Federal Court  Cour fédérale

Date: 20160212

Docket: IMM-2424-15

Citation: 2016 FC 191

Ottawa, Ontario, February 12, 2016

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

ROBERT BAKOS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] of the decision of the Immigration and Refugee Protection Board, Refugee Protection Division [RPD], dated April 23, 2015, dismissing the Applicant's claim for refugee protection under sections 96 and 97 of the Act on the basis he did not provide clear and convincing evidence to rebut the presumption of state protection.

II. Background

[2] Robert Bakos [the Applicant] is a citizen of Hungary of Roma ethnicity who claims refugee protection on the basis he fears for his life and safety in Hungary at the hands of anti-Roma individuals and groups.

[3] The Applicant has experienced varying degrees of discrimination, intimidation, and harassment at school, work and in his daily life.

[4] In March 2011, the Applicant opened a beauty salon in Budapest District 8. Shortly thereafter he was approached by two men offering security services, which he declined. As a result, the men, accompanied by another wearing a police badge, returned and badly beat the Applicant, ordering him to pay monthly. The Applicant paid the men upon demand until November 2011, when he could no longer afford to make payments. He closed his business and hid at home.

[5] The Applicant had no way to earn money and attempted to re-open his business for the holidays. He was immediately approached by the same men, who demanded money and assaulted him. The Applicant escaped before being too badly beaten and stayed with his cousin until he left Hungary for Canada on January 30, 2012, claiming refugee status immediately upon arrival.

[6] The RPD's decision was rendered orally on April 23, 2015. The RPD found the Applicant was neither a Convention refugee nor person in need of protection, with the determinative issue being the Applicant's inability to provide clear and convincing evidence of the state's inability to protect.

[7] The RPD explained that the Applicant has the legal burden of rebutting the presumption that adequate state protection exists by adducing clear and convincing evidence to satisfy the RPD, on a balance of probabilities, that the state cannot provide adequate protection to its citizens. In a functioning democracy, such as Hungary, a claimant has a burden to show he should not have been required to exhaust all domestic options available to him before claiming refugee protection abroad.

[8] The RPD referenced the Department of State Report from the National Documentation Package [NDP], which indicates that Hungary is a multi-party parliamentary democracy. Civilian authorities effectively control police and the government has effective mechanisms to investigate and punish abuse and corruption. The RPD noted there is an independent and impartial judiciary and avenues to seek legal recourse for human rights violations. Upon exhausting domestic remedies, individuals have access to the European Court of Human Rights.

[9] The Applicant did not report to the police when extorted and beaten, and did not show he took all reasonable steps in the circumstances to seek protection in Hungary.

[10] Furthermore, the Applicant did not establish his business was specifically targeted because of his Roma ethnicity. Instead, the evidence indicates the Applicant did not know why he was being targeted: he was forced to pay because "everyone pays". As well, the Applicant's Immigration Form states he feared the mafia and criminal people, and made no mention he is Roma. The RPD found the Applicant's explanation – that he felt his Roma identity was evident and did not need to be mentioned –unreasonable.

[11] The RPD noted that the Applicant failed to provide relevant corroborative evidence to support his claim, despite the ample time, over 3 years, he had to do so.

[12] Despite credibility concerns, the RPD accepted the Applicant's allegations as true for purposes of its state protection analysis. The Applicant explained he did not report the beatings and extortion to the police because it would create a "much worse situation". He explained he had once gone to police when his wife was robbed, and they did nothing. The Applicant claimed he does not know anyone who has been aided by police and is not aware of complaint mechanisms or Roma organizations in Budapest.

[13] The RPD did not accept this testimony as reasonable given documentary evidence suggesting otherwise. It found that the Applicant did not provide the necessary clear and convincing evidence establishing on a balance of probabilities that state protection in Hungary is inadequate, as the Applicant took no steps to seek protection before coming to Canada.

[14] The RPD referred to the documentary evidence, summarizing its findings as follows:

a. Roma are subject to discrimination in almost all facets of life in Hungary;
b. the government has taken steps to prosecute and punish officials abusing their powers, indeed, four officers were charged with racially-motivated murders of Roma in 2008 and 2009;
c. documentary evidence also references details of the Jobbik Party, referred to by the Applicant, but indicates that heavy police presence maintain order when this group has held anti-Roma demonstrations;
d. police officers receive training in conflict management related to members of social minorities, within the police force there is a commissioner for fundamental rights, education programs in police schools teach about prejudice and victim and minority protection, and there are minority liaison officers and procedures to lodge complaints against officers in Budapest.

