

Federal Court



Cour fédérale

Date: 20150304

Docket: IMM-7207-13

Citation: 2015 FC 277

Toronto, Ontario, March 4, 2015

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

**SERGEY MASALOV AND RAISA
MASALOVA**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This case is a judicial review, pursuant to section 72(1) of the *Immigration and Refugee Protection Act* (SC 2001, c 27) [IRPA], of a decision of the Refugee Protection Division (RPD) rendered on October 21, 2013. The RPD concluded that the Applicants, citizens of Russia, were not Convention refugees or persons in need of protection pursuant to ss. 96 and 97 of *IRPA*.

II. Facts

[2] The Applicants are an elderly couple of Tatar nationality and the Islamic faith who fear persecution in Russia at the hands of skinheads and other nationalists.

[3] Mr. Masalov was physically attacked for the first time in 1998, followed by eight subsequent attacks in the proceeding decade (2002, 2003, 2004, twice in 2005, 2006, 2008 and in 2009). The injuries from these assaults required medical attention, as did those suffered by his wife during an incident in 2006 when the couple was assaulted together. These physical attacks were in addition to various other threats and insults they received over their many years in Russia. Although the Applicants sought police protection on numerous occasions, no relief was provided.

III. Decision

[4] The RPD heard the claim on September 23, 2013. The Board concluded that Mr. Masalov generally testified in a straightforward manner, but he “embellished and speculated” in some of his testimony. In particular, the Board questioned whether the police telling Mr. Masalov that “he was not going to live a long life” amounted to a threat on his life. Further along this line of reasoning, the Board held that a poster calling for assaults on Tartars, or a stone thrown through the Applicants’ window with a note attached saying “kill all of you”, did not amount to a personalized death threat against the claimant.

[5] On state protection, the Board concluded that Mr. Masalov did not make a concerted effort to avail himself of state protection. It started from the premise that a claimant from a democratic country will have a heavy burden in showing that all remedies available have been exhausted before claiming refugee status. While acknowledging that there have been instances of violence targeting religious and ethnic minorities, the Board cited evidence that the President of Russia at the time, Dimitry Medvedev, urged various government bodies to foster a relationship with the country's Muslim population, numbering 20 million people.

[6] The Board also found that the Applicants had an internal flight alternative [IFA] in Kazan, a primarily Muslim city of 1.2 million people in Tatarstan, and home to over 50 operational mosques.

IV. Positions of the parties.

[7] The Applicants' arguments regarding the unreasonableness of the decision relate to purported errors the Board made with regards to credibility, state protection, and the IFA.

[8] In instances where the Board raised credibility concerns, the Applicants argue that these conclusions were flawed because they did not accord with the evidence on the record. For instance, while the Board described Mr. Masalov's testimony as stating that the police told him that he would "not live a long life", the transcript of the hearing shows that his actual testimony was that the police told him, "Go away from here and far if you want to be alive."

[9] The Board also found that “no other action against the claimant was adduced” after a rock with a threatening note attached had been thrown through the Applicants’ window in the summer of 2008. Yet, Mr. Masalov was attacked shortly thereafter by his neighbours in August, 2008, and then once again the following year. Not only do medical documents confirm that he suffered bruises and that his teeth had to be removed, but the Applicants provided a copy of a flyer left in their mailbox which states, “EVERYBODY STAND UP AND FIGHT KIKES, ASIANS AND TARTARS! THE ONLY WAY TO KILL THAT CONTAIGION IS BY FORCE!” Consequently, the fears faced by the Applicants are not embellishments, but realistic possibilities.

[10] As for state protection, the Applicants sought protection, on five separate occasions after their assaults, but no assistance was provided. As such, their efforts were perfectly reasonable in the circumstances. Furthermore, the Board misapprehend the actual level of democracy in Russia in applying its strong presumption of state protection. The Applicants argue that there was substantial documentary evidence on the record to show that Russia does provide the kinds of human rights protections that one would ordinarily expect in a fully functioning democracy.

[11] Mr. Masalov also attempted to use the media for redress, writing a letter to the local newspaper regarding the conduct of the police, which was included in the documentation submitted. The Board doubted his credibility with respect to this action, concluding that there was no evidence to support that his letter had been received by the newspaper. The Applicants submit that it is unclear what additional documents the Board expected them to provide, given that the newspaper had not replied, but instead forwarded the letter to the police. Indeed, the

Board did not address the fact that there was a handwritten note on the letter, presumably written by newspaper staff, advising the newspaper not to publish the letter and redirecting it to the police because “it’s their business to sort out.”

