Federal Court Cour fédérale

Date: 20170912

Docket: IMM-785-17

Citation: 2017 FC 824

Ottawa, Ontario, September 12, 2017

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

ROBERT RACZ, ZSUZSANNA RUSZO,
VIKTORIA RACZ

Applicants

and

THE MINISTER OF IMMIGRATION,
REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA* or the Act] for judicial review of the decision of a Senior Immigration Officer [Officer], dated January 13, 2017 [Decision], which rejected the Applicants' Pre-

Removal Risk Assessment [PRRA] application on the grounds that the Applicants failed to rebut the presumption of state protection.

II. BACKGROUND

[2] The Applicants are citizens of Hungary of Roma ethnicity. Robert Racz and Zsuzsanna Ruszo are spouses. Viktoria Racz is Robert and Zsuzsanna's minor daughter.

[3] Fearing persecution because of their Roma ethnicity, the Applicants initially fled Hungary in 2011. Shortly after arriving in Canada, the Applicants initiated claims for refugee status. On June 27, 2012, the Refugee Protection Division of the Immigration and Refugee Board of Canada [IRB] denied the Applicants' claims, finding the Applicants to be neither Convention refugees nor persons in need of protection. The Applicants subsequently left Canada on October 31, 2012.

[4] The Applicants recount a series of attacks on themselves and other family members after returning to Hungary.

A. *Attacks on the Applicants*

[5] In June 2014, Neo-Nazis attacked Zsuzsanna. At the time, Zsuzsanna was pregnant. She returned to the hospital the day after the attack because she still felt sick. Doctors at the hospital performed an abortion as Zsuzsanna's baby had died.

[6] In May 2016, Neo-Nazis attacked Robert and Zsuzsanna. Both required hospitalization as a result. Zsuzsanna was released from hospital two days after Robert. Zsuzsanna understood that hospital staff called the police on her behalf, but the police never arrived. Zsuzsanna called the police herself from the hospital. Police told Zsuzsanna that she could report the attack in-person at a station once discharged. Because of previous experiences of family members' reports to police being ignored, Zsuzsanna did not go to the police station after she was discharged from the hospital.

[7] The Applicants also allege that they were forcibly evicted from their home in Miskolc, Hungary by local authorities and forced to relocate to Budapest in August 2015.

B. *Attacks on the Applicants' Family*

[8] In December 2013, Zsuzsanna's adult son, Roland Mata, was attacked while entering his apartment building. The attackers yelled ethnic slurs at Mr. Mata during the attack. Zsuzsanna called the police. After the police did not arrive, Zsuzsanna called the police again to ask why they had not arrived. The police told Zsuzsanna that they were busy but would come when they had time. The police never arrived.

[9] In December 2015, Mr. Mata's partner, Alexandra Reka Szucs, was attacked by a neighbour from their apartment building. Ms. Szucs was pregnant at the time and the attacker told Ms. Szucs that "he [didn't] want [her] to give birth to a gypsy": Affidavit of Alexandra Reka Szucs at para 14. Like Zsuzsanna, Ms. Szucs had to abort the baby as it had died. Since she was able to identify her attacker, Ms. Szucs called the police on two occasions from the hospital. The

police told Ms. Szucs that she should report the attack at the police station after being discharged. Ms. Szucs went to the police station and described the attack, but the police did not take notes. Nothing happened to Ms. Szucs' neighbour.

[10] In March 2016, Mr. Mata and Ms. Szucs were attacked on their way home from work because of their ethnicity. Mr. Mata suffered a concussion and went to the hospital. Police arrived at the hospital but took no notes while inquiring about the attack.

[11] Finally, in August 2016, people shouting ethnic slurs attacked Zsuzsanna's daughter's partner, David, in the family's apartment and beat him unconscious. Zsuzsanna and Mr. Mata took David to the hospital. Hospital staff cleaned the blood from David's face but did not examine him despite Zsuzsanna's insistence. David was eventually transferred to a different hospital. There is no evidence that the Applicants or other members of their family attempted to contact the police about the attack on David.

III. DECISION UNDER REVIEW

[12] The Decision under review is a rejection of the Applicants' PRRA application. The Decision resulted from the Applicants' return to Canada on September 15, 2016. They again made claims for refugee status but were determined to be ineligible because of the IRB's rejection of their previous claim. The Applicants are subject to deportation orders because they returned to Canada without the required authorization. Consequently, they submitted PRRA applications to Immigration, Refugees and Citizenship Canada on October 11, 2016. In a

Decision dated January 13, 2017, the Officer rejected the Applicants' PRRA applications on the grounds that the Applicants failed to rebut the presumption of state protection.

