

Federal Court



Cour fédérale

Date: 20170503

Docket: IMM-4436-16

Citation: 2017 FC 444

Ottawa, Ontario, May 03, 2017

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

SIMONA KOTLAROVA

Applicant

and

**THE MINISTER OF IMMIGRATION,
REFUGEES AND CITIZENSHIP**

Respondent

JUDGMENT AND REASONS

[1] The Applicant is a 20 year old ethnic Roma citizen of Slovakia who claims refugee protection in Canada on the basis of discrimination in healthcare, education, housing, employment and lack of police protection. The Applicant was assaulted by a skinhead and was bitten by his dog. The police in Slovakia did nothing in response to this assault. The Refugee Appeal Division's [RAD] decision of September 22, 2016, upheld the Refugee Protection

Division's [RPD] finding that the Applicant was not a Convention refugee or a person in need of protection because there was adequate state protection in Slovakia.

[2] This judicial review is allowed on the basis that the RAD erred by applying the wrong test to the state protection analysis.

I. Background

[3] The Applicant alleges that her family has experienced discrimination on a number of grounds, including healthcare and education. The Applicant completed grade eight in a segregated Roma class, where Roma students were given little instruction, sent to collect garbage, and excluded from extracurricular activities. Roma students were also assaulted and subjected to ethnic slurs. The Applicant says that she was unable to progress past grade eight, because the discrimination impaired her ability to meet entrance requirements for high school.

[4] The Applicant also alleges discrimination in employment. For instance, when she would turn up for job interviews that had been arranged over the phone, she would be told that the positions were already filled. She believes this was done because of her Roma ethnicity.

[5] In May 2014, the Applicant's mother was attacked by skinheads at a train station when she was travelling home from the hospital with her son. When she sought assistance from the police at the train station, she was told to make a complaint in another city. When she did so, the police there said that they could not help her as the attack had happened elsewhere.

[6] The RPD accepted that the Applicant was assaulted by a skinhead on September 12, 2015, when he yelled derogatory names at her and her friend, spat on them, and then released his dog on them, which attacked the Applicant. Bystanders did not intervene. The Applicant was turned away from a nearby hospital and referred to a hospital in a city 80 kilometres away, where she was eventually treated, but was refused an ambulance to transport her there.

[7] When the Applicant, her friend, and her grandmother reported the attack to the police, they were required to wait for hours. An officer took down their information and said he would follow up, but failed to do so. When the Applicant's grandmother returned to the police station to inquire about the investigation, the officers became aggressive and told her to leave and not to bother the police again.

II. Decision under review

[8] Before the RPD, the Applicant relied on the following evidence to establish a lack of adequate state protection:

1. Country conditions documentation concerning difficulties faced by Roma in accessing state protection;
2. Her father's complaints to healthcare staff concerning her brother's medical condition;
3. Her mother's complaints to police; and
4. Her complaint to police and her grandmothers follow up, three weeks after, on her initial complaint with the same police officer.

[9] Although the RPD found the Applicant to be credible, it concluded that she failed to rebut the presumption that state protection would be available to her in Slovakia.

[10] On appeal, the RAD confirmed the RPD's determination that the Applicant is not a Convention refugee or a person in need of protection.

[11] In keeping with the direction in *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93, the RAD indicated that it conducted its own independent assessment of the record to determine whether or not the RPD erred. The RAD found that "the mere fact of Roma ethnicity is not, in and of itself, sufficient to establish that an applicant faces more than a mere possibility of persecution upon their return to the Slovak Republic" (RAD Reasons and decision at para 8). The RAD then reviewed applicable case law on state protection, such as the presumption of state protection, as articulated by the Supreme Court of Canada in *Canada (Attorney General) v Ward*, [1993] 2 SCR 689.

[12] Concerning the police's inaction following the Applicant's attack by a skinhead, the RAD found that there was no evidence that the lack of investigation was due to the Applicant's Roma ethnicity. Rather, the RAD concluded that this was due to the fact the Applicant could not identify her assailant. The RAD also noted that "state protection is never perfect and the failure of one police officer or one police department to investigate a crime does not, by itself, determine that there is no state protection" (RAD Reasons and decision at para 19).

[13] The RAD acknowledged that Roma people face severe difficulties and discrimination with respect to housing, employment, schooling and health care, but that no evidence was presented in the case at hand to “support the contention that the Slovak authorities took active steps to prevent the [Applicant] from obtaining employment in their respective professions or denying them housing or health care” (RAD Reasons and decision at para 21).

[14] The RAD further stated that the authorities have “taken proactive steps to address the issues of discrimination and violence targeting minorities, in particular the Roma” (RAD Reasons and decision at para 30) and that there is evidence of “programs in place resulting in improvements to the lives of Roma” (RAD Reasons and decision at para 35). Additionally, the RAD explained that the “fact that Roma are discriminated against in the Slovak does not mean that there is never any state protection for them or that they are not required to seek that protection prior to seeking refuge in another country” (RAD Reasons and decision at para 44).

[15] The RAD concluded that the Applicant failed to provide clear and convincing evidence that the Slovakian state is unwilling or unable to provide her with adequate protection.

III. Issue

[16] While the Applicant has raised a number of issues with respect to the RAD decision, the determinative issue is the RAD’s assessment of the availability of state protection.

IV. Analysis – State Protection Test

[17] The Applicant argues that the RAD erred by applying the wrong test in evaluating state protection.

[18] The Applicant claims that the RAD applied the “serious efforts” test to the state protection analysis, as indicated by the RAD’s use of language in paragraphs 14, 15, 24, 36 and 43 of the decision where phrases such as “has taken” or “is taking” is used to describe the state’s efforts to provide protection.

[19] The Applicant argues that the proper analysis for state protection involves the examination of whether there exists adequate state protection at the operational level. The correct test is explained in *Majoros v Canada (Citizenship and Immigration)*, 2013 FC 421, by Justice Zinn as follows:

[12] I adopt Justice Mosley’s statement of the law in this regard in *Meza Varela v Canada (Minister of Citizenship & Immigration)*, 2011 FC 1364 at para 16: “Any efforts must have ‘actually translated into adequate state protection’ at the operational level.” Or, as I put it in *Orgona v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1438 at para 11: “Actions, not good intentions prove that protection from persecution is available.” At the same time, state protection need not rise to the level of perfection. That a state is unable to provide adequate protection, assessed at the operational level, can be proved with whatever evidence is sufficiently convincing, including documentary evidence.

[20] Here, in considering the issue of state protection, the RAD repeatedly refers to “state efforts” and to “serious efforts” taken by the state to provide protection. While the RAD

identifies the government's steps and that serious efforts have been made to address the issues of discrimination and violence against minorities (including the Roma population), the RAD failed to address the applicability and the effectiveness of these programs and efforts.

[21] This Court has stated that “adequate protection” and “serious efforts at protection” are not the same thing (*Kumati v Canada (Citizenship and Immigration)*, 2012 FC 1519 [*Kumati*] at para 27). Here, the RAD was charged with evaluating the “empirical reality of the adequacy of state protection” (see *Kumati* at para 28).

[22] As the correct legal test to apply is whether state protection actually resulted in operational effectiveness, the “failure to address the adequacy of state efforts at the operational level is a reviewable error” (see *Castro v Canada (Citizenship and Immigration)*, 2017 FC 13 at para 11).

[23] Here, although the RAD referenced the operational efforts at paragraph 35 of the decision, as follows: “I note there is also some evidence that at the operational level the state is taking action to address the discrimination and violence targeting the Roma population” (see RAD Reasons and decision at para 35). This, at best, appears to be a passing reference to operational effectiveness.

[24] I agree with the Applicant that the RAD applied the wrong test in considering the issue of state protection. The decision is therefore not reasonable.

JUDGMENT in IMM-4436-16

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted. The decision of the RAD is set aside and the matter is remitted for redetermination;
2. No question of general importance is proposed by the parties and none arises; and
3. There will be no order as to costs.

"Ann Marie McDonald"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4436-16

STYLE OF CAUSE: SIMONA KOTLAROVA v THE MINISTER OF
IMMIGRATION, REFUGEES AND CITIZENSHIP

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APPEARANCES:

Leigh Salsberg FOR THE APPLICANT

Christopher Ezrin FOR THE RESPONDENT

SOLICITORS OF RECORD:

Leigh Salsberg FOR THE APPLICANT
Barrister and Solicitor
Toronto, Ontario

William F. Pentney FOR THE RESPONDENT
Deputy Attorney General of
Canada
Toronto, Ontario