

Federal Court



Cour fédérale

Date: 20120925

Docket: IMM-9273-11

Citation: 2012 FC 1120

Toronto, Ontario, September 25, 2012

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

**ATTILLA BIRO (A.K.A ATTILA BIRO)
and ANDREA HOFFER**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Refugee Protection Division of the Immigration and Refugee Board determined that the applicants are not Convention refugees or persons in need of protection. For the reasons that follow, this application is granted and the decision set aside.

Background

[2] The applicants are Hungarian citizens of Roma ethnicity and common law spouses. They allege harassment and discrimination throughout their lives, as well as physical assaults by White Hungarians. They fled Hungary for Canada on April 6, 2010, and claimed refugee protection the next day. Their claim was refused on November 10, 2011.

[3] The Board determined, following an unusually brief examination, that the discrimination experienced by the applicants did not rise to the level of persecution; that Attila Biro, the principal applicant, was not credible; and that the applicants had failed to rebut the presumption of state protection.

Issues

[4] The issues raised in this application are as follows:

- a. Was the Board's credibility finding unreasonable;
- b. Was the Board's finding that the treatment the applicants suffered amounted to discrimination but not persecution unreasonable;
- c. Were the Board's state protection analysis and finding unreasonable?

Analysis

1. Credibility

[5] The Board's credibility finding is as follows: "Given the problems with respect to major issues, the panel finds that the claimants were generally lacking in credibility." The Board did not base its decision on a general credibility finding. Nonetheless, and although I agree with the

respondent that the Board is entitled to considerable deference on such a matter, I find that its decision on credibility is unreasonable and may have tainted much of its consideration of the other issues in dispute.

[6] The Board based its credibility assessment on Mr. Biro's evidence relating to two incidents that occurred on February 5, 2009, and March 21, 2009, respectively.

February 5, 2009 Incident

[7] The details of this incident were not summarized in the decision, nor was Mr. Biro asked much about it by the Member during the oral hearing. The Personal Information Form (PIF) recites the details:

On Thursday, February 5, 2009, around six or seven in the evening, my spouse and I went to do some shopping. As we did so, we were attacked by four men. One of them hit me on my face and the other pushed my spouse to the ground where he kicked her in the mid-section. Before the beating, they called us worthless cockroach gypsies and attacked us, as we wanted to walk around them. After the attack, they laughed and mocked us; finally, they told us to get the hell out of there.

[8] At the hearing the Member asked Mr. Biro if he was satisfied with that response and the exchange that followed formed the basis for the credibility finding.

MEMBER: Were you satisfied with the police response?

CLAIMANT: No.

MEMBER: Did you approach any other authority?

CLAIMANT: No.

MEMBER: Why not?

CLAIMANT: I am afraid of the police.

MEMBER: But you went to them to make a report and then you were not satisfied with their response.

CLAIMANT: No, I was not satisfied.

MEMBER: But you are telling me now that you are afraid of the police but you went to them to make a report.

CLAIMANT: Yes. This is the only authority which can protect us. That is why we went over there. There is no other place to turn to. They are the ones who are supposed to give us protection.

[9] On the basis of this exchange the Member finds that Mr. Biro's response to why he would go to the police when he was afraid of them was "unreasonable." He writes:

The panel finds his explanation unreasonable, for example, the panel notes that it was after he was not able to answer the question, "why he would approach the police if he was afraid of them", that he decided to ignore the question and return to the previous question "if he had approached any other authority" and tried to re-answer the question. In other words, he realized his answer made no sense, so he gave a different answer to what he had previously given. The panel therefore finds his lack of straightforwardness to undermine his credibility. As such, the panel also finds that, on a balance of probabilities, he was not attacked on February 5, 2009 and therefore was not told by the police to come back when they were bleeding.

[10] With due respect, the Member's characterization that Mr. Biro returned to answer the previous question – whether he approached another authority – is, on my reading of the record, mistaken. Mr. Biro was responding to the question posed – why go to the police if you are afraid of them? His answer that there is no one other than the police to go to is, in my view, a perfectly acceptable and reasonable response. Further, the purported conflict between the two statements – fearing the police and reporting to them – is only a conflict if the fear is a fear of personal harm. By

way of illustration: one may fear bats, but still deal with them when trying to remove them from one's house. On the other hand, if the fear is that they will bite and infect one with rabies, then it is a conflict to say that notwithstanding that fear one deals with them rather than calling an exterminator. Here, the Member never asked why the applicant feared the police and therefore his conclusion that it was unreasonable for him to seek protection from the police is merely an assumption and an unwarranted one that improperly lead to his credibility finding.

March 21, 2010

[11] The second incident relates to the filing of a police report on March 21, 2010. Again, the description of the incident is taken from Mr. Biro's PIF:

The final push for us to leave Hungary happened on Sunday, March 21, 2010. At around nine in the evening, I was attacked and beaten on the street again. My spouse's relative Jozsef Varga walked me to the bus stop when three men from behind walked in front of us. One of them called us gypsies, the other kicked Jozsef. The third one then pushed me to the ground and kicked me several times. We feared for our lives, as one of them yelled very loud that we were going to die right there. We were able to run away, while yelling for help.

We reported this incident to the police. We were told there would be no investigation. However we were first scolded by the police who did not want to even take a report at first. It was only when I became angry that the police decided to take a report. However, afterwards, we never heard from the police again.

[12] The Board gives the following rationale for its adverse credibility finding:

The claimant was asked if he gave the police descriptions; he replied that he saw one of the attackers and gave a description. The panel rejects his allegation that he gave the police any description and finds that it undermines his credibility. For example, noting that it was three individuals who attacked them, he was asked if he had given a description of the others; he replied that it was a dark area and the

attack happened very, very fast. ... The panel therefore finds, on a balance of probabilities, that he could not have given any description of any of the attackers if the area was dark and the incident happened very quickly [emphasis added].

[13] One might think, reading this passage that the description Mr. Biro gave to the police was quite detailed, for that would surely strain credulity when it was dark and the event fast happening. However, the testimony of Mr. Biro is quite different. He stated:

We saw one person who was 180 cm, bald and he had blue jeans on him. ... I do not know the person's name, but the one thing I know is that he was about 180 cm. They asked us to tell them what we remembered. That was what we remembered.

[14] I agree with the applicants who submit that the Member was conducting a microscopic examination of the evidence in order to support his credibility determination. It was unreasonable to base an adverse credibility finding on this meagre evidence.

[15] Lastly, although not specifically referenced as a credibility finding, the Board suggests in the following phrase that his claim that he feared the police is not believed: "The claimant testified that he is afraid of the police ... there is no persuasive evidence before it that the claimant had any need to fear the police ..."

[16] There was evidence in the record that supports that a Roma has good reason to fear the police in Hungary. Support for that conclusion may be found in the findings of fact made by this Member in his decision, including the following: "[T]he preponderance of 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, [and] discrimination or persecution [emphasis added].” In my view, the Member’s acknowledgment of the existence of police abuse is not consistent with the Member’s earlier conclusion that Mr. Biro did not have “any need to fear the police.”

2. Discrimination Versus Persecution

[17] The Member found that the incidents suffered by the applicants amounted to discrimination but not persecution. They submit that criminal violence is persecution. Their submission, as written in the memorandum of argument is as follows: “The notion that the acts of *criminal violence*, can ever be anything *but* persecution, as opposed to “discrimination” (which involves a deprivation of goods and services on an equal footing as other citizens) defiles the very definition and would read out the very word “persecution” out of the definition [emphasis in original].”

[18] This Court has examined decisions of the Board involving criminal assaults where it was found that they did not amount to persecution, and found them to be reasonable: See, for example, *Ozvald v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1250, *Horvath v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1350, *Orban v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 559, *Balla v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1436, and *Zsuzsanna v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1206.

[19] I accept that criminal acts may amount to persecution, but I do not accept that every criminal action amounts to persecution because persecution requires evidence that the conduct is sustained or

systemic. In order to constitute persecution, the criminal acts, discriminatory conduct, or harassment must be “so constant and unrelenting that the victims feel deprived of all hope of recourse, short of flight:” *Gladys Maribel Hernandez*, Immigration Appeal Board Decision, M81-1212, January 6, 1983.

3. State Protection

[20] The Member, at the commencement of his analysis of state protection, makes the following statement: “One accepted measure of assessment is whether the state is making “serious efforts” to protect its citizens” and cites as support *Canada (Minister of Citizenship and Immigration) v Villafranca*, [1992] FCJ No 1189 (FCA). As the Member puts it, this is not the test of whether there is state protection.

