Federal Court

Cour fédérale

Date: 20120905

Docket: IMM-6481-11

Citation: 2012 FC 1049

Ottawa, Ontario, September 5, 2012

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

GYULA KANTO
GYULANE KANTO
GYULA KANTO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

<u>REASONS FOR JUDGMENT AND JUDGMENT</u>

[1] This is an application for judicial review of a decision of the Refugee Protection Division (the "Board") dated August 29, 2011, whereby the Board rejected the Applicants' claim for protection, finding that the three Applicants were not Convention refugees or persons in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] For the reasons that follow, I have found that this application must be dismissed.

1. Facts

[3] Gyula Kanto Sr., his wife, Gyulane Kanto, and their son, Gyula Kanto Jr. are Roma citizens of Hungary. They arrived in Canada on September 15, 2009, and, on the same day, sought refugee protection on the basis of a well-founded fear of persecution for reasons of race and membership in a particular social group.

[4] The Applicants argue that Romanies regularly face discrimination in Hungary. Since the 1980s, the Roma people claim to have faced persecution in many forms. Roma children are segregated in schools, have the letter "C" affixed to their name to indicate their ethnic origin, and are said to suffer humiliation at the hands of their classmates and teachers. The Applicants further argue that, by reason of their ethnicity, Roma people are unable to secure meaningful employment and are reduced to menial labour that non-Roma would not entertain. They submit that, in 2006, the Hungarian Guard, a Neo-Nazi organization with a violent anti-Roma agenda, along with other skinhead/fascist groups, increasingly targeted Romanies and that violence against the Roma people is largely ignored by police officers. It is against this backdrop that the Applicants allege to have experienced persecution.

[5] The Applicants allege that they were the victims of a number of incidents because of their ethnic origin. The first of these incidents is said to have occurred on November 21, 2006, when Gyula Kanto Jr. was attacked on his way home from work by a group of five or six skinheads. He

managed to escape and run home, while sustaining only minor injuries. He did not report that incident to the police.

[6] On December 6, 2006, after leaving work, Gyula Kanto Jr. was surrounded and assaulted by the same group of individuals as the previous month. Fellow colleagues came to his rescue. Two blocks from the incident, he met a police officer who refused to come to his aid, claiming that the Applicant had probably triggered the altercation.

[7] In 2006, Gyula Kanto Sr. participated in the Roma elections for a position in the minority government. This participation further publicized his ethnicity and role as a Roma activist. In the Applicants' apartment complex, their upstairs neighbour was a known racist and Guardist. The neighbour would shout racial slurs at them and send threatening letters. He even broke their windows. The Applicants complained to the police but they refused to intervene.

[8] On July 8, 2009, Gyula Kanto Jr. was confronted by three Guardists. He warned them that he would complain to the authorities. However, one of the men pulled out a police badge and retorted that the Applicant could press charges but that his complaint would not be investigated. The Applicant was then hit in the face with an empty beer bottle. He required stitches after this incident.

[9] On July 25, 2009, while travelling in the metro, Gyula Kanto Sr. was grabbed from behind, turned and punched in the face by a young man. No passengers came to his aid. He complained to a police officer who smiled and declared that no one is attacked without prior provocation. This is

the most significant incident that influenced the Applicants' decision to flee Hungary. At some point in August 2009, Gyula Kanto Sr. encountered a demonstration while on his way home and a group of skinheads began to verbally assault him, telling him to disappear. The Applicant did not suffer any physical injuries as a result of the incident and did not report the incident to the police.

[10] On August 26, 2009, Gyula Kanto Jr. was surrounded and verbally abused by a group of police officers at a bank machine. They spoke with approval about a recent violent attack on Romanies by a group of skinheads. The Applicant overheard one of the police officers say: "At least there is one less Roma in the country".

[11] The hearing of this refugee protection application took place over the course of three sittings: March 25, May 27 and July 29, 2011. At the initial sitting, the Board member asked Gyula Kanto Sr. to confirm that the Personal Information Form (PIF) had been translated to him in its entirety. The Applicant explained that counsel had him sign the PIF before filling out the narrative portion of that form. In addition, his narrative was never read back to him in Hungarian. The Board member then left the room to allow the Applicant and his counsel the opportunity to sort out this issue among themselves. However, the Board's audio record system was inadvertently left running and the privileged conversation that ensued was recorded.

