Federal Court  Cour fédérale

Date: 20180110

Docket: IMM-2760-17

Citation: 2018 FC 20

Ottawa, Ontario, January 10, 2018

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

ANDRASNE LAKATOS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant is Hungarian of Roma ethnicity. She seeks review of a pre-removal risk assessment [PRRA] decision of May 5, 2017, concluding that she was not entitled to protection under ss. 96 or 97 of the *Immigration and Refugee Protection Act* [IRPA]. For the reasons that follow, this judicial review is allowed as the PRRA Officer's [the Officer] state protection analysis is flawed.

I. Background

[2] In 2011, the Applicant left Hungary due to her fear of persecution from organized groups, including skinheads and the Jobbik Party. The Applicant arrived in Canada and sought refugee protection on the basis of widespread discrimination of Roma.

[3] The Refugee Protection Division [RPD] found no credible basis to the Applicant's claim of persecution in Hungary and therefore found that she was not a Convention Refugee under s.96 of the IRPA or a person in need of protection under s.97 of the IRPA. On December 11, 2013, the Federal Court dismissed the Applicant's application for judicial review of the negative RPD decision.

II. Decision Under Review

[4] In considering the risks to the Applicant, the Officer quoted extensively from the documentary evidence that Roma experience discrimination in many aspects of their lives, including in education, housing, employment and access to social services. The Officer acknowledged that acts of violence and discrimination occur against Roma. However, the Officer concluded that not all Roma in Hungary face discrimination and that the discrimination at issue does not amount to persecution.

[5] The Officer further concluded that Hungary is a democracy and that there are avenues of redress in Hungary and that "the state is making serious efforts to protect its citizens."

[6] The Officer discounted the application of other decisions of the Refugee Appeal Division [RAD], the RPD, and the Federal Court where positive findings of persecution of Roma claimants were found. The Officer concluded that this case was different "because of the serious credibility concerns identified at the RPD for this applicant which have not been resolved by new evidence."

III. Issues

[7] The following issues are dispositive of this application:

A. Did the Officer apply the correct state protection test?

B. Did the Officer properly assess the state protection evidence?

IV. Standard of Review

[8] The applicable standard of review on the Officer's application of the proper test for state protection is correctness (*Mata v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 1007 at para 10 [*Mata*]).

[9] The standard of review on the Officer's assessment of the evidence relating to the adequacy of state protection is reasonableness *(G.S. v Canada (Citizenship and Immigration)*, 2017 FC 599 at para 12).

V. Analysis

A. *Did the Officer apply the correct state protection test?*

[10] In a claim under s.96, the Applicant must demonstrate a (1) well-founded fear of persecution, which is subjective and (2) an objective basis to the fear (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 [*Ward*]). State protection goes to whether the fear is objectively reasonable (*Hinzman v Canada (Citizenship and Immigration)*, 2007 FCA 171 at para 42), and state protection findings are equally applicable under s.97 of the IRPA (*Horvath v Canada (Citizenship and Immigration)*, 2014 FC 670 at para 7).

[11] While there is a presumption that a state can protect its citizens, this presumption can be rebutted by "clear and convincing evidence" (*Ward*, at 724). The Applicant must show that she is unable to obtain state protection or that she is unwilling to seek out state protection because of a well-founded fear of persecution (*Ruszo v Canada (Citizenship and Immigration)*, 2013 FC 1004 at para 30 [*Ruszo*]).

[12] The Officer needs to consider the operational adequacy of state protection in the country of origin, not the best efforts of the state (*Mata*, at para 13).

[13] Here in the Officer's reasons he states: "[T]he documents indicate that the Romani community continue to face discrimination in housing, employment, education and healthcare. To address these inequalities, the Hungarian government has made efforts in education, employment and healthcare".

[14] The Officer concludes as follows:

> I note the evidence also reveals that Hungary has taken initiatives to bring about change as well as continuing efforts to promote the integration of the group and addressing the situation and treatment of the Roma…According to documentary evidence, the applicant can seek redress from mechanisms in Hungary for the failure of the police to conduct their work accordingly such as the Ombudsman, the Independent Police Complaints Board (IPCB), the Equal Rights Treatment Authority and the Commissioner for Fundamental Rights. I find, that according to the documentary evidence, the state is making serious efforts to protect its citizens, even if it is not always successful, since a government cannot guarantee the protection of its citizens at all times. (emphasis added).

[15] These statements by the Officer demonstrate that he assessed the avenues of redress in Hungary according to whether the state was making efforts to improve the situation for Roma. However, the Officer failed to assess the operational adequacy of these avenues of redress.

[16] This alone is a dispositive reviewable error (*Kotlarova v Canada (Immigration, Refugees, and Citizenship)*, 2017 FC 444 at para 22), rendering the Officer's decision unreasonable.

B. *Did the Officer properly assess the state protection evidence?*

[17] The Respondent argues that as the Applicant's claim before the RPD was found to have "no credible basis", relying upon country condition evidence cannot overcome that negative credibility finding. The Respondent relies on *Kocsis v Canada (Citizenship and Immigration)*, 2012 FC 737 at para 6, and *Samuels v Canada (Citizenship and Immigration)*, 2011 FC 366 at para 27 for this proposition.

[18] While a lack of subjective fear of persecution can dispose of a claim under s.96, the claim under s.97 is objective in nature, meaning a negative credibility finding does not necessarily affect the analysis of the objective nature of risk (*Bouaouni v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1211 at para 41). This is true of state protection because only in situations in which state protection "might reasonably have been forthcoming will the claimant's failure to approach the state for protection defeat his claim" (*Ward*, at 724).

[19] As such, simply because the Applicant was not found credible is not automatically dispositive of the s. 97 claim. Where there is "independent and credible documentary evidence in the record capable of supporting a positive disposition of the claim," credibility findings are not determinative (*Canada (Citizenship and Immigration) v Sellan*, 2008 FCA 381 at para 3), especially where state protection depends on an objective analysis.

[20] Here, although the Applicant does not appear to have sought state protection, the Officer failed to regard the "independent, credible" documentary evidence in the record which would overcome a credibility finding and demonstrate that it is objectively unreasonable for the Applicant to seek state protection (*Ruszo*, at para 34). The Officer both failed to consider relevant evidence in the record which arose after the RPD hearing and failed to distinguish contradictory evidence which he expressly copied at length in his decision.

[21] This same error was identified in *Sanchez Mestre v Canada (Citizenship and Immigration)*, 2015 FC 375 at para 15and are descriptive of the Officer's reasoning in this case:

> Because state protection was the only issue in the present case, and since the main ground for rejecting the Applicants' claims was the

> RPD's finding that state protection would be forthcoming if they approached the authorities, the RPD should have provided at least some reasoning regarding the evidence that directly contradicted his conclusion.

[22] The more important the evidence which is left unanalyzed, the more likely it is that the decision is unreasonable (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC) at para 17). Here, the contrary evidence indicated that the avenues of redress specifically cited by the Officer as constituting state protection were actually quite limited. This is important evidence.

[23] Further, the particular avenues of redress referenced by the Officer in Hungary have previously been found by this Court to be inadequate: *Katinszki v Canada (Citizenship and Immigration)*, 2012 FC 1326 at paras 14-15; *Racz v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 824 at para 38; *Vidak v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 976 at para 13).

[24] Accordingly there was sufficient evidence on the record to support a finding that it was objectively reasonable for the Applicant not to seek state protection in this case. The Officer erred by failing to consider the totality of this evidence. The analysis should be re-conducted in light of a proper state protection finding.

JUDGMENT in IMM-2760-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted, and

2. No question of general importance is proposed by the parties and none arises.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2760-17
STYLE OF CAUSE:	ANDRASNE LAKATOS v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	DECEMBER 5, 2017
JUDGMENT AND REASONS:	MCDONALD J.
DATED:	JANUARY 10, 2018

APPEARANCES:

Ms. Wennie Lee	FOR THE APPLICANT
Ms. Aleksandra Lipska	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lee & Company Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT