

Federal Court



Cour fédérale

Date: 20140515

Docket: IMM-1789-13

Citation: 2014 FC 474

Toronto, Ontario, May 15, 2014

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

**LASZLO HANKO
LILIANA FRIDA HANKO
FRIDA KRAJCZAR**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

ORDER AND REASONS

[1] The present Application concerns a Roma family, a couple and their daughter, who are citizens of Hungary and who claim refugee protection based on a well-founded fear of more than a mere possibility of persecution on the basis of their ethnicity should they be required to return to Hungary. In the decision under review, dated January 30, 2013, the Refugee Protection Division of the Immigration and Refugee Board (the RPD) rejected the Applicants' claims for

protection under ss. 96 and 97 of the *IRPA* on a finding that the Applicants had not rebutted the presumption of state protection (Decision, para. 6). The central issue in the present Application is whether the RPD's finding is justified, transparent, and intelligible, and, therefore, reasonable (*Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, at para. 47). For the reasons that follow, in my opinion, it is not reasonable.

I. The Applicants' Position on the Issue of State Protection

[2] The RPD made no finding of negative credibility, and, therefore, the Applicants' evidence of past persecution in Hungary was accepted: the Applicants fled to Canada after suffering a lifetime of discrimination and persecutory treatment in terms of accessing education, employment, medical care, and other social services based on their Romani ethnicity.

[3] The undisputed culminating event that caused the Applicants to flee to Canada occurred on February 1, 2011:

On February 1, 2011, my family and I were walking home when a car pulled up. A group of non-Roma men got out of the car and accosted us on the street. They were all wearing camouflage [sic] pants and baseball hats, which did not seem normal. They were racist and verbally abusive towards us, even threatening to kill us. One of them pushed Frida, calling her a dirty gypsy whore. They also spit on us. By their appearance and behavior, we feared they were part of Jobbik and/or the Hungarian Guard. We were so frightened by this incident that we went to the police station to make a complaint. The police said there was no point taking the report because we could not confirm if there had been any witnesses. Hearing of other Roma who sought assistance from the police with no follow up, we did not think it would make any difference if we complained to a higher authority.

11. Roma are persecuted in a multitude of ways in our country. Our personal experiences are confirmed by the media. After the

attack on my family on the street, we became so fearful for our safety and broken by the ongoing persecution we suffered every day in Hungary that we decided to leave. It took time for us to gather enough money to buy the plane tickets to Canada and get our passports. We left for Canada as soon as we could.

(Laszlo Hanko's PIF narrative, Tribunal Record, pp. 29 and 30)

[4] The Applicants' position before the RPD, and in the present Application, is that the evidence of ongoing and worsening discrimination against, and persecution of, Roma in Hungary is clear and convincing evidence that rebuts the presumption of state protection in Hungary. On this basis, the Applicants argued before the RPD that, while they did seek state protection from the police, they did not take any further steps to do so because, on the evidence, state protection would not have been forthcoming (*Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689).

II. The RPD's Acknowledgement of Discrimination and Persecution

[5] In the following paragraphs in the decision, the RPD acknowledged that there is ongoing and worsening discrimination against, and persecution of, Roma in Hungary and states the central issue as a result:

[9] Based on the Board's latest documents, conditions for the Roma have deteriorated. In a report on his May 2011 mission to Hungary, the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance wrote that the situation of Roma individuals had not improved in recent years, but rather worsened. According to the Society for Threatened Peoples (STP), an independent human rights organization based in Germany, Roma in Hungary are "consciously despised by the majority population and pushed to the edge of society," while previously "hidden anti-Roma attitudes are becoming more open".

[...]

[11] The panel would be remiss if it did not acknowledge and consider that there is information in the documentation to indicate that there is widespread reporting of incidents of intolerance, discrimination and persecution of Romani individuals in Hungary, as noted previously.

