

Federal Court



Cour fédérale

Date: 20181023

Docket: IMM-376-18

Citation: 2018 FC 1061

Ottawa, Ontario, October 23, 2018

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

**ATTILA TIBOR LAKATOS
AGNES HORVATH
ATTILA LAKATOS
NIKOLASZ KRISZTIAN LAKATOS**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of the decision of the Refugee Appeal Division [RAD] dated December 20, 2017 [the Decision or RAD Decision], which confirmed the decision of the Refugee Protection Division [RPD] dated May 11, 2017 that the Applicants are neither

Convention refugees nor persons in need of protection under sections 96 or 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] As explained in greater detail below, this application is dismissed, because I have found that the RPD did not demonstrate conduct giving rise to a reasonable apprehension of bias, and the Applicants' arguments have not established that the Decision is substantively unreasonable.

II. **Background**

[3] The Applicants are a family of four Hungarian citizens, all of Roma ethnicity: two adults and their two children of preschool age at the time their claims were assessed. According to their Basis of Claim form [BOC], the Applicants left Hungary for Canada on November 4, 2015 and claimed protection based on discrimination and racism, including homelessness and fear of attacks by racist groups attributable to their ethnicity. Their allegations refer specifically to discrimination in the areas of education, employment, housing, and health care and to experiencing a right-wing, anti-Roma group called the Hungarian Guardists marching through their community.

[4] While the RPD accepted that there is widespread discrimination against the Roma in Hungary, it found that the level of discrimination faced by the Applicants did not amount to persecution, as insufficient persuasive evidence was adduced to show that the Applicants' basic human rights were denied. In reaching this conclusion, the RPD found components of the Applicants' narrative lacking in credibility, particularly in relation to their experiences with the

Hungarian health care system, in part because of a lack of either documentary corroboration for their claims or a satisfactory explanation why such documents were not obtained.

[5] The RPD observed from the country condition evidence that, while some members of the Roma community in Hungary may experience persecution, such evidence does not establish that all Roma face a serious possibility of treatment that rises to the level of persecution. Finding the Applicants' allegations to be generally lacking in credibility, the RPD concluded that there was no reason to review the general country conditions. It therefore found that the Applicants were not Convention refugees or persons in need of protection under ss 96 or 97 of IRPA.

[6] At the RPD hearing, counsel for the Applicants objected to how the RPD member [the Member or RPD Member] questioned the adult female Applicant, Agnes Horvath, about the medical treatment received by her and her son in Hungary and asked that the Member recuse himself because of a reasonable apprehension of bias, if not actual bias. The Member dismissed this request at the hearing and subsequently provided reasons in the RPD's decision, concluding that his questioning was not overly harsh or demeaning, was not such that it would adversely affect the ability of the Applicant to provide answers on the Hungarian health care system and her experiences with it, and would not lead an informed person to conclude that the Member would be unable to decide the matter fairly.

[7] The Applicants appealed the RPD decision to the RAD, arguing that the Member erred in failing to recuse himself and alleging various errors in the substantive decision.

[8] In connection with the recusal issue, the RAD listened to the relevant portion of the recording of the RPD hearing, observing that the exchange between the Member and Applicants' counsel was heated. The RAD stated both that counsel tried to corner the Member to find evidence of bias and that the Member failed to maintain professional order and decorum. However, it held that the actual questioning of Ms. Horvath was not severe or demeaning and that the Member did not preclude her from testifying about her allegations. The RAD concluded that the Member was correct in declining to recuse himself.

[9] The RAD's substantive analysis centred on what it considered to be the determinative issue of credibility. It agreed with the RPD's adverse credibility findings in connection with the allegations surrounding evictions and the health care system and observed that the Applicants' appeal did not challenge those findings or provide any explanation which might have clarified their testimony before the RPD. The RAD also found that the Applicants had failed to provide any reliable evidence that they were personally subjected to harm by the Guardists who marched through their town.

[10] The RAD noted the Applicants' argument that the country condition evidence supported a conclusion that, as members of the Roma community, they would be subjected to persecution or their lives would be in danger if they were to return to Hungary. However, the RAD referred to Federal Court jurisprudence as supporting principles to the effect that evidence of a general climate of discrimination against people of Roma ethnicity is insufficient to support a claim for protection. The RAD therefore held that the Applicants are not Convention refugees or persons in need of protection under ss 96 or 97 of IRPA.

III. **Issues and Standard of Review**

[11] The Applicants articulate the following issues for the Court's consideration:

- A. Did the RAD err in finding that the RPD Member did not demonstrate a reasonable apprehension of bias?
- B. Were the RPD and RAD decisions as to the Applicants' credibility reasonable?
- C. Did the RAD err by failing to address the totality of the evidence?
- D. Did the RAD err by failing to conduct a separate section 97 analysis?

[12] The latter three issues involve questions of mixed fact and law and are reviewable on a standard of reasonableness. With respect to the first issue, surrounding reasonable apprehension of bias, the Respondent submits that the standard of review is correctness. The Applicants take no particular position on which standard is applicable to this issue. I agree with the Respondent that, as this issue raises a question of procedural fairness, it is reviewable on a standard of correctness (see *Oyejobi v Canada (Citizenship and Immigration)*, 2018 FC 107 at para 14).

IV. **Analysis**

A. *Did the RAD err in finding that the RPD Member did not demonstrate a reasonable apprehension of bias?*

[13] While the Applicants' counsel advised at the hearing of this application that his submissions would not focus on this issue, he also confirmed that the issue is not being withdrawn. As such, I will address it, albeit briefly.

[14] Applying the standard of correctness, I agree with the analysis by the RAD. I have listened to the recording of the portion of the hearing referenced in the RAD Decision, which covers the end of the Member's questioning of Mr. Lakatos and his questioning of Ms. Horvath, during which a somewhat heated exchange between the Member and the Applicants' counsel took place. I agree with the RAD's conclusion that this exchange demonstrates a lack of professionalism but would not conclude that it gives rise to a reasonable apprehension of bias on the part of the Member.

[15] As identified by the RAD, the test for determining reasonable apprehension of bias is whether an informed person, viewing the matter realistically and practically and having thought the matter through, would conclude that the decision-maker, either consciously or unconsciously, would not decide fairly (see *Committee for Justice and Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369).

[16] Portions of the Member's questioning and his exchange with counsel, which are raised by the Applicants in support of their bias allegation, demonstrate that the Member was sceptical about components of the Applicants' assertions. The Member questioned the assertion that the homeless are permitted starve to death in Hungary and sought support for this assertion in the country condition documentation. The Member also explained that he was having difficulty with the Applicants' allegation that a Hungarian physician had refused to prescribe appropriate medication for their child, as the Applicants had not presented evidence to support the diagnosis that they alleged required the medication. Neither area of questioning demonstrates that the Member was not considering the Applicants' claims fairly.

[17] At the hearing of this application, the Applicants' counsel raised concern about how the Member's questioning affected Ms. Horvath's ability to give her evidence. However, as the Respondent points out, the Applicants have not filed affidavit evidence from Ms. Horvath in support of this argument.

[18] In conclusion on this issue, I agree with the RAD that the RPD Member was correct in not recusing himself.

B. Were the RPD and RAD decisions as to the Applicants' credibility reasonable?

[19] The Applicants submit that the RAD rejected the Applicants' evidence based largely on improper credibility findings, because those findings focused on irrelevant details. The

Applicants refer to findings related to their evidence surrounding eviction from their homes, access to proper medical care, and the march by the Hungarian Guardists.

[20] As an initial point, I note that I do not read the decisions by either the RPD or the RAD as turning on adverse credibility findings surrounding the march by the Guardists. Indeed, in his oral submissions, the Applicants' counsel took the position that no credibility issue was identified surrounding the march. Rather, as I read the decisions, the RPD found that the possibility that the marchers had broken the Applicants' window was not sufficient to found a refugee claim, and the RAD did not find this evidence to indicate that the Applicants were personally subjected to harm by the Guardists. Both decision-makers also noted that the marchers dispersed after the police arrived. The Applicants argue this conclusion by the RAD was erroneous, as the marchers dispersed, but not because of the actions of the police. However, this argument asks the Court to draw different conclusions based on the evidence than did the decision-maker, which is not the Court's role in judicial review.

[21] I agree with the Applicants that the RAD rejected their evidence based largely on adverse credibility findings, which the RAD described as determinative of their refugee claim. However, as argued by the Respondent, the RAD both agreed with the RPD's adverse credibility findings and noted that, in relation to both the eviction and medical care, the Applicants did not challenge these credibility findings before the RAD.