[13] The Officer begins the Decision by outlining the Applicants' first claim for refugee protection in Canada, their departure in 2012, and return in 2016.

[14] The Officer then assesses some of the evidence that was before him. The Officer found insufficient documentary evidence to establish that the Applicants' eviction from their home in August 2015 was caused by their Roma ethnicity. The Officer then references the June 2014 attack on Zsuzsanna which required her to abort her baby, and the May 2016 attack on Robert and Zsuzsanna that resulted in their hospitalizations. The Decision notes that Zsuzsanna did call the police but points out that she chose not go to the police station to report the attack after being discharged. The Decision then references Zsuzsanna's perception of the inadequacy of police response without elaborating on the basis for that belief. None of the attacks on the Applicants' family members or the attempts to report some of those attacks to the police, including Zsuzsanna's own attempt to report the December 2013 attack on Mr. Mata, are mentioned in the Decision.

[15] The Decision then goes on to deal with the Officer's state protection analysis. Citing *Konya v Canada (Citizenship and Immigration)*, 2013 FC 975, the Officer begins by stating that "the test for state protection is not a test of effectiveness, but rather one of adequacy." The Officer notes that Hungary is a functioning democracy with effective control over its territory. Thus, the Applicants bore a heavier onus than simply showing that they had been unsuccessful

when attempting to engage members of the local police. Furthermore, as the Applicants did not allege that the agent of persecution was the state, assessment of state protection was a matter of state capacity to provide protection. Local refusal to provide protection could only amount to state refusal if there was evidence of a broader state policy: *Zhuravlvev v Canada (Minister of Citizenship and Immigration)*, [2000] 4 FCR 3 at para 31 (TD) [*Zhuravlvev*].

[16] Evaluating the evidence in light these factors, the Officer concludes that the Applicants failed to clearly and convincingly establish that the Hungarian police cannot provide adequate protection. The Officer again emphasizes Zsuzsanna's failure to go to the police station after the May 2016 attack. The Officer describes Zsuzsanna's behaviour as "doubting the effectiveness of state protection without reasonably testing it, or simply asserting a subjective reluctance to engage the state" that failed to rebut the presumption of state protection: citing *Ruszo v Canada (Citizenship and Immigration)*, 2013 FC 1004 at para 33. The Decision states that an unsatisfactory local response places an onus on those alleging a failure of state protection to pursue the matter with other law enforcement officials. However, there is no analysis or explanation of how alternative avenues of redress could provide the Applicants with the protection they seek. The Officer acknowledges evidence that Roma victims often face discriminatory police treatment in Hungary, but decides that complaint mechanisms do exist.

[17] The Decision concludes by addressing two remaining evidentiary issues. First, the Officer gives reasons for discounting a letter presented by the Applicants to support their contention that Viktoria suffered from an eating disorder caused by the Applicants' 2015 eviction. The Officer then references supporting country documentation describing the situation

of Roma in Hungary. The Officer accepts that Roma often face discrimination and violence but finds that the generalized nature of the material fails to establish an adequate connection to the Applicants' personal circumstances.

IV. ISSUES

[18] The Applicants submit that the following is at issue in this application:

1. Is the Officer's finding that the Applicants failed to rebut the presumption of state protection unreasonable?

V. STANDARD OF REVIEW

[19] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness*), 2013 SCC 36 at para 48.

[20] Both parties agree that the standard of review is reasonableness and the Court concurs. See *Ogbonna v Canada (Citizenship and Immigration)*, 2017 FC 93 at para 5; *Kulanayagam v*

Canada (Citizenship and Immigration), 2015 FC 101 at para 21; *Alvarez v Canada (Citizenship and Immigration)*, 2014 FC 564 at paras 19-20.

[21] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at para 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

VI. ARGUMENT

A. *Applicants*

[22] The Applicants submit that the Officer's finding that the Applicants failed to rebut the presumption of state protection was unreasonable for two principal reasons:

1. The Officer focused on Zsuzsanna's failure to go to the police following her discharge from hospital after she was attacked in May 2016, but ignored Zsuzsanna's attempt to engage state protection in Hungary after the attack on Mr. Mata in December 2013; and
2. The Officer ignored evidence that individuals similarly situated to the Applicants have tried to access state protection unsuccessfully.

