

Federal Court



Cour fédérale

Date: 20150410

Docket: IMM-6504-13

Citation: 2015 FC 437

Ottawa, Ontario, April 10, 2015

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

**KRISZTIAN ISTVA GRAFF
(A.K.A. GRAFF, KRISZTIAN ISTVAN)**

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Defendant

JUDGMENT AND REASONS

[1] Mr. Graff is 31 years old, a citizen of Hungary, and of mixed Hungarian and Roma ethnicity. He is asking the court to set aside the decision of the Refugee Protection Division, denying his claim for refugee status or protection in Canada.

[2] For the reasons that follow, I find that the Panel's assessment of state protection was unreasonable because (i) it found that Mr. Graff ought to have looked to organizations other than

the police force to protect him, and (ii) it focused on efforts by the state to protect Roma, rather than considering whether there was any evidence that protection might reasonably be forthcoming.

Background

[3] The Panel stated at the outset of the decision that the sole and determinative issue was whether there was adequate state protection in Hungary. Accordingly, it must have accepted that Mr. Graff was credible both with respect to the incidents of intimidation, harassment and violence that he experienced in Hungary and with respect to his unsuccessful attempts to seek state protection. Although it may not strictly be necessary to recount his evidence as to the abuse he has suffered, it is necessary to do so in order that one can appreciate the failures of the state to protect him.

[4] Mr. Graff's father is Hungarian and his mother, who died when he was a one-year old, was Roma. He states that as a mixed-race child, he was denigrated in school and segregated from his white Hungarian classmates. He blames the treatment he received for his failure to complete elementary school.

[5] At the age of 15, his father kicked him out of his house, telling him to go live with his Gypsy relatives. He found work, but his employer searched him on a daily basis to check that he was not stealing from him. He states that he was regularly denied access to public spaces and establishments on the basis of his Roma ethnicity. He recounts one incident when he was denied entry into a grocery store and told that he "should die of hunger."

[6] He was treated in 2000 and 2001 for a collapsed lung and was required to undergo surgery. He states that he had this condition for many years but it was misdiagnosed because the doctors dismissed him as a malingering Gypsy, trying to avoid work.

[7] As Mr. Graff became an adult, he suffered harassment on a regular basis from the police. They justified frequently stopping and frisking him by calling him a drug addict and accusing him of stealing to support his habit. The police often said that his "kind" only knew how to steal.

[8] In the summer of 2008, Mr. Graff was stopped and searched by the police seven different times in one day, during a two and one-half kilometre walk. When stopped for the seventh time, he asked why the police were targeting him, which led to the police physically assaulting him. He was left with a fractured skull and a lost tooth. Mr. Graff tried to report the assault at the police station in Budapest, but the police officers there told him that everyone knew that he was a lying Gypsy, and they threatened him, telling him that he would have even bigger problems if he tried to pursue his lie.

[9] Mr. Graff recounts other harassments and persecutions by the police, including another assault in 2009. In 2010, the police were called (unnecessarily, he says) to assist in evicting him from his apartment. When Mr. Graff asked to gather his personal belongings from the apartment, the police officers slapped him and told him to "get the hell out."

[10] In 2011, Mr. Graff's Hungarian girlfriend left him. She was aware of how difficult Mr. Graff's life was and the harassment he experienced from the police. She told him that she could

not have a child with him as she could not stand the thought of her child suffering the kind of routine persecution she had witnessed him face. Moreover, she worried that she too might be in danger because of her relationship.

[11] It was this last event that led Mr. Graff to leave Hungary. He arrived in Toronto in November 2011, and immediately made a claim for refugee protection.

[12] The Panel denied the claim, finding that Mr. Graff had not provided clear and convincing evidence of Hungary's inability to adequately protect him if he returned to Hungary.

Issues

[13] In my view, there are two issues raised in this application:

1. Was the Panel's determination that Mr. Graff had not rebutted the presumption of state protection reasonable?
2. Did the Panel use an incorrect legal test in its assessment of the availability of state protection for Roma in Hungary?

Analysis

A. Rebutting the Presumption of State Protection

[14] Mr. Graff complains that the Panel's analysis of state protection failed to focus on his particular situation:

[T]he RPD's reasons for its decision are essentially a long-winded survey of documentary evidence as it relates to the availability of state protection for Roma in Hungary generally, which can be found copy-and-pasted into many of the Board's negative decisions

on Roma claims from Hungary. The RPD only mentions the particular circumstances of the Applicant in three out of the 44 paragraphs contained in the "analysis" section of its reasons, paragraphs 14, 25 and 30.

[15] An examination of what the Panel says of Mr. Graff's circumstances at those three paragraphs is telling. They are cursory and inaccurate, and lead directly to an unreasonable decision because the Panel failed to consider state protection from the perspective of Mr. Graff's personal circumstances.

[16] At paragraph 14, the Panel notes Mr. Graff's mixed ethnicity and states that "since the claimant is perceived as Roma due to his appearance, mannerism, and the company he keeps, he suffered intimidation, verbal and physical abuse at the hands of racist Hungarians." The Panel then notes that his girlfriend left him and writes that "it is unfortunate that the claimant's relationship with his girlfriend ended due to problems arising out of his ethnicity." [emphasis added]

[17] At paragraph 25, the Panel summarizes the interactions between Mr. Graff and the police in a manner that minimizes and mischaracterizes them. He writes:

The claimant testified that he had been discriminated against, intimidated, and abused by racist people in Hungary. He testified that he did not approach the police because he had run into problems with the police for many years because the police had harassed him on several occasions. He testified that one day he had been stopped seven times within a distance of two and a half kilometers. He added that he had also been hit by the police three times; once on 2008, then in 2009, and also received two slaps in 2010. The panel asked the claimant if he had ever reported the police abuse to higher authorities. He replied that he had gone to the police headquarters in Budapest, however, his complaint was not taken seriously and he was told to leave before he would run

into bigger problems. It is unfortunate that he claimant was harassed by the police. Based on the documentary evidence, the panel accepts that the attitude of some Hungarian people, including some in positions of authority, toward the Roma is certainly discriminatory and prejudicial. The panel, however, is of the view that is a claimant believes the actions of some police officers are corrupt, the onus is on the claimant to approach other members of the security forces or the authorities. [emphasis added]

[18] The court cannot help but note that the Panel refers to Mr. Graff having been hit and slapped by the police but makes no mention of the assault that left him with a fractured skull and a missing tooth. Nor does the Panel reference the police telling him to "get the hell" out as they slapped him about and deprived him of an opportunity to retrieve his personal possessions. The court also notes that the Panel's focus appears to be on "corrupt" police officers when there was never any suggestion that the police were corrupt, just that they were vicious and harassed and demeaned him. To describe his experience with the police as "unfortunate" represents a complete failure to appreciate the evidence. Further, the suggestion that he ought to have approached other members of the security forces completely ignores that Mr. Graff did so. He approached the police in Hungary's capital city. Not only was his complaint ignored, he was told that filing it would only result in more trouble for him from the police!

[19] At paragraph 30, the Panel repeats its view that Mr. Graff ought to have raised his complaints to higher or other authorities:

There is no significant reason why this claimant, who alleged to have gone to the police headquarters in Budapest and alleged to have approached Roma organizations could not have complained to the state agency(ies) that oversee police inaction, misconduct and abuse. Based on the totality of the evidence adduced in this case, the panel finds that the authorities take action against police officers who abuse their power or engage in illegal practices. The panel finds this claimant did not make a reasonable and diligent

effort to seek protection from the state authorities in his own country before seeking it internationally.

[20] The evidence relied on by the Panel as support for its conclusion that authorities take action against police officers is excerpted in the preceding paragraph of his reasons. It references the Independent Police Complaints Board (IPCB) which investigates police abuses and omissions affecting individual rights – exactly the sort of issue Mr. Graff had with the police. However, the IPCB can only make recommendations to the national police chief. The evidence of how the chief dealt with the 67 serious complaints found by the IPCB hardly shows, as the Panel held, that the authorities "take action against police officers who abuse their power." Of the 67 serious cases, the national police chief agreed with the findings in only two cases, partially agreed with the findings in three cases, rejected the findings in three cases, and the remaining cases were pending. The court recently noted that more current "evidence does not suggest that the IPCB's efficacy has improved:" *Balogh v Canada (Minister of Citizenship and Immigration)*, 2015 FC 76.

