Federal Court Cour fédérale

Date: 20131115

Docket: IMM-10944-12

Citation: 2013 FC 1164

Ottawa, Ontario, November 15, 2013

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

SANDOR IGNACZ
ANDREA BALOG
BRENDON IGNACZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is yet another application for judicial review of a decision of a Member of the Refugee Protection Division of the Immigration and Refugee Board of Canada [the Member], denying the Roma Applicants' application for refugee protection on the grounds that the they had not rebutted the presumption of state protection in Hungary.

[2] Each decision turns on its own facts and the thoroughness of the analysis done by the Board, which explains why many claims are denied on the basis of state protection while others succeed, despite being determined on the same national documentation package [NDP].

BACKGROUND

[3] The Applicants are Hungarian citizens of Roma ethnicity who lived in the small town of Mohacs in southern Hungary. They arrived in Canada on May 17, 2011, and claimed refugee status the next day. Mr. Sandor Ignacz is 31 years old. He has a common law wife, Andrea Balog who is 25 years old, and together, they have a 3 year old son, Brendon Ignacz.

[4] The RPD accepted the evidence of the Applicants as to their treatment and experiences in Hungary. There were three particular events relied on by the Applicants that were considered by the RPD in concluding that they had failed to rebut the presumption of state protection.

1. 2004 Attack

[5] In 2004, the adult claimants were assaulted by a group of young adults [the 2004 Attack]. Mr. Ignacz was hit and, when on the ground, was kicked and punched. Ms. Balog tried to come to his aid but was grabbed by the hair and thrown to the side. She lost consciousness during the attack. When she came to, she found Mr. Ignacz bloodied and on the ground, but conscious. She took him to a hospital where they received care for their injuries. They went to the police to file a report regarding the attack and were told that they would be contacted if the perpetrators were found, but the police did not take any of their personal information. They were unable to

provide the police with any identifying information except for the location of the attack, and their attackers' clothing, skin tone, and height.

2. 2007 Incident

[6] In February 2007, around noon, while at an annual festival, Mr. Ignacz and Ms. Balog were chased by uniformed members of the Hungarian Guard, an outlawed, extremist right-wing organization [the 2007 Incident]. They escaped without incident and after calling the police from a safe location, they were told that nothing could be done because the festival was going on and to stay at the location they were at as it was safe.

3. 2010 Incident

[7] In late 2010, the Applicants were visiting Ms. Balog's father who recently had surgery. When the four of them left Mr. Balog's home, members of the Hungarian Guard, who were marching and conducting a protest in the area, attacked the Applicants and Mr. Balog. Mr. Balog and Mr. Ignacz were both beaten and humiliated. They retreated into the house, but the Hungarian Guard broke the windows [the 2010 Incident]. The Applicants called the police who advised them to stay indoors. The police arrived at Mr. Balog's house quickly and spoke to the Hungarian Guard members outside the house. Both the police and the Guardists then left. The police did not go into the house to talk to the Applicants about the assault or the broken windows. No arrests were made.

[8] It was this incident that precipitated the Applicants fleeing to Canada and seeking protection.

THE DECISION

[9] The Member determined that the Applicants were not Convention refugees or persons in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act,* SC 2001, c 27. The Member noted that there is "widespread reporting of incidents of intolerance, discrimination, and persecution" of Roma in Hungary. She further found that the evidence indicates that the attitudes in Hungary towards Roma are "discriminatory and prejudicial." However, the Member ultimately determined that the Applicants had received adequate state protection or, in the alternative, had not taken all reasonable steps in the circumstances to seek out state protection. Specifically, the Member found that they did not complain to higher authorities about their dissatisfaction with police responses. The Member specifically noted that they failed to engage the president of their Roma community, and the complaints mechanisms available through the new Commissioner of Fundamental Rights [CFR], and the Independent Police Complaints Board [IPCB].

Analysis of the Reasonableness of the Finding that the Applicants Failed to Rebut the Presumption of State Protection

[10] The only issue raised in this application is the reasonableness of the Member's state protection finding. For the reasons that follow, I find that the state protection finding is not reasonable and the decision under review must be set aside.

Unreasonable Assessment of the Adequacy of the State Protection Actually Received

[11] The RPD found "the response that they [the Applicants] received from the police they contacted to be adequate in the circumstances."

[12] With respect to the 2004 Attack, the RPD found the police response adequate because "the claimants were unable to provide any specific description of their assailants to the police so that they could properly investigate the criminal activity." I have two issues with that conclusion.

[13] First, the police not only failed to investigate, the police "did not write down <u>any</u> data." (Emphasis added). Ms. Balog testified that "as soon as we went in they didn't take any data from us" and that "they didn't take our personal data," despite informing the police that the assailants all wore black army boots and white T-shirts with the emblem of the Guardists. She also told the police that they were white people and she told the police their heights. The Member asked Ms. Balog what she expected the police to do given that she could not really describe the attackers. She responded that "we wished that they could even try to find them." I have previously stated 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:" *Pinter v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1119 at para 14.

[14] There may be a few circumstances where a police response to do nothing is not unreasonable - perhaps a hooded figure taking gum from a child's hand is one example. Being short-staffed because police resources are tied up dealing with threats to the lives of many may be another example. However, I do not find a police response of doing absolutely nothing to be adequate when two citizens are beaten to the point that they are required to be treated at a

hospital for their injuries. It is a particularly inadequate and unreasonable response when the attack has all the ear-marks of a racially motivated attack by a group of thugs. Moreover, in my view, there was every indication that the police were not taking the report of an assault seriously and that they had no intention of doing anything because they failed to take down the personal data of the Applicants, even though they said they would contact them in the future if the perpetrators were apprehended. How, one must ask, would they have done that when they had failed to record the names, addresses, or phone numbers of the Applicants?

[15] If this was the only occasion when the police response was to do nothing, it may have been insufficient to overcome the presumption of state protection - but it was not.

[16] The RPD found the police response to the 2007 Incident to be adequate because "without a description of exactly who they were supposed to be looking for, it was reasonable for the police to suggest that the claimants remain in a safe place away from the area where they had been harassed." I cannot see how a police response of stating the obvious but doing nothing constitutes adequate protection.

[17] The Applicants had taken shelter from the thugs pursuing them in a friend's home. Advising them to stay put is not offering protection - coming to their location, assessing the situation, showing a police presence to the assembled group - that is offering protection. Again, the incident had all the signs of being racially motivated. There was nothing to suggest that the police were so short-staffed that they could not send an officer or two to the Applicants' location to ensure that they were safe, or to escort them to their house, or to attend at the site to see if the

culprits were otherwise engaged in harassing other Roma. Again, I ask, how is giving the same advise - stay indoors - that a mother would give her child being bullied in the school yard, reasonably adequate police protection?

[18] The RPD also found the police response to the 2010 Incident to be adequate "based on the fact that when they were called, they advised the claimants to stay in the house away from the perpetrators, they came to the scene in a prompt manner, and they spoke to the perpetrators and sent them away." In this instance, at least, the police did more than tell them to stay indoors; they showed up. However, how can one reasonably say that the police sending the perpetrators away is adequate protection when there had been an assault on the two men and property destruction? Here, the identity of the perpetrators was known - the police spoke to them, but they did nothing other than send them away. Admittedly, the Applicants were thus protected by the state; but the police response to the crimes committed against them was, in my view, wholly inadequate. Not only did the police not arrest or charge the perpetrators, they failed to even speak to the Applicants to see if they could identify any of their attackers from those gathered outside the house.

[19] In my view, the Member's assessment that the police response in these three incidents constituted adequate state protection is wholly unreasonable. Perhaps the Member ought to have asked herself this question: "Had these events happened to me or my family would I have thought that the police response provided me with adequate protection?" The 2010 Incident, in particular, is a glaring illustration of how the police were unable, or unwilling to address the Applicants' agents of persecution.

Unreasonable Assessment of the Failure to Seek Protection from Higher Authorities

[20] The Member also found that the Applicants had failed to rebut the presumption of state protection because they failed to take their concerns regarding the police response to those higher up.

[21] The Member found that "the central government is motivated and willing to implement measures to protect the Roma and has provided specific examples of how this is effective at the operational level" (emphasis added).

[22] Two examples of what the Member considers effective measures on an operational level are the CFR and the IPCB, of which she says the NDP "indicate[s] that these complaint mechanisms do in fact, take complaints, make findings and then report those findings back to the appropriate authorities for their response." I agree entirely with the observation of Justice de Montigny that the mandate of these and similar organizations in Hungary "is not to provide protection but to make recommendations and, at the best, to investigate police inaction after the fact:" *Katinszki v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1326 at para 14. I further agree with his statement at paragraph 15 that "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 nor the mandate to assume that responsibility."

[23] I repeat the question I posed in *Majoros v Canada (Minister of Citizenship and Immigration)*, 2013 FC 421: Had the applicants followed up with the president of their Roma community, or used the complaints mechanisms available through the CFR and the IPCB, would they be any safer or any more protected? Unless, one can answer that question positively - and there is nothing in the NDP that would support that response - then failing to approach these authorities cannot be fatal to a refugee claim when police protection has been unsuccessfully sought. The Member's finding that these institutions offered the Applicants - and Roma generally - effective protection at the operational level is just not supported by the evidence and her conclusion that the claims of the Applicants must fail because they failed to seek it out, is therefore unreasonable.

Unreasonable Reliance on Amendments to the Hungarian Criminal Code

[24] In her reasons, the Member noted Article 174/B of the Hungarian Criminal Code which "criminalizes violent acts committed against a person for belonging to a national, ethnic, racial, or religious group." This, the Member states, is an example of an initiative that Hungary has implemented to ensure adequate state protection on an operational level.

[25] In relying on the implementation of Article 174/B, the Member ignores evidence regarding the actual, as opposed to the theoretical, effectiveness of this amendment. Article 174/B has been in force since 2004. One would expect that in the nearly ten years since its enactment, there would be tangible results speaking to this provision's effectiveness at the operational level. Yet the evidence in the record states that the Article "is not systematically applied," that "police often choose to begin the investigation on the basis of non-hate crime

charges," and that police, prosecutors and court officials are "reluctant to consider racial bias motivation as an aggravating circumstances to crime." In other words, it is not being implemented.

[26] The statistics are also telling. In each of 2004 and 2005, the police only identified seven crimes that would be punishable under Article 174/B. In 2008, this number rose to 12, but in 2009, immediately receded back to 6. Further, in spite of Article 174/B, the Member herself confirms that "in recent years, "conditions for the Roma have deteriorated" and "worsened" and that "hidden anti-Roma attitudes are becoming more open." The Member therefore erred by concluding that Article 174/B exemplifies Hungary's efforts to make state protection at the operational level adequate, without actually addressing the evidence in the record to the contrary.

[27] Moreover, had it been evidence of adequate protection, one would have expected the police to have used this criminal provision in dealing with the 2010 Incident, if not all three relied upon by the Applicants, and not simply have let the gang leave the scene without even questioning them.

Selective Reading of the Evidence in the NDP

[28] Finally, while I acknowledge the presumption that the Member considered all of the evidence in the NDP before her, I note that the Member selectively pulled excerpts from the NDP that supported her view that state protection was adequate in this case, and failed to address evidence in the NDP that contradicted her conclusion. The Member even states that:

> … there are some inconsistencies among several sources within the documentary evidence; however, the objective evidence regarding

> current country conditions suggests that, although not perfect, there is adequate state protection in Hungary for Roma who are victims of crime, police abuse, discrimination or persecution, that Hungary is making serious efforts to address these problems and to implement these measures at the operational or local level and that the police and government officials are both wiling and able to protect victims.

[29] However, despite noting the "inconsistencies" in the evidence, the Member does not deal with any of those inconsistencies specifically, nor does she explain why she prefers the evidence in the NDP that suggests that there is adequate state protection. The following are just some of the examples of evidence in the NDP that undermine the Member's conclusion that adequate state protection - from either the police, or higher authorities - would have been available to the Applicants had it been sought out.:

a. The Society for Threatened Peoples note that "state response to anti-Roma sentiment and violence is 'often restrained and not particularly effective';"

b. In 2011, the UN Special Rapporteur stated that "racism against Roma is prevalent within public institutions, <u>notably the police and judicial system</u>" and emphasized "<u>the racial profiling and abuse against Roma by the police, as well as refusal of police officers to record Roma complaints</u> and imposing 'disproportionate fines' when Roma broke the law" (emphasis added);

c. The European Human Rights Court ruled against Hungary in a case involving a Roma woman and held that the police had used excessive force and that there was a "failure to conduct an effective investigation" <u>after the woman filed a complaint against the police</u>; (emphasis added) and

d. Human Rights First reports that because of cases of police "ill-treatment and discrimination" against Roma, there is a "high level of mistrust of authorities' within Roma communities, which results in 'severe underreporting' of racist and violent incidents."

[30] The above excerpts from the NDP provide objective and reasonable explanations for why the Applicants in this case may not have sought protection from higher authorities, and examples of failures of the complaint mechanisms that the Member concluded were adequate. In my view, by failing to address any of the evidence in the NDP that contradicted her conclusions - apart from saying that it exists - the Member's reasons do not live up to the "justification, transparency and intelligibility" mandated by *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47.

CONCLUSION

[31] The decision under review does not withstand scrutiny using the test enunciated by the Supreme Court in *Dunsmuir v New Brunswick*, 2008 SCC 9. The rejection of the Applicants' claims for protection was unreasonable because: (1) the Member found that they had received adequate state protection in Hungary when they had received no protection at all, and (2) the Member found that they had failed to rebut the presumption of protection because, even if they had not received protection from the police, they failed to complain of police failures to higher authorities, when there was no evidence that those authorities were in a position to actually protect the Applicants.

[32] No question for certification was proposed.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is allowed, the decision denying the Applicants claims for protection is set aside, their claims for protection are referred to another Member for determination, and no question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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