Federal Court  Cour fédérale

**Date: 20100308**

**Docket: IMM-5479-08**

**Citation: 2010 FC 264**

**Ottawa, Ontario, March 8, 2010**

**PRESENT: The Honourable Mr. Justice Near**

**BETWEEN:**

**VASYL VELYCHKO**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application for judicial review of the decision (the decision) of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated November 13, 2008. The Board determined that the Applicant is neither a Convention refugee nor a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, R.S. 2001, c. 27.

[2] For the reasons set out below, the application is dismissed.

## I. Background

[3] The Applicant is a married 49 year old male citizen of the Ukraine. His wife and children remain in the Ukraine and are not parties to this application.

[4] The Applicant claims that he is at risk from extortionists in the Ukraine. He claims that he owned and operated a kiosk that sold various goods. In 2000, two unknown extortionists began to demand payments. When he could no longer pay, the extortionists attacked the Applicant in his home, after which he went to the hospital. The police took a report when he was in the hospital. The Applicant alleges that after the police took his report, his kiosk was set on fire, he was hit by a car, and received threatening calls, all by the extortionists. The Applicant stated he did not contact the police for any of these events as the police and extortionists were working together and that there was evidence that the Ukraine is a corrupt society.

[5] In the decision, the Board found that there was no nexus between the Applicant and a Convention ground as vendettas cannot be a ground for Convention refugee status. Next, the Board held that the Applicant was not a person in need of protection as it did not find the Applicant credible, that he had failed to rebut the presumption of state protection, and that the Applicant had an Internal Flight Alternative (IFA) to Kiev.

[6] The Board did not find the Applicant credible based on inconsistencies between the evidence, specifically a medical report and a tax certificate.

[7] The Board then stated that the Applicant had not rebutted the presumption of state protection. Relying on the documentary evidence, the Board found that the Ukraine was able to provide state protection, albeit not perfect protection, and that the Applicant must first seek protection from his own country. The Board did not find the Applicant's reasons for not contacting the police a second time rebutted the presumption of state protection.

[8] Finally, the Board held that the Applicant had an IFA to Kiev as there is no central registry in the Ukraine, even if people must register locally.

## II. Standard of Review

[9] The issues in this matter are credibility, state protection, and an IFA. They will be assessed on a standard of reasonableness (see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12; [2009] 1 S.C.R. 339). As set out in *Dunsmuir* and *Khosa*, reasonableness requires the existence of justification, transparency, and intelligibility in the decision-making process. It is also concerned with whether the decision falls within a range of acceptable outcomes that are defensible in respect of the facts and law.

[10] The Court is to demonstrate significant deference to Board decisions with regard to issues of credibility and the assessment of evidence (see *Camara v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 362; [2008] F.C.J. No. 442 at paragraph 12).

## III. Issues

[11] In his application, the Applicant raised three issues:

a) that the Board erred in finding that there was no nexus between his claim and an enumerated ground;

b) that the Board erred when it found he had not rebutted the presumption of state protection as its analysis of the country condition documents was unreasonable, and

c) that the Board's IFA findings were unreasonable.

### A. *Did the Board Err in Finding That There Was No Nexus Between the Applicant's Claim and an Enumerated Ground?*

[12] The Applicant submits that the Board erred when it determined that no nexus existed between the Applicant's situation and Convention refugee grounds. The Applicant argues that the Board relied on selective portions of the documentary evidence which supported its view of organized crime in the Ukraine, while ignoring parts which contradicted this view.

[13] It is the Respondent's position that the Convention only protects individuals with a reasonable fear of persecution due to their religion, race, nationality, political opinion and membership in a particular social group.

[14] It is clear that victims of crime are not protected by the Convention (see *Bencic v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 623, 2002 FCT 476, at paragraph 17). The Applicant cited *Vassiliev v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 955; 72 A.C.W.S. (3d) 900, at paragraph 13 to support his position that there was a nexus between his claim and an enumerated ground. However, in *Vassiliev*, the Court held that there was no distinction between the criminal and ideological/political aspects of the claimant's fear of persecution and that the Applicant's refusal to participate in a corrupt system was an expression of political opinion.

[15] There are no such connections in this matter. While the Applicant argues at paragraph 11 of his Memorandum of Fact and Law that his "refusal to cooperate with the mafia because of his personal moral convictions would be considered a political statement", he has provided no evidence of the extortionists' identity or if they were linked with any government organization. Refusal to bow to extortion, threats, and violence due to his status as a business owner does not qualify him as a refugee under the Convention. The decision was reasonable.

B *Did the Board Err When It Found That the Applicant Had Not Rebutted the Presumption of State Protection As Its Analysis of the Country Conditions was Unreasonable?*

[16] The Applicant argues that the Board erred by ignoring documents that suggest corruption persists in the Ukraine. He takes the position that the Board erred in considering that the state must actually provide protection and not merely indicate a willingness to help. While the Applicant acknowledged that the Board is presumed to have considered all the evidence before it (see paragraph 11 of the Applicant's Further Memorandum of Fact and Law), he argues that the Board erred by not explaining why they preferred some evidence over other evidence which ran contrary to the Board's findings on the central issue of state protection.

[17] Finally, the Applicant argues that the Board erred when it held that it was not objectively reasonable for the Applicant to conclude that no state protection would be forthcoming.

[18] The Respondent takes the position that the Board reasonably found that the Applicant should have taken further steps to obtain protection in the Ukraine and that the Board is entitled to give some documents more weight than others.

(1) <u>The Presumption of State Protection</u>

[19] Refugee protection is meant to be a form of surrogate protection to be invoked only in those situations where the refugee claimant has unsuccessfully sought the protection of his or her home

state (see *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689; [1993] S.C.J. No. 74; *Hinzman v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 584; 2007 FCA 171).

[20] In *Carillo v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94; 69 Imm. L.R. (3d) 309, the Federal Court of Appeal found that the Applicant had not rebutted the presumption of state protection. The Court held that even though the claimant had sought police protection once, she had not made additional efforts to seek state protection from higher authorities when the local police did not provide protection (see paragraphs 31-36).

[21] In *Szucs v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1614; 100 A.C.W.S. (3d) 650, the Applicant claimed he did not report two incidents of persecution to the police because he did not think it would help his situation. In his reasons, Justice Pierre Blais held the Board may examine all reasonable steps taken to seek state protection.

[22] In this case, the police took a report after the first assault but the Applicant did not contact them thereafter. The Board found that the Applicant's reasons for not contacting the police or seeking protection from higher authorities did not rebut the presumption.

[23] A claimant seeking to rebut the presumption of state protection must adduce relevant, reliable and convincing evidence which satisfies the trier of fact on a balance of probabilities that

the state protection is inadequate (*Carillo*, above, paragraph 30). In this case, the Applicant did not discharge his burden and the Board's decision was reasonable.

[24] In his Further Memorandum of Fact and Law, the Applicant took the position that he does not have to seek state protection when it is objectively reasonable to presume it would not be forthcoming (see *L.A.O. v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1057; [2009] F.C.J. No. 1295). At paragraphs 22-23 of *L.A.O.*, Justice Russell Zinn wrote:

> [22] An applicant does not have to seek state protection where it is objectively reasonable to presume that state protection would not be forthcoming. "[O]nly in situations in which state protection 'might reasonably have been forthcoming', will the claimant's failure to approach the state for protection defeat his claim" [Emphasis added]: *Ward* at 724.
>
> [23] In *Ward*, at 724-725, Justice LaForest described two types of evidence that an applicant could provide to rebut the presumption of state protection: (1) evidence of the claimant's actual attempts to seek state protection that resulted in no protection, and (2) evidence of similarly situated individuals who were unable to obtain state protection. He did not intend that these examples be exhaustive; however, they do reflect the most common types of evidence led by claimants.

[25] In this case, the Board rejected the Applicant's reasons for not contacting police after he was hospitalized and preferred documentary evidence that demonstrated that the Ukraine provides state protection. Therefore, the Board determined that the presumption of state protection was not rebutted. This was reasonable.

(2) Discussion of the Evidence in the Reasons

[26] The fact that the Division did not mention each and every one of the documents entered in evidence before it does not indicate that it did not take them into account. A tribunal is assumed to have weighed and considered all the evidence presented to it unless the contrary is shown (see *Florea v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 598 (F.C.A.)). The Board has discretion in assessing documentary evidence and is entitled to give some evidence more weight (see *Velinova v. Canada (Minister of Citizenship and Immigration)*, [2008] F.C.J. No. 340; 324 F.T.R. 180).

[27] In this case, the Applicant failed to demonstrate that the Board erred in preferring some evidence over others. The Board stated that they considered all the evidence but preferred the documentary evidence to that of the claimant because it was gathered from a number of objective, independent sources with no interest in the matter. This was sufficient in this case (see *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, 157 F.T.R. 35; 1998 Can LII 8667).

C. *Where the Board's IFA Findings Unreasonable?*

[28] As set out in *Irshad v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 763; [2005] F.C.J. No. 941 at paragraph 21, the concept of an IFA is an inherent part of the Convention refugee definition. In order to be considered a Convention refugee, an individual must be a refugee from a country, not from a region of a country. Therefore, where an IFA is found a claimant is not a

refugee or a person in need of protection (see *Sarker v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 353; [2005] F.C.J. No. 435).

[29] In this case, the Board found that the Applicant had an IFA to Kiev, noting that there was no central registry in the Ukraine and therefore it would be difficult for the extortionists to locate him there. This was reasonable.

## JUDGMENT

**THIS COURT ORDERS AND ADJUDGES that:**

1. this application for judicial review is dismissed; and

2. there is no order as to costs.

" D. G. Near "
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | **IMM-5479-08** |
| **STYLE OF CAUSE:** | **VELYCHKO v. MCI** |
| **PLACE OF HEARING:** | **TORONTO** |
| **DATE OF HEARING:** | **FEBRUARY 4, 2010** |
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| **DATED:** | **MARCH 8, 2010** |

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