[21] More critically, there is no mention made in the documentary evidence or in the Panel's decision of how taking complaints to higher authorities would result in Mr. Graff obtaining state protection. The question I posed in *Majoros v Canada (Minister of Citizenship and Immigration)*, 2013 FC 421 is apt: If the applicant had pursued his complaints regarding the police to other authorities would he be *any* safer or any more protected?

[22] I agree with Mr. Graff that the various organizations that the Panel identified as possible avenues for making complaints about police inaction or police aggression would do little to

provide him with immediate or near-term protection. Had he made complaints through those organizations, the most he could hope for is that the individual police officers might eventually be chastised.

[23] In *Ignacz v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1164, 235 ACWS (3d) 1057, I indicated that the failure of an applicant to make complaints through these organizations cannot be fatal to a refugee claim when police protection has been unsuccessfully sought and that the Board's conclusion that these institutions offered Roma effective protection at the operational level is not supported by the evidence.

[24] This court has previously indicated 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:" *Katinszki v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1326, 223 ACWS (3d) 1017 at para 15; *Zepeda v Canada (Minister of Citizenship and Immigration)*, 2008 FC 491, [2009] 1 FCR 237 at paras 24-25.

[25] In addition to these concerns, the Panel never addresses the evidence that Mr. Graff was basically threatened by the police should he pursue his complaints about their conduct. In the face of such threats and in light of his previous interactions with the police, is it unreasonable for him not to take his complaints higher?

[26] The Panel's assessment of the evidence results in an unreasonable decision that Mr. Graff had failed to rebut the presumption of state protection.

B. *The State Protection Test Used*

[27] It is well established that one must consider the actual adequacy of state protection rather than the willingness of the state or the efforts it has made to correct discrimination: See, for example, *Lopez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1176, [2010] FCJ No 1589 at para 8; *Balogh v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 809, 22 Imm LR (3d) 93 at para 37.

[28] The Panel's reasons demonstrate that it was alive to the evidence indicating that incidents of intolerance, discrimination and physical abuse of the Roma is widespread in Hungary and it noted that the latest documents indicate that conditions for the Roma in Hungary have deteriorated. The Board states at para 22 that "[a] fair reading of the documentary evidence ... indicates that criticism regarding the conditions of the Roma in Hungary may be warranted, and that it may be an understatement to say that state protection in Hungary is not perfect." At para 34, the Board acknowledges that the fact that the state is making serious and genuine efforts to improve the situation of Roma does not establish that state protection is operationally adequate.

[29] Nonetheless and despite accurately stating the test and the limitations it is subject to, the Panel, in my opinion, like in *Olahova v Canada (Minister of Citizenship and Immigration)*, 2012 FC 806, [2012] FCJ No 818 at para 8, "relies far too much on efforts and good intentions from

the State, and gives too little examination of the application of and results achieved from those efforts and intentions.”

[30] This is apparent from the following examples. At para 22, the Board states that the Hungarian government does not condone racially discriminatory behaviour and that the law prohibits inciting hatred against minorities and other groups. At para 32, it mentions that it “is clear that the government of Hungary is committed and is making serious efforts to address” these issues. At para 42, the Board states:

... the panel acknowledges that the quality of existence for the Roma is not what it should be, but their existence is not threatened by the state. The progress in combating racism is not as rapid, and there have been set-backs and obstacles, but the panel finds that the commitment of the state to continue the battle is not in question. The panel finds it unreasonable to expect that the state measures should have prevented or eliminated all racism or acts of violence related to race....

[31] While the Board goes on to state at para 42 that Hungary “has enacted legislation, has infrastructure and a functioning police force in place ... and there are numerous examples that, if complaints are made, authorities do take action,” it is evident that the Board's focus was on the efforts of Hungary to combat racism rather than on whether realistic avenues for obtaining protection were open to this applicant.

[32] Accordingly, I agree with Mr. Graff that the Board erred in applying the wrong legal test for state protection.

[33] Neither party proposed a question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is allowed, the decision of the Refugee Protection Division is set aside, the claim for protection is remitted to a differently constituted panel, and no question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6504-13

STYLE OF CAUSE: KRISZTIAN ISTVA GRAFF
(A.K.A. GRAFF, KRISZTIAN ISTVAN) v THE
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