Federal Court  Cour fédérale

Date: 20140401

Docket: IMM-3263-13

Citation: 2014 FC 313

Ottawa, Ontario, April 1, 2014

PRESENT: The Honourable Madam Justice Gleason

BETWEEN:

JUDIT HORVATH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant is 22 years old and a citizen of Hungary of Roma ethnicity. In 2011 she left Hungary, travelled to Canada and made a refugee claim upon arrival. Unlike many other Romani refugee claimants, the applicant was not a victim of physical violence and had been employed in Hungary. She claims to have left Hungary due to the wide-spread discrimination faced by the Roma in that country and to her fear of being the victim of ongoing discrimination and possibly of violence if she remained in Hungary.

[2] In a Decision dated March 14, 2013, the Refugee Protection Division of the Immigration and Refugee Board [the RPD or the Board] rejected the applicant's claim, finding that the discrimination the applicant had faced in Hungary did not amount to persecution and that the applicant had not rebutted the presumption of adequate state protection in Hungary.

[3] In this application for judicial review, the applicant challenges both of these findings.

[4] In recent years, there has been a myriad of decisions from this Court and from the Board in asylum claims of Romani citizens of Hungary. The results in respect of them have been mixed, with some claimants being granted refugee status and others not and some negative RPD determinations being set aside by this Court and others not. As my colleague, Justice Zinn, recently noted in *Ignacz v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1164 at para 2, "[e]ach decision turns on its own facts and the thoroughness of the analysis done by the Board, which explains why many claims are denied on the basis of state protection while others succeed, despite being determined on the same national documentation package".

[5] In this case, the facts support the RPD's determination that the applicant had not faced persecution. Likewise, the Board's treatment of the objective documentation regarding the situation of the Roma in Hungary was thorough, balanced and did not focus solely on the aspirations of the Hungarian state in respect of protecting its Romani citizens, but, rather, discussed the degree to which such protection was actually available and whether the applicant had rebutted the presumption of adequate state protection. Thus, for these reasons, which are more fully expanded on

below, the RPD's Decision was reasonable and this application for judicial review must therefore be dismissed.

Background

[6] The applicant grew up in the village of Diósjenő, a community in Nógrád county, where many Roma live. She attended primary and secondary school, completing 10 years of schooling. She claims that she was teased at school and was called a "dirty gypsy" by classmates, which profoundly hurt her. She also alleges that her sister was beaten up by schoolmates because she was a Roma, and that while her parents lodged a complaint with the principal, nothing was done. After she left school, the applicant looked for work and made 10 to 15 applications before she was hired to work in a supermarket, stocking shelves. She alleges that her manager was discriminatory, denying her break time and assigning her much more work than her co-workers were required to do as her manager did not like Roma people. The applicant therefore quit this job. She says that it took her several months to find another one, and started working in September 2011 at a factory. She claims that her co-workers there often made discriminatory remarks and that, at the same time, anti-Roma sentiment was growing in the country generally and there were increasing acts of violence and hate speech directed against the Roma. She therefore quit her second job and left Hungary with two friends in October 2011. All three made refugee claims upon arrival in Canada.

[7] As noted, the applicant was not ever physically attacked. However, members of the right-wing Hungarian Guard did engage in anti-Roma demonstrations in the applicant's village, which caused her and her family to hide in their homes out of fear. The applicant did not make any complaint about the discrimination she faced at work to her supervisors or to any governmental

agency, charged with dealing with discrimination complaints. Nor did she or her family complain to the police about the actions of the Hungarian Guard in their village.

The RPD's Decision

[8] The RPD accepted that the applicant was a credible witness, noting that she was "a delightful young person" and that her testimony was "very direct without any exaggerations" (Decision at paras 8 and 10). After summarising the applicant's testimony about her experiences, the Board reviewed highlights from several of the documents in the national document package and concluded that the Roma in Hungary "face discrimination in their everyday lives" (Decision at para 12). The RPD, however, concluded that in the applicant's case such discrimination did not amount to persecution as she had not been personally targeted for violence, had not complained about the discrimination she faced in her employment and therefore had not experienced a lack of assistance from the governmental authorities. The RPD additionally concluded that the documentary evidence, while "certainly not [painting] a rosy picture", showed that the government had taken steps to devote resources to deal with complaints of discrimination and to remedy extremist demonstrations of the type that had occurred in the applicant's village (Decision at paras 26-28).