[12] Upon resumption of the hearing, the Board was advised by counsel for the Applicants that he was withdrawing due to a breakdown in the solicitor-client relationship. At that time, the Board informed the Applicants that they had the burden of proving the allegations of incompetence made against their lawyer. The hearing was then adjourned.

[13] On May 27, 2011, the Applicants' new counsel, Mr. Michael Korman, presented an urgent motion before the Board requesting: (a) the recusal of the Board member; (b) that the existing audio record be destroyed or redacted to remove the privileged conversation; and (c) a *de novo* hearing. Counsel made three essential arguments: (1) the Applicants' rights had been violated so as to compromise the integrity of the administration; (2) the Board member inappropriately shifted the burden to prove allegations against their former counsel onto the Applicants; and (3) there was a reasonable apprehension of bias on the part of the Board member, warranting his recusal. Counsel's motion was denied that same day.

[14] The hearing resumed on July 29, 2011 and the Board rendered its decision rejecting the Applicants' claim for protection one month later.

2. The impugned decision

[15] After considering the Applicants' testimony, the Board determined that they were not credible. In addition, the Board found that Hungary provides adequate state protection.

[16] Regarding the issue of credibility, the Board viewed the Applicants' testimony as both contradictory and inconsistent.

[17] Firstly, the Applicants could not provide medical reports to corroborate their allegations of physical injuries. Gyula Kanto Sr. did not seek medical attention for his injuries. Gyula Kanto Jr. initially stated that he had no medical report with respect to the incident of July 2009. When probed further, he admitted to possessing a copy of the report, which he had not submitted to the Board

despite the fact that question 31 of the PIF specifically urges refugee claimants to attach copies of any medical documentation. As the Applicants had the benefit of being represented by two experienced counsel, the Board drew a negative inference from Gyula Kanto Jr.'s failure to submit the medical report and concluded that he had not been physically assaulted in July 2009.

[18] Secondly, after Gyula Kanto Jr. testified regarding the November 2006 incidents, he was asked if there were any other incidents that he wished to describe, and he immediately began relating the events of August 2009. When further questioned regarding the November 2006 assault, he explained that the interaction with the police officer described as having occurred in July 2009 in the application materials had actually transpired in December 2006, following another incident. The Board member rejected the Applicant's assertion that the confusion in dates was an innocent mistake, finding that it was reasonable to expect that Gyula Kanto Jr. would describe the November and December 2006 ordeals consecutively since they were allegedly perpetrated by the same individuals. Consequently, the Board concluded that Gyula Kanto Jr. was not assaulted in either November or December of 2006.

[19] As for state protection, the Board acknowledged that Hungary has a history of discrimination against Roma people. Hungary, however, is a democracy; therefore, there is a strong presumption in favour of adequate state protection. Furthermore, the Board found that the documentary evidence shows that Hungary has taken active measures to correct discriminatory practices against the Roma people. The Board then listed a series of legislative measures taken by the Hungarian government to protect the rights of ethnic minorities. By way of example: the government has mandated training in human rights, basic freedoms and tolerance for in-service and

aspiring police officers; in 1993, the government enacted the *Rights of National and Ethnic Minorities*, a comprehensive and progressive tool for protecting minority rights; and, in June 2007, Parliament adopted a resolution, *The Decade of Roma Inclusion Programme Strategic Plan (2007-2015)*, presenting tasks to be accomplished in an effort to eradicate discrimination.

[20] While the Board determined that the police had provided no assistance whatsoever in one instance of discrimination alleged by Gyula Kanto Sr., they found that the remaining incidents described by Gyula Kanto Sr. and Gyula Kanto Jr. either were not credible or had not been reported to the authorities, allegedly because the Applicants did not trust the police. Ultimately, the Board took the view that local authorities' failure to provide protection does not establish a broader pattern of the state's inability or refusal to provide protection. As a result, the Board found that the Applicants did not provide clear and convincing evidence that Hungary could not provide adequate state protection.

3. Issues

[21] This application for judicial review raises the following issues:

a) Was there a breach of the principles of natural justice?

b) Did the Board err in failing to consider the issue of cumulative discrimination?

c) Did the Board err in concluding that there was adequate state protection?

4. Analysis

[22] The parties are in agreement as to the applicable standard of review. As stated by the Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190

[*Dunsmuir*], a court can seek guidance from the existing case law for determining the appropriate degree of deference for a particular type of question. The first question is one of procedural fairness, which courts have held to be reviewable on a standard of correctness (*C.U.P.E. v Ontario (Minister of Labour)*, 2003 SCC 29 at paras 100 and 102, [2003] 1 SCR 539; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 43; *Dios v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1322 at para 24, 337 FTR 120). Therefore, the Court will not show deference and may substitute its view for that of the Board.

[23] The second and third questions raise issues pertaining to the assessment of risk of persecution and the availability of adequate state protection. These are issues of mixed fact and law that fall squarely within the expertise of the Board (*Khatun v Canada (Minister of Citizenship and Immigration)*, 2012 FC 159, [2012] FCJ no 169 at para 47; *Sarmis v Canada (Minister of Citizenship and Immigration)*, 2004 FC 110, 245 FTR 312 at para 11). As such, they are reviewable against a standard of reasonableness. This requires the Court to inquire into the existence of justification, transparency, and intelligibility in the decision-making process. The Court will only intervene if the decision falls outside of the range of possible, acceptable outcomes that are defensible in respect of the facts and law (*Dunsmuir*, above at para 47).

a) Was there a breach of the principles of natural justice?

[24] The Applicants allege the existence of a reasonable apprehension of bias on the part of the Board member which, in turn, breaches the principles of natural justice. This allegation is based on two arguments:

1) The Board member refused to strike or redact the original hearing record containing privileged communication with their former counsel. In spite of this refusal, the Board member declined to recuse himself and to order a *de novo* hearing; and

2) The Board member inappropriately shifted on the Applicants, the burden of proving the allegations of incompetence against their former counsel onto the Applicants.

[25] The legal test for determining the existence of a reasonable apprehension of bias is well-established. In *Committee for Justice and Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369 at 394, 9 N.R. 115, Justice de Grandpré stated:

> [T]he 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. In the words of the Court of Appeal, that 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." [Emphasis added.]

[26] It is against this standard that the Applicants' allegation of a reasonable apprehension of bias must be examined.

[27] The first allegation that the Board member refused to strike or redact the original record is without merit. During the second sitting of the hearing, the Board member unequivocally stated that he did not object to destroying all record of the privileged conversation (Tribunal Record, page 958, line 40). In fact, the only indication in the transcripts of this conversation is the following annotation: "RECORD LEFT RUNNING AND ENTIRE CONVERSATION BETWEEN

CLAIMANT AND COUNSEL WAS RECORDED" (Tribunal Record, page 951, line 10). No further detail of the conversation is transcribed.

[28] Furthermore, I accept the Respondent's submission that the fact that the conversation was recorded does not in and of itself create unfairness. At the second sitting, the Board member stated that he had not listened to the recording and explained that transcripts are not prepared for the benefit of the members of the Board. Transcripts are produced only upon request of a party. Even when such transcripts are prepared, a copy is not provided to any member of the Board, including the presiding member (Tribunal Record, Transcripts at page 958, lines 15 to 25). It also appears from the parties' submissions that the conversation that ensued between the Applicants and their former counsel took place in Hungarian. There is no evidence that the Board member understands Hungarian or that there is reason to believe that he may have had access to an English translation of the privileged communication.

[29] With these considerations in mind, the Applicants have not provided evidence of a breach of the solicitor-client privilege. An informed person would not conclude that the Board member had access to any privileged communication that would influence his ability to decide the case in a fair and impartial manner. Therefore, the Applicants have provided no basis for a finding of a reasonable apprehension of bias on the part of the Board member.

[30] Additionally, it should be noted that the Applicants have not reiterated their allegation of incompetence against their former counsel before this Court. They have, however, submitted a

second basis for their allegation of bias against the Board member, claiming that the burden of proving their former counsel's incompetence was mistakenly placed on their shoulder.

[31] The Applicants' submission in this respect is unfounded. In *Shirvan v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1509, [2005] FCJ no 1864 at para 20, Justice Teitelbaum states the following with respect to the evidentiary burden of an allegation of incompetence:

> The Applicants recognize that the test for incompetent counsel is very high. They submit that the party making the allegation of incompetence must show substantial prejudice to the individual, that prejudice must flow from the actions or inaction of the incompetent counsel, and that the prejudice must bring about a miscarriage of justice.
>
> (Cited with approval in *Ahmad v Canada (Minister of Citizenship and Immigration)*, 2008 FC 646, [2008] FCJ no 814 at para 52.)

