Federal Court  Cour fédérale

Date: 20140722

Docket: IMM-1362-13

Citation: 2014 FC 723

Ottawa, Ontario, July 22, 2014

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

KRISZTIAN VITALIS
LAJOS VITALIS
LAJOSNE VITALIS

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is a judicial review application of a decision of the Refugee Protection Division [RPD] of January 4, 2013, made pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. As with many cases involving Hungarian citizens of Roma ethnicity, these applicants claim the protection of sections 96 and 97 of the IRPA.

[2] The applicants raised two issues before this Court. First, the assessment of the evidence by the RPD was deficient to the point of being unreasonable. Second, the test for state protection was misunderstood in the view of the applicants. Given the conclusion that the matter has to be sent back for a redetermination because of the way the credibility was assessed, it will not be necessary to deal with the second issue raised.

I. Standard of Review

[3] It is not disputed that the standard of review on credibility issues is that of reasonableness, which carries a measure of deference that will not be easy to displace in most cases. That is because "[i]n judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process." To the extent a "decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law", a reviewing court will not intervene as it would substitute its view of the matter for that of the decision-maker who has the expertise in the area (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, para 47 [*Dunsmuir*]). A judicial review seeks to control the legality of an administrative tribunal's decision, not the discretion exercised.

[4] I am particularly alert to the admonition of the Supreme Court of Canada that "[r]eviewing judges should pay "respectful attention" to the decision-maker's reasons, and be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful." (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708, para 17)

II. Facts

[5] In a short decision of barely 18 paragraphs, the RPD found against the applicant on both the credibility of the alleged persecution and the availability of state protection in Hungary. Having acknowledged at paragraph 5 that the central issue was credibility, the decision-maker deals in two pages with the issue.

[6] Basically, the principal applicant stated that in the five years preceding their departure (the other two applicants are the principal applicant's parents) from Hungary, on May 6, 2011, he reported to the police 10 incidents involving them, but principally the principal applicant. No action was taken by the authorities; indeed no report of the incidents was even prepared by the authorities.

[7] It seems that the situation with this family worsened from the 80's where there were acts of discrimination to the 2000's where acts of violence intensified. The principal applicant testified that after the 2010 election, he and his parents realized that positive change was elusive. It is an incident involving the throwing of a Molotov cocktail against their house, in February 2011, that was the final trigger of their decision to leave their country. That incident convinced them to leave Hungary to seek refuge in Canada.

[8] The RPD made its credibility findings with respect to a few of the 10 incidents, over the last five years, about which the principal applicant testified that he had complained to the police. Actually, the principal applicant's father would have complained many more times, but these do not appear to have been the subject of much exploration by the RPD.

[9] The credibility findings were based on peripheral considerations, some would say insubstantial pretext, in an attempt to discount the importance or significance of those events.

[10] The first credibility finding is in relation to the Molotov cocktail attack on February 5, 2011, against the house occupied by the applicants. The RPD did "not believe the event took place as described by the claimants". The reasons given for that conclusion is that the principal applicant testified that he did not see anyone, as he did not look outside for fear that another Molotov cocktail might be thrown. This portion of his testimony is said to contradict another portion where the principal applicant stated that he had seen broken glass on the ground and gasoline splashed against the wall. The RPD also took issue with the statement of the principal applicant that he did not do anything immediately after the Molotov cocktail was thrown. It is said that a reasonable expectation would have been for the family to hide away from the windows or try to escape or call the police.

[11] I fail to see how these two concerns can justify concluding that the event did not take place as described. Actually, it is less than clear how much discounting of the events is made by the RPD. Is there a conclusion that the attack did not take place at all? The conclusion is not stated in those words. If it took place, what difference does it make that the principal applicant peaked outside to ascertain what had been thrown, but did not look outside beyond the yard? And what is unreasonable about hiding in the house and not trying to escape as the attack is occurring?

[12] The second incident examined by the RPD would have taken place in 2007. Accosted by three skinheads and members of the Hungarian Guard, the principal applicant would have been threatened with a knife put against his throat. The complaint to the police did not result in a report, let alone an investigation. However, the RPD did not comment on this attack.

[13] A third incident about which the principal applicant testified was another attack, this time in February 2009, at a subway station. The principal applicant testified that he was attacked by two skinheads. He sought medical attention at a clinic. His reporting of the assault causing bodily harm to the police did not produce any assistance. No medical report was prepared because the medical personnel indicated their belief that it was the applicant who instigated the fight.

[14] The RPD found "the claimant not credible with respect to the alleged February 2009 incident" because it is not for the medical personnel to make a determination as to who instigated what, a medical report being for the purpose of documenting injuries suffered and the treatment that is prescribed or recommended.

[15] The conclusion reached does not seem to have considered that this may constitute further evidence that Hungarians of Roma ethnicity may be treated as second-class citizens. Instead, without giving any explanation or relying on any evidence other than seemingly limited Canadian experience, the RPD chooses to apply standards about the creation of medical reports that are those in Canada to the situation of Roma in Hungary. Indeed, on this record, the file is replete of evidence of discriminatory practices against Hungarian citizens of Roma ethnicity.

What is in my view a peripheral issue, the refusal to make a medical report on what may appear to be discriminatory reasoning by the medical personnel, becomes a reason good enough to, for all intents and purposes, eliminate from consideration a significant attack.

[16] The discussion at the hearing before the RPD touched on the lack of police action when complaints are filed. To the question why is that so, the principal applicant spoke in terms of "I think" that is because of the Roma ethnicity. The RPD took issue with the use of the word "think". It found that the reasonable expectation, in the circumstances, would have been to say "I know".

[17] That led to a discussion of the RPD's concerns about attempts to use recourses against police inaction. The RPD concluded that the "lack of interest in the organization that possibly could assist him with respect to obtaining police protection will have a negative impact on the claimant's fear and credibility." Without more, I fail to see the connection.

[18] There are in my view two problems with this conclusion. In the narrative that runs for 60 paragraphs, done on June 6, 2011, the principal applicant lists a great number of incidents in which he and his family were involved. They tend to show, together with the documentary evidence in this case, that acts of violence against Roma are very public and not on the margins of civil society. One is hard pressed to understand why not seeking a recourse against police inaction could have a negative impact on credibility about events that are alleged to have taken place. The impact on the consideration of the availability of state protection should not be

confused for credibility concerns. Second, how can a lack of interest in an organization have a negative impact on the credibility and, if so, credibility as to what?

[19] Finally, the RPD took issue with the principal applicant's testimony that he did not know whether or not complaints against the police were effective. It was found that "it defies logic that the claimant felt too "helpless" and "powerless" to seek the assistance from organizations that possibly could help him get protection from police within his own country, yet had the strength to come to Canada to seek protection."

[20] It is very much unclear what principle of logic has been defied. Being helpless and powerless before one state apparatus which, according to the principal applicant, has proven ineffective for more than 20 years, does not undermine the strength needed to seek refuge elsewhere. The RPD does not state with respect to this latest issue what impact this finding may have on the credibility of the principal applicant, nor his credibility as to what. Rather, the RPD seems to find some sort of support for its general view on the fact that the principal applicant would be more educated than the vast majority of Hungarians of Roma ethnicity. That would appear to have been offered to counter the feelings of helplessness and powerlessness because the principal applicant would have had the skills and ability to find information useful to seeking redress in his own country. Although that might be relevant to the consideration of the availability of state protection, those views were not presented for that purpose, but rather for the general conclusion that the claimants are not "credible with respect to their alleged persecution."

[21] As I have tried to show with regards to every element presented in support of the conclusion of lack of credibility, none of them fits the description of what reasonableness is concerned with, in the words of the Supreme Court of Canada (*Dunsmuir*, *supra*). Neither justification, transparency nor intelligibility is present. As such, it is not possible, on this record, to ascertain whether the decision falls within a range of outcomes defensible in respect of the facts. The Court cannot, and should not, substitute its view of the matter, having reviewed the matter with care.

[22] As a result, the application for judicial review is granted. The case will be returned to a differently constituted panel of the RPD for redetermination. There is no certified question.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted.

There is no certified question.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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