Federal Court  Cour fédérale

Date: 20130812

Docket: IMM-7516-12

Citation: 2013 FC 860

Ottawa, Ontario, August 12, 2013

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

GYORGY BENCSIK, GYROGYNE BENCSIK, EDINA BENCSIK, VIKTOR BENCSIK, GYORGY BENCSIK

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Panel), rendered on July 5, 2012, which denied refugee status to Mr. Gyorgy Bencsik, together with his wife and three children (the applicants). This application is made pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act).

[2] The applicants raise two issues on this application, both concerning state protection. First, did the Panel apply the correct test with respect to state protection? Second, did the Panel err in its application of the test?

[3] The applicants did not press a third ground, concerning an earlier allegation of bias against the Panel. There was no argument presented to that effect, and the matter is considered abandoned.

I. Facts

[4] Given the nature of the grounds raised by the applicants and the conclusion I have reached, it will not be necessary to delve into the facts of this case. A short summary will suffice for our purpose.

[5] The applicants are citizens of Hungary of Roma ethnicity. They arrived in Canada on April 24, 2011 and initiated a refugee claim, based on persecution they were subjected to in Hungary. A number of specific incidents of violence are the basis for the refugee claim. It appears that five physical assaults took place between 1998 and 2009, with reports being made to the police on two or three occasions.

II. Decision impugned

[6] The Panel chose to deal with the application solely on the basis of state protection. The decision did not turn on credibility, whether the incidents took place or whether they are enough to open the door to the application of sections 96 and 97 of the Act.

[7] Having assumed that the applicants have been victims of violent attacks by skinheads, the Panel goes on to find that they would benefit from state protection if they return to Hungary.

[8] The presumption of state protection can be rebutted, but that will require clear and convincing evidence on the part of the applicants. Actually, the burden is made heavier if the country under consideration is a well functioning country.

[9] There appeared to be some uncertainty as to the test the Panel sought to apply. It seems to have found that a test of "whether the state is in effective control of its territory, has military, police and civil authority in place, and is making 'serious efforts' to protect its citizens" was considered (para 30, Panel decision).

[10] The Panel considered documentary evidence regarding Hungary from which it seems to have found that state protection exists. While acknowledging ancient and deep seeded prejudices against Romani people, the Panel found that efforts have been made in Hungary to address the issue. More police resources have been dedicated, avenues of redress have been created, and some groups known to inflict mistreatment on Roma are being monitored by the authorities.

[11] Without claiming that the human rights situation is ideal, the Panel is satisfied that state protection is available. To be more precise, the Panel finds that the evidence falls short of establishing that state protection is unavailable. Given the laws and redress mechanisms, Hungary is willing to protect the Roma (para 45). Thus, the Panel appears to find sufficient state protection in that there are in place laws and redress mechanisms.

[12] The panel also suggests a measure of effectiveness in law enforcement when it states at the end of paragraph 45:

> … The evidence of convictions, police responses to crime, and other state actions in the documentary record shows that Roma are being defended by the state in practice. The protection is imperfect, but not, I find, inadequate.

However, the only evidence offered in support of such a statement seems to be four arrests in August 2009. This comes after the Panel had reckoned that the failure by the applicants to go to the police is not implausible, given that the applicants "believed that the police could not help them with these problems" (para 33). After all, attacks are committed by unidentifiable assailants. That, however, leaves the issue of the adequacy of the measures, or their effectiveness in a quandary.

III. Standard of review

[13] The parties disagreed on what the standard of review ought to be. The applicants claim that the standard of correctness applies to the issue of the test to be used to determine the existence of state protection. Is it sufficient that efforts be made, or is something more required, something in the nature of a measure of effectiveness for state protection to be available and adequate? Once the test has been identified, the applicants argue that reasonableness will be the standard against which the evidence about state protection will be measured.

[14] The respondent counters that either issue is reviewable on a reasonableness standard. He insists that deference is owed to the decision-maker.

IV. Arguments

[15] In essence, the applicants argue that the state protection test used by the Panel is wrong in that state protection must be efficient, without being perfect, in order to satisfy our law. On that account, they contend that the Panel's decision is deficient because it did not establish that measures taken abroad have been efficient. Such decision is reviewable on a correctness standard. The Panel's decision should be quashed also because it did not use the right test and could not satisfy the proper test, which makes the decision unreasonable.

