Federal Court		Cour fédérale

Date: 20101223

Docket: IMM-2651-10

Citation: 2010 FC 1326

Ottawa, Ontario, December 23, 2010

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

TONY DJAJADI SUGIARTO
HENNY SUGIANTO
ANGELINA NATSH LAZAKAR
ANGELA NIKITA LAZAKAR

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c.27 [*IRPA*], of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated March 25, 2010. The Board found that the applicants were neither Convention refugees nor persons in need of protection for the purposes of sections 96 and 97 of the *IRPA*.

BACKGROUND

[2] Tony Djajadi Sugiarto and his wife Henny Sugianto are both citizens of Indonesia. They have two daughters: Angelina Natasha Lazakar (12 years old) and Angela Nikita Lazakar (10 years old). Angelina was born in Indonesia and is an Indonesian citizen, while Angela was born in the United States (US) and is a US citizen. The family (collectively referred to as the "applicants") is of Chinese descent. They are practicing Catholics.

[3] The applicants left Indonesia for the US in April of 1999, almost one year after wide-spread rioting saw the targeting of ethnic-Chinese living in Indonesia. Out of fear for being returned to Indonesia, the applicants did not immediately apply for asylum in the US. Instead, they waited until 2003 to make their claim; it was ultimately refused. Upon July 7, 2008, the applicants arrived in Canada. They applied for refugee protection on arrival.

[4] The Board provided an accurate summary of the facts alleged by the applicants in support of their claim, it reads as follows:

> [5] The adult claimants allege [they] were discriminated against when they were young, because they were considered to be [translation] "second-class" citizens. Thus, they allege that they were forced to study in private schools, because they would not have had access to public schools.
>
> [6] The claimants also allege that they were harassed in their youth. Mr. Sugiarto's [translation] "pocket money" was stolen by some young Indonesians when he was eight or nine years old, and Mrs. Sugianto was groped in the street by some Indonesians in 1988, when she was 17 years old.

> [7] The male claimant, Mr. Sugiarto, alleges that he was also assaulted in 1996 when he drove his car through a crowd of soccer fanatics. He alleges that soccer fans also threw rocks at the church that he and his wife attended in 1997. Firecrackers were also thrown at his house and at those of other ethnic Chinese, in December 1997, at the end of Ramadan.
>
> [8] The male claimant, Mr. Sugiarto, also stated that his older brother was attacked twice, in September 1997 and January 1998, while driving his car through traffic congestion.
>
> [9] The claimants allege that they lived in fear of being attacked by Indonesian extremists during the riots of May 1998….

THE DECISION UNDER REVIEW

[5] The Board indicated that the determinative issue with respect to the applicants' claim was whether or not there existed a risk to the applicants in the event that they were returned to Indonesia. It started its analysis by identifying the subjective fears held by the applicants in this regard. Specifically, it indicated that they were afraid of Muslim extremists in Indonesia, and in particular, it indicated that they feared that rioting, similar to the rioting of May 1998, would reoccur.

[6] In determining whether the applicants' fears were well-founded, the Board made reference to a number of recent documents from its research directorate materials which indicated that discrimination against, and persecution of, the ethnic-Chinese minority in Indonesia had lessened since the riots of 1998. The Board pointed out that this was something that the applicants, themselves, had admitted during the hearing. One report indicated that violence against the ethnic-Chinese had virtually disappeared. Despite this, the Board did acknowledge that some of these documents, nonetheless, indicated that discrimination against the ethnic-Chinese was still a problem in Indonesia. The Board also pointed to a 2003 document, supplied by the applicants, which

indicated that, “it is dangerous to be an ethnic Chinese Christian in Indonesia today. There is significant possibility that such persons will suffer serious physical harm.” The Board recognized that there was a contradiction between this and the other documentary evidence that it had canvassed, and indicated that it attached greater probative value to the evidence from the research directorate materials because that evidence was “more recent and more varied.” The Board also indicated that it had considered the various newspaper articles submitted by the applicants related to “certain incidents” of violence and tension between Muslims and Christians in Indonesia.

[7] In concluding its analysis, the Board indicated that it had also considered the fact that the adult applicants’ parents, brothers, and sisters — who were all still in Indonesia — had not experienced any problems related to their ethnicity or religion since the applicants had left.

