

Federal Court



Cour fédérale

Date: 20130715

Docket: IMM-8700-12

Citation: 2013 FC 788

Ottawa, Ontario, July 15, 2013

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

**HORVATH, GABOR
RACZ, GABRIELLA ROZA
HORVATH, DZSENI FER GABRIELLA**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision of the Refugee Protection Division [RPD], dated August 13, 2012 denying the Applicants refugee protection.

I. Facts

[2] The Applicants are a family of Roma ethnicity from Budapest. The female Applicant has experienced racism since she was born and by the sixth grade, she was discriminated by her classmates. They called her names and made threatening remarks and one even pushed ice cream onto her head. Her parents took her out of school and moved to an area where there were more Roma. In 1999, she was attacked by skinheads who ripped her sweater and took her purse and she was helped by the male Applicant, who is also a Roma. He has been attacked by skinheads numerous times.

[3] By the time their daughter turned six, she did not want to go to daycare anymore because the other children were calling her racist names. When the Applicant's daughter started school in 2009, she endured racist taunts.

[4] One week end, the Applicants were attempting to sell some seeds and skinheads started beating them and other people yelled racist remarks. While the Applicants did go to the police, they ignored them. The Applicants were treated with suspicion in stores. There were acts of violence committed by the Hungarian Guard. They were away one night and when they came home, they found their door kicked open, their windows broken and their possessions destroyed. They came to Canada on October 6, 2009 and made a refugee claim a few days later.

II. Decision under review

[5] The RPD determined that the Applicants have not established a serious possibility of persecution on a Convention ground or that they would personally be subjected, on a balance of

probabilities, to a danger of torture or a risk to life or a risk of cruel and unusual treatment or punishment upon return to their country.

[6] The RPD first determined that there were a number of discrepancies in the Applicants' evidence when their oral testimony is compared to their Personal Information Forms [PIF]. The female Applicant stated that her parents complained to the principal about the incident involving other children and that the principal did nothing. However, the fact that the Applicant's parents complained to school authorities but were rebuffed was not mentioned in her PIF. The RPD was not satisfied with the explanation that the Applicant did not know why it was not included as it is clear in the PIF that claimants need to include any attempts to obtain protection.

[7] Moreover, the female Applicant did not report the 1999 incident involving the skinheads to the police and stated that relatives had gone to the police on other occasions and did not receive assistance. The RPD found that the Applicant lacked credibility as she did not state this last fact in her PIF and again, the explanation to the effect that she does not understand why it was not included was not found to be satisfactory.

[8] The RPD determined that the Immigration documents prepared by the Applicant only make reference to generalized violence but not to violence she personally experienced. The RPD therefore determined that it undermines her credibility.

[9] The RPD drew a negative inference from the fact that the male Applicant was not able to submit any reports resulting from his medical treatments following incidents when he was beaten

because he would have to make a request in person, as in other cases, claimants from Hungary have been able to provide such documentation.

[10] The male Applicant stated orally that he reported five to eight of the beatings to the police and that he received unsatisfactory response each time, however, no mention of this fact is made in his PIF. The RPD did not accept his explanation that he did not include this information because he had no proof that they occurred.

[11] The RPD then determined that the Applicants did not rebut the presumption of state protection. It considered that Hungary is a democratic country and that although discrimination does exist, the Hungarian government is making efforts to combat it which have resulted in some progress. The RPD acknowledged that the police do use excessive force against the Roma and that discrimination against the Roma in education, housing and access to social services continues. However, the RPD determined that in Hungary, there are government agencies tasked with addressing complaints against officials using excessive force and that those crimes are investigated. It also reviewed a number of cases, where officials were condemned.

III. Applicants' submissions

[12] The Applicants submit that the RPD failed to observe a principle of natural justice as it made a credibility finding based on discrepancies between their PIFs narrative and their testimony at the hearing although the narratives were not before the RPD. The absence of the PIFs is an insurmountable obstacle making the Court unable to review the credibility findings as it has been

established by case law that a Court must determine whether the record before it allows it to properly dispose of the application for judicial review.

[13] The Applicants also submit that the RPD's state protection finding is unreasonable. First, the RPD found that the efforts of Hungary to protect the Roma have achieved mixed results and that extremist violence against the Roma was increasing. Considering this evidence, it was unreasonable to conclude that there is adequate state protection for the Roma in Hungary. While the state's efforts are indeed relevant to an assessment of state protection, they are neither determinative nor sufficient as efforts need to have translated into adequate state protection at the operational level. The RPD's acknowledgment of the fact that violence has worsened shows that the Hungarian State is not willing or able to protect Roma people.

IV. Respondent's submissions

[14] The Respondent submits that the record does not support a breach of natural justice. The Applicants have relied on evidence that the RPD had misplaced their file to suggest that the decision was made without regard to the evidence although there is no evidence to suggest that the Applicants' PIFs were not before the RPD in the course of making its decision. The fact that the RPD refers with precision to what information did and did not appear in the narrative shows that the RPD had in fact the PIFs when deciding the Applicants' claim and drawing inferences on their credibility.

[15] Moreover, at the hearing, the RPD Member indicated that he had read the Applicants' PIFs. Each of the inconsistencies noted by the RPD between the Applicants' PIFs and their oral testimony

were canvassed in detail at the hearing allowing both the Applicants and the Court to adequately understand the basis of the RPD's findings regarding the inconsistencies in the Applicants' evidence.

[16] The Respondent further submits that the question is whether a meaningful, as opposed to perfect, review of the RPD's decision can take place.

[17] The IRPA and Rules of the Court specifically contemplate consideration of leave without a complete record before the Court and a certified tribunal record [CTR] is produced only after leave is granted. The responsibility was on the Applicants to put forward a PIF narrative on leave if they consider this evidence to be important to their case and the fact that they do not have a copy of this document does not render the RPD's reliance on those documents unfair. The Applicants bore the onus of putting forward this evidence or at least affidavit evidence demonstrating the errors they believe the RPD made with respect to the contents of their PIFs as if it were otherwise, the Applicants could obtain leave simply by withholding evidence.

[18] The Respondent further submits that the Applicants bear the onus of rebutting the presumption of state protection through clear and convincing evidence that their state would provide them with inadequate protection. The Applicants have attempted to impugn the RPD's analysis as unreasonable by referring to evidence that racism and violence against the Roma persist in Hungary. However, this evidence is directed at the wrong question as what the RPD needs to determine is not whether Hungary has been able to address the problem of racism on a broad scale. The test is not

perfect protection. It is impossible for any state to guarantee the safety of individuals at all times and the test is therefore adequacy and not effectiveness.

[19] Moreover, evidence of an on-going situation of violence or criminality is not sufficient to rebut the presumption of state protection as this evidence does not tell about what the state can and/or will do if approached by a claimant for protection. In this case, the evidence reasonably supported the conclusion that the state actively intervenes to provide protection to the Roma.

[20] In this case, the RPD provided a detailed analysis of the operational adequacy of efforts undertaken by the government of Hungary to provide adequate state protection to the Roma, although it continues to face significant challenges in protecting the Roma.

[21] The Applicants have advanced evidence to suggest that the Roma are subject to racist attacks, police abuses and discrimination and the RPD did acknowledge this evidence. However, it remains open to the RPD to weight this evidence against the extensive evidence of the efforts that have been undertaken by the Hungarian government to provide protection.

[22] Finally, the evidence indicates numerous avenues by which the Roma can exercise and vindicate their rights although the Applicants did not access these recourses and the RPD determined that there is no evidence in the Applicants' case suggesting that protection would not be reasonably forthcoming.

[23] During the hearing, the Respondent suggested that as documentary evidence shows that the Hungarian government provides adequate state protection, it is not necessary for the Court to assess the reasonability of the credibility findings. Therefore, regardless of the RPD's findings related to the Applicants' fear of persecution, they could not be granted refugee protection on the sole basis that documentary evidence establishes clearly that their home state is able to offer adequate protection.

V. Applicant's reply

[24] The fact that the RPD twice requested a copy of the file from counsel for the Applicants shows that it did not have it. Moreover, to the Respondent's position that by not citing the missing PIFs, the Applicants have not presented an adequate case, the Applicant replies that they cannot cite something that no one appears to have. The application for judicial review is founded on the fact that the narratives are missing. The RPD could not find its copies and the office of the counsel for the Applicants could not find its copy and the principal Applicant stated in an affidavit that he and his family had never received copies of their PIFs.

[25] With regards to state protection, the Applicants submit that if anti-Roma violence is increasing, then the RPD needed to explain how the government's dedication to the protection of the Roma people translated into operational adequacy of protection and it failed to do so.

[26] The Applicant disagrees with the Respondent's submission that they argued that the applicable test is perfect state protection. The Applicant's position is that the test is operational

adequacy and that it is not met in the circumstances as there is a lack of protection from discrimination and violence against the Roma in practice.

VI. Issues

1. Does the absence of the PIFs from the CTR make the Court unable to properly dispose of the present application for judicial review?

2. Are the RPD's findings on state protection reasonable?

VII. Standard of Review

[27] The standard of correctness applies to the first issue as it raises a question of procedural fairness (*C.U.P.E. v Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 SCR 539). The standard of reasonableness applies to the state protection determination (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190).

VIII. Analysis

- A. *Does the absence of the PIFs from the CTR make the Court unable to properly dispose of the present application for judicial review?*

[28] The CTR does not contain the PIFs of the Applicants nor does it make any reference to phone calls made by the case officer and the coordinating member when inquiring about obtaining the PIFs because the RPD had lost them. It is also noteworthy to mention that the RPD in its decision did not inform that prior to releasing the decision, fifteen (15) months after the hearing, it did not have a copy of the Applicants' PIFs. The transcript shows that they were available at the time of the hearing.

[29] In the present case, the absence of the PIFs from the CTR justifies allowing the application for judicial review.

[30] The Court is unable to assess the reasonability of the RPD's credibility findings due to the absence of the PIFs from the CTR. Credibility findings are determinative in most cases. For a reviewing court, it is important that the documentary evidence used to arrive at these findings be available. During the hearing, the RPD did indicate some of the differences between the PIFs and the oral testimonies. The Court does not have the essential documents to assess properly the credibility findings made. The transcript, in such a situation, cannot be a substitute for such important evidence.

[31] In *Canadian Union of Public Employees, Local 301 v Montreal (City)*, [1997] 1 SCR 793 at para 80, 144 DLR (4th) 577 [*Canadian Union of Public Employees*], the Supreme Court of Canada stated the following:

80 In my view, the decisions in *Kandiah* and *Hayes, supra*, provide an excellent statement of the principles of natural justice as they apply to the record made of an administrative tribunal's hearing. In cases where the record is incomplete, the denial of justice allegedly arises from the inadequacy of the information upon which a reviewing court bases its decision. As a consequence, an appellant may be denied his or her grounds of appeal or review. The rules enunciated in these decisions prevent this unfortunate result. They also avoid the unnecessary encumbrance of administrative proceedings and needless repetition of a fact-finding inquiry long after the events in question have passed.

This is the exact situation that this reviewing Court faces. It may be that the Applicants will be denied a ground of review without these essential documents being available.

[32] Similarly, in *Gokpinar v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1065 at para 10, 44 Imm LR (3d) 80, the Court determined that where a decision is based on the Applicant's lack of credibility, the absence of a transcript of the Applicant's testimony consisted in "an insurmountable obstacle making the Court unable to properly dispose of the application for judicial review." Here, a transcript exists but the evidence that forms the basis of the credibility findings is missing. This reviewing Court cannot assume its judicial obligations in such circumstances.

[33] Therefore, when the record of the Tribunal is incomplete and that as a result of this situation, the reviewing Court is not in a position to properly dispose of the application for judicial review of the impugned decision, there is a breach of natural justice. Moreover, as stated in *Canadian Union of Public Employees, Local 301*, above and subsequently in *Likele v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 1693 at paras 5-6, 175 FTR 281 and as explained above, a breach of natural justice also results from the impossibility of a claimant to show that the RPD's credibility findings are unreasonable. Indeed, the Applicants are not in a position to properly challenge the RPD's credibility findings as they are not able to rely on the relevant passages of their PIFs.

[34] In the case at bar, a breach of natural justice clearly occurred and therefore, this application for judicial review should be granted and the matter sent back for redetermination.

[35] Considering that the credibility findings made are crucial to the issues raised and that the Court cannot review them for the reasons mentioned above, I will not deal with the second issue.

Although the Respondent suggests that state protection should be considered in itself, as sufficient to establish that the Applicants cannot be granted refugee protection, regardless of the RPD's assessment of their credibility, the case law is to the effect that state protection cannot be "determined in a vacuum." Indeed, "[t]he willingness and ability of states to protect their citizens may be linked to the nature of the persecution in question. In short, context matters." (See *Avila Ortega v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1057 at para 24.)

[36] It has been recognized that when undertaking a contextual approach to determine whether a refugee claimant has rebutted the presumption of state protection, a number of factors need to be taken into consideration including the following ones (see *Gonzalez Torres v Canada (Minister of Citizenship and Immigration)*, 2010 FC 234 at para 37):

1. The nature of the human rights violation.
2. The profile of the alleged human right abuser.
3. The efforts that the victim took to seek protection from authorities.
4. The response of the authorities to requests for their assistance.
5. The available documentary evidence.

[37] In the present case, the credibility findings that the Court is not in a position to review are of great importance and they are related to all of the above-mentioned factors, except for the last one. Therefore, the Court is not in a position to assess the reasonability of the state protection analysis as it is closely linked to the credibility findings made by the RPD. In conclusion, as the state protection determination is intertwined with the credibility findings related to the Applicants' fear of

persecution and efforts to seek protection, the Court is not in a position to draw a conclusion as to the reasonability of the state protection analysis.

[38] This matter will be returned to a different RPD panel and it is expected most probably that the Applicants will submit amended PIFs so that a proper determination be made.

[39] The parties were invited to submit a question for certification but none were proposed.

ORDER

THIS COURT ORDERS THAT:

1. This application for judicial review is granted.
2. The RPD's decision is set aside and the matter is referred back to the RPD for a new determination by a new panel.
3. No question is certified.

“Simon Noël”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-8700-12

STYLE OF CAUSE: HORVATH, GABOR RACZ et al
v THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: July 9, 2013

**REASONS FOR ORDER
AND ORDER:** NOËL J.

DATED: July 15, 2013

APPEARANCES:

Mordechai Wasserman FOR THE APPLICANTS

Julie Waldman FOR THE RESPONDENT

SOLICITORS OF RECORD:

Mordechai Wasserman FOR THE APPLICANTS
Barrister & Solicitor
Toronto, Ontario

William F. Pentney FOR THE RESPONDENT
Deputy Attorney General of Canada