(1) Zsuzsanna's Failure to Go to the Police

[23] The Applicants submit that the Decision was unreasonable because the Officer ignored evidence that Zsuzsanna attempted to access state protection in 2013, after Neo-Nazis attacked her son, Mr. Mata. The Officer made no reference to the attack on Mr. Mata, Zsuzsanna's two calls to the police, and the failure of the police to arrive on that occasion.

[24] Instead, the Officer concentrated on Zsuzsanna's response to being attacked and hospitalized in May 2016. The Decision does not mention Zsuzsanna's call to the police from the hospital or her previous experience attempting to engage the Hungarian state. The Officer describes Zsuzsanna's failure to go to the police station as a "subjective reluctance to engage the state" without assessing the context of that reluctance.

(2) Evidence of Similarly Situated Individuals Before the Officer

[25] The Applicants further submit that the Decision is unreasonable because it ignores evidence that individuals similarly situated to the Applicants have attempted to engage state protection with little success. Relying on the Federal Court of Appeal's decision in *Salibian v Canada (Minister of Employment and Immigration)*, [1990] 3 FCR 250 at 259 (CA), the Applicants argue that, as in cases evaluating the risk of persecution, the treatment afforded to similarly situated individuals is the best evidence available of the adequacy of state protection. The Applicants point to the attack on Ms. Szucs in 2015, and the second attack on Mr. Mata in 2016, as two instances where police were called and attempts at filing reports were made, yet state protection was inadequate.

[26] The Applicants argue that the country documentation before the Officer objectively establishes the inadequacy of state protection. They cite *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at 724-25 [*Ward*], for the principle that evidence of "similarly situated individuals let down by the state protection arrangement" can objectively establish that a failure to engage the state was not unreasonable in the circumstances. In addition to the attacks on the Applicants' family members, the Applicants point to the conclusions of a report issued by the Harvard School of Public Health that they say establishes the inadequacy of the Hungarian government's response to the discrimination and persecution faced by Roma in Hungary. The Applicants argue that the adequacy of state protection must be evaluated at the operational level, *Meza Varela v Canada (Citizenship and Immigration)*, 2011 FC 1364 at para 16, quoting *Beharry v Canada (Citizenship and Immigration)*, 2011 FC 111 at para 9, and that when persecution is widespread, individual attempts to engage the state have little persuasive value: *Majoros v Canada (Citizenship and Immigration)*, 2013 FC 421 at para 16 [*Majoros*].

[27] Finally, the Applicants submit that the evidence of the attacks on Mr. Mata and Ms. Szucs, which was not commented on by the Officer, has led to those individuals being found to be persons in need of protection in a separate proceeding. They argue that this establishes the significance of this evidence to the Decision and reinforces the Decision's unreasonableness.

[28] The Applicants request that this Court quash the Decision and return the matter for redetermination by a different officer.

B. *Respondent*

[29] The Respondent argues the Officer properly discussed and applied the principles of state protection, and that the Decision is therefore reasonable.

[30] The Respondent notes that absent a complete breakdown of the state apparatus, state protection is presumed. To rebut the presumption, an applicant must present clear and convincing evidence of the state's inability to provide adequate protection: *Flores Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 at para 38; *Ward*, above, at 726. The Respondent argues that while the test for state protection is adequacy, this is measured by "serious efforts to protect": *Canada (Minister of Employment and Immigration) v Villafranca* (1992), 99 DLR (4th) 334 at 337 (FCA).

[31] The Respondent further argues that the Applicants provided insufficient evidence of their efforts to engage the Hungarian state. The Respondent notes that the Federal Court of Appeal has stated that the more democratic the state, the more the Applicant must do to exhaust reasonable remedies before seeking international protection: *Kadenko v Canada (Solicitor General)* (1996), 143 DLR (4th) 532 at 534 (FCA). The Respondent points to the Officer's finding that Hungary is a democratic state, is in effective control of its territory, has a functioning security apparatus, and has independent mechanisms to ensure that police are providing protection. Thus, the Respondent argues that the Decision was reasonable, as it was the Applicants' burden to exhaust all avenues of redress open to them: *Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171 at para 57.

[32] Regarding the question of material before the Officer that could objectively establish the inadequacy of state protection, the Respondent points out that the Officer accepted that documentary evidence on the adequacy of state protection in Hungary is mixed, that shortcomings exist, and that Roma victims experience discriminatory treatment from police when reporting crimes. But the Respondent argues that the Officer appropriately considered jurisprudence establishing that local refusals by some officers do not obviate the need to seek protection or amount to state refusal. See *Zhuravlvev*, above. The Respondent argues that the Applicants' failure to refer all incidents to the authorities renders the Officer's finding that the Applicants failed to rebut the presumption of state protection reasonable. The Applicants dispute the Respondent's characterization of these facts and, as explained above, points to evidence before the Officer of instances where reports were made to the police after attacks on the Applicants' family.

[33] The Respondent submits that the Applicants' argument that the documentary evidence objectively established the inadequacy of state protection is merely an invitation to this Court to reweigh the evidence and reach a different conclusion. The Respondent argues that it is not the role of this Court to engage in such reweighing and that to do so would merely substitute the Court's opinion under the "guise of reasonableness." Furthermore, the Decision summarizes all of the evidence before the Officer and demonstrates that the Decision was not unreasonable. The Respondent argues that a state protection analysis is a complex exercise within the Officer's core area of expertise. Therefore, the existence of contrary evidence does not demonstrate a perverse finding of fact or a breakdown in the logic of the analysis rendering the Decision rationally unsupported.

[34] The Respondent therefore requests that this Court dismiss the application for judicial review.

VII. ANALYSIS

[35] I agree with the Respondent that PRRA decisions are discretionary and must be decided on a case by case basis. I also agree that a decision is not unreasonable simply because it could reasonably have been decided otherwise. I further acknowledge that Roma applications refused on a state protection basis have been decided both ways upon review in the Federal Court. However, in the present case, I think that unreasonable mistakes have been made that require the matter to be returned for reconsideration.

[36] The Officer raises no credibility concerns and clearly accepts the specific incidents of violence and discrimination suffered by the Applicants and other family members, as well as the failure of the police to respond adequately. But the Officer declines to accept the personal experiences of the Applicants and their family as evidence of inadequate statement protection on the following grounds:

(a) Zsuzsanna's failure to report to the police after she was discharged from Peterfy Sandor Hospital following the May 2016 attack;

(b) The failures of the police to respond to the violence suffered by the Applicants, and other family members were no more than "local failures," and "[l]ocal failures to provide effective policing do not amount to lack of state protection… in the absence of evidence of a broader state policy to not extend state protection to the target group";

(c) The "actions of some police officers [do] not preclude the need to seek protection from the authorities…. If the [A]pplicants believed that the actions of some police officers were unsatisfactory and less than desirable, the onus falls on them to approach other members of law enforcement or other authorities for assistance";

(d) The documentary evidence is "mixed" with respect to state protection efforts in Hungary, but the Officer accepts that "Roma victims often experience discriminatory treatment such as indifference and hesitation from police when they want to report a crime" (emphasis added). However, "complaint mechanisms and avenues of redress do exist for those alleging mistreatment at the hands of police";

(e) The Officer acknowledges that the country evidence shows that the "Roma population in Hungary do face societal attitudes that are inhospitable and intolerant. Namely, discrimination against Roma in education, housing, employment and access to public places have been identified areas of concern." In addition, the "rise of right-wing nationalism has further fuelled anti-Roma sentiment and violence." Notwithstanding this acknowledgement, the Officer decides that the country evidence is "generalized in nature and [does] not establish a linkage directly to applicants' personal circumstances" (emphasis added).

[37] Having accepted the Applicants' personal evidence on the serious violence, discrimination, harassment and other indignities they have suffered, it is obvious that the Officer fails to appreciate that the general country documentation is not "general" in nature in this instance. It directly supports and confirms the Applicants' own experience. This is a Roma

family that has suffered the violence, and state indifference to that violence, that the Officer agrees is "often" suffered by Roma people in Hungary.

[38] Further, the so-called "complaint mechanisms and avenues of redress" that the Officer relies upon are not specifically identified but appear to be alternatives that the Court has consistently found do not render state protection in Hungary adequate. See *Katinszki v Canada (Citizenship and Immigration),* 2012 FC 1326 at paras 14-16; *Orgona v Canada (Citizenship and Immigration)*, 2012 FC 1438 at para 14; *Balogh v Canada (Citizenship and Immigration)*, 2015 FC 76 at paras 30-32; *Beri v Canada (Citizenship and Immigration)*, 2013 FC 854 at paras 57-59; *Bari v Canada (Citizenship and Immigration)*, 2014 FC 862 at paras 16, 29.

[39] The Officer's conclusion that the "[d]ocumentary evidence is mixed with respect to state protection efforts in Hungary" also fails to address the clear contradictions to this position found in that evidence. For example, a report titled "Accelerating Patterns of Anti-Roma Violence in Hungary," from the François-Xavier Bagnoud Center for Health and Human Rights and Harvard School of Public Health (Boston: February 2014), has the following to say on point:

> 119. Hate speech and actions by extremists groups as well as by leaders, hate-motivated killings, stigmatization of Romani people, discriminatory practices (both individual and structural), and social and economic exclusion were on the rise in Hungary between 2008 and 2012. Neo-Nazis' groups organize secret military trainings and camps where members learned about theoretical military education and performed formation and shooting exercises.
>
> 120. *Although the incidents provided very clear signals for taking action, the Government response was inadequate to stem the rise in racial crimes and extremist action.*
>
> [emphasis added]

There is nothing to suggest that this situation has improved.

[40] The July 2015 Response to Information Request also makes it clear that the police in Hungary lack the resources to deal with violence against Roma, and do not adequately respond to hate crimes:

> **2. Complaints Mechanisms**
>
> According to a report on discrimination in Hungary, produced by the European Union's (EU) Agency for Fundamental Rights (FRA), an independent body of the EU that provides information to member states on issues of fundamental rights and Community law (UN n.d.),
>
> > [t]here is no specific complaints mechanism dealing with racist and related abuse by police officers… the options for victims to seek redress are limited.
>
> […]

[41] This kind of evidence suggests to me that the problems faced by Roma in Hungary, including indiscriminate violence, are ongoing and are, in fact, getting worse. The lack of an adequate government response encourages impunity for those members of Hungarian society who wish to harm Roma people and, as the evidence makes clear, racist bigotry and violence aimed at the Roma of Hungary is widespread. The Officer fails to deal with this evidence and takes refuge in the all-too-easy "mixed" epithet. This will not do. See *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 at para 17 (FC).

[42] This case has many parallels with the situation that Justice Zinn had to deal with in *Majoros*, above:

> [16] Where persecution is widespread and indiscriminate, and unless a claimant is repeatedly targeted by the same individual(s), I fail to understand how it can be said that individual attempts to engage the authorities will have significant, persuasive evidentiary value as to the state's ability to protect against future, indiscriminate violence. In those cases, documentary evidence, rather than individual attempts to seek protection, is more relevant to the state protection analysis. As discussed below, the Board in this case did review the documentary evidence; however, one cannot escape the conclusion reading the decision as a whole that the applicants' perceived inadequate attempts to engage the police not only figured prominently, but were decisive in the Board's analysis. That legal error – which is to place a *legal* burden of seeking state protection on a refugee claimant – is unreasonable and itself sufficient to warrant granting this application.
>
> [emphasis in original]

[43] The Officer's general lack of care over the facts of this case is also reflected in the refugee claim of Roland Mata (whose situation is cited and relied upon in this case to show the violence this family has had to face, see Affidavit of Alexandra Reka Szucs at paras 8, 14-15) who was accepted as a genuine refugee in Canada on the same facts a little more than two weeks later. Mr. Mata was attacked by people yelling ethnic slurs outside his apartment building in 2013. His partner, Alexandra Reka Szucs, was attacked by a neighbour in 2015. Mr. Mata and Ms. Szucs were attacked on their way home in 2016. In each case, the Applicants or their family attempted to access state protection, but their appeals were met with indifference. In Mr. Mata's refugee claim, the PRRA officer, relying on the same evidence, specifically notes that the family "called and approached the police on multiple occasions due to physical and violent attacks" but that "they were not given any assistance": Exhibit "C" to the Affidavit of Stefanie Tantalo at 5.

[44] All in all, I have to conclude that this is a very unsatisfactory and unreasonable Decision that should be reconsidered by another officer, keeping my comments in mind.

[45] Counsel agree there is no question for certification and I concur.

JUDGMENT IN IMM-785-17

THIS COURT'S JUDGMENT is that

1. The application is allowed. The Decision is quashed and this matter is returned for reconsideration by a different officer.
2. There is no question for certification.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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