[8] In light of the foregoing, the Board concluded that “even though incidents could still arise between Muslim individuals or groups and Christian or Chinese individuals or groups, the analysis of the evidence as a whole does not show that the claimants would face a serious possibility of persecution or a probability of being subject to a risk to their lives, to a risk of cruel and unusual treatment or punishment, or to a danger of torture, owing to their dual Chinese and Christian origins, should they return to their country.” With respect to the minor applicant, Angela Nikita Lazakar, the Board noted that she was a US citizen and, as such, could return to the US. The Board determined that the applicants were not Convention refugees, nor persons in need of protection.

ISSUES

[9] This application raises the following issues:

a) What is the applicable standard of review?

b) Did the Board err in assessing whether or not the applicants held a well-founded fear of persecution?

ANALYSIS

a) ***What is the applicable standard of review?***

[10] The question of whether a fear of persecution is well-founded is a question of mixed fact and law and, as such, it is reviewable using the reasonableness standard (*Dunsmuir v New-Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 53; *Jean v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1014 at para 9). The Supreme Court of Canada in *Dunsmuir* at para 47 described the reasonableness standard as being "concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."

b) ***Did the Board err in assessing whether or not the applicants held a well-founded fear of persecution?***

[11] The applicants argue that the Board committed a reviewable error by failing to consider whether there might be "cumulative grounds" for finding a well-founded fear of persecution in their case. They submit that it was incumbent on the Board to consider whether their past experiences, combined with the compelling historical record of persecution against ethnic-Chinese Christians in Indonesia, gave rise to a well-founded fear of persecution. Instead, the applicants claim that the

Board did the opposite – i.e. that it minimized both their past experiences and the overall history of anti-Chinese persecution in Indonesia. I do not agree.

[12] I would agree with the applicants that when evidence establishes a series of actions which can be characterized as discriminatory, if not necessarily persecutory, it is incumbent on the Board to consider the cumulative nature of those actions in order to determine whether the overall effect might constitute a valid basis for a well-founded fear of persecution for the purposes of section 96 of the *IRPA* (*Munderere v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 84, 291 DLR (4th) 68 at para 44; *Mete v Canada (Minister of Citizenship and Immigration)*, 2005 FC 840, 46 Imm LR (3d) 232 at para 4; *Bobrik v Canada (Minister of Citizenship and Immigration)* (1994), 85 FTR 13, 50 ACWS (3d) 850 (TD) at para 22).

[13] In this case, however, nothing in the Board's reasons suggest that it failed to conduct this type of a cumulative analysis. On the contrary, the Board thoroughly reviewed the applicants' allegations of past mistreatment. At the start of the hearing, it took the time to ask the applicants to articulate their current fear. The Board then proceeded to consider whether that fear was well-founded on a prospective basis. The documentary evidence reviewed by the Board indicated that while the ethnic-Chinese minority in Indonesia had, in the 1990s, faced "social forms of discrimination, extortion, and persecution," the situation had improved greatly in the years since then. The Board's decision, thus, did not turn on whether or not the applicants had been persecuted in the past. Instead, the Board arrived at its decision after finding that the applicants had not demonstrated that they would face a serious possibility of persecution in the event of their return to Indonesia *today*, some eleven years after their departure in 1999.

[14] Justice Marshall Rothstein, in *Pour-Shariati v Canada (Minister of Employment and Immigration)* (1994), [1995] 1 FC 767, 52 ACWS (3d) 621 (TD) emphasized the prospective nature of the "well-founded fear of persecution" pointed to by section 96 of the *IRPA*. At paragraph 17, he indicated:

> Before turning to the cases themselves, I would observe that a Convention refugee claimant must demonstrate a well-founded fear of persecution in the future to support a Convention refugee claim. In making a claim for Convention refugee status, an individual will often advance evidence of past persecution. This evidence may demonstrate that he/she has been subjected to a pattern of persecution in his/her country of origin in the past. But this is insufficient of itself. The test for Convention refugee status is prospective, not retrospective: for example, see *Minister of Employment and Immigration v. Mark* (1993), 151 N.R. 213 (F.C.A.), at page 215. The relevance of evidence of past persecution is that it may support a well-founded fear of persecution in the future. However, it is a finding that there is a well-founded fear of persecution in the future that is critical.

[15] Given that over eleven years had passed since the applicants had left Indonesia, it was entirely appropriate for the Board to look to the relevant documentary evidence on country conditions, as well as to the experiences of the applicants' family members who had remained in Indonesia, to determine whether or not the subjective fear held by the applicants was still, in the year 2010, objectively well-founded. The applicants testified that since they had left Indonesia in 1999, their family-members who had remained had not experienced any problems with respect to their ethnicity or religion. The applicants, in fact, admitted that the situation in Indonesia had improved. The documentary evidence pointed to by the Board indicated that instances of violence against the ethnic-Chinese in Indonesia had drastically declined since the late 1990s, and that discrimination against the ethnic-Chinese was also significantly diminished. While the Board

acknowledged documentary evidence submitted by the applicants that was to the opposite effect, it provided reasons for assigning that evidence lower probative value.

[16] I note that the applicants have confined their argument to "one issue: The Board's failure to conduct an analysis based upon cumulative grounds." I have already indicated that this argument cannot be sustained in the current case. By way of further illustration, it is useful to consider *Junusmin v Canada (Minister of Citizenship and Immigration)*, 2009 FC 673, 81 Imm LR (3d) 97, *HL v Canada (Minister of Citizenship and Immigration)*, 2009 FC 521, and *Suryanti v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1164, the three decisions put forth by the applicants in support of their "cumulative grounds" argument.

[17] In *Junusmin*, my colleague Justice Michel Shore indicated that the Board had failed to consider the evidence "as to the cumulative effect of harassment in Indonesia" (*Junusmin*, above at para. 48). The Board had stated in its reasons that "between 1998 and their departure in 2006, there was only one incident with regard to [the applicants], in April 2006." It then went on to discount that incident as an isolated occurrence not amounting to persecution. The problem, however, was that the applicants had, in fact, pointed to multiple incidents of harassment and violence during the period between 1998 and 2006. Completely absent from the Board's discussion, for instance, was the fact that Mr. Junusmin had been forced, on a recurring basis, to pay protection money to two groups, in order to avoid harassment and physical harm. The Board had failed to acknowledge these important, recent events and thus, had truly failed to consider the "cumulative effect" of the applicants' experiences in Indonesia. The same cannot be said in the current case where the Board provided a comprehensive review of the applicants' past experiences, identified the applicants'

subjective fears, and – given the passage of eleven years - addressed that fear through an analysis of current country conditions.

[18] *H.L.*, above, was another case involving ethnic-Chinese from Indonesia. In rejecting the applicants' claim for refugee protection in that case, the Board failed to acknowledge that one of the applicants had alleged that she was the victim of a racially-motivated rape. In addition, contrary to the documentary evidence, the Board found that the riots of May 1998 and the acts of extortion surrounding those events were acts of a "general nature", not targeted at the ethnic-Chinese. Ultimately, the Board conceded that the Chinese in Indonesia were discriminated against, but it found that there was nothing to indicate that that discrimination amounted to persecution. It was in this context that my colleague Justice Luc Martineau found that the Board had not been sensitive to the cumulative effect of the applicants' past experiences.

[19] Similarly, in *Suryanti*, above, the Board discounted the applicant's past experiences in Indonesia as being "isolated incidents" that did not amount to persecution. The Board was also very brief with respect to the documentation on current country conditions. It acknowledged that some incidents of discrimination had occurred in recent years, but found that any discrimination to which the applicant would be subject would not amount to persecution. Given this, Justice Yvon Pinard found that the Board erred by failing to delve further into the evidence and give reasons to explain why it did not find persecution.

[20] In the present case, however, the Board comprehensively reviewed the applicants' account of past mistreatment. It did not dismiss that treatment as being isolated and as not amounting to

persecution. In fact, it cited evidence acknowledging that the ethnic-Chinese in Indonesia had been persecuted in the mid to late 1990s. Instead of minimizing or mischaracterizing the applicants' past experiences, the Board focussed on determining whether or not there was a prospective basis for their alleged fear, given the changes that had taken place during the intervening eleven years.

[21] Ultimately, the Board's determination that the applicants had not demonstrated an objectively well-founded fear of persecution, considering the prospective nature of this requirement, was not unreasonable. For these reasons, the application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS that the application for judicial review be dismissed.

"Danièle Tremblay-Lamer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2651-10
STYLE OF CAUSE:	TONY DJAJADI SUGIARTO HENNY SUGIANTO ANGELINA NATSH LAZAKAR ANGELA NIKITA LAZAKAR Applicants and THE MINISTER OF CITIZENSHIP AND IMMIGRATION Resp**ondent**
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