Federal Court  Cour fédérale

Date: 20150525

Docket: IMM-3769-14

Citation: 2015 FC 672

Ottawa, Ontario, May 25, 2015

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

MYKOLA TKACHUK

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant seeks judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act], of the decision of the Refugee Protection Division of the Immigration and Refugee Board [Board], dated March 2014, which found that he was not a Convention refugee or a person in need of protection pursuant to sections 96 and 97 of the Act.

[2] For the reasons that follow the application is allowed.

Background

[3] The applicant, a citizen of Ukraine, arrived in Canada on March 27, 2012 and claimed refugee protection, alleging persecution due to his political activities that opposed the Ukrainian Government's laws and policies. The applicant had been a senior police officer in the Ministry of Internal Affairs. Following the election of Victor Yanukovich as President in 2009, major changes were made in the police administration. The applicant opposed these changes, quit the police force and, in 2011, applied to become a member of the rival Batkyvschina Party [BP]. The applicant claims that: he participated in rallies; he spoke out about police corruption, changes in the law which were contrary to the constitution and Ukraine's discontinuance of integration in the European Union [EU]; and, that he consulted with and advised victims of police corruption. The applicant claims that, as a result of these activities, he was targeted.

[4] The applicant recounts that he was assaulted on August 22, 2011 and death threats were directed to him and his family warning him to discontinue his interference. As a result of the assault he was hospitalized. He reported the incident to the police but no efforts were made to investigate or to protect him. He also recounts that a car without any licence plates attempted to run him down and that he repeatedly received threatening telephone calls. The applicant stated that he moved his family 30 km away from their home for safety.

[5] The applicant purchased a fraudulent Israeli passport at a market in Kiev in December 2011 and, following the receipt of the passport, in March 2012, he travelled by mini-bus from Ukraine to Rome, abandoned his Ukrainian passport with the driver and flew from Rome to Toronto.

The Decision

[6] The Board found that, on a balance of probabilities, it did not believe the applicant's story, but, if it had, state protection would be available.

[7] The Board noted the applicant's demeanour and found that he did not testify in a straightforward manner and that his elaboration of details undermined his ability to tell his story in a clear and convincing manner. The Board stated that there were contradictions, inconsistencies and discrepancies between his written and oral testimony which were not explained to the Board's satisfaction.

[8] The Board did not accept the applicant's explanation that he gave his Ukrainian passport to the mini-bus driver to avoid being found with two passports, noting that he could have just as easily thrown it away himself. The Board also noted that at his Point of Entry [POE] interview he stated that the passport might be back in Ukraine.

[9] The Board did not accept that the applicant would travel through other EU countries on his internal Ukrainian passport but not seek asylum and did not accept his explanation that he only wanted to make an asylum claim in Canada and that it was not safe for him to seek asylum in Europe.

[10] The Board found that the applicant's failure to know why he was previously refused a Canadian Visa was unreasonable. The Board also noted that, after being refused a Canadian Visa, the applicant purchased a fraudulent Israeli passport while planning his exit to seek

protection only in Canada. Although the Board acknowledged his explanation that he purchased an Israeli passport because he could then enter Canada without a visa, the Board found that his planned exit was not consistent with the subjective fear of one fleeing imminent harm. The Board noted that he could have fled sooner using his own passport and could have sought asylum in another EU country.

[11] The Board, therefore, concluded that the applicant did not have a well-founded fear of persecution or that he would face a serious possibility of harm if he returned.

[12] Alternatively, the Board found that there was, and would be, state protection. The Board noted that Ukraine was not in a complete breakdown and the presumption that Ukraine is capable of protecting its citizens applied.

[13] The Board referred to the general principles regarding state protection, including that the burden is on the applicant to rebut the presumption. The Board also noted that a subjective reluctance to engage the state and doubting the effectiveness of state protection will not rebut the presumption where that effectiveness has not been tested.

[14] The Board was not satisfied with the applicant's explanation of his efforts to follow-up on his police report or with his failure to report the attempt to run him down in October 2011 or the threatening phone calls.

