Federal Court  Cour fédérale

Date: 20141127

Docket: IMM-1558-14

Citation: 2014 FC 1140

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, November 27, 2014

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

JENONE FARKAS
JOZSEF FARKAS
JANOS MARTIN FARKAS

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Preliminary

[1] How, where and for what reason does one decide between discrimination and persecution? According to *Csonka v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1056, written by the undersigned:

> The demarcation line between discrimination and persecution in refugee law is thin.
>
> In cases of this nature, the distinction is made, as is specified by the jurisprudence of higher courts, discussed and cited above.
>
> In a more evolved world, one day, a "kinder and more gentle" norm will, perhaps, prevail in evaporating the distinction between the two; as did the notion of "separate but equal", gradually, evaporate (in certain state jurisdictions); however, international law jurisprudential norms have not, as yet, evolved thereto, (in regard to the fluidity of the demarcation between discrimination and persecution).
>
> Should a child, or, for that matter, an adult be discriminated against anywhere, for the same reason, he or she may have been, or is, persecuted without recourse to refugee status (because it has not attained the level of persecution)?
>
> International norms, in respect of refugee law, have, as yet, not decided that suffering discrimination (without reaching the level defined as persecution) allows for the granting of refugee status. In recognition of the hope that countries of origin should be encouraged to do more to evolve the state of human rights within their own jurisdictions, whether that occurs or not is for the future to envisage.
>
> A judge's mandate is but to interpret the legislation and jurisprudence, generally, and, more particularly of the higher courts. As the trajectory of the law and its interpretation evolves through jurisprudence, as did the notion in constitutional law, as stated by Lord Sankey, that of a "growing tree", does take place in constitutional law, so it may eventually in refugee law; however, that is not where this branch of international law finds itself presently; thus, the interpretation of the refugee convention in this regard has not attained that stage, which it may, as yet, but as of today, the

> world is still distant from it. (It must be acknowledged that a continuous amelioration of human rights is the responsibility of refugee-producing countries; otherwise, the onus would solely be on refugee-receiving countries, rather than that of refugee-producing countries, to ameliorate their human rights records, as part of the community of nations, if, in fact, international legislative norms are to lead to an evolution of the human condition.)
>
> Therefore, this Court has no option but to differentiate and to delineate between discrimination and persecution as have the higher courts in their jurisprudence. The higher courts have recognized the state of the civilized world in which the higher courts find themselves, in that, reality and the ideal have not, as yet, met in this regard.

II. Introduction

[2] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act* [IRPA] for judicial review of a decision dated February 20, 2014, by the Refugee Protection Division [RPD] of the Immigration and Refugee Board.

[3] In her decision, the RPD member concluded that the applicants are not refugees under section 96 of the IRPA or "person[s] in need of protection" under section 97 of the same Act.

III. Facts

[4] The principal applicant, Jenone Farkas, aged 51, and her two sons, Jozsef and Janos Martin Farkas, aged 23 and 17 respectively, are Hungarian citizens of Roma origin.

[5] The applicants allege that they were subjected to numerous, violent discriminatory acts because of their Roma ethnicity.

[6] In particular, the applicant says that in 2008 commandos dressed in black entered every Roma house on the street where the applicants were staying during a visit to Tarnabod. The applicant was held down on the ground and kicked while her ex-husband was struck with a baton. The applicant contends that her children were profoundly affected by this attack and still are.

[7] The applicants also submit that the RPD member is the same member who rejected the refugee claim of the applicant's ex-husband and father of the two other applicants in this proceeding, a few months before their hearing.

IV. Decision

[8] The RPD's negative decision is predicated on the applicants' general lack of credibility, based on the discrepancies and contradictions in the applicants' narratives.

[9] In addition, the RPD determined that the applicants did not rebut the presumption of state protection contained in subparagraph 97(1)(*b*)(i) of the IRPA.

[10] Moreover, the member justified her refusal to recuse herself by determining that the allegation of a reasonable apprehension of bias made by the applicants was unfounded.

V. Issue

[11] Is the RPD's decision that the applicants are not "refugees" or "person[s] in need of protection" under sections 96 and 97 of the IRPA reasonable?

VI. Statutory provisions

[12] The following statutory provisions of the IRPA are pertinent:

Convention refugee	**Définition de "réfugié"**
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.
Person in need of protection	**Personne à protéger**
97. (1) A person in need of protection is a person in	**97.** (1) A qualité de personne à protéger la personne qui se

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

(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(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,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

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) 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) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant:

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(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) 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) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé

	adéquats.
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.
Exclusion – Refugee Convention	**Exclusion par application de la Convention sur les réfugiés**
98. A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.	**98**. La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.

VII. Analysis

[13] The applicants base their claim on three grounds. First, they raise the risk of a reasonable apprehension of bias on the part of the RPD. According to the applicants, the member, who had previously rejected the refugee claim of the applicant's ex-husband, should have recused herself. Next, the applicants submit that the RPD erred in assessing the applicants' credibility and the availability of state protection.

[14] The Court finds that, contrary to the applicant's submissions, the RPD did not err in law.

[15] First, the Court rejects the applicants' argument that the member raised an apprehension of bias. This is a serious allegation, and the onus is on the applicants to demonstrate a real or

apprehended violation of the presumption of impartiality (*Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40).

