Federal Court Cour fédérale

Date: 20180302

Docket: IMM-2803-17

Citation: 2018 FC 237

Ottawa, Ontario, March 2, 2018

PRESENT: The Honourable Mr. Justice Grammond

BETWEEN:

A.B.

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant is an eight-year old child and a citizen of Hungary. She is of Roma and Chinese ethnic heritage. Through her mother, she claimed refugee status upon her arrival in Canada, based on acts of sexual assault by her father, as well as the fact that she witnessed her father's frequent acts of violence against her mother.

[2] The applicant's claim was dismissed by the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada, and that dismissal was then confirmed by the Refugee Appeal Division [RAD].

[3] The applicant now seeks judicial review of the RAD's decision. For the reasons that follow, I am granting her application and remitting the matter for redetermination.

I. Facts and Decision Reviewed

[4] In September 2013, the applicant's mother complained to the Hungarian police about the acts of sexual assault committed by her husband against the applicant. She sought a restraining order against her husband. That request was dismissed a few weeks later. The police then had the applicant examined by a criminal justice psychologist, who concluded that the applicant was unlikely to have experienced sexual assault. In March 2014, the police closed the file without taking any further action. It appears that the police never interviewed the applicant's father. A police officer gave written reasons for closing the investigation, which contain the following remarks:

> The moral and emotional development of the minor was not endangered by the father's act, no psychological disturbance is expected to appear at a later stage of her life in connection with this. In the case of the minor [A.B.], the parents represent two very different language, customs, social and cultural characteristics and behaviour, which influences the child's development in such a way that she receives from her parents not one behavioural example consistently represented by both parents, but two, which can cause insecurity and anxiety in the child. [Translation]
>
> (AR, p. 75)

[5] In July 2014, the applicant's mother made another complaint to the police, this time regarding violence directed towards herself. She stated that the two police officers who came to her house told her that she must have caused the situation and that "there is always problem with Gypsy women". As a result of this intervention by the police, child protection authorities became aware of the situation and initiated proceedings for the removal of the applicant from her family. These proceedings were terminated when the authorities learned that the child had been brought to Canada.

[6] The RPD dismissed the applicant's claim on January 31, 2017. The RPD found that the claimant's mother lacked credibility, because her evidence that the Hungarian police do not interfere in family matters was contradicted by the fact that the police, in her case, conducted an investigation. For the same reasons, the RPD found that the applicant could avail herself of Hungary's protection.

[7] The applicant appealed that decision to the RAD, which dismissed her appeal on June 5, 2017. The RAD stated that it was prepared to accept the documentary evidence corroborating the applicant's allegations of sexual abuse and domestic violence, because the Canadian Border Services Agency [CBSA] was unable to provide any additional information impeaching its authenticity. As a result, state protection was the main issue before the RAD. The RAD found that the applicant had failed to bring clear and convincing evidence to rebut the presumption of state protection. In this regard, the RAD noted that:

> Local failures by authorities to provide protection does [*sic*] not mean that the state as a whole fails to protect its citizens, unless the failures form part of a broader pattern of the state's inability or refusal to provide protection. (para 29)

[8] The RAD went on to consider the applicant's case, and found that the fact that the Hungarian authorities conducted an investigation into her complaints demonstrated that state protection was available. It noted that the applicant had provided no evidence showing that the investigation was deficient (para 41). Lastly, the RAD reviewed country evidence regarding the situation of the Roma in Hungary and found that:

> […] although not perfect, there is adequate state protection in Hungary for Roma who are victims of crime, police abuse, discrimination or persecution, that Hungary is making serious efforts to address these problems, and that the police and government officials are both willing and able to protect victims. (para 48)

[9] Before the RAD, the applicant also argued that the RPD had improperly disclosed personal information when it asked CBSA officials in Hungary to authenticate certain documents. According to the applicant, the potential disclosure of that information to Hungarian authorities and, possibly, to the applicant's father would increase her risk of persecution, giving rise to what is known as a "*sur place*" claim. The RAD also dismissed this argument.

