Federal Court Cour fédérale

Date: 20191009

Docket: IMM-6282-18

Citation: 2019 FC 1276

Ottawa, Ontario, October 9, 2019

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

JENO CSIKLYA
KATALIN MOLNAR
DORINA CSIKLYA
JENO CSIKLYA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA") for judicial review of the decision of a Pre-Removal Risk Assessment Officer (the "Officer") dated October 17, 2018, which refused the Applicants' Pre-

Removal Risk Assessment ("PRRA") application. The Applicants fear for their lives in Hungary on the basis of their Roma ethnicity.

[2] It was reasonable for the Officer to require more than mere establishment of Roma ethnicity in order to determine that the Applicants face a risk of persecution in Hungary. The Officer considered the particular circumstances of the Applicants and the documentary evidence concerning the country conditions in Hungary. Also, there was no requirement for the Officer to hold an oral hearing. It is clear, however, that the Officer erred by failing to consider whether the discrimination faced by the Applicants tantamount to persecution. Furthermore, the Officer erred in his analysis of the availability of state protection.

[3] For the reasons that follow, I am setting aside the decision.

II. **Facts**

[4] Jeno Csiklya (the "Principal Applicant"), his common-law partner Katalin Molnar (the "Associate Applicant"), and their two children Dorina and Jeno Csiklya (the "Minor Applicants") are Hungarian citizens of Roma ethnicity. The Applicants fear persecution in Hungary on the basis of their Roma ethnicity. Specifically, the Applicants fear violence from groups such as the Guardists, Jobbik, and skinheads. Additionally, the Applicants believe that they will face severe discrimination and persecution in education, employment, housing, and health care if they are forced to return to Hungary.

[5] The Applicants filed a claim for refugee protection in Canada in December 2009. On January 12, 2012, the RPD rejected the Applicants' refugee claim. The Applicants applied for judicial review of the RPD's decision. This Court granted the application for judicial review and set aside the decision of the RPD. The Applicants failed to appear at their scheduled RPD hearing on February 18, 2013. Subsequently, the Applicants were instructed to appear at an RPD hearing on March 5, 2013. The Applicants failed to appear and the RPD deemed their application to be abandoned.

[6] The Applicants left Canada on January 15, 2014 and returned to Hungary. Upon their arrival in Hungary, the Applicants found themselves locked out of their rented house. Their furniture had been tossed outside. The Applicants discovered that other Roma families had also been evicted that year. The government threatened to remove the Minor Applicants from their parents if the Applicants were unable to secure housing. The Minor Applicants faced bullying in school because of their Roma ethnicity. The Minor Applicants were eventually sent to a predominantly Roma school which offered a lower quality of education.

[7] The Principal Applicant experienced discrimination while searching for employment. Additionally, the Applicants were unable to find housing due to the refusal of landlords to rent to Roma people. This forced the Applicants to stay with friends and family. The lack of a fixed address rendered it impossible to receive social assistance or health care.

[8] The Applicants departed Hungary and re-entered Canada on June 29, 2018. Upon their return to Canada, the Applicants submitted a PRRA application. The Officer rendered a negative PRRA decision on October 17, 2018.

III. **Decision Under Review**

[9] In the reasons for the Decision, the Officer held that the Applicants had demonstrated a lack of subjective fear. In arriving at this determination, the Officer noted that the Applicants failed to present themselves at the RPD hearings in February and March of 2013. Additionally, the Officer noted that the Applicants returned to Hungary and availed themselves of that country’s protection. Furthermore, the Officer considered the fact that the Principal Applicant had not taken the opportunity to seek refugee protection in England when he travelled to that country for two three-month periods in 2015 and 2016.

[10] The Officer recognized that the Applicants are members of the Roma ethnic group. The Officer held, however, that the Applicants could not rely solely on general country condition evidence to support their PRRA application. Instead, the Applicants were required to demonstrate that the treatment faced in their personal circumstances amounted to persecution. The Officer noted the Applicants’ claim that Roma people in Hungary are widely persecuted, but found that this assertion did not relate specifically to the Applicants.

[11] The Officer found that the Applicants’ claim “is general, vague and lacks detail and supporting corroborative evidence”. For example, the Applicants did not corroborate their claim that they received substandard health care. Similarly, the Applicants did not provide sufficient

detail in relation to their claim that the government threatened to remove the Minor Applicants. Additionally, the Applicants failed to provide corroborative evidence in support of their assertion that they had been unjustly evicted from their apartment in Hungary on the basis of their Roma ethnicity.

[12] The Officer noted that the Principal Applicant was able to obtain employment for brief periods and that there was no evidence demonstrating that this made him unable to support his family. Additionally, the Officer noted that the Applicants were able to find accommodation with family members and enroll their children in school. The Officer determined that the Applicants had provided insufficient details to support their claim that the poor quality of the education available to their children was persecutory in nature. The Officer went on to assess the objective evidence, which demonstrated that Hungary has taken significant steps to ameliorate the educational outcomes of Roma students.

[13] The Officer reviewed the objective evidence and determined that Hungary is making significant efforts to protect Roma people from persecution. Additionally, the Officer found insufficient evidence that the Applicants would be unable to access state protection. Moreover, the Principal Applicant had only sought assistance from the police once and did not rebut the presumption of state protection. The Officer then considered the availability of assistance through organizations. The Officer concluded there are multiple organizations that provide social assistance to Roma people in Hungary.

[14] The Officer concluded that the Applicants face no more than a mere possibility of persecution if they are returned to Hungary. Furthermore, the Officer determined that the Applicants would not likely be at risk of torture, or likely to face a risk to life, or cruel and unusual treatment. The Officer refused the Applicants' PRRA application.

IV. **Issue and Standard of Review**

[15] The issues to be determined in the present matter are the following:

1. What is the standard of review?

2. Was the Officer's decision reasonable?

3. Was there a breach of procedural fairness?

[16] A standard of reasonableness applies to a PRRA officer's findings of fact, determinations based on mixed fact and law, and consideration of evidence (*Selduz v Canada (Minister of Citizenship and Immigration)*, 2009 FC 361 at paras 9-10).

[17] In recent years, courts have used a standard of correctness to assess procedural fairness (*Mission Institution v Khela*, 2014 SCC 24 at para 79, [2014] 1 SCR 502; (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61, [2009] 1 SCR 339 at para 43). The Federal Court of Appeal recently stated that "even though there is awkwardness in the use of the terminology, this reviewing exercise is 'best reflected in the correctness standard' even though, strictly speaking, no standard of review is being applied" (*Canadian Pacific Railway*

Company v Canada (Attorney General), 2018 FCA 69 at para 54, [2018] FCJ No 382). In a recent decision, Justice Russell stated, "While an assessment of procedural fairness [on a standard of correctness] accords with recent jurisprudence, it is not a doctrinally sound approach. A better conclusion is that no standard of review at all is applicable to the question of procedural fairness" (*Fedee v. Canada (Citizenship and Immigration)*, 2019 FC 88 at para 29). Similarly, Justice Boswell stated, "The analytical framework is not so much one of correctness or reasonableness but, rather, one of fairness and fundamental justice" (*Asiri v. Canada (Citizenship and Immigration)*, 2018 FC 1025 at para 13).

[18] The assessment of procedural fairness "requires no assessment of the appropriate standard of judicial review. Evaluating whether procedural fairness, or the duty of fairness, has been adhered to by a tribunal requires an assessment of the procedures and safeguards required in a particular situation" (*Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11 at para 74, [2002] 1 SCR 249). Instead of conducting a review of procedural fairness on a standard of correctness, this Court will review the procedures afforded to the Applicants and determine whether the process as a whole was fair.

V. **Analysis**

A. *Convention Nexus to Establish Persecution under S. 96 of the IRPA*

[19] The Applicants contend that the mere fact of being Roma in Hungary establishes the existence of persecution under section 96 of the Act. The Applicants ask this Court to ignore the subjective components of their claim and rely solely on the general status of Roma in Hungary.

