

Federal Court



Cour fédérale

Date: 20151015

Docket: IMM-5957-14

Citation: 2015 FC 1169

Ottawa, Ontario, October 15, 2015

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

**ANITA FUSTOSNE CSOKE
AND DOMINIKA FUSTOS**

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Anita Fustosne Csoke and her minor daughter Dominika Fustos have brought an application for judicial review of a decision of the Refugee Protection Division [RPD] of the Immigration and Refugee Board. The RPD found that the Applicants are neither Convention

refugees under s 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA] nor persons in need of protection under s 97.

[2] For the reasons that follow, I have concluded that the RPD unreasonably found that adequate state protection exists in Hungary for Ms. Csoke and her daughter as victims of domestic violence. The application for judicial review is therefore allowed.

II. Background

[3] The Applicants are citizens of Hungary. They entered Canada on October 27, 2011 and claimed refugee protection on November 9, 2011.

[4] Ms. Csoke's claim for protection was based on the following contentions:

- Ms. Csoke has suffered ongoing and significant domestic violence at the hands of her estranged husband, Laszlo. Their daughter Dominika was born in 2000, and Ms. Csoke married Laszlo in 2003. Laszlo became abusive following the marriage. In April, 2005 he was arrested in Hungary, charged and convicted of fraud. It was at this time that Ms. Csoke first became aware of her husband's connections to the Ukrainian mafia. She and her daughter went into hiding.
- Ms. Csoke filed for divorce in 2006 but she was coerced by her husband into withdrawing the application. She filed a police report in 2007 against her husband due to his ongoing abuse.

- In August, 2011, Laszlo attempted suicide. Shortly afterwards, Ms. Csoke decided to flee Hungary with her daughter. Because Laszlo worked as an international truck driver, she determined that it would be necessary for them to seek refuge outside continental Europe.
- Ms. Csoke purchased airline tickets for Dominika and herself to travel to Canada without informing Laszlo. He discovered her plan, assaulted her physically and sexually, and forced her to purchase an additional ticket so that he could accompany them.
- Ms. Csoke, Laszlo and their daughter arrived in Canada on October 27, 2011. Laszlo was subsequently arrested in Canada on October 31, 2011 and charged with domestic assault against Ms. Csoke. He was deported to Hungary on December 28, 2011.

III. The RPD's Decision

[5] The RPD made no adverse findings of credibility against Ms. Csoke. It found the determinative issue to be state protection, and concluded that Ms. Csoke had failed to rebut the presumption of adequate state protection in Hungary.

[6] The RPD referred to the Chairperson's *Guidelines Regarding Women Refugee Claimants Fearing Gender-Based Persecution* [*Gender Guidelines*] and also considered documentation regarding country conditions in Hungary. The RPD held that the presumption of adequate state protection could be rebutted only by clear and convincing proof, and that evidence of inadequate protection must be reliable and probative. The RPD noted that a state's efforts may not always be

successful, but this is not sufficient to rebut the presumption. A subjective reluctance to engage the state is also not sufficient. The RPD cited this Court's decision in *Camacho v Canada (Minister of Citizenship and Immigration)*, 2007 FC 830 at para 10) for the proposition that "... absent a compelling explanation, a failure to pursue state protection opportunities within the home state will usually be fatal to a refugee claim."

[7] The RPD found that Ms. Csoke did not take all reasonable steps to seek state protection in Hungary before she fled to Canada. The RPD noted that Ms. Csoke contacted the police on only one occasion in 2007. She was interviewed by the police, and they then spoke to her husband and gave him a warning. The RPD concluded that the police response was appropriate.

[8] The RPD referred to recent legislation in Hungary that criminalizes spousal rape and domestic violence. The RPD also concluded that police corruption and incompetence are not systemic in Hungary, and that the police are subject to meaningful oversight and review.

IV. Issues

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

- A. Did the RPD fail to conduct an independent analysis of the claim for protection advanced on behalf of Ms. Csoke's minor daughter Dominika?
- B. Was the RPD's finding of adequate state protection reasonable?

V. Analysis

A. *Did the RPD fail to conduct an independent analysis of the claim for protection advanced on behalf of Ms. Csoke's minor daughter Dominika?*

[10] The RPD, on its own motion, assigned a designated representative and counsel for Ms. Csoke's minor daughter, Dominika, who was approximately 13 years of age at the time of the hearing before the RPD, participated in the proceedings in an independent capacity. It was argued before this Court that Dominika's interests were distinct from those of her mother, and that they should have been assessed separately. In particular, Dominika testified that she feared abduction by her father in Hungary and that she was also afraid of what her paternal grandfather might do to her. Neither of these risks was assessed by the RPD.

