Federal Court  Cour fédérale

Date: 20180405

Docket: IMM-3939-17

Citation: 2018 FC 367

Toronto, Ontario, April 5, 2018

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

BRIGITTA LAKATOS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant, Brigitta Lakatos, seeks judicial review under section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [IRPA], of an officer's negative Pre-Removal Risk Assessment [PRRA] dated August 28, 2017 [PRRA Decision]. For the reasons that follow, I am granting her application.

I. Background

[2] Ms. Lakatos is a citizen of Hungary of Roma ethnicity. She is 26 years old. She came to Canada on September 22, 2011, with her common-law husband and infant son and claimed refugee protection. Her claim was refused by the Refugee Protection Division on December 18, 2012 [RPD Decision] on the basis of adequate state protection. Leave to judicially review the RPD Decision was dismissed by the Federal Court.

[3] Ms. Lakatos did not appear for her pre-removal interview. She was arrested in June 2017, and detained at the Immigration Holding Centre. She subsequently filed a PRRA application, including written submissions, a sworn affidavit, a medical report, and country condition documents post-dating the RPD Decision. Ms. Lakatos cited experiences of physical violence and harassment as well as discrimination in school and healthcare, and submitted that she would face persecution and risk to her life upon return to Hungary.

[4] In her affidavit sworn in support of her PRRA, Ms. Lakatos referenced two incidents of physical violence she experienced in Hungary, the credibility of which were not impugned by the reviewing officer [Officer].

[5] First, as an infant, a Molotov cocktail was thrown into Ms. Lakatos' home, causing her crib to catch fire. As a result, Ms. Lakatos suffered severe burns, and sustained injuries visible until today. She lost all her toes, which resulted in a walking impairment that requires orthopedic shoes. Ms. Lakatos underwent numerous operations in Hungary, where she received treatment in

a segregated ward for Roma. She deposed in her PRRA that while the police were called, no police report was filed because her parents could not describe the assailant. She further deposed that her father was told by police at that time that he was lucky not to have been charged himself for negligent caregiving.

[6] Second, Ms. Lakatos deposed that, during her adolescence, she was pushed by a skinhead, breaking a finger. She went to the police, but was told that a report could not be filed against an unknown person.

[7] In the PRRA Decision, the Officer excerpted parts of the RPD Decision which summarized Ms. Lakatos' testimony during the RPD hearing, and noted that the RPD had accepted Ms. Lakatos' evidence and had not impugned her credibility. These excerpts detailed that, after becoming pregnant in 2010, Ms. Lakatos was assaulted by the Hungarian Guard, but did not seek medical or police assistance because the Hungarian Guard had threatened to kill her father if the police were notified. She also testified that she attempted to commit suicide around 2006, due to the humiliation she had endured.

[8] The Officer accepted Ms. Lakatos' personal narrative, but determined that she had not demonstrated that she had suffered persecution in the past, and that state protection in Hungary was adequate.

[9] Ms. Lakatos' removal to Hungary was then scheduled for October 2, 2017, but she was granted a stay of removal by this Court, pending the final determination of this application.

II. Issues and Standard of Review

[10] Ms. Lakatos argues two issues in this judicial review.

[11] First, she submits that the Officer's conclusions regarding persecution were unreasonable. She argues that although the Officer accepted her past experiences of physical violence, those experiences formed no part of the ultimate analysis, which instead focused only on discrimination against Roma in education and healthcare. She further argues that the Officer failed to consider forward-facing risk based on her complete profile and the cumulative effects of discrimination she experienced.

[12] Second, Ms. Lakatos argues that the Officer applied the wrong test for state protection by focusing only on Hungary's efforts to improve state protection, and failing to engage with the operational adequacy of those efforts. She also argues that the Officer's conclusions with respect to state protection were, in any event, unreasonable and not supported by the record.