[10] The applicant then sought and obtained leave to bring an application for judicial review of the decision of the RAD.

II. Analysis

A. *Issues and Standard of Review*

[11] Before this Court, the applicant challenges the RAD's conclusions regarding the availability of state protection and her *sur place* claim. Both arguments relate to her father's acts of sexual assault against her and domestic violence against her mother.

[12] This Court reviews decisions of the RAD on a standard of reasonableness (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93, [2016] 4 FCR 157, at paras 30-35). My role is to ensure that the decision of the RAD is based on a defensible interpretation of the relevant legal principles and a reasonable assessment of the evidence (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190).

B. *Assessing the Evidence Regarding State Protection*

[13] It is now beyond dispute that gender-based domestic violence may give rise to a refugee claim. To meet the definition of "Convention refugee", persecution must be based on one of the grounds set out in section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. Although gender is not specifically listed, women may nevertheless constitute a "particular social group" for the purposes of section 96. In *Canada (AG) v Ward*, [1993] 2 SCR 689 [*Ward*] at 739, the Supreme Court of Canada affirmed that the concept of a particular social group includes "groups defined by an innate or unchangeable characteristic". In that decision, Justice La Forest specifically noted that this category "would embrace individuals fearing

persecution on such bases as gender”. Decisions of this Court have since recognized that domestic violence may give rise to a well-founded fear of persecution based on a Convention ground (see *Narvaez v Canada (Minister of Citizenship and Immigration)*, [1995] 2 FC 55 (TD)).

[14] However, even if a person is found to have a well-founded fear of persecution based on a Convention ground, refugee status may be denied to persons who can avail themselves of the protection of their own country. This concept is known as “state protection.” It is the crucial issue in this case, as in many other domestic violence cases. At the outset, it is useful to recall certain relevant principles and to discuss what kind of evidence may be used to evaluate the availability of adequate state protection.

[15] State protection is presumed to be available. In other words, refugee claimants bear the burden of proving not only a well-founded fear of persecution, but also that their country of nationality is unable or unwilling to protect them — or that they have valid reasons for not seeking that protection (*Ward* at 724-25).

[16] The determination of whether a claimant is a Convention refugee is forward-looking. It does not focus on past persecution, but on fear of persecution that is likely to occur in the future. Acts of past persecution are not relevant in and of themselves, but rather as evidence of what might take place in the future (James C. Hathaway and Michelle Foster, *The Law of Refugee Status*, 2nd ed. (Cambridge: Cambridge University Press, 2014) at 165). The same holds true for state protection: what matters is whether such protection will be available in the future. Here again, however, past failures may help predict what is likely to happen.

[17] Where a claimant has provided evidence that state protection may not be available, this Court has held that a decision-maker must do more than simply point to efforts made by a foreign country to address shortcomings in the areas of policing and criminal justice, such as the enactment of new legislation or other measures. Those efforts must translate into operationally adequate measures (*Garcia v Canada (Minister of Citizenship and Immigration)*, 2007 FC 79, [2007] 4 FCR 385 at paras 15, 18, 20; *Meza Varela v Canada (Citizenship and Immigration)*, 2011 FC 1364 at para 16; *Majoros v Canada (Citizenship and Immigration)*, 2013 FC 421 [*Majoros*]; *Beri v Canada (Citizenship and Immigration)*, 2013 FC 854; *Juhasz v Canada (Citizenship and Immigration)*, 2015 FC 300).

[18] Failure of state protection is rarely a purely individual issue. It usually has a systemic dimension (see *Majoros* at paras 13-16). In certain cases, the effectiveness of the police apparatus as a whole is impugned. In other cases, biases against particular groups are alleged to be prevalent among police officers. For that reason, evidence of systemic failures will often be highly relevant. What matters is how the police are likely to treat complaints from members of a specific group in the future. The manner in which the police treated a specific individual in the past may be a relevant predictor, but it is not determinative. Systemic evidence is rarely within the reach of individual claimants. This is why the RPD and the RAD rely extensively on information compiled by governments and NGOs about the human rights situation in refugee claimants' countries of origin.