[11] The Minister notes that no application was made to sever Dominika's claim from that of her mother. According to the Minister, it may be inferred that the RPD's finding regarding the adequacy of state protection extended to any risks that Dominika might face due to the actions of her father or grandfather. The central issue was Ms. Csoke's failure to avail herself of state protection. The RPD found that on the one occasion that Ms. Csoke complained to the police, their response was appropriate.

[12] I agree with the Minister that the claim for protection advanced on behalf of Dominika was not sufficiently distinct from that of her mother to require a separate analysis. Given that the central issue was the adequacy of state protection, and in particular the RPD's finding that Ms.

Csoke failed to avail herself of state protection, it was reasonable for the RPD to assess the two claims together. This ground of judicial review does not disclose a reviewable error.

B. *Was the RPD's finding of adequate state protection reasonable?*

[13] The RPD placed significant emphasis on Ms. Csoke's decision to seek police protection on only one occasion. The RPD concluded that the police response was adequate, and that Ms. Csoke's had not made sufficient "efforts to seek state protection in Hungary." Indeed, the RPD criticised Ms. Csoke for her delay in contacting the police and for not being more forthcoming about the nature of the abuse she faced:

[30] ... The crime was reported to the police three days after the incident occurred and the principal claimant withheld critical information. She did not tell the police about Laszlo's history of abuse, his criminal record or his threats. This type of complaint where the victim withholds important information from the police are [*sic*] difficult to investigate and the perpetrator may not receive the same type of scrutiny by police since police would not be aware of the full scope of the abuse. Even the most effective, well-resourced and highly motivated police forces will have difficulty investigating complaints and providing effective protection where the victim, and typically the sole witness, withholds significant information.

[14] There was extensive documentary evidence before the RPD regarding the social and cultural mores in Hungary that act as a significant impediment to victims of domestic violence seeking state protection. To highlight just one example, a report authored by the Hungarian Association of Women Judges and included in the Immigration and Refugee Board's National Documentation Package for Hungary includes the following observations:

Most of the legislative reform that has been implemented was based on the need to join the EU and to harmonise Hungary's legal system with EU norms. The Criminal Code, the Criminal Procedure Code, and other laws have been amended also.

But accession to the EU did not solve all the problems; it could not change the people's thinking or the attitudes of experts in relation to violence in the home. Many rules incorporated in several laws ensure the enforcement of human rights and generally provide adequate guarantees. But it is still important to question whether these legal regulations offer effective protection for victims of domestic violence. These questions have special relevance in transitional societies like Hungary, Romania, Bulgaria, and Slovakia. [...]

I am afraid the change of rule is not enough. It is rather easy to draft legislation in general, but very difficult to change social attitudes, especially on issues that have long traditions in a given country. An evaluation of domestic violence provides a perfect example of this.

[15] Contrary to the RPD's conclusion, Ms. Csoke did in fact offer an explanation for her reluctance to seek police protection:

Member: ... And why didn't you go back to police? Why didn't you call police or report to them as they indicated you should if it happened again?

Claimant: Because ... because it was pointless. What I mean by that [is] that in the legal system in Hungary these kinds of incidents were simply not considered being a crime and all I would have achieved is to get him more worked up and getting him more abusive.

[16] Nor did the RPD consider Ms. Csoke's attempts to obtain assistance from two women's shelters without success. Her experience in this regard was corroborated by documentary evidence. Nevertheless, the RPD relied upon the existence of women's shelters to buttress its

conclusion that Ms. Csoke would not be at risk if she were to return to Hungary. It is, in any event, an error for the RPD to cite the availability of services offered by non-governmental organizations in support of a finding of adequate state protection (*Garcia v Canada (Minister of Citizenship and Immigration)*, 2007 FC 79 at para 15; *Gender Guidelines* at page 401).

[17] Where credibility is not in issue, an applicant's testimony is presumed to be true (*Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 (CA) at para 5; *Agranovski v Canada (Minister of Citizenship and Immigration)*, [1996] FCJ No 923 at para 12). While the RPD may prefer documentary evidence over testimony, if an applicant's credibility is accepted then a clear explanation must be provided for doing so (*Okyere-Akosah v Canada (Minister of Employment and Immigration)*, 157 NR 387 at para 5, [1992] FCJ No 411(QL)).

[18] In my view, the RPD failed to properly assess the reasons for Ms. Csoke's reticence to disclose all of her personal circumstances to the police, and her reluctance to seek police protection in general. The RPD commented favourably upon the enactment of new legislation in Hungary that augments the legal protections offered to victims of domestic violence. However, it failed to analyse the extent to which social and cultural mores in Hungary may impede the effective implementation of this legislation. The application for judicial review is therefore allowed.

VI. Conclusion

[19] For the foregoing reasons, the application for judicial review is allowed and the matter is remitted to a differently-constituted panel of the RPD for re-determination.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed and the matter is remitted to a differently-constituted panel of the RPD for re-determination. No question is certified for appeal.

"Simon Fothergill"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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