Federal Court Cour fédérale

Date: 20130325

Docket: IMM-3871-12

Citation: 2013 FC 299

Ottawa, Ontario, March 25, 2013

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

IMRENE NAGY
HELENA MERCEDESZ HORVATH
(A.K.A. HELENA MERCEDES HORVATH)
(a minor)

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The principal applicant, Ms. Imrene Nagy, and her eight-year-old daughter, Helena, applied for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board [Board], dated March 15, 2012, rejecting the applicants' claim for refugee protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. This decision was made following a *de novo* hearing of a claim which was originally decided by the Board on November 3, 2010, and subsequently overturned on judicial review before

this Court. The basis for this Court's intervention was the Board's failure to deal with the principal applicant's claim that she faced a risk of persecution on account of her daughter's partial Roma ethnicity (*IN v Canada (Minister of Citizenship and Immigration)*, 2011 FC 723, [2011] FCJ No 919).

Background of the Refugee Claim

[2] The principal applicant lived in a small town called Panda in Hungary. She was married to a police officer from 1987 to 2000 and, throughout their marriage; she was threatened, verbally assaulted and physically abused by her husband. However, she was reluctant to report the abuse to the police because her husband was a police officer in their town. After their divorce, the applicant's husband obtained custody of their two children.

[3] In 2003, she began a relationship with a Hungarian Roma. The principal applicant alleges that as her former husband found out about her relationship with a Roma, he became verbally and physically abusive with the applicant and her partner, and threatened to deny the applicant her visitation rights with the children.

[4] In May 2004, the principal applicant gave birth to her younger daughter, Helena. She alleges that after the birth of her daughter, her ex-husband started harassing and threatening her again as he did not want his children to be associating with Roma during their visits at the applicant's home.

[5] The principal applicant alleges that in October 2008, her husband decided to meet with her ex-husband to settle the matters with him. The principal applicant's husband never returned from

the meeting and the family's efforts to find him were unsuccessful. After her husband's disappearance, the applicant decided to make arrangements to leave Hungary. She and her daughter arrived in Canada on October 20, 2008 and immediately sought refugee protection.

The Board's Decision

[6] Although the principal applicant originally claimed protection based on her fear of her abusive ex-husband in Hungary, the issue raised during the *de novo* hearing was mainly that of state protection. The Board set out the principal issues as follows: i) whether the discrimination allegedly suffered by the principal applicant amounted to persecution, and ii) whether there is adequate state protection in Hungary or whether there is clear and convincing evidence of the state's inability to protect the applicants.

Discrimination vs Persecution

[7] The Board stated that in the applicants' Personal Information Form [PIF] narrative they failed to identify any specific incidents relating to persecution they faced in Hungary arising out of the minor child's ethnicity as Roma.

[8] At the hearing before the Board, the principal applicant testified regarding discriminatory treatment against her daughter and herself that was the basis of their alleged fear of persecution. Two main incidents were relied upon in support of the applicants' claim. First, the principal applicant testified that her daughter attended daycare for approximately one year prior to leaving Hungary, and the principal applicant felt that daycare workers were distancing themselves from her and were ostracizing her. The Board found that the applicant's suspicion was not based on any

evidence. The child did not verbalize any difficulties she was presumably having at the daycare and no other evidence supported this allegation.

[9] Second, the principal applicant alleged that the medical attention given to her daughter was substandard. She referred to a number of incidents where her daughter and herself were deprived of adequate medical care either because the doctor did not take enough time to examine them, systematically saw non-Roma patients ahead of them, or failed to visit her daughter at their home although he had promised to. On the basis of this evidence, the Board was not satisfied that the medical care provided to the principal applicant or her daughter was either discriminatory or persecutory.

[10] Moreover, the principal applicant alleged that discrimination against Roma was present in schools and workplaces and that her daughter may face discrimination in her schooling and future job prospects. The applicants argued that Roma people face a high degree of discrimination in all facets of life in Hungary and such discrimination cumulatively amounts to persecution.

