Federal Court  Cour fédérale

Date: 20111020

Docket: IMM-2005-11

Citation: 2011 FC 1202

Toronto, Ontario, October 20, 2011

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

ANDRAS SZTOJKA
ANDRASNE SZTOJKA
ANDRAS SZTOJKA
NIKLOASZ SZTOJKA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants are a family of four Hungarian nationals of Roma ethnicity. They sought protection in Canada due to harassment and abuse experienced in their country. The Immigration and Refugee Board, Refugee Protection Division accepted that they may have suffered discrimination but found that they were not Convention refugees or persons in need of protection.

[2] This is an application for judicial review under s. 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA") of the decision made on February 4, 2011 by the Board. For the reasons that follow, the application is dismissed.

DECISION UNDER REVIEW:

[3] The determinative issue before the Board was the availability of state protection. The applicants alleged that they had been subjected to violence, that the parents had been denied employment opportunities and medical services, and that the children had been mistreated at school and by bullies in the streets.

[4] The Board member considered the mother's testimony and the documentary evidence. The member did not accept that the applicants had been denied treatment by the medical system because of their ethnicity. The mother's claim that her stomach problem was not treated for three years was found to be implausible as a 2008 medical report showed that she had been treated promptly at that point. The applicants' Personal Information Form claimed that the father, Andras, was denied treatment in 2003 after receiving a broken nose. A medical report showed that he was treated for a fractured nasal tip in 2005. No satisfactory answer was given by the applicants to explain the discrepancy. Media reports of an attack at the carnival where the parents worked gave no indication that it was racially motivated.

[5] The member found that the applicants may have been subject to discrimination because of their Roma ethnicity, but this discrimination both singularly and cumulatively did not reach the

level of persecution. The member considered the physical attacks on the applicants and concluded they were not sustained or systemic violations of basic human rights demonstrating a failure of state protection.

[6] The member concluded that there is adequate protection available to the applicants in Hungary. Documentary evidence outlined that there has been difficulties in Hungary with addressing racism and discrimination against the Roma. However, the member found that although the situation was not perfect, the country is making serious and genuine efforts to erase the problem. In the applicants' specific case, the Board noted that the police had investigated the older son Andreas' fight in 2007. The police had also intervened in the attack on the applicants at the carnival. Overall, the member found, the applicants did not rebut the presumption of state protection with clear and convincing evidence.

ISSUES:

[7] While the applicants questioned the Board's implausibility findings in their written argument, counsel for the parties focused on the following issues in their oral submissions before the Court:

1. Did the Board err in finding that the applicants' mistreatment did not amount to persecution on all of the evidence including their testimony?
2. Did the Board err in determining that state protection is available to the applicants?

ANALYSIS:

[8] The issues in this matter are all fact driven calling for the application of the reasonableness standard: *Lin v Canada (Minister of Citizenship and Immigration)*, 2008 FC 698; *Tetik v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1240; *Bledy v Canada (Minister of Citizenship and Immigration)*, 2011 FC 210; *Zepeda v Canada (Minister of Citizenship and Immigration)*, 2008 FC 491; and *Flores v Canada (Minister of Citizenship and Immigration)*, 2010 FC 503.

[9] In reviewing a decision against the reasonableness standard, the Court must consider the justification, transparency and intelligibility of the decision-making process, and whether the decision falls within a range of possible acceptable outcomes which are defensible in light of the facts and the law: *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR190 at para 47, and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 59.

[10] On questions of fact, the Federal Court can intervene under paragraph 18.1(4)(d) of the *Federal Courts Act*, RSC, 1985, c F-7 only if it considers that the decision maker "based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it". In enacting this ground of review, Parliament intended administrative fact finding to be given a high degree of deference: *Khosa*, above, at para 46.

[11] It is well established that those claiming refugee status must provide clear and convincing confirmation of their state's inability to protect: *Canada (Attorney General) v Ward*, [1993] 2 SCR 689. The protection afforded by the state need not be perfect: *Canada (Minister of Employment and Immigration) v Villafranca*, (1992) 18 Imm LR (2d) 130 (FCA).

[12] The burden of proof, standard of proof and quality of the evidence necessary to rebut the presumption of state protection were addressed by the Federal Court of Appeal in *Canada (Minister of Citizenship and Immigration) v Carrillo*, 2008 FCA 94 at paragraphs 17 to 30. An applicant bears both an evidentiary and legal burden; she must introduce evidence of inadequate state protection and must convince the trier of fact that the evidence adduced establishes that the state protection is inadequate. The evidence will have sufficient probative value if it convinces the trier of fact on the balance of probabilities that the state protection is inadequate. Therefore the evidence must be relevant, reliable and convincing.

[13] Here, the applicants, relying on *Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 (FCA), argue that the member erred by refusing to rely on their testimony that they received inadequate medical attention and in placing greater weight on the documentary evidence. They contend that he erred by setting a standard of "systemic discrimination" so high that only the wholly uneducated, without any work or housing, could qualify as being persecuted in Hungary. It is argued also that the member misinterpreted the hundreds of pages of documents in evidence which support the applicants' position that there are systemic and sustained violations of human rights in Hungary and that the member misunderstood and misapplied the test of persecution.

[14] On the member's determinative finding that adequate state protection was available, the applicants argue that the member erred by relying on the steps being taken by Hungary to ameliorate conditions without a thorough analysis of the effectiveness of the results.

[15] I find that the member did not err in his findings on persecution and state protection. The decision was thorough, well reasoned, and reasonable in its conclusions. The reasons for decision clearly explain the member's analysis. The findings were based on the evidence before the Board and were reasonable.

[16] Contrary to the applicants' assertions in their written representations, the member did not reject their evidence due to a lack of corroboration. The member looked closely at the documents provided by the applicants (medical reports and a news article) and compared that evidence to the testimony of the adult female applicant. Where the two conflicted, she was given an opportunity to explain the contradictions. It was open to the member to find that she did not provide a reasonable explanation. With regard to the claim that the adult applicants had been denied medical care, the member reasonably concluded that the medical reports showed that they had received adequate care when it was needed.

[17] The member did not err by applying a standard of "systemic discrimination" for finding persecution. As the respondent points out, and as the member cites in the decision, this test is derived from the leading case, *Ward*, above. The applicants cite *Saad v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 1140, (2000) 187 FTR 262 for the proposition that

the “systemic discrimination” test is inappropriate. That is not how I read that decision. The application in that case was allowed because the tribunal focused on the foreign government’s intentions rather than upon their actions.

[18] The applicants do not challenge the reasonableness of the summary of their evidence which the member provided. He also reviewed the social indicators, both positive and negative, relating to the status of the Roma in Hungary in terms of education, employment, housing and health care. The member clearly turned his mind to the negative information contained in the documentary evidence. The evidence was weighed and applied to the persecution test. Contrary to the applicants’ argument, the negative country documentation was not ignored; the member found that the applicants’ personal experiences had not risen to the level of persecution. That was a finding reasonably open to the Board on the evidence.

[19] The applicants’ claim is based largely on the collective experience of Roma in Hungary rather than their personal history. While the experiences of persons with similar profiles must be taken into consideration in determining whether persecution is systemic, each of these cases must be determined on its own facts. Here, the member’s analysis of the availability of state protection to the applicants is thoughtful, well reasoned, and carefully crafted to conform to the relevant case law.

[20] To illustrate, there was evidence in the documentation before the Board indicating that there have been instances of police violence towards Roma in Hungary. However, it is clear from the applicants’ evidence that in the past they had no difficulty in approaching the police for help. Indeed

the assertion that the applicants now fear the Hungarian police was first raised in their further memorandum of argument and was not presented to the Board.

[21] In conclusion, I am satisfied that the member's reasons for decision in this case are transparent, intelligible and justified on the evidence and that the decision falls within a range of possible acceptable outcomes which are defensible in light of the facts and the law. The application is, therefore, dismissed.

[22] The parties did not propose any serious questions of general importance and none will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed. No questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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