Federal Court  Cour fédérale

Date: 20171026

Docket: IMM-769-17

Citation: 2017 FC 956

Ottawa, Ontario, October 26, 2017

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

ZSOLT POCZKODI

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Zsolt Poczkodi, seeks judicial review of the decision of the Refugee Appeal Division of the Immigration and Refugee Board [RAD] dated January 27, 2017, which confirmed the decision of the Refugee Protection Division [RPD], refusing the joint claims of he and his family members under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act]. The RPD and RAD considered the joint claims of the Applicant and Bertalan Poczkodi, Bertalenne Poczkodi, and Benjamin Poczkodi, the Applicant's father,

mother, and younger brother, respectively [the family]. In the original application, Bertalan Poczkodi was the principal applicant. Bertalan Poczkodi, Bertalenne Poczkodi, and Benjamin Poczkodi have withdrawn their applications for judicial review. Zsolt Poczkodi is the adult son and is the only applicant pursuing this Application for Judicial Review. As a result, the style of cause is changed to refer only to Zsolt Poczkodi.

I. Background

[2] Zsolt Poczkodi is a citizen of Hungary of Roma ethnicity. He arrived with his parents and younger brother in Canada on May 19, 2016 and sought refugee protection based on the family's experience in Hungary. The family alleged discrimination and persecution in housing, employment, education, and in entering public places, as well as physical assaults based on their ethnicity.

[3] The RPD found that discrimination experienced by the family in housing, health, employment and education did not rise to the level of persecution separately or cumulatively, but when considered with the physical assaults alleged, did amount to persecution. The RPD found, however, that the determinative issue was state protection. The RPD concluded that state protection was adequate and that the family would be afforded adequate state protection if they returned to Hungary and sought state protection if and when needed. The RPD probed the family's efforts to seek state protection in Hungary following two alleged assaults, on Bertalan Poczkodi and the Applicant, respectively. The RPD found that the family's accounts of reporting these assaults to the police were not credible. The RPD concluded that Bertalan Poczkodi had not reported his beating to the police and that Zsolt Poczkodi did not provide the police with

sufficient details of his assault, although he knew the name of his attacker. The RPD also noted that the alleged assault was reported to the police in a different location from where it took place and where the family lived. The RPD noted that claimants cannot assert lack of state protection in general without making efforts to test the adequacy of state protection.

[4] The family did not dispute the RPD's credibility findings in their appeal to the RAD.

II. The RAD Decision Under Review

[5] The RAD noted that it conducted its own assessment to determine whether the family would face discrimination or persecution upon return to Hungary and whether, "in their particular situation and circumstances", they would receive adequate state protection if they were to seek it.

[6] The RAD's decision is lengthy and comprehensive. The RAD addressed the situation of Roma in Hungary in general with reference to the documentary evidence. The RAD agreed that Roma face discrimination in several aspects of their lives, but noted that Hungary's anti-discrimination laws were well advanced and that the government has been engaged in improving the situation of minorities.

[7] With respect to education, the RAD acknowledged the disparity in education levels between Roma and non-Roma, but noted the improvements over the last decade as reported in recent Responses to Information Requests. The RAD acknowledged that the adult family

members had faced discrimination in school. However, the RAD concluded that the documentary evidence did not establish that Roma are denied the opportunity to get an education at any level.

[8] With respect to employment, the RAD acknowledged that Roma face more difficulty obtaining steady jobs. The RAD found that Roma face discrimination, but that the evidence did not establish that Roma face persecution in either education or employment. The RAD noted that the adult family members had been gainfully employed in Hungary and found that they had not established that they would not find work upon return, in their particular circumstances.

[9] With respect to access to medical services, the RAD found that Roma patients have been subjected to differential treatment, but initiatives have been taken to reduce inequalities. The RAD concluded that there was insufficient evidence to conclude that the family had been denied medical services and found that they would receive essential medical services upon return to Hungary as needed.

[10] With respect to housing, the RAD noted the segregation of Roma and that the family had been evicted from their home in Miskolc. The RAD agreed that this amounted to discrimination but found that it did not rise to the level of persecution, noting that the family had found housing while living in Hungary, including after their eviction.

[11] The RAD found that the discrimination faced by the family in housing, employment, education and in public places did not amount to persecution. Similarly, the RAD found that

Roma as a group experience discrimination, but that the evidence did not establish that Roma as a group face persecution.

[12] The RAD found that, despite its finding that the family had not established persecution or such a risk upon return, the determinative issue was the adequacy of state protection.

