

Federal Court



Cour fédérale

Date: 20130815

Docket: IMM-343-12

Citation: 2013 FC 874

Montréal, Quebec, August 15, 2013

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

**ANNA LARIONOVA
KOSTIANTYN KUZMENKO
SOFIYA LARIONOVA**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondents

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*, SC 2001, c 27 [IRPA], of a decision that the applicants were not Convention refugees or persons to be protected.

Background Facts

[2] Ms. Larionova, her father Mr. Kostiantyn Kuzmenko, and her six-year-old daughter Sofiya are Ukrainian citizens. Mr. Kuzmenko also possesses a Romanian passport. He was the principal applicant before the Immigration and Refugee Board. Ms. Larionova's brother, Daniil Kuzmenko, is deceased, leaving a widow and a now three-year-old son in Ukraine. Mr. Kuzmenko's wife Nataliya, and Ms. Larionova's husband Myraslav also remain in Ukraine.

[3] Mr. Kuzmenko is a Chernobyl survivor and a recipient of the Hero of Chernobyl metal. In 1999, he decided to dedicate his life to working with children. Together with his family, he founded and ran a home for orphans and street children in Kiev. This started out in a rented building with 40 children, but by 2006 he was able to build a purpose-designed house for 100 children. The new facility had a dining-room, computer room, psychologist's office, playground, and carpentry and sewing workshop, and provided classes in music, art, and English.

[4] In September 2010, representatives of the Office of Family and Youth visited the facility. They were angered to find that the children were being given religious education. The authorities began to tell Mr. Kuzmenko to cease reporting on the centre in the press and to contemplate closing it down. Local authorities informed him that he would not be funded and also requested that he close. However, small business owners continued to donate money to keep the centre running.

[5] In autumn 2010, two men came to the centre. They threatened and hit Mr. Kuzmenko and demanded 50% of the centre's funding. He was given two weeks to pay \$6,250 US. He explained that he had no spare money for this and that all donations went into the centre. They returned in two

weeks and repeated the demand. Seeing his granddaughter Sofiya, they let him understand that “something could happen to her.” Mr. Cruz testified that he did not go to the police because he was scared.

[6] In spring 2011, threatening phone calls began. On April 29, 2011, Mr. Kuzmenko reluctantly closed the centre. In May 2011, the family applied for visas to travel to Canada but were refused. They were followed around town, and one evening Ms. Larionova’s car was set on fire.

[7] Mr. Kuzmenko indicated in his Personal Information Form (PIF) that the police at the scene told the family that they had “crossed someone” and the fire department determined that it had been arson. Mr. Kuzmenko requested police protection but there was no response.

[8] Documents were entered into evidence that indicated that after the fire report, a statement was taken by the police from Ms. Larionova’s husband on July 12, 2011 in which he indicated that the car was deliberately set on fire.

[9] A further document of the police dated July 19, 2011 was entered into evidence that described a decision refusing to open a criminal case. In the report, Mr. Larionov is quoted as stating that he did not know why the passenger side of the car had caught on fire, that he did not have any enemies and did not observe anybody suspicious. Mr. Kuzmenko testified at the hearing, however, that he knew why it happened and who did it but did not know how he could possibly prove it.

[10] The police report indicates that an investigation was conducted and no eyewitnesses to the event were discovered. The investigation included that of “antisocial individuals” known to be inclined to committing offences and crimes who were examined under administrative supervision.

[11] Failing to establish anyone who could have carried out the act and noting that the car had cost US\$400, it was decided that, although an unidentified individual had committed a criminal offence, due to its insignificance the act did not pose social danger and a criminal case would not be opened. This information was conveyed to Mr. Larionov on July 13, 2011. He testified that he was not satisfied with the investigation.

[12] Mr. Kuzmenko testified that after the car was burned he went to the police and asked for protection because he was scared for his family and for his life. He related to the Chief of police how he had been kicked and his fear. The Chief of police was trying to calm them down and told him that he would send police officers to watch over his house. Mr. Kuzmenko states however that the Chief of police “was not burning of desire to protect us”. After the Chief of police indicated that the car that was burned was not worth too much, he testified that he realized that he would not get any protection.

[13] At the end of August 2011, Ms. Larionova, Mr. Larionov and the child Sofiya decided to attempt to enter Canada illegally for their safety. They obtained Lithuanian passports and travelled via Thailand, but were twice intercepted and taken off flights to Vancouver, first in South Korea and then in Taiwan. They had to return to Ukraine.

[14] On September 8, 2011, Mr. Kuzmenko was telephoned with a threat against his son's life, being Daniil Kuzmenko. He was told that his appeal to the police and statements to the investigators had doomed the family, which apparently had been made after the fire. Two days later he was called again and told that he had paid dearly for his stubbornness. Meanwhile, on September 9, his son had gone missing. Mr. Kuzmenko turned to the police. After eleven days, he learned that his son's half-naked body had been discovered dumped on or by the highway 40 kilometres outside Kiev without identification papers, and had been buried with other unknowns six days ago. When he finally found his son at the morgue through identifying clothing he had been wearing and informed the police of the threats which had been received, the police did nothing.

[15] Mr. Kuzmenko filed an application for an investigation into the inadequacy of the original investigation. A document was entered into evidence from the state prosecutor of Ukraine dated October 6, 2011 to the senior justice counselor in Kyiv referring to Mr. Kuzmenko's complaint and directing him to carry out an investigation. It included the application from Mr. Kuzmenko. The prosecutor was directed to inform the senior prosecutor about the results of the investigation.

[16] The family had Daniil Kuzmenko reburied. They again attempted to obtain visas for Canada and were again refused. Ms. Larionova then bought false German passports for herself and her daughter and flew to the Dominican Republic and from there to Cuba, then flew into Toronto and took a train to Montreal. Mr. Kuzmenko already had a five-year visa for the U.S. from a trip to the 2010 annual convention of the Seventh-Day Adventist Church in Atlanta, Georgia. He used his U.S. visa to fly to New York, then took a bus to Buffalo, where he received a Canadian visa and was able to enter Canada and rejoin his daughter and granddaughter.

[17] An undated summons to Mr. Kuzmenko's wife Nataliya was also entered into the evidence summoning her to attend before the police on November 30, 2011 concerning the investigation. Ms. Larionova indicated she did not know why Nataliya was called, "they were asking to find the murderers, but until now it's still silence about that".

[18] They indicated that the authorities wanted Nataliya to sign a document ending the investigation. There is no further information on the investigation. There is no evidence that the complainants took any steps to inquire about the progress or results of the investigation.

[19] Photographs of the deceased son Daniil were also entered into evidence. He was shown to be naked from the knees up with his shirt open and signs of severe bruising on his face and head.

[20] Mr. Kuzmenko's wife and son-in-law subsequently reported that officers with the Service on Human Trafficking came to their residence (they were living in the former children's centre) with a summons for the son-in-law, Myroslav Larionov, who was taken to an office in Kiev and interrogated about the Lithuanian passports the family had used before. He was told that if he did not turn in the people who had sold them, his wife and daughter would be deported back from Canada and jailed in Ukraine, and that he would be jailed if he did not cooperate. His telephone was searched. After a few hours he was released.

Decision of the Board

[21] The Board noted that the key issue was state protection. It found that the Ukrainian authorities had genuinely attempted to investigate the arson of Ms. Larionova's car and the alleged murder of Mr. Kuzmenko's son.

[22] The Board did not believe Mr. Kuzmenko's allegation that the state had not acted on his complaint or his statement that there is "complete silence till today."

[23] The Board, on its own initiative, researched the Criminal Code of Ukraine to determine the reference to s. 286 (2) in the letter of the State Prosecutor dated October 6, 2012 referred to above. The Board determined that this section addresses violation of rules related to vehicle driving safety which included the imposition of a term of imprisonment of 3 to 8 years in situations causing death or grievous bodily harm of the victim.

[24] Based on this information and the fact that Mr. Kuzmenko's wife had been summoned to testify in the investigation, the Board indicated that it had serious doubts about the cause of the son's death, suggesting he was likely killed in a road accident. It noted that the state had acted on their complaint. The Board stated that "although the claimants are unhappy with the findings of the investigation, they did not show, on a balance of probabilities, that state protection is inadequate.

[25] The Minister of Public Safety intervened before the Board with respect to Mr. Kuzmenko's Romanian citizenship to request that he be excluded from the claim under Article 1E as he was a

citizen of Ukraine and Romania. As the Board had found that there was adequate state protection, it did not address this submission.

[26] The Board concluded that the applicants were not Convention refugees or persons in need of protection.

Issues

[27] The issue raised by the applicants is whether the decision that the claimants are not persons in need of protection can be sustained on the basis that there is adequate state protection in Ukraine considering whether:

- a. the Board erred in concluding, on the sole basis of the police reports, that Mr. Kuzmenko's son was not murdered; and
- b. without taking into consideration all of the other evidence that the applicants were not refugees.

Standard of review

[28] These issues refer to the Board's assessment of the facts. They are therefore reviewable on a standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12).

Analysis

1. *Did the Board err in concluding, on the sole basis of the police reports, that Mr. Kuzmenko's son was not murdered?*

[29] As a starting point, I am not satisfied that the Board based its decision solely on any finding of how the son was killed. The thrust of the decision, as I read it, is that the police followed up adequately on matters when requested to do so.