[11] The Board noted that the applicant's daughter was enrolled in daycare in Hungary and that the principal applicant herself was employed and had no impediments to finding adequate housing. In sum, insufficient reliable and probative evidence was adduced to indicate that either the principal applicant or her daughter, who was seven years old at the time of the hearing, would be unable to obtain employment in the future.

[12] As for the allegation of persecution, the Board stated that as per *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at para 63, persecution has been ascribed the meaning of "sustained or systemic violation of basic human rights demonstrative of a failure of state protection"; the Supreme Court found that "to be considered persecution, the mistreatment suffered or anticipated must be serious." The Board concluded that in light of the objective documentary evidence relating to the current issues of discrimination faced by the Roma in Hungary, the discrimination the applicants may have faced or may face is not tantamount to persecution as it does not threaten their fundamental rights but rather affects the quality of their existence in their home country.

Availability of State Protection

[13] Coupled with the Board's finding that the evidence did not disclose that the applicant's faced a serious risk of persecution was its finding that the applicants failed to establish that, should they require it, they would not be able to obtain state protection against the discrimination that Roma people admittedly face in Hungary. In fact, the applicants did not demonstrate that the denial of their human rights was indicative of a failure of state protection because such protection was not sought.

[14] The Board noted that in light of the documentary evidence, Hungary is a democratic state where free and fair elections are held and a relatively independent and impartial judiciary is in place. As a result, "[t]he Board is not obliged to prove that [the state] can offer the applicant effective state protection, rather, the applicant bears the legal burden of rebutting the presumption that adequate state protection exists by adducing clear and convincing evidence which satisfies the Board on a

balance of probabilities" (*Sanchez v Canada (Minister of Citizenship and Immigration)*, 2011 FC 491 at para 31, [2011] FCJ No 610).

[15] The Board acknowledged that the country documentation confirmed the principal applicant's allegation that some members of the police are discriminatory against Roma. However, the Board found that there are recourses and remedies available to the applicants if faced with such a situation and that the state takes action when complaints are made. Having examined the availability of state protection against anti-Roma discrimination according to the documentary evidence (including *Response to Information Request* [RIR], HUN103566.E, 22 September 2010), the Board concluded as follows:

> I would be remiss if I did not acknowledge and consider that there is information in the documentation to indicate that there is widespread reporting of incidents of intolerance, discrimination and persecution of Romani individuals in Hungary. However, weighted against this is persuasive evidence that indicates that Hungary candidly acknowledges its past problems, and is making serious efforts to rectify the treatment of minorities in that country, especially in the case of the Roma. The Board recognizes that there are some inconsistencies among several sources within the documentary evidence; however, the preponderance of the objective evidence regarding current country conditions suggests that, although not perfect, there is an adequate state protection in Hungary for Roma who are victims of crime, police abuse, discrimination and persecution, that Hungary is making serious efforts to address these problems, and that the police and government officials are willing and able to protect victims.

[16] The Board referred to a number of legal and institutional measures taken by the Hungarian government to improve the situation of the Romani minority, such as the Parliamentary Commissioner for National and Ethnic Minority Rights (Minority Ombudsman) and the Roma Integration Department within the Ministry of Social Affairs and Labour (RIR, HUN103566.E, 22

September 2010 and RIR, HUN103232.E. 15 October 2009). The Board also stated that Hungary has taken a number of initiatives relating to the situation of the Roma as regards education, employment, housing, health and political representations (RIR, HUN103267.E. 16 October 2009).

[17] In addition, the Board referred to the Independent Police Complaints Board [IPCB] as a further available recourse. The IPCB is an independent board in charge of reviewing complaints against police action which violate fundamental rights, and its recommendations to the head of the National Police can be referred to the courts if not accepted or reported to the Parliament. The Board noted that the European Roma Rights Centre described the IPCB as a credible and independent watchdog to ensure accountability of police and has called for the government to ensure the IPCB's independence and strengthen its mandate (United States. 8 April 2011. Department of State *"Hungary" Country Reports on Human Rights Practices for 2010*).

