Federal Court  Cour fédérale

Date: 20160315

Docket: IMM-4236-15

Citation: 2016 FC 316

Toronto, Ontario, March 15, 2016

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

NORBERT OLAH
NORBERTNE OLAH
BEATRIX OLAH
NORBERT OLAH

Applicants

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [the Act] of a Pre-Removal Risk Assessment [PRRA] dated July 31, 2015. In that PRRA, a Senior Immigration Officer [Officer] found that the

Applicants would not be at risk of persecution, danger of torture, risk to life or risk of cruel and unusual treatment or punishment if returned to Hungary.

[1] The PRRA at issue was conducted in a unique factual context. In a previous hearing before the Refugee Protection Division [RPD], the Applicants were represented by a lawyer named Viktor Hohots. As was found in a disciplinary hearing before the Law Society of Upper Canada [LSUC] (*Law Society of Upper Canada v Hohots*, 2015 ONLSTH 72 [*Hohots*]) and has been discussed in other decisions of this Court, Mr. Hohots provided thousands of Roma refugee claimants with inadequate representation (see *Galyas v Canada (Citizenship and Immigration)*, 2013 FC 250, *Pusuma v Canada (Citizenship and Immigration)*, 2012 FC 1025 [*Pusuma #*1], *Pusuma v Canada (Citizenship and Immigration)*, 2015 FC 658 [*Pusuma #2*]).

[2] The Applicants in this case were among those who received that inadequate representation. Unsurprisingly, their claim before the RPD was rejected, as was their 2013 application for judicial review of that decision. Both rejections occurred before the full extent of Mr. Hohots' misconduct became known through the well-publicized LSUC proceedings and the subsequent holding in *Hohots*.

[3] When it came time to file their PRRA application, the Applicants had different, competent counsel to assist them. The Officer, however, in evaluating the Applicants' submissions, concluded erroneously that they had competent counsel before the RPD and thus relied on the RPD's findings. The Applicants argue that this error is fatal. The Respondent acknowledges the error but insists that the decision should be upheld anyway.

[4] For the reasons below, I find in favour of the Applicants.

II. Background

[5] The Applicants – Mr. and Mrs. Olah and their two children – are an ethnic Roma family from Hungary. They arrived in Canada on March 16, 2010 and immediately made a claim for refugee status. They alleged persecution on the basis of their ethnicity.

[6] In their claim for refugee status, the Applicants argued that they had faced discrimination and harassment throughout their lives. While they alleged several problematic incidents, three events were of particular note.

[7] First, in 2001, Mr. Olah states he was physically assaulted and robbed by three skinheads. He was subsequently treated for a fractured jaw. The skinheads later threatened the Applicants if they went to the police so they did not report the attack.

[8] Second, in 2009, Mr. and Mrs. Olah allege a physical assault by another group of skinheads. The Olahs made a formal complaint to the police but moved to a different town shortly thereafter.

[9] Third, in January 2010, the Applicants were at home when they claim that unknown individuals threw stones through their windows and threatened them. They contacted the authorities but allege that the police failed to patrol the area in response. The Applicants fled to Canada two months later and sought refugee status upon arrival.

[10] As mentioned above, the Applicants retained Mr. Hohots for their refugee claim and their subsequent leave application. Mr. Hohots was found guilty of professional misconduct in *Hohots*, the key factual elements of which were summarized by the LSUC Tribunal as follows:

> [3] The Respondent [Mr. Hohots] felt overwhelmed by the demands of his refugee practice and, during the relevant period, he relied on a Hungarian speaking interpreter to perform many of the essential services of a competent refugee lawyer. The interpreter, who was also a Certified Immigration Consultant for about a year while he worked for the Respondent, was the first point of contact for many of the complainants. Mr. Hohots did not meet many of his clients, and left the interpreter to act largely autonomously, with little guidance on the preparation of the most important document in a refugee claim – the Personal Information Form ("PIF").
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> [4] The Lawyer consequently left many complainants with inadequate and inaccurate documentation to take with them to Immigration and Refugee Board ("IRB") hearings. In many cases, inadequate preparation appears to have resulted in adverse credibility findings and even unsuccessful refugee claims. The Lawyer's abdication of responsibility for his office staff was substantiated by several very junior lawyers who worked with him for short periods of time. In some cases, they chose to leave because of their concerns with the low level of service that the office provided to refugee claimants, and Mr. Hohots' inadequate supervision of the interpreter and indeed the junior lawyers.