[22] At the hearing before the Court, the Applicants' counsel responded to this argument by pointing out that the Applicants' Memorandum of Argument before the RAD included

submissions that the RPD had ignored evidence, was required to assess the country condition documentation, and was required to consider prospective risk, not just the credibility of the Applicants' allegations of past incidents. I read these submissions as related to the Applicants' argument that, regardless of the adverse credibility determinations, the RPD was still obliged to assess the Applicants' forward-looking risk as Hungarian Roma based on the country condition evidence. That argument, which the Applicants also raise in this application for judicial review, will be addressed later in these Reasons. However, it is not an argument challenging the RPD's adverse credibility conclusions.

[23] I note that the Applicants' Memorandum of Argument before the RAD also submitted that the RPD erred in basing its negative determination on a want of corroborative documentary evidence. The RAD addressed this argument, concluding, in the context of the evidence surrounding medical care, that it was reasonable to expect that the Applicants would have made an effort to obtain documentary evidence of their medical conditions. The RAD noted Ms. Horvath's testimony that a medical report on her son's condition existed in Hungary but that no effort had been made to obtain the report or to obtain corroborative evidence from a Canadian healthcare provider.

[24] The Applicants challenge this aspect of the RAD's analysis, arguing that the lack of corroborative documentation is not a basis to reject consistent testimony. They rely on the principle that corroborative evidence is only required if (a) the decision-maker has reason to doubt an applicant's claim; and (b) the corroborating evidence could reasonably be expected to be available (see *Horvath v Canada (Citizenship and Immigration)*, 2018 FC 147 at para 24).

[25] In my view, this principle does not undermine the reasonableness of the RAD's analysis. As I read the Decision, the RAD shared the RPD's concerns that the Applicants had not provided any medical evidence supporting their allegation that their son was actually suffering from the condition which they alleged was misdiagnosed and improperly medicated. The Applicants do not have medical expertise, and Ms. Horvath testified that corroborating medical documentation existed in Hungary. Therefore, in the absence of any explanation why they did not make an effort to obtain that documentation, I find the RAD's treatment of this issue to be reasonable.

[26] Other than by advancing this argument surrounding corroborative documentation, which the RAD reasonably addressed, the Applicants' Memorandum of Argument before the RAD did not include submissions challenging the RPD's adverse credibility findings. I therefore find the RAD Decision reasonable in its treatment of the credibility issue. The principal issue that remains for the Court's consideration is whether the RAD was reasonable in its conclusion that the adverse credibility findings were determinative of the Applicant's refugee claim.

C. Did the RAD err by failing to address the totality of the evidence?

[27] The principal issue argued by the Applicants is that, independent of the adverse credibility findings, the RPD and RAD erred by failing to analyse the country condition documents to consider whether the conditions of Roma similarly situated to the Applicants were such that there was more than a mere possibility that they would face discrimination cumulatively amounting to persecution if they were to return to Hungary.

[28] The Applicants submit that such an analysis was required in order to assess their s 96 claim, as s 96 addresses prospective risk, does not require evidence of past persecution, and can be established based on membership in a particular protected group which the documentary evidence indicates faces persecution. The Applicants rely on sets of guidelines published by the Chairperson of the Immigration and Refugee Board relating to women refugee claimants and child refugee claimants, which they submit require such an analysis. They also refer to Justice Strickland's decision in *Somasundaram v Canada (Citizenship and Immigration)*, 2014 FC 1166 [*Somasundaram*] at paras 21 to 22:

[21] As stated in *Fi v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1125, [2006] FCJ No 1401 at para 13 [*Fi*], to satisfy the definition of "Convention refugee" in s. 96 of the IRPA, the applicant must show that he or she meets all the components of this definition, beginning with the existence of both a subjective and objective fear of persecution. The applicant must also establish a link between him or herself and persecution on a Convention ground. In other words, the applicant must be targeted for persecution in some way, either "personally" or "collectively", and the applicant's well-founded fear must occur for reasons of race, religion, nationality, membership in a particular social group, or political opinion.

[22] Further, persecution under s. 96 can be established by examining the treatment of similarly situated individuals (*Salibian v Canada (Minister of Employment and Immigration)*, [1990] 3 FC 250 (CA) at paras 17-18). As stated in *Fi*, above, at para 16:

Therefore, a refugee claim that arises in a context of widespread violence in a given country must meet the same conditions as any other claim. The content of those conditions is no different for such a claim, nor is the claim subject to extra requirements or disqualifications. Unlike section 97 of IRPA, there is no requirement under section 96 of IRPA that the applicant show that his fear of persecution is "personalized" if he can otherwise demonstrate that it is "felt by a group with which he is associated, or even, by all citizens on account of a risk of persecution based on one of the reasons stated in the definition [of a Convention refugee]" (*Salibian*, above, at 258).

