Federal Court  Cour fédérale

Date: 20140627

Docket: IMM-3230-13

Citation: 2014 FC 628

Ottawa, Ontario, June 27, 2014

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

GYULA KANTO, GYULANE KANTO AND GYULA KANTO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) of a March 27, 2013 pre-removal risk assessment (PRRA) by a Senior Immigration Officer (the Officer) finding the applicants to not be subject to a risk of persecution or in need of protection.

I. FACTS

[2] The applicants are Roma citizens of Hungary. The principal applicant was a Roma activist and professional musician in Hungary. He entered Canada along with his wife and son on September 15, 2009, and filed refugee claims on the same day.

[3] The applicants' refugee claims were rejected on September 2, 2011. The Refugee Protection Division (the RPD) determined that the applicants lacked credibility and that there is adequate state protection in Hungary.

[4] The applicants filed an application for judicial review on September 20, 2011 and this was denied on September 5, 2012. The Court upheld the RPD's decision on credibility, though found its state protection analysis erroneous.

[5] The applicants submitted their PRRA applications on November 19, 2012 along with new evidence indicating that their lives are still at risk in Hungary and that the situation for Hungarian Roma has become increasingly precarious and dangerous since their claim for refugee protection was denied.

II. THE DECISION UNDER REVIEW

[6] The Officer rejected the applicants' PRRA application, concluding that the applicants had not demonstrated that they would be subject to a risk of persecution, danger of torture, or a risk to life if returned to Hungary. She found that the applicants had provided insufficient evidence to

demonstrate that the alleged persecutory incidents took place. She noted that the applicant did not indicate that the incidents were reported to Hungarian authorities and did not provide a copy of a police report. The Officer also gave little weight to the threatening notes and the sister-in-law's letter because the evidence came from a source close to the applicant, and the notes were not signed, dated, or specifically addressed to the applicant or his family members.

[7] The Officer also assigned little weight to the applicant's statement that his daughter, who is not included in the PRRA application, was physically assaulted by a Guardsman in mid-November 2012 due to the fact that she is homosexual and of Roma descent. Although the applicant had submitted a medical report dated 13 November 2012 indicating that his daughter had suffered from injuries due to an assault, he had provided little evidence to demonstrate that the attack was racially motivated.

[8] While it was accepted that the applicant was a Roma activist and professional musician, he had provided insufficient evidence to demonstrate that he and his family members were and will be personally targeted for these reasons.

[9] The Officer recognized that racial violence is an existing problem in Hungary and that right-wing extremist groups exist, however the authorities in Hungary have taken serious action to combat the problem. Country condition evidence indicated that the authorities in Hungary have the ability to prosecute perpetrators and that although state protection is not perfect, the Hungarian government has made serious efforts and demonstrated its ability to confront the problem. She also assigned little weight to the documentary evidence submitted detailing the

discrimination and violence against the Romani population in Hungary, finding that the applicants had provided insufficient corroborative evidence to demonstrate that they will be personally targeted upon their return.

III. ISSUES

1. Did the Officer reject credible documentary evidence?
2. Did the Officer err in her state protection analysis?
3. Did the Officer fail to conduct a hearing?

IV. STANDARD OF REVIEW

[10] It is well recognized that the first two issues relating to the Officer's evaluation of evidence and the availability of state protection are to be assessed on a standard of reasonableness (*Radi v Canada (Minister of Citizenship and Immigration)*, 2014 FC 306 at para 9; *Shaikh v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1318 at para 16).

[11] The jurisprudence on the standard of review applicable to an Officer's failure to conduct an oral hearing in the context of a PRRA decision is mixed, as reviewed by Justice de Montigny in *Ponniah v Canada (Minister of Citizenship and Immigration)*, 2013 FC 386 at para 24 as follows:

> The jurisprudence of this Court is divided on the standard of review for oral hearings under paragraph 113(b). I recently reviewed this question in *Adetunji v Canada (Citizenship and Immigration)*, 2012 FC 708, and I can do no better than repeat what I wrote there (at para 24):

> That being said, there is a controversy in this Court as to the standard of review to be applied when reviewing an officer's decision not to convoke an oral hearing, particularly in the context of a PRRA decision. In some cases, the Court applied a correctness standard because the matter was viewed essentially as a matter of procedural fairness (see, for example, *Hurtado Prieto v Canada (Minister of Citizenship and Immigration)*, 2010 FC 253 (available on CanLII); *Sen v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1435 (available on CanLII)). On the other hand, the reasonableness [standard] was applied in other cases on the basis that the appropriateness of holding a hearing in light of a particular context of a file calls for discretion and commands deference (see, for example, *Puerta v Canada (Citizenship and Immigration)*, 2010 FC 464 (available on CanLII); *Marte v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 930, 374 FTR 160 [*Marte*]; *Mosavat v Canada (Minister of Citizenship and Immigration)*, 2011 FC 647 (available on CanLII) [*Mosavat*]). I agree with that second position, at least when the Court is reviewing a PRRA decision.
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> See also: *Rajagopal v. Canada* (*Citizenship and Immigration*), 2011 FC 1277; *Silva v. Canada (Citizenship and Immigration)*, 2012 FC 1294; *Brown v. Canada (Citizenship and Immigration)*, 2012 FC 1305.

