Federal Court Cour fédérale

Date: 20181003

Docket: IMM-1198-18

Citation: 2018 FC 987

Ottawa, Ontario, October 3, 2018

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

ISTVAN GYORGY BAN
ANGELA BALOGH-SZABO
GABRIELLA MARIA GABOR
ISTVAN BAN

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicants, Istvan Gyorgy Ban, his common law spouse Angela Balogh-Szabo, his mother Gabriella Maria Gabor and his father Istvan Ban, are citizens of Hungary. Upon arrival in

Canada, they initiated a claim for protection as they feared violence from right-wing groups and faced severe discrimination amounting to persecution in Hungary due to their Roma ethnicity.

[2] The claims were heard jointly in January 2018. In a decision dated February 21, 2018, the Refugee Protection Division [RPD or panel] found the applicants were neither Convention refugees nor persons in need of protection. They seek judicial review of that decision pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[3] The application raises a number of issues, but I need only address whether the RPD erred (1) by failing to consider reported instances of discrimination and violence cumulatively, and (2) by ignoring relevant, contradictory evidence in conducting the state protection analysis.

[4] I am of the opinion that the RPD erred in both respects. There is an absence of analysis in respect of the cumulative impact of the reported incidents of discrimination. The panel also failed to engage with evidence put before it by the applicants — evidence that is directly contradictory to the state protection finding. For these reasons, which are set out in greater detail below, I conclude the Court's intervention is warranted and find the decision unreasonable. The application is granted.

II. Style of Cause

[5] The applicants have named the Minister of Immigration, Refugees and Citizenship Canada as the respondent in this matter. The correct respondent is the Minister of Citizenship and Immigration (*Federal Courts Citizenship, Immigration and Refugee Protection Rules*,

SOR/93-22, s 5(2) and *Immigration and Refugee Protection Act*, SC 2001, c 27, s 4(1)). Accordingly, the respondent in the style of cause is amended to the Minister of Citizenship and Immigration.

III. Background

[6] Istvan Gyorgy and his common law spouse Angela came to Canada in February 2012. In seeking protection, they asserted that due to their Roma ethnicity, they fear violence by skinheads and would face severe discrimination amounting to persecution in Hungary. They report that they were attacked by skinheads while attending a wedding in December 2011 and that police were called. Reportedly, the Guardists, a paramilitary group, responded and told them not to contact the police as nobody would help them. They also report they were bullied in school and were unable to work in their fields of study due to their ethnicity.

[7] Istvan Gyorgy's parents, Mr. Ban and Ms. Gabor, arrived in Canada in April 2012 and also initiated a claim for protection. In addition to the wedding incident, they report that in early 2012, skinheads surrounded their car and shouted slurs at them, kicked the car, and jumped on the hood. They claim that in responding to this attack, the police behaved in a friendly manner with the attackers and that they never received a police report. Ms. Gabor also claims she was refused post-secondary education and denied work opportunities due to her ethnicity. Further, she claims she was forcibly sterilized when, during an operation to remove ovarian cysts, her ovarian tubes were removed without her consent.

IV. Decision under Review

[8] The RPD set out the allegations in support of the claim of persecution and noted that the determinative issue was state protection. The RPD then undertook an analysis of each of the reported incidents of discrimination and persecution in the areas of education, employment, and medical care.

[9] The panel acknowledged that Roma in Hungary often face barriers in completing their education due to bullying and discrimination. The RPD found that discrimination in the area of education had been experienced but concluded that this discrimination did not amount to persecution. It further found that in respect of educational opportunities, the documentary evidence reflected discrimination against the Roma generally, but discrimination was not borne out in the specific circumstances of Istvan Gyorgy and Angela, who had completed post-secondary studies in their chosen fields.

[10] Turning to employment, the panel noted that Istvan Gyorgy and Angela did not work in their chosen fields, which they alleged was due to their Roma ethnicity. The RPD accepted that all the applicants had experienced discrimination in the workplace but again found that this discrimination did not constitute persecution. The RPD noted that there were other factors that could explain the inability to find work in specific fields including age and work experience.

[11] In addressing Ms. Gabor's assertion that she had been subject to forced sterilization, the RPD accepted that in the course of surgery to remove cysts, her ovarian tubes were also removed

without her consent. However, the RPD found the evidence did not clearly indicate what exactly led to the removal of the ovarian tubes and that the Hungarian medical report was of little probative value as the recording medical official could not be questioned. The RPD was unwilling to speculate about the reasons for removing the ovarian tubes and did not accept that the surgery amounted to forced sterilization due to Ms. Gabor's Roma ethnicity.

[12] The panel accepted that Roma are discriminated against in Hungary, that the line between discrimination and persecution can be difficult to establish, and that the mere fact of being Roma in Hungary is not sufficient to establish more than a mere possibility of persecution. The RPD concluded the applicants had not shown they faced discrimination amounting to persecution or a forward-looking risk of persecution simply by being Roma.

[13] The RPD then turned to the issue of state protection, noting that it had reviewed all the evidence on the issue.

[14] It noted the onus is on the claimant to approach the state for protection if such protection is reasonably forthcoming and found the applicants had not rebutted the presumption of state protection. A claimant must produce "clear and convincing evidence" to rebut the presumption, and the burden of proof is directly proportional to the state's level of democracy. Local failures to protect citizens do not mean the state as a whole fails to protect its citizens, unless there is a broader pattern. State protection need not be perfect.

[15] The RPD found that the claimants had failed to establish that state protection would be unavailable. The RPD noted that Hungary is a functioning democracy, that Roma have recourse to seek remedies against discrimination and protection against physical abuse, and that there were no current reports of right-wing or nationalist marches or gatherings in Hungary targeting, harassing, or threatening the Roma. The RPD found the applicants had failed to establish a lack of state protection as they did not contact or pursue matters with police in response to the reported incidents of violence.

[16] The panel concluded that while the situation in Hungary is not perfect, the claimants would have access to operationally adequate state protection and remedies.

V. Standard of Review

[17] The application engages questions of mixed fact and law that are to be assessed against a standard of reasonableness (*Sanchez v Canada (Minister Citizenship and Immigration)*, 2007 FCA 99 at paras 9–10).

VI. Analysis

A. *Was the RPD's persecution analysis flawed?*

[18] The applicants identified various incidents of discrimination and violence that they submit cumulatively amount to persecution. The applicants acknowledge that the RPD individually considered each of the incidents of alleged discrimination in conducting its persecution analysis. However, they submit the RPD's analysis was flawed as the panel failed to

(1) recognize that even a single incident of violence may be sufficient to establish persecution; (2) consider the alleged violent attack on Mr. Ban and Ms. Gabor; and (3) engage in any analysis or explain its conclusion that life-long discrimination in the areas of employment, education, and public life coupled with discrete incidents of physical violence did not, in the aggregate, amount to persecution.

(1) Did the RPD fail to recognize that even a single incident of violence may be sufficient to establish persecution?

[19] To recognize a claimant as a Convention refugee, the evidence must establish a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group, or political opinion. A claimant must demonstrate, on a balance of probabilities, a subjective fear of persecution that is well-founded in an objective sense. In order to satisfy the objective component of the test, a claimant need not establish that persecution would be more likely than not, but rather that there is more than a "mere possibility" of persecution based on an assessment of the objective circumstances disclosed by the evidence (*Chan v Canada (Minister of Employment and Immigration)*, [1995] 3 SCR 593 at paras 119, 120, and 134 [*Chan*]). Mistreatment will rise to the level of persecution where it is serious and repetitive or systematic (*Maksoudian v Canada (Citizenship and Immigration)*, 2009 FC 285 at paras 12–14 citing *Chan* at para 69 and *Rajudeen v Canada (Minister of Employment and Immigration)* (1984), 55 NR 129 (FCA) at para 14).

[20] The applicants argue, relying on *Chan* and *Porto v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 881 (QL), that the two reported incidents of raced-based violence are themselves sufficient to establish persecution. I disagree.

[21] Incidents of violence that are particularly egregious may well be given significant weight when considering whether a fear of persecution is well-founded in the objective sense. However, this is not the same as concluding that an act of violence, without more, establishes persecution or that incidents of violence should be considered apart from reported instances of discrimination. I am unable to read the jurisprudence the applicants rely on in a manner that supports the position advanced.

(2) Did the RPD fail to engage in an analysis of the cumulative effect of the reported incidents of discrimination and violence?

[22] The respondent argues that the RPD's reasons demonstrate the incidents of violence were considered and the cumulative impact of the reported incidents was assessed. The respondent submits that the applicants' disagreement with the panel's assessment does not warrant judicial intervention.

[23] I concur with the respondent's submission to the effect that mere disagreement is not a basis upon which a reviewing court should intervene. However, where the RPD fails to address an incident supporting a claim of persecution in the course of its analysis and comes to a simple conclusion that the cumulative effect of individual incidents of discrimination and violence do

not amount to persecution, the RPD opens the door to a reviewing court's intervention. That is what has occurred here.

[24] In its decision, the RPD addressed each instance of mistreatment separately. The RPD accepted the incidents occurred and concluded each incident of mistreatment, while discriminatory, did not rise to the level of persecution.

[25] There were two exceptions. First, the RPD did not find that Ms. Gabor's sterilization was discriminatory on the basis that the evidence was simply insufficient to demonstrate the procedure was not medically necessary. After reviewing the record and the panel's decision, I am satisfied that this conclusion was reasonably open to the RPD.

[26] The second exception was the incident of violence involving Mr. Ban and Ms. Gabor where skinheads surrounded their car and shouted slurs at them, kicked the car, and jumped on the hood. This incident was identified in the panel's summary of the allegations of persecution and was addressed in the course of the RPD's state protection analysis. Although the RPD was clearly aware of this alleged incident of violence, it is simply not addressed as part of the persecution analysis.

[27] It is well-established that the RPD is required to consider the cumulative effect of reported incidents of mistreatment that do not individually amount to persecution (*Canada (Minister of Citizenship and Immigration) v Munderere et al*, 2008 FCA 84 at para 42). There is no doubt the RPD was aware of this obligation, having reached the conclusion that "[w]hen

considered individually or cumulatively in the particular circumstances of these claimants, the panel finds these claimants' experiences do not rise to the level of persecution."

[28] As was the case in *Bledy v Canada (Citizenship and Immigration)*, 2011 FC 210, the RPD's cumulative risk conclusion in this case was reached after a sequential consideration of the reported incidents of mistreatment. The RPD does not engage in any real analysis relating to the cumulative impact of discrimination and, as noted above, omitted from its sequential consideration of incidents one of the more serious reports of violence linked to ethnicity.

[29] The RPD should not be held to a standard of perfection. However, in the absence of some analysis supporting the RPD's conclusion and in light of the RPD's failure to consider all the allegations of mistreatment, I agree with the applicants. The decision leaves the reader to wonder why the various incidents did not collectively amount to persecution. I conclude that the RPD's persecution analysis was flawed and the errors made warrant the Court's intervention.

(3) Did the RPD err by ignoring relevant, contradictory evidence in conducting the state protection analysis?

[30] Prior to the hearing, the RPD disclosed additional documentation to the applicants and sought their input. The applicants describe the documents as supportive "of state protection efforts in Hungary." In response, the applicants placed evidence before the panel that reflected the ineffectiveness of state protection mechanisms. The applicants submit that none of this evidence was referred to by the RPD, nor did it explain why the positive evidence in respect of the question of state protection outweighed evidence to the contrary.

[31] The respondent argues that the RPD understood the law of state protection, applied the correct test, and considered the mixed evidence. The panel did not need to mention every piece of evidence it considered; it was sufficient to state it reviewed the applicants' documents and submissions. I am not persuaded.

[32] It was open to the RPD to conclude, as it did, that state protection was adequate. In doing so, it was under no obligation to address each and every piece of mixed evidence on the record. However, as stated in the oft-cited case of *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35, a decision-maker's failure to mention and analyze evidence that directly contradicts a finding or conclusion makes it easier for a reviewing court to infer that findings were made without regard to the evidence. This principle is perhaps even more pertinent where the non-addressed yet directly relevant contradictory evidence has been furnished by an applicant at the request of the decision-maker and, as was done here, is highlighted in written submissions.

[33] The contradictory evidence in this case calls the following into question: (1) the meaning and effect of a 2017 decision of the Hungarian Supreme Court [the Curia]; (2) the panel's finding that there is an absence of current reports of right-wing nationalist activity targeting, harassing, and threatening the Roma; (3) the effectiveness of the European Union's oversight of the treatment of minorities in Hungary; and (4) the effectiveness of alternative avenues of recourse in response to mistreatment available to Roma in Hungary. All of this evidence was highly relevant to the state protection analysis. The RPD's failure to address this evidence and the

submissions made in light of this evidence was a reviewable error. I am left to infer that the state protection decision was made without regard to the material before the panel.

VII. Conclusion

[34] The application is granted. The parties have not proposed a question of general importance and none arises.

JUDGMENT IN IMM-1198-18

THIS COURT'S JUDGMENT is that:

1. The application is granted;
2. The matter is returned for redetermination by a different decision-maker; and
3. No question is certified.
4. The respondent in the style of cause is amended to the Minister of Citizenship and Immigration.

"Patrick Gleeson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1198-18
STYLE OF CAUSE:	ISTVAN GYORGY BAN, ANGELA BALOGH-SZABO, GABRIELLA MARIA GABOR, ISTVAN BAN v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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