

Federal Court



Cour fédérale

Date: 20161205

Docket: IMM-2630-16

Citation: 2016 FC 1337

Toronto, Ontario, December 5, 2016

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

VIKTOR GASPAR

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The present Application concerns the Applicant's claim for refugee protection on the ground of his Roma ethnicity as a citizen of Hungary. The Refugee Protection Division (RPD) rejected the Applicant's claim. The Applicant's appeal to the Refugee Appeal Decision (RAD) was dismissed by the decision presently under judicial review dated June 8, 2016.

[2] In reaching a decision on appeal, the RAD canvassed the RPD's evaluation of the Applicant's experience while living in Hungary and stated the following conclusion:

The RPD acknowledged the widespread discrimination against Romas [sic] in Hungary. However, it found that the discrimination experienced by the Appellant, did not rise to the level of persecution. The RPD considered the UNHCR Handbook dealing with cumulative discrimination.

[...]

The RPD concluded that given the overall country conditions and government's actions in regards to employment equity for Roma, that the Appellant would not face any difficulties that would be tantamount to persecution. The RPD concluded that the cumulative effective of discrimination suffered by the Appellant did not amount to persecution. It found that the Appellant's basic human rights were not threatened, but rather what the Appellant experienced affected the quality of its [sic] existence in his home country.

[Emphasis added]

(Decision, paras. 25 and 27)

[3] As a result, the RAD found that there was insufficient credible and trustworthy evidence to establish a risk of persecution should the Appellant return to Hungary (Decision, para. 35). However, in my opinion, the RAD also made a finding which not only impugns the RPD's decision but constitutes a reviewable error in the RAD's decision.

[4] The following passage from the RAD's decision establishes that there was cogent evidence on the record before the RPD which was not considered by the RPD:

The Appellant submits that the RPD erred when it stated that the panel was unable to find reports in the past two years of violent attacks committed against Roma in Hungary, when there are, in fact, such reports against Roma prior to 2014, and subsequently. The Appellant submits that the RPD erred when it ignored all of

the foregoing evidence, and did not explain what documentary evidence supports its conclusion.

The RAD finds that the RPD's decision was not based on the issue of "state protection". Accordingly, the RAD declines to make comment on the submissions surrounding this issue. Having said this; the RAD concurs with the Appellant that it was incorrect for the RPD to state that the panel was unable to find reports in the past two years of violent attacks committed against Roma in Hungary. The documentary evidence speaks to the contrary. However, this error by the RPD does not, in any way, affect the outcome of the decision as the RPD's determination was based on credibility and discrimination vs. persecution.

[Emphasis added]

(Decision, paras. 37 – 38)

[5] With respect to the importance of the evidentiary discovery, I find that the conclusion reached by the RAD constitutes a reviewable error.

[6] The RPD was charged with making a prospective risk assessment as to whether, upon returning to Hungary, the Applicant would face more than a mere possibility of persecution pursuant to s. 96 of the *IRPA* or probability of risk pursuant to s. 97. In reaching an assessment the RPD considered the Applicant's past experience in Hungary and, properly, also considered evidence of current in-country conditions. However, in the course of making its own assessment of the evidence, the RAD discovered that, due to a mistake, the RPD had not considered critical in-country evidence on the record. Thus, in my opinion, the RPD effectively rendered its decision in mistake of fact.

[7] On issues of fact or mixed fact and law, the RAD is required to review an RPD decision on the standard of correctness (see: *Huruglica v Canada*, 2016 FCA 93 at para. 103). Therefore,

upon discovering that the RPD had delivered its decision with the mistake outstanding, the RAD had the responsibility of dealing with the mistake. Given the serious nature of the mistake, I find that, pursuant to s. 111(1)(b) and (c) of the *IRPA*, the RAD was required to either set the RPD's decision aside, or make its own independent determination upon properly considering all the evidence of risk on the RPD record. Since the RAD did neither, but acted to avoid the mistake entirely, I find that the RAD's decision is issued in error of law.

[8] Accordingly, I find that the decision under review is unreasonable.

JUDGMENT

THIS COURT'S JUDGMENT is that the decision under review is set aside and the matter is referred back for redetermination by another RAD member.

There is no question to certify.

"Douglas R. Campbell"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2630-16

STYLE OF CAUSE: VIKTOR GASPAR v THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

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JUDGMENT AND REASONS: CAMPBELL J.

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