[16] The Supreme Court of Canada set out the appropriate test for such an allegation in *Committee for Justice and Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369 at p 372:

> The apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information, the test of "what would an informed person, viewing the matter realistically and practically . . .conclude?" There is no real difference between the expression found in the decided cases "reasonable apprehension of bias", "reasonable suspicion of bias" or "real likelihood of bias" but the grounds for the apprehension must be substantial. The question of bias in a member of a court of justice cannot be examined in the same light as that in a member of an administrative tribunal entrusted with an administrative discretion. While the basic principle that natural justice must be rendered is the same its application must take into account the special circumstances of the tribunal. [Emphasis added]

[17] At the hearing, the applicant referred to the events of 2008 in Tarnabod, included in her narrative, which are the same events that had been recounted by her ex-husband (from whom the applicant separated in 2001) and rejected by the same member, in order to support the allegation of apprehension of bias.

[18] However, no evidence was adduced that could establish that the member based her conclusions on materials extrinsic to the record or otherwise demonstrated potential bias. Rather, the RPD's decision shows that the member began an extensive analysis of the evidence and the

applicants' testimony for the purpose of making her findings on the applicants' lack of credibility and the availability of state protection.

[19] The fact that the member heard the claim of a member of the applicants' family is not in itself likely to give rise to an apprehension of bias in a reasonable person. In a Federal Court decision, Mr. Justice Sean Harrington stated that "[t]he same member can hear various claims from various members of the same family. There is a presumption that members reach their decisions by relying solely on the evidence before them in the record and that they are able to ignore any other evidence from other files" (*M.A.L.A. v Canada (Minister of Citizenship and Immigration*), 2011 FC 908 at para 5).

[20] The applicants did not discharge their burden of demonstrating actual bias or a reasonable apprehension of bias on the part of the member. As the Federal Court of Appeal stated, an allegation of bias "cannot rest on mere suspicion, pure conjecture, insinuations or mere impressions of an applicant or his counsel. It must be supported by material evidence demonstrating conduct that derogates from the standard" (*Arthur v Canada (Attorney General)*, [2001] FCJ No 1091 at para 8; see also *Ianvarashvili v Canada (Minister of Citizenship and Immigration)*, 2004 FC 695 at para 6).

[21] Moreover, the member noted that at the hearing one of the applicant's sons did not testify spontaneously regarding the alleged events in Tarnabod. It was reasonable for the member to draw a negative inference about his credibility in this regard (RPD's decision, at para 17). In addition, the member concluded that the 2008 incident at Tarnabod was not the central event in

the applicants' case and that this event was not even mentioned in the Personal Information Form of the applicant's children, applicants in this proceeding.

[22] Second, the Court finds that the RPD reasonably concluded that the acts of harassment experienced by the applicants do not constitute persecution, but discrimination.

[23] The RPD acknowledged the increased discrimination towards Roma minorities in Hungary and considered, *inter alia*, the problems this minority faces especially in the areas of employment, accommodation and education. Moreover, the RPD recognized the tensions and the existence of violent, racist hatred speech towards Roma. However, the RPD found that the discriminatory acts experienced by the applicants did not constitute persecution in their particular case (*Sagharichi v Canada (Minister of Employment and Immigration)* (FCA), [1993] FCJ No 796).

[24] Furthermore, the RPD analysed the cumulative effects of the discriminatory acts experienced by the applicants in arriving at this finding (*Baranyi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1065 at para 19; *Munderere v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 84).

[25] The RPD relied, *inter alia*, on the *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (UNHCR, Geneva, 1992) to analyze the difference between discrimination and persecution:

> **(c) Discrimination**
>
> 54. Differences in the treatment of various groups do indeed exist to a greater or lesser extent in many societies. Persons who receive less favourable treatment as a result of such differences are not necessarily victims of persecution. It is only in certain circumstances that discrimination will amount to persecution. This would be so if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on his right to earn his livelihood, his right to practise his religion, or his access to normally available educational facilities.

[26] Third, despite the RPD's finding that the applicants had not been persecuted, it nonetheless analyzed the availability of state protection and concluded that the Hungarian state is able to provide adequate protection to the applicants.

[27] At the end of a methodical analysis of the documentary evidence on country conditions, the RPD explored the mechanisms the state has put in place as well as the state's willingness to respond to the problems faced by Roma minorities in Hungary; it concluded that Hungary is a democracy equipped with political and legal instruments that provide adequate protection to its citizens (RPD's decision, at para 28-60).

[28] The RPD found that the Hungarian state has embarked on numerous initiatives to provide increased protection to Roma minorities and that there are penalties and prosecution mechanisms to hold those who are convicted of offences accountable for their actions.

[29] The Court finds that the RPD's conclusion that the applicants did not rebut the general presumption of state protection is reasonable, given the lack of clear and convincing evidence of the state's inability to ensure such protection (*Bordas v Canada (Minister of Citizenship and*

Immigration), 2004 FC 9; *Carillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94).

VIII. Conclusion

[30] The Court finds that the RPD's independent and detailed analysis shows that the Court's intervention is not warranted. The application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application for judicial review is dismissed;

2. There is no question to certify.

"Michel M.J. Shore"
Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Stéphanie Valois	FOR THE APPLICANTS
Margarita Tzavelakos	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Stéphanie Valois Montréal, Quebec	FOR THE APPLICANTS
William F. Pentney Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT