

Federal Court



Cour fédérale

Date: 20150417

Docket: IMM-6801-13

Citation: 2015 FC 474

Ottawa, Ontario, April 17, 2015

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

FRANTISEK BANDA

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Defendant

JUDGMENT AND REASONS

[1] Mr. Banda challenges the decision made by the Refugee Protection Division [the Board] determining that he is not a Convention refugee nor a person in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

[2] For the reasons that follow the application is allowed.

Background

[3] Mr. Banda is a citizen of the Slovak Republic and is of Roma ethnicity. He arrived in Canada with his homosexual partner and the Board jointly considered their claims. This application does not deal with Mr. Dome's refugee claim.

[4] Mr. Banda alleges that he was discriminated against and suffered from verbal harassment while in school because he is Roma. He says that he reported this treatment to his teachers, but nothing was done about it. In trade school, his life became more difficult because his classmates knew that he was homosexual. In his Personal Information Form [PIF], he stated that he was "often beaten up" by his classmates and that he was not allowed to use the washroom. At the Board hearing, he testified that he was beaten twice while in school and provided further detail of these incidents. He explained to the Board that he had been "nervous and embarrassed" to provide more detail in the PIF and his testimony was elaborating on the summary provided in it.

[5] On July 3, 2010, Mr. Banda went to a dance club where Roma were allowed entry. While walking home, he was chased and physically attacked by a group of five or six skinheads. His attackers stopped when another group of people walked down the street. He did not seek medical attention because his injuries were not serious, but he did report the matter to police and presented a police report to the Board.

[6] In his PIF, he stated that he was "often beaten up in the street for no [reason]," and that if he approached the police, all they would do in response is to make a report.

[7] Mr. Banda says that he was not allowed entry to bars or restaurants, and if he was allowed entry, he was not served. Further, he claims that it is “very difficult to be a gypsy and gay” so he did not often go out in public with his partner because they were “always attacked verbally and physically.”

[8] Fearing for their lives, Mr. Banda and his partner fled to Canada from the Slovak Republic on March 15, 2011 and applied for refugee protection the same day.

[9] Credibility and state protection were the determinative issues for the Board.

A. *Credibility*

[10] The Board stated that Mr. Banda has a “serious problem when it comes to telling the truth,” noting the following:

- He testified that he was assaulted once in July 2010 but had stated in the PIF that he was “often beaten up in street for no reason;”
- He “said that when he was attacked on the street it was because he was Roma and when he was attacked at his boarding school it was because of his sexual orientation;”
- He only reported the incidents at school once because nothing was done the first time;
- He testified that he was beaten twice in school when he had stated in the PIF that he was “often beaten up by [his] classmates”; and
- No details about the two assaults at school were mentioned in his PIF.

[11] The Board rejected the explanation that he failed to mention the incidents at school in his PIF because he was “nervous and embarrassed” because Mr. Banda had informed an immigration official that he was homosexual during an interview.

[12] The Board held that there is difference between the use of the word “often” in the PIF regarding the alleged school beatings and his testimony that he was beaten twice. The Board found that Mr. Banda was attempting to embellish his claim.

[13] With respect to the July 2010 assault, the Board noted that Mr. Banda could not identify or describe his attackers. The Board reviewed jurisprudence of this court that states that random assaults and those with unidentified assailants are difficult to effectively investigate and protect against and therefore it is not reasonable for a claimant to expect the police to seek out and arrest their persecutors in those circumstances. The Board also noted that there was no persuasive evidence that the police took no action after the report was made and that there were no medical reports, despite the allegations that Mr. Banda and his partner had been physically attacked.

B. *State Protection*

[14] The Board found that the Slovak Republic is a functioning democracy, and thus held that Mr. Banda must exhaust all avenues of protection that are reasonably available to him and noted that the burden to prove otherwise is a heavy one.

[15] The Board reviewed the objective documentary evidence and made the following finding:

The preponderance of the objective evidence regarding current country conditions suggests that, although not perfect, there is

adequate state protection in the Slovak Republic for victims of crime, that the Slovak Republic is making serious efforts to address the problems of criminality, and that the police are both willing and able to protect victims. Police corruption and deficiencies although existing and noted by the Board, are not systemic. In the panel's view in canvassing the documentary evidence that, as a whole, the issues of corruption and deficiencies are being addressed by the Slovak Republic.

[16] With regard to the alleged harassment due to sexual orientation, the Board acknowledged that both Mr. Banda and his partner had stated they avoided going out in public together to “avoid homophobic retribution.” However, the Board contrasted this against his testimony that he was physically assaulted twice at trade school due to his homosexuality, but otherwise they were only verbally attacked. His statement in his PIF was that they were “always attacked verbally and physically.” The Board noted that the documentary evidence suggested that “attitudes toward homosexuality are negative and it is especially difficult for Roma who are gay,” but found that the Mr. Banda and his partner had available avenues to address homophobia because the state was taking steps to address these issues.

Issues

[17] Mr. Banda raises two issues:

1. Did the Board err in its credibility analysis?
2. Did the Board err in its state protection analysis?

Analysis

A. Credibility

[18] Mr. Banda submits that the RPD found him not to be credible "based purely on a microscopic analysis rooted in petty semantics." Having reviewed the record in its entirety, I agree. I note that most of the decision relates to the claim of Mr. Banda's partner, and not to him, the events he recites, or his testimony.

[19] The Member observes that in his PIF, Mr. Banda wrote that at trade school, he was "often beaten up" by his classmates, whereas in his oral testimony he stated that he had been physically assaulted twice at school, had reported it once but nothing was done, and did not report the second physical assault because nothing was done on the first occasion. The Member compares the words "often" and "twice" and concludes that Mr. Banda "engaged in embellishments to bolster his claim for refugee status."

[20] There are two difficulties with that conclusion. First, it is impossible to understand how reducing the number of attacks in sworn testimony "bolsters" a claim. It is not uncommon for a Member to find that a claimant has bolstered his claim when he recounts additional episodes of persecution in oral testimony from that provided in the written narrative. I am unaware of any example where the reverse has been described as bolstering. Second, the Member ignores that Mr. Banda, when asked by the Member whether he considered a verbal attack to be the equivalent to being beaten up, responded that he did. Based on that understanding, his evidence was that he was "beaten up" often – two physical assaults and a number of verbal attacks. As such, there was no bolstering.

[21] The Member relies on the fact that the assaults are not described in detail in the PIF as a basis of impugning credibility; however, the assaults are referenced and the court has on many occasions indicated that the PIF is to be a summary of the evidence and it is thus not serious if it is not provided in detail.

[22] The Member also notes that there is a lack of corroborative documentary evidence – only one document for each claimant. He concludes saying "although the claimants said that they were beaten up, not once did they have to seek medical attention even when they were attacked by several skinheads at a time." I agree with counsel that this amounts to a veiled finding that the attacks did not occur. At a minimum it points to the Member being sceptical that they occurred. Yet, Mr. Banda provided a police report for the July 3, 2010 assault by the skinheads that compares most favourably with his evidence. The Member fails to address it at all. It is impossible to reconcile this report with the scepticism of the Member. He had to engage with that evidence and explain how he reached the conclusions he did considering it.

[23] In short, the basis on which the Member found it necessary to opine that Mr. Banda has a "serious problem when it comes to telling the truth" was insufficient to permit him to reasonably reach that conclusion.

B. *State Protection*

[24] The analysis the Member undertakes is deficient because he looks to efforts and not results. Many times the Member speaks to the "serious efforts" being undertaken but fails to address whether there actually is state protection available on the ground for gay Roma. As the

court has observed numerous times, that is an error: See *Henguva v Canada (Minister of Citizenship and Immigration)*, 2013 FC 912 and the cases cited therein.

Conclusion

[25] The decision is unreasonable and the claim of Mr. Banda must be determined by a different Member.

[26] Neither party proposed a question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is allowed, the decision is quashed, the claim for refugee protection is to be determined by a differently constituted Board, and no question is certified.

“Russel W. Zinn”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6801-13

STYLE OF CAUSE: FRANTISEK BANDA v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

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