

Federal Court



Cour fédérale

Date: 20121116

Docket: IMM-11693-12

Citation: 2012 FC 1333

Ottawa, Ontario, November 16, 2012

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

**DANIEL KUSMIEREK
BARTOSZ KUSMIEREK**

Applicants

and

**THE MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS**

Respondent

REASONS FOR ORDER AND ORDER

[1] The Applicants are Roma, citizens of Poland who are brothers; one is 28 years old, the other 25 years old. They have come to Canada due to discrimination based on harassment, abuse and violence in Poland which was not denied in their specific situation by the Refugee Protection Division of the Immigration and Refugee Board, but rather, it was fully affirmed.

[2] The Polish government has put into place significant measures to protect all segments of its population and has enforced provisions against hate crimes and incitement of violence in respect of ethnic origin; as was specified by the Refugee Protection Division, the Refugee Protection Division, nevertheless, stated that, “notwithstanding the government enforcement efforts were sometimes ineffective”; and, as was further stated by the Refugee Protection Division, “the documentary evidence indicates that there were isolated incidents of racially motivated violence, verbal and physical abuse directed at Roma...”. Thus, although serious efforts have been made and even effectively put into place, the documentary evidence before the Refugee Protection Division does show that, in exceptional cases, “skinheads” and others have perpetrated acts of serious violence wherein government intentions and efforts, although in place, have not been able to arrest serious physical attacks in the vicinities of schools, residences and places of employment.

[3] The Applicants have come to Court with an application for a stay of removal to be effected this evening, November 16, 2012; an underlying application for leave and judicial review has been submitted to the Court in respect of a denied deferral by the removals officer, in addition, a humanitarian and compassionate (H&C) grounds application has been put forward for consideration by the Applicants.

[4] Discrimination, in specific cases, may, in fact, reach the level of persecution in the recognition that inhuman treatment has been perpetrated to such a serious extent on the lives of individuals, that, they, as a result, become victims of agents of persecution rather than victims of acts of discrimination (not as yet under the control of state-sponsored programs of enforcement). As stated, above, the Refugee Protection Division has, itself, confirmed, in paragraph 15 of its decision,

that isolated incidents of racially motivated violence directed at the Roma have taken place. This appears to be such a case.

[5] It is a case unto itself. It deserves a sober examination, thus, consideration, due to a serious issue as well as potential irreparable harm and, on a balance of convenience, favours the Applicants as per the tripartite conjunctive *Toth v Canada (Minister of Employment and Immigration)* (1988), 86 NR 302 (FCA) decision test.

[6] In addition, an H&C has been submitted as specified which, according to uncontradicted evidence before this Court, demonstrates that the Applicants have attempted to integrate themselves materially and socially into Canadian society (by which to begin a new and promising life after an existence of discrimination and physical harassment since early age);

[7] As was previously stated by the undersigned in *Csonka v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1056:

[68] Whether the Applicants' situation rises to the level of persecution depends on whether their basic human rights are threatened "in a fundamental way" (*Chan v Canada (Minister of Employment and Immigration)*, [1995] 3 SCR 593 at para 70; *Sadeghi-Pari v Canada (Minister of Citizenship and Immigration)*, 2004 FC 282). In determining this issue, the Board must consider the cumulative effect of the events of persecution (*Munderere v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 84).

[69] The documentary evidence on the general country conditions of the Hungarian Roma raises serious human rights concerns. Educational, employment, housing, economic, and health barriers and anti-Roma violence described in the evidence could show that the conditions of certain Roma in Hungary could rise to the level of persecution.

...

The demarcation line between discrimination and persecution in refugee law is thin.

In cases of this nature, the distinction is made, as is specified by the jurisprudence of higher courts, discussed and cited above.

In a more evolved world, one day, a “kinder and more gentle” norm will, perhaps, prevail in evaporating the distinction between the two; as did the notion of “separate but equal”, gradually, evaporate (in certain state jurisdictions); however, international law jurisprudential norms have not, as yet, evolved thereto, (in regard to the fluidity of the demarcation between discrimination and persecution).

Should a child, or, for that matter, an adult be discriminated against anywhere, for the same reason, he or she may have been, or is, persecuted without recourse to refugee status (because it has not attained the level of persecution)?

International norms, in respect of refugee law, have, as yet, not decided that suffering discrimination (without reaching the level defined as persecution) allows for the granting of refugee status. In recognition of the hope that countries of origin should be encouraged to do more to evolve the state of human rights within their own jurisdictions, whether that occurs or not is for the future to envisage.

A judge’s mandate is but to interpret the legislation and jurisprudence, generally, and, more particularly of the higher courts. As the trajectory of the law and its interpretation evolves through jurisprudence, as did the notion in constitutional law, as stated by Lord Sankey, that of a “growing tree”, does take place in constitutional law, so it may eventually in refugee law; however, that is not where this branch of international law finds itself presently; thus, the interpretation of the refugee convention in this regard has not attained that stage, which it may, as yet, but as of today, the world is still distant from it. (It must be acknowledged that a continuous amelioration of human rights is the responsibility of refugee-producing countries; otherwise, the onus would solely be on refugee-receiving countries, rather than that of refugee-producing countries, to ameliorate their human rights records, as part of the community of nations, if, in fact, international legislative norms are to lead to an evolution of the human condition.)

Therefore, this Court has no option but to differentiate and to delineate between discrimination and persecution as have the higher courts in their jurisprudence. The higher courts have recognized the state of the civilized world in which the higher courts find themselves, in that, reality and the ideal have not, as yet, met in this regard.

[Emphasis in original].

[8] In the *Csonka* decision, it appears that, in certain cases, the demarcation line between discrimination and persecution is thin and, as a result, the call must be made that discrimination may have, in fact, turned into persecution due to serious physical assaults in such exceptional cases where, due to on-going physical harassment since early age, the situation becomes intolerable to the victims (thus, that which the Handbook on Procedures and Criteria for Determining Refugee Status by the Office of the United Nations High Commissioner for Refugees termed as overriding reasons wherein a change in country enforcement measures may not always produce a complete change in the attitude of a population, nor, in the view of passed experiences in the mind of the refugee; thus, it may necessitate a different response from decision-makers in respect of that which no longer can be considered to be discrimination but rather becomes persecution).

[9] Therefore, a stay of removal is granted pending final disposition of the outstanding application for leave and judicial review.

ORDER

THIS COURT ORDERS that the Applicants' stay of removal be granted pending final disposition of the outstanding application for leave and judicial review.

Obiter

It is recommended, exceptionally, by the undersigned, that an H&C consideration take place, prior to removal if removal is to be effected in regard to the Applicants, due to their specific circumstances; although, it is fully recognized by this Court that it is not in the purview of its discretion but rather it is in the purview of the discretion of the appropriate authority to decide the time and the substance of the H&C.

“Michel M.J. Shore”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-11693-12

STYLE OF CAUSE: DANIEL KUSMIEREK
BARTOSZ KUSMIEREK v THE MINISTER OF
PUBLIC SAFETY AND EMERGENCY
PREPAREDNESS

**MOTION HELD VIA TELECONFERENCE ON NOVEMBER 16, 2012 FROM
OTTAWA, ONTARIO AND TORONTO, ONTARIO**

REASONS FOR ORDER

AND ORDER: SHORE J.

DATED: November 16, 2012

ORAL AND WRITTEN REPRESENTATIONS BY:

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