[12] I find Justice de Montigny's reasoning persuasive and find that the standard of review applicable to the third question is also that of reasonableness.

V. ARGUMENTS AND ANALYSIS

A. Did the Officer reject credible documentary evidence?

[13] The applicants allege that the Officer's treatment of the evidence submitted including threatening notes, the applicant's sister-in-law's letter as well as the medical report was unreasonable and perverse.

[14] I agree. While it is well recognized that it is up to the Officer to weigh the evidence, I find that the Officer here erroneously discounted the probative value of the evidence submitted by the applicants for reasons that do not withstand scrutiny.

[15] The Officer assigned little weight to the threatening notes since they were not signed, dated, or specifically addressed to the applicants, since they "provide little information", and since the applicant did not indicate that the incidents were reported to Hungarian authorities and did not submit a police report. It is not realistic to expect that authors of death threats would sign and date them. These considerations were not relevant to the probative value of the notes. The Officer's statement that the notes do not specifically address the applicants is not supported by the record where one of the letters directly references the sexual orientation of the applicant's daughter. Further, the fact that the notes were not reported to police is irrelevant to an evaluation of their probative value, particularly considering that this Court has found before in the context of Roma in Hungary that "where persecution is widespread and indiscriminate, a failure to report mistreatment to the authorities is of doubtful evidentiary significance" (*Muntyan v Canada (Minister of Citizenship and Immigration)*, 2013 FC 422 at para 9).

[16] As for the Officer's rejection of the sister-in-law's letter, this Court has recognized on several occasions that it is unreasonable to assign a low probative value to evidence simply because it comes from an applicant's family members (*Ugalde v Canada (Minister of Citizenship and Immigration)*, 2011 FC 458 at paras 26-28; *Ahmed v Canada (Minister of Citizenship and Immigration)*, 2004 FC 226 at para 31). In R. v *Laboucan*, [2010] 1 S.C.R. 397 cited by the respondent, the Supreme Court of Canada specifically warns, "A trier of fact, however, should not place undue weight on the status of a person in the proceedings as a factor going to credibility". The Officer here found that there was no credible evidence of the incidents alleged by the applicants, stating, "as the evidence comes from a source close to the applicant, it does not have a high probative value and I have, therefore, assigned little weight to it". I find the Officer's reasoning flawed. It is logical that the sister-in-law would be best placed to detail the instances of persecution that she observed or that had happened to her and it was unreasonable for the Officer to reject this evidence simply because of her relation to the applicant.

[17] Lastly, I find that the Officer's treatment of the medical report submitted was similarly flawed. The Officer assigns little weight to the applicant's statement that his daughter had been attacked since he had provided little evidence to demonstrate that the attack was racially motivated. It is unreasonable and unrealistic to expect that a medical report would give evidence of the motivation for an attack. In *Adeoye v Canada (Minister of Citizenship and Immigration)*, 2012 FC 680 at para 10 Justice Mosley found unreasonable similarly flawed discounting of medical evidence:

> Some of the officer's conclusions appear to be wrong on the face of the record. The letter from the medical centre, for example, does corroborate the applicant's narrative to the extent that he claims to have suffered mistreatment, contrary to the officer's finding. And

> it is unreasonable to expect that a medical report would go further to identify the aggressor.

[18] The Officer again made an unreasonable finding when she stated that the applicants had presented insufficient evidence to demonstrate that they will face discrimination that will amount to persecution. The Officer accepted that the applicant was a Roma activist and professional musician, and that this may make them more recognizable and may place them at a "high risk of racial discrimination". Given the large quantity of documentary evidence before her detailing the extent of the discrimination faced by Roma in Hungary and the fact that a PRRA application deals with forward-looking risk, it was incumbent upon the Officer to conduct an analysis and provide reasons for her finding that in the case of the applicants, what the Officer herself described as a high risk of discrimination wouldn't amount to persecution. As Justice Marceau of the Federal Court of Appeal explained in *Sagharichi v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 796 (FCA) at para 3:

> …the dividing line between persecution and discrimination or harassment is difficult to establish…It remains, however, that, in all cases, it is for the Board to draw the conclusion in a particular factual context by proceeding with a careful analysis of the evidence adduced and a proper balancing of the various elements contained therein.

The Officer was required to weigh the situation experienced by the Roma as supported in the documentary evidence with the evidence of the applicants' personal situation (*Kovacs v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1003 at para 83). She unreasonably failed to do so.

B. Did the Officer err in her state protection analysis?

[19] The applicants submit that the Officer erred in relying on the "efforts" of the Hungarian state to enact laws and policies in the face of evidence that such laws and policies have not been effective. She also misconstrued the objective documentary evidence and relied on Hungary's highly functioning democracy, the fact that Hungary is in "effective control of its territory", and that it has a "functioning judiciary", despite overwhelming evidence to the contrary.

[20] Again, I agree. I find that the Officer's state protection analysis does not withstand scrutiny. The Officer was tasked with evaluating what state protection currently exists for Roma in Hungary. As I have previously stated and as has since been well recognized in the jurisprudence of this Court, it is the actual operational level of state protection which must be considered and not merely efforts taken by the state to provide protection (*Lopez v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1341 at paras 19-20; *Molnar v Canada (Minister of Citizenship and Immigration)*, [2003] 2 FC 339 at para 33; *Hercegi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 250 at para 5). This is particularly important when, as is the case here, the documentary evidence shows that the level of democracy is at an all time low (*Katinski v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1326 at para 17).

[21] In the present case the Officer erroneously focused on the efforts of the Hungarian government in protecting its Roma citizens rather than the result of these efforts. She noted specifically that "the authorities in Hungary have taken serious action to combat the problem" and that "the government has made serious efforts and demonstrated its ability to counter the

problem". This Court has repeatedly found an Officer's reliance on efforts or good intentions on the part of the Hungarian government to be an unreasonable approach to evaluating state protection for Romani people (*Katinszki v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1326 at paras 14 to 18; *Kemenczei v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1349 at paras 57 – 60; *Orgona v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1438 at paras 5-16).

[22] The Officer grounds her conclusion of the availability of state protection on a series of selectively chosen passages that clearly misconstrue the objective documentary evidence. For example, the Officer refers to the US Department of State 2011 Human Rights Report detailing the intimidation of the Roma community in the town of Gyongyospata by far-right extremists over a period of two months. She noted that the Interior Minister visited the town and ordered increased police presence, though failed to include the information contained in the next sentences of the reports detailing that of the eight extremists ultimately arrested and charged with disorderly conduct, five were acquitted.

[23] The Officer also cites the 2012 Amnesty International Annual Report and the IRD Research Directorate Document HUN104110.E to show that the Hungarian government has adopted legislation targeting violence based on ethnic or racial discrimination. However, this again is not an accurate reflection of the evidence. The US Department of State 2011 Human Rights Report details the complaints of NGOs that courts have increasingly used the provision of the criminal code on racism to convict Roma rather than protect them. The HUN104110.E Report points to the problem that lawmakers did not include bias motivation for crimes against

property and harassment in the Penal Code amendments, thus rendering the modifications insufficient. The Officer fails to mention this contradictory evidence and the excerpts included do not represent a fair or balanced reading of the evidence.

[24] Further, the Officer cited from this same HUN104110.E Report the words of the Hungarian Minister of state for government communications who stated that "[e]vents on the ground show [that the] policies are working" and the "last two or three years have shown a decline in violence". However, she failed to include the very next sentence in the report which directly contradicts this observation: "However, in a report on his mission to Hungary in May 2011, the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance noted that according to several interlocutors, racism against Roma is prevalent within public institutions, notably the police and judicial system." The Officer then again cited to this same report to find that since in one out of twenty-two cases involving Roma victims of violence the perpetrator was convicted and in twelve prosecution was pending, "this demonstrates that the authorities in Hungary have the ability to prosecute perpetrators and provide protection to the Romani population." This is an unfair reading of the documentary evidence, as the report in fact provides these statistics to support the conclusion that "state authorities are not effective in responding to violence against Roma". The Officer's treatment of the objective documentary evidence cannot be said to be reasonable, as she has selectively chosen passages that misconstrue the information before her. As such, the decision cannot be said to be justified or transparent, and it does not fall within the range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[25] In light of my findings on the first two issues, I find it unnecessary to deal with the third.

[26] For these reasons, this application is allowed and the matter is remitted to be determined by a differently constituted panel.

JUDGMENT

THIS COURT'S JUDGMENT is that:

This application is allowed and the matter is remitted to be determined by a differently constituted panel.

"Danièle Tremblay-Lamer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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