Federal Court  Cour fédérale

Date: 20171011

Docket: IMM-4924-16

Citation: 2017 FC 899

Ottawa, Ontario, October 11, 2017

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

MARCELLA OLAH

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP
THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

JUDGMENT AND REASONS

I. Overview

[1] Marcella Olah [Ms. Olah, or the Applicant] seeks judicial review of the decision of a Senior Immigration Officer [the Officer], which rejected her application for a Pre-Removal Risk Assessment [PRRA] under section 112 of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 [*IRPA*].

[2] Ms. Olah first came to Canada with her husband in May 2011. She made a claim for refugee protection, but it was withdrawn on October 19, 2011 when they returned to Hungary. She claims she had to return to Hungary due to health problems of a close family member. She then returned to Canada in late 2015. By application dated January 6, 2016, Ms. Olah requested a PRRA and stay of deportation pending the PRRA. On September 2, 2016, the Officer determined that Ms. Olah was neither a Convention refugee nor a person in need of protection under sections 96 and 97 of the *IRPA*. On December 6, 2016, Mr. Justice Russell granted Ms. Olah a stay of the deportation order.

[3] Ms. Olah's profile is that of an unemployed Roma woman, over the age of 50, suffering from domestic abuse. In her PRRA application, Ms. Olah said that she did not seek police protection because, as a Roma, she feared that protection would not be forthcoming. Given that the Officer considered Hungary a functioning democracy, he decided that he would look at the objective evidence to determine whether state protection was available to Ms. Olah in Hungary.

[4] For the reasons that follow, this application is allowed. The Officer performed little or no analysis of the adequacy of state protection. He drew conclusions without explaining how he reconciled various conflicting reports and he failed to critically examine those reports in terms of Ms. Olah's profile. He also did not consider whether the cumulative effects of the discrimination she suffered amounted to persecution. As a result, in this case, the decision is unreasonable.

II. **Standard of Review**

[5] The Officer's determination of whether there is adequate state protection is reviewable on a standard of reasonableness as it involves questions of mixed fact and law: *Hinzman v Canada*

(Minister of Citizenship and Immigration), 2007 FCA 171 at para 38, 282 DLR (4th) 413; *GM v Canada (Minister of Citizenship and Immigration)*, 2013 FC 710 at para 27, 434 FTR 298.

[6] A decision is reasonable if the decision-making process is justified, transparent, and intelligible, resulting in a determination that falls within the range of possible, acceptable outcomes which are defensible on the facts and law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190 [*Dunsmuir*].

III. **Analysis**

[7] The Officer's decision first considered the general state of Roma in Hungary before turning to a discussion of state protection and discrimination. Although not identified as a discrete issue, the Officer also made several references to the failure of local authorities to implement central government measures, which will also be addressed in these reasons.

A. *Roma in Hungary*

[8] The Officer began by dealing generally with the situation of Roma in Hungary. He outlined the inability of the various levels of government in Hungary to implement measures to combat racism and address Roma issues with housing, education, and unemployment. Violence toward the Roma stems, he said, from right-wing extremist groups including the Jobbik, an extreme right-wing political party with a strong anti-Roma and anti-Semitic agenda.

[9] The Officer referred to the fact that the United States Department of State's Country Report on Human Rights Practices in Hungary for 2015 [DOS 2015] confirms that the Jobbik continue to use derogatory rhetoric about "Gypsy crime" and incite hatred against the Roma community. He then inserted a "however" and referred to a 2014 article by the Athena Institute

which was outlined in the Response for Information Request HUN105587.E [RIR 2016]. He highlighted that the article said extremist groups were "on a path to insignificance" and membership was nowhere near the peak that had been reached "a couple of years ago".

[10] The Officer's background section on the situation of Roma in Hungary ends at that point. The Officer failed to mention that DOS 2015 reported that the Jobbik increased the number of seats it held in the National Assembly following the 2014 national election and that one of its leaders was elected to be one of five deputy speakers of parliament. These facts, omitted by the Officer from the decision, run counter to the inference in the decision that the Jobbik is "on a path to insignificance". Quite the contrary, the voter support given to the Jobbik, which espouses an anti-Roma, anti-Semitic philosophy, indicates it is on the rise in popularity and exerts more influence within the government.

[11] While it is disappointing that the Officer selectively referred to extracts from the reports in the background section of his decision, that alone does not serve to render his decision unreasonable. Nonetheless, it casts a pall on it.

B. *Discrimination*

[12] After reviewing Hungary's obligation to uphold standards in order to maintain membership in the European Union, the Officer noted that Hungary was one of the first signatories to the Framework Convention for the Protection of National Minorities of the Council of Europe [Framework Convention]. The Officer indicated that the Hungarian parliament ratified the Framework Convention in 1999.

[13] DOS 2015 states that "human rights NGOs [non-governmental organizations] continued to report that Roma suffered social exclusion and discrimination in almost all fields of life, particularly in employment, education, housing, prisons, and access to public places, such as restaurants and bars". This passage was cited by the Officer in the background section of the decision. Moving from the general treatment of Roma to the specific experience of Roma women, DOS 2015 finds that there was economic discrimination against women in the workplace, particularly against job seekers older than 50. That describes Ms. Olah.

[14] Later on, when discussing discrimination against the Roma, the Officer asserts that, "[e]ven if criticism of Hungary's measures to combat racism is warranted, particularly against the Romani population, on a balance of probabilities, Hungary is taken [sic] the measures to implement the standards that are mandated as a member of the European Union". This exact statement, as well as several others in the Officer's decision, is boilerplate that appears in a number of decisions considering Roma in Hungary. It was most recently criticized by Mr. Justice Boswell as being "flawed at best and, indeed, as the Applicant argues, little more than a boilerplate analysis which appears to have been copied and pasted from another decision": *Kohazi v Canada (Minister of Citizenship and Immigration)*, 2015 FC 705 at para 17, 482 FTR 119.

[15] Multiple instances of boilerplate, including conclusions that are written in the first person, without attribution, are also present in the decision under review. It leaves the Court with little confidence that any analysis of the particular facts and up-to-date evidence put forward by counsel for Ms. Olah was read or considered by the Officer prior to dismissing her application. If it was, there is no indication in the decision of how the evidence was assessed,

weighed, or rejected by the Officer. The result is that neither Ms. Olah nor the Court can understand why the Officer came to the conclusion that Hungary is taking measures to implement the standards prescribed by the European Union.

[16] Simply put, regardless of the Framework Convention, the fact that Hungary is "tak[ing] measures to implement" certain standards is not the same as providing citizens with adequate state protection from discrimination. One is a paper tiger; the other is the realization of the state's obligation.

[17] Finally, having recognized that discrimination exists against Roma in virtually every facet of daily living, the Officer should have considered, but did not, whether such cumulative discrimination amounted to persecution in Ms. Olah's case. Not only is Ms. Olah Roma, she is an unemployed woman who is over the age of fifty. As reported in DOS 2015, NGOs recognize this as a particular form of economic discrimination against women. The failure to examine Ms. Olah's personal domestic abuse allegations and to consider whether her cumulative grounds of discrimination amount to persecution prevented the Officer from fully considering whether state protection would be available to Ms. Olah.

C. *State Protection*

(1) Ms. Olah's Personal Risk

[18] At no point did the Officer assess Ms. Olah's allegation of domestic abuse. As he never challenged her credibility, the Officer presumably believed her allegations. The Officer only examined the question of whether Ms. Olah's failure to report her domestic abuse to the police was warranted on the basis, as the Officer put it, that she lacked trust and confidence in the willingness of the police to protect her Roma ethnicity.

[19] The assessment of state protection is largely a factual assessment made on a case-by-case basis: *Molnar v Canada (Minister of Citizenship and Immigration)*, 2012 FC 530 at para 93 [*Molnar*]. By not assessing the risk to Ms. Olah of her husband's domestic abuse, as supported by his 12 brothers, the Officer neglected to consider an important fact relevant to her ability to obtain state protection. Similarly, the Officer's failure to consider whether the cumulative acts of discrimination to which Ms. Olah would be subject, given her profile, could amount to persecution is a reviewable error by the Officer.

(2) The Presumption of State Protection

[20] The Officer noted generally that the presumption of state protection cannot be rebutted in a functioning democracy by asserting only a subjective reluctance to engage the state. He acknowledged that the objective evidence confirms "ongoing challenges with societal racism in Hungary". He found, though, that such evidence was "counterbalanced" by information from the European Roma Rights Centre (ERRC), the Chance for Children Foundation (CFCF), and the Hungarian Helsinki Committee (HHC) that Hungary has one of the most advanced anti-discrimination laws and a system for minority protection in the Central and Eastern European region. The Officer did not indicate that he understood that passing anti-discrimination laws is not the same as implementing those laws. He does not appear to have considered whether the mechanisms that were developed on paper to combat the challenges with racism in Hungary were in fact a real counterbalance to those challenges.

[21] Such evidence that there may not be a real counterbalance was before the Officer, but not mentioned by him. The Officer relied on several parts of DOS 2015 but did not mention many parts that were highly critical of the Hungarian central government. DOS 2015 reports that

NGOs have reported failures and omissions on the part of the police and prosecution in investigating hate crimes committed against minority group members (including the Roma). The Executive Summary, at page 1 of the report, states that:

> International organizations and human rights nongovernmental organizations (NGOs) continued to voice criticism of the systematic erosion of the rule of law, checks and balances, democratic institutions, and transparency, and intimidation of independent societal voices.

