

Federal Court



Cour fédérale

Date: 20140502

Docket: IMM-6686-13

Citation: 2014 FC 626

Vancouver, British Columbia, May 2, 2014

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

**ISTVAN DUDU, EDIT TORZSOK
AND EMILIA MARIA DUDU**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT

UPON APPLICATION for judicial review of the September 19, 2013 decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada [the RPD] finding that the Applicants are not Convention refugees or persons in need of protection pursuant to sections 96 and 97, respectively, of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA];

AND UPON reading the materials filed and upon hearing the submissions of counsel for the parties;

AND UPON determining that the application should be dismissed for the following reasons:

The Applicants are citizens of Hungary. The Principal Applicant, Istvan Dudu, is of Roma ethnicity. The other Applicants are his wife, Edit Torzsok, and their daughter Emilia Maria Dudu. They claim that they suffered persecution based on the Principal Applicant's race, their mixed Roma and ethnic Hungarian marriage, and, mixed racial heritage.

The RPD dismissed the Applicants' claims under both sections 96 and 97 of the IRPA based on credibility. The Applicants do not challenge the credibility finding, but submit that the RPD applied the wrong legal test for refugee protection (*Salibian v Canada (Minister of Employment and Immigration)*, [1990] FCJ No 454 (CA) (QL) [*Salibian*]). The Applicants submit that the RPD did not refer to any of the country conditions documentary evidence of pervasive and serious systemic discrimination against Roma in Hungary, who are similarly situated persons. Instead, it wrongly focused on whether the Applicants had established that they had been persecuted in the past, rather than conducting a prospective analysis (*Fi v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1125 [*Fi*]; *Piel v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 562 [*Piel*]). When making submissions before me, the Applicants focused on the minor Applicant, asserting that there was no analysis of her claim.

The Respondent submits that the RPD's finding of a lack of credibility is determinative of the Applicants' claims. They did not satisfy the test under section 96 of the IRPA because

they failed to establish the requisite fear of persecution or to rebut the presumption of state protection. The RPD specifically referred to both the country conditions documentation and the evidence of the minor Applicant. The fact that some documentary evidence might show that the situation in a given country could be problematic does not necessarily mean that there is a risk to a given individual.

In its decision, the RPD explicitly acknowledged that the country conditions documents established that discrimination against Roma does exist in Hungary and that in some cases this could rise to the level of persecution. However, it found that the Applicants had failed to establish that the discrimination that they may have faced rose to that level because they had failed to provide clear, cogent descriptions of the primary events upon which their claim was based. Due to these credibility concerns, the Applicants had not established that they were prevented from maintaining employment or a residence due to their ethnic origin and mixed racial marriage to an extent that would constitute persecution. They also failed to establish that either the Principal Applicant or his wife were ever assaulted because of their mixed marriage and failed to provide credible evidence detailing their efforts to seek state protection in Hungary.

The RPD must apply the correct tests applicable to section 96. Its selection and understanding of the test is a question of law reviewable on the correctness standard (*Mohammed v Canada (Minister of Citizenship and Immigration)*, 2009 FC 768 at para 36; *Ruszo v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1004 at paras 20-22). However, the application of the facts to that test is an issue of mixed fact and law attracting the reasonableness standard of review (*Dunsmuir*, above, at para 53; *Ruszo*, above, at para 21; *Leshiba v Canada (Minister of Citizenship and Immigration)*, 2011 FC 442 at para 11).

In its decision, the RPD did not misstate or choose the wrong section 96 test. In order to be found to be Convention refugees the Applicants had to establish that, by reason of a well-founded fear of persecution because of race or membership in a particular social group, they were unable, or by reason of that fear, unwilling to avail themselves of protection in Hungary. The RPD stated that the claimants had not established that they faced a well-founded fear of persecution.

To establish fear of persecution, an applicant must establish that he or she subjectively fears persecution and that this fear is well-founded in an objective sense (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at 723 [*Ward*]; *Canada (Minister of Citizenship and Immigration) v Elbarnes*, 2005 FC 70 at para 19; *Fi*, above, at para 13; *Lopez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1156 at para 20). Where an applicant is found to be credible, the subjective branch of the test is met (*Ward*, above, at para 723). However, that is not the circumstance in this matter as the Applicants were found to be not credible.

In that regard, there is also jurisprudence that holds that where the RPD determines that an applicant is lacking in credibility, their claim may fail based on the lack of a subjective fear of persecution (*Han v Canada (Minister of Citizenship and Immigration)*, 2009 FC 978 at para 22; *Cruz Herrera v Canada (Minister of Citizenship and Immigration)*, 2007 FC 979 at paras 23 and 25; *Garcia Arreaga v Canada (Minister of Citizenship and Immigration)*, 2013 FC 977 at para 39). Here, the RPD clearly found the Applicants not to be credible and that this was the determinative issue. On this basis alone, it was open to the RPD to find that they were not Convention refugees pursuant to section 96.

Even if that were not so, the Applicants bore the burden of rebutting the presumption of state protection based on clear and convincing evidence, and that state protection was inadequate (*Ward*, above, at 724-5; *Flores Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 95 at paras 17-19, 25, [2008] 4 FCR 636, 2007 FC 320 at paras 18-19 [*Flores Carrillo*]). While it is true that the RPD's reasons, beyond those pertaining to its credibility finding, were brief, it did acknowledge that the country conditions documentation confirmed that discrimination against Roma in Hungary exists and, in some cases, can rise to the level of persecution. However, the RPD found that the Applicants had not established discrimination to that extent and had failed to provide credible evidence detailing their efforts to seek state protection. The RPD's brief reference to the country conditions documentation is understandable given its credibility findings. The fact that it did not mention each and every one of the documents does not indicate that they were not taken into account. There is also a presumption that it has weighed and considered all of the evidence presented to it unless the contrary is shown (*Flores Carrillo*, above, at para 2).

The above presumption can be rebutted by pointing out serious contradictory evidence not mentioned by the RPD (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 (TD) at paras 15-17 (QL), 157 FTR 35; *Bustos v Canada (Minister of Citizenship and Immigration)*, 2014 FC 114 at paras 35-39). Here, however, all of the documentary evidence cited by the Applicants is essentially consistent with the Board's conclusion in that it shows that serious discrimination may rise to the level of persecution in Hungary. However, it does not establish that the discrimination faced by Roma in Hungary rises to the level of persecution for all and every Roma.

Applicants for refugee protection do not need to prove that they will probably be persecuted, only that they face a serious risk of persecution (*Chan v Canada (Minister of Employment and Immigration)*, [1995] 3 SCR 593 at para 120; *Adjei v Canada (Minister of Employment and Immigration)*, [1989] 2 FC 680 at 682-683). Given the RPD's credibility finding, it can be reasonably inferred that the RPD was not satisfied that the Applicants were among those Roma who face a serious possibility of persecution and that its credibility finding was dispositive on that issue (*Sheikh v Canada (Minister of Employment and Immigration)*, [1990] 3 FC 238 at para 8 (CA)).

I acknowledge that there is authority for the proposition that persecution can be established by examining the treatment of similarly-situated individuals and that a claimant need not necessarily demonstrate persecution has occurred or would occur to him or her. Further, if persons like them are at a risk of persecution for which the state is accountable, then he or she need not necessarily show that the fear of persecution is personalized (*Salibian*, above; *Mohammed*, above, at para 69; *Fi*, above, paras 14-16; *Piel*, above, at para 25). However, this situation is distinguished because of the RPD's credibility finding and because it did not misstate the test.

Finally, although the RPD only briefly mentioned the minor Applicant's testimony it must be recalled that she would have been five-years-old when she left Hungary, had not begun school there and did not remember attending daycare. The transcript of her testimony before the Board indicates that she recalled no specific events of discrimination. Her testimony was, in essence, that she liked Canada, the people were nicer than in Hungary, she had more friends

here than in Hungary, that in Hungary people always had to play what they wanted to play and, for unspecified reasons, did not let her play.

While the testimony of the seven-year-old minor Applicant was, properly, not questioned as to credibility by the RPD, I am not convinced it overcomes her parents' lack of credibility such that it would save all of their claims. Nor does it establish a serious risk of persecution. Given the substance of the testimony, it is unsurprising that the RPD afforded it little weight.

In conclusion, the Decision does not support the Applicants' position that the RPD applied the wrong test nor that it erred in concluding that the Applicants have not established they face a well-founded fear of persecution in Hungary. The Decision fell within the range of possible, acceptable outcomes defensible in respect of the facts and law (*Dunsmuir*, above, at para 47).

This application for judicial review is therefore dismissed. Neither party proposed a question for certification under section 74 of the IRPA and none arises.

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is dismissed;
2. No question of general importance is certified; and
3. There is no order as to costs.

“Cecily Y. Strickland”

Judge