Federal Court Cour fédérale

Date: 20141212

Docket: IMM-6085-13

Citation: 2014 FC 1199

Ottawa, Ontario, December 12, 2014

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

ANDRAS GEZA DINOK,
AGNES BELOVAI DINOKNE,
DOMINIK NORDIN DINOK,
DEBORA EVA DINOK

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter and Background

[1] The Refugee Protection Division of the Immigration and Refugee Board of Canada [the Board] rejected the Applicants' requests for protection under sections 96 and 97(1) of the

Immigration and Refugee Protection Act, SC 2001, c 27 [the *IRPA*], and they now apply for judicial review of the Board's decision pursuant to section 72(1) of the *IRPA*.

[2] The Applicants are a Roma family from Hungary consisting of the principal Applicant, his wife, and their two children now aged 12 and 17. They arrived in Canada on November 10, 2010, and immediately sought refugee protection. They originally claimed to fear discrimination and racist violence, but shortly before the claim was heard by the Board on April 17, 2013, the principal Applicant supplemented his personal information form's narrative with accounts of extortion and the abduction of his daughter.

[3] The principal Applicant alleged before the Board that he became scared after members of a criminal organization demanded 25 million forints. He said that when he did not pay, they beat him and forced him at gun point to sign over his Mercedes Benz car on August 6, 2010. Following this incident, the principal Applicant mortgaged his house to pay the demanded forints, but two days later a further demand for 30 million forints was made and the principal Applicant fled with his family to his mother-in-law's home in Pilis to hide. On September 10, 2010, the principal Applicant claims his daughter was kidnapped outside her school and the members of the criminal organization demanded that the principal Applicant pay the 30 million forints for the sake of his children. The Applicants left Hungary about two months later.

II. Decision under Review

[4] In its decision dated August 27, 2013, the Board decided that the Applicants were neither Convention refugees nor persons in need of protection.

[5] The Board did not believe the Applicants' tale about the kidnapping extortionists. The Board found the principal Applicant's story was rife with inconsistencies on many matters, ranging from his employment to his family's place of residence and his daughter's school. The principal Applicant told the Board that he had taken out a mortgage on his house to pay off the extortionists and reported the kidnapping to the police, but he never supplied any documentation of the loan or the police report, and he did not provide a statutory declaration confirming his story from the lawyer who allegedly helped him.

[6] Moreover, the Board found it significant that the Applicants did not leave Hungary until two months after the alleged incident in September, 2010, which prompted their departure. As Budapest is a major international destination, the Board did not believe the principal Applicant when he said that the first flight available was two months following that incident. In any event, the Board said that the risk of crime could not attract section 96 *IRPA* protection since it had no nexus to a Convention ground, and paragraph 97(1)(b) of the *IRPA* was not engaged since it was a risk faced generally by other wealthy individuals in Hungary.

[7] The Board was satisfied that the Applicants were Roma and did not doubt the veracity of the claims in their original narratives. It considered those claims and found that the situation of Roma in Hungary is discriminatory and prejudicial. Racists continue to violently attack the Roma and they are discriminated against in almost every field of life, including employment, education, and housing. Even political figures have discriminatory attitudes toward the Roma, and a right-wing party campaigning against the so-called "gypsy terror" has achieved significant levels of support.

[8] However, the Board determined that the Applicants are not like most other Roma living in Hungary. Rather, the Board found that they were fairly wealthy because of the principal Applicant's business success. Being ridiculed and treated differently while the adult Applicants were growing up may have been demeaning, but the Board did not consider this to amount to persecution. Neither did the failure of the police to catch the men who assaulted the principal Applicant in 1995 show a lack of state protection, since the principal Applicant could not identify his assailants. When the principal Applicant was again attacked in 2010, the police interrupted the assault and arrested two of the perpetrators.

[9] The Board summarized various aspects of the evidence relating to the state's response to incidents of crime and discrimination against minorities such as the Roma in Hungary. Although the police did not always respond perfectly, the Board found that "Hungary is making serious efforts to address these problems, and that the police and government officials are both willing and able to protect victims". As for the discrimination that Roma face, the Board found there are a number of programs in place to help Roma overcome the barriers they face and Hungary is working to improve its compliance with European Union standards. These programs may not have cured the problems of the Roma entirely, but the Board noted how relatively well-off the Applicants were vis-à-vis other Roma. The principal Applicant and his wife had both secured steady employment for years and, by the time they left Hungary, owned a house, an apartment, and a successful business. In these circumstances, the Board was not satisfied that the Applicants had rebutted the presumption of adequate state protection and therefore denied their claims.

III. Issues

[10] The Applicants do not challenge any of the Board's credibility findings. Instead, they submit three issues for the Court's consideration, which can be paraphrased as follows:

1. Did the Board fail to assess the operational adequacy of Hungary's efforts to protect Roma?
2. Do the Board's reasons adequately explain its conclusions in light of its factual findings about the plight of Roma in Hungary?
3. Did the Board fail to properly consider the treatment of similarly-situated people in Hungary?

[11] The Respondent reduces the issues to be considered by the Court to two: (1) what is the appropriate standard of review; and (2) whether the Board's decision is reasonable.

[12] For the sake of analytical convenience, the issues can be restated as follows:

1. What is the standard of review?
2. Did the Board misunderstand the legal tests for state protection and persecution?
3. Was the Board's state protection finding unreasonable?

IV. The Parties' Arguments

A. *The Applicants' Arguments*

[13] The Applicants assert that the Board made a basic error which taints its decision as a whole by virtue of its review of country conditions for Roma in Hungary.

[14] The Applicants note that this Court has overturned findings that state protection is adequate for Roma in Hungary several times before, and argue that the same result should be obtained here (see: e.g. *Hercegi v Canada (Citizenship and Immigration)*, 2012 FC 250 at para 5, [2012] FCJ No 273 (QL) [*Hercegi*]). The Applicants submit that the Board erred by holding that Hungary's serious efforts to provide protection were enough without examining whether those efforts resulted in any actual protection at the operational level (see: e.g. *Koky v Canada (Citizenship and Immigration)*, 2011 FC 1407 at paras 56-60, 62-66, 69, 71, [2011] FCJ No 1715 (QL) [*Koky*]).

[15] Furthermore, the Applicants say that the Board did not give adequate reasons for its decision, which is a denial of natural justice that should be reviewed on the correctness standard (*VIA Rail Canada Inc v Canada (National Transportation Agency)* (2000), [2001] 2 FCR 25 at paras 21-22, 193 DLR (4th) 357). Alternatively, the Applicants contend that the Board's decision was unreasonable and fell outside the range of acceptable outcomes.

[16] The Applicants argue that the Board's findings of fact clearly showed that, not only are Hungarian Roma persecuted and discriminated against, but there is societal and police violence

against them. In light of this, the Applicants say that the Board erred by failing to explain why it concluded that state protection was adequate, as there was no link to the evidence for such conclusion (*Kaleja v Canada (Citizenship and Immigration)*, 2010 FC 252 at paras 21-26, [2010] FCJ No 291 (QL) [*Kaleja*]).

[17] In addition, the Applicants argue that the Board inexplicably ignored the fact that they were Roma and imposed on them an obligation to show that they were personally persecuted in the past, which is contrary to the guidance of the Federal Court of Appeal and the Supreme Court of Canada (*Salibian v Canada (Minister of Employment and Immigration)*, [1990] 3 FCR 250, 73 DLR (4th) 551 [*Salibian*]; *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at 724-725, 103 DLR (4th) 1 [*Ward*]). The Applicants also state that the Board's decision failed to assess the Applicants' risk on a forward-looking basis.

B. *The Respondent's Arguments*

[18] The Respondent argues that the Board's state protection findings are entitled to deference (*Lakatos v Canada (Citizenship and Immigration)*, 2014 FC 785 at para 23, [2014] FCJ No 842 (QL) [*Lakatos*]). The Respondent says that the Applicants need to show that the decision under review is one that is outside the range of reasonable or acceptable outcomes.

[19] The Respondent emphasizes that no state can provide perfect protection and the Applicants need to prove that state protection for them was inadequate. The Respondent notes that the Applicants were found not to be credible, and the Board carefully considered all of the evidence and acknowledged that it was mixed. The Board was entitled, according to the

Respondent, to conclude that state protection in Hungary was adequate since the evidence reasonably showed not just serious efforts by the state but the positive results that those efforts have yielded. Moreover, the Respondent states, the finding of fact made by the Board that not all Roma are persecuted is reasonable and, ultimately, the onus was upon the Applicants to provide sufficient credible evidence to rebut the presumption of adequate state protection in order for their claims to succeed.

[20] Finally, the Respondent argued that the adequacy of reasons is not alone a ground for allowing a judicial review application (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 21-22, [2011] 3 SCR 708 [*Newfoundland Nurses*]), and that the Board appropriately and reasonably explained the basis for its decision.

V. Analysis

A. *Standard of Review*

[21] A full standard of review analysis is unnecessary when the standard appropriate for an issue has been satisfactorily decided by other cases (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62, [2008] 1 SCR 190 [*Dunsmuir*]). I agree with the Respondent that the adequacy of reasons is not about procedural fairness and does not engage review by this Court on a standard of correctness as the Applicant would have it. The duty to give reasons is satisfied by any reasons at all, and any challenge to the quality of those reasons occurs within the ordinary reasonableness analysis (*Newfoundland Nurses* at para 22).

[22] However, I disagree with the Respondent's contention that reasonableness is the standard for every issue. The Applicants argue that the Board misunderstood the law as it pertains to the tests for state protection and, hence, for that issue the standard of review is correctness (*Ruszo v Canada (Citizenship and Immigration)*, 2013 FC 1004 at paras 20, 22, [2013] FCJ No 1099 (QL) [*Ruszo*] ; *Koky* at para 19). I agree with the Applicants in this regard. However, the application of such law to the facts is reviewable on a standard of reasonableness (*Dunsmuir* at para 53; *Ruszo* at paras 21-22; *Lakatos* at para 23).

[23] A decision is reasonable if it is justifiable, intelligible, transparent, and defensible in respect of the facts and the law. These criteria are met so long as "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland Nurses* at para 16).

B. *Did the Board misunderstand the legal tests for state protection and persecution?*

[24] Where a person fears persecution in which the state is not complicit, such a fear will not be well-founded unless his or her home state cannot provide adequate protection (*IRPA*, s 96; *Ward* at 716-717, 726). Similarly, the presence of state protection is also determinative of a claimed risk under paragraph 97(1)(b), since that paragraph is not engaged unless "the person is unable or, because of that risk, unwilling to avail themself of the protection of that country" (*IRPA*, s 97(1)(b)(i)). Furthermore, unless there has been a complete breakdown of the state apparatus, "it should be assumed that the state is capable of protecting a claimant" (*Ward* at 725). As such, claimants typically bear the burden of proving inadequate state protection and their

claims should fail unless they provide "clear and convincing confirmation of a state's inability to protect" (*Ward* at 724).

[25] In this case, the Applicants argued that the Board erred in assessing state protection because it looked only at the state's serious efforts to provide protection without assessing whether those efforts had any practical or operational effect. I disagree. In *Canada (Minister of Employment and Immigration) v Villafranca*, 1992 CarswellNat 78 (WL Can) at paragraph 7, 99 DLR (4th) 334, 150 NR 232 (FCA), the Federal Court of Appeal said the following:

> [W]here a state is in effective control of its territory, has military, police and civil authority in place, and makes serious efforts to protect its citizens from terrorist activities, the mere fact that it is not always successful at doing so will not be enough to justify a claim that the victims of terrorism are unable to avail themselves of such protection. [Emphasis added]

[26] The error identified in the decisions to which the Applicants refer occurs when the Board assesses only the state's good intentions and not whether those intentions have any practical impact. In *Ward* at 724, the Supreme Court noted that a state's willingness to attempt to protect a person will not be enough if an "objective assessment established that they are not able to do this effectively". Consequently, "it is not enough that a government is willing to provide protection and is making efforts to do so. In order for state protection to be present, the efforts made must adequately protect citizens in practice" (*Koky* at para 63). In other words, "when examining whether a state is making serious efforts to protect its citizens, it is at the operational level that protection must be evaluated" (*Gilvaja v Canada (Citizenship and Immigration)*, 2009 FC 598 at para 39, 81 Imm LR (3d) 165).

[27] There is no indication that the Board here failed to consider the level of protection at the operational level. On the contrary, the Board was mindful of the need to look to the operational level and expressly stated the following at paragraph 38:

> … I find on balance that Hungary is making serious efforts to address these problems, and that the police and government officials are both willing and able to protect victims and that there are operation [sic] adequacies in place to deal with both discrimination and violence directed towards minorities, including the Roma. [Emphasis added]

[28] The Board plainly understood the law, and this is reflected in its analysis. For example, it did not stop at noting that Hungary has laws against abuses by the police, but went on to look at the evidence of how many disciplinary charges were prosecuted against members of the police force. As such, the Board made no error of law in this regard.

[29] The Applicants also claimed that the Board erred by focussing too much on the Applicants' own history and failing to consider the plight of other Roma. In *Ward* at 724-725, the Supreme Court gave the following examples to demonstrate how to prove inadequate state protection: "a claimant might advance testimony of similarly situated individuals let down by the state protection arrangement or the claimant's testimony of past personal incidents in which state protection did not materialize". Indeed, in *Salibian* at 259, the Federal Court of Appeal endorsed the statement that "the best evidence that an individual faces a serious chance of persecution is usually the treatment afforded similarly situated persons in the country of origin". As a corollary, "the applicant does not have to show that he had himself been persecuted in the past or would himself be persecuted in the future" (*Salibian* at 258).

[30] However, I cannot see how the Board can be faulted in this regard. At many times throughout the decision, the Board referred to the situation of other Roma and described the recourses available to them. That was the primary focus of the Board's decision. Although it also considered the Applicants' experiences, that was not an error. Indeed, as the Supreme Court has recognized, a "claimant's testimony of past personal incidents in which state protection did not materialize" is also relevant. There is nothing to suggest that the Board here misunderstood the law, and the Applicants can really only challenge the application of these tests to their situation.

C. *Was the Board's state protection finding unreasonable?*

[31] The Applicants note that, in *Hercegi* at para 5, Mr. Justice Hughes said that "…the evidence is overwhelming that Hungary is unable presently to provide adequate protection to its Roma citizens". The Applicants ignore the fact that Mr. Justice Hughes prefaced this statement with the qualification: "In the present case". In *Konya v Canada (Citizenship and Immigration)*, 2013 FC 975 at para 47, 63 Admin LR (5th) 27, Madam Justice Snider explained the flaw with the Applicants' argument is this regard as follows:

> [47] … the Applicant appears to be using findings of this Court as evidence that state protection is not adequate in Hungary. This would be a wrong application of the law. A judge of the Federal Court, sitting in judicial review, is not determining whether state protection is or is not adequate in Hungary. The task of the judge on judicial review is to review the decision to determine whether it is reasonable. Each case will be decided on the basis of the facts and arguments before the Court. In the course of analysis, a judge may express views of what the documentary evidence tends to show. However, these judicial comments cannot be elevated to factual findings. Only the Board is able to make such findings. Use of jurisprudence in the manner proposed by the Applicant is improper. [Emphasis added]

[32] Consequently, the mere fact that a finding of adequate state protection was held to have been made unreasonably in *Hercegi* and other cases does not necessarily mean that the Board's decision in this case was unreasonable. As Mr. Justice Russell observed in *Molnar v Canada (Citizenship and Immigration)*, 2012 FC 530 at para 105, [2012] FCJ No 551 (QL):

> The Hungarian situation is very difficult to gauge. Much will depend upon the facts and evidence adduced in each case, and on whether the RPD goes about the analysis in a reasonable way. Where it does, it is my view that it is not for this Court to interfere even if I might come to a different conclusion myself.

[33] In my view, the Board's finding of state protection was reasonable in view of the facts and circumstances of this case. The Board recognized that Roma are treated badly in Hungary, but ultimately found that the Applicants "cannot be described as similar to most other Roma living in Hungary". On the contrary, the Applicants were educated and well-off. It is understandable why the Board considered these factors to be relevant, since it means that some problems faced by most other Roma, such as a lack of housing or poor employment prospects, are not as likely to be a problem for these Applicants.

[34] More importantly, the Board found that state protection for the Roma in Hungary is adequate. The Board described a series of high-profile crimes against Roma that were solved by the police and, in addition, noted that one of the times the principal Applicant was attacked the police stopped the assault and arrested the perpetrators. Furthermore, although there are reports of police corruption and police sometimes use excessive force against Roma, action is taken when complaints are made and that finding is supported by the evidence that was before the Board. Similarly, the Board described in detail the various programs that Hungary administers to combat discrimination against the Roma and the positive effects it has had. Again, it is

understandable why the Board made the decision it did and the outcome is defensible in respect of the facts and the law.

VI. Conclusion

[35] In the end, I find that the Board's decision was reasonable and the application for judicial review should be and is hereby dismissed. Neither party suggested a question for certification; so, no such question is certified.

JUDGMENT

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

"Keith M. Boswell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

George J. Kubes	FOR THE APPLICANTS
Rafeena Rashid	FOR THE RESPONDENT

SOLICITORS OF RECORD:

George J. Kubes Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANTS
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT