

Federal Court



Cour fédérale

Date: 20111123

Docket: IMM-4326-10

Citation: 2011 FC 1350

Ottawa, Ontario, November 23, 2011

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

LASZLO HORVATH

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Laszlo Horvath applies for judicial review of the decision made by the Immigration and Refugee Board's Refugee Protection Division (RPD) refusing his claim for refugee protection on the grounds that he would suffer persecution as a person of Roma ethnicity if returned to Hungary.

[2] The RPD found that Mr. Horvath was not a Convention refugee or a person in need of protection, as the treatment he faced constituted discrimination but not persecution. The RPD also found that one of the attacks he described did not happen, as the Applicant was inconsistent in

remembering when this incident occurred. The RPD did not accept the submissions that he had memory problems, as no medical evidence had been submitted. Finally, the RPD also found that state protection would be available from the Hungarian state.

[3] Mr Horvath submits the RPD erred in finding the story of his assault to be not credible. He also submits that the RPD erred in finding that the treatment he faced amounted to discrimination but not persecution. Lastly, he submits the RPD erred in finding adequate state protection would be available.

[4] I have concluded that the RPD's decision is unreasonable with respect to the finding there was no persecution and with respect to finding adequate state protection. My reasons follow.

[5] The judicial review is granted.

Background

[6] The Applicant, Laszlo Horvath, is of Roma ethnicity and is a citizen of Hungary. He claims he has been subjected to various acts of violence and harassment due to his Roma ethnicity.

[7] Mr. Horvath stated he was attacked by a group of four or five individuals in 2005 and suffered injury. He was treated at the hospital and reported the assault to the police, who merely recorded the incident as being committed by "unknown assailants". He described a second attack again on May 1, 2007 by drunken individuals, but sustained no injuries. He did not report this to the

police because from his past experience, he did not believe the police would do anything. He reported a third attack in 2008 by another group, one with a knife, but he used a belt to defend himself and did not receive any injuries. He did not report this incident to the police. He also described being attacked where bottles were thrown at him. He tried to hail a police car after this happened, but the police car drove away.

[8] Mr. Horvath stated he was often subjected to verbal abuse and racial slurs.

[9] Mr. Horvath also provided evidence about restrictions on his capacity to earn a livelihood. He had obtained a skilled worker diploma in 1989 and managed to secure employment commensurate with his training working in a restaurant except for the period 2001 to 2003. Although employed as a cook, he was subsequently demoted to dishwasher because restaurant patrons complained about having a Roma cooking. The Applicant testified that he could not find work elsewhere in his chosen vocation as a cook. In 2008 he was laid off when the restaurant was sold.

[10] He came to Canada on October 20, 2008 and filed a claim for refugee protection on November 6, 2008.

Decision Under Review

[11] The RPD refused the Applicant's claim for refugee protection on June 16, 2010.

[12] The RPD noted that the Applicant gave inconsistent answers about what time of year the 2005 attack occurred. Although the Applicant's counsel attempted to establish that the Applicant had memory problems, the RPD noted that no medical certificate had been filed in support. The RPD found on a balance of probabilities that the 2005 incident did not take place. The RPD did not make findings of fact with respect to the other attacks reported by the Applicant.

[13] The RPD found that although the Applicant claimed Roma are not given any opportunity to work in their trades and are forced into menial labour, the Applicant had completed his education, received a skilled worker Diploma in 1989, and worked as a cook until 2008, with the exception of the period in 2001 to 2003. The RPD acknowledged that for the last two years, the Applicant was not allowed to cook at the restaurant because customers complained about having a Roma cook, and instead he was compelled to work as a dishwasher.

[14] The RPD examined the issue of whether the discrimination suffered by the Applicant amounted to persecution. It reviewed how persecution has been defined in the case law, and concluded that the legal question to be determined is "does the persecution alleged by the claimant threaten his or her basic human rights in a fundamental way?" The RPD found that the Applicant experienced discrimination and harassment which did not amount to persecution. The RPD found there was no persuasive evidence of sustained or systemic violation of basic human rights demonstrative of a failure of state protection.

[15] The RPD found in the alternative, that there is state protection available to Mr. Horvath were he to return to Hungary.

[16] The RPD noted the Applicant had not filed a police report in the other attacks other than one attempt to stop a police car which drove away. The RPD concluded the Applicant had not established that state protection was unavailable for him in Hungary.

[17] The RPD observed that Hungary is a democracy with free and fair elections and a relatively independent and impartial judiciary. The RPD acknowledged the Applicant's counsel's submissions that state protection in Hungary for Roma is ineffective. The RPD also acknowledged that Hungary has a history of discrimination against Roma people. However, the RPD noted that the Hungarian government is attempting to correct this historical discrimination and has made a number of initiatives to eradicate discrimination and racism, including enacting legislation and making efforts in social fields.

[18] The RPD noted that Hungarian criminal law has provisions which may be used in hate motivated crimes, and that steps have been taken to improve the treatment of the police force towards minorities. The RPD found the preponderance of the objective evidence on country conditions suggest there is adequate state protection in Hungary and that the Hungarian government is making serious and genuine efforts to address the problem of racism.

[19] The RPD concluded that the Applicant was neither a Convention refugee nor a person in need of protection.

Legislation

[20] The *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*) provides:

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

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
 (a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or
 (b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if
 (i) the person is unable or, because of that risk, unwilling to avail themselves of the

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

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) 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) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
 (i) elle ne peut ou, de ce fait, ne

protection of that country,
(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...

veut se réclamer de la
protection de ce pays,
(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 le sont généralement pas,

Issues

[21] The Applicant submits the RPD erred:

- a) by failing to reasonably assess the evidence as a whole,
- b) by failing to consider the evidence as credible in the absence of corroboration,
- c) by failing to consider the extensive country documents filed,
- d) by making erroneous findings of fact, and
- e) by basing its decision on erroneous findings of fact made in perverse or capricious manner.

[22] The Applicant's many submissions are issues relating to the assessment of facts and amount to a question of whether the RPD's decision is unreasonable.

[23] The Respondent submits the issue is "Has the Applicant demonstrated a reviewable error in the RPD decision?"

[24] I would simply state the issues as:

- a) Is the RPD's finding that the Applicant's treatment in Hungary was discrimination and harassment rather than persecution reasonable?

- b) Is the RPD's alternative finding that state protection was available for the Applicant reasonable?

Standard of Review

[25] The appropriate standard of review of an RPD decision on findings of mixed law and fact is reasonableness: *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 53. To be reasonable, an RPD decision must fall within a range of possible and acceptable outcomes defensible in respect of the facts and the law: *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 59.

[26] Questions of the adequacy of state protection are “questions of mixed fact and law ordinarily reviewable against a standard of reasonableness”. *Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171 at para 38.

Analysis

Credibility

[27] The Applicant takes issue with the RPD's decision to reject his explanation of memory problems for his inconsistencies in recalling the date of the 2005 assault for which the Applicant reported he was injured and had informed the police. The Applicant submits that the RPD should have assessed the Applicant's credibility in the context of his limited education and cognitive

problems due to the physical injuries he sustained, and that his memory problems should have been clear from the transcript of the proceedings.

[28] The Applicant points out that when an applicant swears to the truth of certain facts, there is a presumption that these allegations are true unless there is a reason to doubt their truthfulness:

Maldonado v Canada, [1980] 2 FC 302, 31 NR 34 (FCA) at para 5.

[29] The jurisprudence has established that if the applicant's account appears credible, he or she should be given the benefit of the doubt, unless there are good reasons to the contrary: *Chan v Canada (Minister of Employment and Immigration)*, [1995] 3 SCR 593, 128 DLR (4th) 213 at para 47. The Applicant submits that the RPD failed to give reasons for casting doubt on the Applicant's credibility in clear and unmistakable terms: *Hilo v Canada (Minister of Employment and Immigration)* (1991), 130 NR 236, 15 Imm LR (2d) 199 (CA); *Almasy v Canada*, 2001 FCT 701 at para 7. In the cases cited by the Applicant, the Court had been unable to find reasons for the RPD doubting the truth of the Applicant's allegations. Nevertheless, the Court emphasized the RPD's duty to give clear reasons for casting doubt upon the Applicant's account.

[30] In the case at hand, the RPD made its finding after noting inconsistencies in dates given for the 2005 incident in the Applicant's Personal Information Form (PIF) and the oral hearing. The RPD did not accept the Applicant's claim of a poor memory because it was not supported by objective medical evidence. While a claim of poor memory may be supported by non-medical evidence, such a claim is not, without more, sufficient evidence of poor memory due to a medical

condition. The RPD did not dispute the Applicant's account of other assaults and as such is to be taken as accepting that the other incidents did occur.

[31] Since the RPD gave reasons based on evidence before it for finding that the 2005 assault did not occur, I find the RPD's finding with respect to the 2005 assault falls within a range of acceptable outcomes.

Discrimination or Persecution

[32] The Applicant, in addition to recounting his fear of physical attacks, also stated on his arrival to Canada on November 6, 2008:

I am suffering from discrimination for being a Roma. I was hired to be a cook but in reality I was only washing dishes and washing the floor. The restaurant patrons would not eat in a restaurant with a Roma cook so the restaurant owner would not let me cook. I could not find any other job as a cook in the city.

He repeated this statement in his PIF and again in his testimony at the hearing.

[33] The Applicant submits that the RPD erred by concluding that only the "chronically unemployed", the "systematically discriminated", uneducated, and the unsophisticated, could qualify to be persecuted in Hungary. The Applicant submits that the RPD misinterpreted the issue of persecution as was defined by the Federal Court of Appeal in *Rajudeen v Canada (Minister of Employment and Immigration)* (1984), 55 NR 129 (CA) at para 14:

The first question to be answered is whether the applicant had a fear of persecution. The definition of Convention Refugee in the *Immigration Act* does not include a definition of "persecution". Accordingly, ordinary dictionary definitions may be considered. The *Living Webster Encyclopedia Dictionary* defines "persecute" as:

"To harass or afflict with repeated acts of cruelty or annoyance; to afflict persistently, to afflict or punish because of particular opinions or adherence to a particular creed or mode of worship."

The *Shorter Oxford English Dictionary* contains, inter alia, the following definitions of "persecution":

A particular course or period of systematic infliction of punishment directed against those holding a particular (religious belief); persistent injury or annoyance from any source.

[34] The Applicant submits this test is to be determined on the standard of proof of "reasonable chance": *Adjei v Canada (Minister of Employment and Immigration)*, [1989] 2 FC 680, 7 Imm LR (2d) 169 (FCA).

[35] The Applicant submits that the RPD applied an erroneous standard of systematic persecution that had been rejected by Justice Nadon in *Saad v Canada (Minister of Citizenship and Immigration)* (2000), 187 FTR 262 (TD). Justice Nadon found that the RPD erred in concluding that if an agent tortures an individual but does not intend to systematically persecute him, this does not constitute persecution.

[36] The RPD found the Applicant had completed his education, received a skilled worker diploma, and had been employed as a cook. The RPD also noted that the Applicant had been attacked on a number of occasions but did not report the incidents. Based on the evidence before it,

the RPD concluded that this treatment amounted to harassment and discrimination rather than persecution, and the Respondent submits that this falls within a range of possible and acceptable outcomes and is therefore reasonable.

[37] Given the above finding, the Applicant is left with his account of the remaining attacks. Jurisprudence on claims by Roma would suggest that in cases where an applicant has complained of physical attacks, the Court may be willing to accept the RPD's finding that such treatment constitutes discrimination and not persecution: *Orban v Canada (Minister of Citizenship and Immigration)*, 2004 FC 559; *Balla v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1436; *Szucs v Canada (Minister of Citizenship and Immigration)* (2000), 100 ACWS (3d) 650. In these cases the Federal Court has found that the applicants only faced discrimination and not persecution, despite their history of violent physical attacks. Here the attacks on the Applicant were of a lesser degree and the Applicant did not make any serious effort to report the attacks to the police. Such conduct is consistent with the RPD's finding that the attacks were in the nature of harassment rather than persecution.

[38] The Applicant's claim of persecution is broader than just the attacks he experienced. He also claims Roma are persecuted because of their race and he experienced such treatment, notably when he was demoted from cook to dishwasher because he was Roma. He also stated he could not find employment elsewhere as a cook.

[39] In my view, the RPD did not satisfactorily address this important aspect of the Applicant's claim. The RPD did acknowledge the Applicant was not allowed work in his trade as a cook

despite having been trained in that vocation. Taking note is not enough. The RPD must consider both the restriction of the Applicant's employment and his prospects for future employment in answering the question it posed for itself: "does the persecution alleged by the claimant threaten his ... basic human rights in fundamental way?"

[40] When considering the distinction between cases involving discrimination and persecution, the Federal Court found it useful to refer to the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and 1967 Protocol relating to the Status of Refugees* (Re-edited, Geneva, January 1992): *Gorzsas v Canada (Minister of Employment and Immigration)*, 2009 FC 458. The Handbook states at paragraph 54:

Differences in the treatment of various groups do indeed exist to a greater or lesser extent in many societies. Persons who receive less favourable treatment as a result of such differences are not necessarily victims of persecution. It is only in certain circumstances that discrimination would amount to persecution. This would be so if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on his right to earn his livelihood, his right to practise his religion, or his access to normally available educational facilities.

[Emphasis added]

[41] The Applicant said he was demoted to a dishwasher because he was Roma and stated that he could not work elsewhere as a cook. In addition, there is documentary evidence about Roma unemployment in Hungary consistent with his experience.

[42] The RPD is to have regard to the documentary evidence in addition to the Applicant's personal situation in determining whether the facts established he was persecuted because of his Roma ethnicity: *Bors v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1004, 94 Imm LR (3d) 112 at para 80. In this case, the US DOS 2009 Human Rights Report on Hungary notes that Human Rights NGOs reported Roma were discriminated against in almost all fields including employment, and the unemployment among the Roma in Hungary was estimated at 40 percent overall and exceeding 90 percent in underdeveloped regions.

[43] The RPD's reasons refer to but do not analyze the restriction on the Applicant's ability to pursue a livelihood. Nor has the RPD addressed documentary evidence which supports the Applicant's claim in this regard. Given the importance of being able to pursue a livelihood, such restrictions are not to be merely noted in analysis. The RPD's failure to do so constitutes a reviewable error.

State Protection

[44] The Applicant submits that the RPD erred in ignoring the ineffective measures by the Hungarian state to overcome the problems of the Roma. The Applicant emphasizes that efforts on the part of the Hungarian state are not necessarily tantamount to adequate protection. The mere fact that the Hungarian government is taking measures is not enough.

[45] The RPD did acknowledge that the documentary evidence indicated many problems with how the Hungarian society treats the Roma. However, the RPD found the documentary evidence

was that the government of Hungary was making serious efforts to address the problem. The Respondent submits that this was sufficient, because state protection does not need to always be perfect or even always effective: *Kovacs v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1003.

[46] There is a presumption that a State is able to protect its citizens; the Applicant has the onus of providing clear and convincing confirmation of the state's inability to protect: *Ward v Canada (Minister of Employment & Immigration)*, [1993] 2 SCR 689, 103 DLR (4th) 1 at paras 50 and 51. Furthermore, the burden of proof that rests on the Applicant with respect to the availability of state protection is directly proportional to the level of democracy of the state: *Kadenko v Canada (Minister of Citizenship and Immigration)* (1996), 143 DLR (4th) 532, 124 FTR 160 (FCA) at para 5.

[47] The RPD is presumed to consider all of the evidence: *Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ no 598 (FCA); *Ramirez Chagoya v Canada (Minister of Citizenship and Immigration)*, 2008 FC 721. However, the RPD has the obligation to address contrary evidence submitted by an applicant and to explain why it chose not to accept that evidence: *Cedepa-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ no 1425, 157 FTR 35.

[48] A general statement by the RPD is not sufficient. The Board should refer to contrary evidence and explain why it does not give it weight: *Sanchez v Canada (Minister of Citizenship*

and Immigration), 2008 FC 1336, [2008] FCJ no 1673; *Aguirre v Canada (Minister of Citizenship and Immigration)*, 2010 FC 916, [2010] FCJ no 1116.

[49] Sorting through the Applicant's evidence, the Applicant makes three principal submissions about persecution. First, he was subjected to physical attacks much as other Roma have been. Second, he avers the general treatment of Roma in Hungary as worsening, in particular with the presence of right wing xenophobic groups engaged in demonstrations and confrontations against Roma. Finally, he submits he experienced other forms of persecution such as racial slurs, hostility and restrictions to his ability to earn a livelihood.

