

Federal Court



Cour fédérale

Date: 20120117

Docket: IMM-894-11

Citation: 2012 FC 56

Ottawa, Ontario, January 17, 2012

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

**DAVID BIHARY
MARGITA PETEROVA
DAVID BIHARY (JR)
ADELA BIHARYOVA
MARIE BIHARYOVA
RICHARD BIHARY
MARGITA PETEROVA**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] Mr. David Bihary is a 26-year-old citizen of the Czech Republic. His claim for refugee protection is joined with those of his family members, including his mother-in-law, Margita

Peterova, his common-law spouse, Margita Peterova, and their four children, David Bihary, Marie Biharyova, Richard Bihary, and Adela Biharyova.

[2] The applicants are all Roma and citizens of the Czech Republic. They arrived in Canada in 2009 and made refugee claims. A panel of the Immigration and Refugee Board heard the applicants' claims jointly and found that they were neither Convention refugees nor persons in need of protection.

[3] The applicants argue that the Board's decision was unreasonable in a number of respects. It unreasonably concluded that they did not have a subjective fear of persecution or mistreatment in the Czech Republic; that they only faced a risk of discrimination, not persecution; and that the Czech Republic was willing and able to provide them protection. Further, they argue that the Board failed to take account of the physical assaults they endured.

II. Factual Background

[4] Mr. Bihary claims that he had been attacked and harassed by "white Czech people". He said he was afraid of the rise of neo-Nazi parties and anti-Roma activities in the Czech Republic, and worried that his children would have the same difficulties he had.

[5] Before the panel of the Immigration and Refugee Board that heard their claims, Mr. Bihary detailed the discrimination he had experienced as a Roma. From an early age he was made to attend a special school for the mentally challenged, a common experience for Roma children. He was

constantly physically and verbally attacked by non-Roma students, and his teacher did nothing to stop it. He said he wanted to learn to be an auto mechanic or attend musical school, but he was afraid of discrimination and his test results were poor. Mr. Bihary's spouse suffered similar treatment at school.

[6] Mr. Bihary left school at the age of 15 and began living with his common-law spouse. Both they and his mother-in-law experienced discrimination and harassment because they were Roma. In addition, they experienced violent assaults by skinheads.

[7] In 1999, his spouse and mother-in-law were at a party. Some skinheads came and began fighting, and the mother-in-law was hit on the head with a bottle. Criminal charges were laid, and, in 2003, the skinheads received suspended sentences.

[8] In 2001, Mr. Bihary and his spouse were on their way home with their newborn son when they were attacked by skinheads. While his spouse escaped with their child, Mr. Bihary was badly beaten and hit in the head with a baseball bat. He was taken to the hospital and stayed there for 45 days. Although he reported the incident to the police, they could not find the perpetrators or any witnesses, so they stopped their investigation.

[9] In 2009, Mr. Bihary's common-law spouse and her sister were on their way home when they were attacked by two Czech men. The sister was pregnant and managed to run away, but Mr. Bihary's spouse was kicked to the ground. She shielded her face with her arm and ended up in the hospital, where her arm was put into a cast. Mr. Bihary also said that groups of 600-700 skinheads

would march in their town several times a year. They would throw bricks and burning bottles into Roma apartments, shouting threatening slogans and beating up Roma. The police would usually only come after the marches were over. Mr. Bihary said he is afraid to go to sports games or movie theatres or anywhere else with large crowds. He once took his spouse to a restaurant, but the staff turned them away, saying “blacks are not being served here”. He does not believe the state has good intentions towards Roma.

III. The Board’s Decision

[10] The Board first addressed the issue of credibility. Mr. Bihary testified that he had been stopped on the street and questioned by police more than 3,000 times, and had been unlawfully arrested. However, he could not satisfactorily explain why he had not mentioned these incidents, or his consequent fear of the police, in his written narrative or in his interview at the port of entry to Canada. Further, when questioned about the date of the unlawful arrest, he gave inconsistent answers.

[11] The Board rejected Mr. Bihary’s evidence in this area entirely. It found that he had never been arrested or unlawfully stopped by the police.