[15] The Board concluded that the applicant had failed to provide clear and convincing evidence that Ukraine would not provide state protection. The Board noted his reluctance to follow-up with the police based on the advice of his friend, but found that regardless, he could not rebut the presumption without testing the adequacy and effectiveness of state protection.

[16] The Board added that it "considered and accept[ed] reports that there are some victims of political crime, corruption and vendettas which the state might have failed to protect, but the mere fact that the state's efforts to protect a claimant are not always successful does not rebut the presumption of state protection."

The Issues

[17] This application for judicial review raises two broad issues: whether the Board's credibility findings are reasonable and whether the Board's alternative finding that adequate state protection would be available to the applicant is reasonable.

The Standard of Review

[18] The standard of reasonableness applies to both issues. Therefore, the role of the Court is to determine whether the decision "falls within 'a range of possible, acceptable outcomes which are defensible in respect of the facts and law' (*Dunsmuir*, at para. 47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome" (*Canada (Minister of Citizenship and*

Immigration) v Khosa, 2009 SCC 12 at para 59, [2009] 1 SCR 339). Deference is owed to the decision-maker.

[19] In *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 [*Newfoundland Nurses*], the Supreme Court of Canada elaborated on the requirements of *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*], noting that reasons are to "be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes" and that courts "may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome" (at paras 14-16).

[20] It is well-established that boards and tribunals are ideally placed to assess credibility: *Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 at para 4, 160 NR 315 (FCA) [*Aguebor*]. The Board's credibility findings should be given significant deference: *Lin v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1052 at para 13, [2008] FCJ No 1329; *Fatih v Canada (Minister of Citizenship and Immigration)*, 2012 FC 857 at para 65, 415 FTR 82; *Lubana v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 at para 7, 228 FTR 43.

[21] Despite the high degree of deference owed to the Board's credibility findings, such findings are not immune from review. For example, the Board should provide clear reasons for its credibility assessment, should not seize on trivial or minute contradictions and while demeanor, hesitation and vagueness may lead to credibility findings, it is preferable if there are

more objective facts to support the finding *(Rahal v Canada (Minister of Citizenship and Immigration)* 2012 FC 319 at paras 43-45, [2012] FCJ 369).

The Applicant's Position

[22] The applicant argues that the credibility findings were primarily based on peripheral issues and were unreasonable.

[23] First, the Board made an adverse credibility finding from the applicant's demeanour, after noting that the applicant did not appear nervous, tried to testify in a confident manner, and elaborated on his responses. The applicant submits that the adverse inference is perverse.

[24] Second, the Board made an unreasonable implausibility finding regarding the applicant's evidence that he gave his Ukrainian passport to the mini-bus driver. The applicant submits that he explained why he did so – to avoid being found with two passports – and that his belief that it would be back in Ukraine is not implausible.

[25] Third, with respect to his failure to seek protection in another EU country while in transit, the applicant submits that he provided a reasonable explanation: he would not be safe in the countries he travelled through, he had family in Canada, his intention was only to seek refugee protection in Canada and he was only in transit in other countries en route to Rome for his flight to Canada.

[26] Fourth, the applicant explained that he did not know why his Canadian Visitor Visa was refused. This was a truthful answer, which responded to the Board member's guidance to not make up answers and to indicate if he did not know the answer to any question. In addition, it was a reasonable answer, because the applicant did not understand the English language to determine the reason for refusal.

[27] The applicant also submits that the Board's state protection findings are contrary to the documentary evidence before the Board which indicates the level of corruption that prevails in Ukraine.

[28] The applicant submits that his reasonable belief that the police and other authorities would not help him was based on the lack of investigation of his assault and threats, the information provided by his friend at the police station and the documentary evidence that demonstrates that there is corruption and no adequate state protection.

[29] The applicant argues that the Board did not conduct any proper analysis of state protection: Ukraine cannot be considered to be a democracy and the Board did not weigh the available evidence about state protection, but simply concluded it would be provided. The applicant notes the inconsistent conclusion of the Board, which acknowledged that some victims of political crimes, corruption and vendettas may not be protected, but "the mere fact that the state's efforts to protect a claimant are not always successful does not rebut the presumption of state protection."

The Respondent's Position

[30] With respect to the credibility findings, the respondent submits that although the Board noted the applicant's demeanour, it did not rely on demeanour, but rather on inconsistencies, contradictions and evasive answers in his testimony.

[31] The respondent submits that the Board's findings must be considered in the context of the applicant's conduct which led to his claim in Canada. The respondent notes the chronology beginning with his resignation from the police force in August 2010, the alleged assault in August 2011, his request and refusal of a Canadian Visitor Visa in the summer of 2011, his claim that someone attempted to run him down in October 2011, his purchase of a fraudulent passport in December 2011, his continued political activities during this time, the receipt of his fraudulent passport on March 8, 2012, and his departure from Ukraine on March 23, 2012. The respondent submits that this context is relevant to the Board's adverse inference of credibility arising from his delay in leaving Ukraine and not seeking asylum in other EU countries. He stated that he only wanted to come to Canada and did not want to seek protection in other EU countries; however, if he was in imminent danger, he would have fled earlier.

[32] The Board did not err in suggesting that the applicant was asylum shopping or in drawing a negative inference from this (*Rana v Canada (Minister of Citizenship and Immigration*), 2012 FC 453 at para 28, 219 ACWS (3d) 432 [*Rana*]; *Remedios v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 437 at para 23, [2003] FCJ No 617 [*Remedios*]).

[33] The Board reasonably found that the applicant's failure to claim protection in the countries he had access to without needing a visa negatively impacted his credibility and that his explanation, that he only wanted to come to Canada and did not want to seek protection in other EU countries, is not a reasonable explanation for a person in fear. The Board is also entitled to draw an adverse inference from the applicant's failure to seek protection in the countries he travelled through en route to Canada.

[34] With respect to the applicant's route from Ukraine to Rome and his testimony about his passport, the respondent argues that it is open to the Board to determine the plausibility of testimony (*Aguebor* at para 4). The applicant's explanation that he did not want to be found with two passports does not explain why he would give his Ukrainian passport to the bus driver rather than disposing of it himself. In addition, his answer was inconsistent with his statement at his POE interview which indicated he gave the passport to the mini-bus driver and it might be back in Ukraine.

[35] With respect to state protection, the respondent submits that although this was an alternative finding, the Board predicated its assessment of state protection on the adverse credibility findings. For example, the Board did not accept that the applicant had been assaulted due to his political activities; therefore, the Board's acceptance that state protection may not always be provided for political crimes was not reflective of the applicant's circumstances.

The Credibility Findings are not Reasonable

[36] I have considered the high degree of deference owed to the Board with respect to credibility, given that the Board observes the applicant and can probe an applicant's testimony and the manner in which it is provided. I have also considered the principles enunciated in *Newfoundland Nurses*, which calls upon the Court to consider the record, where necessary, to determine whether the outcome is reasonable, in accordance with the *Dunsmuir* standard.

[37] In this case, the record, in particular the transcript of the hearing, reveals testimony by the applicant that was candid, detailed and not inconsistent with his written narrative. The Board drew negative inferences from the applicant's confident delivery and his answers which sometimes provided more detail than the question required or the Board expected. Although the applicant's demeanour was not the only basis for the adverse credibility findings, it appears to have been a significant factor and begs the question of how an applicant is expected to provide answers. It appears that if an applicant is hesitant and vague, inferences may be drawn, but if they are confident and explicit, inferences may also be drawn. Although the Court should not second guess the Board's comments or findings about demeanour, given that the Board observed the applicant and the Court did not, in the present case, the Board's findings do not logically flow from its observations of the applicant's demeanour or from his testimony on the record. In addition, the Board did not appear to take into account that the applicant was a senior police officer and his confidence may be due to his experience and his profession.

[38] The respondent noted the context and the chronology as important factors to justify the negative credibility inferences regarding the applicant's delay in leaving Ukraine, his plan to

only come to Canada and his failure to claim in the EU states he travelled through. That context could provide a rationale for the Board's findings, but this is the respondent's rationale and the discussion does not describe this as the rationale of the Board. The Board's decision singles out a few concerns, dismisses the applicant's explanations and makes adverse inferences, without explaining why the explanations were rejected.