[32] Accordingly, during the first sitting, the Board member's statements to the Applicants were not inconsistent with the jurisprudence of this Court:

> The claimant, the principal claimant had made an accusation of misconduct on the part of his previous lawyer and I believe sir that there is case law in the federal court that says, you know, when there is such an accusation, it is up to the claimant to demonstrate that he has made all the necessary steps in order to show that there has been that type of misconduct sir.
>
> Tribunal Record, Vol 5, page 959, Lines 25 to 29

[33] Clearly, the Applicants cannot expect the Board to prove this allegation of misconduct on their behalf nor to accept their submissions at face value. This would be contrary to the role of the Board. As Justice Herman of the Ontario Superior Court of Justice stated in *R v Ellis*, 2010 ONSC 2390 at para 63, 89 Imm LR (3d) 201:

> As a member of the Refugee Protection Division, it was his job to "make well-reasoned decisions on behalf of Canadians on immigration and refugee matters efficiently, fairly and in accordance with the law." In particular, it was his job to conduct hearings and decide whether the individuals appearing before him were refugees or in need of protection.

[34] To this end, it would be contrary to a member's role and responsibilities to blindly accept an applicant's allegations or to aid an applicant in proving an allegation. In fact, I am of the view that it is this precise situation that would create a reasonable apprehension of bias against Canadian interests and in favour of refugee claimants, thereby compromising the duty of impartiality that is expected and required of Board members.

[35] In light of the above, the Board member made no error of law. An informed person would not perceive any apprehension of bias in the member's statements. In fairness to the Applicants, it must be added that counsel did not vigorously pursue this argument at the hearing.

b) Did the Board err in failing to consider the issue of cumulative discrimination?

[36] The Board member has made a number of findings against the credibility of the Applicants. Counsel for the Applicants, however, has not contested these findings, and went so far as to acknowledge at the hearing that the Board made adverse credibility findings. Nevertheless, counsel alleged that the Board erred in law in its failure to consider whether the cumulative nature of their treatment in Hungary amounts to persecution.

[37] Admittedly, at paragraph 46 of *Chan v Canada (Minister of Employment and Immigration)*, [1995] 3 SCR 593, 128 DLR (4th) 213, the Supreme Court addressed the United Nations High

Commissioner for Refugees *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (Reedited, Geneva, January 1992) (the "UNCR Handbook"), stating as follows: "[T]he UNCR Handbook must be treated as a highly relevant authority in considering refugee admission practices. This, of course, applies not only to the Board but also to a reviewing court." Thus, the following paragraphs of the Handbook are particularly relevant:

> (b)
>
> Persecution
> ...
> 52. Whether other prejudicial actions or threats would amount to persecution will depend on the circumstances of each case, including the subjective element to which reference has been made in the preceding paragraphs. The subjective character of fear of persecution requires an evaluation of the opinions and feelings of the person concerned. It is also in the light of such opinions and feelings that any actual or anticipated measures against him must necessarily be viewed. Due to variations in the psychological make-up of individuals and in the circumstances of each case, interpretations of what amounts to persecution are bound to vary.
>
> 53. In addition, an applicant may have been subjected to various measures not in themselves amounting to persecution (e.g. discrimination in different forms), in some cases combined with other adverse factors (e.g. general atmosphere of insecurity in the country of origin). In such situations, the various elements involved may, if taken together, produce an effect on the mind of the applicant that can reasonably justify a claim to well-founded fear of persecution on "cumulative grounds". Needless to say, it is not possible to lay down a general rule as to what cumulative reasons can give rise to a valid claim to refugee status. This will necessarily depend on all the circumstances, including the particular geographical, historical and ethnological context. [Emphasis added.]
>
> (c) Discrimination
>
> 54. Differences in the treatment of various groups do indeed exist to a greater or lesser extent in many societies. Persons who receive less favourable treatment as a result of such differences are not

> necessarily victims of persecution. It is only in certain circumstances that discrimination will amount to persecution. This would be so if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on his right to earn his livelihood, his right to practise his religion, or his access to normally available educational facilities.
>
> 55. Where measures of discrimination are, in themselves, not of a serious character, they may nevertheless give rise to a reasonable fear of persecution if they produce, in the mind of the person concerned, a feeling of apprehension and insecurity as regards his future existence. Whether or not such measures of discrimination in themselves amount to persecution must be determined in the light of all the circumstances. A claim to fear of persecution will of course be stronger where a person has been the victim of a number of discriminatory measures of this type and where there is thus a cumulative element involved. [Emphasis added.]

