

Federal Court



Cour fédérale

Date: 20131126

Docket: IMM-11756-12

Citation: 2013 FC 1184

Vancouver, British Columbia, November 26, 2013

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

FERENC LASZLO BIRKAS

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Notwithstanding that this application was initiated by all members of the family, only Ferenc Laszlo Birkas is challenging the decision under review. Accordingly, and with the consent of the parties, the style of cause will be amended to reflect Mr. Birkas as the sole Applicant.

[2] Mr. Birkas challenges the decision of the Refugee Protection Division of the Immigration and Refugee Board [RPD] that he is not a Convention refugee nor is there a serious possibility that

he would be at risk of cruel and unusual treatment or punishment, torture, or a risk to his life if returned to Hungary.

[3] Mr. Birkas is a homosexual Roma who fled to Canada from Hungary on January 22, 2010, and filed for refugee protection. He claimed to have been a victim of numerous threats and physical assaults due to his Roma ethnicity and his homosexuality. He also claimed to have been unsuccessful in the attempts he made to seek state protection.

[4] The RPD found that Mr. Birkas “was not credible regarding his efforts to seek state protection in Hungary.” It further found that he was not credible when testifying about the attacks he suffered in Hungary as a result of his sexual orientation and ethnicity.

[5] The RPD states that “the determinative issue in the case at hand is the presumption that a country is capable of protecting its citizens, and this underscores the principle that international protection comes into play only when a refugee claimant has no other recourse available” (emphasis added).

[6] Mr. Birkas challenges only the finding of the RPD on the “issue of state protection of Roma in Hungary.” He does not challenge the negative credibility findings. Accordingly, the finding of the RPD that the persecutory events did not happen and the finding that no efforts were made to seek state protection, must stand.

[7] Justice Barnes in *Camacho v Canada (Minister of Citizenship and Immigration)*, 2007 FC 830 at para 10, referencing the decision in *Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, observed that “in the absence of a compelling explanation, a failure to pursue state protection opportunities within the home state will usually be fatal to a refugee claim – at least where the state is a functioning democracy with a willingness and the apparatus necessary to provide a measure of protection to its citizens.”

[8] Applying that principle to the case at hand, Mr. Birkas - having failed to provide any evidence of personal persecution or efforts to seek protection that the RPD found to be credible - could only succeed in his claim for protection if there was clear and convincing evidence that:

1. All gay Roma men in Hungary have a well-founded fear of persecution or are subjected to a risk to their lives or to a risk of cruel and unusual treatment or punishment; and
2. There is no adequate state protection available to them.

[9] In this case, that clear and convincing evidence would have to be found in the country condition documents [CCD] before the RPD.

[10] First, there is no evidence in the CCD that all gay Roma in Hungary have a well-founded fear of persecution or are subjected to a serious risk to their lives or to a risk of cruel and unusual treatment or punishment just because of their identity as gay Roma. Second, there is no evidence in the CCD that all gay Roma in Hungary have inadequate state protection.

[11] The RPD in this decision noted that the CCD discloses that some Roma in Hungary are persecuted or at risk and there are issues of inadequate state protection in some cases. Those findings, in my view, are reasonable based on the CCD. But those findings fall well short of that which would have been necessary for Mr. Birkas to succeed in his application for protection.

[12] Therefore, even if I were to find that the RPD's analysis of state protection in Hungary vis-à-vis Mr. Birkas was unreasonable, he has failed to establish that merely because he is a gay Roma, he is at risk in Hungary and has inadequate state protection. Accordingly, even if he were to succeed in this application, exercising my discretion as to remedy, I would not have remitted his application back to be re-determined by a different Member of the RPD, because his application cannot succeed.

[13] For these reasons this application is dismissed. No question for certification was proposed.

JUDGMENT

THIS COURT’S JUDGMENT is that:

1. The style of case is amended by deleting, as Applicants, Szimonetta Kitti Birkas (a.k.a. Szimonetta Kitt Birkas) and Nikolett Livia Ronto; the only Applicant is Ferenc Laszlo Birkas;
2. This application is dismissed; and
3. No question is certified.

“Russel W. Zinn”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-11756-12

STYLE OF CAUSE: FERENC LASZLO BIRKAS v THE MINISTER
OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: NOVEMBER 21, 2013

**REASONS FOR JUDGMENT
AND JUDGMENT:** ZINN J.

DATED: NOVEMBER 26, 2013

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