[9] The RPD then moved to discuss state protection, noting that as Hungary was a functioning democracy, the burden was on the applicant to establish, in a clear and convincing way, the absence of state protection in Hungary. The RPD concluded that the applicant had not discharged this burden because the documentary evidence is not so stark so as to show that state protection is unavailable for all Roma in Hungary. In the words of the Board, "there is a certain level of ineffectiveness … however … we do see that there exist different avenues that the [applicant] could

have used … [and] that there is an infrastructure in Hungary to try to obtain justice and protection" (Decision at para 30).

[10] In reviewing these avenues and infrastructure, the RPD quoted extensively and, in my view, fairly from the national documentation package. In this regard, it highlighted the significant problems faced by the Roma and the challenges faced by the government in addressing the systemic historical discrimination faced by them in Hungary. The RPD noted that the central Hungarian government had passed legislation designed to assist the Roma, including through the provision of free legal aid in respect of discrimination complaints, the creation of ombudsmen, devotion of monies to improving housing and education, providing for the election of minority self-governments and the hiring of Romani police officers. The Board went on to note that these various programs had not corrected the plight of the Roma, and cited several examples from the documentary evidence where Romani Hungarians had not been adequately protected from extremist right-wing violence and were found to continue to face discrimination and hardship. The RPD concluded that the documentary evidence showed "extreme challenges on one side [and] many gestures [taken by the Hungarian government] seemingly …in good faith, in order to remedy the situation" on the other side, but that the documentary evidence left the Board with "difficulty finding out how effective these measures are" (at para 25 of the Decision). In light of this, the Board determined that the applicant had not met her burden of rebutting the presumption that the Hungarian state could adequately protect her.

The parties' arguments

[11] The applicant argues that the RPD's determination that she had not faced persecution – and by implication that she was unlikely to face persecution in the future – constitutes a reviewable error and that the Board likewise erred in finding that the applicant had not rebutted the presumption of adequate state protection. In support of both arguments the applicant relies on several passages in the objective documentation that highlight the discrimination and risk faced by the Roma in Hungary. Counsel in particular pointed to the evidence documenting that unemployment among the Roma is rampant, with 70% or by some estimates 90% of Hungarian Roma being unemployed, that housing conditions for the Roma are sub-standard, with many living in what amount to rural slums, that the average life span of the Roma is ten years less that of other Hungarians, and that right wing extremism and violence toward the Roma were reported in several sources to be on the rise when the applicant left Hungary. Counsel for the applicant also noted several passages in the national documentation package, and in the Board's Decision, itself, where the efforts made by the government to address the situation have been criticised, which she argues demonstrate their ineffectiveness. Counsel highlights in this regard the following passage at paragraph 28 of the Decision:

> Obviously, the documentary evidence shows that the results are not at desired levels. However, it seems pretty evident that the government is taking real steps to try to improve the situation and is not standing idle on the sidelines. Obviously, some time will be required to implement the desired changes.

[12] The applicant submits that the foregoing demonstrates that the RPD applied the incorrect test in assessing state protection, focusing on the mere fact that the Hungarian state had made efforts to try to address the situation as opposed to focusing on the efficacy of those efforts. Counsel

therefore argues that this case is on all fours with *Gilvaja v Canada (Minister of Citizenship & Immigration)*, 2009 FC 598 [*Gilvaja*] and *Koky v Canada (Minister of Citizenship & Immigration)*, 2011 FC 1407 [*Koky*], where this Court set aside RPD decisions that erred in assessing the adequacy of state protection solely from the point of view of whether or not a state had made efforts to attempt to provide protection as opposed to focussing on the efficacy or adequacy of those efforts.

[13] The respondent, on the other hand, asserts that the applicant's reading of the RPD decision in this case is unfair and that, contrary to what the applicant argues, the RPD focused not only on efforts made by the Hungarian government but also on whether those efforts have borne fruit. The respondent moreover highlights that the Board's findings in respect of persecution and state protection in this case are subject to review on the deferential reasonableness standard, and argues that under this standard the Decision must be upheld because the RPD's determinations find support in the evidence, do not misapply the applicable law, and, accordingly, fall within the range of possible acceptable outcomes open to the Board.

The Standard of Review

[14] I agree that the reasonableness standard of review applies to both of the errors the applicant alleges the Board made in this case. In this regard, both determinations involve questions of mixed fact and law and accordingly are reviewable on the reasonableness standard (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 53, [2008] 1 SCR 190 [*Dunsmuir*]). Indeed, the case law specifically recognises that determinations of this nature are subject to review on this standard.

[15] As concerns the Board's finding with respect to the lack persecution faced by the applicant, in *Paradi v Canada (Minster of Citizenship and Immigration)*, 2013 FC 996, my colleague, Justice Simon Noël, held in respect of a similar determination that "[t]he RPD reviewed mixed-evidence in coming to this conclusion and, as a matter of fact, it lies within the RPD's expertise to draw conclusions as to whether or not the troubles encountered by the Applicant amount to persecution" (at para 51). (See also to similar effect *Kaleja v Canada (Minister of Citizenship & Immigration)*, 2010 FC 252 at para 19; *Ferencova v Canada (Minister of Citizenship & Immigration)*, 2011 FC 443 at para 8; *Sagharichi v Canada (Minister of Employment & Immigration)* (1993), 182 NR 398 (FCA) at para 3).

[16] As concerns the Board's state protection finding, it is likewise firmly settled that the reasonableness standard applies to such determinations. As Justice Sexton stated in *Re Hinzman*, 2007 FCA 171 at para 38, "questions as to the adequacy of state protection are questions of mixed fact and law ordinarily reviewable against a standard of reasonableness". (See also *Bustos v Canada (Minister of Citizenship and Immigration)*, 2014 FC 114 at para 29; *Hetyei v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1208 at para 9 [*Hetyei*]; *Gezgez v Canada (Minister of Citizenship and Immigration)*, 2013 FC 130 at para 9; *Kanto v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1049 at para 23).

[17] The reasonableness standard is a deferential one, and requires that a reviewing court not intervene if the administrative decision-maker's reasoning is transparent, justified and intelligible and if the result reached falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at para 47). In short, the reviewing court cannot second-

guess the tribunal even if it disagrees with the decision made. Rather, under the reasonableness standard, the reviewing court must defer to the administrative decision-maker's expertise and uphold decisions that are defensible in light of the applicable law and facts.

[18] Here, the applicant challenges both the reasoning process of the Board and the results reached. More specifically, the applicant argues that the Board's reasoning is not justifiable because the RPD did not assess the effectiveness of state protection but rather incorrectly focussed only on the efforts made by the Hungarian state. In respect of the result reached by the RPD, the applicant argues that the determinations that the applicant did not – and would not – face persecution and that she had not rebutted the presumption of adequate state protection are both unreasonable, given the tenor of much of the national documentation package, which the applicant claims leaves no room for a conclusion other than that the Roma will be subject to ongoing persecution in Hungary in respect of which the state cannot provide adequate protection.

Analysis

[19] With respect, I disagree with the arguments made by the applicant.

[20] Turning, first, to the test applied by the RPD in respect of state protection, when the decision is read as a whole, it is clear that the Board did not focus solely on the efforts made by the Hungarian state but, rather, considered the impact of those efforts. This is evident from several passages in the Decision. In addition to the passages previously noted, the RPD also writes the following:

- [I]t seems that most government departments have the capacity, or at least resources, to deal with complaints of discrimination in the place of employment" (Decision at para 26).

- As for extremist groups which protested and had organized demonstrations …, we also see … that the government takes these demonstrations seriously and deploys efforts to try to remedy and prevent these situations" (Decision at para 27).

- The documentary evidence does not demonstrate the absence of state protection, but it does show that there are certain levels of ineffectiveness. However, recourses do exist in Hungary, and the [applicant] never tried to seek any of these recourses" (Decision at para 29).

[21] This case is therefore distinguishable from *Gilvaja* and *Koky*, relied on by the applicant, where decisions were set aside for focussing on mere efforts to provide state protection as opposed to assessing the adequacy of those efforts.

[22] Insofar as concerns the results reached by the RPD in its assessment of whether the applicant had faced persecution and its conclusion that the applicant had not rebutted the presumption of state protection, I disagree with the applicant that the objective documentation in the national documentation package for Hungary must necessarily mandate a conclusion that the Roma will face persecution in Hungary or that there is not adequate state protection for them. In my view, the documentation does not paint such a dire picture so as to render all opposite conclusions unreasonable. Indeed, several recent decision of this Court have upheld determinations like that made in the present case, dismissing asylum claims of Hungarian Roma due to the claimants' failure to rebut the presumption of adequate state protection (see e.g. *Radics v Canada (Minister of Citizenship and Immigration)*, 2014 FC 110; *Hetyei*; *Ruszo v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1004; *Paradi*; *Konya v Canada (Minister of Citizenship and Immigration)*,

2013 FC 975; *Riczu v Canada (Minister of Citizenship and Immigration)*, 2013 FC 888; *Buzas v Canada (Minister of Citizenship and Immigration)* (2013), 234 ACWS (3d) 1006; *Racz v Canada (Minister of Citizenship and Immigration)*, 2013 FC 702; *Kotai v Canada (Minister of Citizenship and Immigration)*, 2013 FC 693; *Olah v Canada (Minister of Citizenship and Immigration)*, 2013 FC 106).

