Federal Court  Cour fédérale

Date: 20150603

Docket: IMM-8210-13

Citation: 2015 FC 705

Ottawa, Ontario, June 3, 2015

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

SANDOR KOHAZI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant is a 31-year-old man from Hungary who fears discrimination and persecution in that country because of his Roma ethnicity. He came to Canada with his common-law wife and daughter on November 30, 2011, and they all asked for refugee protection under sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*Act*]. Initially, their claims were processed together, but after the Applicant was charged with assaulting his wife on September 18, 2013, the counsel who had been representing the family

asked to be removed as counsel of record and the new counsel for the Applicant's wife applied to separate the Applicant's claim from that of his wife and daughter. The Refugee Protection Division [RPD] approved both requests on October 21, 2013, but did not reschedule the Applicant's hearing. The Applicant could not secure new counsel in advance of his hearing on October 29, 2013, and thus attended on the scheduled date unrepresented.

[2] On November 5, 2013, the RPD rejected the Applicant's request for protection, finding that the Applicant's fear was not well-founded. Alternatively, the RPD applied the test from *Rasaratnam v Canada (Minister of Employment and Immigration)* (1991), [1992] 1 FCR 706 at 710, 140 NR 138, and determined that the Applicant had a viable internal flight alternative [IFA] in Budapest.

[3] The Applicant now applies for judicial review under subsection 72(1) of the *Act*, asking the Court to set aside the negative decision and return the matter to a different member of the RPD for re-determination.

I. Was the hearing before the RPD fair?

[4] The Applicant argues that the process before the RPD was unfair. While he acknowledges that the RPD is not required to act as counsel for unrepresented claimants, he argues that he was still entitled to a fair hearing (citing *Law v Canada (Citizenship and Immigration)*, 2007 FC 1006 at paragraphs 16-17 [*Law*]).

[5] In his affidavit filed as part of the Application Record dated February 5, 2014, the Applicant states, among other things, that: the RPD member did not mention the possibility of a postponement so he could obtain counsel and she quickly moved on after deciding to proceed with the hearing; the RPD member cut him off when he tried to explain that the assault charge against him was false, when he began to tell his story about why he could not stay in Hungary, and when he tried to mention incidents not contained in his written narrative; and, also, the RPD member never tried to elicit any information about his repeated attempts to access state protection or about any of the incidents he experienced when he lived in Budapest. The Applicant also says that the RPD member's tone "was quite disrespectful towards me", and that by the middle of the hearing he "felt that the Member seemed bored with me and already had her mind made up."

[6] The Applicant has also filed a further affidavit dated January 13, 2015, from a legal assistant at the law firm of the Applicant's counsel. She deposes that she listened to the audio recording of the Applicant's hearing on two occasions, once to prepare a transcript which was included as part of the Application Record, and a second time to compare it with the transcript contained in the Certified Tribunal Record [CTR]. She testifies that there were four specific instances at the hearing where the Applicant's testimony in Hungarian was cut short by interjections from the RPD panel member and, consequently, not translated in the CTR transcript. This further affidavit also states that, in response to the Applicant's explanation that one of the reasons he could not live in Budapest was because his wife was still doing her studies, the panel member is transcribed in the CTR transcript as saying, "Well she's not on your claim now"; whereas, in the transcript prepared by the affiant, the word "claim" is transcribed as

"plane." The affiant says that after listening to this portion of the audio recording repeatedly, she still hears the words, "well she's not on your plane now." The Applicant says in his affidavit that he took this to mean that "when I would be deported to Hungary it would be on my own."

[7] The Respondent made no objection to either of these affidavits being before the Court in its Further Memorandum (which was filed after the January 13, 2015 affidavit from the legal assistant); nor did the Respondent raise this as an issue during oral argument at the hearing of this matter. The general rule in this regard is that the evidentiary record for purposes of a judicial review application is restricted to that which was before the decision-maker (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paragraph 19, 428 NR 297 [*Association of Universities*]; *Gaudet v Canada (AG)*, 2013 FCA 254 at paragraph 4). However, new evidence can sometimes be admitted if it is necessary to substantiate a procedural defect not apparent in the record (*Association of Universities* at paragraph 20).

[8] Inasmuch as these affidavits have been filed to substantiate the procedural defects about which the Applicant complains, I determine that they are properly before the Court.

[9] The Applicant says he never had any opportunity to simply tell his own story in full (citing *Zhang v Canada (Citizenship and Immigration)*, 2013 FC 42 at paragraphs 13-14). When the RPD member asked him at the end of the hearing whether there was anything he would like to say, she cut him off after just one sentence. Indeed, in the transcript prepared by the Applicant there is a written reference to "Sounds of crying" just before where the panel member is

transcribed in the CTR transcript as saying, "I…it's obvious that you…you are upset about what's happened with your wife." The Applicant contends, therefore, that he was denied the ability to present his case.