[13] The RAD referred at length to the principles in the jurisprudence regarding state protection, including that refugee claimants are required to make reasonable efforts to seek protection in their home country before seeking refugee protection in another country and that the onus rests on the refugee claimant to provide clear and convincing evidence to rebut the presumption of adequate, not perfect, state protection. The RAD noted the submissions made by counsel for the family and the jurisprudence they relied on, as well as the information in the National Documentation Package. The RAD acknowledged that the evidence was mixed and that some Roma experience violence by racists, including by some rogue police officers. The RAD also referred to the initiatives underway in Hungary to address racism, including to ban the Hungarian Guard and to address corruption.

[14] The RAD concluded that the family had not provided clear and convincing evidence that state protection is inadequate for them. The RAD noted that the family “alleged that they made complaints to the police, and the police did not help them”. The RAD found that it would be reasonable to expect them to have sought redress by reporting the alleged inaction of the police to the appropriate agency. The RAD noted that the family was “resourceful” and that they would be expected to be resourceful upon return to Hungary.

[15] The RAD concluded, based on the documentary evidence, that if the family were returned to Hungary they would have adequate state protection if they reported a crime and, if dissatisfied with the police response, that they would have recourse to other authorities. The RAD provided several pages of excerpts from the National Documentation Package regarding, among other things, programs for the recruitment of Roma police, the process for making complaints about police, and the work of the Equal Treatment Authority. The RAD found that the reports on these initiatives demonstrated "results on the ground". The RAD noted, "[a]lthough not perfect, the RAD finds that the evidence demonstrates that Hungary's progressively evolving measures/actions to provide protections for its citizens, including Roma, are actually having an impact operationally on the ground." The RAD added that the evidence shows that police investigate crimes against Roma and that perpetrators are held accountable when there is sufficient evidence.

[16] The RAD agreed with the family's submissions that serious efforts to provide state protection is not the test for adequate state protection. The RAD found that based on all the evidence, Hungary is doing more than making efforts; it has enacted legislation, put an infrastructure in place to enforce the law, has a functioning police force, has recourse mechanisms for police inaction and has implemented many related programs. The RAD found that the objective documents on the record show positive results for several operational programs to address discrimination against Roma.

[17] The RAD concluded that the family had not rebutted the presumption of adequate state protection with clear and convincing evidence and that adequate state protection would be forthcoming if they were to need and diligently seek state protection upon return to Hungary.

III. The Issues

[18] The Applicant, Zsolt Poczkodi, argues that the decision is not reasonable: the RAD erred in finding that the discrimination the family experienced did not cumulatively amount to persecution; and, the RAD erred in its state protection analysis by failing to apply the correct test and relying on efforts rather than demonstrated operational adequacy; and, by ignoring the country condition documents and jurisprudence submitted by the family.

IV. The Standard of Review

[19] The decision of the RAD is reviewed on the standard of reasonableness as all the issues raised relate to matters of mixed fact and law. It is well established that, where the standard of reasonableness applies, the role of the Court is to determine whether the decision "falls within 'a range of possible, acceptable outcomes which are defensible in respect of the facts and law' (*Dunsmuir*, at para. 47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome" (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59, [2009] 1 SCR 339). Deference is owed to the decision maker. The Court will not re-weigh the evidence or remake the decision.

[20] In *Majlat v Canada (Minister of Citizenship and Immigration)*, 2014 FC 965, [2014] FCJ No 1023, Justice Mary Gleason summarized the notion of deference, following a comprehensive analysis of the reasonableness standard of review. Justice Gleason explained, at para 24, that "deference requires that tribunals such as the RPD be afforded latitude to make decisions and to have their decisions upheld by the courts where their decisions are understandable, rational and reach one of the possible outcomes one could envisage legitimately being reached on the applicable facts and law."

A. *The Applicant's Submissions*

[21] Zsolt Poczkodi acknowledges that the determinative issue for both the RPD and RAD was state protection, but submits that the RAD erred in failing to consider whether the discrimination faced by the family in education, employment and housing on a cumulative basis amounted to persecution and in finding that it did not. He submits that given the RADs findings regarding the extent of discrimination against Roma, this finding is not justified. He submits that had the RAD found that the family suffered persecution, the state protection analysis would be different.

[22] Zsolt Poczkodi further submits that the RAD erred in its assessment of the adequacy of state protection. Although it correctly stated the test of adequate state protection, the RAD did not apply the correct test; rather, it focussed on improvements and efforts. The RAD ignored documentary evidence and the jurisprudence cited by the family where the Court has found that Roma are persecuted and that state protection is not adequate at the operational level. Zsolt

Poczkodi submits that this Court has found that the same initiatives relied on by the RAD in the present case to be inadequate state protection in other cases.

[23] He submits that the jurisprudence has established that only reasonable efforts are required to seek state protection and that the burden on the family to seek state protection should be assessed in the context that persecution of Roma is widespread and police do not respond to complaints from Roma. He asserts that the RAD acknowledged that the police did not investigate the family's complaints.

[24] He also argues that the RAD erred in considering the resourcefulness of the family as an element of its assessment of state protection. He also argues that the RAD's reference to the family's resourcefulness suggests some bias or pre-determination of the claim. He argues that if fleeing Hungary demonstrates resourcefulness, and if that same resourcefulness is relied on to expect him to seek state protection in Hungary, then all refugees would be similarly "resourceful" and the RAD would not fairly assess the claims.

B. *The Respondent's Submissions*

[25] The Respondent submits that the RAD considered all the evidence and applied the principles from the jurisprudence, but was not satisfied that the family would face a serious risk of persecution if returned to Hungary or that state protection would not be available, if the family needed and sought state protection.

[26] The Respondent submits that the RAD did not ignore the evidence or jurisprudence submitted by the family. The RAD addressed the voluminous country condition documents and concluded that the discrimination faced in housing, education and employment by Roma in Hungary was indeed discrimination, but not rise to the level of persecution. The RAD considered the family's evidence of discrimination both separately and cumulatively, noting that this issue was squarely raised in the family's appeal to the RAD and was squarely addressed.

[27] The Respondent notes that the RAD engaged in a detailed analysis of the country condition documents regarding Roma in Hungary and of the family's particular circumstances. The analysis demonstrates that the RAD did not rely on efforts and improvements but on the outcomes of the efforts made by the Hungarian government to address discrimination. The RAD's assessment of the country condition documents, particularly those found to be objective, support the finding that Hungary was both willing and able to provide protection when protection is actually sought. The RAD noted the "mixed evidence" but found that the objective evidence does not support the conclusion that all Roma will face persecution and that state protection is not adequate.

[28] The Respondent further submits that the RAD reasonably found that the family did not rebut the presumption of adequate state protection, noting that their account of seeking protection following two separate assaults was not found to be entirely credible.

[29] With respect to the RAD's comment about the resourcefulness of the family, the Respondent's position is that this was simply a comment and not an additional element of the

state protection analysis. In any event, a refugee claimant's efforts to seek state protection are a highly relevant consideration.

[30] The Respondent refutes the serious allegation of bias against the RAD, which arises from the RAD's comment on the resourcefulness of the family, noting that it does not come close to meeting the high threshold to establish a reasonable apprehension of bias established in *Committee for Justice and Liberty v Canada (National Energy Board)* [1978] 1 SCR 369 at 394, 68 DLR (3d) 716 [*Committee for Justice and Liberty*].

V. The RAD did not fail to consider whether the discrimination recounted by the family amounted to persecution

[31] The RAD did not fail to assess whether the discrimination experienced by the family in housing, education, employment and in entering public places – which were the bases of their claim before the RAD – amounted to persecution either separately or cumulatively. The RAD's lengthy analysis shows that it clearly considered this issue. The RAD painted a rather bleak picture of the challenges faced by Roma in Hungary. It did not gloss over the "mixed" evidence, yet reasonably found this did not amount to persecution for this family.

[32] Zsolt Poczkodi's reliance on jurisprudence which has found that discrimination in housing, employment, education and access to medical services for Roma claimants constitutes persecution does not lead to the conclusion that this decision of the RAD must be found unreasonable. The decision of the RAD is based on the circumstances of the family and the evidence presented. Each case is determined on its own merits. In the present case, the RAD

found, based on the evidence provided, that the family had been able to obtain housing, despite their eviction in Milscolk, that education was not denied to their sons, that they had not demonstrated that essential medical services were denied to them, and that the adult family members had been employed.

[33] Moreover, the RAD's finding that the discrimination experienced by the family did not amount to persecution need not be addressed given that the determinative issue for both the RPD and the RAD was the adequacy of state protection. Even if the RAD had found that the family's experiences individually or cumulatively amounted to persecution, the outcome would have been the same based on the finding that state protection is adequate; the family had not rebutted the presumption of adequate state protection with clear and convincing evidence.

[34] As Justice O'Keefe found in *Dawidowicz v Canada (Minister of Citizenship of Immigration)*, 2014 FC 115 at para 27, 23 Imm LR (4th) 61:

> [27] The Board was therefore correct to approach the issue the way it did. Having found adequate protection, there was no need to go on to consider whether the cumulative acts of discrimination amounted to persecution since such a finding could not have changed the result.

VI. The RAD did not err in its assessment of state protection for this family

[35] The RAD decision, as noted above, is lengthy and comprehensive. The RAD correctly noted the principles from the prevailing jurisprudence, including that there is a presumption of adequate state protection, the onus rests on the refugee claimant to provide clear and convincing evidence that state protection is not adequate for them, that state protection need not be perfect,

that local failures alone do not demonstrate inadequate state protection, and that a claimant must make reasonable efforts to access state protection – which are proportional to the level of democracy in the state before seeking the protection of another country.

[36] The jurisprudence with respect to state protection is extensive. The RAD's decision reflects the relevant principles including those noted above. These principles start from the premise that refugee protection is considered to be surrogate or substitute protection in the event of a failure of national protection (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at 709, 103 DLR (4th) 1). The presumption that a state is capable of protecting its citizens is only rebutted by clear and convincing evidence that state protection is inadequate or non-existent; the evidence must be "relevant, reliable and convincing evidence which satisfies the trier of fact on a balance of probabilities that the state protection is inadequate" (*Flores Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 at para 30, [2008] 4 FCR 636).

[37] Adequate state protection does not mean perfect state protection, but the state must be both willing and able to protect *(Bledy v Canada (Minister of Citizenship and Immigration)*, 2011 FC 210 at para 47, [2011] FCJ No 358 (QL)). State protection must also be adequate at the operational level (*Henguva v Canada (Minister of Citizenship and Immigration)*, 2013 FC 483 at para 18, [2013] FCJ No 510 (QL); *Meza Varela v Canada (Minister of Citizenship and Immigration*), 2011 FC 1364 at para 16, [2011] FCJ No 1663 (QL)).

[38] As noted more recently by Justice Gascon in *Galamb v Canada (Minister of Citizenship and Immigration)*, 2016 FC 1230 at paras 32- 33, [2016] FCJ No 1220 (QL):

> [32] It is not disputed that the appropriate test in a state protection analysis commands an assessment of the adequacy of that protection at the operational level. The state protection test must focus not only on the efforts of the state but also on actual results: "[i]t is what state protection is actually provided at the present time that is relevant" (*Hercegi v Canada (Citizenship and Immigration)*, 2012 FC 250 at paras 5-6 [emphasis in the original]). A state protection analysis must not just consider governmental aspirations. Stated otherwise, for a protection to be adequate, it must amount to a protection that works at the operational level. To measure the adequacy of state protection, the RAD has to consider the state's capacity to implement measures at the practical level for the persons concerned (*Bakos v Canada (Citizenship and Immigration)*, 2016 FC 191 [*Bakos*] at paras 26 and 29; *Juhasz v Canada (Citizenship and Immigration)*, 2015 FC 300 at para 44; *Molnar v Canada (Citizenship and Immigration)*, 2015 FC 273 at para 46).
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> [33] Efforts made by a government to achieve state protection may, of course, be relevant to the question of whether operational adequacy has been achieved. However, actual results in terms of what is concretely accomplished by the state must also be assessed (*Kovacs v Canada (Minister of Citizenship and Immigration)*, 2015 FC 337 [*Kovacs*] at paras 71-72). While "[a]dequacy remains the standard", what is adequate "will vary with the country and the circumstances" (*Kovacs* at para 72).

[39] The RAD noted that Hungary is a functioning democracy. While democracy alone does not ensure effective state protection, it is a relevant factor.

[40] In addition, the onus on a claimant to seek state protection varies and is commensurate with the state's ability and willingness to provide protection (*Sow v Canada (Minister of Citizenship and Immigration)*, 2011 FC 646 at para 11, [2011] FCJ No 824 (QL) at para 10; *Kadenko v Canada (Minister of Citizenship and Immigration)*, [1996] FCJ No 1376 (QL) at para 5, 143 DLR (4th) 532 (FCA)).