[11] Like many of Mr. Hohots' clients, the Applicants never actually met with him. Instead, they interacted with Jozef Sarkozi, the same "Certified Immigration Consultant" mentioned in paragraph 3 of the LSUC decision, and were represented at the RPD hearing by Diana Younes, a lawyer who worked for Mr. Hohots. After the RPD rejected their claim, the Applicants retained Mr. Hohots to seek judicial review of that decision. Again, they never met with him, instead interacting solely with an interpreter.

[12] The Law Society sanctioned Mr. Hohots, by suspending him from practice for 5 months and restricting him from refugee law practice for 2 years.

[13] In an affidavit attached to the Applicants' PRRA application, Mr. Olah outlined significant problems in their representation by Mr. Hohots before the RPD. The Olahs, for example, were given no direction on what to include in their Personal Information Form [PIF], what corroborating documents would assist in their claims, and what the consequences of insufficient evidence might be. Additionally, neither the narrative nor the PIF that were eventually submitted were translated into Hungarian so that the Applicants could attest to their accuracy.

[14] The RPD, in denying their claim, concluded that the Applicants lacked credibility and that Hungary offered them adequate state protection. Most significantly, with respect to credibility, the RPD did not believe (i) that the 2001 attack occurred and (ii) that the Applicants contacted the police in 2010.

[15] After leave was denied in 2015, the Applicants received an invitation to apply for a PRRA. They retained new counsel on April 7, 2015 and filed their PRRA and a complaint about Mr. Hohots to the LSUC not long after.

III. The Decision

[16] The Applicants submitted a great deal of new evidence in their PRRA application, including information relating to Mr. Hohots and their inadequate representation before the RPD, materials to corroborate the 2001 attack, and country documentation on Hungary.

[17] In a lengthy set of written reasons, the Officer reached two conclusions: first, that while the Applicants faced discrimination in Hungary, it did not amount to persecution under section 96 of the Act; and second, that the Applicants had not rebutted the presumption of state protection.

[18] The Officer initially noted the failed RPD claim, stating that while "I am not bound by the RPD's decision… I give considerable weight to [its] findings" (Application Record, p 11 [AR]). The Officer then described the RPD's concerns regarding the 2001 attack and the 2010 incident.

[19] The Applicants, in their PRRA submissions, argued that no weight should be given to the RPD decision or to any of its findings because of the prior involvement of Mr. Hohots. The Officer disagreed, concluding erroneously that, since the Applicants were represented by Ms. Younes at the hearing itself and "[t]here is little information that she was in the employ or contracted by Viktor Hohots or that she was similarly incompetent", there was no reason to be suspicious of the RPD's findings (AR, pp 14-15).

[20] The Officer then evaluated the new evidence presented by the Applicants on the 2001 attack and found, in light of the RPD's concerns, that it was unpersuasive. As a result, the Officer restricted the analysis to the 2009 and 2010 incidents, concluding that:

> Neither of these two incidents separately or combined together along with the other incidents in his past meet the definition of persecution. In [Mr. Olah's] description of these two events I find that there is little doubt that the applicant and his family were discriminated against but that there are both insufficient elements of severity and repetition to rise to the level of persecution.
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> (AR, p 17)

[21] The Officer then turned to the question of state protection, stating that "the RPD determined that on a balance of probabilities, [the Applicants] had not provided the requisite clear and convincing evidence that state protection in Hungary is inadequate or that they had exhausted all avenues before fleeing to Canada" (AR, p 18). The Officer concluded that while racism and discrimination against Roma exist in Hungary, there appears no broad pattern of refusal or inability to provide state protection, including specifically to the Applicants (AR, pp 20, 29).The Officer found instead that:

> Any lack of police intervention would appear to be as a result of the applicant and not the police… For example, in 2001 if the attack occurred as the applicant states it did, he did not go to the police. In 2009 after being attacked in Budapest, the applicant went to the police to file a report. There is no indication from the applicant that they refused to take the report or otherwise assist the applicant in any way. The applicant actually left Budapest in the same month that he was attacked and he has not indicated that he ever followed up with the police in Budapest. And in 2010 when his house was being attacked, the applicant called the police and they showed up.
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> (AR, pp 22-23)

[22] The Officer concluded that while the Applicants may not have been personally satisfied with the police response, it was nonetheless sufficiently available to them (AR, p 30).

IV. Analysis

[23] Both parties agree that the Officer erred in finding that Ms. Younes was unaffiliated with Mr. Hohots and thus that any reliance placed upon the RPD findings was a mistake. The key issue to be determined within this judicial review, then, is whether the Officer's reliance upon the credibility findings of the Board irreparably tainted the decision, as the Applicants contend, or whether, as the Respondent counters, the Officer came to an independent, reasonable conclusion on state protection that does not rely on the RPD findings in a fatal way and thus should withstand this review.

[24] I will apply a correctness standard in addressing the issue, the same standard that has been applied when inadequate or incompetent counsel raise fairness concerns (*Galyas v Canada (Citizenship and Immigration)*, 2013 FC 250 at para 27; *Nagy v Canada (Citizenship and Immigration)*, 2013 FC 640 at para 19; *El Kaissi v Canada (Citizenship and Immigration)*, 2011 FC 1234 at para 21). The issue here, of course, is the effect of incompetent counsel in a prior proceeding that is referenced in the decision under review, rather than a direct claim of incompetence. I note that in *Pusuma #2*, a case with closely analogous facts and issues, Justice Mactavish also applied the correctness standard.

[25] To briefly summarize, *Pusuma #2* involved three other Roma applicants who were inadequately served by Mr. Hohots before the RPD and later sought judicial review of negative

PRRA and humanitarian and compassionate [H&C] decisions. As in this case, the applicants argued that it was an error for the officer making both decisions to rely on the RPD findings when they were "tainted" by Mr. Hohots' inadequate representation (*Pusuma #2* at para 47). Justice Mactavish agreed, finding that both the PRRA and H&C decisions were heavily and negatively affected by reliance on the RPD decision and that this constituted a reviewable error.

[26] The Applicants rely on *Pusuma #2*. They also rely on *Flores v Canada (Minister of Citizenship and Immigration)*, 2010 FC 503 for the proposition that state protection analysis varies considerably with subjective fear and thus that a proper credibility assessment is an essential element of that analysis. Since the Officer erroneously relied on the RPD decision's negative credibility findings, they argue that the state protection analysis itself was flawed.

[27] The Respondent counters that while an error in procedural fairness will ordinarily void a decision, an exception arises where it is a foregone conclusion that a re-assessment of the claim would automatically lead to the same outcome (*Yassine v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 949 (FCA) [*Yassine*], see also *Mobile Oil Canada Ltd et al v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202 at para 53 [*Mobile Oil*]). Indeed, the Respondent points out that even while expressing doubts about the veracity of the Applicants' allegations; the Officer treated them as true for the purposes of the state protection analysis. While I agree with the Respondent that the decision here was lengthy and detailed, I cannot agree that the *Yassine* and *Mobile Oil* exception applies.

[28] It is trite that in refugee law a finding of adequate state protection is determinative of a refugee claim. Nonetheless, as this Court noted in *Gonzalez Torres v Canada (Citizenship and Immigration)*, 2010 FC 234 [*Gonzalez Torres*], state protection is a contextual, rather than a free-standing, analysis:

> [38] The [contextual] nature of the human rights violation is important in the state protection analysis because there are many countries that provide adequate state protection generally, but fail to do so for specific types of violations, for example, gender-based violence. Further, the frequency and severity of violations are important in determining both what steps a claimant is expected to take as well as what track record of protection the state was able to provide over a period of time. If all the alleged human rights violations happened within a short period of time, a state's protection apparatus may not have had time to effectively function. At the same time, when faced with a provable imminent risk to their life, claimants may not have to take the same efforts to rebut the presumption of state protection as when there is no imminent risk.
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> [39] The profile of the alleged human rights abuser is important due to the fact that, even in democratic countries, certain individuals can be above the law. The adequacy of state protection frequently depends on the characteristics of the abuser. If the abuser is in a position of power or has close ties to the police or other authorities, it may be very difficult, if not impossible, for a claimant to obtain protection.

