Federal Court

Cour fédérale

Date: 20130809

Docket: IMM-6514-12

Citation: 2013 FC 851

Ottawa, Ontario, August 9, 2013

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

BORIS GVOZDENOVIC
KRISTINA GVOZDENOVIC
PAUL GVOZDENOVIC
LUKAS GVOZDENOVIC

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 (Act) for judicial review of the decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board, dated 5 June 2012 (Decision), which refused the

Applicants' application to be deemed Convention refugees or a persons in need of protection under sections 96 and 97 of the Act.

BACKGROUND

[2] The Primary Applicant (Applicant) is a 39-year-old male of Serbian ethnicity, and the Secondary Applicants are his wife and two sons. The Applicant and his family are citizens of Croatia.

[3] The Applicant was born and lived in a small town in Croatia with his wife and two sons. The town is composed of roughly 15,000 people and is "maybe 70 kilometers" away from Zagreb. In 2007, the Applicant became a member of the Social Democratic Party (SDP), because he found it difficult to find a job without being a member of a political party. The Applicant was not initially interested in politics, but sympathized with the party's political program and appreciated that the party was not based on nationality.

[4] Gradually, the Applicant became more involved with the SDP. He started having problems with friends and neighbours who told him that if he was really a Croat then he would be a member of the Croatian Democratic Party (HDZ). However, the Applicant remained a member of the SDP because he believed in democracy and the Croatian system.

[5] At a meeting of the local SDP association in 2008 the Applicant was elected President against his wishes. He began to experience escalating intimidation and threats, which he partly attributed to his Serbian ethnicity. This included: personal attacks and anonymous, life-threatening phone calls on a regular basis; attacks on his wife on two different occasions; someone following

the Applicant's son; and several dead animals that were left with notes threatening him and his family. When the Applicant complained to other SDP members, they told him that it was normal and that he must not give up. The Applicant did not go to the police because the head of the police was a great sympathizer of the HDZ.

[6] The Applicant tried to resign from his position as President, but the party refused to allow him, saying that everything that was happening was part of the political fight. Worried that he would be re-elected in an upcoming election and that the risk would continue to grow, the Applicant and his family fled to Canada in June 2011. In support of his claim, the Applicant filed a letter from his brother-in-law confirming his Serbian ethnicity, two letters from Zlata Kasaic and In Kutina confirming attacks on the Applicant and his family, and a letter from Measki Mario confirming that the Applicant was elected President of the local branch of the SDP in Repusnica. The Applicant's refugee hearing took place on 31 January 2012, and his claim was refused on 5 June 2012.

DECISION UNDER REVIEW

[7] The RPD dismissed the Applicant's claim on several bases, namely "the credibility of the claimants' testimony, the subjective component of the well-founded fear of persecution, the objective component of their well-founded fear, notably whom the claimants fear would persecute them should they return to Croatia, and the availability of state protection and an Internal Flight Alternative (IFA) [in Zagreb]."

[8] The RPD doubted the Applicant's credibility and found much of his claim to be implausible. In this regard, it stated:

> The Panel finds it not credible that this claimant and his wife would remain for three years allegedly under threat by unknown persons and make no effort to seek police assistance or any other support in determining the persons responsible for such behaviour. The Panel finds the evidence in this claim totally untrustworthy and lacking in any credibility and that, on a balance of possibilities, the incidents as the claimant has described never occurred and, therefore, do not believe what the claimant has alleged in his claim. …

[9] The RPD also noted that the only evidence that supported the Applicant's Serbian ethnicity was a letter from his brother-in-law, stating that the family declared themselves as Croats during the war, and the Applicant's Serbian ethnicity only came to light after his marriage. The RPD noted that the Applicant's marriage certificate recorded both his and his wife's nationalities as Croat, and that if the Applicant's name was ethnically Serbian then his wife's family would have known he was a Serb before the marriage.

[10] As regards state protection, the RPD noted at paragraph 9 of the Decision that "The claimant has the burden of rebutting the presumption of state protection. These claimants in not making any reasonable efforts to seek protection have not presented any clear and convincing proof of Croatia's inability to protect its own citizens." The RPD also noted that there was no evidence that the Applicant's brother or mother, who continue to live in the Applicant's town, have been persecuted for being Serbian.

[11] The RPD also found that an IFA exists in Zagreb. While the documentary evidence indicated there is some discrimination against minorities in Zagreb, the RPD did not think the Applicants faced an objective risk of being persecuted there. The RPD found there was nothing to indicate the Applicants would face any sort of hardship that rendered the IFA unreasonable.

[12] The RPD found that the Applicants' refugee claim was grounded in a desire to seek a better life in Canada, and that this is not a ground for refugee protection. For the above reasons, the RPD rejected the Applicants' claim for refugee protection under both section 96 and 97 of the Act.

ISSUES

[13] The Applicants raise the following issues in this proceeding:

a. Did the RPD err in law because it ignored highly corroborative evidence that supported the claim and that ought to have been considered?

b. Did the RPD err in making an adverse credibility finding because it made unreasonable plausibility findings and ignored evidence?

c. Did the RPD err in its IFA finding because it misconstrued and ignored evidence in relation to the risk faced by the Applicant in Zagreb?

STANDARD OF REVIEW

[14] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[15] The RPD's evaluation of the evidence before it is something to which deference is owed, and is reviewable on a reasonableness standard (*Alhayek v Canada (Minister of Citizenship and*

Immigration), 2012 FC 1126 at paragraph 49). Thus, the first issue will be reviewed on a reasonableness standard.

[16] In *Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 (FCA) the Federal Court of Appeal held that the standard of review on a credibility finding is reasonableness. Further, in *Elmi v Canada (Minister of Citizenship and Immigration)*, 2008 FC 773, at paragraph 21, Justice Max Teitelbaum held that findings of credibility are central to the RPD's finding of fact and are therefore to be evaluated on a standard of review of reasonableness. Finally, in *Aguilar Zacarias v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1155, Justice Mary Gleason held at paragraph 9 that the standard of review on a credibility determination is reasonableness. The second issue will be reviewed on a standard of reasonableness.

[17] The existence of an IFA is a matter of mixed fact and law, and is reviewable on a reasonableness standard (see *Davila v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1116 at paragraph 26; *Nzayisenga v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1103 at paragraph 25; *M.A.C.P. v Canada (Minister of Citizenship and Immigration)*, 2011 FC 81 at paragraph 29). Also involved in this issue is state protection, which the Federal Court of Appeal held in *Carillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 at paragraph 36 is reviewable on a reasonableness standard. Thus, reasonableness is the standard applicable to the third issue.

[18] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at

paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

STATUTORY PROVISIONS

[19] The following provisions of the Act are applicable in this case:

Convention refugee	**Définition de « réfugié »**
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	**96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	*a*) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
[…]	[…]
Person in Need of Protection	**Personne à protéger**
97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would	**97.** (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence

subject them personally	habituelle, exposée :
(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	*a*) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	*b*) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,	(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,	(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
[…]	[…]

ARGUMENTS

The Applicants

Did the RPD ignore corroborative evidence?

[20] The RPD found the Applicant's testimony implausible due to his failure to report anything to the police. However, the RPD had evidence before it that went to the heart of the Applicant's claim, and thus had an obligation to consider that evidence and explain why it did not accept it (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 (TD)).

[21] The RPD had before it three letters corroborating the Applicant's story and the threats the family received, yet the RPD only referred to one of these letters – the one from the Applicant's brother-in-law confirming that the Applicant is a Serb. All the other corroborating documents that confirmed the events that led to the Applicant fleeing Croatia were not mentioned at all. The RPD cannot simply ignore this evidence, and if it disbelieved this evidence it was required to provide good reasons for rejecting it.

[22] This is similar to the case in *Terigho v Canada (Minister of Citizenship and Immigration)*, 2006 FC 835, where the Court noted at paragraphs 9-10:

> There is generally a presumption that a tribunal, such as an officer conducting an H&C assessment, will have considered all of the evidence that was before it. But where there is relevant evidence that contradicts the tribunal's finding on a central issue, there is an obligation on the tribunal to analyse that evidence and to explain in its decision why it does not accept it or prefers other evidence on the point in question. The greater the relevance of the evidence, the greater the need for the tribunal to explain its reasons for not attributing weight to them: *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, (1998) 157 F.T.R. 35, [1998] F.C.J.

> No. 1425 (QL) (T.D.); *Hilo v. Canada (Minister of Employment and Immigration)* (1991), 130 N.R. 236, 15 Imm. L.R. (2d) 199 (F.C.A.).
>
> There is no question that the documentary evidence was highly relevant to the issue of the genuineness of the marriage. When cross-examined on her affidavit as to why she made no mention of the documents in her decision, the officer's response was, in essence, that they were only one piece of evidence and that she preferred to rely upon the face to face interviews and her assessment of the spouses' consistency in answer to her questions. Thus it appears that the officer totally discounted the documents and based her decision entirely upon the opinion she formed from the interviews. While I have no doubt that interviews can be an effective tool in uncovering fraud in the H&C process, the results achieved do not relieve the officer of the responsibility to properly analyse the other evidence. Her failure to do so is a reviewable error.