[19] Undue focus on individual situations may distract from the forward-looking and systemic aspects of the state protection analysis. For example, it is sometimes said that state protection

need not be perfect, and that individual failures of the police to protect a certain individual do not constitute insufficient state protection (see *Canada (Minister of Employment and Immigration) v Villafranca* (1992), 99 DLR (4th) 334 (FCA)). It is certainly true that the police are not required to solve each and every crime; state protection does not mean that criminality has to be completely eradicated. Yet, assertions that perfection is not the appropriate yardstick should not be allowed to obscure documented systemic problems. Individual policing failures do not prove that state protection is inadequate, and neither does the fact that the police took some action in an individual case prove the adequacy of state protection.

[20] In assessing evidence relating to state protection, decision-makers should not lose sight of the inherent difficulty of obtaining individual evidence of police misconduct. Public authorities, including the police, are unlikely to make statements that will reveal their biases, shortcomings or misconduct. Proving police misconduct may require investigative powers and access to police records, which may be beyond the reach of individual refugee claimants — especially if they are out of the country. Expert evidence may be needed to establish acceptable police practices and to identify deviations from the norm. This is a further reason why country evidence may be more useful than evidence concerning the applicant’s situation in determining whether state protection is adequate.

[21] Moreover, country evidence may provide useful context for the assessment of the individual evidence. A claimant’s situation may reveal a shortcoming of state protection if it conforms to documented patterns of abuse in that country. This reality can be obscured if a decision-maker looks at a claimant’s circumstances through a Canadian lens.

[22] Lastly, it is often said that there is a very strong presumption that democratic countries are able to protect their citizens. There is, of course, a kernel of truth in that assertion. However, the concept of democracy may be of limited usefulness in deciding specific cases. As my colleague Justice Anne Mactavish has stated: "democracies exist along a spectrum" (*Bozik v Canada (Citizenship and Immigration)*, 2017 FC 961 at para 28). Moreover, when assessing the quality of a democracy, one usually refers to several indicia that may not be directly related to the issue of state protection, such as the fairness of the electoral process, freedom of the press, civilian control of the military, access to government information, the absence of corruption, and so forth. Hence, characterizing a country as being democratic does not relieve the RPD and RAD from the duty of carefully reviewing the evidence regarding state protection. As Justice Donald Rennie (now of the Federal Court of Appeal) aptly summarized: "[d]emocracy alone does not ensure effective state protection" (*Sow v Canada (Citizenship and Immigration*), 2011 FC 646 at para 11).

C. *Reasonableness of the RAD's Decision*

[23] With these principles in mind, I can now turn to the RAD's decision in this case.

[24] Why did the RAD conclude that the applicant could avail herself of the protection of Hungary? Its conclusion was based exclusively on its finding that the police's actions in response to the applicant's mother's complaints constituted proof of adequate state protection. The fact that there was an investigation, reasoned the RAD, showed that the police were doing their job. The result of the investigation was found not to be relevant in this regard.

[25] However, if one analyzes the applicant's situation against the backdrop of the country evidence, a very different picture emerges. The RAD had before it country reports, including a Human Rights Watch 2013 report, a United States Department of State 2016 report, and 2015 and 2016 responses to information requests by the IRB, that revealed the following information:

- Police and judicial authorities in Hungary often consider domestic violence against women (both Roma and non-Roma) to be a "family problem" and not a criminal issue. Police officers receive little or no training in this area and, when called, have a tendency to blame the victim;
- Hungarian law provides for the issuance of restraining orders in cases of domestic violence; however, there is evidence that such orders are very difficult to obtain and that the law is not implemented effectively;
- Charges are very rarely laid against the perpetrators of domestic violence — statistics indicate that about two percent of cases reported to the police result in a prosecution;
- Women have reported that child protection services threatened that their children would be taken from them if they made a complaint of domestic violence; and
- There is a dearth of women's shelters to accommodate and protect victims of domestic violence in Hungary, and Roma women may have more difficulty in accessing those shelters that do exist.

[26] In light of this evidence, which the RAD completely failed to mention, it was unreasonable for the RAD to conclude that the investigation performed by the Hungarian police proved that Hungary would provide adequate state protection to the applicant. Rather, the applicant's individual situation fits the pattern disclosed by the country evidence. An

investigation was formally begun, but it resulted in no charges being laid, as is the case in almost all domestic violence cases. The request for a restraining order was denied. On a separate occasion, police officers blamed the applicant's mother for the violence she had experienced, in addition to making derogatory remarks about Roma women. A child protection procedure was initiated as a result of the latter complaint. Finally, when the applicant's mother sought the assistance of a women's shelter, she was turned away and told that she should give up her daughter for adoption.

[27] It was also unreasonable for the RAD to require the applicant to provide evidence of the precise shortcomings in the Hungarian police investigation of her complaint. As mentioned above, such evidence can be very difficult to obtain, and may in fact require an expert. Nevertheless, the fact that the file was closed without the applicant's father being interviewed is certainly problematic. The psychologist's report was also based on questionable reasoning, quoted above, regarding the different ethnocultural backgrounds of the applicant's parents. In any event, what is at stake is not past police conduct in and of itself, but what this conduct tells us about how the applicant is likely to be treated in the future.

[28] The RAD devoted only one paragraph to the child protection investigation (para 43). It mistakenly stated that the investigation was initiated by the applicant's mother. It appears to have treated this investigation as additional evidence of adequate state protection. The RAD failed to appreciate the difficult situation of Hungarian mothers who know that making a complaint for domestic violence can precipitate an intervention of child protection authorities and the removal of their children. There is not enough evidence in the file to allow me to judge whether the

intervention of child protection authorities in this case was warranted. However, once again, the applicant's mother's story fits a pattern that has been documented by NGOs. At a minimum, the child protection investigation cannot be held as evidence of state protection. Moreover, if we assume that the domestic violence against the applicant's mother constituted sufficient grounds for beginning a child protection investigation, one then wonders why the police did not see fit to pursue a criminal investigation and lay charges.

[29] I am cognizant that the RAD briefly discussed the country evidence. However, its discussion was limited to the general situation of the Roma in Hungary (para 48, quoted above). The RAD mentioned Hungary's efforts to improve the protection afforded to Roma people and concluded that the Roma, as a rule, must make efforts to avail themselves of Hungary's protection. In saying this, the RAD completely overlooked the parts of the country evidence that were the most relevant to the applicant's claim and that connected the situation of the applicant and her mother to a documented pattern of lack of effective protection of victims of domestic violence, even though its attention was specifically directed to them in the applicant's submissions.

[30] The RAD also insisted that state protection need not be perfect. Thus, in the RAD's view, the fact that the result of the Hungarian police's investigations was not "to the liking" of the applicant did not constitute a failure of state protection (para 42). But that, with respect, is beside the point. The inquiry into state protection is properly focused on whether there are systemic shortcomings such that a claimant would be unlikely to receive adequate protection from future persecution. The police's past treatment of the applicant may be a relevant predictor of the

adequacy of that protection, but it is not determinative. In this case, there was uncontradicted evidence that the Hungarian authorities do not, in fact, afford adequate protection to victims of domestic violence. The RAD entirely failed to address this evidence.

[31] Thus, in its analysis of state protection, the RAD overlooked critical evidence that showed that the applicant could not be expected to avail herself of the protection of her country of citizenship. As mentioned in the oft-quoted case of *Cepeda-Gutiérrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC):

> […] the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact. (para 17)

[32] Or, to borrow the words of Justice David Stratas of the Federal Court of Appeal, a decision is unreasonable if it is based on a "finding that is completely at odds with the evidentiary record" (*Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 at para 72). That is what happened here.

[33] Before leaving this issue, I want to discuss a particularly troublesome aspect of the RAD's decision. In support of its assertion that state protection need not be perfect, the RAD mentioned a number of incidents where police officers in Canada allegedly employed excessive

force (para 38), and compared the situation of Roma in Hungary with that of Canada's First Nations:

> I am sure that members of Canada's First Nations would also readily cite attitudes of discrimination against them here in our own country of Canada. And that may well be true. However, this does not mean that Canada does not provide protection for members of its First Nations. And so it is with Hungary. (para 49)

[34] I have serious concerns with this line of reasoning. The RAD apparently started from the assumption that events taking place in Canada can never give rise to a valid refugee claim in another country. Thus, according to that logic, events taking place in a foreign country cannot give rise to a refugee claim if similar events occur in Canada.

[35] Decision-makers should not trivialize the situation of the Indigenous peoples nor assume that adequate protection is always afforded to them. Current concerns with respect to the relations between the Indigenous peoples and the police are such that the federal, provincial and territorial governments have launched a public inquiry. In this context, and without any evidence before it, it was imprudent for the RAD to make broad pronouncements on the situation of the Indigenous peoples in Canada.

[36] Most importantly, this line of reasoning obscured the real issue before the RAD, which was whether the applicant could expect adequate state protection in Hungary. It bears repeating that the applicant did not allege that she was the victim of a police blunder, but rather that there is a systemic lack of attention for domestic violence issues in Hungary. Considerations about the police treatment of individuals or groups in Canada are simply irrelevant to that inquiry.

D. *Sur Place Claim*

[37] As I am granting the application on the basis that the decision is unreasonable with respect to state protection, it is not necessary for me to address the second issue advanced by the applicant, namely, whether the disclosure of personal information gave rise to a *sur place* claim.

E. *Style of Cause*

[38] After the hearing of this application, I issued a direction to the parties asking for submissions as to whether the style of cause should be amended to preserve the anonymity of the applicant, a child who is alleged to have been victim of sexual abuse. The applicant supports such an amendment, but the respondent asserts that the open court principle should prevail.

[39] Proceedings before this Court are open to the public. Litigants are publicly identified by name. The openness of judicial proceedings is constitutionally guaranteed as a consequence of the freedom of the press (*Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326). Publicity, however, may be restricted to protect serious countervailing interests. In a number of cases, the Supreme Court of Canada has held that various forms of confidentiality orders may be appropriate where there is proof of the "necessity of the publication ban" and "proportionality between the ban's salutary and deleterious effects" (*R v Mentuck*, 2001 SCC 76 at para 32, [2001] 3 SCR 442; see also *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835; *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 SCR 522).

[40] Canadian courts have often allowed victims of sexual assault to pursue a civil claim anonymously (see *MHB v AB*, 2016 NSSC 137; *ABC v Nova Scotia (Attorney General)*, 2011 NSSC 476 [*ABC*]; *CW v LGM*, 2004 BCSC 1499; *JLD v Vallée*, [1996] RJQ 2480 (CA)). In some cases, courts required evidence of the specific harm that the individual applicant would suffer without a confidentiality order. Indeed, in this case, the respondent submits that no order should be made because the applicant did not submit any such evidence. However, in *AB v Bragg Communications Inc*, 2012 SCC 46, [2012] 2 SCR 567, Justice Abella of the Supreme Court of Canada noted that: “while evidence of a direct, harmful consequence to an individual applicant is relevant, courts may also conclude that there is objectively discernable harm” (at para 15). Thus, a judgment may be anonymized even though there is no evidence before the Court as to the effects of the public dissemination of the applicant’s identity.

[41] The Court may take judicial notice of the highly undesirable effects of the disclosure of the identity of victims of sexual assault. In particular, victims may be re-traumatized if their names are made public, and their healing process may be made more difficult (*ABC* at para 4). Depending on the context, public disclosure may also act as a disincentive to launch a complaint after a sexual assault — ironically, the open court principle hampers access to justice in such cases. Further, section 486.4 of the *Criminal Code* makes confidentiality orders automatic to protect the identity of victims of sexual crimes. This also confirms that sexual assault victims generally have an interest in anonymity in court processes. I note that, in *Canadian Newspapers Co v Canada (Attorney General)*, [1988] 2 SCR 122, the Supreme Court of Canada confirmed the constitutional validity of a previous version of section 486.4 of the *Criminal Code*. Hence, protecting the privacy of sexual assault victims is compatible with the open court principle.

[42] Moreover, the balance between the protection of privacy and the need to uphold the open court principle should take into account the realities of cyberspace (see generally K. Eltis, "The Judicial System in the Digital Age: Revisiting the Relationship between Privacy and Accessibility in the Cyber Context" (2011) 56:2 McGill LJ 289). Modern search engines make it considerably easier to retrieve information about a particular individual. Thus, when published judgments containing sensitive private information are not anonymized, the information they contain is easily accessible to anyone.

[43] In keeping with these principles, this Court has frequently ordered that applicants in immigration cases be identified by their initials, so as to protect their privacy when judgments are published. This has occurred, for example, in cases where the applicant alleged that he or she was a victim of sexual assault (see *AB v Canada (Citizenship and Immigration)*, 2009 FC 640; *IMPP v Canada (Citizenship and Immigration)*, 2010 FC 259; *LF v Canada (Citizenship and Immigration)*, 2016 FC 534) or indicated that he was HIV positive (*AB v Canada (Citizenship and Immigration)*, 2017 FC 629). Similar orders have also been issued upon proof that disclosure would expose the applicant to a risk if returned to his or her country of origin (see *AB v Canada (Citizenship and Immigration)*, 2009 FC 325, [2010] 2 FCR 75).

[44] In this case, I am satisfied that the public disclosure of the applicant's identity as a result of the publication of these reasons would have serious harmful effects. The applicant would be publicly known as an alleged victim of sexual assault. As mentioned above, this may re-victimize the applicant and hamper her healing. I am satisfied that anonymizing the style of cause is necessary to protect the applicant's very important interests and would only minimally

impair the open court principle. Therefore, I will order that the style of cause be amended to refer to the applicant by the initials "A.B."

[45] It should be noted that I am not issuing a broader confidentiality order and that the court file will not be sealed. In *AB v Canada (Citizenship and Immigration)*, 2002 FCT 471, [2003] 1 FCR 3, Justice O'Keefe held that a sealing order under Rule 151 of the *Federal Courts Rules*, SOR/98-106, could not be issued after the complete record had been filed and that such an order would constitute too severe a restriction on the open court principle. Nevertheless, in those circumstances, Justice O'Keefe held that it was appropriate to amend the style of cause. I also observe that, in some of the cases mentioned above, a similar order was made after it was requested at the hearing (see also *EF v Canada (Citizenship and Immigration)*, 2015 FC 842).

F. *Certified Question*

[46] The applicant asked me to certify the following question: "Whether a minor refugee claimant's vulnerabilities must be taken into consideration when a refugee claim is made pursuant to section 96 of IRPA".

[47] According to the Federal Court of Appeal, "to be certified, a question must (i) be dispositive of the appeal and (ii) transcend the interests of the immediate parties to the litigation, as well as contemplate issues of broad significance or general importance" (*Mudrak v Canada (Citizenship and Immigration)*, 2016 FCA 178 at para 16).

[48] While interesting, the proposed question is not dispositive of the case. Accordingly, I cannot certify it.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted and the matter is returned to a different member of the Refugee Appeal Division for redetermination;
2. No question is certified;
3. The style of cause is amended with immediate effect to refer to the applicant by the initials, A.B.

"Sébastien Grammond"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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