[10] The Respondent argues that the hearing was fair. The RPD was not required to act as the Applicant's counsel or elicit his testimony for him, and the Applicant was never cut off; he simply gave short answers. According to the Respondent, the Applicant was asked twice whether he had anything to add, and twice he declined. As for the questions about his criminal charges and his health, the Respondent contends that these were relevant to the claim since they related to why his claim was severed from that of his spouse and why he was unemployed in Canada. The Respondent also says the RPD was not required to inform the Applicant that he could get counsel, and notes that the Applicant never expressed any reservations about proceeding without counsel. In any event, the Applicant had told the RPD that he had been refused legal aid, so any adjournment would have been futile.

[11] Upon review of the proceedings in this case, it is apparent that the RPD here did not ensure that the Applicant received a fair hearing. Accordingly, on this basis alone, the matter should be returned to the RPD for re-determination.

[12] At a minimum, procedural fairness means allowing affected persons to present their case and providing them with the opportunity to be heard (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraph 28, 174 DLR (4th) 193; *Public Service Alliance of Canada v Canada (AG)*, 2013 FC 918 at paragraphs 58-60, 439 FTR 11). While

administrative tribunals are not required to act as counsel for unrepresented parties, they must still ensure that a fair hearing takes place. Unrepresented litigants are therefore entitled to whatever leeway is reasonably possible to allow them to present a case in its entirety: see *Law* at paragraphs 16-18.

[13] In this case, the Applicant involuntarily lost his counsel just about a week before the hearing, and the RPD member did not inform him of any procedural opportunities to rectify that. Nor did she ensure that the Applicant understood the proceedings well enough that he could know what facts might be relevant, and on several occasions she interrupted him while he was giving evidence. This case is therefore similar to *Nemeth v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 590, 233 FTR 301, where the Court found as follows:

> [10] The Board was aware that the Nemeths had been represented up until just prior to the hearing. It was, or should have been, alive to the risk that the claimants were ill-prepared to represent themselves. Under the circumstances, it had an obligation to ensure that the Nemeths understood the proceedings, had a reasonable opportunity to tender any evidence that supported their claim and were given a chance to persuade the Board that their claims were well-founded.
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> …
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> [13] I have already stated above that the Board did not violate the Nemeths' right to counsel. But the Board's freedom to proceed in the absence of counsel obviously does not absolve it of the overarching obligation to ensure a fair hearing. Indeed, the Board's obligations in situations where claimants are without legal representation may actually be more onerous because it cannot rely on counsel to protect their interests.

[14] Although the foregoing determination, that the RPD did not ensure that the Applicant received a fair hearing, is sufficient reason that the matter should be returned to the RPD for re-determination, there are other aspects of the RPD's decision in this case that warrant mention.

II. Was it reasonable to determine that the Applicant's fear had no objective basis?

[15] I agree with the Applicant's argument that it was unreasonable for the RPD to say that "[i]f nothing untoward has occurred since 2007, it is not reasonable to find that the claimant's fears have an objective basis." That does not accurately reflect the Applicant's testimony, since he only said that he had not been beaten up since 2007. He had, however, been "chased by [the people who had assaulted him] several times" since then. In any event, it is well-established that a refugee claimant "does not have to show that he had himself been persecuted in the past or would himself be persecuted in the future" (*Salibian v Canada (Minister of Employment and Immigration)*, [1990] 3 FCR 250 at 258, 73 DLR (4th) 551). It was therefore unreasonable for the RPD to imply that a fear can only be well-founded if someone had been persecuted within four years of their departure from the country.

III. Was the RPD's determination that the Applicant had an IFA in Budapest reasonable?

[16] Turning now to the RPD's alternative determination that the Applicant had an IFA in Budapest, it needs to be noted that the RPD did not question the Applicant's credibility. This being so, the RPD's reasons on the issue of state protection, which is an implicit aspect of determining whether an IFA exists, must be scrutinized with particular care: see *Velasco Moreno v Canada (Citizenship and Immigration)*, 2010 FC 993 at paragraph 1, 92 Imm LR (3d) 119.