[23] In the alternative, if the Court determines that the RPD did consider this evidence, the Applicant submits that the RPD failed to provide adequate reasons for rejecting it. There is a presumption of truthfulness, and negative credibility findings must be made in clear and express terms. As stated in paragraphs 12-13 of *John Doe 2004 v Canada (Minister of Citizenship and Immigration)*, 2004 FC 360:

> As stated in *Maldonado v. Canada (Minister of Employment and Immigration)*, [1980] 2 F.C. 302, when an applicant swears that the allegations are true, this creates a presumption:
>
> > It is my opinion that the Board acted arbitrarily in choosing without valid reasons, to doubt the applicant's credibility concerning the sworn statements made by him and referred to supra. When an applicant swears to the truth of certain allegations, this creates a presumption that those allegations are true unless there be reason to doubt their truthfulness ... On this record, I am unable to discover valid reasons for the Board doubting the truth of the applicant's allegations above referred to.
>
> Despite the latitude that is given to the Board in the assessment of credibility, the Board has the duty to identify all unfavourable credibility findings in "clear and unmistakable terms" (see *Hilo v.*

> *Canada (Minister of Employment and Immigration)*, [1991] F.C.J. No. 228). This normally includes the duty to give examples or illustrations of the reasons in order to explain why the applicant's testimony was not accepted, as discussed in *Gonzalez v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 1256.

[24] The Applicant submits that the RPD failed to provide adequate reasons for rejecting his evidence.

Credibility

[25] Furthermore, in this case, the RPD did not disbelieve the Applicant because of contradictions in his testimony or his demeanour, but based its negative credibility finding solely on the implausibility of his story. The Court noted in *Pulido v Canada (Minister of Citizenship and Immigration)*, 2007 FC 209 at paragraph 37:

> There are several problems with this submission. First of all, it is well established that in making plausibility findings, the Board must proceed with caution, and that such findings should only be made in the clearest of cases, where, for example the facts are either so far outside the realm of what could reasonably be expected that the trier of fact could reasonably find that it could not possibly have happened, or where the documentary evidence before the tribunal demonstrates that the events could not have happened in the manner asserted by the claimant: see *Divsalar v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 875, 2003 FCT 653, at para. 24. That is simply not the case here.

[26] The RPD found it implausible that the Applicant did not complain to the police, but the Applicant clearly explained that it would have been futile for him to seek help from the police because the authorities were dominated by the HDZ. The RPD held that the Applicant should have

complained to some higher authority, but this question was never put forward to him. Thus, this finding was unreasonable.

[27] Moreover, the Applicant indicated that the assailants threatened that if he or his wife complained to the police they would suffer serious consequences. This explanation was completely ignored by the RPD. The RPD also found that the Applicant ought to have complained to local SDP officials, but the Applicant stated that he did so and that it was futile. The RPD's finding was erroneous in this regard.

Internal Flight Alternative

[28] The RPD found that the Applicant would not be at risk in Zagreb, a city that is "miles" from where he lived. The Applicant testified that he could not go to Zagreb because he feared persecution due to his Serbian ethnicity, and that he had a noticeably Serbian name. The RPD noted that the only evidence of the Applicant's ethnicity came from the letter from his brother-in-law, and that if the Applicant's name was recognizably Serbian his ethnicity would have come to light prior to his marriage.

[29] The Applicant submits that the RPD misunderstood the letter from the brother-in-law. The brother-in-law does not say that he only learned of the Applicant's Serbian heritage after the marriage, but rather that he was asked about it by others after the marriage. Thus, the Applicant submits that the RPD's conclusion that the Applicant was not Serbian or recognizably Serbian was an error. The Applicant points out that he provided cogent *viva voce* evidence as to his ethnicity, which the RPD was obliged to consider.

[30] The RPD also inferred that because the Applicant's family did not have problems, he would not have problems. However, the Applicant testified that his brother faced constant employment discrimination due to the fact that he was Serbian. More importantly, the Applicant asserted that the problems he faced arose not only because he is a Serb, but because he was a politically active Serb. The RPD was required to make an assessment based on this evidence, and if the RPD disbelieved it then it was required to explain why.

[31] There was evidence before the RPD in relation to the IFA that indicated that it was not only unreasonable because of his ethnicity, but because he was politically active and known all over Croatia. It was open to the RPD to reject this evidence, but it could not simply ignore it.

The Respondent

Credibility

[32] The Respondent submits that the RPD's finding that it was not plausible that the Applicant failed to seek any help over three years of attacks and threats was reasonable. This finding was based on the documentary evidence, common sense and rationality.

[33] The RPD reviewed the documentary evidence about the SDP, which said that the party had some influence in Croatia. It was therefore reasonable to expect the Applicant to report the incidents to someone of influence. The Applicant incorrectly argues that the RPD found that he did not complain to the local SDP, when the RPD actually found that the Applicant did not complain to the mayor or other people of influence. As such, the Respondent submits that the RPD did not err.

[34] Moreover, the Applicant's actions are far outside what one would reasonably expect. The Applicant and his family allegedly experienced multiple attacks and serious threats. The Applicant testified that he was really afraid for his family, but yet remained in his political position and waited two years to take any action, despite continuing threats and attacks. The Applicant's actions do not accord with common sense and rationality, and the RPD is entitled to reject evidence if it is not consistent with the probabilities affecting the case as whole (*Araya v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 626 at paragraph 6).

[35] The RPD is presumed to have considered all the evidence and is under no obligation to mention every piece of evidence in its Decision (*Hassan v Canada (Minister of Employment and Immigration)*, [1992] FCJ No 946 (CA)). The RPD did not need to mention the letters submitted by the Applicant; it found that the failure to make any efforts to seek protection undermined his credibility to the extent that it concluded the incidents alleged never occurred. Since it did not believe the events happened as alleged, the letters were not important enough to be referred to in the Decision.

Internal Flight Alternative

[36] The Applicant argues that the RPD misconstrued the letter from this brother-in-law, but the letter states that only after the marriage did friends ask about the Applicant's ethnicity, and that the brother-in-law did not know the Applicant was Serbian until the Applicant told him. This implies that the brother-in-law did not know the Applicant was Serbian simply from his name. As such, the Respondent submits that the RPD's interpretation that the Applicant's wife's family was not aware of his ethnicity from the letter was reasonable.

[37] Regardless, the RPD also found that the Applicant would not be persecuted. There is no evidence that his brother and mother who reside in his town are being persecuted for being Serbian. The Applicant argues that the RPD discounted his testimony that his brother faced discrimination in employment due to being Serbian, but the RPD found that there was no evidence of persecution. The Applicant did not demonstrate that his brother's employment difficulties rise to the level of persecution.

[38] The Respondent also points out that the Applicant has not adduced evidence that, because he was once politically active and a Serb, people will persecute him in Zagreb and throughout Croatia. Thus, it was reasonable for the RPD to only mention the Applicant's claim in relation to his ethnicity.

[39] The Respondent points out that the finding of an IFA is determinative of a claim for refugee protection. As the Applicant has failed to demonstrate that the RPD's IFA finding was unreasonable, this issue is determinative of this judicial review.

The Applicant's Reply

[40] The Applicant points out that the sole credibility finding was that it was not plausible that the Applicant would not seek protection from the authorities. However, this situation was amply explained during the course of the hearing. The Applicant reiterates that the RPD ignored evidence and drew unreasonable inferences.

[41] The Respondent asserts that the RPD's IFA finding was reasonable; however, this finding was based on the fact that the Applicant would not be recognizable as a Serb. The Applicant

submits that this finding was not reasonably available to the RPD, and thus the IFA finding is unreasonable.

[42] Moreover, the RPD's finding that the Applicant would not face hardship in Zagreb is inconsistent with the RPD's own finding that there is discrimination against Serbs in Croatia.

ANALYSIS

[43] Applicants' counsel argues that the only real issue in this Decision is credibility and that, had the RPD found the Applicants believable, all the other findings would have been different. I do not think that a fair and reasonable reading of the Decision supports that position. Paragraph 6 of the Decision makes it clear that the "determinative issues" are:

a. Credibility;

b. The subjective and objective components of well-founded fear;

c. The availability of state protection;

d. IFA

The RPD then goes on to provide a separate analysis for each of these issues. IFA is given its own heading, but paragraphs 8 and 9 deal with state protection and make clear and discrete findings on point.

[44] The Applicants' failure to seek protection in the face of severe threats over three years caused the RPD to doubt their credibility, but their failure to go to the police, given the other evidence on point, also meant that they had failed to rebut the presumption of state protection.

[45] The RPD's state protection analysis is brief but, given the failure of the Applicants to refer to any documentary evidence on point in post-hearing submissions, the analysis is sufficiently transparent and justifiable.

[46] The RPD adequately addresses the reasons put forward by the Applicant as to why he did nothing to seek protection after three years of serious threats. I cannot say that the state protection analysis contains a reviewable error that takes it outside of the *Dunsmuir* range.

[47] I am also not convinced that the IFA analysis was unreasonable. Even if the RPD did make a mistake about whether the Applicant was recognizable as a Serb (and the evidence is not clear on this point) there was no evidence that his family members in Croatia have been persecuted, or that he would be a marked man in Zagreb if he ceased his political activities (which he claims he wants to do). The threats he received were because of his post- political involvement with the SDP and he has now quit that position.

[48] All in all, I cannot find a reviewable error with either the state protection findings, or the IFA findings. In my view, these findings stand as alternative grounds to the issues surrounding credibility. In my view, then, there is no reason to assess the Applicants' credibility arguments.

[49] Counsel agrees there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. There is no question for certification.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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