[12] The Board accepted that the applicants were Roma, but it found that they did not possess a well-founded fear of persecution. First, they delayed leaving the Czech Republic until 2009, even though they testified to persecution dating back to 1999. Mr. Bihary explained their delay by saying “Canada was not open”, but could not explain why the family did not try fleeing

anywhere else. He also stated that he “had to borrow money” to leave. The Board found that, if the applicants had truly possessed a well-founded fear of persecution, they would have borrowed money at the first opportunity to escape to another city or country, rather than waiting for Canada to drop its visa requirement.

[13] In addition, the mother-in-law testified that she was not afraid to return to the Czech Republic. When asked why she was making her refugee claim, she said, “[b]ecause I am going where the kids are”.

[14] The Board found that this evidence did not support a well-founded fear of persecution and that their claims therefore failed under s 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA – see Annex for provisions cited].

[15] The Board further found that the applicants had not experienced discrimination rising to the level of persecution. With regard to education, it found that Mr. Bihary left school not because he was Roma, but to take care of his first child. He did not receive government assistance, but nor did he apply for it. Mr. Bihary said he was unable to find employment because he was Roma, but the Board noted that he had been employed from 2003 until 2008. Furthermore, Mr. Bihary testified that he had been fully employed in the Czech Republic until he left for Canada. He could not explain how he found work when other Roma could not, but said his employer “did not discriminate against me”.

[16] The Board also found that the applicants had received appropriate healthcare whenever they needed it. When the mother-in-law was attacked in 1999, doctors and ambulance staff treated her injuries at the scene. Mr. Bihary's wife gave birth to all her children in the local hospital at Budejovice. The children were all born healthy and she checked herself out of the hospital the next day, having signed a release form. No one forced her to leave, and the Board found that she had her own room at the hospital. Mr. Bihary stayed 45 days in the hospital after being attacked in 2001, and received X-rays, CT scans and other medical care. Finally, Mr. Bihary's wife received hospital treatment after being attacked in 2009, which included X-rays, a cast, follow-up treatment and medication.

[17] The Board also noted documentary evidence showing that the Roma were discriminated against in the Czech Republic, and that they experienced disadvantages in housing, education and healthcare. However, it also noted that "there are many positive advances being undertaken by the Czech government to improve the situation for the Roma people in that country". These included police efforts to improve relations with the Roma, as well as Czech government initiatives to address the shortfalls for Roma within the healthcare system.

[18] The Board also found the claimants had not advanced any allegations of unequal treatment in housing or government financial assistance. Although the applicants had faced some limited discrimination and harassment, this fell short of persecution, which involves serious restrictions on the right to earn a livelihood, practice religion, or access normally available educational facilities or housing. Accordingly, their claims failed under s 96 of IRPA.

[19] The Board then considered the applicants' claims under s 97 of IRPA, and assessed the issue of state protection. It reiterated the legal tests and the onus and burdens of proof regarding state protection. It looked at the documentary evidence before it, and concluded that the Czech Republic is a democracy, with a functioning political and judicial system and an official apparatus sufficient to provide a measure of protection to its citizens. It is in control of its territory and has functioning security forces, with no evidence of a total breakdown of state authority. The Board noted that local failures to provide effective policing do not amount to a lack of state protection unless they are part of a pattern of state inability or refusal to provide protection, and that claimants must exhaust all avenues of state protection reasonably available to them. The burden on the claimants to show that they could not be expected to exhaust all avenues, therefore, was a heavy one.

[20] In the applicants' particular case, there was no evidence that state protection had not been forthcoming for them. The mother-in-law was interviewed by police at the scene of the 1999 assault, and arrests were subsequently made. She went to court and a judge convicted the perpetrators, giving them suspended sentences. When Mr. Bihary was assaulted in 2001, police interviewed him at the hospital, although their investigation was ultimately unsuccessful. Mr. Bihary's spouse was assaulted in 2009 but did not report the incident to the police.

[21] Although the Board noted that the Roma had experienced discriminatory behavior at the hands of politicians and the police, it stated that not all politicians and police acted this way and steps were being made in the right direction. For example, the most recent US DOS Report showed that the Czech Police had arrested and charged four men with attempted murder for

throwing Molotov cocktails at Roma people; arrested 34 neo-Nazis for various persecutory acts; and arrested and charged eight other men for Roma-specific assaults.