[29] Clearly the severity and number of incidents faced by the Applicants, the number of attempts they made to contact the police and the results of those attempts are central to measuring the adequacy of state protection. In this case, the Applicants alleged being subjected to three separate attacks (2001, 2009, and 2010), and attempted to make contact with the police after two of them (2009 and 2010), providing an explanation as to why they did not do so in the third (2001).

[30] The Officer, however, relied on the RPD's finding that the 2001 attack was not credible, (p 16, AR), and doubted that the Applicants contacted the police in 2010 (pp 21-22, AR). On this point, the Respondent asserts that the Officer did not believe that the Applicants had made contact but treated it as true for the purposes of the analysis.

[31] I find, however, that much of the discussion on the 2010 contact seemed designed to support the skepticism that came from the RPD decision. Certainly the allegation that Mr. Olah suffered three attacks (including an extremely violent one in 2001, culminating in a fractured jaw) rather than two, goes a considerable way towards explaining the Applicant's reticence to seek state protection, just as the allegation that the police did not conduct the patrols they said they would after the 2010 attacks, goes a considerable way towards explaining a subjective fear that the police could or would protect them. Instead, the Officer made clear that the RPD's objections should be given "considerable weight" (AR, p 11; see also AR, pp 14, 16). Despite the Respondent's submissions to the contrary, it is difficult to disentangle the Officer's skepticism derived from the RPD decision from the rest of the Officer's analysis.

[32] Finally, I note the Respondent's efforts to distinguish this case from *Pusuma* #2 on the basis that the PRRA decision in that case failed to take into account corroborative evidence that the RPD had previously rejected as a result of Mr. Hohots' inadequate counsel. According to the Respondent, the Officer in this decision considered all of the Applicant's new evidence, rather than restricting itself erroneously.

[33] These contentions, however, sidestep the fundamental issue in both cases, which is that "the reasons given for the PRRA decision demonstrate that the assessment of the applicants' PRRA was also negatively affected by the officer's reliance on the decision in the applicants' refugee case" (*Pusuma #2* at para 80). It is the Officer's reliance on the RPD's findings that is the issue, not its treatment of new evidence. Here, the Officer's language, as in *Pusuma #2*, evinced clear reliance on the RPD, despite lip service otherwise.

[34] Furthermore, one cannot be sure, as the Respondent would have it, that a proper re-determination of the PRRA application would come to exactly the same conclusion on state protection. The question of adequacy of state protection is common in Hungarian Roma claims. Sometimes state protection is adequate, sometimes not. The outcome depends on a number of factors relating to an applicant's personal circumstances. As noted by Justice Russell in another Roma case, "[t]he Hungarian situation is very difficult to gauge. Much will depend upon the facts and evidence adduced in each case, and on whether the RPD goes about the analysis in a reasonable way" (*Molnar v Canada (Citizenship and Immigration)*, 2012 FC 530 at para 105).

[35] Here, it is not hard to imagine that a contextual state protection analysis might be different if the Officer had not given the findings of the "tainted" RPD decision some weight. If the Officer had, for example, considered the evidence on the 2001 attack and accepted that it had indeed occurred, the Officer could have concluded that Mr. Olah had a long history of violent treatment at the hands of anti-Roma assailants and altered the conclusion on state protection. Similarly, one can imagine that, if the Applicants had been competently represented and prepared in their case before the RPD, they may have been found credible and their allegations

would have been accepted. Rather, they received wholly inadequate preparation, guidance, and counsel for their RPD hearing and their claim was irreparably undermined as a result. The Officer should have recognized this and altered the analysis accordingly.

[36] This is not a comment on the likelihood of success for the Applicants' claim. There are ample cases from this Court pointing in different directions on the question of state protection in Hungary, as it should be if state protection analysis is contextual and specific to each claimant. But I cannot accept the Respondent's position that, regardless of the Officer's error, the decision would inevitably be the same. The Applicants were inadequately and insufficiently represented before the RPD. It is unfair for the Officer to ignore that fact and to rely upon the RPD's findings in any way.

V. Conclusion

[37] In light of the above reasons, this application for judicial review is allowed.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is allowed.

There is no order as to costs.

There are no questions for certification.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4236-15
STYLE OF CAUSE:	NORBERT OLAH,NORBERTNE OLAH, BEATRIX OLAH, NORBERT OLAH v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 8, 2016
REASONS FOR JUDGMENT AND JUDGMENT:	DINER J.
DATED:	MARCH 15, 2016

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