Federal Court  Cour fédérale

Date: 20221128

Docket: IMM-8468-21

Citation: 2022 FC 1631

Ottawa, Ontario, November 28, 2022

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

NIKOLETT SIMON
ZSOLT CSUBAK AKA ZSOLT SINKO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of case

[1] Nikolett Simon, the FA wife [FA], and Zsolt Csubak, the MA husband [MA], are Hungarian citizens of Roma ethnicity. The MA obtained 15 years of formal education, including 3 years of post-secondary millwright engineering, in Hungary. They have two young children who are Canadian citizens. They claim to have suffered discrimination in all fields of life

including education, employment and healthcare while in Hungary. The FA also fears her former common-law partner who assaulted her on multiple occasions in Hungary.

[2] The Court was advised at the hearing the FA's application for a PRRA, pending at the time of filing, was granted March 31, 2022. Neither party asked the present application be held in abeyance or be considered moot. Therefore, these reasons consider the case as if the PRRA was not granted.

[3] Also as a preliminary matter, the names of the two children were incorrectly added to the style of cause. They are ordered removed with immediate effect.

[4] The Applicants applied for permanent residence on humanitarian and compassionate grounds [H&C] under section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] in October 2020. An immigration officer [Officer] reviewed their files and decided that the factors listed in their application were insufficient to be granted an H&C exemption. The decision was dated November 5, 2021 [Decision].

II. Facts

[5] The FA grew up in Miskolc where she faced discrimination from a young age due to being Roma. Amongst other incidents of discrimination, she highlights that she was barred from pursuing a musical education and had a hard time finding and retaining employment as a hairdresser. In 2007, she met her former common-law partner who physically abused her when

he discovered that she was Roma in 2010. In 2012, with the help of a friend, she fled her former partner to Canada.

[6] In 2014, she returned to Hungary to renew her visitor visa. During her time in Hungary, her former partner found and assaulted her again. She has not seen him since then, but submits that he visited her mother in 2017 to threaten her family.

[7] When the FA returned to Canada in 2014, she met the MA and they started a family together. Their two daughters were born in Canada in 2016 and 2017.

[8] The MA also grew up in Miskolc. In 1996, he was charged and found guilty of forgery of private documents. He first entered Canada in 2001. He submitted a same-sex spousal application in 2009 which was refused due to his criminal charge in Hungary. In 2010, he applied for Criminal Rehabilitation which was refused. In 2013, the MA was issued an exclusion order. The MA applied for a work visa in 2016, but was denied. He reentered Canada in 2015 and 2017 as a visitor. He overstayed his visitor status and was detained in September 2019 at which point the Canada Border Service also learned the FA had overstayed her visitor status. They were both subject to a removal order and received negative Pre-Removal Risk Assessments [PRRA]. The FA's PRAA was set aside by Justice Go in *Simon v Canada (Citizenship and Immigration)*, 2021 FC 1018 and as noted she now has a positive PRRA decision.

III. Decision under review

[9] On November 5, 2021, the Officer issued the Decision ruling that the factors the Applicants listed in their application were not sufficient to be granted an H&C exemption. The factors the Officer considered were the MA's criminal past; discrimination or adverse country conditions upon return to Hungary; personal ties in Canada; degree of establishment in Canada; best interests of the children; and ties or residency in any other country.

[10] The Officer noted that in January 2009 the MA had been found inadmissible to Canada pursuant to paragraph 36(1)(b) *IRPA* because he had been convicted in Hungary for forgery of private documents. He was also charged with theft under $5000 in 2010 in Toronto, although the charges were eventually withdrawn. His application for Criminal Rehabilitation was refused in May 2010 and the status of the Criminal Rehabilitation application he submitted in August 2021 is unknown. While the conviction and the charges happened many years ago, the Officer concluded that the MA, having been charged and convicted of serious criminality in Hungary, is inadmissible to Canada.

