Federal Court  Cour fédérale

Date: 20120307

Docket: IMM-5359-11

Citation: 2012 FC 296

Toronto, Ontario, March 7, 2012

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

GJYSTE PEPAJ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This application and another are closely related. Each deal with members of the Pepaj family who, in a single decision of a Member of the Refugee Protection Division of the Immigration and Refugee Board, dated July 15, 2011, were found to be able to claim refugee protection in Canada. One other member of the family was found in the same decision to be a person entitled to protection; thus, her claim was accepted. I will provide the same set of Reasons in both applications which reasons will deal with both applications before me IMM-5357-11 and IMM-5359-11.

[2] In brief, the Applicants in file IMM-5357-11 are a brother, twenty years old; and a sister, fourteen years old. They were born in and are citizens of the United States of America. It was found that they could expect adequate state protection there. The Applicant in IMM-5359-11 is their eighty year old grandmother, who was found could expect adequate protection in Albania. The decision of the under review by this Court, but not part of either of these two judicial reviews, also found that the mother of the son and daughter, who is the daughter-in-law of the grandmother, could not expect adequate state protection in Albania; thus, her claim for refugee protection in Canada was accepted.

[3] The story begins in 1991 when Gjon Pepaj and Valentina Pepaj (whom I have called the mother) fled Albania and, via Yugoslavia, came to the United States of America. They obtained permanent resident status there, but never citizenship. Two children were born to them, Zef Gjon and Gjovjana (Applicants in IMM-5353-11), in the United States. These children are citizens of that country. In 1993, a family friend, Paulin Lunaj, was visiting the Pepaj home at a time when the husband, Gjon Pepaj, was not at home. Paulin raped Valentina. She shot him dead. She was tried and convicted of manslaughter and sentenced to two years' imprisonment in the United States. Back in Albania, the Lunaj family declared a blood feud on the Pepaj family because Valentina had killed Paulin.

[4] Back to the United States. The Pepaj family was being harassed in various ways by those sympathetic to the blood feud declared by the Lunaj family. Gjon shot dead Gjek Sufaj, whom he believed was an instrument of the Lunaj family, in the United States during a church service. He was charged and convicted of first-degree murder and is serving a life sentence in a Michigan

prison. Gjon's mother, Gjyste Pepaj, whom I have called the grandmother, came over from Albania to look after the two children. She stayed about fifteen years in the United States and never claimed refugee status.

[5] Once the mother, Valentina Pepaj, was released from prison, having served her two-year sentence in the United States; she, the two children and the grandmother fled to Canada and claimed refugee protection. The husband, Gjon, of course, was and is still in prison in the United States.

[6] The claim by the mother, two children and grandmother for refugee protection in Canada came on for hearing before a Member of the Refugee Board. The claims were heard and determined together. The Member, in a decision dated July 15, 2011, determined that the mother, Valentina, could not expect to receive adequate state protection in Albania – a principal reason being that she was the one who shot Paulin and the consequent blood feud. On the other hand, it was determined that the grandmother, Gjyste, being an elderly woman not directly involved in the events, would not likely be targeted in the blood feud and could receive adequate protection in Albania. It was determined that the two children, one now an adult, being United States citizens, could expect adequate protection there. The two children, on the one hand (IMM-5357-11), and the grandmother on the other (IMM-5359-11), have each sought judicial review of that part of the decision related to them. Although they all were represented by legal counsel before the Board, they filed their applications for judicial review in their own names, with no lawyer's name apparent on any document. At the hearing before me, however, each of the children on the one hand and grandmother on the other hand were represented by Counsel albeit different Counsel. Different Counsel represented the Minister in each proceeding.

[7] The issues in respect of the children Zef Gjon and Gjovjana, on the one hand; and Gjyste, the grandmother, on the other hand, are the same: Was the Board Member's decision as to state protection reasonable? The arguments of Counsel for each were somewhat different; but in general, they attacked the reasonableness of the decision respecting their client(s).

[8] There was general agreement between Counsel in both applications, that is, both for the Applicant and the Respondent, as to several matters:

a. the decision is to be reviewed on a standard of reasonableness;

b. no certification of a question is required;

c. there is a presumption that a state is able to afford adequate protection; and

d. the applicant(s) bear the onus of rebutting the presumption of state protection by clear and convincing evidence.

AS TO GJYSTE PEPAJ (The Grandmother)

[9] The Member discussed the issue of state protection in Albania in respect of Gjyste (grandmother) and Valentina (mother) together, as they both could be returned to Albania. He found that adequate state protection was available to both of them; but that, in respect of Valentina (mother), due to her particular circumstances she would be unable to avail herself of that protection.

[10] The Member wrote at paragraphs 104 to 106 of the decision:

> *[104] Neither the objective evidence nor the claimants' own evidence is a clear and convincing rebuttal of the presumption of adequate state protection. The panel finds that adequate state protection is available to Gjyste Pepaj and Valentina Pepaj in Albania.*
>
> *[105] Can Valentina Pepaj, in her unique circumstances, be reasonably expected to access that state protection? The claimant is a victim of a sexual assault, during which she shot and killed her attacker and was subsequently imprisoned. Her family was threatened and attacked and in response her husband killed another man, and will spend his life in an American prison. She has struggled with depression and thoughts of suicide, continues to re-experience the traumatic event, and suffers significant functional impairment.[118] She would return to a patriarchal society as a "shamed" victim of sexual abuse, without her husband present to assist her. In those circumstances, it is simply unreasonable to expect her to be able to actively seek state protection from those who seek to harm her. Having considered this evidence, as well as the Chairperson's Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution,[119] I find that, in her particular circumstances, Valentina Pepaj would be unable to avail herself of the protection of her country.*
>
> *[106] The two claimants who are citizens of Albania have not rebutted the presumption of adequate state protection in that country. The claim of Gjyste Pepaj, already lacking in objective basis, must also fail on the basis of state protection. The claim of Valentina Pepaj, which does have an objective basis, cannot be rejected on the basis of state protection, as the panel finds that the claimant is unable, in her particular circumstances, to avail herself of that protection.*

[11] Counsel for the grandmother, Gjyste, challenged this decision as being unreasonable. It was argued that the Member failed to have due regard to Gjyste's oral evidence, failed to have due regard to the fact that she was an elderly woman, and failed to weigh properly the expert evidence; particularly that of Professor Standish.

[12] The Supreme Court of Canada has recently provided guidance to Courts, such as this one, as to the approach to be taken in a judicial review of a tribunal's decision. Respect is to be given to the decision; the reasons are not to be examined minutely as to what was not said or to evidence not mentioned. Justice Abella, writing for the Court in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, wrote at paragraphs 15 to 18:

> *15 In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (Dunsmuir, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.*
>
> *16 Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn., [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the Dunsmuir criteria are met.*
>
> *17 The fact that there may be an alternative interpretation of the agreement to that provided by the arbitrator does not inevitably lead to the conclusion that the arbitrator's decision should be set aside if the decision itself is in the realm of reasonable outcomes. Reviewing judges should pay "respectful attention" to the decision-maker's reasons, and be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful.*
>
> *18 Evans J.A. in Canada Post Corp. v. Public Service Alliance of Canada, 2010 FCA 56, [2011] 2 F.C.R. 221, explained in reasons upheld by this Court (2011 SCC 57) that Dunsmuir seeks to "avoid an unduly formalistic approach to judicial review" (para. 164). He*

> *notes that "perfection is not the standard" and suggests that reviewing courts should ask whether "when read in light of the evidence before it and the nature of its statutory task, the Tribunal's reasons adequately explain the bases of its decision" (para. 163). I found the description by the Respondents in their Factum particularly helpful in explaining the nature of the exercise:*
>
> > *When reviewing a decision of an administrative body on the reasonableness standard, the guiding principle is deference. Reasons are not to be reviewed in a vacuum - the result is to be looked at in the context of the evidence, the parties' submissions and the process. Reasons do not have to be perfect. They do not have to be comprehensive. [para. 44]*

[13] I have considered Counsel's arguments and reviewed the decision of the Board Member and the record before him. I find that the decision is reasonable. He reasonably considered the relevant evidence, including awareness that Gjyste was an elderly woman, and weighed the expert reports. He preferred the expert evidence of Professor Alston. It was reasonable for him to do so.

[14] I find no basis for setting aside the Board Member's decision respecting the grandmother, Gjyste Pepaj.

AS TO ZEF GJON PEPAJ AND GJOVJANA PEPAJ (The Children)

[15] The Board Member found that Zef Gjon Pepaj and Gjovjana Pepaj (the children) were both citizens of the United States of America and could expect adequate state protection there. I repeat part of what he wrote at paragraphs 107 and 112 to 113 of his decision:

> *State Protection the United States*
>
> *[107] Gjovjana Pepaj and Zef Gjon Pepaj are citizens of the United States. They claim that they could not remain in the United States,*

> *and cannot return there, because the authorities there were aware of the blood feud and did nothing to prevent it.*[120]
>
> …
>
> *[112] Not only does the evidence fail to rebut the presumption of state protection in the United States, but it in fact supports the presumption. It may be that American authorities did not act perfectly in every instance, but it is clear that they took the claimants' problems seriously and acted. What is also clear is that the claimants were reluctant to vigorously pursue state protection, because they believed that the state could not protect them from a blood feud.*
>
> *[113] The panel finds that the U.S-born claimants can expect adequate state protection in their country of citizenship, and their claims must therefore fail.*

[16] Counsel for the children made the same type of arguments as did Counsel for the grandmother as to the treatment of the evidence by the Board Member. I make the same finding; the decision of the Board Member was reasonable.

[17] Counsel for the children made a further argument relying on the decision of Justice Teitlebaum of this Court in *John Doe v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1532, which applied the decision of the Supreme Court of Canada in *Ward v Canada (Minister of Employment and Immigration)*, [1993] 2 SCR 689. The argument was that due to the particular circumstances of this case, in that both parents had shot a person dead, thus provoking a blood feud that found its way into the United States, the children required a "high level" of state protection which the United States was unwilling to provide.

[18] I have reviewed the Board Member's decision, including the paragraphs repeated in these Reasons, and I find that the decision is reasonable. The Member found that the United States

authorities took the claimant's problems seriously, and acted. Any lack of protection was due, at least in part, to their reluctance to vigorously pursue state protection. The United States can provide a level of protection adequate in the circumstances.

CONCLUSION

[19] Accordingly, both applications are dismissed. There is no question to be certified. There is no special reason to order costs.

JUDGMENT

FOR THE REASONS PROVIDED:

THIS COURT'S JUDGMENT is that:

1. The application is dismissed;

2. No question is certified; and

3. No Order as to costs.

"Roger T. Hughes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5359-11
STYLE OF CAUSE:	GJYSTE PEPAJ v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	March 6, 2012
REASONS FOR JUDGMENT AND JUDGMENT BY:	HUGHES J.
DATED:	March 7, 2012

APPEARANCES:

Cheryl Robinson	FOR THE APPLICANT
Rachel Hepburn Craig	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Kranc Associates Barrister & Solicitor Toronto, Ontario	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT