Federal Court		Cour fédérale

Date: 20100219

Docket: IMM-424-09

Citation: 2010 FC 187

Ottawa, Ontario, February 19, 2010

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

VITALIY CHERNYAK

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(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated January 8, 2009, wherein the Board determined that the applicant was not a Convention refugee or a person in need of protection.

Factual Background

[2] The applicant, a citizen of Ukraine, alleges he is a homosexual in a homophobic country and his life is at risk in Ukraine. The applicant alleges that although homosexuality in Ukraine is no longer a criminal offence, the attitude towards homosexuals is extremely homophobic and negative.

[3] The applicant allegedly fears skin-heads and members of the Ukrainian society who are homophobic. The applicant states that although the authorities would never admit it, homosexuals are persecuted and harassed by people and authorities all over the country.

[4] The applicant had his first homosexual relationship at the Kiev University from 1995 to 1997. The applicant's classmates had doubts about his sexual orientation and he was the victim of derogatory name calling.

[5] The applicant and his partner were beaten on February 14, 2006 at a café in a small town known as Novodnestrovsk, Ukraine, which is approximately 400 kilometres south-west of Kiev. The applicant and his partner were attacked by four young men dressed in paramilitary uniforms who had become aware that the applicant was homosexual.

[6] The applicant and his partner then sought treatment for their injuries at a hospital and doctors contacted the police who took details about the attack. The applicant believes the police were not interested in helping him because he is homosexual. The police said they would contact the applicant if they required additional information.

[7] The applicant followed-up with the police on the investigation approximately five months later, in July 2006. The applicant was told his case was closed because there was insufficient evidence to find his attackers.

[8] The applicant alleges he made a second attempt to obtain state protection in September 2006. The doctors at the hospital had called the police who came to visit the applicant following another attack by three homophobes on September 25, 2006.

[9] The applicant arrived in Canada on January 29, 2007. He made a claim for Convention refugee status on February 8, 2007. A hearing took place on December 2, 2008.

Impugned Decision

[10] The Board concluded the applicant was not a Convention refugee and not a person in need of protection. His claim was rejected. The Board accepted that the applicant is a homosexual but found he was unable to rebut the presumption of state protection by bringing forth clear and convincing evidence that protection would not be forthcoming.

[11] The determinative issue for the Board was state protection. The issue of state protection goes to the objective portion of the test of fear of persecution (*Canada (Minister of Citizenship and Immigration) v. Olah*, 2002 FCT 595, 219 F.T.R. 152). There is a presumption that every state is able to protect its citizens unless the state is unable to do so due to a complete breakdown of the state apparatus. However, an applicant may rebut that presumption by bringing clear and convincing

evidence that protection would not be forthcoming. In this case, the Board found the applicant did not provide persuasive evidence that the police in Ukraine were unwilling or unable to protect him.

[12] The Board noted homosexuality is decriminalized in Ukraine and this is acknowledged by the applicant. While there are problems with the attitudes of people in Ukraine towards homosexuals, the Board found no indication from the documentary evidence that when sought, protection would not be reasonably forthcoming to the applicant.

[13] The police took the statements of the applicant and his partner about the attack and stated they would contact the applicant if additional evidence was required. The police thus made efforts to find who was responsible for the attack. The Board notes the police did not fail the applicant and his partner. The Board concluded the applicant had an obligation to follow up with police after the report was taken to see if additional information was required. The applicant went to the police for a follow-up to the investigation on the attack approximately five months later in July 2006. At this time, the applicant learned that the police had closed the case because they did not have enough evidence to find the attackers.

[14] The Board cited documentary evidence such as Response to Information Request UKR102897E dated August 25, 2008 and found there was insufficient evidence that the police would not have offered protection by charging the individuals with the appropriate criminal charge if there was evidence to do so.

[15] In the case at bar, the applicant sought state protection from the police and the Board found the police responded appropriately. The police did not refuse to take a report but had insufficient evidence to make arrests. The Board notes the protection from the state need not be perfect, nor can a state protect its citizens at all times (*Canada (Minister of Employment and Immigration) v. Villafranca*, (1992), 150 N.R. 232, 37 A.C.W.S. (3d) 1259 (F.C.A.)). The Board found there is not a serious possibility or reasonable chance the applicant would face persecution for a Convention ground if he returns to Ukraine.

Issues

As per the hearing, the only issue to be addressed by the Court is whether the Board erred in its finding on state protection?

Analysis

[16] In light of *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at par. 55, 57, 62 and 64, the Board's conclusions on state protection are subject to review under the reasonableness standard (*Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, 362 N.R. 1 at par. 38; *Huerta v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 721, 167 A.C.W.S. (3d) 968 at par. 14; *Chagoya v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 721, [2008] A.C.F. no 908 (QL)). The factors to be considered are justification, transparency and intelligibility within the decision-making process and the outcome must be defensible in respect of the facts and the law (*Dunsmuir* at par. 47).

[17] The onus is on the applicant to rebut the presumption of state protection (*Sanchez v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 134, 165 A.C.W.S. (3d) 336) and in order to rebut this presumption, the applicant must adduce reliable, relevant and convincing evidence which demonstrates, on a balance of probabilities, that state protection is inadequate (*Carrillo*).

[18] In *N.K. v. Canada (Minister of Citizenship and Immigration)*, (1996), 206 N.R. 272, 68 A.C.W.S. (3d) 334 (*Kadenko*), the Federal Court of Appeal noted that an applicant cannot automatically conclude that a democratic state is unable to protect one of its citizens because a police officer refused to intervene. In the case at bar, the evidence shows that the applicant diligently sought to obtain protection from his country before coming to Canada and he has provided clear and convincing evidence to rebut the presumption that the state of Ukraine was able to protect him.

[19] The Board found that if the applicant had other information or evidence to contribute to the investigation, it was his responsibility to contact the police with this information. The police did not communicate with the applicant because they had not obtained any further information on the incident on their end and they ultimately decided to close the applicant’s case. The Board concluded the police had not refused to protect the applicant, but they simply had insufficient evidence to arrest his attackers.

[20] However, in the transcript of the hearing before the Board (at page 185 of the Tribunal Record), the applicant explains to the Board member that he was able to find the address of his

attackers with the assistance of his partner's parents. The applicant explained that this information was provided to the police. However, despite obtaining this information, it seems that the investigation into the attack was not pursued further. The transcript confirms that the Board barely discussed this important information with the applicant, nor did the Board question the applicant about any further actions taken by the police after obtaining this address.

[21] The Court notes that the Board did not make any adverse credibility findings regarding the applicant. This information provided at the hearing should have been further investigated. In its reasons, the Board did not explain why it accepted the fact that the police had closed the applicant's case when there was additional evidence available to continue with the investigation, i.e. the address of the attackers.

[22] The Court accepts there is a presumption that the Board has considered all the evidence before it. However, when there is relevant evidence which runs contrary to the Board's findings on the central issue, in this case the availability of state protection, the Board has the duty to analyze that evidence and to explain why it does not accept it or prefers other evidence on that point (*Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, (1998), 157 F.T.R. 35, 83 A.C.W.S. (3d) 264 at par. 14-17). In the case at bar, the Board should have explained why the applicant's evidence contained in his Personal Information Form (PIF) and testimony at the hearing were omitted.

[23] Furthermore, the Court notes that the Board failed to consider the applicant's allegations that the police officers became disinterested, unfriendly and hostile when they learned he was a homosexual. Indeed, when the applicant went to the police station to follow up on the first attack in July 2006, he was told by a police officer that if he reconsidered his "way of life", people would treat him differently. These crucial allegations should have been considered and discussed by the Board, as the Board must provide reasons to explain why evidence is deemed neither relevant nor reliable (*Simpson v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 970, 150 A.C.W.S. (3d) 457 at par. 44; *Salguero v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 486, [2009] F.C.J. No. 594 (QL)).

[24] The Board also erred in assessing the applicant's case because the Board did not consider another attack on the applicant in September 2006. In his narrative, contained in his PIF (at pages 20-21 of the Tribunal Record), the applicant describes this attack, which happened on September 2006. The applicant explained that when he was going home around 9:00 p.m., he was attacked by three men near his house. Luckily, the attackers fled when a group of passer-by arrived and called an ambulance. The applicant was hospitalized for two days and he was diagnosed with multiple contusions, a dislocated right arm and two fractured ribs. The doctors called the police who again visited the applicant in the hospital, but the applicant submits the police seemed disinterested after hearing the attack was premised on the applicant's sexual orientation. This second attack was not mentioned at all during the applicant's oral hearing or in the Board's reasons.

[25] The Board ignored evidence on facts at the heart of the applicant's claim, as this evidence of a second attack is most important to rebut the Board's finding on the availability of state protection in the case at bar. This omission is fatal to the Board's decision (*Gill v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 656, 129 A.C.W.S. (3d) 783 at par. 17). The lack of assistance and interest by the police and the fact that the applicant was not the victim of a single, random attack, illustrate, in this case, the lack of state protection available to him in Ukraine.

[26] The Court finds the Board's decision unreasonable. The Board did not conduct a full assessment of the evidence, including the applicant's testimony and the totality of the documentary evidence on file. The evidence shows the applicant did seek other means of state protection and he demonstrated, from the police officer's comments and the lack of follow-up after the second attack, that state protection was not reasonably forthcoming in Ukraine. The decision was not reasonable in the circumstances and the Court's intervention is justified. The application for judicial review is therefore allowed.

[27] No question was proposed for certification and there is none in this case.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is allowed. The decision is set aside and sent back to the Immigration Refugee Board to be heard by a different member. No question is certified.

"Richard Boivin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-424-09
STYLE OF CAUSE:	Vitaliy Chernyak v. The Minister of Citizenship and Immigration
PLACE OF HEARING:	Toronto, Ontario
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