[13] PRRA decisions are generally reviewable on the reasonableness standard, meaning that they must be justified, transparent, and intelligible, falling within the range of outcomes defensible in fact and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). This includes any state protection analysis (*Canada (Citizenship and Immigration) v Neubauer*, 2015 FC 260 at para 11 [*Neubauer*]); however, if an officer has applied the wrong state protection test, the correctness standard applies (*Neubauer* at para 10; *Martinez v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 23 at para 13 [*Martinez*]).

III. Analysis

A. *Persecution*

[14] In the PRRA Decision, the Officer found that Ms. Lakatos' past experiences did not amount to persecution and that Ms. Lakatos would not face a possibility of persecution going forward. The Officer further found that a cumulative analysis of the prior incidents was unnecessary where state protection was available for the discriminatory acts at issue.

[15] I agree with Ms. Lakatos: it is problematic that her experiences of racially-motivated violence and harassment were not considered by the Officer except in relation to state protection (see *Bledy v Canada (Citizenship and Immigration)*, 2011 FC 210 at para 35 [*Bledy*]).

[16] However, where the risk to the claimant has been properly characterized, a finding of adequate state protection against that risk disposes of the refugee claim (see *Gebre-Hiwet v Canada (Citizenship and Immigration)*, 2010 FC 482 at paras 15-18; *Poczkodi v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 956 at para 33 [*Poczkodi*])).

[17] Therefore, the determinative issue before me is that of adequate state protection.

B. *State Protection*

[18] Under section 96 of IRPA, a refugee claimant must establish a well-founded, subjective fear of persecution. In *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 (SCC) at 712

[*Ward*], the Supreme Court of Canada held that adequate state protection speaks to whether a claimant's subjective fear is objectively well-founded. Subsequent cases have confirmed that a finding of adequate state protection is also fatal to claims under section 97 (see *Samuel v Canada (Citizenship and Immigration*, 2012 FC 973 at para 40). Therefore, a finding of adequate state protection precludes refugee protection status (*Canada (Citizenship and Immigration) v Foster*, 2016 FC 130 at para 25; *Neubauer* at para 23).

[19] There is a presumption that state protection is available in a claimant's country of origin (*Ward* at 724-725), particularly where that state is democratic (*Sow v Canada (Citizenship and Immigration)*, 2011 FC 646 at paras 9-10 [*Sow*]). However, not all democracies are equal. Rather, they exist across a spectrum, and what is required to rebut the presumption of state protection varies with nature of the democracy in the state (*Bozik v Canada (Citizenship and Immigration)*, 2017 FC 961 at paras 28-29 [*Bozik*]; *Sow* at 10-11). In other words, a nation's status as a democracy does not lead inexorably to an ability to protect its citizens (for an excellent synopsis of the law summarizing this and related points, see Justice Grammond's recent decision in *AB v Canada (Citizenship and Immigration)*, 2018 FC 237 at para 22 [*AB*]).

[20] A refugee claimant has the burden of rebutting the presumption of adequate state protection with clear and convincing evidence (*Ward* at 724). This imposes both an evidentiary and a legal burden: the claimant must adduce evidence, and must convince the decision-maker, on a balance of probabilities, that state protection is inadequate (*The Minister of Citizenship and Immigration v Flores Carrillo*, 2008 FCA 94 at paras 17-19, 21). To meet this burden, a refugee claimant will typically have to demonstrate a seeking out, but denial of state protection. This is

not a legal requirement. Rather, it goes to whether the claimant has met their evidentiary onus (*Orsos v Canada (Citizenship and Immigration)*, 2015 FC 248 at para 18).

[21] In considering whether state protection is adequate, a decision-maker must focus on actual, operational adequacy, rather than a state's "efforts" to protect its citizens (*Lakatos v Canada (Citizenship and Immigration)*, 2018 FC 20 at para 12 [*Lakatos*]). Efforts must have actually translated into adequate protection at the present time (see *Hercegi v Canada (Citizenship and Immigration)*, 2012 FC 250 at para 5). In other words, lip service does not suffice. The protection must be real, and it must be adequate.