[39] The applicant's explanation that he gave his Ukrainian passport to the mini-bus driver to avoid being found with two passports, and that he believed that the passport could be back in Ukraine, is not implausible. I note that the Board did not refer to the inconsistency noted by the respondent – if it is an inconsistency – that at his POE interview he said the passport might be back in Ukraine, but at the hearing he said the driver may have thrown it out. Both outcomes are possible and the applicant may not know what the mini-bus driver did with his passport; however, he was consistent in indicating that he gave his passport to the driver.

[40] While it is true that the applicant did not flee immediately after the August 2011 assault or the October 2011 car incident, his testimony was straightforward. He indicated that he was refused a Canadian Visitor Visa in the summer of 2011. In the fall he arranged to purchase a fraudulent Israeli passport because he was aware, due to on-line research he had done, that with an Israeli passport he would not need a visa to enter Canada or other countries. The applicant also explained that his intended destination was Canada because he had a cousin in Canada, as indicated in his PIF, and that he had not approached other countries for protection because he did not think they could protect him. He clearly indicated that he was "looking at Europe as a transit

on the way to Canada". Although the Board may have considered the applicant to be asylum shopping, this is not fatal to a refugee claim.

[41] The applicant indicated that he spent two and a half or three days in the mini-bus continually en route to Rome. This can be distinguished from situations where a claimant lands in a country and spends time in those countries without making a claim for protection.

[42] The respondent noted the jurisprudence which has found that it is not unreasonable for the Board to draw an adverse inference from the failure to claim in a country while in transit.

[43] In *Remedios*, Justice Snider noted at para 23:

> In my view, the Board did not err by concluding that the Applicants were country shopping. The principal Applicant clearly testified that they had the option of seeking asylum in the United States, but chose not to do so because their chances of success were much greater in Canada. This testimony supports the finding that the Applicants' refugee claims are based on a desire to immigrate to Canada and not on a well-founded fear of persecution.

[44] In *Rana*, Justice Near (as he then was) relied on *Remedios* to find that it was reasonably open to the Board to make a negative credibility finding based on the applicants failure to seek protection in the U.S., noting at para 29:

> This reasoning is equally applicable to the Applicants' circumstances. Their explanation for not claiming in the US as the Board paraphrased it was that "they wanted to come to Canada; they had two friends in Canada" and that they were told that the Canadian government granted asylum to people like them. They also suggested that two lawyers told them they had no chance of pursuing a claim in the US. The Board gave these explanations due consideration before making its negative credibility finding.

> Its position was supported by previously failed attempts to acquire visas to enter Canada.

[45] However, in both cases, the facts were different from the present cases. In *Remedios*, the applicants had spent three months in the United States [U.S.] without seeking protection. In *Rana*, the applicants had also spent several months in the U.S. and had made more than one attempt to seek a visa to enter Canada.

[46] The applicant noted jurisprudence which has found that the failure to claim protection in countries while in transit will not necessarily undermine an applicant's subjective fear.

[47] In *Nel v Canada (Minister of Citizenship and Immigration)*, 2014 FC 842, 244 ACWS (3d) 669 Justice O'Keefe found that it was unreasonable for the Board to reject the applicants' explanation for not seeking protection in the United Kingdom, where they spent one day in transit en route to Canada, and to conclude that this undermined their subjective fear (at para 54). Justice O'Keefe noted at para 55:

> That was unreasonable. First of all, nothing in the decision allows me to understand why the Board decided that the applicants' explanation is invalid. While the respondent condemns it as forum shopping and that might be relevant to public policy, it is certainly not something that is incompatible with a subjective fear of persecution. On the contrary, it is unsurprising that someone who actually fears persecution would want to go to a country where their claim has the best chance of success, since the price of failure is a return to the persecution they fear. At the very least, it cannot be summarily rejected without explanation and that made this crucial finding non-transparent.

[48] Similarly, in *Packinathan v Canada (Minister of Citizenship and Immigration)*, 2010 FC 834, 191 ACWS (3d) 1250, Justice Snider noted that while a failure to make a refugee claim in a third country may raise doubts about a refugee claimant's subjective fear, the circumstances must be considered. Justice Snider noted at para 7:

> ... However, where a claimant had always planned to come to Canada, and merely was in transit during a stopover in a third country, the Court has held that such a situation does not undermine the subjective fear of persecution (*Ilunga v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 569, [2006] F.C.J. No. 748 (QL)).

[49] In the present case, the applicant clearly indicated that his intention was to come to Canada. His route by mini-bus through other countries to Rome was continuous and cannot be considered as any type of sojourn in the other countries where, in his view, he could safely seek protection. Therefore, the Board's adverse finding arising from his failure to claim protection while en route to Rome to board his flight to Canada is not reasonable.

[50] With respect to the inference drawn from the applicant's inability to provide a reason for the refusal of his Canadian Visitor Visa, the transcript of the hearing indicates that the applicant indicated that he received a letter from Kiev indicating the Visa was denied, but he did not know English well and he did not inquire of a translator. The Board member then stated "OK, so you don't know why?" and the applicant replied, "I cannot say exactly, I don't know. And I don't want to mislead you." The Board member then responded, "don't know why is a good answer", adding that he had previously told the applicant that if the applicant did not know the answer to a question to say so. The transcript also reveals that the Board member did give this advice at the outset of the hearing stating: "If I ask you a question that you do not know the answer to, don't

try to make something up. You can simply say, I don't know, and then I would not push the issue."

[51] Based on this guidance from the Board member and his statement that "I don't know" is an acceptable answer, the Board's negative inference is not reasonable. If the Board intended to base a negative credibility finding on its dissatisfaction with the applicant's explanation, or lack of explanation, the Board should have probed the issue more fully, despite its previous advice.

[52] Although the Board's decision refers to other contradictions and inconsistencies and the Board states that its reasons do not recount the entirety of its considerations, but only the determinative factors, there are no other inconsistencies or contradictions than those noted above. The applicant provided more detailed explanations for the Board's concerns than acknowledged by the Board.

The Board did not Conduct the Required State Protection Analysis

[53] The Board stated that its state protection finding is an alternative finding; i.e., that even if the applicant were found to be credible, he would have had adequate state protection.

[54] As noted by the respondent, it appears that the brief state protection analysis was influenced by the Board's credibility findings.

[55] Given that the applicant's claim must be reconsidered by the Board based on the unreasonable credibility findings, the Board may also be required to reconsider its state protection analysis.

[56] Although the Board cited the relevant principles with respect to state protection, including that a functioning democracy is presumed to be capable of protecting its citizens and that the onus is on the applicants to rebut that presumption with clear and convincing evidence that satisfies the trier of fact on a balance of probabilities that state protection is inadequate or non-existent (*Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 at para 30, [2008] 4 FCR 636), the Board did not consider where Ukraine sits on the democracy spectrum.

[57] As noted by Justice Rennie (as he then was) in *Sow v Canada (Minister of Citizenship and Immigration)*, 2011 FC 646 at para 10, [2011] FCJ No 824, the onus on an applicant to rebut the presumption of state protection varies with the level of democracy:

> 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.

[58] The applicant's efforts to seek state protection and to rebut the presumption will have to be assessed in the context of, and proportional to, the level of democracy and the adequacy of state protection in Ukraine. Clearly the applicant must take reasonable steps to engage authorities

in Ukraine; however, those steps need to be assessed in the context of his circumstances and his claim that he was a politically active former police officer.

[59] The documentary evidence provided to the Board and highlighted in the applicant's submissions to the Board indicated that corruption, including by the police and judiciary, is a significant problem in Ukraine and that law enforcement agencies are part of the problem rather than the solution. The Board did not appear to assess the country condition evidence to first, determine whether adequate state protection was available for the applicant and second, determine whether the applicant's efforts to seek state protection, or his reluctance to pursue his allegations with higher police or other authorities, were reasonable.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed; and

2. No question is proposed for certification.

"Catherine M. Kane"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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