[17] In this case, the RPD's conclusions and reasoning with respect to the adequacy of state protection for Roma in Hungary is flawed at best and, indeed, as the Applicant argues, little more than a boilerplate analysis which appears to have been copied and pasted from another decision of the RPD. For example, the RPD offered the following analysis:

> [19] Hungary faces criticisms regarding the implementation of the laws that it has enacted to address the discrimination and persecution of its minorities, especially the Romani. While there may be motivation within the central government to have its laws enforced, there is difficulty in implementing the enforcement of these laws at the local level, and resources routinely fail to reach the groups with the greatest needs. The criticisms against Hungary may be deserved, but what is important to note is that Hungary is a part of the European Union and is therefore responsible for upholding a number of various standards to maintain its membership in the Union. For instance, the European Commission against Racism and Intolerance (ECRI) was established by the Council of Europe. It is an independent human rights monitoring body specialized in questions relating to racism and intolerance. It is composed of independent and impartial members, who are appointed on the basis of their moral authority and recognized expertise in dealing with racism, xenophobia, anti-Semitism and intolerance. The ECRI published a report on Hungary in which gives praise to Hungary for its accomplishments, cites issues of concern, and gives recommendation for future action. What is important to note, in this instance, is that Hungary is not an island unto its own, but it is a responsible member of the European Union and reports regularly to the governance structures within that Union. Even if criticism of Hungary's measures to combat racism is warranted, particularly against the Romani population, on a balance of probabilities, Hungary is taking the measures to implement the standards that are mandated as a member of the European Union.
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> [footnote omitted]

[18] An almost-identical passage in a different decision was found to be unreasonable in *Buri v Canada (Citizenship and Immigration)*, 2014 FC 45, 22 Imm LR (4th) 115. After quoting the impugned passage, the Court stated as follows:

> [65] In my view, this is an unreasonable conclusion. The RPD appears to be saying that the measures implemented by the state are ineffective and that the "criticism against Hungary may be deserved," but this doesn't matter because, as a member of the European Union, Hungary is supposed to uphold "a number of various standards to maintain its membership in the Union." And this means that (para 55):
>
> > Even if criticism of Hungary's measures to combat racism is warranted, particularly against the Romani population, on a balance of probabilities, Hungary is taking measures to implement the standards that are mandated as a member of the European Union.
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> [66] Hungary may be taking measures but, as the RPD itself says, this is not how the adequacy of state protection is assessed: "Regard must be had to what is happening and not what the state is endeavouring to put in place." …

[19] I agree. Moreover, the RPD's assessment of the adequacy of state protection for Roma in Hungary appears much like that in *Katinszki v Canada (Citizenship and Immigration)*, 2012 FC 1326, 421 FTR 107, where the Court stated:

> [13] … I agree with the Applicants that the analysis of the Board with respect to state protection and, implicitly, the first prong of the test for an IFA is flawed in many respects. First of all, the Board seems to be of the view that police protection is better in Budapest than in the rest of the country, yet points to no evidence supporting that assumption. …
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> [14] The Board also points to various organizations that can provide protection to the Applicants and again seems to assume that these organizations would be in a better position to provide protection in Budapest since their head offices are located there. The problem with this assertion is that there is no evidence on the record that these organizations would be better able to "protect" the Applicants in Budapest than in the rest of the country. More importantly, the mandate of each of the organizations referred to by the Board (the Independent Police Complaints Board, the Parliamentary Commissioners' Office, the Equal Treatment Authority, the Roma Police Association, the Complaints Office at the National Police Headquarters) is not to provide protection but

> to make recommendations and, at best, to investigate police inaction after the fact.
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> [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 nor the mandate to assume that responsibility. …
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> [16] Accordingly, I find that it was not open to the Board to decide on a balance of probabilities that there is no serious possibility of the Applicants being persecuted in Budapest. The male Applicant has been attacked in Budapest because of his Roma ethnicity. There is nothing in the Board's IFA analysis or in the evidence that suggests that Budapest is safer than any other parts of the country, other than the fact that "Budapest is a large city" and "host to a number of organizations and government services for …Roma who are discriminated against." Neither the size of the city nor the organizations listed offer effective protection against persecution in Budapest.

[20] Lastly, the boilerplate nature of the RPD's analysis further appears in various portions of its reasons: for example, where the Applicant is referred to as being a "she" (at paragraph 35) or by the plural "claimants" (at paragraphs 42-43); and where the RPD refers to the Parliamentary Commissioners for Civil Rights, Future Generations, and the Rights of National and Ethnic Minorities (at paragraph 41), an organization which was eliminated following the adoption of a new constitution in 2012.

IV. Conclusion

[21] In the result, therefore, the application for judicial review is hereby allowed and the matter is returned to the RPD for re-determination by a different panel member. Neither party suggested a question for certification; so, no such question is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed and the matter returned to the Refugee Protection Division for re-determination by a different panel member. No serious question of general importance is certified.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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