Federal Court  Cour fédérale

Date: 20190412

Docket: IMM-2754-18

Citation: 2019 FC 455

Toronto, Ontario, April 12, 2019

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

JULIANNA SOOS
HENRIETT BALOGH
FERENC BALOGH
ROLAND BALOGH
DANIEL BALOGH

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision by the Refugee Protection Division rejecting the Applicants' claim which is based on the Principal Applicant's fear of persecution

from her ex-spouse, and her children's fear of persecution due to their Roma ethnicity. Due to unreasonable errors in the decision, the matter will be sent back for redetermination.

II. Background

[2] The Principal Applicant and her four children [collectively, the Applicants] are citizens of Hungary. In 2012, the Principal Applicant, her common-law spouse and their four children left Hungary claiming refugee protection in Canada because of problems arising from her common-law spouse's and children's Roma ethnicity in the village where they lived.

[3] In 2013, the Principal Applicant left her spouse after suffering years of physical and emotional abuse both in Canada and previously in Hungary. In Hungary, she had sought assistance from the police, who told her they could not intervene as it was a domestic matter. She sought refuge with her children in a shelter, but her husband found her and brought her back home.

[4] The family made their refugee claim, and later, the Principal Applicant left her ex-spouse. Then, she disjoined his refugee claim and reported him to the police. He was charged and convicted of assault. He threatened to take revenge if she ever returned to Hungary.

[5] In May 2018, the Refugee Protection Division [Board] rejected the Applicants' claim for refugee protection, finding that they were neither Convention refugees nor persons in need of protection as per sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[6] The Board found the determinative issue to be state protection. First, regarding treatment of the Roma community, it noted that the documentary evidence was mixed. However, because the Principal Applicant was not ethnically Roma and her children, "only half Roma" and not "visibly different from other Hungarians", the Board found that they would likely not experience discrimination upon their return to Hungary. It noted that while the transition might be challenging, there was insufficient evidence to show that the Hungarian authorities would not assist them, or that they would be forced to live in a Roma community.

[7] Regarding domestic violence, the Board highlighted that the Principal Applicant's fear of being attacked by her ex-spouse in Hungary was based almost entirely on her experience in Canada. It considered the Principal Applicant's past experience with the Hungarian police and the documentary evidence. The Board ultimately found that her fear was "speculative and therefore not adequately well-founded" because the ex-spouse is in Canada claiming refugee status, and there is a "strong possibility that [he] would remain in Canada without status even if his claim was rejected". It further noted that there was insufficient evidence indicating that he would return to Hungary to pursue her.

III. Issues and Standard of Review

[8] The sole issue is the reasonableness of the Board's state protection analysis and its "only half Roma" findings pertaining to the minor Applicants. State protection findings are reviewed under the reasonableness standard (*Ruszo v Canada (Citizenship and Immigration)*, 2018 FC 943 at para 16).

IV. Parties' Submissions and Analysis

1. Was the state protection analysis reasonable?

[9] The Applicants submit that the Board erred by finding the Applicants' fear to be speculative, when the decision itself rests on the Board's own speculation that the husband would remain in Canada without status even if his claim was rejected, despite having found the Applicants' testimonies credible.

[10] The Applicants also submit that because refugee claims are forward-looking, by rendering the decision "regardless of future possibilities", the Board applied the wrong standard. Indeed, whether the ex-spouse's refugee claim is accepted or not, the Applicants contend that it is more likely than not that he would return to Hungary and would be able to harm the Principal Applicant.

[11] The Respondent counters that the Applicants failed to rebut the presumption of state protection, because the Board reasonably found that the Principal Applicant did not fit the profile of a Roma victim of domestic violence, and any fear of being attacked was speculative, given that her situation differed from that of most Roma and Hungarian women.

[12] I agree with the Applicants that is unclear how the Board came to the conclusion that the ex-spouse would not likely return to Hungary, given his past conduct, and the credible evidence of his violence and history of physical, mental and emotional abuse. This Court has held that it is unreasonable for the Board to speculate, without any basis, "as to the agents of persecution's

motives, means and future intentions" (*Builes v Canada (Citizenship and Immigration)*, 2016 FC 215 at para 17).

[13] What someone will do in the future is by definition speculative. Certainly, the Board is entitled to make reasoned inferences based on the evidence before it. In *Ifeanyi v Canada (Citizenship and Immigration)*, 2018 FC 419, Justice Gascon provided as follows:

> [32] […] Speculation is not to be confused with inference. It is acceptable for a decision-maker to draw logical inferences based on clear and non-speculative evidence (*Laurentian Pilotage Authority v Corporation des pilotes du Saint-Laurent central inc*, 2015 FCA 295 at para 13). In the same vein, it is well-accepted that a decision-maker can rely on logic and common sense to make inferences from known facts. The RAD cannot engage in speculation and render conjectural conclusions. However, a reasoned inference is not speculation (*Bhatia v Canada (Citizenship and Immigration)*, 2017 FC 1000 at para 38).

[14] Logical, reasoned inferences should thus be based on clear and non-speculative evidence.

[15] In its decision, the Board found that the ex-spouse would not return to Hungary because of his pending refugee claim. However, the evidence on the record was that (a) the Principal Applicant's ex-spouse had carried out with his threats which manifested into domestic violence, and (b) resulted in a criminal conviction of assault in Canada. Her fear, at least in Canada, proved not to be speculative, as he had threatened to pursue her were she to return to Hungary.

[16] I am not persuaded that the Board made a reasoned inference. Rather, it engaged in speculation, as there is no evidentiary support for the Board's conclusion that "there is a strong possibility that the husband would remain in Canada without status even if his claim was

rejected" and it failed to state why it was not persuaded by the Principal Applicant's testimony, objective evidence from the criminal court, and psychological reports – all of which address the real possibility that the ex-spouse would return to Hungary.

[17] In fact, regarding the forward-looking risk, the Board relied on documentary evidence about victims of domestic violence in Hungary to conclude that the Principal Applicant would not be at risk because she is not Roma. However, the documentary evidence not only outlined the risk that Roma victims of domestic abuse face, but also discussed the risk to non-Roma women (see Human Rights Watch, *Unless Blood Flows: Lack of Protection from Domestic Violence in Hungary*, November 2013, Application Record at 162).

[18] Moreover, the Board made an unreasonable inference in finding that the Principal Applicant "would be viewed differently" in Hungary because she has "legal documents from Canada highlighting the husband's criminal charges". Here, the Board made two errors. First, it incorrectly characterized the ex-spouse's assault conviction as "charges". Second, it failed to cite evidence to support its finding that the Principal Applicant would benefit from different, or greater protection by presenting Hungarian police with Canadian "legal documents", as the Board described them. These were not reasonable inferences drawn from established facts.

[19] In my view, the Principal Applicant tendered sufficient evidence and a non-speculative basis to support her fears of domestic abuse: she feared domestic abuse, was abused, and her ex-spouse was convicted of assault. While her inference was reasoned, the Board's inference

was speculative, and disregarded the pattern of violence presented in the evidence. Therefore, this was not a reasonable inference to draw from the facts presented to the Board.

[20] This first ground is fatal, and enough to send the matter back without more. However, the second ground raised by the Applicants is also problematic, and worthy of review.

2. Were the "only half Roma" findings reasonable?

[21] The Applicants argue that in rejecting the children's claim on the basis that they are "only half Roma", the Board at best relied on an irrelevant factor and, at worst failed to understand the nature of ethnic persecution. They argue that throughout history, people have been persecuted for their racial or ethnic identity even if they are just part of that ethnicity. The Applicants argue that the finding was even more egregious because the Board neither raised the issue at the hearing, nor pointed to any documentation suggesting that "half Roma" are safe from abuse.

[22] The Respondent counters that jurisprudence supports the Board's finding that the children had not made out their claim based on ethnicity, considering their background (*Glassl v Canada (Citizenship and Immigration)*, 2018 FC 176; *Zdraviak v Canada (Citizenship and Immigration)*, 2017 FC 305). The onus is on the Applicants to establish that their appearance would identify them as Roma (*Somyk v Canada (Citizenship and Immigration)*, 2016 FC 1338). The Respondent contends that the Board reasonably found that the Applicants did not face a serious possibility of persecution in Hungary based on their ethnicity.

[23] Once again, I agree with the Applicants. In addition, the three cases on which the Respondent relies all differ in that the applicants had not substantiated any affiliation with the Roma ethnicity (*Glassl* at paras 9 and 20; *Zdraviak* at paras 15–19; and *Somyk* at paras 5, 32-33). Here, by contrast, the Board accepted that the three children were half Roma due to their father's ethnicity.

[24] The Board failed to point to evidence that the children will not face persecution due to the fact that they are "only half Roma", and to support its finding that the children were not "visibly different from other Hungarians". The Board did not impugn any of the children's testimony for credibility. Their testimony was that they were clearly identified as Roma in Hungary, and suffered for it. They also testified that they self-identified as, and were identified by others as Roma, due to their dress, cultural indicators, and appearance.

[25] Finally, I note that implicit to the Board's finding is an expectation that the children hide their ethnic identity. It is trite law that the Board cannot expect failed refugee claimants to return to their respective countries and hide or repress an innate characteristic, or fundamental part of their identity, to avoid persecution (*Akpojiyovwi v Canada (Citizenship and Immigration)*, 2018 FC 745 at para 9).

V. Conclusion

[26] Given the Board's unreasonable (i) speculation regarding the prospect of future harm from the agent of persecution, and (ii) findings on ethnic affiliation relating to the children, the claim will be returned to the Board for redetermination by a different member.

VI. Costs

[27] The Applicants argue that because they waited five and a half years for their claim to be decided, and its decision is characterized by bad faith, there are special reasons for granting costs under Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22.

[28] I agree with the Respondent that these circumstances do not reach the threshold required to justify the award of costs, in that it does not otherwise satisfy the requirements underlying Rule 22. There was no bad faith, unfairness, or other conduct that unnecessarily prolonged the decision (*Johnson v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1262 at para 26).

JUDGMENT in IMM-2754-18

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted.

2. The matter is returned for redetermination by a differently constituted panel.

3. No questions for certification were argued, and none arise.

4. There is no award as to costs.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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