[18] The Board also reviewed the 2009 report of the European Commission against Racism and Intolerance [ECRI] and found that although progress had admittedly been slow in reducing discrimination against Roma people, as a member of the European Union [EU], Hungary was responsible for upholding a number of various standards to maintain its membership in the Union and the evidence showed that efforts had been made in this sense.

[19] In conclusion, the Board determined that the applicants failed to rebut the presumption of adequate state protection with clear and convincing evidence as there was insufficient evidence to conclude that such protection would not be forthcoming if they required it and availed themselves of it.

Issue and Standard of Review

[20] The sole issue raised in this application for judicial review is whether the Board erred in finding that the applicants failed to rebut the presumption of state protection.

[21] Neither party addressed the question of the applicable standard of review in their written submissions. However, the jurisprudence is well-established that the issue of the Board's interpretation of "persecution" and the documentary evidence pertaining to state protection findings typically involve question of mixed fact and law that require a tribunal to interpret its enabling statute, and are therefore to be evaluated against the standard of reasonableness (see *Carillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, [2008] FCJ No 399; *Lozada v Canada (Minister of Citizenship and Immigration)*, 2008 FC 397, [2008] FCJ No 492; and *Tamas v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1361 at paras 21-22, [2012] FCJ No 1675).

[22] In reviewing the Board's decision using a standard of reasonableness, the Court is required to consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, *Khosa v Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12 at para 59.

Analysis

[23] Quite obviously, the documentary evidence regarding the adequacy of anti-discrimination state action in Hungary is contradictory in many respects and the question remains unresolved in recent decisions of the Board's and in this Court's recent jurisprudence. My understanding of the case law cited by both parties is that, while the objective documentary evidence allows for a determination either way, the reasonableness of the decision as a whole depends on the circumstances of each case, whether due consideration is given to the nature and extent of the alleged persecutory discrimination and whether the Board meaningfully assessed the most relevant contradictory evidence concerning the current and actual living conditions for the Romani people (*Bors v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1004 at paras 53-54, 58, 70-73, [2010] FCJ No 1242 [*Bors*]; *Rezmuves v Canada (Minister of Citizenship and Immigration)*, 2012 FC 334 at paras 11-13, [2012] FCJ No 374; *Hercegi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 250 at paras 4-5, [2012] FCJ No 273 [*Hercegi*]).

[24] In this case, the applicants essentially take issue with the Board's assessment of the documentary evidence. They rightfully submit that "[w]here a tribunal determines the applicant has failed to take steps to seek protection this finding is only fatal to the claim if the tribunal also finds that protection would have been reasonably forthcoming. A determination of reasonably forthcoming requires that the tribunal examine the unique characteristics of power and influence of the alleged persecutor on the capability and willingness of the state to protect." (*Mendoza v Canada (Minister of Citizenship and Immigration)*, 2010 FC 119 at para 33(6), [2010] FCJ No 132 [*Mendoza*]).

[25] For the reasons that follow, although I agree with the applicants that the Board's review of the documentary evidence is cursory, and at points superficial, I find that, overall, the Board reasonably and intelligibly explained its finding of state protection given its acknowledgement of the evidence indicating discrimination against Roma persists in Hungary. The Board did not base its decision on a selective citing of the evidence and properly justified its decision in light of the applicants' subjective evidence in this case.

[26] The applicants submit that the Board misconstrued the evidence by relying on the "efforts" and "measures" of the Hungarian state to enact laws and policies in the face of evidence that such laws and policies have been ineffective and of little practical effect for the victims. It is submitted that the Board failed to address other issues disclosed in the documentary evidence regarding the limited scope of action of institutions such as the IPCB or the Minorities Ombudsman, the reluctance of courts to acknowledge non-material damages, and the ineffectiveness of the government's initiatives to address issues of Roma education, employment, housing and healthcare.

[27] These issues were raised by counsel for the applicants before the Board. It is well-established that "the Board is presumed to have considered all of the evidence before it and need not mention every piece of evidence. […] However, the more important the evidence that is not mentioned, the more willing a court may be to infer from silence that a tribunal made a finding of fact without regard to the evidence." (*Horvath v Canada (Minister of Citizenship and Immigration)*, 2013 FC 95 at para 36, [2013] FCJ No 117). I am not convinced that the Board would have reached a different conclusion in the circumstances of this case had it specifically discussed all of the above-

mentioned points.

[28] The onus was not on the Board in this instance. It was on the applicants to demonstrate, on a balance of probabilities and based on relevant, reliable and convincing evidence, that their home country provides inadequate state protection (*Giovani Ipina Ipina v Canada (Minister of Citizenship and Immigration)*, 2011 FC 733 at paragraph 5, [2011] FCJ No 924 [*Giovani*]). Furthermore, the test developed by the jurisprudence of this Court asks whether the state protection is adequate, although "effectiveness", like a state's "serious efforts" at the operational level to protect its citizens, remain relevant considerations (*Gilvaja*, above, at para 39; *Flores v Canada (Minister of Citizenship and Immigration)*, 2008 FC 723 at para 8, [2008] FCJ No 969; *Carillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 at para 38, [2008] FCJ No 399). In this case, the points raised by the applicants in the documentary evidence were not sufficiently clear and convincing to establish that their state's efforts would result in inadequate protection or that the state is unwilling to protect them.

[29] Besides, while I agree with the applicants that some of the elements in the Board's analysis, such as Hungary's obligation to abide by the requirements of EU membership or the Hungarian Supreme Court's ruling upholding the dissolution of the Hungarian Guard, are non-persuasive to the question of whether there is adequate state protection for the applicants, this does not affect the overall reasonableness of the Board's decision.

[30] The applicants argue that in *Hercegi*, above, in finding that the Board's analysis of state protection was flawed and unreasonable, this Court has recently ruled that "the evidence is

overwhelming that Hungary is unable presently to provide adequate protection to its Roma citizens." It is worth noting that as per *Mendoza*, above, at para 33(3), "each case is *sui generis* so while state protection may have been found to be available in Mexico, maybe even in a particular state, this does not preclude a court from finding the same state to offer inadequate protection on the basis of different facts." Furthermore, the Board is not precluded to consider the applicant's own attempts to seek state protection in its analysis, even though a negative finding is not always fatal to the claim.

[31] In *Bors*, above, at paras 67 and 71, the Court stated that:

> The fact that the Hungarian state is making efforts to head toward improving the situation of the Roma is clear from the evidence. Nevertheless, in this case, the seriousness of the danger and the incidents of violence that the applicant and his family have had to face, the extremes to which the family has had to reduce itself by hiding, in addition to the frequency or continuation of the incidents and the span of time over which the incidents had to have taken place show that the state does not seem to have shown that it can effectively protect them.
> […]
> The subjective evidence in the applicant's testimony is consistent with the objective documentary evidence as a whole, filed in the record, pertaining to the protection provided by Hungary. In this regard, the documentary evidence could corroborate the applicant's narrative if the facts of this narrative had been considered as a whole by the decision-maker. The PRRA officer erred by not at least considering the facts in the applicant's testimony.
>
> [emphasis added]

[32] By contrast, in the case at bar, the applicants did not convince me that the Board ignored any relevant documentary evidence that would have corroborated the applicants' allegations of past and future persecution. Moreover, the Board reasonably found that the applicants' evidence did not

disclose a serious possibility of discrimination that would amount to persecution and the applicants did not take issue with this finding.

[33] Accordingly, this judicial review will be dismissed. The parties did not raise a question for certification and none arises from this case.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question for certification.

"Jocelyne Gagné"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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