in isolation without regard to the cumulative effect of the totality of such experiences.

[19] The Officer examined the multiple incidents of discrimination that the Applicant has encountered throughout his life, starting from his teenage years to recent times, but concluded the Applicant has failed to establish the persistence and severity of the discrimination he faced with respect to each of the incidents. The Officer's reasoning was made all the more puzzling as they often prefaced the description of each of the incidents with an acknowledgment that the Officer "accepted" that the Applicant has experienced discrimination. Taken together, the Officer accepted that the Applicant experienced discrimination in "education", "societal isolation", and in "employment", but the Officer found each one of these incidents did not establish there was a "systemic, severe and repetitive effort" to exclude the Applicant.

[20] The Officer also accepted that the Applicant "had a physical encounter" with "far-right extremism", that he witnessed a bus full of people laughing at a homeless Roma man, and that he saw extremists marching through the streets of Budapest. Notwithstanding these findings, the Officer assigned each of these incidents low probative value because, each one, on its own, was either not "severe" or not "frequent" enough.

[21] Even putting aside the unreasonableness of the Officer's characterization of the attacks on the Applicant and his common law as a "physical encounter", and the assessment of incidents

involving far-right extremism as not "severe", I find the Officer erred by concluding, without explaining why, that all of these events, taken together, did not justify a claim to a well-founded fear of persecution (*Munderere* at para 42).

[22] In their written submission, the Respondent replies that the Officer was aware of the requirement that these instances be cumulatively assessed as a whole. With respect, the Officer may well be aware of such a requirement, the question is whether the Officer applied that requirement in their assessment (*Ruszo* at para 26).

[23] The Respondent also submits that the Officer adopted a holistic approach, citing as examples the Officer's assessment of each of the incidents and their conclusion that there was little evidence of probative value to establish the frequency and severity of the establishment. The Respondent's argument in my view misses the point of what constitutes a "holistic" approach, namely one that considers not only the severity of each of the individual acts of discrimination in question, but also the cumulative affect of all of the acts in total.

[24] At the hearing, counsel for the Respondent made a new argument suggesting that the Officer should not have to consider violent incidents of attacks when considering whether the cumulative events of discrimination amounted to persecution. If I understood counsel's argument correctly, he posited that events of "discrimination" refers only to such incidents as discrimination in employment, housing, access to services and the like, which are typically covered by human rights laws. Violent incidents of attacks, on the other hands, should be separately considered under s.96 and 97, according to the Respondent. Asking decision makers

to consider violent attacks as part of the cumulative events of discrimination would amount to double counting, the Respondent argued, since these attacks are already considered under the two branches of s.96 and 97.

[25] I reject counsel's new argument for three reasons.

[26] First, counsel offered no support for his narrow definition of "discrimination" in the context of risk assessment, and for excluding acts of violence under the rubric of discriminatory acts. Applying the logic as supplied by the Respondent, decision makers would have to exclude, for instance, incidents of sexual violence from being considered as part of the cumulative analysis of discrimination based on sex.

[27] Second, while counsel suggested that there has not been any case that confirms violent attacks should be double counted and considered under the cumulative effect of discrimination, I came to an opposite conclusion based on my reading of the case law. I find nothing in the jurisprudence that draws a distinction between "violent attacks" on the one hand, and acts of discrimination that do not involve physical acts of violence on the other.

[28] As the Federal Court of Appeal noted in *Munderere*:

> [41] More recently, in *Mete v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 840, 46 Imm. L.R. (3d) 232 (F.C.), Madam Justice Dawson dealt with a claimant's argument that the Board had erred in failing to take into account, in the determination of his refugee claim, the cumulative nature of various acts of harassment and attacks that had been directed against him. In answering the question before her, she enunciated at page 233 of her Reasons the following principles, which I accept:

> [4] The following three legal principles are not controversial. First, in *Rajudeen v. Canada (Minister of Employment and Immigration)* (1984), 55 N.R. 129, the Federal Court of Appeal defined persecution in terms of: to harass or afflict with repeated acts of cruelty or annoyance; to afflict persistently; to afflict or punish because of particular opinions or adherence to a particular creed or mode of worship; a particular course or period of systematic infliction of punishment directed against those holding a particular belief; and persistent injury or annoyance from any source.
>
> [5] Second, in cases where the evidence establishes a series of actions characterized to be discriminatory, and not persecutory, there is a requirement to consider the cumulative nature of that conduct. This requirement reflects the fact that prior incidents are capable of forming the foundation of present fear. See: *Retnem v. Canada (Minister of Employment and Immigration)* (1991), 132 N.R. 53 (F.C.A.). This is also expressed in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status ("Handbook on Refugee Status") in the following terms, at paragraph 53: [Citation omitted]
>
> [6] Third, it is an error of law for the RPD not to consider the cumulative nature of the conduct directed against a claimant. See: *Bobrik v. Canada (Minister of Citizenship and Immigration)* (1994), 85 F.T.R. 13 (T.D.) at paragraph 22, and the authorities there reviewed by my colleague Madam Justice Tremblay-Lamer.

[29] As noted above, the Federal Court of Appeal used phrases such as "cumulative nature of various acts of harassment and attacks", "to afflict harassment or act of cruelty and annoyance" and "persistent injury and annoyance", to denote a wide range of acts as part of the cumulative nature of conduct that decision makers must consider. Such conduct may or may not include acts of physical violence. The Federal Court of Appeal went on to conclude that the decision maker:

> [42] …is duty bound to consider <u>all of the events which may have an impact on a claimant's claim</u> that he or she has a well founded fear of persecution, <u>including those events which, if taken individually, do not amount to persecution</u>, but if taken together, may justify a claim to a well founded fear of persecution….
>
> [emphasis added]

[30] These passages made clear the Federal Court of Appeal instructs that ***all*** of the events, including those that on their own do not amount to persecution, be taken into account by decision makers. It would be contrary to these teachings for the Court to instruct decision makers to only look at acts of discrimination that do not involve physical acts of violence, while ignoring those that do, when assessing the risks that an individual would face on account of their race or other human rights grounds in their country of return.

[31] Third, the distinction that the Respondent now urges the Court to make between violent attacks and other acts of discrimination did not in fact form the basis of the Officer's analysis to reject the Applicant's PRRA. The Respondent was asked at the hearing to point out where in the Decision such a distinction was made but was unable to do so. Having reviewed the Decision, I find no evidence of the Officer's reliance on the position now urged by the Respondent to justify their conclusion.

[32] Given the fundamental error found in the Officer's treatment of the Applicant's persistent experiences of discrimination as well as acts of violence as a Roma, I find the Decision is unreasonable and must be set aside.

[33] While I acknowledge the Applicant's persuasive arguments regarding the Officer's faulty and selective analysis on state protection, as the matter will be sent back for redetermination based on the Officer's erroneous assessment of persecution, I do not find it necessary to address the remaining issues raised by the Applicant.

IV. Conclusion

[34] The application for judicial review is allowed and the matter is referred back for redetermination by a different decision maker.

[35] There is no question for certification.

JUDGMENT in IMM-5088-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. The matter is referred back for redetermination by a different decision maker.

3. There is no question for certification.

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5088-21
STYLE OF CAUSE:	OLIVER KOKENY v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD VIA VIDEOCONFERENCE
DATE OF HEARING:	JUNE 23, 2022
JUDGMENT AND REASONS:	GO J.
DATED:	JULY 6, 2022

APPEARANCES:

Gavin MacLean	FOR THE APPLICANT
Stephen Jarvis	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Gavin MacLean Lewis & Associates Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENTS