Federal Court  Cour fédérale

Date: 20130607

Docket: IMM-9156-12

Citation: 2013 FC 620

Ottawa, Ontario, June 7, 2013

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

PETER KALOCSAI
KATALIN KALOCSAINE
HORVATH PETER KALOCSAI (JR)

Applicants

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 (the Act) for judicial review of a decision of the Immigration and Refugee Board, Refugee Protection Division (the Board), dated August 13, 2012, wherein the applicants were determined to be neither Convention refugees within the meaning of section 96 of the Act nor persons in need of protection as defined in subsection 97(1) of the Act.

[2] The applicants request that the Board's decision be set aside and the application be referred back to the Board for redetermination by a different panel.

Background

[3] The applicants are Hungarian citizens of Roma ethnicity. They allege persecution on the basis of this ethnicity.

[4] On May 20, 2010, Katalin Horvath Kalocsai, wife of the principal applicant, Peter Kalocsai, narrowly avoided becoming a victim of rape at the hands of men using racist insults.

[5] On April 22, 2011, the principal applicant was badly beaten in an attack by skin heads.

[6] On another occasion, the family was chased by racists and escaped unharmed.

[7] The principal applicant arrived in Canada on October 4, 2011 and sought protection with his father, mother, sister, brother, wife and son. His parents and siblings were separated from the claim of his immediate family.

Board's Decision

[8] The Board made its decision on August 13, 2012. The Board briefly listed the applicants' allegations, accepted their nationality and turned to the decisive issue of state protection.

[9] The Board accepted that the Roma community in Hungary faced violent attacks, racially motivated crimes and were discriminated against in almost all fields of life. He noted the high unemployment rate and a recent law reducing unemployment benefits. The Board recited the principles of state protection, including the presumption that states are capable of protecting their citizens and the applicants' burden to rebut that presumption.

[10] The Board considered what steps the applicants had taken to access state protection. After an assault on the principal applicant's wife on June 20, 2010, they waited two weeks to report the incident to police. She had testified that the police did unsuccessfully try to find the attackers and that she had not pursued the issue with the police afterwards as she wanted to move on.

[11] After another assault on April 22, 2011, the principal applicant had testified he did not call the police because nothing had been done by the police after the 2010 assault. The principal applicant did not report an incident in January 2010 when he was chased by armed men for the same reason. The Board concluded the applicants failed to vigorously pursue all opportunities for state protection. There was insufficient information suggesting the police did not make a genuine and earnest effort; no police report was provided.

[12] The remainder of the Board's decision is concerned with country conditions evidence. The Board considered the applicants' claim that the new Hungarian constitution was not favourable to minority rights, but concluded this was only in the area of rights for sexual minorities and did not concern Hungary's protection of Roma. The Board preferred a US Department of State (DOS)

report indicating that Hungary is a democracy, to the applicants' newspaper articles indicating Hungary was not a western-style democracy.

[13] The Board's general conclusion on the country conditions evidence was that while there was widespread reporting of incidents of intolerance against Roma individuals, there is adequate state protection for Roma who are victims of crime and that Hungary is making serious efforts to address those problems.

[14] The Board catalogued minority protection legislation and noted that the Hungarian Guards had been banned for inciting resentment against Roma. The Board discussed the complaints mechanism for victims of police abuse and government bodies charged with preventing discrimination. The Board acknowledged the central government's efforts were not always implemented at the local level. The Board identified relevant European institutions that Hungary was a member of.

[15] The Board concluded that the applicants had not rebutted the presumption of state protection and therefore their claim did not fall under sections 96 or 97 of the Act.

Issues

[16] The applicants submit the following points at issue:

1. Did the Board err by failing to reasonably assess the evidence as a whole and not having regard for the totality of evidence?

2. Did the Board err by failing to assess the issue of persecution and the availability of state protection?

3. Did the Board err by selectively relying on the testimony of the applicants?

4. Did the Board err by not assessing all major events that the applicants mention in their personal information forms and oral testimony?

[17] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Did the Board err in rejecting the applicants' claim?

3. Did the Board violate procedural fairness?

Applicants' Written Submissions

[18] The applicants argue that the Board erred by not giving sufficient reasons for preferring the Board's evidence over that of the applicants and also erred by requiring corroboration in the form of police reports. The evidence of lack of state protection was not considered by the Board and the Board did not consider the ineffectiveness of the measures described as serious efforts.

[19] Concerning the principal applicant's wife's failure to pursue her police complaint, the Board did not consider that she was 15 years old at the time. She never stated that the police tried to find the attacker; she stated she hoped the police would do so. The principal applicant had testified in relating an attack on his parents in August 2010, that the police had allegedly started an investigation, but never testified they had actually done so. There was an interpretation error

concerning the word "allegedly". The principal applicant testified that concerning the assault against him on April 22, 2011, he did not call the police because nothing had been done following the attacks on his wife and his parents. He testified the police themselves were racists.

[20] The applicants argue the Board completely ignored the testimony of the principal applicant concerning the 2007 attack on his father by the police. He was seriously beaten and a gun was pushed against his head. This was reported to the police authority and to the prosecutor's office but there was no investigation. The police laughed at the principal applicant's father. This shows state protection was inadequate. The Board cannot ignore this evidence. The Board also failed to mention evidence of the 2008 attack on the principal applicant's parents by the Hungarian Guard with a taser, which resulted in his father being hospitalized. Another omitted incident was the 2009 police intimidation of the principal applicant on the basis of his ethnicity.

[21] The applicants rely on statements from various country conditions documents concerning the treatment of Roma in Hungary to argue state protection is inadequate. They argue this evidence was ignored. The applicants also cite decisions of this Court quashing Immigration and Refugee Board findings that state protection for Roma in Hungary is adequate.

[22] Finally, the applicants argue their claim being separated from their extended family is a breach of procedural fairness as it deprived them of the testimony of the principal applicant's father.

Respondent's Written Submissions

[23] The respondent argues the applicable standard of review is reasonableness and that the Board's assessment of state protection was reasonable.

[24] The respondent argues the Board did not mischaracterize the level of democracy in Hungary, as the DOS report only articulated "concerns", not a demonstration that democracy was low.

[25] On state protection, the respondent notes the Board is presumed to have considered all evidence before it. The Board acknowledged incidents of intolerance, discrimination and persecution of Roma. The Board assessed how the Hungarian state was able to protect the applicants, which is more pertinent than Hungary's general ability to protect victims of crimes.

[26] The respondent argues the Board reasonably concluded the applicants had failed to seek state protection. On the sole occasion that they approached the police, when the principal applicant's wife was attacked, the police were willing and able to provide assistance. Even if the alleged police response to the attack on the principal applicant's father was true, it occurred three years before the police showed their willingness to assist in the attempted rape.

[27] The respondent argues the Board correctly applied the test for state protection. Finally, the applicants never raised an objection before the Board to their claim being separated from the rest of their family's claim. They therefore cannot rely on such a position now.

Analysis and Decision

[28] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[29] It is established jurisprudence that credibility findings, described as the "heartland of the Board's jurisdiction", are essentially pure findings of fact that are reviewable on a reasonableness standard (see *Lubana v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 at paragraph 7, [2003] FCJ No 162; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 46, [2009] 1 SCR 339; *Demirtas v Canada (Minister of Citizenship and Immigration)*, 2011 FC 584 at paragraph 23, [2011] FCJ No 786). Similarly, the weighing of evidence and the interpretation and assessment of evidence are reviewable on a standard of reasonableness (see *Oluwafemi v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1045 at paragraph 38, [2009] FCJ No 1286).

[30] In reviewing the Board's decision on the standard of reasonableness, the Court should not intervene unless the Board came to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 47; *Khosa* above, at paragraph 59). As the Supreme Court held in *Khosa* above, it is

not up to a reviewing court to substitute its own view of a preferable outcome, nor is it the function of the reviewing court to reweigh the evidence (at paragraph 59).

[31] It is trite law that the appropriate standard of review for issues of procedural fairness is correctness (see *Khosa* above, at paragraph 43). No deference is owed to decision makers on these issues (see *Dunsmuir* above, at paragraph 50).

[32] **Issue 2**

Did the Board err in rejecting the applicants' claim?

The Board is presumed to have considered all of the evidence before it (see *Oprysk v Canada (Minister of Citizenship and Immigration)*, 2008 FC 326 at paragraph 33, [2008] FCJ No 411). However, the more important the evidence that is not mentioned, the more willing a court may be to infer from silence that the tribunal made a finding of fact without regard to the evidence (see *Pinto Ponce v Canada (Minister of Citizenship and Immigration)*, 2012 FC 181 at paragraph 35, [2012] FCJ No 189).

[33] Before the Board, the applicants argued that part of the reason they did not have faith in the police's willingness to investigate the crimes against them was because the principal applicant's father had been attacked by the police themselves. As summarized by their counsel in his submissions to the Board:

> In particular the male claimant has testified to some of the previous attacks that has [*sic*] took place, or that has [*sic*] happened to his parents and family. And their particular experience with the police. In particular, the male claimant submitted that in 2007 May his father was actually attacked by two police officers and his actual attack for reasons of ethnic background and after attack his father tried to go to

> the police station to report the incidents and the police were laughing at him and dismiss his claim. And his father also tried to go to a higher authority for help and they did not believe him as well.

[34] This evidence is highly relevant to the question of state protection. The respondent's counsel argues that since the police were more helpful three years later in responding to the attempted rape, the applicants should have had more faith in the police. This was not, however, the reasoning of the Board. The Board's reasons completely omit any mention of the persecution of the principal applicant's parents on this and other occasions or the police's failure to protect them.

[35] The Board concluded that the applicants had not taken all steps to access state protection in Hungary. Coming to this conclusion without analyzing the evidence concerning the parents' experience with the police is an omission that rises to the level described in *Pinto Ponce* above. It therefore renders the Board's decision unreasonable.

[36] Given my conclusion on this point, I need not consider the matter of procedural fairness.

[37] The application for judicial review is therefore granted and the matter is referred to a different panel of the Board for redetermination.

[38] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed and the matter is referred to a different panel of the Board for redetermination.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

***Immigration and Refugee Protection Act*, SC 2001, c 27**

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.
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 themself of the protection of each of those countries; or	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) 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.	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.
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	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) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(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,

(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) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

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

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

FEDERAL COURT

SOLICITORS OF RECORD

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