

Federal Court



Cour fédérale

Date: 20180321

Docket: IMM-3447-17

Citation: 2018 FC 320

Ottawa, Ontario, March 21, 2018

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

VIKTOR GASPAR

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of the decision of the Refugee Appeal Division of the Immigration and Refugee Board [RAD] dated July 7, 2017 [RAD Decision], wherein the RAD confirmed the decision of the Refugee Protection Division [RPD] dated March 10, 2016 [RPD Decision], that the Applicant is not a Convention refugee or a person in need of protection.

[2] As explained in greater detail below, this application is dismissed, because I have found no reviewable errors in the RAD's adverse credibility determinations, its assessment of prospective risk, or the absence of a state protection analysis in the RAD Decision.

II. Background

[3] The Applicant, Viktor Gaspar, is a 22 year old citizen of Hungary and a member of the Roma community. He alleges that, due to his Roma ethnicity, he could not find employment in Hungary and that, in 2015, he was physically assaulted by a police officer and threatened by strangers.

[4] Mr. Gaspar asserted a claim for refugee protection upon arriving in Canada in August 2015. The RPD rejected his claim, finding that he was not a credible witness and that he had not established that he faced a serious risk of persecution in Hungary. Mr. Gaspar brought an appeal to the RAD, which affirmed the RPD Decision in a decision dated July 8, 2016. He then brought an application for judicial review of that decision. Justice Campbell allowed the application and referred the matter back to the RAD for redetermination (see *Gaspar v Canada (Citizenship and Immigration)*, 2016 FC 1337 [*Gaspar*]). In the RAD Decision which is the subject of the present application for judicial review, the RAD again affirmed the RPD Decision and dismissed Mr. Gaspar's appeal.

[5] The RAD agreed with the RPD's findings on credibility and Mr. Gaspar's risk of persecution. It noted inconsistencies in Mr. Gaspar's testimony about when he finished high school, leading it to conclude that he had not been unemployed for 10 months before coming to

Canada as he had asserted. The RAD also did not believe Mr. Gaspar's allegations about threats being made against him, the police refusing to assist him in relation to that incident, and being assaulted by a police officer. His Port of Entry [POE] notes were silent on the alleged assault and his Basis of Claim [BOC] referred to threats being made against Roma people in his village but did not identify that he had been a specific target of the threats or that police assistance was sought but refused.

[6] Considering whether Mr. Gaspar was at risk of persecution if returned to Hungary, the RAD held that, because of the concerns detailed above, he was not a credible witness and had not established the necessary link between the country conditions applicable to Roma people in Hungary and his particular circumstances. The RAD therefore affirmed the decision of the RPD that Mr. Gaspar is not a Convention refugee or a person in need of protection.

III. Issues and Standard of Review

[7] The Applicant's arguments raise the following issues for the Court's consideration:

- A. Did the RAD unreasonably assess the Applicant's credibility?
- B. Did the RAD unreasonably assess the Applicant's prospective risk?
- C. Did the RAD unreasonably fail to assess the availability of state protection?

[8] Consistent with this articulation of the issues, the Applicant submits, and I concur, that the standard of review applicable to these issues is reasonableness.

IV. Analysis

A. *Did the RAD unreasonably assess the Applicant's credibility?*

[9] Mr. Gaspar challenges the RAD's assessments of his credibility surrounding his alleged unemployment before coming to Canada and the incidents of threats and violence he submits occurred in 2015. I will address each of these arguments below. He also asserted in his written argument that the RAD failed to address alleged errors in the RPD's findings on whether his family relied on social assistance and on his fear of refugees arriving in Hungary. I agree with the Respondent's position that these latter two issues were not raised before the RAD and that they are therefore not appropriate for the Court to consider in this application for judicial review.

