

Federal Court



Cour fédérale

Date: 20160308

Docket: IMM-2713-15

Citation: 2016 FC 284

Ottawa, Ontario, March 8, 2016

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

**GABOR HUSZAR
ESZTER KORONKA
DAVID GERMUSKA
KIRA KINSCO GERMUSKA**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review pursuant to s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA or the Act] challenging a decision from the Refugee Protection Division of the Immigration and Refugee Board [RPD or the Board]. In the decision under review, the RPD found that the Applicants are neither Convention refugees nor persons in need of protection within the meaning of ss 96 and 97(1) of the Act. The Applicants

are seeking to have the decision set aside and referred for rehearing by a differently constituted panel.

[2] For the reasons that follow, the application is dismissed.

I. Background

[3] On October 6, 2010, Ms. Koronka, Mr. Germuska (Ms. Koronka's common-law spouse at the time), and their two children, David and Kira Germuska, all citizens of Hungary, entered Canada and claimed refugee protection the following day.

[4] On August 25, 2011, Mr. Germuska violently attacked and stabbed Ms. Koronka outside their home in Mississauga. Their neighbour at the time, Mr. Huszar, intervened and was stabbed as well. Mr. Germuska was convicted of attempted murder for the attack and sentenced to a term of imprisonment of 6.5 years. Ms. Koronka claims that Mr. Germuska has threatened to kill her as soon as he is released from prison.

[5] On May 8, 2012, Mr. Germuska's refugee claim was deemed abandoned.

[6] Ms. Koronka and Mr. Huszar, a refugee claimant himself, have since started a relationship and have a child together. Their claims were eventually joined.

[7] On January 7, 2015, the Applicants appeared before the RPD, which issued a negative decision on March 20, 2015.

[8] On June 1, 2015, in anticipation of filing this application for judicial review, the Applicants' counsel requested an audio recording of the RPD hearing in order to have a transcript prepared. The Applicants' counsel was ultimately advised that the hearing was not recorded and therefore no copy or transcript could be provided.

[9] On June 10, 2015, the Applicants filed their application for judicial review of the RPD's decision.

II. Impugned Decision

[10] The Board rejected the adult Applicants' protection claims and since the minor Applicants' claims rested on those of Ms. Koronka and Mr. Huszar, it rejected their claims as well. The Board found that aspects of the claims were not credible, an Internal Flight Alternative [IFA] was available in Budapest, and the presumption of state protection had not been rebutted.

III. Issue

[11] The over-arching issue in this application is whether the absence of the transcript of the hearing violates procedural fairness. This raises two sub-issues:

1. Are the Applicants required to demonstrate their inability to respond to determinative issues of the decision caused by the absence of the transcript?

2. Is the transcript required to permit the Court to adequately review the Board's decision regarding state protection?

IV. Standard of Review

[12] The parties did not advance submissions on the applicable standard of review. However, it is trite law that correctness is the applicable standard of review of procedural fairness issues: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43.

[13] In the circumstances of this case, the Court need not consider whether any deference is owed to the RPD's choice of procedures. The allegation of unfairness was caused by the inadvertent loss of the audio recording, rather than any deliberate decision by the RPD to govern its own process.

V. Parties' submissions

[14] The Applicants submit that the absence of a transcript of their hearing before the RPD has led to a denial of natural justice. The Applicants assert they require the transcript to effectively challenge the RPD's findings, which they contend are either founded on, or in some way affected by, negative credibility findings.

[15] According to the Applicants, the unfairness is exacerbated by a number of circumstances, including the fact that both Mr. Huszar and Ms. Koronka testified at the hearing; the RPD

decision rested on negative credibility findings, which in turn informed the conclusions on the IFA and state protection; the reasons for decision contained other reviewable errors, such as the finding that the second prong of the IFA test is only applicable if the agent of harm is the government, or the finding that the Applicants lacked subjective fear of persecution by Mr. Germuska despite the undisputed fact that he tried to murder them and may face deportation back to the Applicants' country of nationality.

[16] The Respondent advanced various submissions. It argues that the Applicants are required to identify specific errors of the Board's decision that are impacted by a lack of transcript. It further submits that the record is sufficient, without the transcript, to support the Board's IFA and state protection conclusions.

VI. Analysis

A. *Are the Applicants required to demonstrate their inability to respond to determinative issues of the decision caused by the absence of the transcript?*

(1) The Applicants' onus

[17] There being no statutory right to a recording or transcript of proceedings before the RPD, it is the Courts' duty to determine whether the record before it allows it to properly dispose of the application for judicial review. Moreover, a new hearing must be ordered if the absence or gaps in the transcript raise a "serious possibility" of the denial of a ground of review. These principles are intended to ensure the fairness of the decision-making process while recognizing the need for flexibility in applying these concepts in the administrative context: *Canadian Union of Public*

Employees, Local 301 v Montreal (City), [1997] 1 SCR 793 at para 81, also citing *Kandiah v Canada (Minister of Employment and Immigration)* (1992), 141 NR 232 at paras 7-9.

[18] In determining whether the absence of the transcript amounts to a serious possibility of procedural unfairness, the case law establishes a number of factors to consider. In *Benavides v Canada (Minister of Citizenship and Immigration)*, 2006 FC 323, Justice O’Keefe cited with approval the factors considered by Justice Lemieux in *Goodman v Canada (Minister of Citizenship and Immigration)* (2000), 185 FTR 102 (TD), summarized as follows:

- (1) the grounds for review advanced;
- (2) the importance of the impugned findings to the refugee claim;
- (3) the basis upon which the RPD arrived at its findings;
- (4) the subject matter of the transcript gaps, and the significance of the transcript gaps to the impugned findings;
- (5) other means the tribunal used to fill the gaps; and
- (6) other means available to the Court to determine what went on at the hearing.

[19] The above cases should be read in conjunction with *Agbon v Canada (Minister of Citizenship and Immigration)*, 2004 FC 356, where at para 3, Justice O’Reilly succinctly described the test to determine whether an applicant had discharged her onus to establish procedural unfairness. Citing *Vergunov v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 584 (QL) (TD), he stated that the applicant must raise an issue that affects the outcome of the case that can only be determined on the basis of a record of what was

said at the hearing, such that the absence of a transcript thereby prevents the Court from properly addressing the issue.

[20] Additionally, Justice Snider's decision in *Cletus v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1378, cited by the Respondent, stands for the proposition that the Court should carefully consider the record to determine whether the omissions and contradictions in the applicant's evidence, which gave rise to negative credibility findings by the RPD, were sufficiently documented in the record before the Court to permit judicial review.

[21] In *Canada (Minister of Citizenship and Immigration) v Liang*, 2009 FC 955, Justice Mainville, relying on a number of authorities of this Court, found that a new hearing may be warranted where the absence of a transcript precludes the Court from reviewing the reasonableness of the RPD's assessment of credibility of a witness' testimony where "the Court has no basis on which to review how and why the Panel disregarded these issues" (para 25).

- (2) Are the Applicants required to make their best efforts to provide alternative evidence of what occurred at the hearing?

[22] I think it follows that if the Applicants bear the onus to demonstrate a breach of procedural fairness by the absence of the transcript, they must demonstrate that they were unable to provide alternative evidence on the salient points of the case in lieu of the transcript. This is a relevant consideration to the Respondent's further submission that the mere absence of the transcript does not present any issue of procedural unfairness nor prevent the Court from reviewing the Board's determinations on state protection.

[23] The Applicants recognized their obligation to provide the Court with some explanation as to why it was not possible to provide alternative information with respect to the Board's credibility findings. In that respect, the Applicants submitted an affidavit of the male Applicant, Mr. Huszar. In his affidavit, he deposed that he and the female Applicant Ms. Koronka, agreed that they needed to order a transcript:

[W]e could not remember everything we had said at the hearing, which took several hours and that [*sic*] which we both testified. While I have some recollection of my testimony, there are areas of the testimony I do not recall and some questions to which the Board member refers in his reasons, that I have no recollection of being asked.

[24] However, in reviewing the record, the Court is concerned that Mr. Huszar was perhaps not in a good position to provide this evidence. I say this because the written final submissions filed by the Applicant's counsel consisting of some 30 pages acknowledged that Mr. Huszar had difficulty testifying and was confused in his evidence.

[25] In the section on credibility, counsel first reviewed and tried to explain away the female Applicant's three amendments to her narrative, which the Board found to be inconsistent. She argued that the amendments could not form the basis for a negative credibility inference, a submission the Board rejected. More importantly, however, are counsel's limited comments referring to Mr. Huszar's credibility, whose testimony she compared with that of Ms. Koronka, as follows from page 4 of her submissions:

As clear and consistent as Eszter's testimony was, it is equally clear that Gabor (the male Applicant) had some difficulty

testifying and his testimony confused details in his written narrative.

[26] In light of these written observations of the Applicant's experienced counsel on the respective capacities of the Applicants to relate what occurred before the Board, I am not satisfied that the Applicants have fully discharged their onus to demonstrate that the absence of a transcript prevents the Court from addressing the salient issues, particularly that of state protection. Quite clearly, Ms. Koronka should have been the deponent speaking to her recollection of what occurred at the hearing.

[27] In addition, I accept the Respondent's submission that, within reason, the Applicants were required to identify any specific errors that were impacted by a lack of transcript that the Court is unable to assess, aside from broadly mentioning credibility. This argument is particularly persuasive in the area of state protection where most of the evidence was objective documentary materials.

[28] My final unrelated point on the issue of providing alternatives to an unavailable transcript is to suggest that it is open to the parties to request the decision-maker to provide copies of his or her hearing notes. They would of course, be redacted so as to refer only to evidence recorded during the hearing, as opposed to disclosing comments and information reflecting on the decision-making process. Although there may be no obligation on the decision-maker to respond, the decision-maker might assent to such a request, rather than see the efforts that went into the decision being wasted for want of a transcript due to a technical slip or some similar problem.

B. *Is the transcript required to permit the Court to adequately review the Board's decision regarding state protection?*

[29] The Respondent submits that the Board's credibility findings do not impact its decision regarding the existence of an IFA available to the Applicants in Budapest. The Court, however, is satisfied that general credibility findings played a role in the IFA decision. Therefore, the Court limits its attention to the Board's decision that the Applicants were afforded state protection that they failed to avail themselves of.

[30] In considering this analysis, the Court notes that the Applicants relied principally upon the objective evidence to demonstrate the inadequacy of state protection for Roma in Hungary. Of the 12 volumes of evidence before the Court, 11 treated this issue. Credibility submissions were less than half a page and basically defensive in nature, as reported above. The Applicants have not challenged the Board's conclusions on state protection. The only area of contention in respect of the missing transcript therefore relates to the Applicants' attempts to obtain state protection.

(1) The Female Applicant

[31] In its reasons, the Board relied upon two statements by the adult female Applicant regarding state protection. First, that she had called the police only one time in February 2004 regarding past incidents of domestic violence, and second, that in a custody dispute with her ex-husband she did not return to the court after six months as recommended by the court, but instead decided to move back in with him because he would not allow her to see the children. The Board

found the latter statement unreasonable, which seems logical given that the custody dispute was at the very time before the court. This was the only statement that could remotely be described as a credibility finding in the reasons relating to the adult female Applicant's attempts to obtain state protection.

[32] The two underlying statements upon which the Board's analysis reposed (only seeking police assistance once in respect of the domestic disputes and returning to reside with her ex-husband instead of seeking court intervention) are reported in the Applicant's Personal Information Form [PIF], as well as repeated in her counsel's 30 page final written submissions to the Board.

[33] Accordingly, I do not find that the absence of transcripts prevents me from reviewing and upholding the Board's decision that Ms. Koronka failed to demonstrate that state protection in Hungary is inadequate, or that she had taken all reasonable steps in the circumstances to seek protection before claiming refugee protection.

(2) The Male Applicant

[34] The Board made clear credibility findings against the adult male Applicant as part of its reasons and concluded that he had not provided clear evidence that state protection was inadequate. However, these findings came after reviewing the Applicant's testimony concerning the attacks made on him and the alleged reports to the police.

[35] The Board referred to the Applicant's evidence that he was attacked by skinheads and made two reports to police, one when he was 12 years old, and the other in 1998 when he was 17 years old, neither of which were serious, at which time the police did nothing. These incidents are set out in his written narrative accompanying his PIF. Notably, while he references these two incidents, he failed to indicate in his narrative that he had reported them to the police.

[36] The Board's initial line of reasoning was based upon the version of the two attacks occurring, without regard to whether he reported them or not. It found that the last complaint when living in Hungary, being some nine years prior to leaving the country, does not amount to a lack of police protection. Thereafter, the Board further rejected the probative value of this evidence on several bases: that the state capacity to protect at the national level was most important rather than the local apparatus; that random assaults, where the assailants are unknown, are difficult to prosecute; and that state protection cannot be based on an incident where the Applicant was unable to identify the assailants.

[37] I find the Board's reasoning that the evidence of the male Applicant's personal incidents was very dated and limited, sufficient to support a finding that the Applicant had not demonstrated the inadequacy of state protection.

[38] In any event, it was only after this analysis that the Board set out in detail the Applicant's inconsistent evidence in his narrative and his live testimony regarding whether he reported these incidents to the police. The only missing evidence that the transcript could provide on this issue

was to confirm the Board's recitation of the Applicant's testimony that he had reported these incidents to the police. As mentioned, the narratives give no indication that he had done so.

[39] I am of the view that the male Applicant, or certainly his spouse, should have had a sufficient recollection to recall whether he testified that he had reported these incidents to the police and that he was questioned on the inconsistency of his testimony with his written narrative. Accordingly, counsel's submission at the hearing that "Gabor had some difficulty testifying and his testimony confused details in his written narrative" likely relates in part to the male Applicant testifying that he had reported these incidents to the police, when this evidence was not disclosed in his written narrative. As such, the credibility findings made against the male Applicant based on the inconsistencies in reporting his incidents to the police appear justified. As mentioned however, these findings were not necessary, as I accept that the incidents, whether reported or not, are too dated and would not justify a conclusion of a history of inadequate state protection of the male Applicant in any event.

[40] In these circumstances therefore, I find that the absence of the transcript produced no procedural unfairness to the male Applicant in the Court's ability to review the state protection findings concerning his evidence. Otherwise, I find no reviewable error in the Board's conclusion that the Applicant failed to demonstrate on the balance of probabilities that state protection in Hungary was inadequate.

VII. Conclusion

[41] For the reasons described above, the Court dismisses the application. No question is certified for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed, with no question certified for appeal.

"Peter Annis"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2713-15

STYLE OF CAUSE: GABOR HUSZAR, ESZTER KORONKA, DAVID GERMUSKA and KIRA KINSCO GERMUSKA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

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