[23] More specifically, as concerns persecution, the applicant is correct in noting that facing significant repeated instances of discrimination in respect of the fundamental aspects of life may amount to persecution within the meaning of the *Convention Relating to the Status of Refugees*, 189 UNTS 150 [*Refugee Convention*] and thus entitle victims to protection under section 96 of the IRPA. The United Nations High Commissioner for Refugee's Handbook on Procedures and Criteria for Determining Refugee Status under the *Refugee Convention*, HCR/IP/4/Eng/REV.1 (reissued 2011) [UNHCR Handbook] provides the following guidance on determining when repeated acts of discrimination may amount to persecution at paras 54-55:

> 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.

[24] Both the Federal Court of Appeal and the Federal Court have recognised that cumulative harassment or discrimination can amount to persecution in certain circumstances (see e.g. *Madelat v Canada (Minister of Employment & Immigration)* (1991), 179 NR 94 (CA) at para 1; *Retnem v Canada (Minister of Employment & Immigration)* (1991), 132 NR 53 (CA) at para 4; *Bobrik v Canada (Minister of Citizenship & Immigration)* (1994), 85 FTR 13 (TD) at para 22). Indeed, the Board's failure to consider whether cumulative adverse events constitute persecution when the factual situation calls for such an analysis amounts to a reviewable error. As Justice Nadon writes, at para 42 of *Munderere v Canada (Minister of Citizenship & Immigration)*, 2008 FCA 84:

> [The] authorities make clear that the Board is duty bound to consider all of the events which may have an impact on a claimant's claim that he or she has a well founded fear of persecution, including those events which, if taken individually, do not amount to persecution, but if taken together, may justify a claim to a well founded fear of persecution.

[25] Therefore, the applicant is right to note that cumulative discrimination can amount to persecution. However, the jurisprudential authorities, as well as the UNHCR Handbook, also make another point clear: whether the cumulative circumstances of an individual rise to the level of persecution depends on the particular circumstances of the case. This requires a fact-driven analysis and is reviewable on the standard of reasonableness.

[26] In the present case, the RPD determined that the applicant had not faced persecution principally because she had not been the victim of violence, had not been faced with a failure of the authorities to redress a complaint, and had been employed. In addition, it held that her difficulty in

finding work could equally have resulted from the sluggish Hungarian economy, noting that youth unemployment in the country is generally elevated. Given these facts, it was reasonable for the Board to conclude that the applicant had not faced persecution.

[27] Likewise, the Board's conclusion that the applicant had not rebutted the presumption of state protection was reasonable. In *Ward v Canada (Minister of Employment and Immigration)*, [1993] 2 SCR 689 [*Ward*] at 716, the Supreme Court of Canada noted that "the international community was meant to be a forum of second resort for the persecuted, a 'surrogate', approachable upon failure of local protection." Thus, a refugee claimant must demonstrate that his or her home state is unable or unwilling to offer protection (*Ward* at 718-19).

[28] The applicant cannot point to any specific failure of state protection in her case. In light of this, and in the face of documentary evidence, that, while mixed, does in some part support the existence of state protection for the Roma in Hungary, the Board's determination that the applicant has not established state protection was unavailable is reasonable, especially when one recalls that it is not the Board's duty to prove that state protection exists. Rather, it is the applicant's burden to establish that it does not. In the circumstances of this case, the Board's determination that the applicant had not discharged this burden is not unreasonable. This case is similar to *Molnar v Canada (Minster of Citizenship and Immigration)*, 2012 FC 530, where my colleague, Justice Russell, in dismissing the application for judicial review, wrote at para 105:

> 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. It is my view that a reasonable analysis was conducted in this case that was alive to the governing

> principles and that applied them to the facts on the record in a responsive way. On this basis, I cannot interfere with the Decision.

[29] I endorse these comments and find they apply in the present case. Accordingly, this application for judicial review will be dismissed.

[30] Neither party proposed question for certification under section 74 of the IRPA and none arises in this case.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review of the RPD's March 14, 2013 Decision is dismissed;

2. No question of general importance is certified; and

3. There is no order as to costs.

"Mary J.L. Gleason"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Styliani Markaki	FOR THE APPLICANT
Sherry Rafai	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Styliani Markaki Advocat-Attorney Montréal, Quebec	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT