

Federal Court



Cour fédérale

Date: 20190109

Docket: IMM-574-18

Citation: 2019 FC 25

Ottawa, Ontario, January 9, 2019

PRESENT: The Honourable Madam Justice Walker

BETWEEN:

SAJMON MESALI BRZEZINSKI

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Sajmon Mesali Brzezinski, is a Polish citizen of Roma ethnicity. He seeks judicial review of a decision (Decision) of the Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada. The RPD found that the Applicant was neither a Convention refugee nor a person in need of protection pursuant to sections 96 and 97, respectively, of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA). The application for judicial review is brought pursuant to subsection 72(1) of the IRPA.

[2] For the reasons that follow, the application is dismissed.

I. Background

[3] The Applicant is an 18-year old citizen of Poland. He came to Canada in June 2012 as a child. His family (father, as principal claimant, mother, minor sister and the Applicant) made refugee claims alleging mistreatment and fear of persecution in Poland on the basis of their Roma ethnicity. The Applicant is married to a Canadian citizen and has a Canadian-born child. He and his wife are expecting a second child.

[4] The refugee claims of the Applicant's three family members were withdrawn. His father returned to Poland in either 2014 or 2015. The Applicant lost contact with his mother in 2016. She too has returned to Poland. The Applicant's sister withdrew her refugee claim but remains in Canada. She married a Canadian citizen and is now a permanent resident.

[5] The Applicant decided to pursue his refugee claim independently. He amended his Personal Information Form, adopting elements of his father's claim and providing an updated narrative. The Applicant fears returning to Poland because he will be recognized as Roma and, as a result, subject to persecution. In terms of his own experiences in Poland as a child, the Applicant states that he was beaten on the way to and in school because he is Roma. He also states that he was almost raped in a school washroom by other boys but managed to get away. The Applicant did not report the beatings to his parents or his teachers due to a fear of reprisals from the other children.

II. Decision under review

[6] The Decision is dated January 17, 2018. The Applicant's identity as a citizen of Poland and an ethnic Roma were not in issue. The RPD found that the Applicant was not a Convention refugee as he did not have a well-founded fear of persecution in Poland. The panel also found that the Applicant was not a person in need of protection as his removal to Poland would not subject him personally to a risk to life or to a risk of cruel and unusual treatment or punishment or to a danger of torture.

[7] The determinative issue for the RPD was that of state protection. The RPD refused the Applicant's claim on the basis that he could rely on protection from the Polish state if he were to return to Poland and require assistance from the police.

[8] The RPD first emphasized that it was not sufficient for the Applicant to assert that all Roma in Poland face discrimination in all aspects of their lives. Rather, each case must be decided on its particular facts and on the personal circumstances of the claimant. While there is undoubtedly societal discrimination against Roma in Poland, the panel concluded that not every individual of Roma ethnicity experiences persecution. The RPD framed the Applicant's case as follows:

The panel notes that there is evidence before it, both in the National Documentation Packages on file and in the counsel's documents, that Roma in Poland face discrimination, high levels of unemployment and some do experience violence from anti-Roma and racist factions of the population. The issue[] before the panel is whether adequate state protection is, and would be, available to the minor claimant in Poland.

[9] The RPD reviewed the principles applicable to an assessment of state protection. Absent a state suffering systemic breakdown, the starting point is that states are presumed capable of protecting their citizens, underscoring the principle that international refugee protection is surrogate protection available only where a claimant can access no other protection. In order to rebut the presumption, a claimant must submit reliable and probative evidence establishing, on a balance of probabilities, that state protection is inadequate. The evidentiary burden of the claimant increases with the level of democracy in the state in question.

[10] The panel noted that the protection available to a claimant need not be perfect. Typically, the claimant must demonstrate the steps he or she took to obtain protection without success. In the present case, as the Applicant was 12-years old when he came to Canada, the RPD acknowledged that he could not be expected to have independently sought police protection while living in Poland. Therefore, the panel considered his evidence of being bullied at school and his memories of the treatment of his family in Poland against the adequacy of prospective state protection should the Applicant require police assistance upon his return to Poland.

[11] The RPD reviewed the security and judicial processes in place in Poland, a functioning democracy. Citing the U.S. Department of State Country Report on Human Rights Practices for 2016 (Poland) (US Report), the panel noted that the Polish security forces report to civilian authorities and do not act with impunity. As stated above, the RPD acknowledged the existence of discrimination against ethnic minorities in Poland, particularly individuals of Roma ethnicity. However, the panel concluded that the documentary evidence showed that the Polish government

“is making serious efforts in policy, as well as at the operational level, to combat violence and discrimination against the Roma population”.

[12] The RPD assessed the submissions and evidence of the Applicant, finding that his concerns regarding the absence of police protection for him in Poland stemmed from general television reports. The panel stated that there was no evidence before it that the Applicant personally would be denied protection in Poland. Further, the panel’s review of the documentary evidence regarding Poland did not support the Applicant’s position that the police would be unwilling to assist Roma citizens generally.

[13] The RPD quoted extensively from, among other reports, the US Report, the European Commission against Racism and Intolerance Report on Poland (2015) (ECRI Report), the Council of Europe Contribution for the 27th UPR Session (April-May 2017) regarding Poland, and the Human Rights Council Resolution 16/21: Poland (UN Report), of the United Nations Human Rights Council. These reports set out: actions of the Polish police and justice system in investigating and prosecuting hate crime; measures put in place by the Polish authorities to protect the Roma population; initiatives to improve educational opportunities for Roma citizens and police protection against hate crimes and racism; and, the implementation of programs training police officers to combat discrimination and hate crimes. Based on its review of the US Report, the panel found that Polish police make arrests in cases involving assaults on Roma individuals and that the Public Prosecutor actively pursues those who instigate and perpetuate crimes, as well as police officers who fail to protect or act. The RPD also considered in some detail the complaint mechanisms in place to report police officers who fail to investigate crimes.

In concluding its review of the general documentary evidence, the RPD found that the Applicant would have recourse to and against the police in Poland and that there would be assistance available to him to do so. His concerns that state protection would not be forthcoming were speculative.

[14] Although the determinative issue in the Applicant's case was the availability of adequate state protection, the panel also addressed general issues regarding the treatment and economic circumstances of the Roma population in Poland. The panel described significant measures by the Polish government to mitigate the discrimination faced by Roma and to fund education, healthcare, employment and housing initiatives for Roma citizens. The RPD found persuasive evidence of concrete action by the Polish government in improving housing conditions for Roma and in combating racial discrimination, xenophobia and related intolerance.

[15] Finally, the RPD considered whether there were any specific impediments or hardships in returning the Applicant to Poland and concluded:

The panel is not persuaded that there are any specific impediments or hardships in returning this minor claimant to Poland. As a Roma, there was no persuasive evidence provided to support the counsel's submission that the minor claimant could be "regarded as a migrant and face the possibility of increased animosity". Even if this speculative submission were realized, the panel has explored comprehensively the various means of protection available to the minor claimant should he require it.

III. Issues

[16] The Applicant raises two issues in this application:

1. Did the RPD misunderstand or misapply the test for adequate state protection?
2. Was the RPD's conclusion that adequate state protection would be available to the Applicant in Poland reasonable?

IV. Standard of review

[17] The question of whether the RPD misunderstood the test for adequate state protection is reviewed by this Court for correctness while its application of the test to the facts of the case is reviewed against the standard of reasonableness (*Hinzman v Canada (Citizenship and Immigration)*, 2007 FCA 171 at para 38; *Ruszo v Canada (Citizenship and Immigration)*, 2018 FC 943 at para 16). Justice O'Keefe of this Court summarized the law as follows (*Dawidowicz v Canada (Citizenship and Immigration)*, 2014 FC 115 at para 23 (*Dawidowicz*):

[23] The parties agree that the standard of review for all issues is reasonableness, but I do not. Chief Justice Paul Crampton recently explained the standard of review for decisions on persecution and state protection in *Ruszo v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1004 at paragraphs 20 to 22, [2013] FCJ No 1099 (QL) [*Ruszo*]. In essence, since the jurisprudence has developed clear tests for both, a board cannot depart from them. Therefore, where applicants allege that a board misunderstood the test, the standard is correctness and no deference is owed to the board's understanding of the relevant tests. However, where applicants challenge how the tests were applied to the facts, those are questions of mixed law and fact and the standard is reasonableness (*Ruszo* at paragraphs 20 to 22; *Gur v Canada (Minister of Citizenship and Immigration)*, 2012 FC 992 at paragraph 17, [2012] FCJ No 1082 (QL); *Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171 at paragraph 38, 282 DLR (4th) 413 [*Hinzman*]). Here, the applicants

allege both types of errors, so I will review the former type for correctness and the latter type for reasonableness.

[18] The standard of reasonableness requires me to accord deference to the RPD and its expertise. This Court will only interfere if the RPD's conclusion regarding the availability of adequate state protection to the Applicant in Poland lacks justification, transparency, or intelligibility, and falls outside the range of possible, acceptable outcomes which are defensible on the particular facts of the case and in law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

V. Analysis

1. *Did the RPD misunderstand or misapply the test for adequate state protection?*

[19] The Applicant submits that the RPD erred in law because it misunderstood or misapplied the test for state protection. He argues that the panel correctly cited the test but erroneously focused on the efforts of the Polish government to provide protection to ethnic Roma and not on the operational adequacy of state protection for the Applicant in Poland. Among other decisions of this Court, the Applicant cites *Dawidowicz* in support of his argument. In *Dawidowicz*, Justice O'Keefe emphasized the requirement that a decision-maker focus on the actual outcome of protection in a country and not the efforts the state has taken to provide that protection.

[20] The test for determining the existence of adequate state protection in a country is well-established and rests on the operational effectiveness of the state's protection. The efforts of the state, however extensive or well-intentioned, are not alone sufficient to ground a positive finding

of adequate state protection (*Lakatos v Canada (Citizenship and Immigration)*, 2018 FC 367 at para 21 (*Lakatos*); *Koky v Canada (Citizenship and Immigration)*, 2014 FC 388 at para 3 (*Koky*); *Dawidowicz* at paras 29-30). As stated by Justice Diner (*Lakatos* at para 21):

[21] In considering whether state protection is adequate, a decision-maker must focus on actual, operational adequacy, rather than a state's "efforts" to protect its citizens (*Lakatos v Canada (Citizenship and Immigration)*, 2018 FC 20 at para 12 [...]). Efforts must have actually translated into adequate protection at the present time (see *Hercegi v Canada (Citizenship and Immigration)*, 2012 FC 250 at para 5). In other words, lip service does not suffice. The protection must be real, and it must be adequate.

[21] In the Decision, the RPD acknowledged the continued existence of societal discrimination and racially motivated violence against Roma in Poland. The panel stated:

Based on last year's reporting as cited above, the panel does find that Roma living in Poland can and do face discrimination. However, the information in the documentary evidence also shows that the government of Poland is making serious efforts in policy, as well as at the operational level, to combat violence and discrimination against the Roma population.

[22] The RPD then reviewed both the actual measures taken by the authorities to combat violence against Roma citizens and the legislative changes implemented in Poland designed to reduce discrimination generally. The panel first cited the US Report in support of its findings that the Polish police arrest perpetrators of crimes against Roma and that the Public Prosecutor actively pursues the instigators of violence. The panel repeatedly acknowledged the difference between efforts and concrete results or actions, focussing on the latter requirement in its consideration of police and prosecutorial responses. The panel noted a number of concrete measures taken by the Ministry of the Interior and Administration in monitoring the commission

of hate crimes, sharing hate crime data with the police and specific training programs for the police completed through 2015 and 2016. The RPD also set out the reporting mechanisms in place in the event of the commission of a crime or the failure of police officers to act on a reported crime.

[23] The RPD reviewed the efforts and measures taken by the Polish government to improve the lives of its Roma citizens, focusing on the allocation of funds for education, health care and housing, and legislative initiatives undertaken by the government to reduce discrimination in Roma daily life. It is predominantly in these sections of the Decision that the RPD focussed on the efforts of the Polish state to combat discrimination. This analysis is set out in parallel to the panel's analysis of the availability of operational state protection to the Applicant.

[24] I find that the RPD correctly identified and applied the test for adequate, operational state protection in Poland. The panel distinguished between the Polish government's efforts to improve the lives of the Roma minority generally and the concrete actions of the police in making arrests, prosecutorial action, the implementation of police training, and a functioning complaint system. The RPD's assessment of the availability of state protection from Polish police and security forces was centred on the actual protection available to the Applicant if targeted in Poland.

[25] In *Dawidowicz*, Justice O'Keefe concluded that the central finding in the decision before him was based on the efforts made by the state to provide state protection. He cited from the decision in question as follows (*Dawidowicz* at para 6):

State protection was the determinative issue and the Board said at paragraph 8 that the issue was “whether Polish authorities can be reasonably expected to provide the claimants with serious efforts at protection if they were to return to Poland, and not whether those authorities can be reasonably expected to provide the claimants with *de facto* effective or *de facto* guaranteed protection.” Further, clear and convincing evidence would be required since Poland is a parliamentary democracy.

[26] The decision-maker in *Dawidowicz* made repeated references to the state’s “serious efforts at protection”. In the present case, the RPD based its finding regarding adequate state protection on the actual operations of the Polish state in extending protection to members of the Roma community and the Applicant has not provided specific, contradictory evidence.

[27] The Applicant also relies on a series of cases from this Court involving refugee claimants of Roma ethnicity from a number of European countries and the inadequacy of decisions that rely on a state’s efforts to provide protection. In each of those cases, the factual circumstances of the claimant(s) differed from that of the Applicant, as did the evidence before the decision-maker, and the underlying decisions were clearly based on efforts to protect and not operational protection. In *Koky*, for example, Justice Zinn set out a number of findings by the RPD panel of brutality and mistreatment by the Slovak police against Roma citizens. The RPD made no such findings in the present case.

2. *Was the RPD’s conclusion that adequate state protection would be available to the Applicant in Poland reasonable?*

[28] The Applicant’s submissions regarding the reasonableness of the Decision are summarized succinctly in his Memorandum of Argument:

In the alternative, the RPD's decision was unreasonable because it relied exclusively on documentary evidence that supports its conclusion, while ignoring evidence to the contrary, including both contrary evidence found in RPD's National Documentation Package ("NDP") and evidence submitted by the Applicant. The RPD further erred by heavily relying on sections of country condition evidence which are self-reporting by the Polish states of its efforts to provide protection to the Roma. Essentially, the RPD's decision is unreasonable because it was made without due regard to the evidence before it.

[29] The Respondent submits that the Applicant's claim was properly characterized by the RPD as resting on the premise that all Roma in Poland face discrimination and, therefore, as a Polish citizen of Roma ethnicity, the Applicant has established himself as a Convention refugee. The Respondent argues that the Applicant has submitted inadequate persuasive evidence that he would be subject to persecution in Poland or that state protection would not be available to him. He also argues that the Applicant's reliance on general country condition evidence is not sufficient to establish his claim.

[30] The Applicant was required to provide clear and convincing evidence to rebut the presumption of adequate state protection in Poland. I find that he has not done so and that the Decision was reasonable. Specifically, the RPD's review of the National Documentation Package (NDP) for Poland as it pertained to state protection was balanced and reasonable. The Applicant relies on general documentary evidence regarding the treatment and circumstances of the Roma population in Poland to rebut the presumption of state protection. In essence, as the RPD stated, the Applicant's case is based on the contention that all Roma in Poland face persecution and that adequate state protection is not available to Roma citizens.

[31] The Applicant argues that the RPD relied only on evidence that supported its conclusion that state protection would be available to the Applicant. I disagree. Throughout the Decision, the panel considered the documentary evidence before it regarding the continued existence of discrimination and hate crime in Poland against the Roma population. The RPD stated:

The panel recognizes that discrimination against ethnic minorities and foreigners exists in Poland, which include “a number of xenophobic and racist incidents.” Societal discrimination against Roma continued to be a problem. Freedom House reports that “Ethnic minorities generally enjoy generous legal rights and protections. Some groups, particularly the Roma, experience employment and housing discrimination, racially motivated insults, and occasional physical attacks.”

[32] The panel cited the US Report and the UN Report in acknowledging the existence of discrimination against Roma in Poland, stating “[b]ased on last year’s reporting as cited above, the panel does find that Roma living in Poland can and do face discrimination”. The panel also acknowledged the existence of hate crime and violence against ethnic minorities.

[33] The Applicant cites other documents from the NDP which refer to hate crimes against Roma and the rise of far-right vigilante groups and militias in Europe. He also relies on the extremely low levels of trust Roma citizens have in the police and the fact that the vast majority of crimes perpetrated against Roma are not reported.

[34] I have reviewed the documents referred to by the Applicant in his Memorandum. The documents speak to the issue of violence against the Roma population in Poland and other European countries. The Applicant includes a number of excerpts from the 2016 report of the Congress of Local and Regional Authorities, titled “The situation of Roma and Travellers in the

context of rising extremism, xenophobia and the refugee crisis in Europe”. The excerpts express concern regarding the rise of far-right vigilante groups in Europe and the increase in the number of hate crimes reported in Poland between 2013 and 2015. The sections of the report from which the excerpts are taken list violence and extremism in a number of European countries and give examples of police mistreatment and brutality in specific countries. However, there is no reference to such incidents occurring in Poland.

[35] The Applicant takes specific issue with the RPD’s reliance on the ECRI Report. The panel cited the ECRI Report in support of the proposition that the situation between the police and the Roma community in Poland has improved. The Applicant correctly argues that the excerpt relied on by the panel is contained in the Polish government’s response to the report and is not a conclusion of the ECRI. I agree with the Applicant that the RPD ought to have properly noted and taken into account this fact. However, in the context of the Decision as a whole, the RPD’s reliance on the ECRI Report does not alone render the Decision unreasonable. The panel cites a number of other credible and independent sources for its conclusion that Polish security forces have and continue to take action in response to reports of violence targeting Roma citizens.

[36] In summary, the Applicant’s arguments are based on the continued existence of discrimination and acts of violence against Roma citizens in Poland. These facts are clearly acknowledged by the RPD in the Decision. However, the panel found that not every Roma citizen faces persecution in Poland and that the Applicant failed to provide reliable and credible evidence establishing, on a balance of probabilities, that he would be unable to secure adequate

state protection in Poland. The RPD's findings in this regard are based on a number of credible reports in the NDP for Poland and are reasonable. The Applicant's reliance on the existence of far-right sentiment and activity in Poland is not sufficient to rebut the presumption of state protection.

VI. Conclusion

[37] The application is dismissed.

[38] No question for certification was proposed by the parties and none arises in this case.

JUDGMENT in IMM-574-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. No question of general importance is certified.

“Elizabeth Walker”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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