

CANADA / JUDGMENT

Kokeny v. Canada (Citizenship and Immigration)

2025 FC 954

COURT

Federal Court

DECIDED

27 May 2025

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Notes

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Decision Content

Date: 20250527

Docket: IMM-6148-24

Citation: 2025 FC 954

Toronto, Ontario, May 27, 2025

PRESENT: The Honourable Madam Justice Ferron

BETWEEN:

ALEX KOKENY

Applicant

and

Minister of Citizenship and Immigration

Respondent

JUDGMENT AND REASONS

I. Overview [1] Mr. Alex Kokeny, the Applicant, seeks the judicial review of a decision by a Senior Immigration Officer [Officer] dated February 2, 2024, which refused his Pre-Removal Risk Assessment [PRRA] application [Decision]. In the Decision, the Officer found that the Applicant had provided insufficient objective evidence to establish a well-founded fear of persecution. Accordingly, the Officer did not find that the Applicant would face more than a mere possibility of persecution, nor that the Applicant would be more likely than not to face a danger of torture, a risk to life, or a risk of cruel and unusual treatment or punishment if returned to Hungary, his country of citizenship.

- [2] In brief, the Applicant argues, inter alia, that the Officer (1) erroneously assessed the Applicant's risk and failed to consider all grounds of persecution, notably with respect to his perceived sexual orientation; (2) erred by failing to reasonably engage with all the evidence, including by making veiled credibility findings masked as insufficient evidence; and (3) failed to convene an oral hearing despite credibility concerns. The Applicant adds that in an order granting the stay of his removal, this Court has previously acknowledged errors made by the Officer in the Decision.
- [3] The Minister of Citizenship and Immigration [Minister], the Respondent, essentially responds that findings on a stay motion are not determinative, that there is no arguable issue with the Officer's assessment and that the Officer's Decision is reasonable.
- [4] For the reasons that follow, the Court will allow the application because the Officer (1)°failed to assess the Applicant's perceived sexual orientation as a ground of persecution; and (2)°unreasonably assigned little weight to the evidence submitted by the Applicant thereby leading the Officer to unreasonably conclude that there was "insufficient evidence", which this Court considers is a disguised unexplained (or "veiled") credibility finding. The file will therefore be sent back to a different officer for redetermination.

II. Brief Summary of the Facts [5] The Applicant is a citizen of Hungary and identifies as belonging to the Roma ethnic group. In October 2009, the Applicant made a joint refugee claim with his parents in Canada that was refused in February 2012. It should be noted that at that time, the Applicant's parents had retained Viktor Hohots, a lawyer who was later reported to the Law Society of Upper Canada and found guilty of professional misconduct and misrepresentation of Roma clients (*Law Society of Upper Canada v Hohots*, 2015 ONLSTH 72). This regrettable situation has been discussed in other decisions of this Court (see *Olah v Canada (Citizenship and Immigration)*, 2016 FC 316 at para 2, citing *Galyas v Canada (Citizenship and Immigration)*, 2013

FC 250; Pusuma v Canada (Citizenship and Immigration), 2012 FC 1025; Pusuma v Canada (Citizenship and Immigration), 2015 FC 658).

- [6] The Applicant therefore returned to Hungary and lived there until his return to Canada in August 2022, when he applied for refugee protection. On January 23, 2023, the Applicant's refugee protection claim was determined to be not eligible for referral to the Refugee Protection Division and a removal order was issued against him.
- [7] On July 4, 2023, Immigration, Refugees and Citizenship Canada received the Applicant's PRRA application. In support of his PRRA application, the Applicant filed his own affidavit, sworn on July 19, 2023, where he claims, inter alia, that:

Throughout his life in Hungary, he and his family have been subjected to consistent discriminatory incidents and attacks due to their Roma ethnicity;

His father, the President of the Local Roma Council, faced relentless threats and hostility from various quarters, including local residents, politicians, extremists, and even law enforcement;

From an early age, he too experienced discrimination and violence. The abuse persisted throughout his education, with white students targeting him physically and verbally;

Later in his life, he had a short relationship with a man, which was forbidden in Roma culture and Roma customs. When his community members learned about his same sex relationship, they initially complained to his father, and in June 2022, local extremists attacked him physically and verbally. He was taken to the hospital and needed surgery;

He reported the assault to the police, but when they saw that he was the son of the President of the Local Roma Council, the police made degrading comments, did not take a full report and refused to consider hate crime and racism as a motive. There were no police investigation results before he left Hungary, and no decision appears to have been reached; and

If he was forced to return to Hungary, his life would be in danger everywhere in the country, due to his Roma ethnicity and his father's Roma activism. In his region, he would be further targeted for being perceived as LGBTQ+, and given how the June 2022 attack was handled, he could not seek or obtain adequate police protection.