[41] In *Ruszo v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1004, 440 FTR 106, the Chief Justice explained at para 33 that a claimant cannot simply rely on their own belief that state protection will not be forthcoming without testing it:

> [33] In this regard, doubting the effectiveness of state protection without reasonably testing it, or simply asserting a subjective reluctance to engage the state, does not rebut the presumption of state protection . . . In the absence of a compelling or persuasive explanation, a failure to take reasonable steps to exhaust all courses of action reasonably available in the home state, prior to seeking refugee protection abroad, typically will provide a reasonable basis for a conclusion by the RPD that an applicant for protection did not displace the presumption of state protection with clear and convincing evidence.
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> [Internal citations omitted]

[42] As noted above, each case must be decided on its own facts. On judicial review, the issue is whether the RAD made findings which are reasonable based on the evidence before the RAD with respect to the claimant. The jurisprudence which has resulted in different conclusions regarding the adequacy of state protection for other Roma in Hungary must be assessed with this in mind. The Court applies the same principles, but different results may be reached in different cases due to different facts and circumstances.

[43] As noted by Justice Boswell in *Dinok v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1199 at para 32, [2014] FCJ No 1246 (QL):

> 32 Consequently, the mere fact that a finding of adequate state protection was held to have been made unreasonably in *Hercegi* and other cases does not necessarily mean that the Board's decision in this case was unreasonable. As Mr. Justice Russell observed in *Molnar v Canada (Citizenship and Immigration)*, 2012 FC 530 at para 105, [2012] FCJ No 551 (QL):

> The 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. Where it does, it is my view that it is not for this Court to interfere even if I might come to a different conclusion myself.

[44] In the present case, the RAD reasonably concluded that state protection was adequate and that the family had not rebutted the presumption of adequate state protection with clear and convincing evidence.

[45] The RAD provided a detailed assessment of the country condition documents regarding state protection. The RAD acknowledged the family's submissions regarding the jurisprudence and the documents submitted, which Zsolt Poczkodi argues were more recent and demonstrated a lack of state protection. The RAD's analysis of all the reports led it to conclude that the legislation and other initiatives were producing results "on the ground". The RAD's reasons reflect that it understood the difference between efforts and operational adequacy of state protection. As noted above, the RAD concluded "[a]lthough not perfect, the RAD finds that the evidence demonstrates that Hungary's progressively evolving measures / actions to provide protection for its citizens, including Roma, are actually having an impact operationally on the ground."

[46] Although Zsolt Poczkodi argues that the RAD accepted that he and his family had made complaints to the police and the police did not respond, this is not an accurate characterization of the RAD's decision. The RAD stated that the family alleged they had complained to the police and that the police did not help. The RAD did not dwell on the evidence of the efforts made by

the family to seek police protection. The RPD, however had probed the evidence and had found Bertalan Poczkodi had not reported his beating to the police and that Zsolt Poczkodi did not provide the police with sufficient details of his assault, although he knew the name of his attacker and had reported to the police in a different location from where it took place and where the family lived. As noted above, the RPD had found that the family's reports to the police were not credible. The family did not challenge these credibility findings in their appeal to the RAD.

[47] The RAD found that it would have been reasonable for the family "in their particular situation and circumstances" to have sought redress from the alleged police inaction from the appropriate organisation. In this context, the RAD noted that the family was resourceful.

[48] The record supports the RAD's finding that the family did not meet the onus to take reasonable steps in their circumstances to seek state protection first from the police and subsequently by seeking recourse from oversight agencies.

VII. The RAD did not show any reasonable apprehension of bias by commenting that the family was resourceful

[49] I note that Zsolt Poczkodi now submits that there was not a "strong" apprehension of bias, but has not resiled from this allegation completely. There is no merit in his submission that the RAD showed any reasonable apprehension of bias by commenting that the family showed resourcefulness in coming to Canada. The RAD's comment was made in the context of assessing whether the family had taken reasonable steps to access state protection, before seeking the protection of Canada. The RAD is entitled to consider all the circumstances, which include the

ability of refugee claimants to seek state protection. In my view, the RAD's comment about their resourcefulness is related to their ability to seek state protection.

[50] The test for bias was established by Justice de Grandpré, writing in dissent, in *Committee for Justice and Liberty* at 394:

> […] 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 […] [T]hat test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.
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> [48] In *R v S (RD)*, [1997] 3 SCR 484, 151 DLR (4th) 193 [*RDS*], at para 113, Justices L'Heureux- Dubé and McLachlin referred to the test and noted that the threshold for a finding of real or perceived bias is high, explaining that "an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice." The Court cautioned that allegations of bias are serious and should not be made lightly. The same principles apply to allegations against other decision makers.

[51] A reasonable apprehension of bias requires more than an allegation based on a passing comment in the decision. The allegation must be accompanied by cogent evidence (RDS at paras 114, 117). In this case, there is no evidence at all to suggest that an informed person would have a reasonable apprehension of bias.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question for certification.

"Catherine M. Kane"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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