[22] On the basis of this evidence, the Board found that the applicants had not established that there is inadequate state protection for them in the Czech Republic, and that they had not taken all reasonable steps in the circumstances to pursue available state protection. Accordingly, their claims under s 97 of IRPA also failed.

IV. Was the Board's Decision with Respect to s 96 Unreasonable?

[23] The applicants point to a number of alleged errors in the Board's analysis of their claim under s 96. First, they suggest that the Board overlooked important evidence supporting their claim of persecution. Second, they contend that the Board erred in finding that their delay in leaving the Czech Republic showed they lacked subjective fear.

(1) Supportive Evidence

[24] The applicants maintain that the Board overlooked a medical report corroborating the 2009 attack. Further, the Board failed to consider the evidence relating to the physical attacks they experienced when it concluded that their experiences amounted to discrimination, not persecution. Their experiences, they say, were corroborated by the documentary evidence on conditions in the Czech Republic.

[25] The Board accepted that Mr. Bihary's spouse had been attacked. It pointed out that medical care was provided to her, but the incident was not reported to the police. In the circumstances, there was no need for the Board to cite the medical report explicitly.

[26] As for the other assaults, again, the Board did not ignore the evidence. However, it considered this evidence in the context of the overall evidence relating to the treatment of the applicants, and the Roma generally, in the Czech Republic, including areas such as health care, education and employment. While it did not explicitly refer to all the evidence before it, I cannot conclude that the Board's conclusion was unreasonable. It is for the Board to determine the weight that the evidence deserves.

(2) Subjective Fear

[27] The applicants submit that the Board failed to consider the full context of the mother-in-law's testimony and her particular circumstances. In particular, they submit that her language skills were poor. In addition, they suggest that her experiences were different because she stayed indoors most of the time.

[28] With respect to the applicants' delay in leaving the Czech Republic, they point out that the event that triggered their departure did not occur until 2009, at a point when the visa requirement for entering Canada was lifted.

[29] In my view, the Board was entitled to deduce from the mother-in-law's testimony that she was not afraid of returning to the Czech Republic. Her testimony was unambiguous. There is no evidence of any language difficulties at the hearing; a Czech interpreter was present at her request.

[30] Regarding delay, this was a relevant factor for the Board to consider. The applicants did not assert that the 2009 event triggered their departure; it was the relaxation of the visa requirement. In my view, the Board reasonably concluded that the evidence did not support the applicants' claim to fear persecution based on their overall experience of life in the Czech Republic.

[31] Accordingly, I am not satisfied that the Board's decision on s 96 was unreasonable.

V. Was the Board's Decision with Respect to s 97 Unreasonable?

[32] The main issue with respect to s 97 was state protection. The applicants submit that the Board's analysis of this issue was flawed because it failed to consider evidence relating to police attitudes toward Roma in the Czech Republic. This evidence would have helped explain why the applicants did not seek state protection in 2009.

[33] In my view, the Board's conclusion that the applicants had received state protection on earlier occasions and, therefore, had no reason for failing to seek protection in 2009 was reasonable. Their evidence simply did not support an absence of state protection. This was a sufficient basis for dismissing their claim under s 97.

VI. Conclusion and Disposition

[34] The Board's conclusions with respect to ss 96 and 97 were intelligible and transparent and fell within the range of defensible outcomes based on the facts and the law. I must, therefore, dismiss this application for judicial review. Neither party proposed a question of general importance for me to certify, and none is stated.

JUDGMENT

THIS COURT’S JUDGMENT is that

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

“James W. O’Reilly”

Judge

Annex

Immigration and Refugee Protection Act, SC 2001, c27

Loi sur l'immigration et la protection des réfugiés, LC 2001, ch 27

Convention refugee

Définition de « réfugié »

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

- (a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or
- (b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

- a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
- b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Person in need of protection

Personne à protéger

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

- (a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or
- (b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if
 - (i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,
 - (ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,
 - (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international

- a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
- b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
 - (i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
 - (ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
 - (iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes

standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-894-11

STYLE OF CAUSE: DAVID BIHARY, ET AL v MCI

PLACE OF HEARING: Toronto, ON

DATE OF HEARING: September 26, 2011

**REASONS FOR JUDGMENT
AND JUDGMENT:** O'REILLY J.

DATED: January 17, 2012

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