- [8] The Applicant appended five exhibits to his affidavit, including a medical report dated July 3, 2022, stating that he was admitted on June 28, 2022, with signs of physical abuse, and photographs of his injuries. The Applicant also included written representations and supporting country conditions documentary evidence.
- [9] On February 2, 2024, the Officer determined that the Applicant would not face more than a mere possibility of persecution, nor that he was more likely than not to face danger of torture, a risk to life or a risk of cruel and unusual treatment or punishment if returned to Hungary. The Officer therefore rejected the Applicant's PRRA application.
- [10] On April 5, 2024, the Applicant filed an application for leave and judicial review.

[11] On April 9, 2024, the Applicant received a direction to report for removal. That same day, the Applicant and his spouse welcomed their newborn son, who was born in Toronto.

[12] On April 28, 2024, the Applicant filed a motion seeking an order to stay his removal until such time as the application for leave and judicial review was heard and decided, which was granted on May 1, 2024.

III. Decision under Review [13] The February 2, 2024, Decision whereby the Officer rejected the Applicant's PRRA application is the one under review. From the Decision, it is clear that the Officer considered the Applicant's evidence that upon return to Hungary, his father had become a Roma activist and politician, which led to animosity toward the Applicant's family, including the Applicant himself, and acts of mistreatment due to his Roma ethnicity.

[14] However, while the Officer considered the abuse that the Applicant suffered at school and the fact that the Applicant was allegedly assaulted and stabbed by a member of a racist extremist group in June 2022, the Officer determined that the evidence put forward by the Applicant was not sufficient to support his PRRA application.

[15] More specifically, in addition to his detailed affidavit, the Applicant provided a hospital report for the June 2022 attack and photographic evidence of injuries he sustained. While the Officer did not indicate any credibility issue with the Applicant's affidavit, the Officer found that the medical report and photos did not establish a causal link between the alleged attack and the Applicant's injuries and gave neither the report nor the photographic evidence any weight.

[16] The Officer further acknowledged that the Applicant stated that he reported this attack to the police and believes it was not investigated. However, the Officer found that while the police response "may have been disappointing," it did not establish inability or unwillingness to protect him given that a report was taken, and that the Applicant's statements regarding a lack of investigation was based on speculation. The Officer further found that the Applicant had failed to provide the police report, which was reasonably expected to be available given the importance of this document in the Applicant's application, and thus, the Applicant had not produced sufficient objective evidence to establish that he was a victim of the assault in June 2022 as described.

[17] Finally, the Officer acknowledged the evidence submitted regarding the country condition evidence. However, while the Officer concluded that the treatment the Applicant experienced could certainly be considered hostile and insensitive in nature, the evidence adduced did not sufficiently demonstrate an accumulation of events that would establish that he was personally exposed to conduct that amounted to persecution.

IV. Analysis A. Standard of Review [18] Both parties submit that the applicable standard of review is reasonableness. I agree. This is in line with the Supreme Court of Canada's landmark decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov] (see also *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 7 [Mason]). It is also in line

with this Court's case law on the standard of review applicable to the assessments made by PRRA officers (*Singh v Canada (Citizenship and Immigration)*, 2024 FC 202 at para 14 [Singh] citing *Flores Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 at para 36, amongst others).

[19] As summarised by Justice Gascon in *Singh*:

- [15] Where the applicable standard of review is reasonableness, the role of a reviewing court is to examine the reasons given by the administrative decision maker and to determine whether the decision is based on “an internally coherent and rational chain of analysis” and is “justified in relation to the facts and law that constrain the decision maker” (*Vavilov* at para 85; *Mason* at para 64). The reviewing court must therefore ask whether the “decision bears the hallmarks of reasonableness—justification, transparency and intelligibility” (*Vavilov* at para 99). Both the outcome of the decision and its reasoning process must be considered in assessing whether these hallmarks are met (*Vavilov* at paras 15, 95, 136).
- [16] Such a review must include a rigorous and robust evaluation of administrative decisions. However, as part of its analysis of the reasonableness of a decision, the reviewing court must take a “reasons first” approach and begin its inquiry by examining the reasons provided with “respectful attention”, seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion (*Mason* at paras 58, 60; *Vavilov* at para 84). The reviewing court must adopt an attitude of restraint and intervene “only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process” (*Vavilov* at para 13), without “reweighing and reassessing the evidence” before it (*Vavilov* at para 125).
- [17] The onus is on the party challenging the decision to prove that it is unreasonable. Flaws must be more than superficial for the reviewing court to overturn an administrative decision. The court must be satisfied that there are “sufficiently serious shortcomings” (*Vavilov* at para 100).
- [20] As such, while factual findings and assessment of the evidence made by PRRA officers entail a high degree of deference, the Officer's findings of insufficiency must be explained and requires justification, transparency and intelligibility within the reasoning process (*Vavilov* at para 99; *Sadeghi v Canada (Citizenship and Immigration)*, 2020 FC 1079 at para 30 citing *Magonza v Canada (Citizenship and Immigration)*, 2019 FC 14 at paras 11, 35 [Magonza], amongst others; *Perampalam v Canada (Citizen and Immigration)*, 2018 FC 909 at para 14).

B. Sufficiency and Credibility [21] In Magonza, Justice Grammond discussed basic concepts that are used to justify findings of fact, i.e., credibility, probative value, weight and sufficiency of the evidence. He proposed an equation in which the weight of evidence is a function of credibility and probative value – weight = (credibility) x (probative value) – and stated that “a decision-maker cannot reach a conclusion regarding weight without having previously assessed credibility or probative value or both” (Magonza at para 29).

[22] Commenting on sufficiency, Justice Grammond stressed that like other factual findings, a finding of insufficient evidence must be explained, and that a common problem is that a conclusion of insufficient evidence is often really a disguised unexplained or veiled credibility finding. He concluded that “[d]ecision-makers should not ‘move the goalposts,’ as it were, when they have mere suspicions about credibility that they are unable to explain” (Magonza at para 35).

C. The Decision is Unreasonable. [23] First, the Court agrees with the Applicant that the Officer’s failure to assess the Applicant’s perceived sexual orientation as a ground of persecution is a fatal flaw.

[24] Contrary to the Minister’s submission at paragraph 13 of his Memorandum, the Applicant’s PRRA application was not only based on allegations of persecution due to his Roma ethnicity. Paragraphs 11 to 15 of the PRRA submissions clearly referred to the Applicant’s short relationship with a man and the consequences he faced, including the alleged June 2022 attack, given that, according to the Applicant’s PRRA submissions at paragraph 12: “LBGTQ+ members are despised by Hungarians, targeted by extremists and authorities due to the systematic discrimination and government led homophobic campaigns against them in Hungary”. The Applicant’s affidavit, and more specifically at paragraphs 20 to 23, 26 and 27, provides detailed evidence with respect to same.

[25] Although the Officer did not have to include all the arguments raised by the Applicant in their Decision (Vavilov at para 91), given that his perceived sexual orientation was a key element explicitly linked to the violent attack the Applicant suffered in June 2022, the complete absence of this element in the Officer’s reasons leads this Court to believe that the Officer did not fully consider the Applicant’s submissions.

[26] Further, the Court notes the Officer’s conclusion that the Applicant had not produced sufficient objective evidence to establish that he was a victim of the assault in June 2022 as described. Whether this conclusion implies that the Officer was of the view that they were not required to assess the Applicant’s perceived sexual orientation as a ground of persecution is an unresolved question that appears from the Decision.

[27] In other words, as the Applicant’s perceived sexual orientation was simply not addressed in the Decision, even though it was a key ground of persecution that was clearly raised by the Applicant in his PRRA submissions, there are no reasons from which the Court may assess the Officer’s findings in that regard. In any case, the Court cannot speculate as to what the Officer was thinking. This reveals a failure to provide transparent and intelligible reasons for

the Court to connect the proverbial dots (Vavilov at para 97 citing *Komolafe v Canada* (Citizenship and Immigration), 2013 FC 431 at para 11; Mason at para 32).