(1) Unemployment

[10] As noted above, the RAD identified inconsistencies in Mr. Gaspar's testimony about when he finished high school, leading it to conclude that he had not been unemployed for 10 months before coming to Canada as he had asserted. In his written submissions to the Court, Mr. Gaspar concedes that his testimony before the RPD was confusing but argues that the RPD and RAD erred in basing their decisions on his failure to provide documentary evidence as to when he completed high school. He submits that the transcript of his RPD hearing demonstrates that he did not state he could not provide such documentation, just that he did not brought it with him.

[11] While Mr. Gaspar did not advance this particular argument before the RAD or in oral argument before the Court, I have nevertheless considered it, as the RAD Decision is based in part on its credibility finding surrounding Mr. Gaspar's assertion that he had a period of 10 months of unemployment before arriving in Canada. However, I do not find this portion of the RAD decision to be unreasonable. While the RAD's analysis includes concern about the lack of corroborative evidence establishing when Mr. Gaspar completed high school, I read the relevant finding as turning principally on the inconsistencies in his evidence. The POE notes record that Mr. Gaspar stated that he had completed high school in 2015. In his oral testimony before the RPD, however, he stated that he had completed high school in 2014. He later changed his answer to 2015. Mr. Gaspar departed for Canada in August 2015. It is therefore impossible for Mr. Gaspar to have finished school in 2015 and to have been unemployed for 10 months before coming to Canada. I find reasonable the RAD's adverse credibility determination in this regard and its conclusion that he was not unemployed for the period he said he was.

(2) Black Car Incident in 2015

[12] The RPD and RAD also did not believe Mr. Gaspar's allegations about threats having been made against him by racists driving a black car in 2015 or that the police refused to assist him at that time. The RAD reached this conclusion because these allegations were not included in Mr. Gaspar's BOC. He argues that this was unreasonable, as paragraph 6 of his BOC stated the following:

6. It happened on more than one occasion that a black car went through the village and racist words were shouted from the car. For example: "You will soon die! We will set fire on your house while you're in!" After this they threw glasses out from the car. They did this 2-3 times every week.

[13] Mr. Gaspar submits that his explanation at the RPD hearing (that he and a friend were specifically threatened by the people in the black car and his friend called the police, but the police refused to assist them) is an elaborative detail properly adduced through oral testimony which should not be treated as inconsistent with his BOC. I find no merit to this submission. The RAD considered paragraph 6 of the BOC and noted there was no reference to the threats being directed at Mr. Gaspar and his friend, nor that the police were called and refused them assistance. The RAD reasonably concluded that this omission from the BOC went directly to the heart of the claim.

[14] Mr. Gaspar also argues that it was an error for the RPD to fail to raise this BOC omission with him at the hearing. However, the hearing transcript he has provided demonstrates the RPD asking why he did not mention in his BOC that he had personal experiences with non-responsiveness from the police. His counsel then referred the RPD to paragraph 6 of the BOC. As such, I cannot conclude that Mr. Gaspar was not afforded an opportunity to address this issue, and I find that the RAD's conclusions on this issue to be reasonable.

(3) Soccer Field Incident in 2015

[15] Mr. Gaspar alleged that he was assaulted by a police officer while playing soccer with his friends in 2015. This incident was identified in the BOC but not in the POE notes. The RAD agreed with the RPD's credibility concerns surrounding this incident, as result of Mr. Gaspar failing to refer to it at the POE.

[16] In challenging this finding, Mr. Gaspar submits that there is no indication the Officer at the POE specifically asked him at that interview to detail every incident of physical persecution he had experienced or about interactions with the police. He also argues that there was no contradiction of the POE evidence, as he did refer at the POE interview to incidents of harassment including being beaten.

[17] I have considered the excerpt from the POE notes on which Mr. Gaspar relies in support of these submissions. I do not read this excerpt as even a general reference to the alleged assault by the police officer. When asked if he had any specific dealings where he felt persecuted, Mr. Gaspar replied that he was fast on his feet and managed to run away. When asked what he thought they would have done to him, he replied that the least they would have done was beat him up. This is neither a reference to an interaction with a police officer nor a reference to an actual assault. I do not find the fact that the POE officer did not specifically ask about beatings or police interactions to undermine the RAD's finding that, if he had been assaulted by a police officer because of his Roma ethnicity just prior to arrival in Canada, he would have mentioned this to the POE officer, even if he did not provide details.

[18] Finally, Mr. Gaspar challenges the RAD's finding that he had adequate time before the RPD hearing to produce evidence which would have explained this omission from the POE interview. He submits that this finding is without merit, as the BOC specifically refers to him having been hit by a police officer. I see no error in this finding, as the RAD was not stating that Mr. Gaspar failed to raise this allegation in the period between the POE interview and the RPD

interview. Rather, its conclusion related to Mr. Gaspar's failure to provide an explanation for why he did not mention the incident at the POE.

[19] In conclusion on this first issue, I find the RAD's adverse assessments of Mr. Gaspar's credibility to be reasonable.

B. *Did the RAD unreasonably assess the Applicant's prospective risk?*

[20] As noted above, in considering whether Mr. Gaspar was at risk of persecution if he returned to Hungary, the RAD held that Mr. Gaspar was not a credible witness and had not established the necessary link between the country conditions applicable to Roma people in Hungary and his particular circumstances. Mr. Gaspar submits that the RAD erred by failing to assess his prospective risk on a cumulative forward-looking basis as is required even where an applicant is found to be not credible. He refers to the following statement of this principle by Justice Elliot at paragraph 5 of *Hassan v Canada (Citizenship and Immigration)*, 2017 FC 507 [*Hassan*]:

[5] The RPD found that Ms. Hassan's testimony lacked credibility. It did not accept that she faced political persecution in Sudan, or that she personally feared that her daughters would be subject to FGM. Whether or not that finding was reasonable, the RPD was still obligated to examine whether, on the basis of the country condition evidence, the daughters faced a serious possibility of gender persecution if they were returned to Sudan. It is well-established that where a claimant has not personally experienced a form of persecution, the RPD is nonetheless obligated to examine whether a personal risk can be inferred from the experiences of similarly-situated persons: *Salibian v Canada (Minister of Employment and Immigration)*, [1990] 3 FCR 250 at paras 16-18 (FCA); *Josile v Canada (Citizenship and Immigration)*, 2011 FC 39 at para 22. [Emphasis added.]

[21] Mr. Gaspar also submits that the RAD reached its conclusions on this issue principally in reliance on the decision in *Balogh v Canada (Citizenship and Immigration)*, 2016 FC 426 [*Balogh*], to the effect that the mere fact of being of Roma ethnicity in Hungary is not, in and of itself, sufficient to establish that an applicant faces more than a mere possibility of persecution on return. He argues that *Balogh* is distinguishable, because in that case the RPD had not accepted the claimant's Roma identity.

[22] I agree with the principle as expressed in *Hassan*. In my recent decision in *Olah v. Canada (Citizenship and Immigration)*, 2017 FC 921 [*Olah*] at paras 14-17, I reviewed some of the applicable authorities, including *Balogh*, as follows:

[14] I agree with the Applicants' submission that personal targeting or past persecution is not required in order to establish a risk for purposes of s 96. Rather, persecution can be established by examining the situation of similarly situated individuals (see, e.g. *Salibian v Canada (Employment and Immigration)*, [1990] 3 FCR 250 at para 17; *Kang v Canada (Citizenship and Immigration)*, 2005 FC 1128 at para 10; *Fi v Canada (Employment and Immigration)*, 2006 FC 1125 at para 14). However, I do not regard the decision in *Balogh*, upon which the Officer relied, to be in any way inconsistent with these principles. As explained by Justice LeBlanc at paragraph 19 of that decision:

[19] Moreover, while the documentary evidence of general country conditions of Roma in Hungary raises human rights concerns, the mere fact of being of Roma ethnicity in Hungary is not, in and of itself, sufficient to establish that an applicant faces more than a mere possibility of persecution upon return (*Csonka v Canada (Citizenship and Immigration)*, 2012 FC 1056, at paras 67-70 [*Csonka*]; *Ahmad v Canada (Minister of Citizenship and Immigration)*, 2004 FC 808, at para 22 [*Ahmad*]). Both subjective fear and objective fear are components in respect of a valid claim for refugee status (*Csonka*, at para 3). The applicant has a burden of establishing a link between the general documentary evidence and the applicant's specific circumstances (*Prophète v*

Canada (Citizenship & Immigration), 2008 FC 331, at para 17; *Jarada v Canada (Minster of Citizenship and Immigration)*, 2005 FC 409, at para 28; *Ahmad*, at para 22).

[15] I read this reasoning as noting that the jurisprudence surrounding refugee claims by Hungarian Roma does not support a conclusion that the general country conditions are such that all Roma in Hungary face discrimination amounting to persecution. Rather, it is necessary to consider a particular claimant's specific circumstances, in combination with the general documentary evidence, to conclude whether that claimant faces a risk of persecution. The above statement from *Balogh* does not represent a departure from the principles surrounding s 96 upon which the Applicants rely but rather an application of those principles.

[16] As noted by the Respondent, similar reasoning is evident in the decision in *Csoka v Canada (Citizenship and Immigration)*, 2017 FC 651 [*Csoka*] at para 28, in which Justice Diner upheld a PRRA officer's analysis, considering the objective evidence as to the difficulties experienced by Roma in Hungary, but finding insufficient individualized evidence that related to the applicants' personal situation in Hungary to support a conclusion that the applicants were at risk.

[17] The Applicants argue that the necessary link between their specific circumstances and the general documentary evidence is established by the mere fact that they are Roma, which distinguishes their circumstances from those in *Balogh*. They note that, in that case, the RPD found that the applicant had not established his Roma ethnicity, which finding was not disturbed by the Court. However, this means only that the analysis in paragraph 19 of *Balogh* was an additional finding, as that analysis was clearly premised on a claimant being found to be of Roma ethnicity. I also note that there does not appear to have been any doubt as to the Roma ethnicity of the claimants who were the subject of Justice Diner's analysis in *Csoka*.

[23] I remain of the view that *Balogh* is sound law and applicable to a claim such as that presented by Mr. Gaspar. The question for the Court's consideration is whether the RAD's analysis in the present case falls short of what was required by the principles canvassed above.

The RAD acknowledged that there was information in its own documentation and in the

arguments and documents submitted as new evidence by Mr. Gaspar to indicate that there is widespread reporting of incidents of intolerance, discrimination, and persecution of Roma in Hungary. However, it held that Mr. Gaspar had not established the necessary link between his personal circumstances and the objective country conditions. Mr. Gaspar argues that this was an unreasonable conclusion because, independent of the allegations of specific past experiences that were found not to be credible, there were particular aspects of his profile that established a link with the country conditions. He notes that he is from a rural area and attended a segregated school made of mostly Roma students, which he submits links him to the objective evidence that 60% of Roma live in the countryside in rural, segregated, remote locations, in poor housing conditions and ghettos.

[24] I have considered this argument but cannot conclude it supports a finding that the RAD's analysis was unreasonable. The written submissions made by Mr. Gaspar to the RAD do not advance arguments on how such a profile, in combination with the country conditions, should lead to a conclusion that he faces more than a mere possibility of persecution. His written submissions to the RAD set out numerous extracts from the country conditions but do not draw any linkage between those documents and Mr. Gaspar's personal profile, other than the fact that he is a member of the Roma minority in Hungary. As the RAD rejected his allegations of past persecution as lacking in credibility, and as no other linkages were argued in support of his prospective risk, I find the RAD's approach to this aspect of its analysis to be within the range of possible, acceptable outcomes on the facts of this case and therefore reasonable.

[25] In reaching this conclusion, I have also considered Mr. Gaspar's arguments that the RAD failed to take into account the Reasons of Justice Campbell in *Gaspar*. Justice Campbell overturned the first decision of the RAD on the basis that the RAD identified an error in the RPD Decision but failed to correct that error. That error was the RPD's statement that it was unable to find reports in the past two years of violent attacks committed against Roma in Hungary, when there was documentary evidence speaking to the contrary. The Court found that the RAD was required either to set the RPD's decision aside or to make its own independent determination upon properly considering all the evidence of risk on the RPD record.

