Federal Court  Cour fédérale

**Date: 20230712**

**Docket: IMM-5400-22**

**Citation: 2023 FC 936**

**Ottawa, Ontario, July 12, 2023**

**PRESENT: The Honourable Madam Justice Strickland**

**BETWEEN:**

**ROBERT BRZEZINSKI**
**ANNA PETELSKA**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## JUDGMENT AND REASONS

[1] This is the judicial review of the decision of the Refugee Appeal Division of the Immigration and Refugee Board of Canada [RAD] affirming the determination of the Refugee Protection Division [RPD] finding that the Applicants are not Convention Refugees nor persons in need of protection, pursuant to s 96 and s 97(1), respectively, of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] For the reasons that follow, I am allowing this application for judicial review. The RAD failed to justify why certain of the news articles adduced by the Applicants as proposed new evidence on appeal were not relevant in the context of the Applicants' submissions that the articles demonstrated the level of democracy in Poland and, therefore, had to be considered as part of a state protection analysis.

**Background**

[3] The Applicants, Robert Brzezinski [Principal Applicant] and his common-law partner, Anna Petelska, are citizens of Poland. They arrived in Canada on December 11, 2019 and two days later sought refugee protection on the basis that they fear persecution in Poland because of their Roma ethnicity.

[4] By decision dated December 1, 2021, the Refugee Protection Division [RPD] rejected the Applicants' claim on the basis that they had not rebutted the presumption of state protection in Poland. The RPD found, while facing challenges, Poland remains a functioning democracy, with a functioning rule of law and a police force that is controlled by civil authorities and subject to civilian oversight and an ombudsperson. Accordingly, the Applicants had a high burden to show that they would not be able to receive state protection. In light of societal attitudes towards Roma, it was understandable that the Applicants would have some issues with respect to the police, however, this was not an adequate reason for why the Applicants did not approach the police. They provided no evidence that they believed the police would harm them for reporting a crime, only that they were afraid the police would not do anything. The RPD found that the

Applicants had not shown that it would be unreasonable for them to approach the police in Poland and therefore failed to rebut the presumption of state protection.

[5] The Applicants appealed the RPD's decision to the RAD. By decision dated May 11, 2022, the RAD agreed with the RPD and upheld its decision. The Applicants seek judicial review of the RAD's decision.

**Decision Under Review**

[6] The RAD found that the determinative issue in the appeal was state protection. Given this, it was not necessary for it to address the Applicants' submissions regarding credibility.

[7] The RAD noted that the Applicants sought to adduce news articles as new evidence in support of their appeal, but declined to accept the new evidence. It found that although items 1-5 of the news articles post-dated the RPD's decision, they were not relevant. Further, items 6-11 did not post-date the RPD's decision and were reasonably available at the time of that decision.

[8] The RAD also found that the RPD erred in establishing the level of the burden the Applicants faced in rebutting the presumption of state protection. The RAD stated that the level of democracy of a state is relevant to the analysis of state protection, although it is not the sole factor to be considered. It found that there was some objective evidence of Polish police misconduct. Thus, the RPD had erred in holding that because Poland is a functioning democracy the Applicants had a high burden to show that they would not be able to receive state protection. In that regard, the RAD found that the Applicants had a "medium burden". However, that the

Applicants had failed to meet this burden as they had not made any efforts to seek state protection. Further, review of the National Documentation Package [NDP] available to the RPD, and the most recent one dated October 29, 2021, contained three references to Roma interactions with police in Poland. However, the RAD found that each of those instances, which it described as local failures, were not sufficient to demonstrate inadequate state protection.

[9] The RAD concluded that the Applicants had failed to demonstrate, with clear and convincing evidence, the state's inability to provide adequate protection for them in Poland, on a balance of probabilities.

**Issues and Standard of Review**

[10] There is only one issue arising from the Applicants' submissions and that is whether the RAD's decision was reasonable.

