

Federal Court



Cour fédérale

Date: 20160712

Docket: IMM-5507-15

Citation: 2016 FC 792

Ottawa, Ontario, July 12, 2016

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

**KALMAN KAROLY HORVATH
KALMAN KAROLYNE HORVATH**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision of the Refugee Appeal Division (RAD) of the Immigration and Refugee Board (Board), dated November 20, 2015. The RAD confirmed the decision of the Refugee Protection Division (RPD) that the Applicants are not Convention refugees and are not persons in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] For the reasons that follow, this judicial review application is dismissed.

I. Background

[3] The Applicants, Kalman Karoly Horvath and Kalman Karolyne Horvath, are husband and wife, are of Roma ethnicity, and are citizens of Hungary. They left Hungary in December 2014, and made a claim for refugee status in Canada.

[4] In their Basis of Claim (BOC) forms, the Applicants claim they suffered discrimination and persecution based upon their Roma ethnicity. They state they were forcibly evicted from their home and they suffered a number of incidents of racial violence.

[5] The RPD rejected the Applicants' claims, finding that they were not credible.

[6] The Applicants' appeal to the RAD was dismissed on November 18, 2015. The RAD, like the RPD, concluded that the Applicants were not credible and that they had not established a well-founded fear of persecution. The RAD also held, in this case, that the general country condition information was not sufficient evidence to prove the claim of persecution.

II. Issues

[7] The Applicants raise the following two issues:

1. The RAD failed to properly assess the evidence of their psychological conditions
2. The RAD failed to consider their general profiles

III. Analysis

1. *The RAD failed to properly assess the evidence of the Applicants' psychological condition*

[8] The Applicants allege that the RAD failed to conduct its own assessment of the evidence and it failed to properly consider and analyze the new psychological evidence. The Applicants

submit that this evidence demonstrates that the credibility issues are a result of their cognitive issues.

[9] These issues are reviewed on a reasonableness standard: *Canada (Minister of Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35 [*Huruglica*].

[10] The Applicants also claim that their cognitive issues were not appropriately accommodated at the RPD hearing, and therefore their procedural fairness rights were not respected. According to the Applicants, the RAD failed to remedy this procedural unfairness.

[11] This issue is considered on the correctness standard: *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43.

[12] The RAD allowed the introduction of new evidence in the form of psychological reports of Ms. Riback and Dr. Meier. The Applicants argue that these reports demonstrate that their ability to testify before the RPD was severely compromised because of their cognitive difficulties. They further argue that the RPD was not aware of their cognitive difficulties and did not modify its procedures to accommodate them as vulnerable persons, and therefore their procedural fairness rights were not respected. They submit that the RAD should have conducted an oral hearing to reassess their credibility, or the RAD should have referred the matter back to the RPD for redetermination.

[13] The RPD's findings of fact included credibility findings based on the Applicants' oral evidence. In *Huruglica*, the Federal Court of Appeal noted that there may be cases where "the RPD enjoys a meaningful advantage over the RAD in making findings of fact or mixed fact and

law, because they require an assessment of the credibility or weight to be given to the oral evidence it hears” (para 69).

[14] The RAD reviewed the RPD’s credibility findings in the context of the record and the new evidence submitted, including the psychological reports. The RAD independently concluded that the Applicants were unable to recall basic details about the incidents described in their detailed BOC narratives.

[15] The RAD found that the psychological reports and the information contained in the reports did not explain the Applicants’ inability to provide basic facts about their claim. The RAD found that these reports did not cure the major deficiencies in the Applicants’ oral testimony.

[16] In any event, the RAD noted that the RPD accommodated the Applicants’ cognitive difficulties by carefully repeating what it understood to be the Applicants’ evidence. When it became apparent that the Applicants had difficulty with specific dates and details, the RAD noted that both the RPD member and the Applicants’ legal counsel proceeded to ask broad and leading questions about their claim. Even then, according to the RAD, the Applicants were unable to tell their story in broad generalities.

[17] In my view, the RAD reasonably assessed the Applicants’ claim, including the Applicants’ credibility. Deference is owed to the RAD’s interpretation of subsection 110(4) of the *IRPA: Canada (Minister of Citizenship and Immigration) v Singh*, 2016 FCA 96 at para 24. The RAD’s assessment of the psychological evidence was reasonable, including its decision not to hold an oral hearing or refer the matter back to the RPD as a result of this evidence. Given the

reasonableness of the RAD's conclusions in regards to the psychological evidence, it follows that no unfairness arises from the RAD conducting the hearing in writing and making its own determination on the Applicants' claim.