[Emphasis in original]

[29] The Applicants submit that the RAD erred by failing to conduct the analysis mandated by the principles described in *Somasundaram*, relying instead on Federal Court jurisprudence which it considered to support principles to the effect that evidence of a general climate of discrimination against people of Roma ethnicity is insufficient to support a claim for protection. The Applicants refer in particular to the RAD's reliance on *Balogh v Canada (Citizenship and Immigration)*, 2016 FC 426 [*Balogh*] at para 19:

[19] Moreover, while the documentary evidence of general country conditions of Roma in Hungary raises human rights concerns, the mere fact of being of Roma ethnicity in Hungary is not, in and of itself, sufficient to establish that an applicant faces more than a mere possibility of persecution upon return (*Csonka v Canada (Citizenship and Immigration)*, 2012 FC 1056, at paras 67-70 [*Csonka*]; *Ahmad v Canada (Minister of Citizenship and Immigration)*, 2004 FC 808, at para 22 [*Ahmad*]). Both subjective fear and objective fear are components in respect of a valid claim for refugee status (*Csonka*, at para 3). The applicant has a burden of establishing a link between the general documentary evidence and the applicant's specific circumstances (*Prophète v Canada (Citizenship & Immigration)*, 2008 FC 331, at para 17; *Jarada v Canada (Minster of Citizenship and Immigration)*, 2005 FC 409, at para 28; *Ahmad*, at para 22).

[30] The Applicants note that, in *Balogh*, the applicant failed to establish his identity as a member of the Roma community. They contrast this with the present case, where their Roma ethnicity is not in doubt.

[31] I agree with the Applicants' submission that past persecution is not required in order to establish a risk for the purpose of s 96. Rather, persecution can be established by examining the situation of similarly situated individuals. However, I do not regard the decision in *Balogh*, upon

which the RAD relied, to be inconsistent with these principles. In *Olah v Canada (Citizenship and Immigration)*, 2017 FC 921, I considered arguments similar to those being advanced in the present case and, at paras 15 to 17, concluded as follows in relation to the reasoning expressed at paragraph 19 of *Balogh*:

[15] I read this reasoning as noting that the jurisprudence surrounding refugee claims by Hungarian Roma does not support a conclusion that the general country conditions are such that all Roma in Hungary face discrimination amounting to persecution. Rather, it is necessary to consider a particular claimant's specific circumstances, in combination with the general documentary evidence, to conclude whether that claimant faces a risk of persecution. The above statement from *Balogh* does not represent a departure from the principles surrounding s 96 upon which the Applicants rely but rather an application of those principles.

[16] As noted by the Respondent, similar reasoning is evident in the decision in *Csoka v Canada (Citizenship and Immigration)*, 2017 FC 651 [*Csoka*] at para 28, in which Justice Diner upheld a PRRA officer's analysis, considering the objective evidence as to the difficulties experienced by Roma in Hungary, but finding insufficient individualized evidence that related to the applicants' personal situation in Hungary to support a conclusion that the applicants were at risk.

[17] The Applicants argue that the necessary link between their specific circumstances and the general documentary evidence is established by the mere fact that they are Roma, which distinguishes their circumstances from those in *Balogh*. They note that, in that case, the RPD found that the applicant had not established his Roma ethnicity, which finding was not disturbed by the Court. However, this means only that the analysis in paragraph 19 of *Balogh* was an additional finding, as that analysis was clearly premised on a claimant being found to be of Roma ethnicity. I also note that there does not appear to have been any doubt as to the Roma ethnicity of the claimants who were the subject of Justice Diner's analysis in *Csoka*.

[32] The Applicants also submit that their profile is more specific than just being members of the Roma community in Hungary. They argue that, independent of the particular allegations that

were rejected by the RAD, the record before the RAD demonstrated that the Applicants are young, undereducated, have not held full-time employment, have struggled to find adequate housing, have lived in impoverished circumstances, and include two children who would be entering a school system that discriminates against Roma students. The Applicants submit that this profile required the RAD to engage in an analysis of the country condition evidence to perform a prospective, cumulative assessment whether, given their profile, there was more than a mere possibility of them being subject to discrimination rising to the level of persecution.

[33] The difficulty with this argument is that the Applicants' claim was not presented in these terms in their appeal to the RAD. In assessing the reasonableness of the RAD Decision in the context of this argument, I note the following paragraph in the Conclusion section of the Decision:

[22] Based on the credibility findings listed above, the RAD concludes that the Appellants are not reliable witnesses with respect to their central allegations. The RAD notes that the RPD's credibility findings were determinative of the Appellants' refugee claims. The Appellants have failed to address, let alone challenge, the RPD's negative credibility findings and in doing so failed to deal with the determinative issue. They do not provide any explanation which might have clarified the testimony provided at the RPD hearing. The Appellants simply provided submissions on the general state of the law with respect to the Roma people. The Appellants have not pointed out any errors in the findings that were made, and there is no basis for the RAD's appellate intervention with respect to those findings.

[34] The RAD then referred to the Applicants' reliance on the documentary evidence as indicating that, as members of the Roma community, they would be subjected to persecution. However, relying on Federal Court jurisprudence including the passage from *Balogh* quoted

above, the RAD applied the principles described therein in upholding the finding of the RPD that the Applicants are not Convention refugees or persons in need of protection.

[35] I have reviewed the Applicants' Memorandum of Argument as submitted to the RAD in support of their appeal and find nothing unreasonable in the RAD's characterization of the Applicants' submissions. Section 3(3)(g) of the RAD Rules requires appellants to make full and detailed submissions regarding the errors that are the grounds of appeal and where those errors are located (see also *Fernander v Canada (Citizenship and Immigration)*, 2016 FC 912 at paras 15-16). The Applicants' Memorandum of Argument before the RAD raises a number of issues, including issues under which the Applicants made substantial submissions on the country condition documentation and case law surrounding the application of s 96. However, these submissions do not draw linkages between the country condition documents and the Applicants' personal profile, other than the fact of their membership in the Roma minority in Hungary. As the Applicants did not successfully challenge the RPD's adverse credibility findings surrounding the allegations that were central to their claim, it was not unreasonable for the RAD to reach the decision that it did.

[36] Finally, while the Applicants' counsel did not pursue this argument in oral submissions, their written submissions argue that the RAD erred in employing an elevated test in its s 96 and 97 analyses. The applicable test under s 96 requires an assessment whether there is more than a mere possibility that a claimant will be persecuted on a Convention ground, and the test under s 97 requires determining whether the claimant, on a balance of probabilities, faces a personalized

risk to his or her life or of cruel and unusual treatment or punishment. The sentence in the Decision upon which the Applicants base their argument reads as follows:

There is no persuasive evidence before the RAD that the Appellants would face persecution or, on a balance of probabilities, face a risk to life, or of cruel and unusual treatment or punishment or a danger of torture, if they returned to Hungary.

[Emphasis added]

[37] The Applicants submit that the use of the word “would” in this sentence results in an elevated test. However, the sentence follows the portion of the Decision in which the RAD explains the Applicants’ failure to address the shortcomings in their evidence. I read this sentence as speaking to the lack of evidence supportive of the Applicants’ claims under either ss 96 or 97. I do not read it as evidencing a misunderstanding or misapplication by the RAD of the applicable tests.

D. Did the RAD err by failing to conduct a separate section 97 analysis?

[38] In their written submissions, the Applicants raised an argument that the RAD erred by failing to conduct an analysis of their claim under s 97 of IRPA, separate from the analysis under s 96. The Applicants’ counsel did not advance this argument at the hearing of this application. Consistent with arguments canvassed under the preceding issue in these Reasons, the Applicants’ counsel explained that their position is that this case turns on s 96, as the Applicants assert that they face persecution based on their ethnicity and membership in a particular social group.

[39] I find no merit to the issue raised by the Applicants in relation to s 97. As acknowledged by their counsel at the hearing, their arguments that they meet the profile of other Roma in

Hungary who are subject to adverse conditions and discrimination according to the country condition documentation is an argument under s 96, as canvassed above. The RAD did not overlook s 97, as it concluded that the Applicants were neither convention refugees nor persons in need of protection under s 96 or s 97. This conclusion turned largely on the adverse credibility findings canvassed earlier in these Reasons. There was no requirement to conduct separate analyses of the same factual assertions in considering ss 96 and 97.

[40] Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT in IMM-376-18

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

No question is certified for appeal.

“Richard F. Southcott”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-376-18

STYLE OF CAUSE: ATTILA TIBOR LAKATOS AGNES HORVATH
ATTILA LAKATOS NIKOLASZ KRISZTIAN
LAKATOS V THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: SEPTEMBER 17, 2018

JUDGMENT AND REASONS: SOUTHCOTT J.

DATED: OCTOBER 23, 2018

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