[11] The parties submit, and I agree, that the reasonableness standard is to be used by the Court in reviewing the merits of the RAD's decision (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 23, 25 [*Vavilov*]). The Court is to ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99).

**Preliminary Issue – Lack of a personal Affidavit**

[12] At the leave stage, the Respondent submitted that the lack of a personal affidavit in support of the application for leave and judicial review was a fatal flaw. The Respondent submitted that the affidavit of the legal assistant to the Applicants' counsel, Mahjabeen Wazir Sheikh [Sheikh Affidavit], could not remedy the failure. Alternatively, where there is no evidence based on personal knowledge filed in support of an application for judicial review, any error asserted by an applicant must appear on the face of the record and that the Applicants had failed to identify any such error.

[13] When appearing before me the Respondent advised that it was not pursing this issue other than with resect to the attaching as exhibits to the Sheikh Affidavit two RAD decisions that were not before the RAD when it made the decision under review.

[14] I agree with the Applicants that the lack of personal affidavit is not fatal to an application for judicial review, so long as the errors in issue are apparent on the face of the record (see, for example, *Ruan v Canada (Citizenship and Immigration)*, 2019 FC 1522 at paras 8-9). In this matter the Sheikh Affidavit, for the most part, outlines the procedural history of the Applicants' refugee claim and, in that regard, attaches as exhibits various documents which are also found in the certified tribunal record [CTR]. A personal affidavit was not required to introduce this evidence. Further, the errors asserted by the Applicants as to the reasonableness of the RAD's decision are apparent from the face of the record.

[15] However, Exhibits F and G are comprised of two redacted RAD decisions (TC1-19853 dated April 12, 2022 and TC1-20550 dated May 10, 2022). These decisions do not appear in the CTR nor are they referred to in the Applicants' submissions to the RAD. Accordingly, to the extent that they are asserted by the Applicants to be "evidence", demonstrating an error on the face of the record, they are inadmissible as they were not before the RAD. This is because the evidentiary record before the Court on judicial review is restricted to the evidentiary record that was before the tribunal, with certain limited exceptions not asserted in this case (*Assn of Universities & Colleges of Canada v Canadian Copyright Licensing Agency*, 2012 FCA 22 at para 19).

**Was the Decision Reasonable?**

RAD's rejection of the new documentary evidence

[16] The Applicants submit that the RAD unreasonably rejected their new evidence which consisted of 11 news articles. While the RAD relied on s 110(4) of the *IRPA* and *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 [*Singh*] and *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 [*Raza*] in disallowing the new evidence, the Applicants submit that the evidence met the statutory requirements in s 110(4) of *IRPA* and the *Singh/Raza* factors. The Applicants submit that the RAD's failure to admit the evidence impacted its analysis of the issue of state protection, particularly with regard to the level of democracy in Poland and the burden placed on the Applicants to rebut the presumption of state protection. With respect to items 1-4 of the new documentary evidence, which post-date the RPD's decision, the Applicants assert that these demonstrated deteriorating levels of democracy, the rule of law, rights of

minorities, the independence of the judiciary and rise of xenophobia in Poland. This was relevant evidence going to the issue of state protection and the level of democracy which the Applicants highlighted in their submissions to the RAD. They submit that the RAD erred by failing to consider that the new evidence was directly relevant to the assessment of the presumption of adequate state protection and the level of democracy in Poland and that the new evidence would have lowered the burden placed on the Applicants. They submit that the RAD ignored evidence of "Poland's crumbling democracy, erosion of the rule of law, and pandering to far right and xenophobic tenancies and groups".

[17] With respect to items 5-11, which pre-date the RPD's decision, the Applicants submit that the RAD's rejection of this evidence, on the basis that it was reasonably available to the Applicants, was unreasonable in light of the circumstances. According to the Applicants, they did not submit this evidence prior to the RPD's decision, dated December 1, 2021, because the RPD indicated at the hearing on September 26, 2021that it hoped to provide its written decision two or three weeks. Thus, the RPD "led the applicants to believe in the imminence" of its decision and this genuine belief by the Applicants "dissuaded them from submitting additional evidence and they were in no position to be expected to provide further evidence since this portion of their claim to gather evidence had been completed". Given this, items 5-11 of the new evidence were not reasonably available to the Applicants. The Applicants also submit that the RAD erred in finding that these articles would have failed the *Singh/Raza* factors of relevance.

*Analysis*

[18] As the RAD pointed out, s 110(4) of the *IRPA* states that on appeal to the RAD "the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection". Further, if the evidence meets one or more of the statutory requirements, the RAD must then determine if the evidence is new, credible and relevant. That is, whether the proposed new evidence also meets the *Singh/Raza* factors, before the RAD can accept it.

[19] With respect to items 1-4 of the new evidence, these news articles post-dated the RPD's decision and thus met the s 110(4) requirement. However, the RAD described each of these articles and found while they were likely credible, they were not relevant to the appeal as their subject matter was not applicable to the Applicants' circumstances.

[20] By way of legal backdrop, the jurisprudence is clear that there is a presumption that a state is capable of protecting its own citizens.

[21] The RAD pointed this out in its reasons (footnotes omitted):

> [20] In *Ruszo,* at paragraph 29, the Federal Court stated:
>
> > "[29] It is settled law that absent a complete breakdown of state apparatus, it should be presumed that a state is capable of protecting its citizens. Moreover, "[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. However, in all cases to which the presumption

> applies, the burden is upon an applicant for refugee protection to demonstrate, with clear and convincing evidence, the state's inability to provide adequate protection. This burden must be discharged on a balance of probabilities." (internal references omitted)

[21] In *Poczkodi*, at paragraph 35, the Federal Court outlined the principles regarding state protection from the prevailing jurisprudence as follows:

> "[35] ... that there is a presumption of adequate state protection, the onus rests on the refugee claimant to provide clear and convincing evidence that state protection is not adequate for them, that state protection need not be perfect, that local failures alone do not demonstrate inadequate state protection, and that a claimant must make reasonable efforts to access state protection - which are proportional to the level of democracy in the state before seeking the protection of another country."

[22] The jurisprudence in this regard is also well summarized by Justice Diner in *Lakatos v Canada (Citizenship and Immigration)*, 2018 FC 367:

> [19] There is a presumption that state protection is available in a claimant's country of origin (*Ward* at 724-725), particularly where that state is democratic (*Sow v Canada (Citizenship and Immigration)*, 2011 FC 646 at paras 9-10 [*Sow*]). However, not all democracies are equal. Rather, they exist across a spectrum, and what is required to rebut the presumption of state protection varies with nature of the democracy in the state (*Bozik v Canada (Citizenship and Immigration)*, 2017 FC 961 at paras 28-29 [*Bozik*]; *Sow* at 10-11). In other words, a nation's status as a democracy does not lead inexorably to an ability to protect its citizens (for an excellent synopsis of the law summarizing this and related points, see Justice Grammond's recent decision in *AB v Canada (Citizenship and Immigration)*, 2018 FC 237 at para 22 [AB]).
>
> [20] A refugee claimant has the burden of rebutting the presumption of adequate state protection with clear and convincing evidence (*Ward* at 724). This imposes both an evidentiary and a

> legal burden: the claimant must adduce evidence, and must convince the decision-maker, on a balance of probabilities, that state protection is inadequate (*The Minister of Citizenship and Immigration v Flores Carrillo*, 2008 FCA 94 at paras 17-19, 21). To meet this burden, a refugee claimant will typically have to demonstrate a seeking out, but denial of state protection. This is not a legal requirement. Rather, it goes to whether the claimant has met their evidentiary onus (*Orsos v Canada (Citizenship and Immigration)*, 2015 FC 248 at para 18).

[23] In the context of the level of democracy and the evidentiary burden, as stated in *Flores Carillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 at para 26 [*Flores Carrillo*], quoting *Hinzman v Canada (Minister of Citizenship and Immigration),* 2007 FCA 171 at paragraph 57, "a claimant coming from a democratic country will have a heavy burden when attempting to show that he should not have been required to exhaust all of the recourses available to him domestically before claiming refugee status". That is, "it is more difficult in some cases than others to rebut the presumption". This is because the quality of the evidence required to rebut the presumption will be raised in proportion with the degree to democracy of a state (*Shaka v Canada (Citizenship and Immigration),* 2012 FC 235 at para 8).

[24] In sum, "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* at para 30).

[25] With respect to new evidence tendered in an appeal to the RAD, in *Singh*, the Federal Court of Appeal found that when a claimant appeals a decision to the RAD, they must provide

full and detailed submissions regarding how the documentary evidence they wish to rely on is relevant to the appellant:

> 45 The same would apply to relevance. This is a basic condition for the admissibility of any piece of evidence, and it would be difficult to imagine the introduction of new evidence being somehow exempt from this criterion. Indeed, Rules 3(3)(g)(iii) and 5(2)(d)(ii) of the Refugee Appeal Division Rules, S.O.R./2012-257 implicitly allude to this by providing that both the appellant's memorandum and memorandum in reply must include full and detailed submissions regarding how any documentary evidence the appellant wishes to rely on not only meets the requirements of subsection 110(4), but also how that evidence relates to the appellant …

[26] Before me, the Applicants make lengthy submissions on the relevance of items 1-4 and how they bring into question the level of democracy in Poland. However, these detailed submissions were not made to the RAD.

[27] Rather, the Applicants' submissions on the admission of the new documentary evidence were limited to stating that "the documents include news articles concerning the country conditions in Poland and go directly to the issue of state protection and are therefore relevant and probative" and that "the documents address the level of democracy and willingness and operational adequacy of Poland's state protection".

[28] That said, the Applicants did refer to items 1, 2 and 4 (as well as items that predated the RPD decision) in their RAD submissions for the purpose of demonstrating that the level of democracy in Poland is deteriorating. Specifically, they asserted that item 1, a Balkaninsight.com article entitled "Threats to Human Rights Growing in Central, Southeast Europe – HWR" (Human Rights Watch), states that there has been an infringement on the independent judiciary

and a clampdown on criticism of the government and press freedom. Further, that item 2, a nytimes.com article entitled “Tusk says hacking marks crises of democracy in Poland”, states that the opposition leader and former President of the European Council stated that the situation in Poland is a “crisis of democracy”. Finally, the Applicants referred to item 4, a theweek.com article entitled “Le Pen, Orban, and Other European populist leaders meet in Warsaw to discuss EU concerns” which states that Poland’s governing party sanctioned a far-right nationalist march on Poland’s Independence Day, which was banned by the courts. From this, the Applicants submitted that many such marches took place across the country, where antisemitism and hatred for immigrants and minorities, which would include the Roma, was on display. They submitted that there has been no action against such hatred by the ruling government.

[29] In my view, the RAD was required to assess the relevance of items 1-4, in the context of the Applicants’ submissions that these items demonstrated that the level of democracy in Poland has declined which, in turn, lowered their burden with respect to rebutting the presumption of state protection. It is unclear from the RAD’s analysis that it did so.

[30] I acknowledge that these news articles are brief and may contain limited potentially relevant content. For example, item 1, “Threats to Human Rights Growing in Central, Southeast Europe – HWR”, reports that Human Rights Watch [HRW] stated in its latest report that women, migrants, ethnic minorities as well as LGBT communities continue to be endangered and their rights threatened in many Southeast and Central European countries in 2021. Further, that the HRW report looks at over 60 countries, among them Bosnia and Herzegovina, Kosovo, Serbia, Hungary, Poland, Greece and Turkey. The article states that “In Poland, the government

‘continued to undermine rule of law by strengthening its control over the judiciary and smearing journalists and human rights activists critical of the government’”. It also addressed the situation of migrants trying to enter Poland. The RAD accurately described this content but found that it was not relevant because none of this was applicable to the Applicants. However, the RAD did not assess whether the article was relevant in determining Poland’s level of democracy.