[22] Systematic erosion of the rule of law in this context implies that anti-discrimination laws may not be followed; indeed, if the rule of law is fully eroded, there is no democratic institution from which the presumption of state protection can arise. This strong language in DOS 2015 deserves more than an unexplained conclusion from the Officer: it deserves full consideration and analysis so that his conclusion can be understood.

[23] The Officer's unsupported "counterbalance" conclusion is all the more confusing given his earlier acknowledgements that there was a "general failure" to maintain strong and effective control mechanisms over rights violations of the Roma and that "the system is not perfect". In my view, a general failure to control rights violations begs the question of whether the central government is making any efforts, serious or otherwise, to protect its Romani citizens. Achieving the operational adequacy of state protection is even harder to envision in a government in which the rule of law is eroding and there is a general failure of the very mechanisms that are supposed to be in place to prevent hate and discrimination against an ethnic group such as the Roma.

(3) Local Failures to Provide Effective Policing

[24] The Officer concluded, once again without explanation, that a fair reading of the documentary evidence showed that the central government was motivated and willing to protect the Roma, but that the measures were not always implemented effectively at the local or municipal level. He then recited that local failures to provide effective policing do not amount to a lack of state protection unless there was a broader pattern of state inability or refusal to provide protection.

[25] The Officer relies upon the Federal Court of Appeal's decision in *Canada (Minister of Employment and Immigration) v Villafranca* (1992), 99 DLR (4th) 334 to support his statement about local failures not amounting to a lack of state protection. In *Canada (Minister of Citizenship and Immigration) v Kadenko* (1996), 124 FTR 160 [*Kadenko*], the Court of Appeal said that, if the refusal to provide protection was a more or less general refusal by the police force to provide protection, the answer as to whether a state is capable of protecting citizens might be different as it would be more than a mere local failure.

[26] Unfortunately, the Officer failed to assess whether there was a broad pattern of refusal or failure to assist Roma as envisioned in *Kadenko*. This omission is of particular concern in light of the Officer's initial comment of a "general failure" to maintain strong and effective mechanisms to control rights violations of the Roma, together with the DOS 2015 report that a systematic erosion of the rule of law was taking place in Hungary. Both speak to more than "mere" local failures.

[27] A failure of a general nature signifies that the failure is more common than not; it is more widespread than merely local. The meaning appears to come within that which was

contemplated in *Kadenko*: a more or less general refusal by the police force to provide protection. In that instance, Ms. Olah would not be expected to seek police protection. Having identified the existence of a general failure to control rights violations of the Roma, the Officer ought to have examined the nature and extent of that general failure when considering whether Ms. Olah could actually avail herself of the protection of the state of Hungary. His failure to do so is unreasonable on the facts of this case.

(4) Alternative Sources of Recourse

[28] The Officer next turned to a consideration of alternative sources of recourse — mentioning the Independent Police Complaints Board, the Equal Treatment Authority, and the Commissioner for Fundamental Rights — to which Ms. Olah could turn. The Officer noted these organizations would take complaints, make findings, and then report those findings to the appropriate authorities for their response.

[29] As has been said many, many times by this Court, the taking of a complaint against the police for non-action is not, in any way, the equivalent of providing state protection. Mr. Justice Zinn put it this way: “Actions, not good intentions, prove that protection from persecution is available” (see *Orgona v Canada (Citizenship and Immigration)*, 2012 FC 1438 at para 11 and cases cited therein).

(5) The Officer’s State Protection Conclusion

[30] The Officer then concludes his state protection analysis by stating the following:

> I recognize that there are some inconsistencies among several sources within the documentary evidence; however, the objective evidence regarding current country conditions suggests that, although not perfect, there is adequate state protection in Hungary for Roma who are victims of crime, police abuse, discrimination or

> persecution; that Hungary is making serious efforts to address these problems; and that the police and government officials are both willing and able to protect victims.

[31] The Officer refers to "serious efforts" without assessing operational adequacy, which in and of itself is fatal to his analysis: *Paul v Canada (Immigration, Refugees, and Citizenship)*, 2017 FC 687 at paras 15, 17. Other than his previous reference to the "alternative sources of recourse", no reason for this conclusion is articulated by the Officer. From my reading of the decision, as explained below, it is likely that the Officer has merely adopted the conclusion given by other officers in other decisions. Yet, those decisions are factually different than Ms. Olah's case.

[32] The Officer also fails to explain how he reconciled the documentary inconsistencies. Which pieces of objective evidence did he rely upon? Which did he reject? It is not possible to understand how the Officer determined that the state and police are able to protect Romani victims of, for example, the police abuse or discrimination to which he referred.