[16] The respondent takes the opposite view. The evidence proffered by the applicants was neither clear nor convincing that state protection was not available. Perfection cannot be achieved. The respondent did not offer case law to counter the jurisprudence submitted on behalf of the applicants. Instead, he sought to distinguish cases.

V. Analysis

[17] I believe that this case has to be sent back for redetermination.

[18] This Panel has chosen to take for granted that the incidents involving these applicants have taken place and are sufficient to open the door to the application of section 96 of the Act, concentrating its attention on the issue of state protection.

[19] It is not easy to establish the test the panel purports to follow here. At one point, it speaks of protection "adequate though not necessarily perfect"; a few lines later, it speaks in terms of "serious efforts" (para 30). Yet, later it speaks in terms of state protection being unavailable as being the test

(para 45). In that same paragraph, the Panel finds that "protection is imperfect, but not, I find inadequate."

[20] The evidence noted by the Panel reflects the existence of laws and mechanisms, but seems to be satisfied with the arrest of four suspects in August 2009, who were subsequently charged. Similarly, the monitoring by Hungarian authorities of the Hungarian Guard, a nationalist group, seems to have produced charges of some sort in 2009 and 2010. The reader is left without knowing what happened to those charges and indeed what they were about. Nothing recent on the adequacy of state protection is presented in support of the rejection of the application.

[21] As has been often repeated since 2008, courts acting on judicial review cannot be subservient to the determination of decision makers even though deference is required where the standard of review is reasonableness. It is not unhelpful to quote again paragraph 47 of *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190:

> [47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[22] Here, the reasons for the decision remain unclear as to the test that was applied as well as to the sufficiency of the evidence found in support of the Panel's conclusion that the evidence was not clear and convincing enough to rebut the presumption of state protection.

[23] In *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 [*Nurses' Union*], the Court quoted with approval the Federal Court of Appeal in *Canada Post Corp. v Public Service Alliance of Canada*, 2010 FCA 56, [2011] 2 FCR 221, in agreeing that reviewing courts should ask whether "when read in light of the evidence before it and the nature of its statutory task, the Tribunal's reasons adequately explain the bases of its decision" (*Nurses' Union* at para 18). At the end of the day, the test will be whether the reviewing court understands why the decision was made:

> … In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.
>
> *Nurses' Union* at para 16.

[24] With respect, I have not been able to conclude that the reasons for the decision in this case meet that test.

[25] There have been many different judgments rendered by this Court in the last few months concerning the state protection for Romani people in Hungary. That suggests that a case-by-case analysis is particularly important as a difference in circumstances might well generate a different outcome. The abundant case law on refugee status seekers of Roma ethnicity of the last few months is an illustration of the need for precise findings and analysis.

[26] In the case at bar, it is not clear what test for state protection was applied and, perhaps more importantly, the reasoning leading to the decision is too generic to allow this reviewing court "to determine whether the conclusion is within the range of acceptable outcomes." As was noted recently by my colleague Justice Simon Noël, in *Horvath v Canada (minister of Citizenship and Immigration)*, 2013 FC 788 [2013] FCJ No 852 (QL), yet another case involving a family of Roma ethnicity from Hungary, state protection cannot be determined in a vacuum. He referred to the factors to be taken into account, suggesting that a simplistic analysis might not suffice. He cited Justice Zinn in *Ortega v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1057 at para 24, [2009] FCJ No. 1295 (QL), to the effect of that "[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". I share that view.

[27] As a result, the application for judicial review succeeds and the matter should be remitted back to a differently constituted Panel. My Reasons for judgment should not be taken as having taken a view as to whether the applicants are entitled to refugee status. This is an issue that is entirely in the province of the new Panel that will have to take a fresh look to this application.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The matter is remitted to a differently constituted Panel for a new determination.

3. No question is certified.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7516-12
STYLE OF CAUSE:	Gyorgy Bencsik et al v. MCI
PLACE OF HEARING:	Calgary, Alberta
DATE OF HEARING:	May 7, 2013
REASONS FOR JUDGMENT:	ROY J.
DATED:	August 12, 2013

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