Federal Court  Cour fédérale

Date: 20130620

Docket: IMM-6803-12

Citation: 2013 FC 693

Ottawa, Ontario, June 20, 2013

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

ROLAND KOTAI
ROLAND KOTAI
LAURA KOTAI
KATALIN BALOGH

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants seek judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the *Act*] of the decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada (the Board), dated June 12, 2012, which found that the applicants were not Convention refugees nor persons in need of protection pursuant to sections 96 and 97 of the *Act*. For the reasons that follow, the application is dismissed.

Background

[2] The applicants, the Kotai family, include the principal applicant, his wife, and their two children. The applicants are Hungarian citizens of Roma ethnicity. They arrived in Canada in 2010 seeking refugee protection due to the racism and discrimination they had experienced in Hungary. The applicants described one incident of vandalism of their home in 2010 when a brick was thrown at the window. The police responded, but the applicants could not identify the perpetrators and no arrests were made. The applicants also described an incident in 2010 when four skinheads accosted them, called them "dirty gypsies", and spat at them. This incident was not reported to the police. The applicants also alleged that one of their children was placed in a segregated Roma kindergarten class and that the mother had experienced insensitive treatment by doctors during the birth of her son.

The decision under review

[3] The Board found that the determinative issue was state protection. The Board noted that the applicants feared the Hungarian Guard and skinhead groups in Hungary and acknowledged the specific incidents the applicants alleged but concluded that the applicants had failed to rebut the presumption of adequate state protection with clear and convincing evidence. The Board noted that the applicants had contacted the police on one occasion and that the police had responded. With respect to their allegations of discrimination in education, and poor treatment during the birth of the younger child, the Board noted that the applicants had not sought any recourse, for example, to the Equal Treatment Authority, nor had they made any complaints to other authorities.

[4] Although the majority of the Board's decision is a description of the programs and initiatives in Hungary which are intended to address discrimination and violence against Roma people, many of which are not relevant to the applicant's circumstances, the Board did focus on the applicants' particular experiences in determining whether they would face persecution upon their return.

[5] The Board acknowledged that the documentary evidence of the government's efforts to protect the Roma is mixed, that right-wing extremism incites violence against the Roma, and that Roma face discrimination and persecution on many levels. However, the Board found that in the particular circumstances, the applicants had not demonstrated that state protection was so inadequate that they need not have approached the authorities at all or that they need not have sought assistance from other authorities, including the Minorities Ombudsman's Office or the Independent Police Complaints Board.

[6] The Board also acknowledged that the country condition documents support the view that protection is not perfect and many areas require improvement. The Board added that there was no evidence of a complete breakdown of the state and there was evidence of the serious efforts underway to improve the situation of the Roma. The Board considered whether the state was able to protect the applicants to the degree reasonable in the circumstances, noting that the police had responded when called. There was no evidence that the past personal experience of the applicants would lead them to believe that state protection would not be adequate or reasonably available if they returned to Hungary.

[7] The Board noted that the fact that the police did not arrest anyone following the vandalism on the applicants' home could be due to many factors, including lack of identification by the applicants.

The Issues

[8] The applicants submit that the decision is unreasonable on five grounds: first, that the police should have investigated the vandalism despite the lack of identifiable suspects and their failure to do so and their failure to prevent such attacks, which are increasing in frequency, demonstrates a lack of state protection; second, that the onus on an applicant to rebut the presumption of state protection must be considered in the context of the spectrum of democracy; third, that the Board failed to consider the increase in racist violence and the heightened need for protection; fourth, that the other agencies referred to by the Board to address discrimination and persecution of Roma are not relevant or effective; and, fifth, that the Board misstated and misapplied the test for state protection.

[9] The respondent submits that the Board considered all of the country condition evidence, acknowledged that it was mixed, and focussed its consideration on whether the applicants had rebutted the presumption of state protection within that context (i.e. within the democracy spectrum). The respondent submits that the Board's decision is reasonable.

Standard of Review

[10] The applicable standard of review of the decision of the Board is reasonableness which calls for deference. The role of the Court on judicial review is not to substitute any decision it would have

made but to "determine if the outcome 'falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law': *Dunsmuir*, at para 47. There may be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome": *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1SCR 339 at para 59.

Is the Board's decision reasonable?

[11] While the applicants have raised five grounds to support their position that the decision is not reasonable, all the grounds are related to each other and to how the Board assessed the adequacy of state protection and the applicant's efforts to rebut the presumption of state protection.

[12] With respect to the police response to the incident of vandalism, which did not result in any arrests, the applicant relies on *Pinter v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1119, where Justice Zinn noted at paragraph 14:

> "Further, I note that accepting a report of criminal conduct does not establish adequate police protection when no steps are taken to investigate the complaint. If police had no obligation to investigate a complaint where the assailant was unknown, their job would be remarkably easier. "

[13] I note that in *Pinter*, Justice Zinn identified several reasons to allow the application for judicial review other than due to the assessment of state protection. In that case, the applicants alleged that they had to overcome resistance to even file the report and that the police did not make any effort to investigate. In the present case, the applicants indicated that the police did respond and

took statements from the female applicant and her parents. There is no suggestion that the police resisted taking their report or indicated that they would not follow up, only that no suspects were identified.

[14] The applicants' submission that the police have an obligation to prevent racist attacks against Roma, in addition to responding to incidents after the fact, and that their failure to do so establishes a lack of state protection, imposes an unrealistically high standard on the police and could make the obligation on refugee claimants to avail themselves of state protection, to the extent that state protection is available, meaningless. The prevention of all crime is simply not possible. The evidence of recent violence, which the applicant submits shows that police failed to prevent and protect, was considered by the Board. The Board found that there was no evidence of a complete breakdown of the state nor did the recent violence demonstrate that there was no state protection to the extent that this would absolve the applicants of their onus to seek state protection. The Board noted the initiatives underway in an effort to deter and prevent racist attacks and also acknowledged that there was room for improvement.

[15] I agree that not all democratic countries provide the same level of democracy and, as noted by the applicants, there is a "democracy spectrum". The onus on an applicant to rebut the presumption of state protection is commensurate with the level of democracy in the country.

[16] As noted by Justice Rennie in *Sow v Canada* (*Minister of Citizenship and Immigration*), 2011 FC 646 at paras 9-11:

> [9] In a democratic country there is a presumption that a state can protect its own citizens. As such, the onus is on the applicant to

> rebut this presumption and prove the state's inability to protect through "clear and convincing" evidence: *Canada (Attorney General) v Ward* [1993] 2 SCR 689 at para 50; *Hinzman v Canada (Citizenship and Immigration)*, 2007 FCA 171 at paras 43-44; *Zepeda v Canada (Minister of Citizenship and Immigration)*, 2008 FC 491 at para 13.
>
> [10] This principle, however, does not stand in isolation. It is tempered by the fact that the presumption varies with the nature of the democracy in a country. Indeed, the burden of proof on the claimant is proportional to the level of democracy in the state in question, or the state's position on the "democracy spectrum": *Kadenko v Canada (Minister of Citizenship and Immigration)* [1996] FCJ No 1376 at para 5; *Avila v Canada (Minister of Citizenship and Immigration)*, 2006 FC 359 at para 30; *Capitaine v Canada (Citizenship and Immigration)* 2008 FC 98 at paras 20-22.
>
> [11] Democracy alone does not ensure effective state protection. The Board must consider the quality of the institutions providing that protection. As well, the Board must look at the adequacy of state protection at an operational level and consider persons similarly situated to the applicant and their treatment by the state: *Zaatreh v Canada (Citizenship and Immigration)*, 2010 FC 211 at para 55.

[17] In the present case, the Board's reasons as a whole indicate that it considered the "mixed" evidence about the initiatives underway in Hungary and their effectiveness, and that this mixed evidence provided the context within which the Board assessed the adequacy of state protection and the applicant's efforts to seek state protection.

[18] The Board canvassed the programs, policies, mechanisms, and institutions in Hungary that address discrimination, several of which had no application to the circumstances of the applicants, but do demonstrate the range of initiatives underway. The Board acknowledged that despite these initiatives, the Roma still face discrimination, including from the police who may not always

respond and are sometimes the perpetrators of discrimination. However, the government has taken measures to deal with corrupt, incompetent police officers.

[19] The Board also canvassed the educational system and noted that if the children faced discrimination, the applicants could have sought recourse through the Equal Treatment Authority, a body which provides recourse to members of national and ethnic minorities with interactions with the authorities.

[20] With respect to the applicant's submission that the Board failed to consider the documentary evidence of recent increases in violence against Roma, which demonstrates that state protection is inadequate and that the applicants would face this violence upon their return, I note that the Board specifically referred to the US Department of State Report, 2010, among other country condition documents, which did indicate that violent and racially motivated attacks were continuing. The Board referred to the public's concern about the racially-motivated violence and again noted that the government had established a process to hold police accountable where they abuse their power or fail to address racist violence.

[21] As the applicants submit, the Board referred to many agencies that would not have been of benefit to them. I agree that many of the Board's references to measures implemented in Hungary to address racism, including the Minorities Ombudsman and the Equal Treatment Authority, would not have any role in the direct protection of Roma against violence. However, these agencies may have been a resource with respect to the applicants' concerns about the segregated kindergarten class or the mistreatment in the hospital.

[22] Both the applicant and respondent agree that the police are primarily responsible for state protection against violent attacks.

[23] As noted by Justice de Montigny in *Katinszki v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1326, [2012] FCJ 1444 at para 15, it is the police that have the responsibility for the protection of citizens:

> [15] The jurisprudence of this Court is very clear that the police force is presumed to be the main institution mandated to protect citizens, and that other governmental or private institutions are presumed not to have the means or the mandate to assume that responsibility. As Justice Tremblay-Lamer aptly stated in *Zepeda v Canada (Minister of Citizenship and Immigration)*, 2008 FC 491, [2009] 1 F.C.R. 237 at paras 24-25:
>
> > 24 In the present case, the Board proposed a number of alternate institutions in response to the applicants' claim that they were dissatisfied with police efforts and concerned with police corruption, including National or State Human Rights Commissions, the Secretariat of Public Administration, the Program Against Impunity, the General Comptroller's Assistance Directorate or through a complaints procedure at the Office of the Attorney General (PGR).
> >
> > 25 I am of the view that these alternate institutions do not constitute avenues of protection *per se*; unless there is evidence to the contrary, the police force is the only institution mandated with the protection of a nation's citizens and in possession of enforcement powers commensurate with this mandate. For example, the documentary evidence explicitly states that the National Human Rights Commission has no legal power of enforcement ("Mexico: Situation of Witness to Crime and Corruption, Women Victims of Violence and Victims of Discrimination Based on Sexual Orientation").

> See also: *Risak v Canada (Minister of Employment and Immigration)*, [1994] FCJ no 1581, 25 Imm LR (2d) 267 at para 11.

[24] The police are the key players with respect to the applicants' experience and concerns about racially-motivated crime and crime in general. The Board assessed the adequacy of state protection for the applicants in the context of the circumstances the applicants had faced, i.e. that the applicants had experienced two incidents and had sought police assistance on one occasion and the police had responded.

[25] With respect to the test for state protection, the applicants allege that the Board correctly set out the test only once at paragraph 11, and thereafter set out the wrong test and applied the wrong test.

[26] At paragraph 11 of the decision, the Board noted:

> "A claimant must show that they have taken all reasonable steps in the circumstances to seek protection, taking into account the context of the country of origin, the steps taken, and the claimant's interactions with the authorities. In determining whether protection is adequate, it is important to analyse not merely whether a legislative and procedural framework for protection exists, but also whether the state, through the police or other authorities, is able and willing to effectively implement that framework."

[27] Later in the decision the Board commented that:

> "It would be remiss for me to state that the government's efforts have eradicated corruption, however, based on the preponderous (sic) of documentary evidence before me, and the circumstances particular to

> this case, I find that Hungary is making *serious efforts* to address the issues of corruption and criminality." [my emphasis]

[28] The Board also acknowledged the inconsistencies in the documentary evidence, however, the objective evidence of country conditions suggested that, while not perfect, Hungary is making "*serious efforts* to address these problems, and that the police and government officials are both willing and able to protect victims." [my emphasis]

[29] The Board further stated that state protection must be adequate and that no government can guarantee the protection of all of its citizens at all times, concluding as follows: "Consequently, as long as the government is taking *serious steps* to provide or increase effective protection for individuals then the individual must seek state protection."[my emphasis]

[30] The applicant submits that the Board focussed on serious efforts and serious steps, which is not the test, rather than focussing on the willingness and current ability of the government to provide adequate state protection.

[31] The Supreme Court of Canada set out the rationale underlying the international refugee protection regime in *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at para 18. That regime is meant to be relied upon when the protection one expects from the state in which the person is a national is unavailable, and even then, only in certain situations. It is considered to be surrogate or substitute protection in the event of a failure of national protection. Persecuted individuals are required to first approach their home state for protection before the responsibility of other states becomes engaged.

[32] There is a presumption that a state is capable of protecting its citizens. The presumption can be rebutted by clear and convincing evidence that state protection is inadequate or non-existent: *Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, [2008] 4 FCR 636 [*Carrillo*]. Such evidence must be reliable and have probative value; claimants "must adduce relevant, reliable and convincing evidence which satisfies the trier of fact on a balance of probabilities that the state protection is inadequate": *Carrillo*, above, at para 30.

[33] The jurisprudence has established that serious efforts of state protection are not sufficient when there is no willingness or ability to provide adequate state protection. The standard is adequate state protection, not perfection. However, willingness on its own is not enough.

[34] As noted by Justice Kelen in *Jaroslav v Canada (Minister of Citizenship and Immigration)*, 2011 FC 634 at para 75, "Serious efforts by the state to provide protection are relevant to, but not determinative of, the question of whether protection is adequate. No standard of perfection is required."

[35] In *Cosgun v Canada (Minister of Citizenship and Immigration)*, 2010 FC 400 at para 52, Justice Crampton summed up the approach as follows:

> [52] Based on the foregoing review of the cases cited by the parties, I agree with the Respondent that the law is now well-settled that the appropriate test for assessing state protection is whether a country is able and willing to provide adequate protection. In short, a claimant for protection under sections 96 or 97 of the IRPA must establish, with clear and convincing evidence, and on a balance of probabilities, the inability or unwillingness of the state to provide adequate protection. This burden of proof remains the same

> regardless of the country being assessed, although the evidentiary burden required to rebut the presumption of adequate state protection will increase with the level of democracy of the state in question. (*Carrillo*, above, at paras. 25 and 26.)

[36] In *Bledy v Canada (Minister of Citizenship and Immigration)*, 2011 FC 210, [2011] FCJ 358 at para 47, Justice Scott noted:

> [47] However, as this Court has pointed out on a number of occasions, the mere willingness of a state to ensure the protection of its citizens is not sufficient in itself to establish its ability. Protection must have a certain degree of effectiveness: see *Burgos v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1537, 160 ACWS (3d) 696; *Soto v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1183 at para 32. As such, an applicant can rebut the presumption of state protection by demonstrating either that a state is unwilling, or that a state is unable to provide adequate protection: see *Cosgun v Canada (Minister of Citizenship and Immigration)*, 2010 FC 400 at para 52.

[37] Although the Board referred to state protection many times and used different wording, when the terms "serious steps" and "serious efforts" are read in their context, it is apparent that the Board had the correct test for state protection in mind, and was aware that both ability and willingness to provide adequate state protection are necessary. The Board applied the correct test to the circumstances of the applicants and assessed the applicants' efforts to rebut the presumption of state protection in the context of the "democracy spectrum".

[38] The applicants submit that the present circumstances are very similar to those in *Molnar v Canada (Minister of Citizenship & Immigration)*, 2013 FC 296 [*Molnar*], where this Court allowed the application for judicial review. In *Molnar*, the applicants recounted several incidents of

violence over the years. The applicants made one attempt to report an incident and the police would not take the report.

[39] In *Molnar*, Justice Gagné found that the Board failed to engage in a case specific and meaningful analysis of the evidence that supported the applicant's position and did not assess the mixed evidence, similar to the mixed evidence in the present case, with a view to the applicant's situation. As a result, Justice Gagné noted that she was unable to assess whether the Board had ignored relevant evidence.

[40] The present case can be distinguished from *Molnar*. The applicants reported one incident to the police and the police attended and took a report. In addition, the Board consistently referred to the circumstances of these applicants in assessing whether they had taken reasonable steps to rebut the presumption of state protection in the context of the mixed evidence that was before the Board. The Board referred extensively to evidence in support of the applicant's position as well as evidence of the initiatives underway to address racism and discrimination. I cannot conclude that the Board ignored relevant evidence.

[41] The country conditions do not suggest that the situation is so bleak that all Roma, regardless of their particular circumstances, should not be expected to make reasonable efforts to seek state protection before seeking refugee protection in another country.

Conclusion

[42] The Board considered the extensive and conflicting documentary evidence and considered the circumstances of the applicants in that context. Although there is jurisprudence from this Court which has found that there is inadequate state protection for the Roma in Hungary, and as a result, the onus on the particular applicants to rebut the presumption of state protection is low or non-existent, each case must be determined on its facts. Moreover, the role of the Court is not to re-weigh the evidence or re-make the decision of the Board in the absence of an error on its part. In the present case, the Board's decision that there was adequate state protection for these applicants and that these applicants had not rebutted the presumption of adequate state protection with clear and convincing evidence was reasonable. The Board did not ignore or misconstrue the evidence before it. The Board considered a wide range of documents, referred to the key documents, and set out its findings in a transparent manner to support the decision it reached.

[43] The application for judicial review is dismissed. No question was proposed for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is dismissed

2. There is no question for certification.

"Catherine M. Kane"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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