Federal Court Cour fédérale

Date: 20171110

Docket: IMM-359-17

Citation: 2017 FC 1033

Ottawa, Ontario, November 10, 2017

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

JÓSZEFNÉ ORLICZKI
SÁNDOR SZAKÁCS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Principal Applicant, Józsefné Orliczki, age 47, and her son Sándor Szakács, age 16, are Hungarian citizens of Roma ethnicity. They first entered Canada on April 25, 2009, along with the Principal Applicant's husband and their daughter, and made a claim for refugee protection. After the Refugee Protection Division [RPD] of the Immigration and Refugee Board [Board] denied their claims in a decision dated February 25, 2013, the family returned to Hungary in June 2013. The Applicants came back to Canada on August 25, 2016, and the

Principal Applicant made a second claim for refugee protection. This claim was not referred to the RPD by virtue of paragraph 101(1) (b) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [*IRPA*], which stipulates that, if a claim for refugee protection by a claimant has been rejected by the Board, it is ineligible to be referred to the RPD. Consequently, the Principal Applicant submitted an application for a Pre-Removal Risk Assessment [PRRA] on September 19, 2016. A Senior Immigration Officer rejected the PRRA application in a decision dated November 28, 2016. The Principal Applicant has now applied under subsection 72(1) of the *IRPA* for judicial review of the Officer's decision.

I. The Applicants' PRRA Submissions

[2] The Principal Applicant claimed in her PRRA submissions that, following her family's return to Hungary in June 2013, the persecution resumed within a few months. Rocks were thrown through a window of their house in Miskolc in late August 2013. The police said they could not do anything and advised them to fix the window. The Principal Applicant's husband replaced the glass in the broken window with wood. Every two weeks or so after this first incident, racists continued to vandalize the family home, kicking in the wood covering the window and throwing in rocks with death threats attached to them. The Principal Applicant's daughter, Anett, suffered panic attacks as a result of these incidents and was hospitalized twice.

[3] In October 2014, the Principal Applicant and her family were evicted from their home by the city of Miskolc, which owned the house. The District Court of Miskolc upheld the eviction, leaving the Principal Applicant's family homeless and forcing them to stay with friends, neighbours, and in churches. All attempts at securing alternate accommodations elsewhere in

Hungary were unsuccessful. As a result of having no fixed address, the Principal Applicant was unable to enrol Sándor in school. While the family members were separated and staying in different churches, police officers confronted the Principal Applicant's husband, stating that they were going to place Sándor in state care because he was not enrolled in school.

[4] In support of the PRRA application, the Principal Applicant submitted a number of documents, including reports on discrimination in Hungary and mass evictions of Roma in Miskolc, medical reports for Sándor and his older sister Anett, a note from a school principal stating Sándor's ineligibility to attend school without a valid proof of address, a copy of the decision by the District Court of Miskolc on the legality of the eviction, and letters from the President and the Vice-President of the Roma National Self-Government of Miskolc City. The Applicants' counsel had prepared additional submissions and information on the evictions but these were not submitted until December 21, 2016, due to counsel suffering a concussion. These submissions were sent after the date of the Officer's decision and were not before the Officer.

II. The Officer's Decision

[5] After summarizing the Applicants' immigration history and status, the Officer stated: "I have read and carefully considered all of the documentary material presented in association with and support of this application." The Officer then proceeded to consider the legal requirements surrounding PRRA applications, particularly the requirement under paragraph 113(a) of the *IRPA* that unsuccessful refugee claimants may only present new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection. The Officer noted

that counsel, while providing documentary evidence in support of the application, had not included full or detailed written submissions. The Officer referenced the Principal Applicant’s statutory declaration, noting that in August 2013 she and her family were harassed, threatened and their home vandalized by unknown assailants due to their Roma ethnicity, that the police were called but did not take any investigative action, and that this event caused her daughter to suffer extreme anxiety and panic attacks that required hospitalization. The Officer then noted “these events are materially consistent with those already addressed by the RPD in the applicant’s hearing and will not be revisited in this setting.”

[6] The Officer considered the decision of the District Court of Miskolc submitted in support of the Principal Applicant’s claim that she had been evicted from her home in Miskolc. The Officer noted that the decision provided no reasons for the eviction, and appeared to be a cursory decision which agreed that the City of Miskolc had rightfully asserted its claim and had strong reason for the Principal Applicant and her family to vacate the house. The Officer further noted that the decision referenced an eviction letter which was acknowledged as received by the Principal Applicant on May 29, 2013, and observed that this letter had not been submitted as evidence with the PRRA application and also that the Principal Applicant had not returned to Hungary until June 4, 2013.

[7] The Officer also considered the letter from Ferenc Gulyás, the Vice-President of the Roma National Self-Government of Miskolc City, noting that:

> The author of this letter does not give any particulars of how he became aware of the applicant’s situation. The statements provided regarding the applicant’s housing situation do not appear to be

> based on first-hand accounts, but rather recounted information that has not been verified by Mr. Gulyas.

The Officer continued by stating:

> For the aforementioned reasons, I give little weight to these three documents and I do not find them to provide sufficient objective evidence to establish, on a balance of probabilities, the applicant lived in the affected neighbourhood and was evicted from her home.

[8] The Officer further stated that, "even if the applicant did to [*sic*] satisfy me that she had been living in the affected area, and I am not," recourse was available to her because research documentation from the Board stated that, as an indefinite term leaseholder, she would be eligible for compensation or provision of an alternate property from the city of Miskolc. The Officer then referenced the numerous pieces of country condition documentary evidence from various sources submitted with the application, and acknowledged the plight of the Roma population in Hungary who face human rights issues. The Officer found this documentary evidence to be "generalized in nature" and did not "establish a linkage directly to the applicant's personal circumstances." In the Officer's mind, evidence of general conditions within a country "is not in itself sufficient to show that the applicant is personally at risk of harm." In the result, the Officer found that the Principal Applicant would not face more than a mere possibility of persecution and that she would not face torture, a risk to life, or a risk of cruel or unusual treatment or punishment if returned to Hungary.

III. Issues

[9] The Applicants raise four issues:

1. Did the Officer fetter his discretion?

2. Did the Officer misconstrue the evidence?
3. Did the Officer err by making credibility findings without affording the Applicants an oral hearing?
4. Did the Officer err by ignoring submissions sent before the Applicants were given notice of the decision?

[10] In my view, however, the determinative issue on this application for judicial review is whether the Officer misconstrued the evidence in such a manner that the Officer's decision was unreasonable.

IV. Analysis

A. *Standard of Review*

[11] It is well established that, absent any question of procedural fairness, the standard of review by which to assess a PRRA officer's decision is that of reasonableness (see: *Paul v Canada (Immigration, Refugees, and Citizenship)*, 2017 FC 687 at para 12, 282 ACWS (3d) 146; *Khatibi v Canada (Citizenship and Immigration)*, 2016 FC 1147 at para 11, 273 ACWS (3d) 156; *Fadiga v Canada (Citizenship and Immigration)*, 2016 FC 1157 at para 8, 272 ACWS (3d) 822; *Chen v Canada (Citizenship and Immigration)*, 2015 FC 565 at para 11, 254 ACWS (3d) 901; *Shilongo v Canada (Citizenship and Immigration)*, 2015 FC 86 at para 21, 474 FTR 121; *Shaikh v Canada (Citizenship and Immigration)*, 2012 FC 1318 at para 16, 223 ACWS (3d) 1020).

[12] The reasonableness standard tasks the Court with reviewing an administrative decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determining "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190. Those criteria are met if "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 and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 S.C.R. 708 [*Newfoundland Nurses*]. Additionally, provided "the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome"; nor is it "the function of the reviewing court to reweigh the evidence": *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61, [2009] 1 SCR 339.

B. *Did the Officer misconstrue the evidence?*

[13] The Applicants contend the Officer misconstrued the evidence of their eviction from their home in Miskolc, and made a negative credibility finding, in the face of numerous corroborating documents, including the Miskolc court decision, letters from the President and the Vice-President of the Roma National Self-Government of Miskolc City, letters from the committee against relocation, and objective documentary evidence on the mass evictions. The Applicants say the Officer erred by giving little weight to the court decision, which explains in detail the circumstances leading to the Applicants' eviction. According to the Applicants, the Officer's expectation that the eviction letter referred to in the court decision should have been presented in

evidence is “perverse.” The Applicants further note that the Officer failed to consider the letter from the President of the Roma National Self-Government of Miskolc City.

[14] The Respondent maintains that the Applicants are contesting the Officer’s weighing of evidence, something which does not raise a reviewable issue. The Respondent observes that the Officer found that: the court decision only established that the facts in the statement of claim are accurate and the legal citation is relevant; the Applicants did not present a letter which was acknowledged as received prior to the Applicants’ date of return to Hungary; the letter from the Vice-President of the Roma National Self-Government of Miskolc City was a reiteration of what he had been told by the Principal Applicant; and the documentary evidence showed that the Principal Applicant would be entitled to compensation as an indefinite leaseholder. In the Respondent’s view, the Officer reasonably found that the Applicants did not demonstrate more than a mere possibility of persecution.

[15] It is, of course, well-established that administrative decision-makers, including PRRA officers, do not have to reference every piece of evidence in their decisions. In *Newfoundland Nurses*, Justice Abella stated (at para 16) that a “decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion.” Similarly, in *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 at para 16, 157 FTR 35 [*Cepeda-Gutierrez*], Justice Evans stated that administrative agencies are not “required to refer to every piece of evidence that they received that is contrary to their finding, and to explain how they dealt with it” as it will often be

sufficient simply to make a statement "in its reasons for decision that, in making its findings, it considered all the evidence before it."

[16] By the same token, however, the deference usually afforded to an administrative decision-maker dissipates and lapses when a key piece of evidence or a significant and material fact is not adequately addressed. If the evidence is highly relevant or appears to contradict other findings of facts, a reviewing court may be willing to infer that the administrative decision-maker ignored such evidence and made an "erroneous finding of fact 'without regard to the evidence'" (see: *Cepeda-Gutierrez* at paras 14-15). A reviewing court should not supplement a PRRA officer's reasons when they fail to address an important or significant piece of evidence. By implication though, a PRRA officer's reasons cannot satisfy the requirements of justification, transparency, and intelligibility, if they fail in this regard.

[17] The Applicants correctly note that the Officer did not explicitly consider the letter from Gábor Váradi, the President of the Roma National Self-Government of Miskolc City, which states in part that:

> I, Gábor Váradi…verify Sándor Szakács, his common law partner, and their children Sándor Szakács Jr. and Anett Orliczki's situation and living conditions are without prospect. Since [sic] their property in Miskolc on 3533, 4 Nyolcadik Street is affected by the by-law accepted in May 2014 by the local self-government…. Those affected by the evictions didn't get an opportunity to participate in a genuine discussion regarding the planned evictions or other possible alternatives. They didn't receive any notice of the eviction.
>
> Only Roma families lived in the Numbered Street among them the aforementioned persons…. Despite the protestations of the Miskolc Roma the settlement liquidation program proceeds….

> For now, those living in the "Numbered Streets" have no idea what will happen to them in the next month or two. Should they start packing their belongings?! The self-government doesn't say anything…

[18] The Officer refers to giving little weight to *three* documents which purport to establish the Applicants' residency in the district of Miskolc where the forced evictions occurred, but only discusses the court decision and the letter from the Vice-President of the Roma National Self-Government. The Officer did not explicitly discuss or engage with the President's letter. This letter states that the Principal Applicant and her family were in fact residing in the area being affected by the mass evictions. It may be that the Officer took issue with the authenticity of Mr. Váradi's letter and possibly it was one of the three documents to which the Officer assigned little weight to substantiate the Principal Applicant's claim that she and her family had lived in the affected neighbourhood and were evicted from their home. However, if this was the case the Officer's reasons in this regard are unintelligible and, consequently, render the decision unreasonable because the Court can only speculate as to what the Officer thought, if anything, about Mr. Váradi's letter.

[19] Although the Officer in this case stated that "I have read and carefully considered all of the documentary material presented in association with and support of this application," the Officer never referenced or ignored Mr. Váradi's letter and the information it provided. In my view, the Officer should have referenced and assessed this letter because it was highly relevant and tended to corroborate and substantiate the Principal Applicant's claim that she and her family, contrary to the Officer's finding in this regard, had lived in the affected neighbourhood and were evicted from their home by reason of their Roma ethnicity. At the very least, the

Officer should have explained why he or she did not accept the evidence contained in Mr. Váradi's letter and what, if any weight, it warranted.

V. Conclusion

[20] The Applicants' application for judicial review is, therefore, allowed. The Officer's decision is not reasonable and, consequently, it is set aside. The matter is returned for reconsideration by a different immigration officer in accordance with these reasons for judgment. No question of general importance is certified.

JUDGMENT in IMM-359-17

THIS COURT'S JUDGMENT is that: the application for judicial review is allowed; the decision by the senior immigration officer dated November 28, 2016, is quashed and set aside and the matter is returned for redetermination by a different immigration officer in accordance with the reasons for this judgment; and no question of general importance is certified.

"Keith M. Boswell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Richard Wazana	FOR THE APPLICANT
Christopher Crighton	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Richard Wazana Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT