

Federal Court



Cour fédérale

Date: 20100707

Docket: IMM-6345-09

Citation: 2010 FC 729

Montréal, Quebec, July 7, 2010

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

NIKOLETTA KALLAI

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of a decision dated November 4, 2009, by the Refugee Protection Division of the Immigration and Refugee Board (the panel), in which the panel found that the applicant is neither a Convention refugee nor a person in need of protection pursuant to sections 96 and 97 of the Act.

Factual background

[2] The applicant is a citizen of Hungary and is a gypsy (Roma). She alleges being a victim of persecution and discrimination by reason of her Romani ethnicity.

[3] The applicant's refugee claim is essentially based on the following incident: in November 2007, the applicant alleges that she was the victim of an assault in the subway during which skinheads surrounded her, threatened her and struck her.

[4] After escaping, the applicant went to the police station to report the incident. She was allegedly told that the police could do nothing because she was unable to identify her assailants.

[5] In March 2008, the applicant came to join her father in Canada and claimed refugee protection in September of that year.

Impugned decision

[6] The panel decided that the applicant had not discharged her burden of proving through clear and convincing evidence that Hungary was unable to protect her. After examining the documentary and testimonial evidence, the panel noted that even if the situation of Roma was not ideal, because many prejudices still exist regarding them, the Hungarian government has put initiatives in place to eradicate stereotypes and help victims of discriminatory acts.

[7] Further, the panel reported that, according to the documentary evidence, Hungary, which is a member of the European Union, has a government that generally respects the rights of its citizens.

[8] The panel added that in May 2008, the Hungarian prime minister appointed a special commissioner to chair the new interministerial committee that coordinates the government's Romani policy, with which any person may file a complaint if he or she believes that his or her rights as a member of a national or ethnic minority have been violated. The panel noted that the commissioner's Web site gives detailed instructions on the procedure to follow to file a complaint and that such a complaint may pertain to the police, the national security services and the armed forces.

[9] Moreover, the panel mentioned that the Ministry of Justice was now operating a network that provided free legal aid to Roma who claim to be victims of discrimination based on their ethnicity. The panel also noted that it was possible to seek assistance from non-governmental organizations such as the Legal Defense Bureau for National and Ethnic Minorities (NEKI), which initiates litigation and represents victims of national or ethnic discrimination before Hungarian authorities.

[10] With regard to the specific incident reported by the applicant, the panel determined that the complaint had been dealt with by the police. The applicant stated that she expected the police to arrest the assailants, but the panel noted that it could be difficult for the police to make arrests if the applicant did not know the identity of her assailants.

[11] The panel also indicated that despite the fact that the applicant was a victim of discrimination, she was able to continue her studies. Moreover, the fact that she had never reported other incidents to the police or called on other mechanisms or organizations shows that she had not exhausted the remedies available to her. The panel therefore found that (i) even if the applicant was the victim of discrimination, this did not amount to persecution within the meaning of section 96 of the Act and (ii) the applicant did not establish that there was a serious risk that she would be personally subjected to a danger of torture or to a risk to her life or a risk of cruel and unusual treatment or punishment within the meaning of section 97 of the Act.

Relevant legislative provisions

[12] The following provisions of the Act apply in this case:

Convention refugee

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

Définition de « réfugié »

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Person in need of protection

Personne à protéger

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

Person in need of protection

Personne à protéger

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

Issue

[13] In this judicial review, the only issue is whether the panel's decision that the applicant is not a Convention refugee or a person in need of protection pursuant to sections 96 and 97 of the Act is reasonable.

Standard of review

[14] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 51, the Supreme Court of Canada recognized that “questions of fact, discretion and policy as well as questions where

the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness”.

[15] Moreover, this Court has recognized that the application of sections 96 and 97 of the Act is a question of mixed fact and law that must be reviewed on a reasonableness standard (*Acosta v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 213, [2009] F.C.J. No.270 (QL)).