[21] Justice Hugessen in *Villafranca* said this:

On the other hand, where a state is in effective control of its territory, has military, police and civil authority in place, and makes serious efforts to protect its citizens from terrorist activities, the mere fact that it is not always successful at doing so will not be enough to justify a claim that the victims of terrorism are unable to avail themselves of such protection. [emphasis added]

[22] What is clear from that decision, and ignored by the Member in the statement above, is that it is not just efforts to protect that matter, but also the success of those efforts. However, despite this error, I am satisfied that the Member applied the proper test. He found that “the police and government officials are both willing and able to protect victims [emphasis added].”

[23] Nonetheless, I agree with the applicants that the Member's analysis of state protection is unreasonable because he does not address significant evidence that points to a contrary conclusion.

[24] The applicants pointed to and relied upon the Amnesty International Report entitled "Violent Attacks Against Roma in Hungary: Time to Investigate Racial Motivation." It summarizes its findings as follows:

Violent attacks against Roma, commonly believed to be racially motivated, are on the rise and have not been adequately investigated by the authorities.

Over a period of 18 months in Hungary, between January 2008 and August 2009, six Romani men, women and children were killed in a series of similar attacks in different parts of Hungary. Four men were arrested soon after the last killing. However, in the same period, local NGOs recorded over 40 separate attacks on members of the Romani community in Hungary.

At the same time, discriminatory attitudes towards Roma have been increasingly accepted in public discourse in Hungary since 2006. Abusive terms, initially used by far-right political groups, are now accepted in the mainstream media.

The report presents first-hand accounts from victims of these violent attacks that many in the community believe are motivated by racial prejudice. It highlights the Hungarian authorities' shortcomings in the investigation and prosecution of attacks against Roma and calls on them to ensure that members of the Romani community, as well as members of other groups, are protected from violence. It also recommends that the authorities improve the investigation and reporting of racially motivated crimes and ensure that their victims receive adequate support.
[emphasis added]

[25] Whether or not the report is sufficient to find that there is not adequate state protection remains for the Board; however, it is most certainly strong evidence that is arguably contrary to the Board's finding and ought to have been addressed by the Member.

[26] I further find that the Member was unreasonably dismissive of the applicants' concern that the police did nothing when the assaults were reported. He writes: "[I]t is not reasonable for the claimants to expect the police to seek out and arrest the claimants' persecutors when they did not provide their identities or any leads for the police." Aside from the fact that they did provide what information they had of one of the attackers, they also provided information as to where and when the attack occurred. The evidence was that the police did nothing at all. When Mr. Biro called two weeks later to see what was happening, they told him they were about to start an investigation.

[27] The applicants suggested, with considerable force, that if Canadian police reacted in this manner our citizens would be outraged. The Member's reaction: "[I]t would be unreasonable to expect in any society that all violent acts reported to police would result in immediate prosecution or conviction." I agree, but we are not speaking of prosecution or conviction, we are speaking of investigation. I do not agree that it is unreasonable to expect that the police, at a minimum, will take the report seriously and canvass the area for possible witnesses to the attack before two weeks have passed and the freshness of memories have faded.

[28] I find it perverse in the particular circumstances of this case for the Member to state that "there is no information to suggest that police were not making genuine and earnest efforts to investigate the claimant's allegation and apprehend the claimant's perpetrator" when the evidence was that they had done nothing at all. I further find it perverse for the Member to admonish Mr. Biro for saying that he "did not wait for the police investigation to be complete before he left his country" when there was evidence that no investigation had been undertaken and one could

reasonably view their statement two weeks later that they were about to investigate, to be insincere given the evidence in the record as to the number of attacks against Roma that are not investigated at all.

[29] The Court, for these reasons, finds the decision unreasonable and sets it aside.

[30] The applicants proposed the following for certification:

1. Are criminal acts of violence, directed at person(s), based on race or ethnicity always “persecution” and subject to a state protection analysis?
2. Or, put another way, can criminal acts of violence, based upon race or ethnicity ever constitute mere “discrimination”?

[31] It was submitted that these questions ought to be certified if the Court decided the application on the basis of the Board’s classification of criminal acts of violence suffered by the applicants, because they are Roma, as discrimination rather than persecution. The application was not decided on that basis and accordingly, the questions posed are not properly certified questions in this application.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is allowed, the applicants' claims for protection are remitted to be determined by a differently constituted panel, and no question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-9273-11

STYLE OF CAUSE: ATTILLA BIRO (A.K.A. ATTILA BIRO) ET AL v.
THE MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: June 21, 2012

**REASONS FOR JUDGMENT
AND JUDGMENT:** ZINN J.

DATED: September 25, 2012

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