Physical Attacks

[50] The Applicant failed to provide clear and convincing evidence with respect to the availability of state protection from physical attacks given the fact that his only attempt to seek protection was to once approach a police car. This failure by the Applicant is not unusual. The 2009 European Union Minorities and Discrimination Survey on The Roma found 85 % of Hungarian Roma respondents did not report crimes committed against them in the previous 12 months. Nevertheless, I conclude the Applicant's evidence falls short of demonstrating why he has a fear of the police so as to explain his failure to report the assaults. Dissatisfaction with or distrust of the police is by itself insufficient.

General Conditions

[51] The Applicant submits the RPD did not consider the documentary evidence of racist attacks, murders of Roma and burnings since 2008. In particular the Applicant submits the RPD ignored all contrary evidence, citing for example the US DOS 2010 Report on Human Rights in Hungary which states:

“Human rights problems included police use of excessive force against suspects, particularly Roma; government corruption, societal violence against women and children; sexual harassment of women; and trafficking in persons. Other problems worsened such as extremist and hash rhetoric against ethnic and religious minority groups. Extremists increasingly targeted Roma, resulting in the deaths of four Roma and multiple injuries to others. Discrimination against Roma in education, housing, employment, and access to social services continued.”

[Emphasis in Applicant’s submission]

[52] The Applicant asserts the RPD ignored all of the Applicant’s submitted documents as well as the RPD’s own sources, including the US DOS Report which confirmed that the police continue to discriminate against the Roma. The Applicant submits that this is a fatal error. The Applicant emphasizes the violence directed against Roma and refers to the rise of xenophobic right wing activity.

[53] Contrary to this submission, the RPD did refer to documentation submitted by the Applicant, for example the *US Department of State Country Reports on Human Rights Practices for 2009* which indicates Hungary has had a history of discrimination against Roma people, as well as other documentation describing negative treatment of Roma.

[54] The RPD made particular note of the *European Commission against Racism and Intolerance* adopted on June 20, 2008. The RPD stated:

The report lists a number of initiatives that the Hungarian government has made in its attempt to eradicate discrimination and racism in the country. Although the existence of right wing political organizations that adopt a xenophobic agenda is part of the Democratic process, the Hungarian government has taken several steps to limit and ban the activities of these groups.

[Emphasis added]

[55] A review of the more recent post 2008 country documentation shows that while a xenophobic right wing political organization has gained some ground, they are not part of the Hungarian government.

[56] I find the RPD did not ignore the general situation in Hungary as it considered contrary evidence and come to its own conclusions on the whole of the documentary evidence.

Livelihood

[57] The RPD is required to conduct an individualized analysis taking into account the Applicant's circumstances in assessing whether the Applicant has proven state protection is available. The RPD's finding on state protection must be tied to the individual claimant in the claim under consideration: *Raja v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1335; *Khilji v Canada (The Minister of Citizenship and Immigration)*, [2004] FCJ no 811, 2004 FC 667 (TD).

[58] The RPD addressed the general situation of Roma in Hungary and government measures to address Roma circumstances. It referred to the Hungarian Parliament's resolution on the *Decade of Roma Inclusion Programme Strategic Plan for 2007 – 2015*. The RPD noted the resolution set out a series of tasks to be accomplished in a number of social fields including employment. The RPD makes this statement in the course of a generalized analysis. Such an analysis may suffice where the Applicant argues the general situation but more is required when the Applicant has provided evidence that directly relates to his own individualized circumstances.

[59] The RPD has not assessed the documentary evidence while having regard to the restrictions placed upon the Applicant's opportunities to earn a livelihood in an area for which he was trained.

[60] I find the RPD's assessment of whether state protection is available fails to have regard to the Applicant's individual circumstances. In result, I conclude the RPD's analysis finding state protection is available for the Applicant is unreasonable.

Conclusion

[61] The application for judicial review will be granted and remitted back for redetermination by a differently constituted panel.

[62] The Parties have not submitted a question of general importance for certification and I do not pose any question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted and is remitted back for redetermination by a differently constituted panel.
2. No question of general importance is certified.

“Leonard S. Mandamin”

Judge

Federal Court



Cour fédérale

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-4326-10

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