Federal Court Cour fédérale

Date: 20130322

Docket: IMM-3925-12

Citation: 2013 FC 296

Ottawa, Ontario, March 22, 2013

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

GEZA MOLNAR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] for judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board [panel], dated March 28, 2012, whereby the panel refused the applicant's claim for protection as Convention refugee or person in need of protection under sections 96 and 97 of the Act on the basis that he had not rebutted the presumption of state protection.

Facts

[2] The applicant, his wife and his minor child, are citizens of Hungary. They fear persecution in Hungary due to their Roma origin. They came to Canada in November, 2009 and immediately claimed refugee protection. At the hearing before the panel, the applicant's claim for protection was disjoined from that of his family because the applicant's wife was hospitalized as a result of complications related to her pregnancy and she could not be present at the hearing. The decision under review concerns only the applicant himself.

[3] In support of his refugee claim, the applicant alleged that he was attacked by skinheads one day as he was walking down the street with his wife. They beat up the applicant and took their dog. The applicant alleged that he filed a complaint with the police but they told him that they could not do anything since the assailants could not be found. When questioned about this incident by the panel, the applicant stated at the hearing that during his visit to the police station no complaint or formal report of the incident was prepared and no further action or investigations that he knew of were taken by the police. He stated that the Hungarian police systematically refuse to take action in connection with complaints from members of the Roma community, unless they are paid by the victims.

[4] The applicant further asserted that the Hungarian police allowed the Hungarian Guard to march against the Roma. He stated that his family was threatened by them or by skinheads several times. He never reported those incidents to the police.

[5] The applicant alleged that he was previously assaulted by other students at school and that the school authorities always refused to intervene. He also testified that as a young man he experienced acts of aggression by two men who were bald.

Decision under Review

[6] The panel implicitly found that the applicant was credible with respect to the attacks against him, but stated that the determinative issue in this case was whether the applicant's subjective fear was objectively reasonable. Accordingly, the panel focused its analysis on whether there was adequate state protection in Hungary, whether the applicant availed himself of that protection, and whether he provided clear and convincing evidence of the state's inability to offer him adequate protection.

[7] In assessing the documentary evidence concerning the state protection available to Roma, the panel found that adequate protection was in fact available to the applicant, stating that "the Hungarian government has taken a number of legal and institutional measures to improve the situation of the Romani minority" and that according to the Open Society Institution (OSI), "Hungary has one of the most advanced systems of minority protection in the region."

[8] The panel conducted a lengthy review of the National Documentation Package [NDP] evidence on Hungary, dated April 20, 2011. The panel scrutinized the documentary evidence with respect to a number of institutions within the state apparatus that have been put in place to ensure Romani integration and provide support to Roma victims of discrimination, including the Roma Integration Department within the Ministry of Social Affairs and Labour, the Council of Roma

Integration, the Inter-Ministerial Committee on Roma Affairs, and the Parliamentary Commissioner for National and Ethnic Minority Rights (Minorities Ombudsman), which receives complaints and aims to investigate any violation of national or ethnic rights. The documentary evidence also indicated that independent organizations, including the Equal Treatment Authority and the Independent Police Complaints Commission, have been established by the Hungarian government and tasked to receive and investigate complaints of discrimination against public bodies, such as the police, or in the fields such as education, employment or access to social services. The panel also reviewed a large number of other avenues of recourse against police misconduct or discrimination in general, as reported in Item 7.2: United States (US). 4 May 2009. Overseas Security Advisory Council (OSAC). "Hungary: 2009 Crime and Safety Report".

[9] Suffice it to note that not all of the authorities and organizations referred to in the panel's reasons are relevant to the applicant's allegations and the basis of his refugee claim. The most relevant of these, in the applicant's particular situation, is perhaps the Independent Police Complaints Board which is an independent body charged to review complaints of police action which violate fundamental rights, police corruption or inaction in response to crimes (Item 10.2: Response to Information Request HUN103566.E. 22 September 2010).

[10] The panel acknowledged that there is information in the documentary material indicating that Roma face discrimination in Hungry. Although no analysis or reference to this conflicting NDP information is found in the reasons, the panel stated that, "weighed against the persuasive evidence that indicates that Hungary candidly acknowledges this problem and is making serious efforts to rectify the discrimination and problems that exist" and that "in canvassing the documentary

evidence as a whole, the issue of corruption and deficiencies are being addressed by the state of Hungary."

[11] Further in the reasons, the panel acknowledged that the documentary evidence contains information regarding reported cases of acts of violence carried out against the Roma community by extremists, including the Hungarian Guard and skinheads. The panel also acknowledged that the evidence gives an account of instances of police inaction in emergency situations, ineffective response and negligence in conducting investigations. The panel also noted, without extensive analysis or reference to the source of the information, that there is evidence of an escalation in the number of hate speeches being made against the Roma community by members of extremist groups and politicians.

[12] Moreover, the panel found that the applicant had not made diligent efforts, nor did he take all reasonable steps in accessing the protection of police authorities in Hungary. The panel therefore concluded that it was provided with insufficient reliable, probative and relevant evidence by the applicant establishing, on a balance of probabilities, that adequate state protection would not reasonably forthcoming to the applicant from Hungarian authorities if he were to face threats of violence or actual violence in Hungary, on account of his ethnic origin.

[13] The panel concluded that there was no persuasive evidence before it to establish a systematic pattern of conduct on the part of the Hungarian law enforcement authorities and government that demonstrated a lack of state protection for Romani victims of ethnic violence. The panel found that the applicant had failed to rebut the presumption of state protection and thus failed

to satisfy the burden of establishing that he was a Convention refugee or a person in need of protection under sections 96 and 97 of Act.

Issue and Standard of Review

[14] The only issue raised in this application for judicial review is whether the panel erred in denying the applicant's claim based on the existence of adequate state protection.

[15] In his written arguments, the applicant takes issue with the panel's analysis of what constitutes state protection, which in turn goes to the panel's interpretation of evidence. While neither party addressed the question of the applicable standard of review in their written submissions, these issues involve questions of mixed fact and law reviewable against the standard of reasonableness (*Lozada v Canada (Minister of Citizenship and Immigration)*, 2008 FC 397 at para 17, [2008] FCJ No 492; *Carillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 at para 36, [2008] FCJ No 399 [*Carillo*]; *Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171 at para 38, [2007] FCJ No 584 [*Hinzman*]). Reasonableness is concerned with "the existence of justification, transparency and intelligibility in the decision-making process" and the reviewing court should intervene where the decision in question falls outside the range of possible, acceptable outcomes defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190).

Analysis

[16] The principles regarding state protection are well-established. There is a presumption that every democratic state can protect its own citizens. As such, the onus is on the applicant to rebut

this presumption and prove the state's inability to ensure protection through clear and convincing evidence (*Canada (Attorney General) v Ward* [1993] 2 SCR 689 at para 50 [*Ward*]). In *Cosgun v Canada (Minister of Citizenship and Immigration)*, 2010 FC 400 at paras 45-52, [2010] FCJ No 458, Justice Crampton noted that following the Federal Court of Appeal's decision in *Hinzman*, above, some cases characterized the test in terms of the ability of a state to provide "effective" protection while others viewed it as the ability of the state to provide "adequate" protection. Having reviewed the relevant jurisprudence, the Court concluded that "the law is now well-settled that the appropriate test for assessing state protection is whether a country is able and willing to provide *adequate* protection."

[17] In the matter at bar, the applicant raises four grounds of review, all of which are related to the panel's conclusion that state protection in Hungary is available for the applicant and that the applicant did not "adduce relevant, reliable and convincing evidence which satisfies the trier of fact on the balance of probabilities that the state protection is inadequate." (*Carrillo*, above, at para 30).

[18] First, the applicant submits that the panel erred in finding that he could have access to adequate state protection by failing to properly consider, in accordance with the principles established in *Sow v Canada (Minister of Citizenship and Immigration)*, 2011 FC 646 at paras 9-13, [2011] FCJ No 824, the quality of the institutions providing that protection, the adequacy of state protection at an operational level, and the treatment by the state of persons similarly situated to the applicant (*Zaatreh v Canada (Citizenship and Immigration)*, 2010 FC 211 at para 55, [2010] FCJ No 247).

[19] Second, the applicant asserts that the panel erred in equating state protection with investigation by police and prosecution of offenders, and by failing to consider the state's duty to prevent crimes against Roma. In *Tobar v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 798 at para 27, 174 FTR 80, Justice Rouleau held that "Governments are in fact required to prevent offences involving violence against women, to investigate such acts and to punish them." Thus, the applicant argues that the sharp rise of hate speeches and racist demonstrations against Roma and the continuing acts of racially motivated violence are evidence of the state's failure to prevent persecution and should be seen as an indication of inadequate protection.

[20] Third, the applicant submits that the panel found that adequate state protection existed based on the preponderance of the objective evidence but failed to explain why it preferred the evidence on which it relied to that pointing to the opposite direction. The applicant argues that this conclusion is simply based on a quantitative assessment, which consists of comparing the amount of evidence pointing to the adequacy or not of state protection, rather than a qualitative assessment with an emphasis on the most compelling and most recent evidence. Yet, according to the jurisprudence, it is an error of law for the panel to selectively rely upon one documentary evidence without referring to the evidence which supports the applicant's position, even though it is not required to refer to all of the documentary evidence before it (*Orgona v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 346 at para 31, [2001] FCJ No 574 [*Orgona*]).

[21] Forth, the applicant is of the view that the panel erred in not addressing the evidence that racist hate speeches and marches leading to violence against Roma have increased recently in

Hungary, and by failing to consider the impact of this evidence in the applicant's particular circumstances in terms of state protection.

[22] Having carefully reviewed the lengthy reasons provided in support of the decision under review, I agree with the applicant that the panel erred in its assessment of the documentary evidence in more than one respect. As a result of these errors, I find that the reasonableness of its conclusion that the applicant failed to rebut the presumption of state protection on a balance of probabilities is seriously affected, even if the panel's assessment of the Hungarian government's efforts to improve the situation of the Roma as objectively equating adequate protection could be found reasonable (*Lakatos v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1070, [2012] FCJ No 1152).

[23] In *Perez Mendoza v Canada (Minister of Citizenship & Immigration)*, 2010 FC 119, para 33, [2010] FCJ No 132, Justice Lemieux stated that according to *Ward*, "the kind of evidence that may be adduced to show that the state protection would not have been reasonably forthcoming includes: testimony of similarly situated persons, individual experience with state protection and documentary evidence." The applicant presented all of these elements to rebut the presumption against him (Amnesty International Report, Violent Attacks against Roma in Hungary, Time to Investigate Racial Motivation, 2010; ECRI Report on Hungary, 2009). However, the panel erred in law by refusing to engage in a meaningful analysis of the evidence that supported the applicant's position. Although I should presume that the panel considered all of the documentation before it (*Hassan v Canada (Minister of Employment and Immigration)* (FCA), [1992] FCJ No 946; *Florea v Canada (Minister of Employment and Immigration)* (FCA), [1993] FCJ No 598), in light of Justice

MacKay's decision in *Orgona*, above, I find it insufficient and unreasonable for the panel to paraphrase such significant evidence, without directly referring to it and without including a more personalized analysis of that evidence with a view to the applicant's situation. In the circumstances, I am unable to assess whether or not the panel ignored relevant evidence.

[24] Providing a case-specific analysis while dealing with opposing evidence is even more compelling when the evidence, if reasonably construed, directly contradicts the panel's findings (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425). Accordingly, I agree with the applicant that the panel erred by failing to address and deal with the evidence of the recent rise of hate speeches and racist demonstrations which have lead to increased instances of acts of violence against Roma. This recent evidence (Amnesty and ECRI reports) was an important part of the applicant's case as it contradicts the adequacy of state protection in the applicant's circumstances.

[25] In *Lee v Canada (Minister of Citizenship and Immigration)*, 2009 FC 782 at para 12, [2009] FCJ No 950, the Court held that evidence demonstrating that the incidence of domestic violence in South Korea had increased markedly in recent years could not be ignored by a PRRA officer as such evidence could arguably indicate that measures taken to combat the problem of domestic violence in that country were not working adequately.

[26] Needless to say that the operational adequacy of state protection is best determined in light of the most recent evidence put before the panel, rather than through generalities based on evidence emanating from state authorities about legislative and procedural measures that the government has,

or has attempted to, put in place. On this last point I fully concur with Justice Russell's remarks in *Kemenczei v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1349 at paras 58-59, [2012] FCJ No 1457, a case which was decided on the same evidentiary record as the one before me:

> There was before the RPD a 2008 ECRI Report on Hungary which, at paragraphs 67 and 68, refers to specific reports of violence against Roma, "including some incidents of police brutality against Roma," and which suggests that the Hungarian authorities need to do a better job "to introduce systematic and comprehensive monitoring of all incidents that may constitute racist violence..."
>
> The suggestion here is clear that the Hungarian authorities either have no idea of the extent of the violence that Roma people are subjected to, or have deliberately chosen not to monitor it. This kind of evidence brings into question the operational adequacy of any legislative and procedural framework that Hungary may have introduced to deal with violence against Roma people. Yet the RPD in this case fails to address this issue and does not attempt to grapple with the need to consider "whether the state, through the police or other authorities, is able and willing to effectively implement that framework," which the RPD acknowledges it had to do when addressing state protection in Hungary.

[27] This application for judicial review is granted and the matter is referred back to the Refugee Protection Division for reconsideration by a different member. The parties agree there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed, and the matter is remitted to a different panel of the Refugee Protection Division for re-determination; and,
2. No serious question of general importance is certified.

"Jocelyne Gagné"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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