

Federal Court



Cour fédérale

Date: 20140911

Docket: IMM-1735-13

Citation: 2014 FC 862

Ottawa, Ontario, September 11, 2014

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

**VIKTOR KAROLY BARI
AND GEZA BARI**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review brought forth under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA* or *Act*), seeking to set aside a decision dated February 2, 2013 rendered by Louise Paquette-Neville (the Officer) of the Immigration and Refugee Board of Canada (IRB or the Board), Refugee Protection Division (RPD). She found that the Applicants are not Convention refugees or persons in need of protection pursuant to sections 96 and 97(1) of the *IRPA*.

[2] Having reviewed the evidence on file and the parties' submissions, I find that the application for judicial review must be allowed.

I. Facts

[3] The Applicants, 37 year-old Viktor Karoly Bari and 54 year-old Geza Bari, who are brothers, are citizens of Hungary. They came to Canada in August 2009 and November 2009 respectively. They allege that they face risk in Hungary because of the fact that they are Roma.

[4] The Applicants allege that they fled Hungary when a friend's house was set on fire and men shot at the family, killing their son as he fled the home.

[5] In 2009, they allege that they both lived in a home that was set ablaze by Molotov cocktails. They were able to stop the fire and were not hurt. It was alleged that four days after this incident, Viktor was beaten with a baseball bat by Hungarian Guards. Geza alleges that he was attacked on the bus several times by racist men and in 2007 he was slapped by Guardsmen in Budapest.

[6] It was also alleged that Geza was assaulted by a group of men, while on a train in Budapest. The conductor of the train noticed the assault and called police who were then waiting at the next station to investigate. When the police saw that Geza is a Roma, they failed to question the conductor and did not search for the assailants. Geza returned to his hometown of Sajoszentpeter and requested that the police there look into the lack of protection from the

Budapest police. However, given that he did not have the badge numbers of the police in Budapest, he was turned away.

[7] The refugee claim was refused. The Officer found that the Applicants failed to rebut the presumption of state protection with clear and convincing evidence.

II. Decision under review

[8] The Officer found that the Applicants have not satisfied the burden of establishing a serious possibility of persecution for a Convention ground, nor that they would be subjected personally, on a balance of probabilities, to a danger of torture, or a risk of cruel or unusual treatment or punishment upon their return to Hungary.

[9] The Officer provided a thorough analysis of the situation of the Roma in Hungary and concluded that Roma were discriminated against in almost all fields of life. She indicated that Roma are significantly less educated than other citizens and their life expectancy is well below average. The unemployment rate among Roma is estimated to be 3 to 5 times higher than the non-Romani population. Overall living conditions are also significantly worse than those of the general population.

[10] The Officer indicated that the 2011 Amnesty International Report stated that “Roma continued to face violent attacks and discrimination and lived in a climate of fear. In June, the Organization for Security and Co-operation in Europe (OSCE) noted that Roma were more

susceptible to being made ‘scapegoats’, blamed for the country’s existing socio-economic problems, as a larger percentage of them depended on state support”.

[11] The Officer acknowledges that there is documentary evidence of specific incidents of persecution against the Roma. The Officer notes as well that Amnesty International reported that at least nine violent incidents against Romani communities are considered by the police to have been allegedly carried out by the same perpetrators between January 2008 and August 2009. The Officer mentions that on August 21, 2009, police officers arrested four suspects.

[12] Relying on the above analysis, the Officer found that the Applicants failed to rebut the presumption of state protection in Hungary with clear and convincing evidence. She was of the view that the Applicants did not take all reasonable steps to seek protection and that they have not provided the requisite clear and convincing evidence that, on a balance of probabilities, state protection in Hungary is inadequate. Based on the Applicants’ own evidence, the fire incident was registered with police and an investigation was started. It also appears from Viktor’s testimony that the police in Sajoszentpeter were willing to take some action against the police in Budapest who were called by the train conductor, but that the Applicants did not have any way to identify them as the police badge numbers were not noted.

[13] The Officer asserts that even though the Applicants do not trust the police to provide protection for them, this distrust alone does not rebut the presumption of state protection in a functioning democracy. While she accepts that there is widespread reporting of incidents of intolerance, discrimination and persecution of Romani individuals in Hungary, documentary

evidence shows that there is nevertheless state protection. In the case at bar, the Officer indicated that police protection had been sought; it was reasonable for the police to do nothing more than take a report in the circumstances, as the perpetrators were unknown.

[14] The Officer noted that while she accepts that government efforts to protect the Roma and to legislate against broader forms of discrimination and persecution is mixed, she could not find that the Applicants were successful in demonstrating that state protection is so inadequate, that they need not have approached the authorities or taken reasonable efforts to seek state protection such as obtaining help from people higher in authority, or with other mechanisms such as the Minorities Ombudsman's Office or the Independent Police Complaint Board, before seeking international protection in Canada.

[15] While accepting that Roma face hateful discrimination in Hungary, the Officer is of the view that Hungary is making serious efforts to address its problems, that police and government officials are willing and able to protect victims, and that there are mechanisms in place to deal with discrimination and violence against minorities, including the Roma.

[16] By way of example, the Officer noted that in Hungary, Roma are entitled to elect their own minority self-governments whose president has the right to attend and speak at local government assemblies. A Parliamentary Commissioner for National and Ethnic Minority Rights takes complaints from any person that feels that as a result of a government agency's decision, a violation has taken place to his/her national or ethnic minority rights or that a direct threat of such a violation is imminent. In addition, there is also the Equal Treatment Authority which

provides individuals with a direct avenue of redress for violations, or the prohibition of discrimination in a variety of public and private law relationships. There are other similar initiatives undertaken by the Hungarian government and the Officer stated that the Applicants have access to all of these programs when needed.

[17] The Officer concluded that while criticism of Hungary's measures to combat racism against Roma is warranted, on a balance of probabilities, as a member of the European Union, the country is taking the measures to implement the standards that are mandated. The Officer further concluded that having considered counsel's submissions in the case at bar that there continues to be criticism regarding the state's ability to protect its Romani population, she was not persuaded that the particular circumstances of the Applicants were not addressed when police protection was sought. In addition, the Officer could not find that the Applicants were unable to obtain employment or housing, or that they were denied an education in Hungary.

III. Issue

[18] The only question to be addressed is whether or not the Board's finding that there was adequate state protection in Hungary was reasonable.

IV. Analysis

[19] It is well established that the standard of review with respect to findings of state protection is reasonableness, as these are questions of mixed facts and law: see, for example, *Pacasum v Canada (Minister of Citizenship and Immigration)*, 2008 FC 822 at para 18; *Estrada*

v Canada (Minister of Citizenship and Immigration), 2012 FC 279; *Canada (Minister of Citizenship and Immigration) v Abboud*, 2012 FC 72; *Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171; *Buri v Canada (Minister of Citizenship and Immigration)*, 2014 FC 45.

[20] In reviewing an officer's decision on the standard of reasonableness, the Court should not interfere if the officer's decision is transparent, justifiable and falls within the range of possible, acceptable outcomes that are defensible in respect of the facts and law. 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 that was before the officer: *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 59.

[21] It is well established that a state is presumed to be able to provide protection to its citizens unless it is in complete breakdown. The burden is on the applicant to rebut the presumption of adequate state protection by providing clear, convincing and trustworthy evidence that satisfies the board, on a balance of probabilities, that state protection is inadequate: *Minister of Citizenship and Immigration v Flores Carrillo*, 2008 FCA 94 at para 30. It is also clear from the jurisprudence of this Court that when assessing the ability of a country to provide protection to its citizens, one must not only consider the best efforts to provide such protection, but also the actual effectiveness and real adequacy of these measures. As summarized by my colleague Justice Zinn in *Orgona v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1438 at para 11, "[a]ctions, not good intentions, prove that protection from persecution is

available”. See also: *Bors v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1004 at paras 59ff; *Hercegi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 250 at para 5; *Kemenczei v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1349 at paras 55ff; *Majoros v Canada (Minister of Citizenship and Immigration)*, 2013 FC 421 at para 18; *Burai v Canada (Minister of Citizenship and Immigration)*, 2013 FC 565 at para 21; *Beri v Canada (Minister of Citizenship and Immigration)*, 2013 FC 854 at paras 33-36.

[22] In the case at bar, the Board did state the proper test with respect to state protection, and acknowledged that in assessing whether an applicant has taken all reasonable steps to seek protection, the context of the country of origin, the steps taken and the applicant’s interactions with the authorities must all be taken into consideration (at paras 12-14). The Board also accepted that the documentary evidence relating to government efforts to protect the Roma and to legislate against broader forms of discrimination and persecution is “mixed” (at para 22). What was determinative, in its view, was the fact that the police were not able to do anything because the Applicants were not able to identify the perpetrators of the acts of which they complained.

[23] Having carefully reviewed the record and considered the parties’ written and oral submissions, I have come to the conclusion that this finding is flawed. The Officer herself indicated that when she asked Viktor if he sought police protection, he said that he tried but was told that he was just a street person and not to bother the police again. This clearly contradicts the Officer’s earlier assertion that the police took a report but were unable to do more because the perpetrators were not known. As for Geza’s testimony following the Officer’s question in

regard to police protection, he indicated as well that the police started an investigation but that nothing happened. When asked whether or not he knew if the police checked the cameras at the gas station to track down the black car they saw throwing the Molotov cocktail, Geza indicated that he did not know but that police had done so in the past when people died. He also indicated that the police ought to have known the Hungarian Guards responsible for these acts because they live in a small community.

[24] Moreover, the Officer did not address all of the Applicants' dealings with the police. The Officer only highlighted the fact that Geza did not have the Budapest police badge numbers and hence the police in his home town of Sajoszentpeter could not act on the investigation. She failed to consider, however, that the police in Budapest had the opportunity to investigate the assault on the train but failed to do so. Geza attested that the train conductor, as well as other eye witnesses on the train, saw the assault and as a result, the police could have followed up with the investigation and asked these eye witnesses for a description of the assailants. However, by not doing so, the police effectively sabotaged any further prospects that the Applicant could avail himself of state protection.

[25] The steps taken by the Applicants were reasonable in the circumstances, and the failure of the police to provide any measure of protection is consistent with the reliable and corroborating evidence which was before the Officer that documented police inability or unwillingness to assist the Roma. Indeed, she found that "[a] fair reading of the documentary evidence indicates that the central government is motivated and willing to implement measures to protect the Roma, but these measures are not always implemented effectively at the local or

municipal level” (para 21). The US DOS report for 2011 and the Affidavit of Aladar Horvath, the first Roma Member of Hungarian Parliament and a leading figure in Roma advocacy, note serious issues regarding Hungarian police authorities’ systemic discrimination against Roma.

[26] The Officer also implied that the Applicants did not engage the state because of their distrust of the police. She stated at paragraph 18: “While it became clear that the claimants did not have a great deal of trust in the police in Hungary, this distrust alone does not rebut the presumption of state protection in a functioning democracy by asserting only a subjective reluctance to engage the state”. This is clearly a misreading of the evidence. It was perfectly reasonable for a Roma to complain to the police and still think that nothing would come out of it. What is material is the effort at availment of protection that was made, not the spirit or attitude of the person who made it. The lack of trust cannot be used against the Applicants to obscure the fact that they visited the police many times and engaged the state authorities.

[27] I find, therefore, that the Officer made two reviewable errors. First, she focused on legislative changes that were put in place in order to deal with the discrimination against Roma, and even listed a litany of ameliorative redress mechanisms, without assessing the real impact of these measures. She provides no support of her assertion that the police and government officials are both willing and able to protect victims. In fact, the evidence referred to and quoted by the Officer indicates that the efforts made by the government have not proven effective. As an example, one needs only to refer to paragraph 20 of her reasons, where she quoted from a Response to Information Request dated October 12, 2011 on police responses to complaints lodged by Roma citizens:

Hungary has one of the most advanced anti-discrimination laws and a system for minority protection in the Central and Eastern European region. A number of mechanisms have been developed to ensure that minority groups enjoy civil and political rights. However, the central government's general failure to maintain strong and effective control mechanisms over rights violations takes its toll on Hungary's largest minority, the Roma.

[28] The second reviewable error made by the Officer was to mischaracterize the Applicants' efforts to engage the police, and to conclude that charges could not be laid because the perpetrators of the racist attacks against the Applicants were not identifiable. As mentioned above, such a conclusion is not borne out by the facts. This is clearly not a case where the risk has not been individualized, or where an applicant has failed to seek the protection of the state. To the contrary, the Applicants turned to the police on numerous occasions, despite the poor record of the state to protect the Roma and in those particular circumstances, it was clearly not reasonable to find that state protection was adequate.

[29] As for the Respondent's claim that state protection can be available from state run or funded agencies and not only from the police, it must be rejected. I can do no better than to quote from my earlier decision in *Katinszki v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1326 at paras 14-15:

14. (...) More importantly, the mandate of each of the organizations referred to by the Board (the Independent Police Complaints Board, the Parliamentary Commissioners' Office, the Equal Treatment Authority, the Roma Police Association, the Complaints Office at the National Police Headquarters) is not to provide protection but to make recommendations and, at best, to investigate police inaction after the fact.

15. The jurisprudence of this Court is very clear that the police force is presumed to be the main institution mandated to protect citizens, and that other governmental or private institutions are

presumed not to have the means nor the mandate to assume that responsibility. As Justice Tremblay-Lamer aptly stated in *Zepeda v Canada (Minister of Citizenship and Immigration)*, 2008 FC 491, [2009] 1 FCR 237, at paras 24-25:

In the present case, the Board proposed a number of alternate institutions in response to the applicants' claim that they were dissatisfied with police efforts and concerned with police corruption, including National or State Human Rights Commissions, the Secretariat of Public Administration, the Program Against Impunity, the General Comptroller's Assistance Directorate or through a complaints procedure at the Office of the Attorney General (PGR).

I am of the view that these alternate institutions do not constitute avenues of protection *per se*; unless there is evidence to the contrary, the police force is the only institution mandated with the protection of a nation's citizens and in possession of enforcement powers commensurate with this mandate. For example, the documentary evidence explicitly states that the National Human Rights Commission has no legal power of enforcement ...

[30] For all of the foregoing reasons, I am of the view that this application for judicial review ought to be granted. The parties were invited to submit questions for certification but none were proposed.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is granted. No question is certified.

"Yves de Montigny"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1735-13

STYLE OF CAUSE: VIKTOR KAROLY BARI AND GEZA BARI v THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: MAY 1, 2014

JUDGMENT AND REASONS: DE MONTIGNY J.

DATED: SEPTEMBER 11, 2014

APPEARANCES:

James Gildiner FOR THE APPLICANTS

Asha Gafar FOR THE RESPONDENT

SOLICITORS OF RECORD:

James Gildiner FOR THE APPLICANTS
Barrister and Solicitor
Toronto, Ontario

William F. Pentney FOR THE RESPONDENT
Deputy Attorney General of Canada
Toronto, Ontario