[18] The RAD noted that no submissions were made by the Applicants in their appeal on the individual incidents they alleged happened to them in Hungary as a result of their Roma ethnicity. The RAD, in agreeing with the RPD, found the Applicants were generally not credible with respect to these incidents. This is a reasonable conclusion.

2. *The RAD failed to consider the Applicants' general profiles*

[19] The Applicants submit that even if they were found generally not credible, they are still illiterate, disabled, and uneducated Roma, and this profile puts them at risk of persecution. They argue that these facts make it very difficult for them to access employment, housing, and healthcare. They submit that it was incumbent on the RAD to independently assess this particular risk profile.

[20] The Applicants rely on *Sido v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1187 at paragraph 16 [*Sido*], where the Court states:

[16] The jurisprudence of this Court establishes that a finding of a lack of credibility does not prevent a person from being a refugee if other evidence establishes both the subjective and objective branches of the test for refugee status. That said, there will be no need to assess documentary evidence where the only evidence linking an applicant to that evidence is the applicant's discredited testimony; it will depend, in each case, on the nature of the documentary evidence and its relationship to the claim: see *Manickan v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1525; *Fernando v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1349.

[21] The Applicants also rely on *Zhuravel v Canada (Minister of Citizenship and Immigration)*, 2011 FC 870 [*Zhuravel*]. In *Zhuravel*, the applicant claimed refugee status on the basis of fear of both gangsters and of domestic violence. The Board in *Zhuravel* found the applicant not credible on both grounds, but there was clear objective evidence in the record corroborating the injuries caused by the applicant's common-law spouse. The Court found the RPD's failure to address this evidence was unreasonable.

[22] This case is not like *Zhuravel*. Here there is no material documentary evidence in the record which contradicts the Board's key findings. The nature of the documentary evidence before the RAD in this case was general country condition documentation concerning the treatment of the Roma in Hungary.

[23] The Court in *Joseph v Canada (Minister of Citizenship and Immigration)*, 2011 FC 548 remarked that the Board need not look to general country condition evidence in every case to determine whether a claim is well-founded, citing *Mathews v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1387 at paragraphs 7-8 [*Mathews*].

[24] Here, like in *Mathews*, the documentary evidence was general and the RAD did not find it necessary to conduct an assessment of the country condition evidence in respect of the Applicants' circumstances, given their general lack of credibility.

[25] Pursuant to *Sido* and *Mathews*, there may be no need to assess country documentation evidence where there is no credible aspect of the claim which links the claimant to this evidence. The Applicant did not point to anything in the documentary evidence which ties their particular profile to persecution.

[26] In the absence of such particular evidence, it was not unreasonable for the RAD to agree with the RPD that the documentary evidence on the general profile for the Roma is not enough, particularly in the face of a general negative credibility: *Nagy v Canada (Minister of Citizenship and Immigration)*, 2013 FC 640.

[27] The RAD concluded that while some Roma persons experience persecution, this does not establish that all Roma face a serious possibility of treatment that rises to the level of persecution. Having found the Applicants not credible, the RAD confirmed the RPD finding that the Applicants are neither Convention refugees nor persons in need of protection.

[28] In my view, the approach of the RAD and its resulting conclusions were not unreasonable.

JUDGMENT

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

There is no question for certification.

"Ann Marie McDonald"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5507-15

STYLE OF CAUSE: KALMAN KAROLY HORVATH, KALMAN
KAROLYNE HORVATH v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JUNE 9, 2016

JUDGMENT AND REASONS: MCDONALD J.

DATED: JULY 12, 2016

APPEARANCES:

Meera Budovitch FOR THE APPLICANTS

Suran Bhattacharyya FOR THE RESPONDENT

SOLICITORS OF RECORD:

Patricia Wells Immigration FOR THE APPLICANTS
Lawyers
Barristers and Solicitors
Toronto, Ontario

William F. Pentney FOR THE RESPONDENT
Deputy Attorney General
of Canada
Toronto, Ontario