[26] Mr. Gaspar submits that the RAD failed to comply with the reasons and findings of the Court in *Gaspar*, as the Federal Court of Appeal confirmed in *Canada (Citizenship and Immigration) v Yansané*, 2017 FCA 48 a tribunal is obliged to do following a successful application for judicial review. He also takes the position that it was implicit in Justice Campbell's decision that he had sufficiently established a personal link to the country condition evidence to justify a prospective risk assessment. I disagree with this characterization of the decision. Justice Campbell identified a specific error in the treatment of the country condition documentation, resulting in the original RAD being set aside. However, consistent with Justice Campbell's Reasons, the RAD then performed its own independent analysis of Mr. Gaspar's risk but concluded that there was insufficient risk to warrant protection, given the absence of linkage to the country condition evidence.

[27] Mr. Gaspar also argues that the RAD Decision is unreasonable because it did not overturn the RPD's statements referring to discrimination experienced by Mr. Gaspar and yet

failed to consider whether that discrimination supported a finding that he was at risk of persecution on a forward-looking basis. Again, I find no reviewable error on the part of the RAD. The RPD Decision references discrimination but provides no explanation of those findings. The RAD conducted its own analysis as it is required to do.

C. Did the RAD unreasonably fail to assess the availability of state protection?

[28] Finally, Mr. Gaspar takes the position that the RAD erred in failing to conduct a state protection analysis. He notes that, early in the RAD Decision, it agreed to admit the country condition documents submitted by Mr. Gaspar as new evidence and stated that it would consider those documents in its analysis of state protection. However, that analysis never took place. Mr. Gaspar also relies on the decision of Justice Noël in *Martinez v Canada (Citizenship and Immigration)*, 2006 FC 343, at para 10:

[10] In my view, there are no inconsistencies between the two above passages. The issue to address in every instance where state protection is at stake is whether state protection might reasonably have been forthcoming if the refugee claimant had sought such protection. The evidence must then be weighted to decide if the presumption of state protection is rebutted on a case-by case basis. If, as mentioned in *Zhuravljev*, the state is shown to be the agent of persecution, then the effectiveness of state protection is pointless. However, a conclusion that the state, as a whole, is the agent of persecution in a given case should not be reached in an expedite manner. Where the persecutors are purely local or rogue elements of the state apparatus, an assessment of the availability of state protection should be conducted, as highlighted by Justice Snider. The question remains whether it is objectively reasonable for the claimant to seek protection, taking all relevant circumstances into consideration.

[29] This passage explains how to conduct a state protection analysis, when state protection is at issue. However, it does not stand for the proposition that a state protection analysis must be conducted in the assessment of every claim for refugee protection. As argued by the Respondent, the RAD found that no prospective risk in Hungary had been established. There was therefore no need to consider whether state protection was available to respond to a risk that had not been established (see *Mallampally v Canada (Citizenship and Immigration)*, 2012 FC 267 at para 41; *Hernandez v Canada (Citizenship and Immigration)*, 2017 FC 659 at para 14).

[30] As for the RAD saying that it would consider the newly submitted country condition documents in its analysis of state protection, I read this as the RAD explaining its acceptance of the new documents into evidence and indicating an intention to rely on them. Once it had conducted its risk analysis (which did take these documents into account), and no prospective risk was found, there was no need to conduct a state protection analysis. The RAD might have corrected its decision to remove this reference to an intention to use the documents in an analysis that ended up being unnecessary, but this does not constitute a reviewable error.

V. Conclusion

[31] Having concluded that Mr. Gaspar's arguments do not undermine the reasonableness of the RAD Decision, this application for judicial review must be dismissed. Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT IN IMM-3447-17

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

No question is certified for appeal.

“Richard F. Southcott”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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STYLE OF CAUSE: VIKTOR GASPAR V THE MINISTER OF
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