[12] On IFA, the Applicants argue that the Board did not turn its mind to the second prong of this test, to consider whether it would be reasonable in the circumstances for the Applicant to seek refuge in Kazan. Mr. Masalov had already tried to seek refuge there on a previous occasion, but it was not possible for him to live there because of his failure to meet an accommodation requirement, a Propiska registration. The Propiska required proof of a permanent job, which he could not obtain. Additionally, some landlords are unwilling to submit registration documents to the Department of Registration, which would also preclude registration. Therefore, it was not possible, on a practical level, for the Applicants to live in that city. Further, they do not have any family in the IFA, and suffer from poor health.

[13] The Respondent, on the other hand, argues that the Board's decision was reasonable.

[14] Given the Board’s credibility concerns, it was open to it to the Board to seek corroborating evidence, and raise concerns about efforts to obtain such evidence. Credibility findings are factual findings and the Applicants must demonstrate that they are perverse and capricious to warrant the Court's intervention.

[15] Furthermore, the Board's state protection and IFA findings were open to it, as the Applicants failed to provide clear and convincing evidence to demonstrate that there was inadequate protection available in Russia.

V. Standard of review

[16] As agreed upon by the parties, the standard of review of the RPD decision is reasonableness. This means that this Court will review whether there is "the existence of justification, transparency and intelligibility within the decision-making process" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). For the Court to intervene, the decision must fall outside of a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

VI. Analysis

[17] I agree with the Applicants that the decision was unreasonable on numerous fronts, which, in their totality, result in the need for a rehearing of this matter.

Credibility

[18] Various credibility findings overlooked key aspects of the written and oral evidence presented. For example, little comment was made on the extensive medical records that corroborated the oral and written testimony regarding the attacks the Applicants suffered. Similarly, the Board did not address the hand written note on Mr. Masalov's complaint letter indicating that it had been received by the newspaper. It was therefore unreasonable for the

Board to conclude that, “no other documentation was produced to substantiate that this letter was received by the newspaper, or that any action was taken by any authority” (Application Record [AR], p 13).

[19] While the decision indicates the Board had credibility concerns with the legitimacy of instances of persecution in the Applicants’ narrative, including whether a rock was thrown into a window at their residence or personal threats were made from their neighbour, the foundation for these concerns is unclear. It is trite law that a claimant’s narrative is to be believed unless there is reason to question otherwise (*Zeng v Canada (Citizenship and Immigration)*, 2014 FC 1060 at para 18; *Lin v Canada (Citizenship and Immigration)*, 2008 FC 381 at paras 14-16; *Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302).

[20] The Board did not find that the Applicants to be evasive or inconsistent generally, and indeed, acknowledged they had testified in a straightforward manner (AR, p 12). After a review of the record, I do not find their testimony, whether written or oral, to be speculative or embellished with respect to the concerns raised by the Board.

State protection

[21] The Board’s treatment of state protection suffers from two fundamental problems.

[22] First, there was ample evidence to show that the Applicants sought protection over a number of years and on a number of occasions, but did not receive any satisfactory response. Mr. Masalov, who was not in a position to protect himself due to his age, reasonably explained how

he tried to rely on the state apparatus through several unsuccessful attempts to obtain protection from the authorities.

[23] Second, the Board noted that the presumption of state protection is heightened in a democracy. This is undoubtedly correct. However, merely because a country purports to conduct itself in democratic manner does not end the analysis. Rather, it is incumbent on the Board to review the documentary evidence and evaluate the degree to which its state institutions uphold democratic protections and ideals. These principles include, for instance, state protection of human rights, an effective police force, and an independent judiciary. In this case, these cornerstones do not appear to align with much of the documentary evidence submitted before the Board.

[24] For example, the *US DOS 2009 Human Rights Report: Russia* notes:

The constitution prohibits such practices; however, there were numerous, credible reports that law enforcement personnel engaged in torture, abuse, and violence to coerce confessions from suspects, and there were allegations that authorities did not consistently hold officials accountable for such actions.

(Certified Tribunal Record [CTR], p. 601)

Police investigation of cases that appeared to be racially or ethnically motivated was frequently ineffective. Authorities were at times reluctant to acknowledge the racial or nationalist element in the crimes, often calling attacks "hooliganism." Many victims met with police indifference, and immigrants and asylum seekers who lacked residence documents recognized by police often chose not to report attacks. According to the SOVA Center, willingness to recognize crimes as hate crimes varied widely depending on the personal views of the local prosecutor; the center noted that the number of hate crimes prosecuted in Moscow increased significantly after a new prosecutor took office in 2008.

Muslims and Jews continued to encounter prejudice and societal discrimination, although it was often difficult to separate religious discrimination from ethnic discrimination.

(CTR, p. 666)

[25] Justice Rennie (as he then was) explained in *Sow v Canada (Minister of Citizenship and Immigration)*, 2011 FC 646, how the presumption of state protection varies with nature of the democracy in the state, and the importance of considering the quality of the institutions providing protection:

9 In a democratic country there is a presumption that a state can protect its own citizens. As such, the onus is on the applicant to rebut this presumption and prove the state's inability to protect through "clear and convincing" evidence: *Canada (Attorney General) v Ward* [1993] 2 SCR 689 at para 50; *Hinzman v Canada (Citizenship and Immigration)*, 2007 FCA 171 at paras 43-44; *Zepeda v Canada (Minister of Citizenship and Immigration)*, 2008 FC 491 at para 13.

10 This principle, however, does not stand in isolation. It is tempered by the fact that the presumption varies with the nature of the democracy in a country. Indeed, the burden of proof on the claimant is proportional to the level of democracy in the state in question, or the state's position on the "democracy spectrum": *Kadenko v Canada (Minister of Citizenship and Immigration)* [1996] FCJ No 1376 at para 5; *Avila v Canada (Minister of Citizenship and Immigration)*, 2006 FC 359 at para 30; *Capitaine v Canada (Citizenship and Immigration)* 2008 FC 98 at paras 20-22.

11 Democracy alone does not ensure effective state protection. The Board must consider the quality of the institutions providing that protection. As well, the Board must look at the adequacy of state protection at an operational level and consider persons similarly situated to the applicant and their treatment by the state: *Zaatreh v Canada (Citizenship and Immigration)*, 2010 FC 211 at para 55.

12 Democracy, for these purposes, encompasses more than the existence of free and fair elections. It is not a black or white analysis. The jurisprudence is clear that democracies are to be assessed on a continuum, and that the more "democratic" a

country, the greater the burden on the applicant to rebut the presumption of state protection. Democracy, to be more than a label, requires institutions and principles to give effect to the values that the term encompasses. These may include, amongst others, an independent judiciary and defence bar, access to justice and a police force that is independent in the exercise of its investigatory function.

[26] In my view, the Board relied excessively on the presumption of state protection in democracies without taking into account the adequacy of Russian institutions. In any event, the Board's state protection analysis seems to be coloured by its credibility concerns over whether the Applicants brought their issues forward to the authorities. Since, as noted above, the Board has made reviewable errors regarding credibility, the state protection analysis should be revisited.

IFA

[27] The test for an IFA is twofold: (i) the Board must be satisfied, on a balance of probabilities, that there is no serious possibility of the claimant being persecuted in the proposed IFA, or (ii) conditions in the proposed IFA must be such that it would not be unreasonable, upon consideration of all the circumstances, for the claimant to seek refuge there (*Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FCR 589; *Singh v Canada (Citizenship and Immigration)*, 2009 FC 1304 at para 14; *Kamburona v Canada (Citizenship and Immigration)*, 2013 FC 1052 at para 25).

[28] The threshold for the second prong is a high one, as indicated by the Federal Court of Appeal in *Canada (Minister of Citizenship and Immigration) v Ranganathan*, [2001] 2 FC 164 at

para 15, requiring “nothing less than the existence of conditions which would jeopardize the life and safety of a claimant in travelling or temporarily relocating to a safe area.”

[29] The Applicants submit that it is unreasonable to expect the Applicants to relocate to the proposed IFA. I agree. Mr. Masalov had attempted to relocate to Kazan in February 2008, but could only obtain temporary residence for three or four days because he was unable to obtain a Propiska registration (CTR, p 732).

[30] The documentary evidence, particularly *Response to Information Request RUS103311.E* [RIR], lists the cascading effects of an inability to register. Permanent registration is a required to access health care services, to vote in elections, to collect unemployment benefits, to receive a pension, to open a bank account, to get a private bank loan, to qualify for housing programs, to agree to a contract and to receive social service benefits (AR, p 608).

[31] It appears that lacking registration may also invite harassment by the authorities, as the RIR indicates that “NGO and media sources indicate that unregistered persons may be subject to harassment by the police” and “police on patrol are permitted to arrest, detain, fine, and search homes of unregistered persons.” Expecting an elderly couple to endure persistent police harassment is unreasonable, as it implicates their safety within the IFA.

[32] The Board referred to the RIR in its decision, concluding:

...The document goes on to outline some of the difficulties faced in registering in a new location. None of the legal restrictions apply to the claimant.”

[33] However, the Board did not make clear in its reasons *why* the legal restrictions would not apply. Put another way, Mr. Masalov, who was found to be generally credible, had already tried, and failed, to obtain a registration in Kazan. I do not see the evidentiary basis for the Board's belief that he would be able to register without issue if he was returned to Russia (*Sarker v Canada (Citizenship and Immigration)*, 2014 FC 1168 at para 22).

[34] Given the reviewable errors of the Board with regards to its credibility, state protection and IFA analysis, I allow the application and would remit the matter for determination by an alternate decision maker.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Application for judicial review is allowed;
2. No questions of certification were raised;
3. There is no Order as to costs.

"Alan Diner"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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