[30] The claimants did not bring the issue of their being targeted to the police's attention until after the investigation of the arson of their son-in-law's vehicle. That incident was investigated with no suspects found and no help from the family; the son-in-law stating that he did not know who could have been responsible or how the incident could have happened. The applicants claim that a criminal file should have nevertheless been open, but to what end is not clear given the findings of the pre-investigation, particularly without the complainants not providing the information on their being targeted that might have assisted the police.

[31] The later complaint to the Chief of police of the extortion attempts, described by Mr. Kuzmenko resulted in a commitment by the Chief to send police officers to watch over his house. Mr. Kuzmenko indicated that he was not convinced of the genuineness of the offer because the Chief mentioned that dollar amount of the vehicle loss in the fire was not a large amount. The evidence nevertheless, demonstrates a commitment to provide protection.

[32] With respect to the investigation into the death of his son, the Board noted that the senior prosecutor pursued his complaint about the inadequacy of the investigation. He assigned it to a prosecutor for follow-up and demanded a report on the outcome. At the time the complainant left the Ukraine for Canada, the investigation was under way and his daughter had been subpoenaed or was about to be, to provide information as part of the investigation. Mr. Kuzmenko suggests that the

summons of his wife was only for the purpose of having the investigation abandoned, which well may have been a topic raised given that the complainant, who initiated the investigation, had emigrated from the country.

[33] What the results of the investigation were after the family left the Ukraine is a mystery; but the absence of information has to lie at the feet of the applicants. The only evidence that they provided was that they had heard nothing about the investigation. As the person making the complaint upon which the police were acting, there is no explanation why Mr. Kuzmenko did not follow up, or even that he had advised the police of his departure from the country. He had counsel in Canada and his wife and son-in-law remained in the Ukraine. He had already made one complaint that was acted upon. There is no explanation as to why he would not continue to press, or at a minimum, put on the record a request for the report to the senior bureaucrat so that closure of some sort could have been achieved on the matter.

[34] At a minimum, Mr. Kuzmenko did not even enter into evidence his letter of complaint to the police. It would have at least indicated in writing his opinion that the cause of death of his son was related to his being targeted as part of the extortion scheme. There is no explanation on the record connecting Daniil to these events as someone working and living in Kiev with no apparent role at the orphanage. There was no indication of his desire to leave the country with the rest of the family who had attempted to enter Canada prior to his death. It is clear from the Board's comments that it was concerned that documents concerning the investigation were missing.

[35] On the basis of the written documentation, the Board had a sufficient evidentiary foundation to conclude that an investigation had been carried out without any apparent help from the family, and that the complainants took no steps to inquire about the results of the investigation.

[36] There is nevertheless some basis for complainants' submission that the Board erred in concluding that it had serious doubts about the cause of the son's death which it believed was the result of a road accident. It is hard to disagree with the argument that the son's condition as shown in the police photographs is in any way suggestive of a motor vehicle accident. In particular, without some explanation as to how his pants had been lowered to his ankles, his state of undress is not easily assimilated under the heading of a motor vehicle accident.

[37] Of even greater concern is the fact that the Board on its own initiative consulted Ukrainian law to investigate the provisions under which the police investigation had been carried out and from this determining that it related to criminal negligence as opposed to some form of murder or manslaughter. The Board not only did his own research on foreign law, but also failed to provide the parties with an opportunity to respond to its findings.

[38] On the basis that the statutory provision mentioned in the investigation letter related to criminal negligence in the operation of an automobile, the Board formed its belief that the claimant's son was killed in a road accident. There is no other source of evidence for this conclusion.

[39] Obviously, by undertaking its own research and relying on the fruits of that research to come to conclusion not submitted by any of the parties in relation to an issue before the Board, it breached the fundamental rules of procedural fairness, which normally would require that the matter be sent back for reconsideration.

[40] Although the issue of the Board undertaking its own inquiry was not a point raised in the applicants' memorandum, the Minister acknowledges that it would have consented to the matter being returned for reconsideration, except for their submission that the Board's belief that the accident was the result of a motor vehicle accident was not pertinent to the conclusion that state protection was adequate. In other words, it is argued that removing this finding out of the decision would not impact on the reasonableness from all of the evidence that the state was acting to deal with issues in a fashion that meets the requirements of Canadian law to conclude adequate state protection.

[41] Normally, I would reject this argument out of hand but for the circumstances that apply in this case. The difficulty is that the Board did not know the nature or contents of Mr. Kuzmenko's complaint and what was the outcome of the investigation. The matter was proceeding, or had proceeded, we now learn after the fact under the rubric of a criminal motor vehicle accident. But apart from that, the Board had was photographs in need of an explanation as to the characterization of the crime and the complainants' evidence that the initial investigation was inadequate, including the burial of the body.

[42] There is more than sufficient evidence to conclude that a subsequent police investigation was carried out into the investigation itself and that the failure to have the results of the subsequent investigation before the Board was attributable to the complainants. There is no evidence of the results of the investigation on the cause of death or what its decision was based on and what follow up would occur. The complainants could not simply stand by and rely upon their taking no steps to demonstrate either that the investigation that they initiated was not carried out, or the results on the cause of Danil's death were not supportable in some fashion on the basis of other evidence.

[43] I agree the evidence before the Board, apart from any reference to the cause of death of Daniil appears sufficient to meet the standards of state protection as they are described by Zinn J., in *Morales v Canada (Minister of Citizenship and Immigration)*, 2009 FC 216 (CanLII), at paragraph 5 as follows:

[5] Canadian law relating to state protection has been stated and developed in a decade and a half of Federal Court jurisprudence interpreting and applying the seminal exposition of the issue in *Canada (Attorney General) v. Ward*, 1993 CanLII 105 (SCC), [1993] 2 S.C.R. 689. In that decision Justice La Forest stressed the surrogate nature of refugee protection; it is only the failure of the foreign state to protect that will engage Canadian responsibility. Absent a situation of total breakdown of state institutions, the ability of the foreign state to provide protection is presumed. The surrogacy principle has raised various issues relating to the intensity of the presumption of state protection and the type of evidence that can demonstrate a failure thereof. The following principles have been articulated in this respect:

- (i) The stronger the democratic institutions of the foreign state in question, the heavier the burden will be on the claimant to rebut the presumption: *Kadenko v. Canada (Solicitor General)*, (1996), 206 N.R. 272 (F.C.A.).
- (ii) A refugee claimant must make reasonable efforts to seek domestic state protection, but needn't exhaust every conceivable recourse: *Chaves v. Canada*

(Minister of Citizenship and Immigration), 2005 FC 193 (CanLII), 2005 FC 193.

(iii) Evidence sufficient to rebut the presumption must be “clear and convincing”: *Hinzman v. Canada* (Minister of Citizenship and Immigration), 2007 FCA 171 (CanLII), 2007 FCA 171.

(iv) An absence of perfect or ideal protection in the foreign state will not engage Canada’s surrogate role; “adequacy,” not effectiveness per se, is what matters: *Canada* (Minister of Citizenship and Immigration) v. *Carillo*, 2008 FCA 94 (CanLII), 2008 FCA 94.

[44] Accordingly, I accept the Minister’s submission that despite the failure in procedural fairness by the Board going outside the confines of the hearing, assuming no conclusion was made on the likely cause of death, this would not nullify the evidence that the Board relied upon to sustain its conclusion that state protection was adequate.

2. Did the Board err in concluding, without taking into consideration all of the other evidence of threats, assaults, and arson including the general documentation, that the applicants were not refugees?

[45] The applicants note that the Board made no adverse credibility findings and thus did not question the account of threats, assaults, and arson. They argue that the applicants’ subjective fear was well founded, given these experiences. The objective evidence of incidents was credible and serious enough to warrant granting refugee status. The complainants argue that the Board’s failure to take these other instances of persecution into account along with the evidence from the general documentation rendered its decision unreasonable.

[46] The Board accepted that these events occurred. The evidence however, was that they were not brought to the police’s attention until after the arson incident was investigated. Thereafter, the

case turns on whether the state protection was adequate. These incidents are relevant only to the issue whether the state adequately responded, which the Board concluded was sufficient for the reasons described.

[47] An issue was also taken with respect to the failure of the Board to consider the general documentation. However the general documentation did not suffice to demonstrate that state protection was not available, when there was evidence that the police had investigated the incidents. See *Sholla v Canada (Minister of Citizenship and Immigration)*, 2007 FC 999, *Tejeda v Canada (Minister of Citizenship and Immigration)*, 2008 CF 438; *Munoz v Canada (Minister of Citizenship and Immigration)*, 2009 FC 478. Moreover, there was no allegation that the police had been corrupted or had been involved in the threats to the applicants.

Conclusion

[48] The Board's decision was not unreasonable. The decision falls within the range of possible, acceptable outcomes that are defensible in fact and in law. For these reasons, the application is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed.

"Peter Annis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE: ANNA LARIONOVA ET AL.
AND MCI

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**REASONS FOR JUDGMENT
AND JUDGMENT:** ANNIS J.

DATED: August 15, 2013

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