[12] Other human rights problems during the year included police use of excessive force against suspects, particularly Roma. According to multiple sources, the Hungarian Guard and other far-right organizations held demonstrations across the country with the goal of inciting ‘prejudice against the Roma.’ The groups organized the demonstrations under the guise of protecting Hungary against what they termed the ‘Gypsy Terror’ or ‘Gypsy criminality’. There were also reports of anti-Roma marches by members of the Jobbik Party as well as the Hungarian Guard that were held in rural towns to ‘intimidate Roma.’

[13] The panel has canvassed the documentary evidence, and it has determined that the documentary evidence indicates that the attitudes toward the Roma by some Hungarian people, including people who are in authority, are discriminatory and prejudicial. It is clear from the documentary evidence that the effect has been to marginalize the Roma people. Roma are generally under-employed, under-educated, frequently live in subsistence housing, and are now subject to violence from radical elements who are gaining support from the general public to some extent. Roma in Hungary are “consciously despised by the majority population and pushed to the edge of society,” while previously “hidden anti-Roma attitudes are becoming more open.” The documentary evidence indicates that persecutory acts are often promoted and carried out by right-wing extremist groups, such as members of the disbanded Hungarian Guard, whose members have continued their activities under different names and in newly formed different organizations. Additionally, the right-wing Jobbik Party feeds on sentiments from its constituency, which contributes to the discrimination and persecution of the Roma. According to sources, Jobbik is an “extreme right-wing” political party with nationalistic roots and a strong anti-Roma and anti-Semitic agenda. Sources indicate that the Hungarian Guard’s popularity, as well as the party’s campaign against so-called ‘Gypsy crime’, significantly contributed to Jobbik’s growth.” On the other hand, while there seemed to have been some surprise to the Jobbik Party’s moderate success in the last national election, in which they became the third-place party with nearly 17% of the vote, the documentary evidence also indicates that Jobbik support dropped in April 2011 to 13 percent among likely voters and in August 2011, it was 15 percent among decided voters. To gain back its support, the Jobbik

Party has renewed its campaign against Roma with rallies in villages across the country.

[14] It is against this background and in taking into consideration the particular circumstances relating to this claim that the panel must determine whether or not adequate state protection exists for this particular claimant in Hungary.

[Emphasis added; Footnotes omitted]

III. The RPD's Treatment of the Evidence of Discrimination and Persecution

[6] The following paragraphs of the decision outline the basis on which the RPD dismissed the Applicants' rebuttal evidence:

[25] The Board recognizes 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 willing and able to protect victims.

[...]

[30] Taking into account the above-mentioned, a fair reading of the documentary evidence indicates that criticism of Hungary's treatment of the Roma is warranted, especially in the context of the standards followed by other European Union member states in relation to human rights. In this particular context, it may be an understatement to say that state protection in Hungary is not perfect. Be that as it may, it is up to the claimant in this particular case to rebut the presumption that adequate state protection exists in Hungary. The panel had demonstrated 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. The panel has demonstrated that there are recourses available to the claimant if they are not satisfied with the police response at the first level or in the first instance.

[31] Even if it is acknowledged that the documentary evidence is mixed, in the circumstances particular to this case, the claimant has not demonstrated that state protection in Hungary is inadequate and that he need not have approached the authorities at all, or that he need not have taken all reasonable efforts to seek state protection in his home country, such as seeking help from people higher in authority, or taking his/her complaint to organizations with powers of oversight, such as the Minorities Ombudsman's Office or the Independent Police Complaints Board (IPCB), before seeking international protection in Canada. The Board's documents indicate that these complaint mechanisms do in fact, take complaints, make findings and then report those findings back to the appropriate authorities for their response (although final resolutions to these complaints appear to have a smaller number of resolutions in favour of the complainant, that is not a matter that is before the panel since it does not have the facts relating to these cases, only the reported numbers).

[32] Therefore, regarding the totality of the evidence before the panel, while there is evidence to indicate that police do still commit abuses against people, including the Roma, the evidence also demonstrates that it is reasonable to expect authorities to take action in these cases and that the police are both willing and capable of protecting Roma and that there are organizations in place to ensure that the police are held accountable. Therefore, in the circumstances of this case, the presumption that adequate state protection exists in Hungary is not rebutted.

[...]

[41] Therefore, having considered the totality of the evidence, the panel finds that the claimant, in the circumstances of this case, has failed to rebut the presumption of state protection with clear and convincing evidence and that the claimant did not take all reasonable steps in the circumstances to avail himself of that protection before making a claim for refugee protection. Therefore, the panel is not persuaded that the state of Hungary would not be reasonably forthcoming with state protection, should the claimant seek it.

[Emphasis added; Footnotes omitted]

IV. Counsel for the Applicants' Argument

[7] The core of Counsel for the Applicants' carefully crafted argument is that the RPD failed to deal with the substance of the Applicants' claim: if they are required to return to Hungary, the suffering that they have experienced in the past will most certainly occur in the future. That is, there is far more than a mere possibility that if they return they will be persecuted simply because they are Romani, and, despite some efforts to do so, the state has not yet established an adequate operational means to address this reality. I find this to be a powerful argument.

[8] In paragraph 31 of the decision quoted above, the RPD expresses an expectation that the Applicants should have gone further than their report to the police, to make a report to a government body that does not offer actual protection but simply receives complaints and reports statistics. It appears that the point being made by the RPD is that a realistic benefit would result from the Applicants doing more to engage state protection. In my opinion, this expectation is unfounded in the circumstances. Given the evidence of the well-understood systemic nature of discrimination against and persecution of Roma, making such a report would not have realistically and reasonably resulted in the Applicants being provided with any greater protection.

[9] Actual police surveillance, visible presence, and immediate response to investigate and take action against the commission of crime and when crime occurs can be considered to be adequate state protection at the operational level. While it is true that even the best trained, educated, and properly motivated police force might not arrive in time, the test for "serious

efforts” will only be met where it is established that the force’s capability and expertise is developed well enough to make a credible, earnest attempt to do so, from both the perspective of the victim involved, and the concerned community (see: *Garcia v Canada (MCI)*, 2007 FC 79 at para. 16). On the evidence, there is presently no such willing and able protection that Roma can engage in Hungary.

[10] In my opinion, making fledging efforts to deal with the undisputed continuing monumental societal problem of active racism against Roma in Hungary cannot be interpreted to be actual adequate protection at the operational level as the RPD maintains.

[11] I agree with Justice O’Keefe’s analysis in *Kumati v Canada*, 2012 FC 1519, where he explains what adequate state protection entails. While the following quote deals with state protection in Guyana, it cites the same RPD approach that exists in the present case:

[27] [...] “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.

[34] With all due deference to the Board in its consideration of evidence, I believe that the Board’s error in stating the proper legal test for state protection is also reflected in its finding that the evidence is “mixed”. That is, the county conditions evidence is really a mix of (1) clear statements that state protection is inadequate and (2) descriptions of various efforts made by the Guyanese state.

[39] When state protection analysis is properly applied, it is clear that the “serious efforts” listed above are not proper evidence of

the adequacy of state protection. A law on the books or a training session for police may not lead to the outcome of adequate protection. Evidence of adequacy is that which indicates whether or not a given law actually functions to protect citizens or whether police training has resulted in a real difference in police behaviour.

[12] As a specific example of the present availability of state protection for Roma in Hungary, the RPD resorts to the following citation:

[22] In regard to the court's instruction that efforts concerning state protection must have actually translated into adequate state protection, the panel has reviewed a March 2011 report by the European Roma Rights Centre (ERRC) which provides information on the progress of 22 cases in Hungary in which Roma were victims of violent attacks between 2008 and 2009, with the following results being observed:

- In six cases the police investigation was suspended because no suspect was identified;
- In one case the police investigation was suspended for lack of crime;
- an investigation against the alleged victim for false testimony was opened;
- In 12 cases prosecution was pending;
- In one case the perpetrator was convicted, resulting in 11-years imprisonment;
- In two cases no information was available.

Based on this information from the ERRC, there is evidence to indicate that the police investigated the above-mentioned incidents and made specific findings resulting from those investigations, which is a demonstration of state protection at the operational level.

[Footnotes omitted]

[13] With respect to this example, Counsel for the Applicant makes the following compelling argument with respect to the misuse of evidence the RPD found to be critical as just quoted above:

20. First, I submit that it is simply wrong to state that one conviction out of 22 cases is conclusive evidence of adequate state protection. Similarly, this evidence only speaks to police protection for well-publicized serial killings and does not deal with police protection from common criminals or racist people who the Applicants fear in this case.

21. More importantly, however, is that this quote is taken entirely out of context from the original report. Specifically, the paragraph directly above the case breakdown states:

The ERRC notes that state authorities are not effective in responding to violence against Roma (15 Feb. 2012). The *Irish Times* reports in a 25 February 2009 article that the Minister of Justice admitted that the police force in Hungary is “failing to find those responsible for a growing number of fatal attacks” on Roma.

Certified Tribunal Record, p. 332.

22. Moreover, in the very ERRC report that examines the 22 cases referred to, the ERRC concludes the following about Roma in Czech Republic, Slovakia and Hungary:

The failure of law enforcement authorities to identify the perpetrators of crimes against Roma in a considerable number of investigations creates a climate of impunity and may encourage further acts of violence against Roma. The issuance by courts of only suspended prison sentences to persons found guilty of serious crimes against Roma reinforces this. Recognition of racial motivation in such a small number of cases may indicate a low level of importance placed on aggravating circumstances of the crimes committed and may fail to account for the full nature of the attacks committed against Roma.

Certified Tribunal Record, p. 471.

23. Even more compelling, [Justice Strickland of] this Court recently found that it is an error for the Board to cite the above passage from the ERRC in finding that there is adequate state protection for the Roma in Hungary. Specifically, this Court found that:

[7] [...] The Board isolates one portion of a Match, 2011 report by the European Roma Rights Centre (ERRC Report) in the National Documentation Package (NDP) from the Response to Information Request, Number HUN 104110.E, July 16, 2012, “Hungary: Treatment of Roma and state protection efforts” (Hungary: Treatment of Roma and state protection efforts), which describes twenty two cases of “the most violent anti-Roma attacks reported to the police” between 2008-2010 which resulted in seven deaths, serious injuries and damage to homes and which did lead to the crimes being investigated and some charges being laid, However, evidence of police action for notorious well- publicized serial killings is of little persuasive value in showing how the police deal with more common criminals as found by Justice Zinn in (*Orgona v. Canada (Minister of Citizenship and Immigration)* 2012 FC 1438 at para 13.

[8] Further, the ERRC Report also concludes that a limited number of perpetrators of violent attacks against Roma are successfully identified, investigated and prosecuted. Even fewer are eventually imprisoned. Of the twenty two cases under review, one conviction was reported. While this may, to a certain extent, demonstrate state protection at the operational level, the situation of the Applicants in the present case, who face discrimination on a daily basis as do many Roma, is not that of the victims of the attacks described by the Board. In addition, the Hungary: Treatment of Roma and state protection efforts document also refers to a 2012 ERRC report which notes that “state authorities are not effective in responding to violence against Roma” and further that the Irish Times reported in a February 25, 2009 article that the “Minister of Justice admitted that the police force in Hungary is ‘failing to find those responsible for a growing number of fatal attacks’ on Roma.”

[Emphasis in the original]

Marosi v. Canada (MCI) (November 26, 2013)
Toronto, IMM-167543 (FC);

24. Thus, the information that the Board Member used to support his finding that there is adequate state protection actually shows the opposite. That is, the police have not appropriately responded to abuse towards the Roma which has led to a climate of impunity.

[14] In every respect, I agree with Counsel for the Applicant's argument.

V. Conclusion

[15] In my opinion, there is no clear line of reasoning from the wealth of evidence that the state in Hungary does not provide adequate protection to Roma at the operational level, to the RPD's conclusion that it does: the reasoning leading to the conclusion is unintelligible. As a result, I find that the RPD's finding that the Applicants failed to rebut the presumption of state protection is not reasonable, and the decision under review is not defensible in respect of the facts and law.

ORDER

The decision under review is set aside and the matter is referred back for redetermination by a differently constituted panel.

There is no question to certify

“Douglas R. Campbell”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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