Date: 20080926

Docket: IMM-609-08

Citation: 2008 FC 1077

OTTAWA, Ontario, September 26, 2008

PRESENT: The Honourable Louis S. Tannenbaum

BETWEEN:

Sergey Valeriev HERMAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) of a decision of the Refugee Protection Division (the Board) where it determined that the Applicant was not a Convention Refugee nor a person in need of protection under sections 96 or 97 of IRPA. The Board's main concerns focused on the Applicant's credibility, the availability of State protection and re-availment. The decision under review is dated January 22, 2008.

[2] The Applicant is a Russian national who fears returning to Russia as a result of anti-Semitic religious persecution.

[3] In 1992 and 1994 the Applicant was the victim of personal property attacks. He left Russia for the United States in 1994 and remained there for five years. He made a failed refugee claim and claims he was forced to return to Russia in 1999. He claims to have changed his family name from "Pirogov" to his real family name of Jewish descent "Herman" upon his return to that country.

[4] In February 2000 he once again left Russia and returned to the United States, this time entering the U.S via the Mexican border. He made a second asylum claim. However, he returned to Russia because his sister had been "attacked" and he claims that the incident was reported to the police.

[5] In 2003 the Applicant once again left Russia and traveled to Italy, Finland and Costa Rica. The Applicant then returned to Russia despite his ongoing fear of the skinheads that had attacked him and his family.

[6] The Applicant claims that in 2003, after passing by a demonstration rally, skinheads attacked him. In 2004, he was attacked by nationalists and claims that the police were unable to help him. After both assaults the Applicant claims to have been hospitalized with internal cerebro-cranial trauma, cerebral contusions and haematomas. The Applicant claims that the RPD exaggerated the trauma he experienced.

[7] Finally, in 2006, the Applicant claims that his son was killed by “skinheads” while on his way home from school. The Applicant’s wife witnessed the event and was subsequently hospitalized. Three weeks after this incident, the Applicant fled Russia and sought refuge in Canada.

[8] The RPD determined that the Applicant was not a refugee or a person in need of protection and that his claim was not plausible for a number of reasons.

[9] The credibility findings made by the Board affected the entire claim of the Applicant as his testimony was full of inconsistencies and implausibilities. The Applicant was unable to explain why he could not seek refuge in Varonesh, a city located some 600 kilometres from Moscow where his wife had been living without problems.

[10] The Applicant could not explain why he changed his name to “Herman”, a Jewish sounding name after having used “Pirogov” all of his life. In its conclusion, the Board found that the Applicant changed his name to “Herman” in order to return to the United States without being turned away, given that he had made a previous failed refugee claim in that country, for which he was unable to provide any information.

[11] The Board also drew a negative inference with regard to the Applicant’s subjective fear given that he did not claim asylum in Italy or Finland in 2003 and he also failed to rebut the presumption of State protection.

[12] The Applicant failed to submit convincing medical evidence regarding his son's death given that the information he provided did not contain addresses, the names of the parents, the location of the incident or a cause of death. Further, the medical reports he submitted regarding his assaults contradicted his testimony and raised a number of implausibilities.

[13] The Applicant argues that the Board made a number of factual and legal errors which justify the intervention of this Court.

[14] The Respondent argues that the RPD did not make an error in determining that the Applicant did not meet the definition of person in need of protection or convention refugee.

[15] The Applicant seeks an order setting aside the Board's decision and remitting the matter for re-determination by a differently constituted panel.

[16] The questions at issue in the present matter are:

1. Did the Board err when it determined that the Applicant did not rebut the presumption of State protection and determined that the Applicant did not have a subjective fear?
2. Did the Board properly assess the Applicant's credibility?

Standard of review

[17] Decisions of the Board will only be disturbed on judicial review if the Board made perverse or capricious findings without regard to the evidence before it (Section 18.1(4)(d) of the *Federal*

Courts Act, R.S.C. 1985, c. F-7). However, recent jurisprudence has also held that in light of the decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, the standard of review applicable to factual questions is that of *reasonableness* (*Khokhar v. MCI* 2008 FC 449).

1. **Did the Board err when it determined that the Applicant did not rebut the presumption of state protection and determined that the Applicant did not have a subjective fear?**

Re-availment

[18] The Applicant discusses in some detail the issue of re-availment and argues that, as a result of not having access to State protection, he applied for a passport to leave Russia. The Respondent however argues that it was not the application for a new Russian passport on which his claim for Refugee status failed. Rather, the fact that he visited a number of countries and failed to claim asylum in those nations undermined his evidence and emphasized that he did not demonstrate a subjective fear (*Vaitialingam v. Canada (MCI)*, 2004 FC 1459 at paras. 24-27).

[19] The decision in *Adjei v. Canada (M.C.I.) (1989)*, 7 Imm. L.R. (2d) 169 (T.D.) confirms that that "well-founded fear" should be interpreted as having two components: a subjective and objective fear. The claimant needs to demonstrate that there are "good grounds", a "reasonable chance" or a "serious possibility" of persecution. There must be a finding that there is a minimum of a "mere risk" of persecution and the decision-maker must be satisfied on the balance of probabilities that the fear is well-founded.

[20] In my opinion, the Applicant has misunderstood the notion of re-availment and I agree with the Respondent. The Applicant himself acknowledges that he traveled to the U.S on two occasions and had failed refugee claims in that country. Further, he traveled to three other countries, each time failing to claim asylum. I would conclude that, given the fact that the Applicant did not claim asylum while in other nations, he has not met the test for a subjective fear of persecution (*Adjei*, *supra*; *Aslam v. Canada (MCI)*, 2006 FC 189 at para. 28) and consequently this conclusion was open to the Board.

State protection

[21] The standard of review to be applied to the decision of the Board with regard to State protection is reasonableness (*Mendez v. Canada (Citizenship and Immigration)* 2008 FC 584; *Martinez v. Canada (Minister of Citizenship and Immigration)* [2006] F.C.J. No. 421 2006 FC 343 Noël J., at para. 7; *Chaves v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 193, [2005] F.C.J. No. 232, at para. 11; *Sanchez v. Canada (Minister of Citizenship and Immigration)* [2006] F.C.J. No. 1159).

[22] It has been established that State protection need not be perfect protection according to *Canada (M.E.I.) v. Villafranca*, [1992] F.C.J. No. 1189 (F.C.A.) (QL), leave to appeal to the Supreme Court of Canada denied, [1993] S.C.C.A. No. 76, 19 Imm.L.R. (2d) 263), and that the claimant has an obligation to seek protection unless it is objectively reasonable not to do so. Furthermore, the claimant has the burden of rebutting the presumption of State protection.

[23] In the case at bar, the Board's main concern and consideration was whether the applicant provided "clear and convincing proof" as to the presence or absence of State protection.

[24] Although the Board did not refer to any specific documentation it reviewed, it did provide references to the material it considered in coming to its decision and did acknowledge that religious persecution does occur in Russia (See page 10 of the Applicant's Record). There are a number of comments and remarks throughout the decision that support the Board's finding that the Applicant did not rebut the presumption of State protection and this was largely due to a lack of credibility and corroborating evidence (See Applicant's Record at pp.10-12).

[25] Based on the standard of review and the materials on the record, I would conclude that the Applicant has not provided clear and convincing evidence that Russia is unable to protect him from religious persecution and thus, did not rebut the presumption of State protection.

2. Did the Board properly assess the Applicant's credibility?

[26] It is well established that the Court will only intervene in the credibility findings of the Board where the findings were made in a perverse or capricious manner or without regard for the material before it pursuant to the *Federal Courts Act*, R.S.C. 1985, c. F-7 at section 18.1(4)(d) (*Bielecki v. Canada (Citizenship and Immigration)* 2008 FC 442, *Thavarathinam v. MCI*, [2003] F.C.J. No. 1866 (F.C.A.) (QL), *Saeed v. Canada (MCI)* 2006 FC 1016; *Ogiriki v. Canada (MCI)*

2006 FC 342; *Mohammad v. Canada (MCI)* 2006 FC 352 (Also see *Bilquees v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 157, [2004] F.C.J. No. 205 (T.D.) (QL) at para. 7).

[27] It is open to the Board to find that a general lack of credibility on the part of an applicant extends to all relevant evidence emanating from the applicant's testimony (*Sheikh* at para. 8.).

[28] In the case at bar, the Board determined that the Applicant was not credible as his testimony was full of implausibilities and inconsistencies.

[29] The Applicant alleges that the Board misunderstood critical facts of his claim. The Respondent however claims that the Board's findings were open to it and it was a result of the Applicant's vague and inconsistent testimony coupled with the documentary evidence that created the inconsistencies.

[30] In its decision, the Board did note that the Applicant's son was 14 years of age and that he and his mother lived in Varonesh. According to the Applicant, his son died at the age of 13 and could not possibly be living in Varonesh with his mother. The Respondent argues that the recitation of the facts of the Board indicating that the Applicant's son was living with his mother was nothing more than a statement in passing, was a *lapsus linguae*, and is not indicative of lack of appreciation of the facts.

[31] On this point, I would agree with the Respondent as the Board refers to the Applicant's son being dead multiple times in the decision (See the Board's decision at pages 3, 5-8, 10-12).

[32] Second, the Applicant claims that his son never used the name Pirogov. Rather, his last name was Herman from the time of his birth. However, the Respondent has submitted that since the Applicant claims to have changed his name to Herman in 1999 and since his son was born in 1993, that the son's last name would have necessarily been Pirogov as a matter of logic.

[33] Regardless of the conclusion on the son's age and name, I do not think that this point affects the Board's decision as a whole. The fact of the matter is that the Applicant was unable to explain the reason for the son having a different last name than him or his wife and this further put into question his credibility (See the Board's decision at page 12).

[34] Third, the Applicant alleges that the Board erred when it determined that the Applicant should have continued to use his "more Russian-sounding name" rather than reverting to his Jewish name. The Applicant claims that he was entitled to use whatever name he chose without being the target of persecution. The Applicant claims that this situation is analogous to a situation involving a homosexual claimant (*Re XMU* [1995] CRDD No 146, at paras.100-103 (QL)).

[35] The Respondent argues that the Board's decisions do not have any precedental value before this Court and that a decision of the Board needs to be considered as a whole and within its context.

In effect, the Board concluded that given the Applicant's untrustworthiness, his story about his name change was suspect.

[36] Here, I once again agree with the Respondent. The Board concluded that the name change was likely a tactic used by the Applicant, as the Applicant had made a failed refugee claim in the U.S under his first name. Further, changing his name to a name that would attract violence against him in Russia seems to be indicative of a lack of subjective fear (*Adjei, supra*). This finding was open to the Board.

[37] The Applicant also makes a general claim that the Board failed to consider the totality of the evidence and relies on *Cepeda-Guiterrez v. Canada (Minister of Citizenship and Immigration)* [1998] F.C.J. No.1425 to support this proposition. In *Cepeda-Guiterrez* the Court held that the Board is presumed to have taken into consideration all of the evidence, unless evidence to the contrary is shown. This is not the situation in the case at bar. In my opinion the Applicant has not properly understood this ruling.

[38] It is clear from the documentary evidence that anti-Semitic sentiment and violence does occur in Russia, however the Applicant failed to point to any specific evidence that the Board did not take into account. He was unable to adduce any information or evidence to corroborate his story and the numerous credibility issues forced the Board to rule as it did. The Board was unable to find that he experienced acts of persecution similar to those described in the country reports.

[39] The Board's findings were open to it and are reasonable. Consequently, this application for judicial review will be dismissed. No question of general importance has been submitted for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that, for the reasons given, the application for judicial review is dismissed.

"Louis S. Tannenbaum"
Deputy Judge

Authorities consulted by the Court

1. *Dundar v. M.C.I.*, 2007 FC 1026
2. *Tameh v. M.C.I.*, 2003 FC 1468
3. *Polgari v. M.C.I.*, 2001 FCT 626
4. *Chandrakumar v. M.C.I.*, 1997 CanLII 5161 (F.C.A.)
5. *X.M.U. (Re)*, [1995] C.R.D.D. No. 146
6. *E.H.F. (Re)*, [1999] C.R.D.D. No. 142
7. *Corbière v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203
8. *Vaitialingam v. Canada (M.C.I.)*, 2004 FC 1459
9. *Aslam v. Canada (M.C.I.)*, 2006 F.C. 189
10. *Thavachelvam v. Canada (Solicotor General)*, 2004 FC 1604
11. *Sinora v. M.E.I.*, [1993] F.C.J. No. 725 (QL) (C.A.)
12. *Al-Shammari v. M.C.I.*, [2002] F.C.J. No. 478 (QL) (T.D.)
13. *Eminidis v. M.C.I.*, 2004 FC 700

FEDERAL COURT

SOLICITORS OF RECORD

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