- [28] The Applicant stresses this oversight may result in a misjudgment of the severity and nature of the personal risk of persecution, which is a fundamental element in determining the need for protection under sections 96 and 97 of the Immigration and Refugee Protection Act [IRPA]. The Court agrees. This oversight is critical as it directly relates to the personal risk the Applicant faces if returned to Hungary and it shows the Officer was not fully responsive to the Applicant's submissions (Vavilov at para 103; Mason at para 34).
- [29] This is a fatal flaw that goes to the Officer's reasoning process and in the Court's view, would be sufficient to conclude that the Decision is unreasonable and that the matter should be returned for redetermination.
- [30] Nonetheless, it is also the Court's view that the Officer did not properly assess the evidence in this matter, and more specifically the medical report and the photographs.
- [31] The medical report states that the Applicant (1) was admitted on June 28, 2022; (2) had an intervention by a surgeon on June 28, 2022; (3) showed visible signs of physical abuse such as heavy bleeding from the open stab wound on the abdomen; and (4) was discharged on July 3, 2022. However, in their Decision, the Officer simply noted that this report was dated July 3, 2022, and was not satisfied as to the cause of the injuries stated in the report.
- [32] As to the photographs filed by the Applicant, they corroborated the claims of physical assault made by the Applicant in his detailed affidavit. Yet, the Officer found that these pieces of documentary evidence did not establish a causal link between the injuries shown and the attack of June 2022, thus giving them no weight.
- [33] As outlined in paragraph 29 of *Magonza*, the Officer had to assess the credibility or probative value of these documents before giving them no weight. In this case however, the Officer makes no assessment regarding the credibility or probative value of the medical report and of the photographs even though these objective elements of evidence directly supported the Applicant's narrative. However, unless the Officer was of the view that the Applicant's affidavit was not credible, which was never put into question by the Officer, this Court fails to see how this conclusion is coherent given the clear corroborative evidence.
- [34] This Court is well aware that it must refrain from reweighing the evidence (Vavilov at para 125). However, the Court is satisfied that this is a case where the Officer fundamentally misapprehended the evidence before them (Vavilov at para 126).
- [35] Moreover, by concluding that the Applicant provided "insufficient objective evidence to establish a well-founded fear of persecution", this Court is of the view that the Officer made a veiled credibility finding, and in doing so, the Officer failed to provide adequate reasons for this negative credibility finding.

- [36] This finding by the Officer seems to stem from the fact that the Applicant did not file the police report of the attack which, according to the Officer, “would be reasonably expected to be available given the importance of this document in the applicant’s application.”
- [37] However, in his affidavit submitted with his PRRA application, the Applicant does not state that a full police report exists. Rather, he states that the police came to the hospital but that when they saw that he was the son of “the President of the Local Roma council, they made degrading comments, suggesting not to waste their time [...]. They refused to take the full report [...]. The (sic) took my report, but they refused to consider the hate crime and the racism as a motive.” As such, while a report may have been taken while the Applicant was at the hospital, he also stated that there was no result and no investigation following the police’s visit.
- [38] Under these circumstances, unless the Officer had credibility issues with the Applicant’s evidence, there would be no reason for the Officer to “reasonably expect” that a police report would have been submitted. Further, while the Officer labeled the Applicant’s claims about the lack of police investigation as speculative and not supported by objective evidence, the record nonetheless shows that the Applicant raised serious concerns about the effectiveness of the police response, based on lack of progress or feedback from the police who knew who the Applicant’s father was. Again, the Officer’s conclusion on the lack of a police report appear to veil credibility issues with the Applicant’s evidence.
- [39] If the Officer did not consider the Applicant or his evidence to be credible, the Officer had to explain this finding rather than simply concluding that the evidence was insufficient (Magonza at 35). As such, the Officer’s failure to explain his finding of insufficient evidence is also a fatal flaw.
- [40] Given the above, it is not necessary for this Court to analyse the other submissions of the Applicant, including the submission that the PRRA officer acted unfairly by making veiled credibility findings despite not having held an in-person hearing. As suggested by Justice Grammond in Magonza at 70, the officer who will decide the issue anew may want to review recent decisions of this Court on this topic, such as Sundralingam v Canada (Citizenship and Immigration), 2022 FC 1768 at paras 36-38 or Johnfiah v Canada (Citizenship and Immigration), 2024 FC 1091 at para 8.

V. Conclusion [41] The Decision is unreasonable and accordingly, the application for judicial review will be allowed and the matter will be sent back to a different officer for redetermination.

JUDGMENT in IMM-6148-24

THIS COURT’S JUDGMENT is that:

The application for judicial review is allowed;

The matter is sent back to a different officer for redetermination;

No question is certified.

“Danielle Ferron”

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Judge

FEDERAL COURT

SOLICITORS OF RECORD

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FERRON J.

DATED:

May 27, 2025

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