Federal Court  Cour fédérale

Date: 20130529

Docket: IMM-7585-12

Citation: 2013 FC 565

Ottawa, Ontario, May 29, 2013

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

GABOR BURAI, SAROLTA FORGACS and TAMAS BURAI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of a decision of the Immigration and Refugee Board, Refugee Protection Division (the Board), dated July 6, 2012, wherein the applicants were determined to be neither Convention refugees within the meaning of section 96 of the Act nor persons in need of protection as defined in subsection 97(1) of the Act.

[2] The applicants request that the Board's decision be set aside and the application be referred back to the Board for redetermination by a different panel.

Background

[3] The principal applicant, Gabor Burai and his family are citizens of Hungary. The principal applicant is of Roma ethnicity and his spouse, Sarolta Forgacs is an ethnic Hungarian born in Romania. They allege that they are persecuted on the basis of their ethnicity.

[4] The applicants' older son, who was not a claimant before the Board but intends to join his family in Canada, was attacked in August 2008 in Budapest by attackers yelling racial slurs. The son was stabbed in the shoulder and required medical treatment in a hospital. The police investigated but were not successful in identifying the perpetrators.

[5] The principal applicant's wife also alleges persecution based on her Romanian background.

[6] The principal applicant alleges he was persecuted by the Hungarian Guard, a nationalist militia with headquarters located very close to his home. In November 2007, several young men threatened him and used racial slurs. In May 2008, he was attacked by four members of the Guard. In July 2008, his car was vandalized after he was again the subject of racial slurs.

[7] In January 2011, the principal applicant's younger son was attacked by three men in black uniforms. His friend was stabbed but the son managed to escape. The friend's mother asked the

principal applicant not to complain to the police because the attackers had threatened further violence if it were reported.

[8] The family fled Hungary and arrived in Canada on March 16, 2011. They claimed protection on March 21, 2011.

Board's Decision

[9] The Board heard the applicants' claim on May 16, 2012 and rendered its decision on July 6, 2012. The Board accepted the identities of the family. The Board described the applicants' allegations and the supporting documentary evidence and appears to have accepted their allegations.

[10] The Board rejected their claim based on state protection. The Board described the principles of state protection and concluded that since Hungary is a democracy, the presumption of state protection was a strong one. The Board indicated it had considered the affidavit of a Roma politician who described proposed constitutional changes to limit the rights of Roma, but noted no such changes had been implemented. The affidavit described other discriminatory measures against Roma, including the desire of the Jobbik political party to establish public security camps. The Board gave little weight to these claims given the lack of corroborating evidence.

[11] The Board went on to canvass several other country conditions documents indicating that discrimination against Roma existed in Hungary and the measures taken by the government to combat this phenomenon.

[12] The Board noted that the police had closed the investigation into the beating of the principal applicant's eldest son as he could not identify the perpetrators. The applicants could have appealed this decision but did not. The oldest son had withdrawn his claim for protection in Canada and returned to Hungary. The Board also noted that the principal applicant and his youngest son had never gone to the police regarding the attacks on them. The Board concluded on a balance of probabilities, the applicants had not rebutted the presumption of state protection on the basis of their personal experience.

[13] The Board noted country conditions, listing the legislation introduced by the government to combat discrimination and other policies relating to housing and employment. Based on the applicants' testimony, the Board concluded the principal applicant had no basic employment difficulties.

[14] The Board concluded the applicants had not rebutted the presumption of state protection personally or the risk to Roma in general and dismissed the claim.

Issues

[15] The applicants submit the following point at issue:

Did the Board commit reviewable errors by failing to consider the totality of the evidence in relation to state protection; and by engaging in an erroneous legal analysis in determining whether there was state protection?

[16] I would rephrase the issues as follows:

1. What is the appropriate standard of review?
2. Did the Board err in rejecting the applicants' claim?

Applicants' Written Submissions

[17] The applicants emphasize that the Board made no negative credibility findings and rejected the claim solely based on state protection. The applicants argue the Board failed to consider the totality of the evidence in relation to state protection and engaged in erroneous legal analysis in finding that there was state protection for the applicants.

[18] The applicants submit the Board overlooked evidence that state legislation and police institutions in Hungary are inadequate, especially in relation to the protection of the Roma. The applicants submitted evidence that violence against Roma has increased since 2008, that the Hungarian legal system and police are imbued with racism against Roma and that the Hungarian state is now taking Roma rights and protections away.

[19] The increase in racially motivated violence since 2008 was in the Board's own National Documentation Package. The Board did address the increase in violence. The Board did not consider recent anti-Roma political developments such as the election of the Jobbik Party to the Hungarian Parliament in 2009 and its becoming the third party in 2010. The head of that party established the Hungarian Guard, the organization whose members persecuted the applicants. The National Documentation Package indicated the government had abolished the position of Minority

Ombudsman. The Board clearly disregarded this evidence, since its reasons specifically mention the Minority Ombudsman as evidence of state protection for Roma. It was unreasonable for the Board to dismiss the expert affidavits.

[20] The applicants dispute the Board's finding that Hungary is a democracy, as they submitted an article challenging this point. The Board also disregarded evidence from a response to information request (RIR) indicating law enforcement authorities systemically failed to provide effective protection to Roma. One of the expert affidavits indicated that a union representing a quarter of police officers has an official alliance with the Jobbik Party. All of this evidence shows it was reasonable for the applicants to mistrust the police. The Hungarian state has clearly failed to stop police violence against Roma. When there is evidence that directly contradicts the Board's findings, it must acknowledge such evidence in its decision.

[21] The applicants' second argument is that the Board used erroneous analysis in assessing state protection. The "serious efforts" standard has been rejected by this Court. State protection must be adequate. A legislative framework on its own is insufficient evidence of adequate state protection. This case law was presented to the Board, but the Board conflated serious efforts with adequate state protection. Had the Board performed a reasonable analysis, the conclusion would have been that there is not adequate state protection for Roma in Hungary.

Respondent's Written Submissions

[22] The respondent submits that the applicable standard of review is reasonableness and that the Board's state protection finding is reasonable.

[23] The respondent argues that where state protection is reasonably forthcoming, a claimant's failure to approach the state for protection will defeat their claim. The applicants were unable to adduce sufficient, reliable and convincing evidence that state protection was inadequate. The Board considered the totality of the evidence but found that the government is making serious efforts to protect the Roma. Tribunals are presumed to have considered all evidence and are not required to mention every piece of evidence. The applicants merely disagree with the Board's assessment of the evidence.

[24] Both parties provided further submissions reiterating their arguments.

Analysis and Decision

[25] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[26] Issues of state protection and of the weighing, interpretation and assessment of evidence are reviewable on a reasonableness standard (see *Ipina v Canada (Minister of Citizenship and Immigration)*, 2011 FC 733, [2011] FCJ No 924 at paragraph 5; and *Oluwafemi v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1045, [2009] FCJ No 1286 at paragraph 38).

[27] In reviewing the Board's decision on the standard of reasonableness, the Court should not intervene unless the Board came to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 47; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59, [2009] 1 SCR 339). As the Supreme Court held in *Khosa* above, it is not up to a reviewing court to substitute its own view of a preferable outcome, nor is it the function of the reviewing court to reweigh the evidence (at paragraph 59).

[28] **Issue 2**

Did the Board err in rejecting the applicants' claim?

The Board, in its reasons, properly described the test for state protection as one of adequacy. This is in line with this Court's repeated instruction that the existence of "serious efforts" at state protection are not determinative of the adequacy of state protection. As I said in *Harinarain v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1519, [2012] FCJ No 1637 at paragraphs 27 to 29:

> 27 The use of the phrase "in other words" in the passage is incorrect: "adequate protection" and "serious efforts at protection" are not the same thing. The former is concerned with whether the actual outcome of protection exists in a given country, while the latter merely indicates whether the state has taken steps to provide that protection.

> 28 It is of little comfort to a person fearing persecution that a state has made an effort to provide protection if that effort has little effect. For that reason, the Board is tasked with evaluating the empirical reality of the adequacy of state protection.
>
> 29 This Court has affirmed this interpretation of state protection repeatedly. …

[29] Therefore, the Board set out the law correctly. The Board's consideration of the country conditions evidence, however, strays from this focus on adequacy instead of effort:

> However, the documentary evidence currently before the Board states that Hungary is attempting to correct its historical discrimination against the Roma people.
>
> […]
>
> …a number of initiatives that the Hungarian government has made in its attempt to eradicate discrimination and racism in the country.
>
> […]
>
> …the government is taking active steps to change the attitude and treatment of members of the police force toward minorities…
>
> […]
>
> The above report also outlines the efforts that the Hungarian government is making to eradicate discrimination.…
>
> […]
>
> The Hungarian government has taken measures to reduce Romani segregation in education…
>
> […]
>
> …there is evidence that the government is making concrete efforts to provide scholarship and non-segregation of Romani pupils to help them obtain a better education.
>
> [emphasis added]

[30] Most importantly, in concluding its analysis, the Board mentions the proper test and the wrong test in the same sentence:

> This suggests that although not perfect, there is adequate state protection in Hungary and that Hungary is making serious and genuine efforts to erase the problem of racism against Roma.
>
> [emphasis added]

[31] While the Board invokes adequacy in its conclusion, the sentence above does little to make a reviewing court confident that the Board's focus was on the proper legal test and not the commonly misused test mentioned immediately after. This ambiguity puts the Board's decision at odds with *Dunsmuir* values of transparency and justifiability, given that it is not clear whether the decision was justified in reference to the proper test.

[32] Similarly, attempting to extrapolate to what the Board's conclusion would have been had it properly stated the test is fruitless, given that it analyzed the majority of the evidence in the frame of serious efforts and attempts, as shown by the excerpts above.

[33] This Court must defer to the Board's expertise in refugee determination, but such deference does not extend to permitting the Board to rely, even in part, on a legal misconception which has been corrected by this Court a number of times.

[34] The Board's decision is outside the range of possible acceptable outcomes due to being rooted in analysis of state protection evidence based on the incorrect "serious efforts" test. It is therefore unreasonable and must be set aside.

[35] The application for judicial review is therefore granted and the matter is referred to a different panel of the Board for redetermination.

[36] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, the decision of the Board is set aside and the matter is returned to a different panel of the Board for redetermination.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

***Immigration and Refugee Protection Act*, SC 2001, c 27**

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.
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,	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) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	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.
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 themself 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.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7585-12
STYLE OF CAUSE:	GABOR BURAI, SAROLTA FORGACS and TAMAS BURAI - and - THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	May 6, 2013
REASONS FOR JUDGMENT AND JUDGMENT OF:	O'KEEFE J.
DATED:	May 29, 2013

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