

Federal Court



Cour fédérale

**Date: 20170615**

**Docket: IMM-4152-16**

**Citation: 2017 FC 599**

**Ottawa, Ontario, June 15, 2017**

**PRESENT: The Honourable Madam Justice McDonald**

**BETWEEN:**

**G.S.**

**C.S.**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

[1] The Applicants are a same sex couple who seek judicial review of a Refugee Appeal Division [RAD] decision finding that they would have adequate state protection in Hungary. They argue that the RAD applied the wrong test for state protection. For the reasons that follow, I conclude that the RAD applied the correct test and this application for judicial review is therefore dismissed.

I. Background

[2] The Applicants are citizens of Hungary. They seek protection in Canada pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] fearing persecution in Hungary due to their sexual orientation. More specifically, they allege that they cannot live openly as a same sex couple in Hungary and they argue that they cannot seek police protection.

[3] The Refugee Protection Division [RPD] accepted that the Applicants are homosexuals and found them to be credible. However, the RPD determined that state protection would be available to the Applicants in Hungary.

II. RAD decision

[4] On appeal, the RAD considered the availability and adequacy of state protection for the Applicants in Hungary. Citing (*Canada (Attorney General) v Ward*), [1993] 2 SCR 689, the RAD outlined the presumption of state protection and the fact that the onus is on the Applicants to produce clear and convincing evidence that the state cannot provide protection.

[5] As well, citing (*Graff v Canada (Citizenship and Immigration)*), 2015 FC 437, the RAD noted its obligation to consider the operational adequacy of state protection, rather than simply the willingness of the state or the efforts made by the state.

[6] In Hungary, the RAD noted that there is “legislation in place to charge and convict perpetrators of crime, and that the police are willing and able to implement the country’s legislative measures relating to criminality” (para 52).

[7] The RAD noted that although LGBT persons face harassment and violence at the hands of individuals or groups in Hungary, the documentary evidence showed that the Applicants would have recourse to adequate state protection in Hungary.

[8] The RAD noted at paragraph 72 that “several sources within the documentary evidence and the objective evidence regarding current country conditions suggest that, although not perfect, there is adequate state protection in Hungary for members of the LGBTI community and other minorities who are victims of crime, police abuse or discrimination. The documentary evidence shows that Hungary is making serious efforts to address these problems by implementing measures through legislation and government programs; and that the police and government officials are both willing and able, and act to protect victims”.

[9] Accordingly, the RAD concluded that the Applicants failed to rebut the presumption of state protection.

### III. Issues

[10] There are two issues raised by the Applicants:

- A. Did the RAD apply the proper test for assessing state protection?
- B. Is the RAD’s conclusion on state protection reasonable?

#### IV. Standard of Review

[11] The applicable standard of review on the RAD's application of the proper test for state protection is correctness (*Kina v Canada (Citizenship and Immigration)*, 2014 FC 284 at para 24). On the correctness standard of review, this Court will show no deference to the RAD's decision if the wrong test was applied (see *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50).

[12] With respect to assessing the adequacy of state protection, the standard of review is reasonableness (*Kina v Canada (Citizenship and Immigration)*, 2014 FC 284 at para 24.) Under this standard, this Court will not intervene unless the decision does not fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

#### V. Analysis

##### A. *Did the RAD apply the proper test for assessing state protection?*

[13] The Applicants argue that although the RAD referenced the proper test of "operational effectiveness", they argue that the RAD applied the "serious efforts" test.

[14] The test for state protection involves the examination of whether there exists adequate state protection in operation. In other words, state efforts must have actually translated into adequate state protection at the operational level (see *Majoros v Canada (Citizenship and Immigration)*, 2013 FC 421 at para 12).

[15] In its reasons, the RAD Member explicitly states that its obligation is to consider the operational adequacy of state protection, rather than simply the willingness of the state or the efforts made by the state to correct discrimination. In doing so, the RAD Member identified the correct legal test for state protection.

[16] The RAD examined Hungary's efforts to provide protection. The use of the term "serious efforts" to describe the state's initiatives does not mean the RAD overlooked the availability of protection for the Applicants at the operational level or that the RAD failed to comprehend the principles governing state protection. The RAD's conclusions were not based on the assumption that a state's "serious efforts" is the basis on which to analyse the availability of state protection for an individual.

[17] The RAD addressed the applicability, effectiveness, and impact of Hungary's efforts concerning protection for the LGBT community in Hungary, *on an operational level* (see para 46 of the RAD Reasons and the documents consulted). The RAD did not simply infer that Hungary's "functional democracy" and legislative initiatives amount to state protection for the Applicants. After reviewing the evidentiary record, the RAD found that police were able to implement the country's legislative measures relating to criminality (para 52) and that the police were able to protect victims (para 72).

[18] The RAD noted that homosexuality is not illegal in Hungary and that although same-sex marriage is not permitted, same-sex domestic partnerships can be legally registered. The RAD

also acknowledged that the new Constitution of Hungary does not include sexual orientation as a ground for discrimination.

[19] The RAD also correctly acknowledged that protection must be from the state, rather than from non-state sources. However, it found the availability of state-run or state-funded agencies capable of providing assistance to be relevant in determining the existence of state protection, as these agencies are part of the state's "protection network" (para 61). Accordingly, the RAD found that the RPD did not err by stating that the Applicants had recourse to such agencies and organizations.

[20] Here the RAD articulated and applied the correct test for state protection.

B. *Is the RAD's conclusion on state protection reasonable?*

[21] The Applicants contend that the RAD failed to properly consider the operational effectiveness of state protection. They argue that the mere possibility that there might be state protection is not sufficient. The Applicants claim the RAD ignored the evidence of the specific harassment they suffered when they were forced to show their ID cards in a park in Budapest known to be frequented by members of the LGBT community.

[22] The presumption is that a state is able to protect its citizens. Here the legal burden is on the Applicants to rebut this presumption with clear and convincing evidence that the state is unwilling, or that a state is unable to provide adequate protection (see *Cosgun v Canada (Citizenship and Immigration)*, 2010 FC 400 at para 52).

[23] The more a country is “democratic”, the greater the burden is on the Applicant to rebut the presumption of state protection (see *Sow v Canada (Citizenship and Immigration)*, 2011 FC 646 at para 12).

[24] Here, the RAD concluded that the Applicants did not provide sufficient evidence to rebut the presumption. The incident in the park was not sufficient to prove their assertion that state protection would not be available.

[25] The RAD considered the country documentation in evidence, and the fact the Applicants did not have evidence of having been subjected to harm while in Hungary, to conclude that there would be adequate state protection in Hungary if the Applicants were to return.

[26] An Applicant “cannot simply rely on their own belief that state protection will not be forthcoming” (*Moya v Canada (Citizenship and Immigration)*, 2016 FC 315 [*Moya*] at para 75).

[27] It is not the role of this Court to reassess the evidence and especially the weight given to the evidence by the decision-maker (see *Samad v Canada (Citizenship and Immigration)*, 2015 FC 30 at para 32).

[28] The conclusion of the RAD with respect to state protection is reasonable and entitled to deference.

**JUDGMENT IN IMM-4152-16**

**THIS COURT'S JUDGMENT is that**

1. The application for judicial review of the RAD decision is dismissed.
2. No serious question of general certification is certified.

"Ann Marie McDonald"

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Judge



**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-4152-16

**STYLE OF CAUSE:** G.S., C.S. v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

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