[11] The Officer then turned to the adverse country conditions in Hungary. They found that there exist some human rights problems in Hungary, including discrimination faced by the Romani population in employment, education, healthcare, housing and political participation. However, the Officer judged that the evidence submitted by the Applicants was lacking in that it did not indicate that all Romani citizens face discrimination. They also did not provide sufficient corroborating evidence to indicate that the Hungarian authorities have not in the past or would

not upon their return, act according to their mandate, should the applicants require and request their services. Nor did they submit evidence that their family members still living in Hungary are experiencing undue hardship due to the adverse country conditions or that the current country conditions would have a direct negative impact on them and would therefore cause them hardship. Finally, the Applicants did not submit evidence that alternate complaint mechanisms are not available to them in Hungary should they face discrimination by local authorities.

[12] Relying on the objective evidence, the Officer noted that while imperfect, the Hungarian government is making serious efforts to address discrimination against the Romani population. In support of this conclusion, the Officer referenced the 2020 Country Reports on Human Rights Practices which notes that the Hungarian government has taken steps to identify, investigate, prosecute and punish officials who committed human rights abuses. They also highlighted a 2017 Supreme Court ruling in which the Court found that the local police's failure to adequately protect the Roma from racist harassment amounted to harassment under the law.

[13] The Officer also noted in the objective evidence that many community organizations in Miskolc offer support to the local Roma population so that they may access social services and social protection programs. Further, the Swiss-Hungarian Cooperation Program (2012-2016) brought increased healthcare access to the Roma population in Hungary. Thus, while not perfect, the situation in Hungary is improving.

[14] The Officer therefore concluded that the Applicants did not submit sufficient evidence to determine that they face discrimination in Hungary due to their Roma ethnicity to the extent that

a favourable decision is warranted. The factors in the country of origin are consequently not a strong factor according to the Officer.

[15] The Officer next dealt with the FA's fear of her former common-law partner. The FA did not provide any corroborating evidence to the effect that her former partner or the Guardsmen were still looking for her. She declared that her former partner went to her mother's house in 2017 in order to threaten them, but without any other evidence the Officer found her assertion that persons in Hungary wish to harm her and her family to be vague, speculative and not supported by corroborating evidence.

[16] Turning to the Applicants' establishment in Canada, the Officer noted a lack of evidence for some of their claims. For example, the MA had not provided sufficient evidence of the establishment of his business in Canada such as the names and addresses of his employees, their remuneration, names and addresses of his clients, what start-up money and tools he required to open his business, or similar details.

[17] On the other hand, the Officer recognized that the Applicants are involved in their community, notably by volunteering with Angel Alert and a soccer club, and that they have filed numerous letters of support from friends and neighbours. However, the evidence provided did not demonstrate that there exists a mutual dependence between themselves and their personal ties in Canada such that their return to Hungary would create hardship for those involved.

[18] Ultimately, the Officer gave their establishment in Canada positive consideration. However, the level of the Applicants' establishment in Canada was not deemed to be unusual compared to others who had stayed here for a similar amount of time. Therefore, this factor did not merit exceptional discretion.

[19] The Officer then discusses the 2020 psychotherapy assessment report according to which the FA is suffering from depression tied to her uncertain immigration status and her past in Hungary, specifically her abusive ex-partner and the discrimination she experienced. The Officer acknowledged that her condition is expected to get worse if she returns to Hungary. However, the Officer found that her mental health was not a sole justification in granting the requested H&C exemption because she did not explain why she waited four years before accessing mental health services once she arrived in Canada. Further, she did not provide evidence that she actually followed the psychotherapy recommended in the report she submitted. Finally, the FA acknowledged that she had access to mental health services in Hungary in 2011 and 2012 demonstrating she would have access to these resources if she returned.

[20] The Officer then considered, the best interest of the children [BIOC]. They recognized and accepted that Roma children may be placed in segregated schools. However, citing the objective evidence, they found that advancement is being made on this front. Notably, in May 2016, the European Commission launched infringement proceedings against Hungary due to discrimination of Roma in Hungary's school system; if Hungary fails to rectify the situation, they could be referred to the European Court of Justice, which could impose financial penalties. The Applicants could also seek redress through the Hungarian government as well as NGOs and

the European Court of Human Rights [ECHR] should their children experience educational discrimination in Hungary. Further, neither the FA nor the MA submitted evidence they were in segregated schooling and they obtained 13 and 15 years respectively of formal education.

[21] The Officer acknowledged that it may be in the children's best interest to remain in Canada considering that they spent their entire lives here and that they have friends and extracurricular activities here. However, they noted the children would be able to rely on their extended family in Hungary to aid them in their transition. Further, they found it reasonable to assume that the children are exposed to the Hungarian language, culture and customs through their parents. Therefore, the Officer concluded that the circumstances concerning the children's best interest with respect to the general country conditions in Hungary, when considered with the other H&C factors presented by the applicants are not sufficient to issue a positive decision.

[22] Finally, the Officer noted throughout their reasons that the Applicants, being members of the European Union [EU], could choose to live elsewhere in the EU if they so desired to avoid the alleged hardship they would face in Hungary.

IV. Issues

[23] The issue in this case is the reasonableness of the Decision.

V. Standard of Review

[24] The Applicants are seeking judicial review primarily in relation to the hardship and BIOC analyses.

[25] In terms of hardship a key passage objected to is:

> In support of the applicants' cited hardships, their submissions include several country condition documents from various sources reporting on issues including but not limited to Roma and the coronavirus, discrimination against the Roma, as well as the Hungarian education and healthcare systems. I have reviewed these submissions and determine that while they support that there exist some human rights problems in Hungary, including as they relate to the Roma population, the applicants have provided insufficient evidence to determine that they face discrimination in Hungary due to their Roma ethnicity to the extent that a favourable decision is warranted. Their evidence does not indicate that all Romani citizens in Hungary face discrimination. Further, the applicants have provided insufficient corroborating evidence to indicate that the Hungarian authorities have not in the past or would not upon their return, act according to their mandate, should the applicants require and request their services. The applicants have not adduced objective evidence to indicate that should they be required, alternate complaint mechanisms are not available to them in their home country should they not be satisfied with the efforts of their local authorities.
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> [Emphasis added]

[26] With respect, in my view material aspects of this analysis do not comport with constraining reasonableness jurisprudence in terms of H&C. I agree I am not to involve myself with the weighing and assessing of evidence. However, on judicial review the Court is responsible for ensuring compliance with constraining reasonableness considerations.

[27] In this connection, there are three unreasonable findings in this aspect of the Decision, and which were discussed at the hearing.

[28] The first concerns the sentence: “I have reviewed these submissions and determine that while they support that there exist some human rights problems in Hungary, including as they relate to the Roma population, the applicants have provided insufficient evidence to determine that they face discrimination in Hungary due to their Roma ethnicity to the extent that a favourable decision is warranted.” [Emphasis added]. In my view, no single factor should be elevated to one that must be established to warrant a favourable decision. By taking this approach, the Officer put too high a burden on the Applicants. A finding such as this may only be considered as but one of many in the holistic analysis required by the jurisprudence: *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paras 25, 28, 33 [*Kanthasamy*]; *Singh v Canada (Citizenship and Immigration)*, 2022 FC 147 per Gascon J at para 30; *Miyir v Canada (Citizenship and Immigration)*, 2018 FC 73 per Diner J at para 33; *Gannes v Canada (Citizenship and Immigration)*, 2018 FC 499 per Norris J at para 25; and *Kaur v Canada (Citizenship and Immigration)*, 2017 FC 757 per Gascon J at para 35.

[29] The Court’s second concern relates to the sentence: “Their evidence does not indicate that all Romani citizens in Hungary face discrimination.” [Emphasis added]. There is no authority to support the proposition that to obtain H&C relief an applicant must show that “all” those in their group face discrimination. If it is the test, it puts the burden too high. That is an observation that may be made in many if not virtually all cases of alleged discrimination. If it is not the test it is not relevant.

[30] Thirdly, the Court finds the next sentence finding unreasonable as well: “Further, the applicants have provided insufficient corroborating evidence to indicate that the Hungarian authorities have not in the past or would not upon their return, act according to their mandate, should the applicants require and request their services.” [Emphasis added].

[31] In the first place, and with respect, there is no state protection analysis in the Decision. It seems to me one is required generally and particularly given the allegation of domestic violence made by the FA. If, on the other hand, this analysis is the state protection analysis, it does not comport with constraining jurisprudence to the effect that state protection must be adequate at the “operational level”. Best or good efforts are decidedly not enough.

[32] In this connection, the Court has repeatedly found the test for assessing the adequacy of state protection is at the operational level which requires an assessment not only of the efforts by the state but the actual results achieved at the operational level: *Asllani v Canada (Immigration, Refugees and Citizenship)*, 2020 FC 645 per Crampton CJ at para 25:

> [24] With respect to both Italy and Kosovo, Mr. Asllani submits that the RAD erred by failing to state the correct test. In this regard, he states that the correct test is whether state protection is adequate at the “operational level” (*Durdevic v Canada (Citizenship and Immigration)*, 2018 FC 427 at para 33) and that it was incumbent upon the RAD to explicitly articulate that test at the outset of its assessment of the state protection issue.
>
> [25] I disagree. I am not aware of any such onus on the RAD or the RPD. What counts is whether the adequacy of state protection is actually assessed at the operational level. This assessment is made in the course of assessing evidence led by the refugee claimant to overcome the presumption of state protection that exists in the absence of a demonstration of a complete breakdown in the state’s apparatus: *Ward*, above, at 692.

> [26] It bears underscoring that the burden of overcoming this presumption and demonstrating that adequate state protection does not exist at the operational level lies upon the refugee claimant. However, in his submissions to the RAD, Mr. Asllani did not endeavour to discharge this burden with respect to Italy by referring to evidence in support of his bald assertion that the RPD had failed to examine the availability of state protection at the operational level.
>
> [Emphasis added]

[33] In *John v Canada (Citizenship and Immigration)*, 2016 FC 915 at para 14, I held in a case where state protection was not mentioned except in conclusory words:

> [14] Counsel for the Minister correctly categorized this decision as ultimately one of state protection. However, it is not apparent that is how the RPD viewed this case. State protection is not mentioned except in the conclusory words of the last clause of one sentence, quoted above. It is not analyzed in any meaningful manner. I recognize the need for clear and convincing evidence, and the presumption of state protection, and that the onus is on the Applicants to rebut the presumption. I agree there is no formula for assessing the adequacy of state protection at the operational level (the proper test in my view), but and with respect, the RPD carried out no analysis of state protection at all. Not that the RPD has to deal with every piece of evidence, but here it made no reference whatsoever to the country condition material showing problems with state protection in the domestic violence context. More fundamentally, even if what is recorded might pass for an assessment of state protection (which in my view it does not), it was fatally flawed at its outset by a denial of the threat itself, namely that the spouse had relatives in St. Vincent who are gang members.

[34] This Court has enunciated and applied this test of operational level in a great number of cases over the years: *Bito v Canada (Citizenship and Immigration)*, 2022 FC 1370 per Brown J; *Zapata v Canada (Citizenship and Immigration)*, 2022 FC 1277 per Favel J at paras 15, 25; *Mejia v Canada (Citizenship and Immigration)*, 2022 FC 1032 per McVeigh at paras 25-26, 28; *Rstic v Canada (Citizenship and Immigration)*, 2022 FC 249 per Favel J at paras 18, 30-31;

Kotai v Canada (Citizenship and Immigration), 2020 FC 233 per Elliott at paras 34, 42; *Asllani v Canada (Immigration, Refugees and Citizenship)*, 2020 FC 645 per Crampton CJ at para 25; *Newland v Canada (Citizenship and Immigration)*, 2019 FC 1418 per McHaffie at paras 23-25; *Dawidowicz v Canada (Citizenship and Immigration)*, 2019 FC 258 per Brown J at para 10; *Gjoka v Canada (Citizenship and Immigration)*, 2018 FC 292 per Strickland J at para 30; *Moya v Canada (Citizenship and Immigration)*, 2016 FC 315 [*Moya*] per Kane J at para 68; *Hasa v Canada (Citizenship and Immigration)*, 2018 FC 270 per Strickland J at para 7; *Eros v Canada (Citizenship and Immigration)*, 2017 FC 1094 per Manson J at para 45; *Benko v Canada (Citizenship and Immigration)*, 2017 FC 1032 per Gascon J at para 18; *Koky v Canada (Citizenship and Immigration)*, 2017 FC 1035 per Gascon J at para 14; *Mata v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 1007 per McDonald J at paras 13-15; *Poczkodi v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 956 per Kane J at para 37; *Paul v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 687 per Boswell J at para 17; and *John v Canada (Citizenship and Immigration)*, 2016 FC 915 at para 14 to name some.

[35] As a further example, in *Moya* Justice Kane states at paras 73-75:

> [73] To be adequate, perfection is not the standard, but state protection must be effective to a certain degree and the state must be both willing and able to protect (*Bledy v Canada (Minister of Citizenship and Immigration)*, 2011 FC 210 at para 47, [2011] FCJ No 358 (QL)). State protection must be adequate at the operational level (*Henguva v Canada (Minister of Citizenship and Immigration)*, 2013 FC 483 at para 18, [2013] FCJ No 510 (QL); *Meza Varela v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1364 at para 16, [2011] FCJ No 1663 (QL)).
>
> [74] As noted by the applicant, democracy alone does not ensure effective state protection; the quality of the institutions providing protection must be considered (*Sow v Canada (Minister of Citizenship and Immigration)*, 2011 FC 646 at para 11, [2011] FCJ No 824 (QL) [Sow]).

> [75] The onus on an applicant to seek state protection varies with the nature of the democracy and is commensurate with the state's ability and willingness to provide protection (Sow at para 10; *Kadenko v Canada (Minister of Citizenship and Immigration)*, 1996 CanLII 3981 (FCA), [1996] FCJ No 1376 (QL) at para 5, 143 DLR (4th) 532 (FCA)). However, an applicant cannot simply rely on their own belief that state protection will not be forthcoming (*Ruszo v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1004 at para 33, [2013] FCJ No 1099 (QL)).

[36] I appreciate the Officer has other things to say on the issue of hardship, but in my respectful view these unreasonable analyses render the Decision fatally flawed contrary to *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 102.

[37] While these findings are sufficient to grant judicial review, similar unreasonableness is found in the BIOC analysis, particularly in the following:

> While it may be in the children's best interest to remain in Canada, having carefully reviewed the applicants' submissions, I do not find that the circumstances concerning the children's best interest with respect to the general country conditions in Hungary, when considered with the other H&C factors presented by the applicants, <u>are sufficient for me to issue a positive decision in this case</u>.
>
> [Emphasis added]

[38] With respect, this analysis also puts the test too high. There is no requirement on an applicant to establish that BIOC alone is sufficient to issue, or to warrant the issuance of a positive H&C decision. At the end of the day, as the Supreme Court emphasized in *Kanthasamy* at para 25 "*all*" circumstances are to be considered. Most notably the Supreme Court itself italicises the word "*all*":

> [25] What *does* warrant relief will clearly vary depending on the facts and context of the case, but officers making humanitarian and

> compassionate determinations must substantively consider and weigh *all* the relevant facts and factors before them: *Baker*, at paras. 74-75.

[39] There are other issues raised and resisted in this application, but in light of the fact judicial review will be granted and redetermination ordered, I decline to deal with them.

[40] Therefore, and with respect, I find the Decision unreasonable such that judicial review must be granted.

[41] No question of general importance was proposed by either party and none arises.

JUDGMENT in IMM-8468-21

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended with immediate effect to delete the names of the children.
2. Judicial review is granted, the Decision is set aside, the matter is remanded for redetermination by a differently constituted decision maker, no question of general importance is certified and there is no Order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-8468-21
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