Date: 20010209

Docket: IMM-2285-00

Neutral Citation: 2001 FCT 50

BETWEEN:

ANTAL BRAZDA, ERNO SZABO, ERNONE SZABO

and RICHARD SZABO

Applicants

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT

DAWSON J.

[1] The applicants in this proceeding are twenty-six year old Erno Szabo, his twenty-six year old wife Ernone, their five year old son Richard, and thirty year old Antal Brazda, a friend of the adult applicants. All are citizens of Hungary who before coming to Canada resided in Budapest. On their arrival in Canada, they claimed status as Convention refugees.

[2] They bring this application for judicial review of the decision of the Convention Refugee Determination Division of the Immigration and Refugee Board ("CRDD"), dated March 28, 2000 whereby it was determined that the applicants were not Convention refugees.

[3] The adult male applicants based their claims to a well-founded fear of persecution on their Roma ethnicity. The female applicant based her claim on the ground of a particular social group, the wife of a Roma husband. The minor applicant based his claim on the ground of a particular social group, the son of a Roma father in a mixed marriage with a mother of non-Hungarian ethnicity.

[4] The applicants recounted incidents of discrimination in finding employment, housing, in daycare (with respect to Richard Szabo) and in access to public services. Both adult male applicants also related attacks by skinheads and others which they did not report to the police because, they said, they believed the police would not investigate their complaints.

THE DECISION OF THE CRDD

[5] The panel considered separately the claim of Mr. Brazda and the claims of the Szabo family.

[6] With respect to Mr. Brazda, the panel concluded that he had not established conduct that went beyond discriminatory acts on the part of racist individuals. The panel went on to find with respect to Mr. Brazda's claim that:

> According to the male claimant's evidence none of the above incidents were reported to the police. How can the response or actions of the police be tested, if this claimant refrains from reporting the incidents to the police? The claimant's inference that all the police would do in such case where the perpetrators are unknown, would be to take statements, has not proven beyond a reasonable doubt that the police are unwilling to provide protection to the claimants. [underlining added]

[7] With respect to the Szabo applicants, the panel concluded that they had not established through their evidence that there was a reasonable chance that they would face persecution if they returned to Hungary. The panel went on to say that:

> They have not established to the satisfaction of the panel, that the police is *[sic]* unwilling to provide them with protection, or is *[sic]* unable to provide them protection. The incidents they now complain of were never reported to the police. Their reasons given for not reporting the incidents, lack credibility.

[8] With respect to the issue of state protection generally, the panel concluded that:

> In the panel's opinion, it would be extremely difficult for even the best police force in the world to provide protection to any citizen or group of citizens, if they are unaware of attacks of such citizens. In Smirnov, the court states:
>
> "Random assaults suffered by the claimants, where the assailants are unknown to the victim and there are no independent witnesses are also difficult to effectively investigate. In all such circumstances, even the most effective, well-reasoned *[sic]* "resourced" and highly-motivated police forces will have difficulty providing effective protection".
>
> It is the finding of the panel, based on documentary evidence, that the claimants have not rebutted the presumption that the state is able to protect the claimants. They did not approach the police, based on experience of friends. Individual incidents with the police cannot taint the entire country. The documentary evidence states Roma in custody is *[sic]* at risk, not Roma on the street. Majority of documents show that skinhead activities have been reduced.

THE ISSUES

[9] While the applicants raised a number of issues, in my view two issues are determinative of this application for judicial review:

1) Did the CRDD err by applying the wrong test in determining whether state protection was available to the applicants?;
2) Did the CRDD err in concluding that the applicants have not established a well-founded fear of persecution?

ANALYSIS

[10] The Supreme Court of Canada in *Canada (Attorney General)* v. *Ward*, [1993] 2 S.C.R. 689 at page 724 considered the evidence required to establish that a state was unable or unwilling to protect its nationals. The Court commented as follows:

> Like Hathaway, I prefer to formulate this aspect of the test for fear of persecution as follows: only in situations in which state protection "might reasonably have been forthcoming", will the claimant's failure to approach the state for protection defeat his claim. Put another way, the claimant will not meet the definition of "Convention refugee" where it is objectively unreasonable for the claimant not to have sought the protection of his home authorities; otherwise, the claimant need not literally approach the state.
>
> The issue that arises, then, is how, in a practical sense, a claimant makes proof of a state's inability to protect its nationals as well as the reasonable nature of the claimant's refusal actually to seek out this protection. On the facts of this case, proof on this point was unnecessary, as representatives of the state authorities conceded their inability to protect Ward. Where such an admission is not available, however, clear and convincing confirmation of a state's inability to protect must be provided. For example, a claimant might advance testimony of similarly situated individuals let down by the state protection arrangement or the claimant's testimony of past personal incidents in which state protection did not materialize. Absent some evidence, the claim should fail, as nations should be presumed capable of protecting their citizens. Security of nationals is, after all, the essence of sovereignty. Absent a situation of complete breakdown of state apparatus, such as that recognized in Lebanon in *Zalzali*, it should be assumed that the state is capable of protecting a claimant. [underlining added]

[11] It follows from this statement of law that:

i. the CRDD erred by setting too high a standard of proof when it stated with respect to Mr. Brazda's claim that he had not proven "beyond a reasonable doubt" that the police were unwilling to provide protection to the claimants; and

ii. the evidence of the experience of the applicants' similarly situated friends was relevant to the issue of the inability of the state to protect the claimants.

[12] As to the effect of the CRDD's misstatement of the applicable standard of proof, counsel for the Minister submitted that an improper formulation of a legal test by a tribunal may be obviated by a proper application of the test. Reliance was placed upon the decision of Pinard J. in *Pompey* v. *Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 1190, IMM-16-96 (September 18, 1996) (F.C.T.D.).

[13] While I accept that proposition of law, in the present case there is no clear indication that the proper test was applied. Nowhere in its reasons does the CRDD properly articulate the test or how the test was applied. With respect to the Szabo claimants, the panel merely stated that they "have not established to the satisfaction of the panel" that the police were unwilling or unable to provide protection.

[14] The panel did find with respect to the Szabos that their reasons for not reporting incidents to the police lacked credibility. Mr. Szabo testified as follows as to why he believed that he could not rely on the protection of the police:

> MALE CLAIMANT (SZABO) No, because there were too many, too numerous stories about my friends being involved in similar incidents, when they were the ones who were kept by the police overnight, without any particular reason and they were interrogated and based on their description, or how does the police handle them, or treated them, I absolutely didn't have any inclination whatsoever to turn to the police, or to talk to the police about my problems.

[15] This evidence was consistent with the documentary evidence before the panel. While the CRDD is free to reject evidence before it, in circumstances where Mr. Szabo's testimony was consistent with documentary evidence before the panel, the CRDD erred in rejecting his testimony as incredible where the panel gave no clear and unmistakable reasons for finding Mr. Szabo's testimony lacking in credibility (see: *Hilo* v. *Canada (Minister of Employment and Immigration)* (1991), 15 Imm.L.R. (2d) 199 (F.C.A.)).

[16] The panel did go on to conclude that based upon documentary evidence the applicants had not rebutted the presumption of state protection.

[17] The documentary evidence before the panel on the issue of state protection was conflicting. In view of the fact that the panel did not specify what evidence it found compelling, did not deal with the conflict in the evidence before it, misstated the applicable standard of proof, and rejected as incredible *viva voce* evidence on the issue without providing reasons, I am unable to defer to the CRDD and unable to conclude that its finding with respect to state protection was reasonably made.

[18] Counsel for the Minister argued that there was another ground upon which the decision of the CRDD could be supported. That ground was the finding of the CRDD that the claimants suffered discrimination, not persecution. Counsel for the Minister fairly conceded that there was "not much analysis" in support of the finding, but submitted that the issue was, nonetheless, worthy of consideration.

[19] In fact, no reasons were given for the panel's conclusion that the Szabos had not established through their evidence that there was a reasonable chance they would face persecution if they returned to Hungary. As for Mr. Brazda's claim, the CRDD stated that even if it accepted as credible his testimony as to the incident in the summer of 1997 (where Mr. Brazdawas stabbed after an attack by five men) and accepted as credible the attack upon him by skinheads in October of 1998, those incidents did not establish cumulatively the elements of persecution.

[20] It is not clear whether the CRDD accepted Mr. Brazda's evidence of these events as credible. Even if the panel took the evidence to be true, the panel gave no reasons for the conclusion that the conduct was not persecutory. Were the events viewed as not being serious enough? Were they viewed as not systemic enough?

[21] As noted by the Court of Appeal in *Sagharichi* v. *Canada (Minister of Employment and Immigration)* (1993), 182 N.R. 398 (F.C.A.) at pages 399-400:

> [3] It is true that the dividing line between persecution and discrimination or harassment is difficult to establish, the more so since, in the refugee law context, it has been found that discrimination may very well be seen as amounting to persecution. It is true also that the identification of persecution behind incidents of discrimination or harassment is not purely a question of fact but a mixed question of law and fact, legal concepts being involved. It remains, however, that, in all cases, it is for the Board to draw the conclusion in a particular factual context by proceeding with a careful analysis of the evidence adduced and a proper balancing of the various elements contained therein, and the intervention of this Court is not warranted unless the conclusion reached appears to be capricious or unreasonable. [underlining added]

[22] In the absence of any analysis and reasons for the panel's conclusion, I am not prepared to uphold the CRDD's decision on this ground. It may be that the result reached by the CRDD was reasonably open to it. However that result was not properly supported by the reasons of the panel.

[23] As a result, the application for judicial review will be allowed. The matter is to be remitted for reconsideration before a differently constituted panel of the CRDD.

[24] With respect to certification of a question, counsel may provide written submissions concerning the certification of a serious question within 14 days of the date of these reasons, after having first disclosed to each other their respective position on the issue. Judgment allowing this application for judicial review will issue following consideration of any submissions provided to the Court.

"Eleanor R. Dawson"

Judge

Ottawa, Ontario

February 9, 2001