[15] The RPD preferred the documentary evidence over the Applicant's unsubstantiated and unpersuasive testimony.

[16] The decision notes that what is relevant to the analysis of state protection is whether adequate protection is actually provided at the present time, not simply the government's efforts.

[17] At the hearing, the RPD denied the Applicant's application pursuant to Rule 36 of the *Refugee Protection Division Rules* (SOR/2012-256) [the Rules] to admit post-hearing submissions consisting of: (i) a business registration document certifying the Applicant's business; (ii) a police report from the Applicant's father explaining he had been approached and threatened by people looking for the Applicant; and (iii) a letter from the Applicant's father explaining that people are looking for the Applicant. Counsel explained that the Applicant was not represented until recently and was unaware he would need the documents. Upon obtaining them, he could not afford to get them translated. Although the RPD permitted the admission of other late-filed documents, it decided not to admit the above listed documents, explaining that

the Applicant has had plenty of time to prepare for the hearing: he is responsible for establishing his claim and providing documents according to the Rules.

III. Issues

[18] The issues are:

A. Was the RPD's state protection analysis reasonable?
B. Was the RPD's conclusion the Applicant had not established a nexus between a Convention refugee ground and his alleged persecution reasonable?
C. Did the RPD violate rules of natural justice by refusing to accept the post-hearing documents?

IV. Standard of Review

[19] The issue of state protection, as well as finding an absence of nexus between a Convention ground and alleged persecution are questions of mixed fact and law reviewed on a standard of reasonableness (*Carillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 at para 36; *Molnar v Canada (Minister of Citizenship and Immigration)*, 2015 FC 273 [*Molnar*]).

[20] A correctness review governs allegations of procedural unfairness and breach of natural justice.

V. Analysis

A. *Was the RPD's state protection analysis reasonable?*

[21] The Applicant claims the RPD erred in assessing state protection in two areas: (i) by focusing on the Applicant's failure to seek protection without regard to the practical significance of that reporting to the real issue of state protection; and (ii) by failing to reconcile contrary evidence regarding the adequacy of state protection for Roma in Hungary.

[22] Regarding the first issue, the Applicant submits the RPD effectively imposed a duty to seek state protection prior to claiming refugee status by placing decisive emphasis on the Applicant's failure to seek state protection. As Justice Russel Zinn outlined in *Majoros v Canada (Minister of Citizenship and Immigration)*, 2013 FC 421 at para 10 [*Majoros*], the role of seeking state protection is a *de facto*, not legal, requirement for refugee protection. When the evidence indicates that state protection would not be forthcoming, a claimant is not required to seek protection from the authorities (*Canada (Attorney General) v Ward)*, [1993] 2 SCR 689 at para 19 [*Ward*]).

[23] The Applicant's narrative described several incidents of attacks and extortion – none of which he reported to police. He did not seek police protection because in his view, the police would do nothing to help him.

[24] The Applicant claims his distrust towards police is supported by the testimony of his cousin, Gyula Bakos, who obtained refugee status in Canada in 2001.

[25] The Applicant also references *Molnar*, above, a recent decision with similar facts and arguments to this case, wherein Justice John O'Keefe followed Justice Zinn's decision in *Majoros*. In both of these cases, the Court found the Board's decision that the Roma applicants had not rebutted the presumption of state protection unreasonable on the basis that a failure to seek state protection, where such efforts would be futile, does not preclude an applicant from rebutting the presumption of state protection.

[26] The Applicant's second argument is that the RPD did not consider the effectiveness of state protection in Hungary and failed to assess contrary evidence regarding adequacy of state protection for Roma. He submits that while Hungary's efforts to protect its citizens are relevant, they are neither determinative, nor sufficient: the RPD must consider the actual adequacy of state protection at an operational level, rather than the efforts made to correct discrimination (*Graff v Canada (Minister of Citizenship and Immigration)*, 2015 FC 437 at para 27 [*Graff*]; *Beharry v Canada (Minister of Citizenship and Immigration)*, 2011 FC 111 at para 9 [*Beharry*]).

[27] The Applicant cites contrary evidence the RPD ignored. The US Department of State's Country Report on Human Rights Practices discloses that extremist anti-Roma groups illegally patrolled small towns in northeast Hungary to intimidate the local Roma population. That report also provides evidence that courts used the criminal code provision on racism to convict, rather than protect, Roma. The IRB Responses to Information Requests on Hungary explain the ineffective police response to crimes committed against Roma in Hungary and the lack of specific procedure for investigation involving Roma.

[28] The Federal Court has been divided on the issue of state protection available to Roma claimants. A majority of recent decisions, despite review on the reasonableness standard, have set aside the Board's conclusions that state protection was adequate in Hungary on the premise that the Board had failed to demonstrate the operational adequacy of government state protection efforts.

[29] Case law has established that the RPD is to consider the actual adequacy of state protection, rather than simply the willingness of the state or the efforts made to correct discrimination (*Graff*, above, at para 27; *Beharry*, above, at para 9).

[30] However, the Court must begin the analysis of state protection in each case by examining basic principles. As stated by Justice Kane in *Kovacs v Canada (Minister of Citizenship and Immigration)*, 2015 FC 337 at paras 66-68, and 71-72:

> 66 The Supreme Court of Canada set out the rationale underlying the international refugee protection regime in *Ward* at para 18. This regime is meant to be relied upon when the protection one expects from the state of which he or she is a national is unavailable. As noted, a state that is a functioning democracy is presumed to be capable of protecting its citizens. The onus is on the applicants to rebut that presumption with clear and convincing evidence that satisfies the trier of fact, on a balance of probabilities, that state protection is inadequate or non-existent (*Carrillo* at para 30).
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> 67 In *Konya*, supra Justice Judith Snider reiterated that the standard is adequate state protection, at para 34:
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> > [34] The test for state protection is not a test of effectiveness, but whether it is adequate (*Kaleja v Canada (Minister of Citizenship and Immigration)*, 2011 FC 668 at para 25, [2011] FCJ No 840; *Kis v Canada (Minister of Citizenship and Immigration)*, 2012 FC 606 at para 16, [2012] FCJ No 603). It is not enough for the Applicant to demonstrate the

> state is not always effective at protecting persons in the Applicant's situation (*Lakatos v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1070 at para 14, [2012] FCJ No 1152).

68 In *Ruszo*, supra (no relation to the applicant's uncle), the Chief Justice reviewed the governing principles and the recent jurisprudence and addressed the issue of how an applicant could rebut the presumption when they are no longer in their country of origin, noting, at para 30:

> [30] In discharging this burden, refugee claimants who are outside their country of nationality may demonstrate either that they are "unable" to obtain adequate state protection or that, by reason of a well founded fear of persecution, are unwilling to avail themselves of the protection of their home state. As stated in *Ward*, above, at para 49:
>
> > The distinction between these two branches of the "Convention Refugee" definition resides in the party's precluding resort to state protection: in the case of "inability", protection is denied to the claimant, whereas when the claimant is "unwilling", he or she opts not to approach the state by reason of his or her fear on an enumerated basis.
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> (emphasis in original)

71 I have considered all the jurisprudence noted by the applicants regarding the assessment and determination of adequate state protection, including: *Dawidowicz*, which reiterated that efforts alone were small comfort and that the empirical reality of the adequacy of state protection should be evaluated; *Kumati*, which noted that a law on the books is not sufficient without evidence that the law actually functions to protect; *Majoros*, which noted that state protection should be sufficiently effective at the operational level; *Salamanca*, which suggests that adequate state protection means that it is more likely than not that the applicant will be protected; and, *Djubok*, which notes that the various risk factors, as well as their intersection, must be assessed.

72 In my view, this guidance elaborates on the indicators of adequate state protection but it does not elevate the standard.

> Adequacy remains the standard and what will be adequate will vary with the country and the circumstances of the applicants. In this case, the Officer's reasons as a whole indicate that he considered the mixed evidence about state protection in Hungary and its effectiveness. This mixed evidence was the context for his assessment of the adequacy of state protection for the risks faced by these applicants.

[31] As also stated by Justice Gleason, as she then was, in *Majlat v Canada (Minister of Citizenship and Immigration)*, 2014 FC 965 at paras 24-25:

> 24 Thus, under the reasonableness standard, the issue is neither whether the court would have reached the same conclusion as the tribunal nor whether the conclusion the tribunal made is correct. Rather, deference requires that tribunals such as the RPD be afforded latitude to make decisions and to have their decisions upheld by the courts where their decisions are understandable, rational and reach one of the possible outcomes one could envisage legitimately being reached on the applicable facts and law.
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> 25 This is particularly so when the case involves a matter falling within the core specialized expertise of the tribunal, as does the assessment of state protection by the RPD. As I stated at para 5 in *Arias v Canada (Minister of Citizenship and Immigration)*, 2012 FC 322, [2012] FCJ No 1105, "[t] he Board is to be afforded considerable deference in respect of its ... conclusions regarding state protection [which]...fall within the core of the Board's expertise and are intimately tied to the facts of a particular case".

[32] Finally, in the case of *Mudrak v Canada (Minister of Citizenship and Immigration)*, 2015 FC 188, Justice Annis, in considering state protection for Roma claimants in Hungary, stated at para 50, that expecting the Board to assess operational effectiveness:

> 50 … tend[s] effectively to shift the onus away from the applicant having to establish inadequate state protection such that it becomes incumbent on the RPD, if it wishes to avoid committing a reviewable error, to demonstrate that the measures taken by the Government of Hungary have been translated into "operational adequacy" of state protection for Roma citizens.

[33] His reasoning concludes that:

i. it is not the Court's role to review and reweigh the evidence and conclude it establishes Hungary is unable to provide adequate protection to Roma, as this reasoning effectively substitutes the Court's opinion for that of experts in the field under the guise of unreasonableness (paras 52 – 54);
ii. it is incorrect to, in effect, reverse the presumption of adequate state protection and require the Board to demonstrate operational adequacy of measures in its reasons: the Court starts with the presumption a state is capable of protecting its citizens, and the onus is on the *Applicant* to rebut that presumption (paras 55, 56);
iii. it is incorrect to impose on a government an obligation to demonstrate the "operational adequacy" of recently instituted protection measures – a threshold that likely requires empirical and opinion evidence, and which is scarcely found in the materials (paras 57-59); and
iv. the RPD, an expert body with experience in evaluating issues of state protection, is to be provided deference upon judicial review in the context of its determinations of mixed fact and law (paras 60, 61).

[34] The role of the Court on judicial review is to assess the quality of the decision and reasons provided therefor with regards to an applicant's particular circumstances. It is not to set aside conclusions of mixed fact and law made by an expert body, the RPD, without a persuasive and compelling justification as to why the decision falls outside the range of acceptable outcomes on the facts and law: that it is not justified, transparent or intelligible.

[35] In this case, the RPD found that the Applicant did not show, as he was required, that he has taken all reasonable steps in the circumstances to seek protection in Hungary, as he did not once go to the police for protection and provided no reliable corroborative evidence of his persecution or why state protection would be unavailable should he seek it. Thus, it concluded he did not provide the necessary clear and convincing evidence establishing on a balance of probabilities that state protection is inadequate. In my view, this conclusion is reasonable. The Federal Court of Appeal has indicated that, except in the most exceptional circumstances, claimants are required to exhaust all possible avenues of protection available to them (*Hinzman,*

Re, 2007 FCA 171 at paras 56, 57). The present case does not, in my opinion, amount to an exceptional circumstance.

B. *Was the RPD's conclusion the Applicant had not established a nexus between a Convention refugee ground and his alleged persecution reasonable?*

[36] The RPD opined that the Applicant failed to prove he was persecuted due to being Roma. I disagree with the Respondent that the Applicant's Roma identity was not established. The RPD accepted the Applicant's identity as a Hungarian and accepted the late submission of documents establishing he is a citizen of Roma ethnicity. His Personal Information Form [PIF] narrative also conveys he is Roma. The RPD made no statement to the effect it did not believe the Applicant is Roma, nor did it dispute the identity of the Applicant's persecutors as Jobbik people. Instead, the RPD noted its concerns that the Applicant did not demonstrate his persecution stemmed from his Roma ethnicity, and was thus connected to a Convention ground.

[37] The Applicant submits that his identity as Roma, and the identity of the persecutors as Jobbik people provide the required nexus to the Convention ground of being persecuted based on ethnic background. He claims the RPD did not find inconsistencies or contradictions between different sources of his evidence, his Port of Entry notes, PIF, and testimony at the hearing.

[38] Contrary to the Applicant's assertion – that since the RPD was aware the Applicant is Roma and he mentioned Jobbik people, the requisite nexus was established – it is not the RPD's role to deduce upon which Convention ground a claim is based from the country a claimant is fleeing and their particular circumstances. The onus was on the Applicant to establish his claim,

including that the persecution from which he fled was connected to a Convention ground – his Roma ethnicity.

[39] In my view, it was open to the RPD to conclude the Applicant did not establish that his business was targeted because he was Roma. When asked why he was being extorted, the Applicant testified he did not know: the men extorting him told him everyone pays. As well, the Applicant's PIF states he feared the mafia and criminal people. Although he mentioned the extortion, he did not convey it stemmed from the fact he is Roma. The Applicant also did not provide corroborative evidence to support his allegations of persecution or that it stemmed from his ethnicity.

[40] Accordingly, the RPD found the Applicant did not establish on a balance of probabilities his business was specifically targeted because he is Roma – a conclusion that does not fall outside the range of reasonable outcomes.

C. *Did the RPD violate rules of natural justice by refusing to accept the post-hearing documents?*

[41] The Applicant argues that the RPD's refusal to accept the post-hearing disclosure amounted to a breach of natural justice.

[42] Rule 36 requires that the RPD consider "any relevant factors" in deciding admissibility, including: (a) the document's relevance and probative value; (b) any new evidence it brings to

the hearing; and (c) whether the party, with reasonable effort, could have provided the document as required by Rule 34.

[43] The Applicant provided explanations for the late disclosure; he was not previously represented, was unaware the documents would be needed, and could not afford translation, which he claims the RPD did not analyze.

[44] I disagree that the RPD's refusal to admit three documents amounted to a breach of natural justice. The transcript reveals that the hearing was fair and the RPD admitted documents it deemed relevant and of probative value, despite non-compliance with the Rules.

[45] At the outset of the hearing the Applicant attempted to admit a number of late documents (including five packages of objective evidence, documents regarding the Applicant's nose injury from being beaten, proof of his Roma ethnicity, PIF amendments, his business registration, and evidence from the Applicant's father) not in accordance with Rule 34, which requires disclosure at least 10 days before the hearing. The Applicant also requested that his cousin be permitted to testify as a witness, despite non-compliance with Rule 44.

[46] The RPD admitted the Applicant's personal documents, finding them relevant and of probative value, "so as not to prejudice Mr. Bakos". The RPD then inquired, pursuant to Rule 36, what evidence the late-filed documents would bring to the hearing, their relevance, probative value and reason they could not have been provided earlier. After hearing counsel's explanation, the RPD decided not to accept the country documents, as there is "ample evidence with respect

to the situation of Roma in Hungary" in the NDP. The RPD also permitted the witness to testify at the hearing.

[47] At the end of the hearing, the RPD determined it would not admit the final three documents – the business registration, the Applicant's father's police report and letter. The RPD mentioned the business registration document was referred to in the course of the hearing, and denied admission of the other documents as "there has been plenty of time for the claimant to prepare for this hearing".

[48] The RPD retains discretion to admit evidence not in accordance with the Rules. The hearing transcript demonstrates that the RPD was fair, considered the Rule 36 factors, and indeed admitted evidence found to be probative and reliable. It is clear that the RPD considered whether the Applicant, with reasonable effort, could have provided the documents as required by Rule 34. With respect to the documents refused, although the RPD did not outwardly convey its consideration of relevance and probative value, or what new evidence the documents brought to the hearing, it is clear the RPD was alive to the factors to be considered. In balancing these factors with the mandate of efficient and effective decision-making, the RPD made its determination based on the documentary evidence before it, including the admitted late-disclosure documents, the Applicant's testimony, the witness testimony, counsel's submissions, the NDP and PIF and amendments.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application is dismissed;

2. No question is certified.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2424-15
STYLE OF CAUSE:	ROBERT BAKOS v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 8, 2016
JUDGMENT AND REASONS:	MANSON J.
DATED:	FEBRUARY 12, 2016

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