The Respondent correctly counters that establishment of Roma ethnicity is insufficient to demonstrate persecution under section 96 of the *IRPA*.

[20] While recognizing the mistreatment of Roma in Hungary and the negative country conditions in that country, Justice Shore stated that "Both subjective fear and objective fear are components in respect of a valid claim for refugee status. Objective fear should not be assessed in the abstract" (*Csonka v Canada (Citizenship and Immigration)*, 2012 FC 1056 at para 70). Therefore, the Applicants' argument must fail.

B. *Consideration of the Evidence*

[21] The Applicants argue that the Decision was unreasonable because the Officer ignored documentary evidence which demonstrates that Roma in Hungary experience widespread discrimination which amounts to persecution. The Applicants further submit that the Officer did not conduct an analysis of persecution on cumulative grounds. Conversely, the Respondents submit that the Officer did consider the country condition evidence after assessing the personal circumstances of the Applicants.

[22] There is a presumption that the Officer has reviewed the available evidence and does not need to mention each piece of evidence reviewed (*Matute Andrade v. Canada (Citizenship and Immigration)*, 2010 FC 1074 at para 64). The Applicants rely on the proposition that a decision-maker is under a heightened obligation to discuss relevant evidence that contradicts its findings (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35 at para 17). However, it must be noted that the requirement to specifically refer to contradictory

evidence applies to evidence specific to a claimant, not general documentary evidence (*Shen v Canada (Minister of Immigration)*, 2007 FC 1001 at para 6; *Quinatzin v Canada (Minister of Citizenship and Immigration)*, 2008 FC 937 (CanLII), at para. 29.

[23] In the case at bar, although the Applicants provided a significant amount of evidence, a total of 158 pages, related to the treatment of Roma people in Hungary, this was general documentary evidence. Thus, the Officer did not err by failing to specifically refer to contradictory evidence.

[24] However, turning to the issue of whether the Officer erred by failing to assess the cumulative impact of discrimination tantamount to persecution, I find there was a reviewable error. A review of the decision demonstrates that the Officer failed to properly consider whether the effects of discrimination for the Applicants based on their personal experiences amounted to persecution. In the decision, the Officer considers each aspect of the Applicants' personal circumstances including: the Applicants' daughter's treatment at the hospital; the threat of the state to take away the children if the Applicants were to become homeless; the Applicants' situation with their housing upon return to Hungary in 2014; the Principal Applicant's employment difficulties; the quality of education for the Applicants' children; and the Applicants' interaction with the police. Subsequently, the Officer provides an explanation describing when discrimination rises to the level of persecution, but fails to explain why the discrimination facing the Applicants did not constitute persecution.

[25] Although the Respondents submit that the Officer noted problems with "sufficiency of the evidence", I am not persuaded by this argument. The Officer appears to accept the evidence regarding to the Applicants' personal circumstances when he states that he "[does] not dispute the principal applicant's statements regarding the treatment he and his family faced." However, in each of the aspects of the Applicants' statements, the Officer takes issue with the fact that the Applicants had not provided supporting corroborative evidence and notes the statements to "lack details" and to be "extremely vague". Although the Officer did not directly raise issues of credibility, this was a veiled way of noting that the Officer did not believe the Applicants statements without the corroborating evidence and concluding that he did not find the evidence to be sufficient (*Horvath v Canada (Citizenship and Immigration)*, 2018 FC 147 at paras 23-25). This analysis was neither clear, logical, nor transparent.

C. *Adequacy of State Protection*

[26] The Applicants claim that the Officer applied the incorrect legal test for the assessment of state protection. The Applicants argue that the Officer was obliged to consider the adequacy of state protection, but failed to do so. Specifically, the Applicants submit that the Officer discussed ameliorative programs and policies, but did not actually consider whether they were being effectively implemented by the Hungarian government.

[27] The Respondent, on the other hand, argues that the Officer did not make an error in assessing the adequacy of state protection. The Respondent submits that it was reasonable for the Officer to find that the Applicants were vague in describing their one attempt to seek state protection and that the Applicants should have been able to produce documentary evidence.

[28] I agree with the Applicants that the mere presence of ameliorative efforts does not establish adequate state protection. Instead, the operational adequacy of programs, policies, and legislation must be assessed in order to determine their actual impact (*Boakye v. Canada (Citizenship and Immigration)*, 2015 FC 1394 at para 11 [*Boakye*]; *Molnar v Canada (Citizenship and Immigration)*, 2013 FC 296). As stated by Justice Strickland in *Boakye* [with emphasis added]:

> [A]dequate state protection involves more than making "serious efforts" to address problems and protect citizens (*De Araujo Garcia v Canada (Citizenship and Immigration)*, 2007 FC 79 (CanLII)). <u>Instead, the focus must be on what is actually happening in a country, that is, evidence of actual or operational level protection, and not on efforts that a state is endeavouring to put in place</u> (*Hercegi v Canada (Citizenship and Immigration)*, 2012 FC 250 (CanLII) at para 5).

[29] In this case, it is unclear from the Officer's decision that the Officer understood operational adequacy as the correct test for establishing state protection. The Officer lists several aspects of state protection and highlights that Hungary is a republic with a parliamentary democracy. After noting the constitutional protection for arbitrary arrest and detention in Hungary, and statements about the Hungarian police forces, the Officer then states, "Based on the objective the state is making serious efforts to ensure protection is available to Roma." This statement shows a complete disregard for the lived experiences of Roma people in the failure to obtain adequate state protection, and lack of understanding that the Officer was required to look to whether police protection is available for Roma people on an operational level.

D. *No Breach in Procedural Fairness*

[30] The Applicants argue that the Officer breached procedural fairness by failing to provide the Applicants an oral hearing. The officer considering a PRRA application has discretion to hold an oral hearing and is guided in this decision by the factors set out in section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 which read as follows:

(a) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act;	a) l'existence d'éléments de preuve relatifs aux éléments mentionnés aux articles 96 et 97 de la Loi qui soulèvent une question importante en ce qui concerne la crédibilité du demandeur;
(b) whether the evidence is central to the decision with respect to the application for protection; and	b) l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection;
(c) whether the evidence, if accepted, would justify allowing the application for protection.	c) la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.

[31] According to the Applicants, an oral hearing should have been granted because credibility was central to the Officer's rejection of their PRRA application. The Applicants rely on *Ahmed v The Minister of Citizenship and Immigration*, 2018 FC 1207 [*Ahmed*] and *Prieto v Canada (Minister of Citizenship and Immigration)*, 2010 FC 253 [*Prieto*] in support of this argument.

[32] The Respondent submits that the Officer did not make any credibility findings. According to the Respondent, the Officer did not disbelieve the Applicants, but instead simply found their evidence to be vague and lacking corroboration. In such a circumstance, the Respondent argues, there is no duty on the Officer to convoke an oral hearing.

[33] Neither *Ahmed* nor *Prieto* are of any assistance to the Applicants. In *Ahmed*, Justice O'Keefe determined that an oral hearing was required because the officer disbelieved the applicant's sworn evidence (at para 43). In *Prieto*, Justice Norris found that an oral hearing should have been held because the officer relied on the negative credibility findings of the RPD (paras 36-38). In the case at bar, the Officer did not make any negative credibility findings. Instead, the Officer found the Applicants' assertions to be vague and uncorroborated. Accordingly, there was no requirement for the Officer to hold an oral hearing.

VI. **Certified Question**

[34] Counsel for each party was asked if there were any questions requiring certification. They each stated that there were no questions for certification and I concur.

VII. **Conclusion**

[35] This application for judicial review is granted. The Officer erred by failing to assess the cumulative impact of discrimination amounting to persecution. Additionally, the Officer erred in failing to apply operational adequacy as the correct test for state protection. These reasons render the decision unreasonable and subject to review.

JUDGMENT in IMM-6282-18

THIS COURT'S JUDGMENT is that

1. The decision is set aside and the matter is to be returned for redetermination by a different officer.
2. There is no question to certify.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

John Salam	FOR THE APPLICANTS
Nicole Paduraru	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Grice & Associates Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT