

Federal Court



Cour fédérale

Date: 20170705

Docket: IMM-5087-16

Citation: 2017 FC 649

Toronto, Ontario, July 5, 2017

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

NICHOLAS FRIGYIK

Applicant

and

**THE MINISTER OF IMMIGRATION,
REFUGEES AND CITIZENSHIP**

Respondent

JUDGMENT AND REASONS

I. Background

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [IRPA or Act] of a November 14, 2016 negative decision [Decision]. In the Decision, the Refugee Appeal Division [RAD or Board], found that Applicant is neither a Convention refugee or a person in need of protection as contemplated by sections 96 and 97(1) of the Act. For the reasons explained below, I am dismissing this judicial review.

[2] The Applicant is a 2 year-old child born in Manchester, England, who is claiming refugee protection from Hungary due to his Roma ethnicity. His father, who was his designated representative, signed his Basis of Claim [BOC] form and testified on his young son's behalf.

[3] The Applicant and his family arrived in Canada on February 10, 2016. Each member made a refugee claim; however, the Respondent found that the Applicant's parents and siblings were not eligible to file claims because they had withdrawn previous claims in 2009 and 2010 respectively. This did not affect the Applicant because the claims were withdrawn before he was born. He was, therefore, allowed to proceed with his claim.

[4] The Applicant contends that he and his family will face persecution in Hungary due to their Roma ethnicity in all aspects of their lives: housing, education, health, and employment. In support of this claim, the Applicant's father has outlined incidents which occurred before and after the Applicant was born.

[5] In January 2009, the Hungarian Guard members [Guardists] attacked the Applicant's parents' residential district, made racial slurs against Roma people, and threw bricks in their windows. The police came and said they would make a report. He alleges the Jobbik political party, who is gaining population in Hungary, supports the Guardists in threatening Roma.

[6] Shortly thereafter, in February 2009, the Applicant's family fled Hungary and came to Canada to seek refugee protection. They made claims upon their arrival. Before their claims were processed, however, the Applicant's grandmother fell ill. As a result, the family went back to

Hungary to take care of her, and subsequently abandoned their claims in Canada. The Applicant's father alleges the discrimination against his family got worse upon returning to Hungary.

[7] In 2014, the Applicant's father found a job as a painter in Manchester, England and moved with his wife and two children. The Applicant's mother was pregnant with him at the time. On May 11, 2014, the Applicant was born in England. The family returned to Hungary in August 2014 and, aside from the father working in England for a month in January 2015, stayed there until their departure for Canada.

[8] In June 2015, the Applicant and his family claim to have been evicted from their home in Miskolc, Hungary. Unable to find alternate accommodation, they were forced to move in with the Applicant's great-grandparents. Due to the residence's small size, which could not accommodate an additional family of five, the Applicant's family was not able to legally register the address as their own. Without a registered address, the Applicant's father claims he or his wife can neither work legally nor receive benefits.

[9] The Applicant's father fears the Applicant will be taken away by the State, and this is part of the reason he chose to relocate his family to Canada and make a refugee claim in February 2016 on behalf of his young son.

[10] In the first decision on this matter, although the Refugee Protection Division [RPD] accepted the Applicant's Roma identity, it had credibility concerns regarding the allegations of

eviction and re-availment to Hungary, and drew a negative inference in this regard from the lack of corroborative evidence. The RPD also found that the discrimination did not amount to persecution and that the Applicant did not demonstrate subjective or objective fear. For these reasons, the RPD rejected the Applicant's claim and found he was not a Convention refugee or person in need of protection.

[11] In the subsequent Decision on appeal, the RAD conducted an independent assessment of the evidence and came to the same end result as the RPD: the Applicant was not a Convention refugee or person in need of protection. Specifically, the Board held that the discrimination did not amount to persecution and that state protection would be available to the Applicant. However, it is worth noting that the RAD overturned the credibility findings with respect to the eviction allegation. It also found that the family's reasons for returning to Hungary were "reasonably substantiated".

II. Analysis

[12] The Applicant argues that the RAD's findings are unreasonable regarding (1) discrimination and (2) state protection.

[13] The standard of review of a RAD decision is reasonableness (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35). Reasonableness also applies to when the RAD interprets its home statute (*Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 at para 29). The issue of whether there is adequate state protection in Hungary is a question of

mixed fact and law reviewable on a standard of correctness (*Canada (Citizenship and Immigration) v Neubauer*, 2015 FC 260 at para 10).

A. *Discrimination*

[14] The Applicant submits that the RAD's finding that the discrimination faced by the Applicant does not amount to persecution is unreasonable, because (i) the RAD overlooked important evidence about the persecution of Roma and (ii) considered the elements of discrimination separately rather than cumulatively, thus committing errors on both counts.

[15] Specifically, the Applicant contends that the RAD overlooked evidence of the eviction, housing crisis, the difficulty of finding work, and the inability to find accommodation faced by the Applicant if he were to return to Hungary, as well as the overrepresentation of Roma children in state care, which would, due to all other factors being present, lead to the removal of the Applicant into state care.

[16] I cannot agree that the RAD failed to fully consider either the cumulative effect of the discrimination, or the claimed element of persecution regarding state care. Starting with the accommodation issue, there are various places in the Decision which show that the RAD considered the Applicant's precarious housing situation. For instance, it acknowledged that "[t]he documentary evidence notes that residential segregation of Roma is evident in Hungary. Even when not formally segregated, Roma continue to live in substandard conditions".

[17] Notwithstanding these findings, the RAD found that the discrimination the Applicant would face in housing, at school, at work, and in accessing social services “does not rise to the level of persecution” (Decision at para 54). Indeed, the RAD noted that “the discrimination feared by the [Applicant], as unfortunate as it is, does not threaten his fundamental rights but rather affects the quality of his existence in his home country” (Decision at para 57).

[18] Although the Applicant is not satisfied with these findings, it is the RAD’s role to distinguish discrimination from persecution (*Sagharichi v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 796 at para 3 (FCA)). Contrary to the Applicant’s submissions, I read these conclusions as referring to and considering the cumulative effect of the elements of discrimination, which it decided did not reach the level of persecution. In light of the particular circumstances experienced by the Applicant’s family in Hungary, it was open to the RAD to make this conclusion. Indeed, as the Respondent put it, for the Board to have decided otherwise would have required it to engage in speculation.

B. *State Protection*

[19] The Applicant submits that the RAD applied the incorrect legal test for state protection: the state must be able to provide actual state protection; a mere effort to protect is not enough. The Applicant submits that the RAD simply described the various efforts made by the Hungarian government and other organizations, without referring to actual evidence which described the efficacy and availability of that state protection.

[20] The test for state protection was articulated by the Supreme Court of Canada in *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at 725 [*Ward*] and was correctly identified by the RAD: a claimant seeking refugee protection must provide “clear and convincing confirmation of a state's inability to protect”. In addition, a claimant’s burden of proof is directly proportionate to the level of democracy of the state in question.

[21] The RAD reviewed the evidence showing state protection for Roma is mixed. It considered negative evidence regarding acts of violence and general discrimination against Roma, including by some police, the rise of anti-Roma sentiment and the Jobbik party. However, the RAD also noted several positive steps including new legislation, initiatives and prosecution to curb anti-Roma action.

[22] I therefore do not agree with the Applicant’s contention that the Board simply discussed the good intentions of the State and ignored all other evidence which came to a contrary conclusion. The RAD considered the effectiveness of the state protection by giving concrete examples of the government and various organizations’ efforts. The Board also referenced international organizations helping to combat racism and the marginalization of Roma. After looking at the evidence presented by the Applicant, as well as in the National Documentation Package, the RAD found that the mechanisms put in place to provide state protection had achieved certain operational success on the ground. This was certainly one conclusion open to it given the particular facts of the Applicant and his family in this case, and consistent with the instructions from the Federal Court of Appeal in *Mudrak v Canada (Citizenship and*

Immigration), 2016 FCA 178 at para 29. Under a different set of circumstances or experiences befalling the Applicant, it may not have been open to the Board to make those same findings.

[23] In particular, the Applicant provided no evidence showing he or his family sought and were denied state or police protection; it was thus reasonable for the RAD to rely solely on the documentary evidence before it. Indeed, the role of this Court is not to reweigh the evidence (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59).

[24] Finally, although the observation in paragraph 77 of the Decision is weakly worded and certainly cannot be supported as a proposition in isolation (as conceded by the Respondent), it is not sufficient to render the remaining 87 paragraphs of the Decision unreasonable.

III. Conclusion

[25] The RAD's conclusions that the Applicant will neither suffer persecution, nor rebutted the presumption of state protection with clear and convincing evidence, were both reasonable in light of the personalized risk presented. In the particular circumstances, the RAD reasonably found there was insufficient evidence to arrive at the Applicant's desired outcome.

JUDGMENT in IMM-5087-16

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.
2. Counsel presented no questions for certification, nor do any arise.
3. No costs will be ordered.

“Alan S. Diner”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5087-16

STYLE OF CAUSE: NICHOLAS FRIGYIK v THE MINISTER OF
IMMIGRATION, REFUGEES AND CITIZENSHIP

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JUNE 22, 2017

JUDGMENT AND REASONS: DINER J.

DATED: JULY 5, 2017

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