Federal Court  Cour fédérale

Date: 20120215

Docket: IMM-2912-11

Citation: 2012 FC 216

Vancouver, British Columbia, February 15, 2012

PRESENT: The Honourable Mr. Justice Blanchard

BETWEEN:

IGNAC BALOGH, GIZELLA BODI,
IGNAC TAMAS BALOGH

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the April 7, 2011 decision by the Refugee Protection Division (the RPD) of the Immigration and Refugee Board refusing the Applicants' claim for refugee protection pursuant to sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2000, c 27 [IRPA]. The application is brought under subsection 72(1) of IRPA.

I. Factual Overview

[2] The Applicants, Ignac Balogh (Principal Applicant), his common-law spouse, Gizella Bodi (Associate Applicant), and their teenage son Ignac Tamas Balogh (minor Applicant), are ethnic Roma of Hungarian nationality. They allege a well-founded fear of persecution because of their ethnicity.

[3] The Principal Applicant is trained as a bricklayer and the Associate Applicant is trained as a primary school teacher and a social worker for youth.

[4] The Applicants advance the following incidents and allegations in support of their claim of persecution:

a. The Applicants allege that they cannot find work in their chosen field because they are Roma.

b. The Principal Applicant reports that he has been beaten severely in 1997, 2000 and 2003 and that his injuries required hospitalization. He states that reports were filed by the doctors with the police for the 1997 and 2000 incidents and no police investigation resulted.

c. The Principal Applicant claims he was assaulted on the basis of his ethnicity approximately 4 times per year. He states he did not report these incidents on his Personal Information Form (PIF) because his previous counsel advised him only to list the incidents where he had sustained bodily harm.

d. The Applicants allege that the Principal Applicant is more targeted than other Roma men because he had an altercation with a leader of a group of ‘skin heads’ in 1997 and that a member of the group had been present during two later assaults.

e. The Principal Applicant claims being detained 5 or 6 times a year for up to four hours at a time by the police for not carrying his ID. He was allegedly beaten by the police on one of these occasions.

f. The Associate Applicant alleges discrimination in the medical treatment she received in medical facilities in Hungary for Cirrhosis of the liver by reason of her ethnicity.

g. The minor Applicant was discriminated against in school by reason of his ethnicity. He was placed in a separate class that consisted of nine Roma children. These children allegedly suffered physical beatings from the teachers and were required to enter and exit from a different door than the ethnic Hungarian students. The Applicants' son was also allegedly attacked by a group of youths in a previous housing complex in which they lived.

h. The Applicants allege that in 2010, a neighbour set fire to the forest surrounding their property, which destroyed their barn, shed, and garden. The Applicants claim the fire department did not respond, claiming their equipment was busy and that the lives of the Applicants and their neighbours were not in danger. The Associate Applicant reported the incident to the police but was told that no report could be made without a report of the fire from the fire department.

II. The Impugned Decision

[5] The RPD rejected the Applicants' claim finding that the claimants did not have a well-founded fear of persecution on a Convention ground in Hungary and that state protection was available to them.

[6] The RPD accepted that the Applicants suffered discrimination but found that it did not amount to persecution. The RPD found that the attacks and violence suffered by the Applicants were "acts of random violence committed by racists". It found, on the evidence, that the discrimination suffered by the Applicants "does not threaten their fundamental rights but rather affects the quality of their existence in their home country."

[7] The RPD also found that state protection was available to the Applicants and they did not avail themselves of the protection and services offered by state agencies, including: the Equal

Treatment Authority (ETA), the access to free legal aid for Roma offered by the Ministry of Justice and Law Enforcement in cases of discrimination based on ethnicity, labour centres that have special officers for Romani affairs focused on the needs of the Romani community, and the Independent Police Complaints Board (IPCB). The RPD relied on country documentation to find that the Hungarian government was making serious efforts to ensure that state protection is available to Roma. As a consequence, the RPD found that the claimants did not refute the presumption of state protection on clear and convincing evidence.

III. Issues

[8] The Applicants raise the following issues on this application:

a. Did the RPD err in law in finding that the denial of the Applicants to work in their respective chosen professions was discriminatory rather than persecutory?
b. Did the RPD err in law in failing to address the adequacy of state protection in light of evidence before the Panel that the Principal Applicant had suffered persecution from state actors?
c. Did the RPD err in law by misconstruing or ignoring evidence properly before it with respect to recent incidents of persecution and the Applicants' recent attempt to obtain protection from the state?

IV. The Standard of Review

[9] All three issues are fact-driven and relate to the weighing of evidence and as such are reviewable on the reasonableness standard (*Diagana v Canada (Minister of Citizenship and Immigration)*, 2007 FC 330 at para 14; *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 53, 63.