Analysis

[16] The determinative issue that the panel had to analyze was the availability of state protection in Hungary. In this regard, the applicant set out the principles of state protection by citing *Avila v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 359, [2006] F.C.J. No. 439, at para. 27, in which my colleague, Justice Martineau, made the following observations concerning state protection:

[27] In order to determine whether a refugee protection claimant has discharged his burden of proof, the Board must undertake a proper analysis of the situation in the country and the particular reasons why the protection claimant submits that he is “unable or, because of that risk, unwilling to avail [himself] of the protection” of his country of nationality or habitual residence (paragraphs 96(a) and (b) and subparagraph 97(1)(b)(i) of the Act). The Board must consider not only whether the state is actually capable of providing protection but also whether it is willing to act. In this regard, the legislation and procedures which the applicant may use to obtain state protection may reflect the will of the state. However, they do not suffice in themselves to establish the reality of protection unless they are given effect in practice: see *Molnar v. Canada (Minister of Citizenship and Immigration)*, 2002 FCTD 1081, [2003] 2 F.C. 339 (F.C.T.D.); *Mohacsi v. Canada (Minister of Citizenship and Immigration)*, 2003 FCTD 429, [2003] 4 F.C. 771 (F.C.T.D.).

[17] The respondent contends that the applicant was unable to rebut the presumption by means of clear and convincing evidence and prove that there was a complete breakdown of the Hungarian state apparatus or that the protection afforded by Hungary was inadequate (*Canada (Attorney General) v. Ward* [1993] 2 S.C.R. 689, [1993] S.C.J. No. 74).

[18] In *Carrillo v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, [2008] F.C.J. No. 399, at para. 38, the Federal Court of Appeal stated the following about the burden, standard and quality of proof of an allegation of inadequacy or non-existence of state protection for a citizen:

[38] ...A refugee who claims that the state protection is inadequate or non-existent bears the evidentiary burden of adducing evidence to that effect and the legal burden of persuading the trier of fact that his or her claim in this respect is founded. The standard of proof applicable is the balance of probabilities and there is no requirement of a higher degree of probability than what that standard usually requires. As for the quality of the evidence required to rebut the presumption of state protection, the presumption is rebutted by clear and convincing evidence that the state protection is inadequate or non-existent.

[19] In the case at bar, the panel's decision shows that it assessed and analyzed the documentary evidence submitted to it, referring notably to the following documents on the situation in Hungary as part of its analysis: United States. February 25, 2009. Department of State. "Hungary". Country Reports on Human Rights Practices for 2008; Council of Europe. March 29, 2006. Commissioner for Human Rights. Follow-up Report on Hungary (2002-2005); HUN100494.E. September 22, 2005. Recourse available to those with a complaint of police inaction in response to crimes,

harassment or discrimination; organizations that would be of assistance in such cases (January 2003-August 2005).

[20] However, the applicant contends that her complaint never came before a court because the police did not pursue the investigation. This Court disagrees with the applicant's claims and is instead of the opinion that it was reasonable for the panel, in the circumstances, to find that this was not attributable to ill will on the part of the police. Indeed, the applicant went to the police on only one occasion. Moreover, she was unable to identify her assailants. What is more, she gave only a very cursory description of her assailants. The documentary evidence did not in any way demonstrate that the police refused to help her. In fact, the police dealt with the complaint and the applicant received a copy (Tribunal Record, p. 152). However, the police were unable to arrest anyone because of the lack of information about the identity of the assailants.

[21] As counsel for the respondent clearly noted at the hearing before this Court, the applicant was obliged to seek the protection of her country of nationality before seeking international protection, which she did not do, given the fact that she filed a complaint with the police only once and did not seek the assistance of any other organization established to help Romani victims of discrimination in Hungarian society.

[22] In view of the foregoing, the Court finds that the panel's decision that the applicant did not rebut the presumption of state protection by means of clear and convincing evidence and that she did not show, on a balance of probabilities, that if she returned to Hungary, she would be personally

subjected to a danger of torture or to a risk to her life or a risk of cruel and unusual treatment or punishment is reasonable. This application for judicial review must therefore be dismissed. This application does not raise any serious question of general importance.

JUDGMENT

THE COURT ORDERS AND ADJUDGES THE FOLLOWING:

1. The application for judicial review is dismissed.
2. No question of general importance is certified.

“Richard Boivin”

Judge

Certified true translation
Susan Deichert, LLB

FEDERAL COURT
SOLICITORS OF RECORD

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