Federal Court  Cour fédérale

Date: 20171110

Docket: IMM-5068-16

Citation: 2017 FC 1035

Ottawa, Ontario, November 10, 2017

PRESENT: The Honourable Mr. Justice Gascon

BETWEEN:

JAROSLAV KOKY, DARINA KOKYOVA, NORA KOKYOVA AND SOFIA KOKYOVA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicants, Mr. Jaroslav Koky, his wife, Ms. Darina Kokyova, and their minor children, Nora and Sofia, are all ethnic Roma from the Slovak Republic. They made a refugee claim in Canada, alleging to fear returning to Slovakia because of the systemic persecution of Romani people in that country, further compounded by the lack of state protection afforded to

them. They also claimed that they suffered a number of incidents of discrimination and violence between 2009 and 2015, which cumulatively amounted to persecution.

[2] A panel of the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada dismissed their claim for lack of credible evidence and failure to provide sufficient proof that state protection was not available to them in Slovakia. The Koky family appealed the RPD's decision to the Refugee Appeal Division [RAD]. In a decision issued in November 2016 [Decision], the RAD dismissed their appeal and confirmed the RPD's findings on credibility and state protection. The RAD notably concluded that the Koky family had not rebutted the presumption of state protection.

[3] The Koky family now seeks judicial review of the RAD's Decision. They argue that the RAD's conclusions on state protection are unreasonable because the RAD erred in assessing an incident of persecution that occurred in 2015, in failing to analyze their claims of persecution on a cumulative basis, and in determining that state protection was adequate in Slovakia. They ask this Court to quash the Decision and to send it back for redetermination by a differently-constituted panel. The determinative issue before the RAD was the availability of state protection in Slovakia and, in this application for judicial review, the Koky family focused their challenge of the Decision on this point.

[4] Having considered the evidence before the RAD and the applicable law, I can find no basis for overturning the RAD's Decision. The RAD's findings on the issue of state protection were detailed and responsive to the evidence, and the outcome is defensible based on the facts

and law. The Decision falls within the range of possible, acceptable outcomes and is not unreasonable. There are no sufficient grounds to justify this Court's intervention, and I must therefore dismiss the Koky family's application for judicial review.

II. Background

A. *The Decision*

[5] In its analysis of the merits of the appeal, the RAD briefly dealt with the RPD's adverse credibility findings relating to the various incidents of discrimination and persecution alleged by the Koky family, before turning to its analysis of state protection.

[6] The RAD provided a detailed review of the issue of state protection before concluding that the Koky family had not rebutted the presumption of state protection. The RAD agreed that the evidence clearly showed that the Roma still suffer from higher rates of unemployment and lower education achievement in Slovakia, and that they are excluded from regular life in terms of housing and healthcare. However, the RAD found that the documentary evidence also indicated that the state is making serious efforts to remedy the situation, despite slow progress. The RAD acknowledged that it is unreasonable to expect that these measures should have prevented or eliminated all racism or acts of violence related to race.

[7] Further to its review of the evidence, the RAD found that the preponderance of objective evidence regarding current country conditions suggests that, although not perfect, state protection in the Slovak Republic is adequate for the victims of crimes; that the state is making

serious efforts to address the problems of criminality; that concrete measures and results are obtained; and that the police are both willing and able to protect victims. The RAD further noted that police corruption and deficiencies, although existing and noted by the RPD, are not systemic.

[8] With respect to a 2015 incident during which Mr. Koky was allegedly physically assaulted by ethnic Slovaks and which he later reported to the police, the RAD observed that there was no evidence as to why the police closed the investigation into the incident shortly after it being reported. But, as the RAD reiterated, local failures to provide effective policing do not amount to a lack of state protection unless they are part of a pattern of the state's inability or refusal to provide protection (*Zhuravlvev v Canada (Minister of Citizenship and Immigration)*, [2000] 4 FC 3 (FCTD)). In effect, the RAD said, evidence that the protection being offered is not perfect does not amount to clear and convincing proof of the state's inability to protect its citizens, as no government can guarantee protection for all citizens at all times (*Zalzali v Canada (Minister of Employment and Immigration)*, [1991] 3 FC 605 (FCA)).

