

Federal Court



Cour fédérale

Date: 20130409

Docket: IMM-8054-12

Citation: 2013 FC 355

Toronto, Ontario, April 9, 2013

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

**IMRE GULYAS
IMRENE GULYAS
IMRE GULYAS
KONSTANTINA HAJ GULYAS
KONRAD GULYAS**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The Applicants seek judicial review of a Refugee Protection Division [RPD] of the Immigration and Refugee Board decision, wherein it was determined that they are neither Convention refugees nor persons in need of protection under sections 96 and subsection 97(1) of the

Immigration and Refugee Protection Act, SC 2001, c 27 [IRPA]. In particular, the Applicants challenge the finding that an internal flight-alternative [IFA] was available to them.

II. Judicial Procedure

[2] This is an application under subsection 72(1) of the *IRPA* for judicial review of the RPD decision, dated July 16, 2012.

III. Background

[3] The principal Applicant, Mr. Imre Gulyas (born in 1972); his spouse, Mrs. Imrene Gulyas (born in 1976), their daughter Imre Gulyas (born in 1995) and their twin sons, Konstantina Haj Gulyas and Konrad Gulyas (born in 1998) are Hungarian citizens.

[4] The principal Applicant alleges that his children were abused at school by students, staff, and teachers. When he complained, the school called the police, who beat him.

[5] The principal Applicant claims that, since the rise of the Hungarian Guard [HG] and Jobbik, the situation of Hungary's Roma has been placed in grave jeopardy (extensive country condition evidence was submitted in this regard). HG menaced and killed Roma in his village and he personally has received death threats and anti-Roma fliers.

[6] Describing a Jobbik flier telling Roma to leave Hungary on threat of death, the principal Applicant testified that he feared an eventual genocide of the Roma and HG and Jobbik pervade Hungary (Certified Tribunal Record [CTR] at pp 70 and 72).

[7] On August 20, 2007, the principal Applicant's niece was assaulted by a truck driver shouting anti-Roma epithets. He was detained but escaped after assaulting the arresting officer. After recapture, he was taken into custody but released that day.

[8] The principal Applicant's spouse cooperated in the investigation but the investigating officer did not accurately transcribe her statement and omitted key points. The truck driver threatened her at the police station on multiple occasions.

[9] The investigation terminated; no charges were made and the principal Applicant's family did not receive protection (including a restraining order) from the truck driver.

[10] The principal Applicant and his spouse presented a police statement, dated September 11, 2007, to the RPD stating, "in connection with a police procedure against an unknown offender based upon a reasonable suspicion of a criminal action which breaks the Criminal law Section 186, Paragraph (1) and qualifies by the same paragraph as causing danger on the public roads" (CTR at pp 486-489).

[11] From the lax police investigation, the principal Applicant and his spouse have inferred that the truck driver is a member of HG or Jobbik. As recently as August 2011, the truck driver attempted to locate the spouse, posing as her friend.

[12] On November 2, 2008, the principal Applicant's cousin and her brother-in law were shot in a nearby village fleeing a racist attack on her house with Molotov cocktails.

[13] The principal Applicant presented a medical certificate of death for his cousin identifying her cause of death as a “gunshot wound caused by a criminal act”, a statutory declaration describing the attack and naming the principal Applicant as a relative (CTR at pp 782-787), and a photo of a recent anti-Roma flier similar to that distributed to his cousin’s family before her murder (CTR at p 475).

[14] In 2010, a gynaecologist performed an abortion on the principal Applicant’s spouse with minimal examination and no medical report, telling her the foetus was dead. On returning for a report, he told them to leave or he would call the police, and stated: “... Why does this matter to you? Why would you - how much do you want to procreate? There [are] so many of you ...” (CTR at p 51).

[15] They reported the incident to a medical board but the gynaecologist committed suicide. They allege he was involved in an HG training camp, was connected to the murder of Roma, and had performed similar abortions on Roma women.

[16] The principal Applicant and associated claimants arrived in Canada on May 29, 2010.

IV. Decision under Review

[17] The RPD found that the Applicants were not Convention refugees or persons in need of protection because they had viable IFAs.

[18] The RPD found that procedures and processes to protect Roma exist generally in Hungary but state protection from the truck driver was unavailable. Police failure to protect the spouse from the truck driver, who threatened her in their presence, left her “exposed to the future possibility of revenge, threats and retaliation” (Decision at para 28). It was objectively unreasonable to expect them to seek further protection.

[19] In finding that a viable IFA was available, the RPD applied *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706.

[20] The RPD was satisfied, on a balance of probabilities, that there was not a serious possibility that the Applicants would be persecuted, or face a risk to life, or a risk of cruel and unusual treatment or punishment or danger of torture in Budapest or Szeged. The RPD acknowledged the principal Applicant’s fear that the truck driver, given his presumed links to the HG, could track them throughout Hungary with the assistance of the authorities but responded that the evidence showed that the primary agents of persecution were localized. The main incidents underlying the claim occurred in Forro, Hungary, from which the proposed IFAs were geographically distant. Even if the unsubstantiated belief that the truck driver is a member of the HG was correct, the RPD did not find that outside HG members would, years later, be seriously interested in the principal Applicant and his family. The truck driver would not likely be aware of their return if they relocated to a large city; nor would he likely pursue them in a distant part of the country.

[21] The RPD found that the IFAs would not be unreasonable in the circumstances. The principal Applicant, having worked abroad, would have job prospects in the large cities of Budapest and

Szeged. It also distinguished his situation from the socio-economic conditions of many Roma in Hungary: (i) his move to Canada illustrated independence and resourcefulness; and (ii) he has a post-secondary education from a technical institute, worked in the past as an engine fitter, vocational training as a structural welder, and a stable employment history working for Roma and non-Roma employers. His spouse had vocational training, was a seamstress for 17 years for a Dutch company, and received employer and government-funded maternity leave.

V. Issue

[22] Is the decision unreasonable because the RPD construed the risk profile of the Applicants too narrowly?

VI. Relevant Legislative Provisions

[23] The following legislative provisions of the *IRPA* are relevant:

Convention refugee

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(b) not having a country of nationality, is outside the

Définition de « réfugié »

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors

country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Person in need of protection

Personne à protéger

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed

(iii) la menace ou le risque ne résulte pas de sanctions légitimes —

in disregard of accepted international standards, and

sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

Person in need of protection

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

Personne à protéger

(2) A également qualifié de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

VII. Position of the Parties

[24] The Applicants submit that the IFA analysis is internally-inconsistent and fails to consider the specific nature of his risk. The Applicants contend that the RPD failed to address the specific risks of abuse, discrimination, and harassment the family would face as Roma in Hungary. Noting that the RPD accepted the credibility of their narrative, the Applicants argue that the IFA analysis fails to consider how these specific risks would arise in the proposed IFAs. In light of these other specific risks, the Applicants take the position that the RPD's conclusion that state protection would not be available to them is inconsistent with its IFA finding. The IFA finding is also unreasonable, according to the Applicants, due to the mobility restrictions on Roma in Hungary. Finally, the RPD's comments on the principal Applicant's job prospects are speculative and unreasonable in light of country condition evidence on the worsening situation of the Roma.

[25] The Applicants also contend that the RPD decision is based on erroneous findings of fact made without regard to the material before it. Specifically, the RPD's inferences that the Driver was local and lacked the interest, motivation, means, and resources to pursue the Applicants in Budapest and Szeged is not based on any evidence. These inferences contradict evidence that considerable resources were available to the Driver (who was not arrested for attacking them or assaulting the arresting police officer), he was not local, and he was a truck driver who travels regularly and would not find it difficult to pursue to Budapest or Szeged.

[26] The Respondent counters that the RPD analyzed the specific risks confronting the Applicants. In the Respondent's view, the principal Applicant identified the truck driver as his family's primary agent of persecution and the RPD determined the claim on that basis. Further, the state protection analysis was not in respect of Roma generally but rather in respect of the family's personal situation vis-à-vis the Driver.

[27] The RPD's IFA finding, according to the Respondent, is reasonable because the Applicants did not establish that they would be at risk in Budapest or Szeged. The principal Applicant's testimony regarding the truck driver's HG connections and ability to track his family to those large cities was speculative. It was also reasonable to infer from the principal Applicant's employment and education history (and that of his spouse) that the IFAs would not be unreasonable in their particular circumstances.

VIII. Analysis

[28] The characterization of a claimant's risk profile attracts deference (*Olivares v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1010 at para 5).

[29] If the standard of reasonableness applies, courts may only intervene if reasons are not "justified, transparent or intelligible". To meet the standard, a decision must also fall in the "range of possible, acceptable outcomes ... defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

[30] In *Olivares*, above, Justice Mary Gleason explains that "RPD decisions which mischaracterize an applicant's profile are unreasonable because in making such a decision the Board fails to consider the evidence before it and to properly evaluate the risk that might be faced by the claimant" (at para 6).

[31] In this Application, the principal Applicant presented evidence that: (i) his children suffered discrimination in school; (ii) the HG and Jobbik menaced and terrorized Roma in his village; (iii) the HG and Jobbik pervade Hungary; (iv) an anti-Roma truck driver had assaulted his niece and threatened his spouse; (v) his cousin was murdered in a violent anti-Roma attack; and (vi) a gynaecologist aborted a child carried by his spouse for anti-Roma reasons. The Applicants presented extensive country condition evidence on anti-Roma violence and discrimination throughout Hungary and the principal Applicant testified that he feared an eventual anti-Roma genocide in that country.

[32] In characterizing the Applicants' specific risk as localized, the RPD limited its risk analysis to retribution for the truck driver investigation. Focusing on this incident, the RPD failed to analyze other, ample evidence of education discrimination, widespread anti-Roma violence and discrimination, the murder of relatives, the abortion, and the general country condition evidence.

[33] Without analyzing other evidence suggesting a broader risk profile for the Applicants, the RPD could not properly analyze their risk and hence, whether a viable IFA was available. Indeed, its IFA analysis is predicated on an unreasonably narrow characterization of their risk profile. Notwithstanding the evidence on a wide array of risks that the Applicants would face as Roma in Hungary, the RPD concluded that IFAs were available in the cities of Budapest and Szeged because (i) the truck driver would not have the ability or inclination to track them in those cities; and (ii) the HG would not be interested in them due to this incident.

[34] The RPD's analysis is reminiscent of another RPD decision in *Parra v Canada (Minister of Citizenship and Immigration)*, 2013 FC 65. In *Parra*, a decision-maker found that a union organizer who was assaulted by three men for union activities had an IFA because there was no evidence that his attackers would be able or inclined to pursue him in Bogota. At the hearing, the Applicant testified that he would resume his union and activist activities in Colombia. Justice Luc Martineau found the decision unreasonable because, in focusing on the Applicant's particular attackers, the decision-maker failed to consider risks that would arise in Colombia from being a union organizer or activist generally. The RPD failed to meet its "burden of explanation" under *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35 with respect to country condition evidence on the persecution of this group not discussed in the decision and to conduct "a

true contextual analysis ... of the prospective risks the applicants face” (*Parra*, above, at para 18). In sum, “the panel misunderstood or too narrowly characterized the profile of a refugee claimant with respect to his ... specific risk profile” (at para 20).

[35] The same issues arise in this Application. In focusing on a single instantiation of violence involving the Applicants, the RPD failed to consider the specific risks arising from the cause of that violence. This approach ignored evidence of other anti-Roma violence and discrimination experienced by the Applicants personally and the country condition evidence on the current situation of Roma in Hungary. The RPD fails to contextually analyze the prospective risks the Applicants face in Hungary and to construct an accurate risk profile.

[36] In arguing that the principal Applicant identified the truck driver as his primary agent of persecution, the Respondent mischaracterizes his testimony. The record shows that the principal Applicant identified both the truck driver and anti-Roma groups like the HG and Jobbik as the basis for his fear of persecution:

Q. So to begin with, sir, I am going to ask you, can you tell me who it is you fear in your homeland and be as specific as possible.

A. From racist individuals mostly. How should I say this, and my wife’s and from my wife’s vengeance I am afraid of – I am afraid for the most – of the most.

Q. Okay. When you say “racist individuals” can you be specific? Do you know who they are?

A. They are members of the Hungarian Guard and the Jobbik Party that is represented in the Parliament as well.

(CTR at p 15).

IX. Conclusion

[37] For all of the above reasons, the Applicants' application for judicial review is granted.

JUDGMENT

THIS COURT ORDERS that the Applicants' application for judicial review be granted and the matter be returned for determination anew (*de novo*) before a differently constituted panel. No question of general importance for certification.

“Michel M.J. Shore”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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