Federal Court  Cour fédérale

Date: 20130822

Docket: IMM-10961-12

Citation: 2013 FC 892

Ottawa, Ontario, August 22, 2013

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

GEJZA CONKA, NADEZDA CONKOVA, STELA CONKOVA, AND OTILIA CONKOVA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision of a member of the Refugee Protection Division of the Immigration and Refugee Protection Board [the Board], pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act]. The Board dismissed the Applicants' claim for refugee protection, concluding that they were not convention refugees or persons in need of protection under sections 96 and 97 of the Act.

I. Background

[2] The Applicants are a family of Slovakian citizens, consisting of a father [the Principal Applicant, or PA], his wife, their daughter and their son. They are of Roma ethnicity.

[3] According to the PA's Personal Information Form [PIF] narrative filed on September 19, 2011, the Applicants have faced discrimination and racism throughout their lives in Slovakia. The key instances of alleged persecution are:

- In 2006, the PA's wife and children were refused medical care and the PA's wife was told to sterilize herself so that she would not have Roma children in the future;
- The Roma colony in which the Applicants lived was attacked every Friday. Rocks were thrown into their windows and they were verbally abused;
- The Applicants were refused access to public transportation and attacked based on their Roma ethnicity;
- In 2005, when the PA was employed as a construction worker, his coworkers started bullying him, writing racial taunts on his locker and changing the water temperature when he was showering; and
- The Applicants lived on the outskirts of a forest and could not go into the city or restaurants because of the abuse they faced.

[4] As a result of this persecution, the Applicants fled to Canada, claiming refugee status on August 25, 2011.

[5] In his testimony before the Board, the PA stated that he had never been physically attacked nor had his home been attacked or suffered damage, as it was somewhat protected within a Roma colony. The PA further testified that he had never had any personal contact with the police for any reason.

[6] The Board's decision notes that the claims in this case were joined pursuant to what is now section 55(1) of the *Refugee Protection Division Rules*, SOR/2012-256.

[7] The determinative issue for the Board in denying the Applicants' claim was state protection. The Board held that the Applicants had not rebutted the presumption of state protection.

[8] At the outset of its reasons, the Board describes discrimination testified to by the PA at the Board's hearing, not the discrimination referred to in the PA's PIF narrative. In other words, the Board describes the verbal abuse and the general attacks on the Applicants' settlement, not damage to the Applicants' home or any attacks against the PA. Consequently, the Board finds that the racism and discrimination against the claimants is not of the nature that would require state protection.

[9] Despite this finding, the Board continues to find that state protection, in the form of police services and oversight agencies, was available to the Applicants. It relies on a brief review of the documentary evidence to do so.

[10] The Board disposed of the claims of the PA and the PA's wife and children on the basis that there was no substantial difference between them.

II. Issues

[11] The issues raised in the present application are as follows:

A. Was it unreasonable for the Board to dispose of the Applicants' wife's claims on the same grounds as for the PA?

B. Was the Board's finding on state protection unreasonable?

III. Standard of review

[12] The Board's finding with regards to state protection is reviewable on the standard of reasonableness (*Khosa v Canada (Minister of Citizenship & Immigration)*, 2009 SCC 12 at paras 46, 59; *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 47-48, 51 [*Dunsmuir*]).

[13] Likewise, the question of whether the evidence underlying the Applicants' claims is factually similar is a question of fact, and entitles the Board to deference on the standard of reasonableness (*Dunsmuir*, above, at para 53).

[14] The Applicants also allege that the Board made a reviewable error in failing to mention certain aspects of the PA's PIF narrative. Adequacy of reasons does not attract an independent standard of review, rather, it should be considered as part of the reasonableness of the decision as a whole (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 14).

IV. Analysis

A. *Was it Unreasonable for the Board to Dispose of the Applicants' Claims on the Same Grounds?*

[15] The Applicants argue that the Board erred in failing to differentiate the PA's wife's claims from those of her husband, which violates her right to a fair hearing and sections 7 and 15 of the Charter, based on gender discrimination.

[16] This position ignores the fact that the Board did refer to and consider the Applicants' difficulties in seeking medical services, as set out in paragraph 5 of the Board's decision.

[17] Further, the Board held that there was adequate state protection available to the Applicants. If reasonable as a finding, it renders the other issues before the Board moot.

B. *Was the Board's Finding on State Protection Unreasonable?*

[18] The Applicants argue that the Board failed to note information contained in the PA's PIF narrative in the decision and that the Board's state protection finding was flawed as a result.

[19] With regards to the omission of the evidence of physical attacks in the PA's PIF narrative, the Board need not address all the evidence in coming to its decision. However, a requirement to explicitly consider evidence arises proportionately to the importance of that evidence to the determination of the issues, as per *Gondi v Canada (Minister of Citizenship and Immigration)*, 2005 FC 433 at para 16:

> It is settled law that the board is presumed to have had regard to all of the documents before it and it is not required to refer to every piece of evidence and to explain how it dealt with it: *Hassan v Canada*

> *(Minister of Employment and Immigration)* (1992), 147 NR 317 (FCA). However, the need to refer to and analyse specific evidence increases with the importance of the evidence: *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35 (TD).

[20] Evidence of physical attacks is very relevant to the question of whether state protection is needed. However, it can be inferred from a review of the transcript that the Board was justified in not mentioning the incidents described in the PIF narrative. On page 221 of the record, the following dialogue from the Board hearing takes place between the Board and the PA:

> Q: Have you ever personally you (sic) or your wife or children been physically attacked by any of these people?
>
> A: It didn't happen personally to us, but it happened to our next door neighbours when they went to town and they were attacked.

[21] At page 223, the Board asks a similar question:

> Q: Okay. So I understand that you and your wife were never physically attacked by any of these skinheads or other racists. That's correct, is it?
>
> A: Yes, that's correct.

[22] It is clear that the Board turned its mind to whether the Applicants were attacked and gave the PA an opportunity to state that they were. While the Board could have done more to explicitly question the PA on the discrepancy between his testimony and his PIF narrative, it is apparent it addressed the fundamental question (whether the PA was attacked) twice during the hearing, and addressed his response (that he was not attacked) in its reasons. It does not therefore seem reasonable to conclude that the Board ignored this evidence and thereby came to an erroneous decision. The Board's conclusion was reasonable.

[23] The Applicants also fail when it comes to the availability of state protection. The test for this was stated in *Carillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 at para 30:

> 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.

[24] The Board's analysis of whether state protection is available is relatively meagre, consisting of a brief review of documentary evidence of institutional efforts by Slovakia to protect the Roma. It does not address the operational adequacy of these efforts (*EYMV v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1364).

[25] However, in *Ward v Canada (Minister of Citizenship and Immigration)*, [1993] 2 SCR 689 at para 49, Justice La Forest states that a claimant's application will be defeated where state protection might reasonably have been forthcoming, but the applicant failed to seek it. In this case, the Applicants made no attempt to seek state protection. While the Applicants did testify that they assumed such attempts would be futile, that evidence is unconvincing, in the face of the documentary evidence discussed by the Board. While it is not required for a claimant to, as per *Ward*, above, at 48, "risk his or her life seeking ineffective protection of a state, merely to demonstrate that ineffectiveness," the Applicants' failure to take any steps to seek protection, given the lack of violence directed at them, was not reasonable.

[26] Accordingly, while the Board's review of the documentary evidence alone may not be sufficient to demonstrate adequate state protection in Slovakia, the Applicants did not attempt to

seek police protection at all, and in not doing so, did nothing to rebut the presumption of state protection.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Applicants application for judicial review is dismissed;

2. No question is to be certified.

"Michael D. Manson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-10961-12
STYLE OF CAUSE:	Conka et al. v. MCI
PLACE OF HEARING:	Toronto, Ontario
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