[9] The RAD further noted that a refugee claimant must do more than approach one police officer unsuccessfully before deciding that state protection would not be forthcoming. There is an onus on the claimant to exhaust all courses of action reasonably available to him or her (*Canada (Minister of Citizenship and Immigration) v Kadenko*, [1996] FCJ No 1376 (FCA) (QL)). In particular, the RAD found no sound rationale for the Koky family's failure to report a first incident of persecution which they claim occurred in 2009. Nor was their failure to report consistent with a well-founded fear or indicative of any genuine attempt to attempt to obtain state

protection. Indeed, the RAD observed that, in the absence of a compelling explanation, a failure to pursue state protection opportunities within the home state will usually be fatal to a refugee claim, at least where the state is a functioning democracy with a willingness and apparatus necessary to provide a measure of protection to its citizens (*Camacho v Canada (Citizenship and Immigration)*, 2007 FC 830). The RAD concluded that the same applies to another incident that allegedly occurred in 2014 between Mr. Koky's daughter, Nora, and a group of antagonistic classmates. The RAD found that there was no evidence that the incident was reported to school authorities or police, nor evidence of it being otherwise racially motivated.

[10] In sum, the RAD found that the Koky family's evidence did not show that they sought, and were then subsequently denied, state protection in Slovakia. The RAD also analyzed the evidence of general conditions in the country and the state's ability to protect its citizens, and determined that active steps were taken to combat deficiencies, with signs of real progress and results. In the end, the RAD concluded that the Koky family had failed to establish, on a balance of probabilities, that state protection is inadequate in the Slovak Republic, and that state protection would not be reasonably available to them.

B. *The standard of review*

[11] The applicable standard of review for the issues raised in the present case has already been determined in the jurisprudence. As a result, there is no need to proceed to an analysis to identify the appropriate standard of review (*Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at para 62). For the analysis of the cumulative basis for persecution, the standard of reasonableness applies (*Galamb v Canada (Citizenship and Immigration)*, 2016 FC 1230

[*Galamb*] at para 12; *Dubat v Canada (Citizenship and Immigration)*, 2016 FC 1061 at para 35; *Smirnova v Canada (Citizenship and Immigration)*, 2013 FC 347 at paras 19, 25). Similarly, the issue of the adequacy of state protection is to be reviewed under the reasonableness standard as it involves questions of mixed fact and law (*The Minister of Citizenship and Immigration v Flores Carrillo*, 2008 FCA 94 [*Flores Carrillo*] at para 36; *Hinzman v Canada (Citizenship and Immigration)*, 2007 FCA 171 [*Hinzman*] at para 38; *Fares v Canada (Citizenship and Immigration)*, 2017 FC 797 at paras 19-22; *Galamb* at para 12). Since the *Immigration and Refugee Protection Act*, SC 2001, c 27 is the enabling statute that the RAD officers are mandated to enforce, its interpretation and application fall within their core area of expertise. In such circumstances, a high degree of deference is owed to the RAD's factual findings and assessment of the evidence.

III. Analysis

[12] The Koky family claims that the RAD made several reviewable errors in its analysis of state protection. They identify three main ones. First, they argue that the RAD erred in stating that no evidence existed as to the reason why the police discontinued its investigation on the 2015 incident involving Mr. Koky. Second, they submit that the RAD failed to consider the cumulative effect of discrimination as amounting to persecution. Third, they contend that the RAD solely focused on the efforts of the Slovak state but omitted to consider whether the state protection was adequate and operationally effective. They submit that the evidence did not allow the RAD to conclude as it did on the effectiveness of state protection in Slovakia.

[13] I disagree and do not share the views of the Koky family on the RAD's assessment of state protection. I instead find that, when viewed as a whole, the RAD's state protection analysis was comprehensive, anchored in the evidence and reflective of the correct test to be applied.

[14] It is not disputed that the appropriate test in a state protection analysis commands an assessment of its adequacy at the operational level (*Galamb* at paras 32-37). The state protection test must focus not only on the efforts of the state but also on actual results: "[i]t is what state protection is *actually provided* at the *present time* that is relevant" (*Hercegi v Canada (Citizenship and Immigration)*, 2012 FC 250 at paras 5-6 [emphasis in original]). A state protection analysis must not just consider governmental aspirations. Efforts made by a government to achieve state protection may, of course, be relevant to the question of whether operational adequacy has been achieved. However, even if serious and significant, efforts are not enough. Actual results in terms of what is concretely accomplished by the state must be assessed and demonstrated (*Kovacs v Canada (Citizenship and Immigration)*, 2015 FC 337 at paras 71-72). But one must still keep in mind that state protection is a relative concept, in that state protection needs not be perfect in order to be effective; it simply has to be "adequate" (*Flores Carrillo* at para 30).

[15] Moreover, there is a general presumption that the state is able to provide protection to its citizens, and it is up to the refugee claimants to provide clear and convincing evidence of the state's inability to do so (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at 724). It is not enough for claimants to merely show that their government has not always been effective at protecting citizens in their particular situation (*Canada (Minister of Employment and*

Immigration) v Villafranca, [1992] FCJ No 1189 (FCA) (QL) at para 7). As stated by the Federal Court of Appeal in *Hinzman*, "refugee protection is meant to be a form of surrogate protection to be invoked only in those situations where the refugee claimant has unsuccessfully sought the protections of his home state" (*Hinzman* at para 41). As such, "the fundamental requirement in refugee law that claimants seek protection from their home state before going abroad to obtain protection through the refugee system" (*Hinzman* at para 62). In the case of a developed democracy (as is the situation here for Slovakia), the claimant is faced with the burden of proving that he or she exhausted all the possible protections offered in the country of origin. It is also trite law that applicants seeking refugee protection cannot simply claim that they believe or fear that state protection will not be forthcoming (*Moya v Canada (Citizenship and Immigration)*, 2016 FC 315 at para 75; *Ruszo v Canada (Citizenship and Immigration)*, 2013 FC 1004 at para 33). Such a claim must be supported by evidence.

[16] I find no reviewable error in the RAD's statement of the law surrounding state protection, as it echoes these principles. Rather, the question for the Court's consideration is whether the RAD's conclusion that the Koky family had not rebutted the presumption of state protection was reasonable in the context of the country condition evidence applicable to the Slovak Republic, and the Koky family's own evidence on their personal experiences. I conclude that it was.

[17] A review of the RAD's reasons reveals that the RAD reviewed the evidence on state protection thoroughly over nearly 30 paragraphs in the Decision. The RAD's Decision clearly indicates that it considered the evidence on state protection objectively, both from the country's perspective and from the Koky family's specific encounters with the Slovak state, before finding

that, while imperfect, the state protection was adequate in Slovakia. I am satisfied that, in this case, the RAD considered not only the efforts of Slovakia to offer state protection to the Koky family, but also looked at the results of the measures undertaken in terms of investigations, prosecutions, police effectiveness and convictions in the treatment of Romani people. There was concrete evidence of the police actually offering protection. As such, the RAD's references to "serious efforts" as a measure of assessment of the adequacy of state protection does not amount to a reviewable error (*Cina v (Canada (Citizenship and Immigration)*, 2011 FC 635 at para 69; *Sholla v Canada (Citizenship and Immigration)*, 2007 FC 999 at paras 8-9).

[18] Conversely, the RAD acknowledged that the evidence relating to the adequacy of state protection in the country was mixed, and that shortcomings and deficiencies still translated into discrimination against the Roma. However, in the end, on the basis of the evidence before it and considering the repeated failures of the Koky family to seek protection, the RAD gave more weight to the documentary evidence relating to the effectiveness and adequacy of state protection than to the concerns expressed by the Koky family or to the documentary evidence pointing to some deficiencies in the state actions. Further to my review of the Decision and of the record before the RAD, I am not convinced that this assessment was unreasonable.

[19] In a case where state protection is an issue, the real question is whether, considering the whole of the evidence about the state's capacity to protect its citizens, the refugee claimants will be exposed to a serious risk of persecution if returned to their home country. Given the evidence on the record, I find that the RAD could reasonably conclude that the Koky family had failed to satisfy that test and to rebut the presumption of state protection.

[20] In the Decision, the RAD did acknowledge the 2015 incident as proof of discrimination against Mr. Koky, but did not elevate it to proof of persecution as the incident was not, in the panel's view, symptomatic of a systemic failure by the state to provide protection. As acknowledged by the Koky family, this fact was not ignored and was actually mentioned in the RAD's reasons when discussing the documentary evidence. In light of the expansive analysis covering a number of elements of state protection in Slovakia, and a large amount of documents, it was reasonable for the RAD to arrive at this conclusion. Nor am I persuaded that the RAD failed to account for the cumulative effects of discrimination suffered by the Koky family generally. In fact, the Decision reveals that the RAD reviewed the discrimination against the Roma in housing, education, employment and healthcare on an individual basis and on a cumulative basis. As to the documentary evidence, the RAD considered a voluminous amount of documents and information. It relied more heavily on certain documentary evidence, and preferred that evidence to the references provided by the Koky family. This does not amount to an unreasonable finding.

[21] When reviewing a decision on the standard of reasonableness, the analysis is concerned "with the existence of justification, transparency and intelligibility within the decision-making process", and the RAD's findings should not be disturbed as long as the decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at para 47). In conducting a reasonableness review of factual findings, it is not the role of the Court to reweigh the evidence or the relative importance given by the decision-maker to any relevant factor (*Kanthasamy v Canada (Citizenship and Immigration)*, 2014 FCA 113 at para 99). Under a reasonableness standard, as long as the process and outcome fit comfortably

with the principles of justification, transparency and intelligibility, and the decision is supported by acceptable evidence that can be justified in fact and in law, a reviewing court should not substitute its own view of a preferable outcome (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*] at para 17). The issue is neither whether the reviewing court would have reached the same conclusion as the administrative tribunal nor whether the conclusion made by the tribunal is correct (*Majlat v Canada (Citizenship and Immigration)*, 2014 FC 965 [*Majlat*] at paras 24-25). Deference means that tribunals such as the RAD must be afforded latitude to make decisions in their specialized field of expertise when "their decisions are understandable, rational and reach one of the possible outcomes one could envisage legitimately being reached on the applicable facts and law" (*Majlat* at para 24).

[22] As such, the arguments put forward by the Koky family in this case simply express their disagreement with the RAD's assessment of the evidence on state protection and ask the Court to prefer their own reading to that of the RAD. In doing so, they are inviting the Court to reweigh the evidence before the RAD and to substitute itself for the decision-maker. Again, in conducting a reasonableness review of factual findings, it is not the role of the Court to reassess the relative importance given by the decision-maker to any relevant factor or piece of evidence.

[23] The Koky family's further contention to the effect that the RAD failed to consider all the evidence submitted in favour of a finding of persecution against them is equally unconvincing. It is trite law that decision-makers are presumed to have considered each piece of evidence before them; failure to refer to every element, such as Amnesty International reports, does not in and of

itself constitute an error (*Newfoundland Nurses* at para 16; *Cepeda-Gutierrez v Canada (Citizenship and Immigration)*, [1998] FCJ No 1425 (FCTD) (QL) [*Cepeda-Gutierrez*] at paras 16-17). It is only when a decision-maker is silent on evidence clearly pointing to an opposite conclusion that the Court may intervene and infer that the decision-maker overlooked contradictory evidence when making its findings of fact (*Ozdemir v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 331 at paras 9-10; *Cepeda-Gutierrez* at paras 16-17). However, *Cepeda-Gutierrez* does not stand for the proposition that the mere failure of a decision-maker to refer to an important piece of evidence that runs contrary to the decision-maker's conclusion necessarily renders a decision unreasonable and results in the decision being overturned. To the contrary, it is only where the non-mentioned evidence is critical and squarely contradicts the decision-maker's conclusion that the reviewing court *may* decide that its omission means that the decision-maker did not have regard to the material before it.

[24] In the case at bar, the RAD conducted a wide-ranging and detailed analysis of the documentary evidence before it. The RAD engaged with the evidence, referred to several reports, was cognizant of the personal incidents involving the Koky family and was aware of the contradictions and deficiencies of state protection in Slovakia. The decision-maker did not ignore or fail to consider the evidence but, after weighing all the evidence on the record, it came to the conclusion that state protection was adequate. For example, the RAD referred to the legal framework in place in Slovakia, to instances where police officers were dismissed following incidents involving Romani victims, to the National Roma Integration Strategy and its results in terms of education, employment, healthcare and housing, to government funds being granted to improve living conditions for the Roma, to the availability of a complaint process in relation to

the conduct of police officers, and to improvements in the police response and concrete examples supporting this. Concrete examples of state protection being effective at an operational level were numerous. The RAD did not omit to incorporate contradictory evidence in its assessment; the RAD instead acknowledged, at many junctures, the ongoing difficulties faced by the Roma community in Slovakia, the mixed evidence and the persistent challenges that plague some of the policies and programs being implemented. The evidence mentioned was not cherry-picked in order to support a positive finding of state protection. Rather, it is apparent that all the evidence was considered by the RAD, but it was insufficient to rebut the presumption of state protection. I find that the RAD's reasoning is nuanced and transparent, and supports the finding that state protection is imperfect but nonetheless "adequate", which remains the accepted standard (*Flores Carrillo* at para 30).

[25] Reasons are to be read as a whole, in conjunction with the record (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 53; *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65 at para 3). A judicial review is not a "line-by-line treasure hunt for error" (*Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 at para 54). The Court should instead approach the reasons with a view to "understanding, not to puzzling over every possible inconsistency, ambiguity or infelicity of expression" (*Canada (Minister of Citizenship and Immigration) v Ragupathy*, 2006 FCA 151 at para 15). When read as a whole, the RAD's Decision shows that the panel properly assessed all the necessary factors and provided an analysis of the evidence presented. The intervention of this Court is not warranted.

[26] I pause to underline that this is not a situation where the decision-maker equated the availability of protection from institutions other than the police with adequate state protection, as was the case in *Csoka v Canada (Citizenship and Immigration)*, 2016 FC 1220. In the current case, the evidence of state protection in Slovakia revolved around police activities.

[27] I would finally add that there is no merit to the Koky family's argument that the RAD should have followed the decision *Stojkova v Canada (Citizenship and Immigration)*, 2017 FC 77 [*Stojkova*]. It is a well-established principle that each case must be decided on its own facts and merits. There are numerous other cases where this Court has dismissed applications for judicial review and upheld state protection determinations with regard to the Roma from Slovakia and other countries (*Galamb* at paras 28-54; *Conka v Canada (Citizenship and Immigration)*, 2015 FC 596 at paras 29-31; *Balaz v Canada (Citizenship and Immigration)*, 2015 FC 537 at paras 16-23). As pointed out in *Kocko v Canada (Minister of Citizenship and Immigration)*, 2017 FC 803 at paras 29-30, the documentary evidence of Roma suffering discrimination and violence in Slovakia as well as of police mistreatment of Roma suspects and detainees that was before the Court in *Stojkova* is irrelevant. *Stojkova* is a decision based on the particular evidence that was before the Court in that case. In each case, the claimants' personal evidence of persecution needs to be linked to the country condition evidence, and each matter must be considered on its own merits based on the personal and country condition documents.

[28] In sum, I conclude that the RAD's reasons in the current case set out an extensive analysis of the state protection documents. The analysis is not only comprehensive, it is comprehensible. The basis for the RAD's conclusion is intelligible, given its review of the legal

principles surrounding state protection, its acknowledgement of the widespread persecution of Romani people disclosed by the documentary evidence, its assessment of the Koky family's personal experiences and of the measures implemented by the Slovak state, and the limited information provided by the Koky family regarding their alleged attempts to seek state protection. I find the analysis to be transparent and within the range of possible, acceptable outcomes by which the reasonableness standard is defined.

IV. Conclusion

[29] For the above reasons, the Decision of the RAD represents a reasonable outcome based on the law and the evidence before it. In my view, the RAD reasonably concluded that state protection is available to the Koky family and that they have failed to rebut the state protection presumption. On a standard of reasonableness, it suffices if the decision subject to judicial review has the required attributes of justification, transparency and intelligibility. This is the case here. Therefore, I cannot overturn the RAD's Decision and must dismiss this application for judicial review.

[30] Neither party proposed a question of general importance for me to certify, and none is stated.

JUDGMENT in IMM-5068-16

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed, without costs.

2. No question of general importance is certified.

3. The style of cause is modified to replace the name of Sofia Kokyyova by Sofia Kokyova.

"Denis Gascon"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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