[22] One may wonder why state protection assessments differ with respect to a common ethnicity and nationality. The reason is that the analysis is a highly contextual one that depends on the claimant's personal circumstances. In some cases, for instance, a claimant may have an objectively reasonably fear of testing state protection given factors such as their age, background, and experiences, including prior responses to incidents (*Aurelien v Canada (Citizenship and Immigration)*, 2013 FC 707 at para 13). It may also be objectively reasonable for a claimant to take only limited steps to test state protection, depending on the state's ability and willingness to provide same (see *Poczkodi* at para 40; *Bozik* at paras 29-30). Equally, while a country may provide adequate state protection generally, it may be lacking in its responses to specific human rights issues or actors (*Gonzalez Torres v Canada (Citizenship and Immigration)*, 2010 FC 234 at paras 38-39).

[23] As a result, this Court has repeatedly held that whether a state protection analysis will withstand scrutiny on judicial review is case-specific, and depends on how the decision-maker conducted its analysis in light of the evidence tendered with respect to the claimant's particular circumstances (see *Poczkodi* at para 42; *Olah v Canada (Citizenship and Immigration)*, 2016 FC 316 at paras 35, 37). Indeed, a common thread that binds Hungarian Roma cases is that the analysis of state protection is highly individualized, where an applicant's experiences must be assessed against the backdrop of any recourse taken.

[24] In the PRRA Decision under review, the Officer found that the evidence showed that "the Hungarian police force is disproportionately harsh against the Roma population" and "did not competently investigate hate crimes". The Officer then found that:

- The Hungarian justice system had recognized that police practices against Roma citizens were unlawful;
- Hungary was making "serious efforts" to recruit more Roma into the police force and hire liaison officers;
- Hungary was taking the issue of police discrimination "seriously", "enacting laws against it", and making "serious efforts to combat discrimination in the police force";
- Hungary was in effective control of its territory, with military, police, and civil authority in place, and making "serious efforts" to protect its citizens, including Roma;
- Although police discrimination "remain[ed] a problem in Hungary", the state was making "serious, real, and consistent efforts to cease this discrimination" by

"recruiting Roma police officers, taking the issue to the highest courts, and employing community liaison officers to assist Roma people in dealing with the police"; and

- The state was "making serious efforts" to reduce discrimination against Roma with respect to education, healthcare, and housing.

[25] The Officer concluded that the "implementation and application of a number of laws and initiatives by the state" had "ensured" that individuals who shared Ms. Lakatos' profile would not face a serious possibility of persecution.

[26] It is not necessarily a reviewable error for a decision-maker to reference a state's efforts in improving protections for its citizens. What matters is whether the decision-maker is aware of the distinction between efforts and operational adequacy (*Poczkodi* at para 45; *Galamb v Canada (Citizenship and Immigration)*, 2016 FC 1230 at paras 33-34). Here, the Officer relied on Hungary's various efforts and initiatives to conclude that state protection was adequate. That is not the test (*AB* at para 17; *Lakatos* at paras 15-16; *Mata v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 1007 at para 14 [*Mata*]; *Dawidowicz v Canada (Citizenship and Immigration)*, 2014 FC 115 at para 30).

[27] Further, I agree with Ms. Lakatos that the Officer's state protection analysis was, in any event, unreasonable, because it considered only governmental aspirations and not the operational effectiveness of those efforts (see *Mezei v Canada (Citizenship and Immigration)*, 2016 FC 1025 at para 9; *Ruszo v Canada (Citizenship and Immigration)*, 2013 FC 1004 at paras 26-27 [*Ruszo*]).

[28] The Officer concluded that Hungary's efforts had "ensured" that Roma citizens would not be subject to persecution, despite also finding that the Hungarian police were disproportionately harsh against Roma and did not competently investigate hate crimes, even following the implementation of a special task force for that purpose. The Officer also concluded that the "state" was "taking the issue to the highest courts", based on a case brought by the Hungarian Civil Liberties Union to a lower court in Eger in 2015, which ruled that the police had failed to protect Roma from extremist groups during marches in Gyongyospata in 2011.

[29] I agree with Ms. Lakatos that the evidence cited showing only a prevalence of "serious efforts" does not support the Officer's broad conclusion that the "implementation and application of a number of laws and initiatives by the state" had "ensured" that individuals who shared Ms. Lakatos' profile would not face a serious possibility of persecution. Equally, in arriving at this conclusion, the Officer did not address the evidence tending against it (see *Bledy* at paras 48-49).

[30] However, as I explain below, a finding that the Officer's state protection analysis referred only to state efforts does not necessarily end the matter.

C. *Efforts to test state protection*

[31] In *Ruszo,* the Chief Justice agreed with the applicants that the RPD had erred in its assessment of state protection by focusing unduly on state efforts and by failing to assess whether those efforts actually provided adequate protection at the operational level to people of Roma ethnicity in Hungary (at para 27). But this error in *Ruszo* was not fatal to the RPD's

decision, because the RPD had reasonably concluded on other grounds that the applicants had not rebutted the presumption of adequate state protection (at para 28): the applicants were found to have not taken all objectively reasonable steps to avail themselves of Hungary's protection, because they had not done more than make a single attempt to seek protection from the police.

[32] In the PRRA Decision under review, the Officer likewise found that Ms. Lakatos had a "duty to seek state protection before soliciting international protection", and that she was required to "do more than simply show that [she] went to see some members of the police force and that her efforts were unsuccessful". Therefore, at the hearing of this application, I asked the parties to address *Ruszo*'s implications for this case.

[33] The Respondent relies on *Poczkodi*, in which Justice Kane echoed *Ruszo* on the point that a claimant's belief that state protection will not be forthcoming does not, on its own, rebut the presumption of adequate state protection (at para 41). Justice Kane went on to hold that the Refugee Appeal Division [RAD] had reasonably concluded that the applicant and his family had failed to take reasonable steps in their circumstances to seek protection from the police and oversight agencies (at para 48).

[34] However, I agree with Ms. Lakatos that *Poczkodi* is distinguishable on its facts from her case. In *Poczkodi*, the family was found to have been not credible in their reports to the police, and those credibility findings were not challenged before the RAD.

[35] Moreover, as Justice Kane recognized in *Poczkodi*, a decision-maker's conclusions on state protection should be considered in light of the applicant's circumstances. In *Ruszo*, for instance, the Chief Justice identified that an applicant may rely on a subjective perception that it is a waste of time to address local police failures where he or she has unsuccessfully sought police protection on multiple occasions (at para 51). More recently, in *Bozik*, Justice Mactavish set aside a PRRA decision where the officer found that the applicants had not exhausted all avenues of assistance open to them, but also failed to address country condition information on the unwillingness of the Hungarian police to assist Roma citizens (at para 31). Similarly, in *Mata*, Justice McDonald found that the PRRA officer had failed to analyze the evidence that the applicant and her family had sought state protection several times (at paras 16-17).

[36] On the particular facts of this case, I am satisfied that the Officer committed the following reviewable error: the Officer accepted Ms. Lakatos' narrative (including the various injuries that she had sustained during attacks against her and subsequent reception by the police), and made findings that the Hungarian police were "harsh" and did not competently investigate hate crimes. However, the Officer then unreasonably failed to analyze whether Ms. Lakatos' efforts to test state protection met the evidentiary burden in her circumstances, in light of the evidence accepted.

IV. Conclusion

[37] The PRRA Decision will be set aside and remitted for reconsideration by a different officer. No questions for certification were argued, and I agree that none arise.

JUDGMENT in IMM-3939-17

THIS COURT'S JUDGMENT is that

1. This judicial review is allowed.

2. The decision is set aside, and the matter remitted for redetermination by a different officer.

3. No questions are certified.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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