[33] The decision does not show that Ms. Olah's claim was analyzed by the Officer. It appears to be an off-the-shelf general statement about the plight, or lack thereof, of Roma in Hungary. It could apply to any Roma fact situation. The Officer's state protection conclusion is a verbatim quote of the finding by the Refugee Protection Division [RPD] as set out in paragraph 27 of *Mudrak v Canada (Citizenship and Immigration)*, 2016 FCA 178, 485 NR 186, which language first seems to have appeared in the RPD's decision of *X (Re)*, 2011 CanLII 94218 at para 13 (CA IRB) [*Re X*]. Previous to that case, the RPD only appears to have referred to the fact that Hungary was making "serious efforts" to provide state protection. In *Re X*, however, the panel added that "the police and government officials are both willing and able to protect victims" (at

para 13). The same quote — occasionally with minor amendments for the nature of the discrimination being experienced (for example, substitute “LGBTI” for “Roma”) or by reference only to the last part which addresses the adequacy of state protection — also appears in the following decisions: *GS v Canada (Minister of Citizenship and Immigration)*, 2017 FC 599; *Peter v Canada (Minister of Citizenship and Immigration)*, 2015 FC 619, 481 FTR 10; *Kovacs v Canada (Minster of Citizenship and Immigration)*, 2015 FC 337; *Dinok v Canada (Minster of Citizenship and Immigration)*, 2014 FC 1199; *Varga v Canada (Minster of Citizenship and Immigration)*, 2014 FC 1030; *Majlat v Canada (Minster of Citizenship and Immigration)*, 2014 FC 965; *Balogh v Canada (Minster of Citizenship and Immigration)*, 2014 FC 771, 29 Imm LR (4th) 17; *Rusznyak v Canada (Minster of Citizenship and Immigration)*, 2014 FC 255, 23 Imm LR (4th) 318; *Buri v Canada (Minster of Citizenship and Immigration)*, 2014 FC 45, 446 FTR 57; *Hetyei v Canada (Minster of Citizenship and Immigration)*, 2013 FC 1208; *Ignacz v Canada (Minster of Citizenship and Immigration)*, 2013 FC 1164, 443 FTR 1; *Beri v Canada (Minster of Citizenship and Immigration)*, 2013 FC 854, 18 Imm LR (4th) 325; *Nagy v Canada (Minster of Citizenship and Immigration)*, 2013 FC 299; *Gulyas v Canada (Minster of Citizenship and Immigration)*, 2013 FC 254, 429 F.T.R. 22; and *Molnar*, above. Further, it also appears in a great number (over 100) of the tribunal decisions over the years.

[34] The decision-making process in this instance was not reasonable. A PRRA is a forward-looking analysis that is personal to an Applicant. Objective evidence of country conditions is to be assessed in evaluating an applicant’s risk. However, adopting in 2016 the findings first made by others in 2011, without scrutinizing or updating those findings, or applying them to the particular facts presented to the Officer, is not an acceptable approach to determining the risk presented in Ms. Olah’s PRRA application.

IV. **Conclusion**

[35] The Officer's state protection analysis and conclusion is flawed and incomplete. He did not assess any of Ms. Olah's risks at all. He selectively referred to parts of documents supporting his finding without acknowledging the contrary position, other than to say there were some inconsistencies — and those he did not weigh or reconcile with his conclusion. He wrongly indicated that Ms. Olah had other sources of recourse available to her when those resources could only accept a complaint of inaction by the state.

[36] The Officer drew conclusions without providing any foundation for them. He also failed to address the significant amount of contradictory evidence put forward by counsel for Ms. Olah. A review of the record indicates there were a great number of facts which relate to her profile that cumulatively could support Ms. Olah's argument of persecution. None of these facts were addressed by the Officer.

[37] The decision must be set aside and the matter returned for consideration by a different officer. Overall, the reasons for the outcome are neither transparent nor intelligible. Consequently, it is not possible to say that the state protection analysis, which is the determinative issue in the decision, falls within the range of possible, acceptable outcomes based on the facts and law, as required by *Dunsmuir*.

[38] Throughout the decision, the Officer recited from the country condition documents without applying them to Ms. Olah's circumstances as a Roma woman who suffers specifically from domestic abuse and generally from discriminatory treatment based on her being an unemployed Roma woman over the age of 50. When this application is reconsidered, it is hoped that those oversights will be corrected.

[39] On these facts, there is no question for certification nor was one suggested by counsel.

JUDGMENT IN IMM-4924-16

THIS COURT'S JUDGMENT is that the application is allowed and the decision is set aside. The matter is returned for redetermination by a different officer. No question for certification arises on these facts.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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