[31] In sum, the difficulty here is that the RAD did not assess the articles in the context of the Applicants’ submission that they were relevant because they spoke to the decline in democracy in Poland which potentially impacted the RAD’s analysis of the burden placed on the Applicants to rebut the presumption of state protection. Had it done so, the RAD may well have found that the articles were not relevant on that basis or may have afforded them nominal weight given their limited content pertaining to the level of democracy in Poland. However, it did not. Accordingly, the RAD erred in failing to grapple with the Applicants’ submissions in that regard when assessing the admissibility of the articles (*Vavilov* at para 128).

[32] However, the RAD did not err in finding that items 5-11 were inadmissible as they all pre-dated and were reasonably available prior to the RPD decision.

[33] The RAD rejected the Applicants’ argument, essentially made again before me, that they could not reasonably be expected to have provided these articles because the deadline to provide documents in support of their claim had passed, the claims had been heard and the matter adjourned while the Applicants awaited the RPD decision.

[34] The RAD acknowledged that the RPD will frequently allow claimants to submit additional documents post-hearing and will usually set a deadline for their submission. It noted that by setting a deadline, the RPD is agreeing that it will not finalize its decision until that deadline has passed. However, in this matter, there was no mention at the second hearing about submitting additional documents, although the RPD did state he would provide a written decision, "...hopefully…in around two or three weeks". The RAD found that, irrespective of whether the RPD agrees in advance, RPD Rule 43 of the *Refugee Protection Division Rules*, SOR 2012-256 allows claimants to make an application to provide additional documents to the RPD at any time after the RPD hearing is completed but before the RPD issues its decision and that the Applicants did not do so. And, while the RAD stated that it understood that after three weeks had passed the Applicants would reasonably have assumed that the RPD decision was imminent, this did not change the fact that Rule 43 would have allowed them to submit these additional documents prior to the RPD making its decision. On this basis, the RAD found that the Applicants had not established that they could not reasonably have been expected to have submitted the documents to the RPD prior to its decision and therefore the articles did not meet the statutory requirement.

[35] While the Applicants make lengthy submission asserting that this finding was unreasonable, I see no error in the RAD's determination.

[36] And, although their counsel asserts that the Applicants are not sophisticated and educated people and therefore could not have been expected to understand that they were still able to submit the documents prior to the RPD's decision, there is no merit to this submission. The

Applicants were represented by counsel when appearing before the RPD. In fact, the same counsel who represents them at this judicial review. Counsel could be expected to be familiar with Rule 43 which permits a party who wants to provide documents as evidence “after a hearing but before a decision takes effect” to make an application to the RPD to do so. The Applicants point to no application made with respect to the submission of items 5-11 of the proposed new evidence.

[37] Given my finding that the RAD erred in its assessment of the relevance, and therefore the admissibility, of items 1-4 of the new evidence, and because the determinative issue before the RAD was state protection, I will allow this application even while recognizing that the outcome may well be the same on redetermination. Accordingly, I need not address the remaining issues raised by the Applicants.

**JUDGMENT IN IMM-5400-22**

**THIS COURT'S JUDGMENT is that**

1. The application for judicial review is granted;

2. The decision is set aside and the matter shall be remitted to a different member of the RAD for redetermination;

3. There shall be no order as to costs; and

4. No question of general importance for certification was proposed or arises.

"Cecily Y. Strickland"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-5400-22 |
| **STYLE OF CAUSE:** | ROBERT BRZEZINSKI, ANNA PETELSKA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | BY VIDEOCONFERENCE USING ZOOM |
| **DATE OF HEARING:** | JULY 5, 2023 |
| **JUDGMENT AND REASONS:** | STRICKLAND J. |
| **DATED:** | JULY 12, 2023 |

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| Hillary Adams | FOR THE RESPONDENT |

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