On state protection, see *Hinzman v Canada (Citizenship and Immigration)*, 2007 FCA 171 at para 38).

V. Analysis

Did the RPD err in law in finding that the denial of the Applicants to work in their respective chosen professions was discriminatory rather that persecutory?

[10] The Applicants argue that the RPD failed to conduct any meaningful analysis of whether their denial of the right to work in their chosen professions amounted to persecution. They argue that the RPD "did not appear to take any issue with the evidence from the Applicants in the hearing that they were repeatedly denied employment in their chosen professions, due to their ethnicity." The Applicants contend that the RPD did not adequately probe the Applicants on this issue. They also argue that the RPD failed to ask them what kind of protection they could have availed themselves to with respect to the denial of employment.

[11] In support of their argument, the Applicants cite *He v Canada (Minister of Employment and Immigration)* (1994), 78 FTR 313 at para 15, 25 Imm LR (2d) 128 [*He*], for the proposition that actively denying an applicant the right to work in her profession was persecutory.

[12] The Respondent contends that the RPD specifically referenced the Applicants' difficulties in finding employment and appropriately considered those circumstances in its decision. The Minister argues that there was only "vague and uncorroborated" evidence to find persecution due to discrimination in employment. The Respondent also argues that *He* does not apply in the circumstances because there is no evidence that the authorities took active steps to prevent the Applicants from obtaining employment.

[13] I am of the view that *He* be distinguished on its facts. In that case, the applicant's job was terminated and her request for a state work permit was denied. The applicant was essentially forced by the state to become a farmer. In the case at hand, there was no evidence to support the contention that the Hungarian authorities took active steps to prevent the Applicants from obtaining employment in their respective professions.

[14] A review of the RPD's reasons and decision at paragraphs 19-20 shows that the panel expressly considered the Applicants' allegations that they were unable to find work in their chosen professions and concludes that the claimants have suffered discrimination that affects the quality of their existence in Hungary. The RPD did consider the circumstances relating to Applicants' work history in Hungary. Reading the decision as a whole, I am satisfied that the RPD's finding that the Applicants' inability to find work in their respective professions did not amount to persecution was reasonably open to it on the record.

Did the RPD err by failing to adequately consider the evidence relating to the Principal Applicant's treatment by state actors in finding that state protection was available?

[15] Since the third issue raised by the Applicants also deals with state protection, I will deal with both the second and third issue together.

[16] The Applicants argue that the RPD erred in finding that state protection was available to them. They contend that the RPD failed to consider that the police were the primary agents of harm and did nothing when serious incidents were reported, and failed to consider whether the alleged violence by the police was persecutory. The Applicants further contend that the RPD failed to engage in a meaningful analysis of the Applicants' circumstances, in particular the allegation that

the Principal Applicant had been detained by the police 5 or 6 times a year for failing to carry his ID. It is further argued the RPD did not consider the Principal Applicant's unwillingness to seek state protection because he is being persecuted by the state, namely the police. They argue that seeking such protection would be futile and cite *Silva v Canada (Minister of Employment and Immigration*) 1994, 82 FTR 100 (TD), [1994] FCJ No 1161, in support of their argument.

[17] The Respondent argues that the Applicant has failed to rebut the presumption of state protection. It is argued that the Applicants mistakenly conflate the police with the state as a whole. The Respondent argues that the RPD took the police action into account in its analysis and pointed to state agencies established by the Hungarian government to address corruption and discriminatory practices, including: 1) the Ministry of Justice and Law Enforcement; 2) the Independent Police Complaints Board (IPCB); 3) the Parliamentary Commissioner's office; 4) special officers for Romani affairs; and 5) the Equal Treatment Agency (ETA). The RPD found that the Associate Applicant did not approach these agencies and found not credible her claim that she had registered a complaint with the ETA.

[18] The Supreme Court of Canada in *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at para 50 confirms that a state is presumed capable of protecting its citizens. There is no dispute that the legal burden is on the Applicants to adduce clear and convincing evidence to rebut the presumption of state protection. The jurisprudence further teaches that state protection need not be perfect and the assessment of state protection requires a forward-looking analysis (*Canada (Minister of Employment and Immigration) v Villafranca* (1992), 99 DLR (4th) 334, 18 Imm LR

(2d) 130 (FCA), *Resulaj v Canada (Minister of Citizenship and Immigration)*, 2006 FC 269 at para 20; *Guevara v Canada (Citizenship and Immigration)*, 2011 FC 242 at para 39).

[19] In its reasons for decision, the RPD did not expressly address the Applicants' allegations that the Principal Applicant would be detained by police 5 or 6 times a year for failing to carry his ID, or the allegation that he was once beaten by the police. In my view, this omission is not fatal to the decision. A review of the RPD's reasons for decision indicates that the panel was well aware of the alleged police discrimination. At paragraph 34 of its reasons, it states: "The claimant's [*sic*] have testified that they were routinely subjected to prejudicial behaviour by teachers, employers, and government workers including the police because of their ethnicity." In my view, the RPD turned its mind to the alleged discrimination by the state in coming to its conclusion. There is no requirement that every element of evidence be addressed in the reasons as long as "… the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes". (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16).

[20] With regard to Applicants' unwillingness to seek state protection given the alleged discrimination by state actors, the RPD notes at paragraph 52 of its decision that refugee protection is always forward-looking. The Applicants were aware that they had access to independent state agencies for assistance. One of those agencies**,** the IPCB, established in 2008**,** investigates violations and omissions by the police that substantively concern fundamental rights which are in essence the same kind of allegations made against the police by the Applicants. There is no evidence that these independent agencies were ineffective or corrupt. The Applicants did not file any complaints with

any of these agencies or attempt to seek assistance. Further, there is no evidence that these agencies are in any way influenced by the local police. The RPD further acknowledged at paragraph 59 of its reasons for decision, that the protection by the Hungarian state was not perfect and that it required improvement in many areas. It also determined that the government of Hungary "is taking significant steps to ensure state protection is available to their citizens including those of Roma ancestry." The RPD also determined that the Applicants did not take reasonable steps to avail themselves of the state protection which was available to them. In my view, the above findings were reasonably open to the RPD on the record.

[21] The Applicants further argue that the RPD erred by failing to adequately consider the evidence relating to the incident of the fire in finding that state protection was available to the Applicants. They contend that the RPD erred in finding the "neighbours lit a fire in the forest around their home to burn off dead grass." It is argued that the evidence shows that the fire was deliberately set with a wish or intention to set fire to the Applicants' home. The Applicants argue that this is important evidence that should have been expressly dealt with by the RPD and since is was not, an inference should be drawn that the RPD made its finding without regard to the evidence, thereby committing a reviewable error.

[22] The Respondent contends that the evidence does not support the suggestion that the fire was purposely set to burn the Applicants' home and argues that the RPD properly characterized the incident in its reasons.

[23] The following transcript of the hearing before the RPD reveals that the panel sought clarification of the incident from the Associate Applicant:

> RPD: Who – who heard or who did this individual admit to that he lit the fire?
>
> Associate Applicant: He let to know to the neighbouring – he let to know to the neighbouring Gypsies he was – he talked – talked about this on the bus with the neighbours and then – and then these people told me that this individual lit the fire and then I asked – and I asked him and he did not deny it.
>
> RPD: Okay. When you say he did not deny it, what does that mean?
>
> Associate Applicant: He said – he said that he lit that land in there so there are new grass could grow again but then when he said, "I wish your house would have been afire" that he wanted to lit everything, not just that land in there.
>
> RPD: Okay. So he said he had lit the fire so new grass could grow and then he said that he wished that your house had burned as well. Is that correct?
>
> Associate Applicant: Yes. Correct.
>
> (p 326 of Tribunal Record)

In my view, the above passage read in context with the remainder of the transcript does not establish that the fire was lit with the intent to burn the Applicants' home. I am satisfied that the RPD's characterization of the incident was reasonably open to it on the record and as such it did not err in its consideration of the incident in its reasons for decision.

[24] The RPD's finding that the Applicants did not discharge their burden of presenting clear and convincing evidence of the state's inability to protect them was reasonably open to it on the record. It is a finding that falls within the range of acceptable outcomes in all of the circumstances.

The RPD committed no reviewable error in its assessment and determination on state protection. This conclusion is determinative of this application.

[25] No question was proposed and none will be certified as a serious question of general importance pursuant to paragraph 74(*d*) of the *Immigration and Refugee Protection Act*, [SC 2001, c 27.]

VI. Conclusion

[26] For the above reasons, the application will be dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed; and

2. No question of general importance is certified.

"Edmond P. Blanchard"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**IMM-2912-11**
STYLE OF CAUSE:	**IGNAC BALOGH et al v MCI**
PLACE OF HEARING:	**Vancouver, BC**
DATE OF HEARING:	**February 9, 2012**
REASONS FOR JUDGMENT AND JUDGMENT:	**BLANCHARD J.**
DATED:	**February 15, 2012**

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