[38] According to these provisions, members of the Immigration and Refugee Board must consider the cumulative instances of discrimination faced by refugee claimants to determine whether it amounts to the requisite level of persecution. However, the doctrine of cumulative persecution is premised on the notion that the Applicants have experienced hardship, albeit of a non-persecutory nature when considered in isolation. In the case at bar, the Board member concluded that the Applicants' testimony was contradictory and inconsistent, which undermined their credibility. This conclusion remains unchallenged. As a result, there is no basis for the Applicants' objective fear of persecution. The Applicants only presented evidence of a general nature in support of their allegations of a general climate of intolerance and discrimination against Romani individuals. This is not enough to conclude that the Applicants are Convention refugees or persons in need of protection.

c) Did the Board err in concluding that there was adequate state protection?

[39] The Applicants submit that the Board erred in concluding that the government initiatives aimed at protecting Roma citizens were indicative of the effectiveness and adequacy of state protection. Counsel submitted that in so finding, the Board misconstrued the documentary evidence by relying on the "efforts" and "attempts" of the Hungarian government to enact laws and policies to protect its Roma citizens without considering the reality on the ground, or whether the laws and policies have been effectively implemented. To support that proposition, the Applicants rely on the decision of the Federal Court in *Bors v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1004, 377 FTR 132 [*Bors*], where it was held that legislation and procedure may reflect the will of the state to protect its citizens but do not suffice to establish the reality of state protection unless they are given effect in practice. In essence, the Applicants claim that the Board should have considered both the willingness and capacity of the state to protect Romani people.

[40] I have to agree with the Applicants on this point. In his reasons, the Board member extensively reviewed documentary evidence pertaining to the legislative measures and policies put in place by the Hungarian state to tackle discrimination and to improve the situation of the Roma people. While these initiatives are undoubtedly commendable, they fall short of the test required to prove the adequacy of state protection.

[41] In *Streanga v Canada (Minister of Citizenship and Immigration)*, 2007 FC 792, [2007] FCJ no 1082 at para 15, this Court explained the standard for a finding of effective state protection:

> The Applicant submits that the PRRA Officer has erred in viewing the legal test as one of "serious measures". The Federal Court in *Elcock v. Canada (MCI)*, [1999] F.C.J. No. 1438 (T.D.) (QL), at paragraph 15, established, that for adequate state protection to

> exist, a government must have both the will and the capacity to effectively implement its legislation and programs:
>
> > Ability of a state must be seen to comprehend not only the existence of an effective legislative and procedural framework but the capacity and the will to effectively implement that framework.
>
> [Emphasis added]

[42] Similarly in *Avila v Canada (Minister of Citizenship and Immigration)*, 2006 FC 359, 295 FTR 35, this Court pointed out:

> [27] In order to determine whether a refugee protection claimant has discharged his burden of proof, the Board must undertake a proper analysis of the situation in the country and the particular reasons why the protection claimant submits that he is "unable or, because of that risk, unwilling to avail [himself] of the protection" of his country of nationality or habitual residence (paragraphs 96*(a)* and *(b)* and subparagraph 97(1)*(b)*(i) of the Act). The Board must consider not only whether the state is actually capable of providing protection but also whether it is willing to act. In this regard, the legislation and procedures which the applicant may use to obtain state protection may reflect the will of the state. However, they do not suffice in themselves to establish the reality of protection unless they are given effect in practice: see *Molnar v. Canada (Minister of Citizenship and Immigration)*, 2002 FCTD 1081, [2003] 2 F.C. 339 (F.C.T.D.); *Mohacsi v. Canada (Minister of Citizenship and Immigration)*, 2003 FCTD 429, [2003] 4 F.C. 771 (F.C.T.D.). [Emphasis added]

[43] In *Bors*, above at paragraph 63 Justice Shore addressed the same issue: "Proof of the state's willingness to improve and its progress should not be, for the decision-maker, a decisive indication that the potential measures amount to effective protection in the country under consideration."

[44] In the present case, the documentary evidence shows that the Hungarian state is willing to protect Romani individuals. The Board member took great heed of that fact, but failed to consider the effectiveness of the state's measures or policies. The Board member should have assessed the

ability of the state to protect Romani individuals and, in particular, whether the Hungarian authorities are willing and able to protect the victims of hateful crimes and prosecute their perpetrators.

[45] That being said, this finding is not sufficient to warrant the intervention of this Court. Although the Applicants have demonstrated an error in the assessment of state protection, it is of no consequence because they have failed to establish that they are in need of that protection. The Board member has not found their story credible and, as a result, their fear of persecution is not subjectively grounded. As a result, this application for judicial review ought to be dismissed.

JUDGMENT

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

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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