Federal Court  Cour fédérale

Date: 20140131

Docket: IMM-6327-12

Citation: 2014 FC 115

Ottawa, Ontario, January 31, 2014

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

LESLAW DAWIDOWICZ
DAWIDOWICZ DAWID
(a.k.a. DAWID MOJZESZ DAWIDOWICZ)
DANUTA DAWIDOWICZ
MIRANDA DAWIDOWICZ
ANDRZEJ DAWIDOWICZ
KLAUDINA JULIA MIRGA
(a.k.a. KLAUDYNA JULIA MIRGA)

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants' claims for refugee protection were denied by the Refugee Protection Division of the Immigration and Refugee Board of Canada (the Board). They now apply for

judicial review of that decision pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

[2] The applicants seek an order setting aside the negative decision and returning the matter to a different panel of the Board for redetermination.

Background

[3] The applicants are a Roma family of three generations from Poland. They arrived in Canada on April 15, 2011 and they asked for refugee protection shortly thereafter. All ten claims relied primarily on the narrative of the father/grandfather, Leslaw Dawidowicz (the principal applicant).

Decision

[4] The Board denied their claims by a decision dated May 23, 2012.

[5] The Board began by setting out the applicants' allegations. The applicants feared violence at the hands of skinheads and discrimination amounting to persecution. The principal applicant recounted many incidents to support the claims, including some violent assaults. Their efforts to seek protection have met with mixed results: sometimes the police would do nothing; one time the police arrested their attackers; another time the police detained them instead.

[6] State protection was the determinative issue and the Board said at paragraph 8 that the issue was "whether Polish authorities can be reasonably expected to provide the claimants with serious efforts at protection if they were to return to Poland, and not whether those authorities can be reasonably expected to provide the claimants with *de facto* effective or *de facto* guaranteed protection." Further, clear and convincing evidence would be required since Poland is a parliamentary democracy.

[7] Here, the Board found that the applicants had not met that burden. Although local police had failed the applicants on occasion, the Board said that such failures do not amount to a lack of state protection unless they are a symptom of the state's broader inability to protect. Further, the Board found that Poland itself was not an agent of persecution and that it is combating discrimination and offering sufficient protection that the applicants' fears are not well-founded.

[8] The Board then went on to explain its findings by quoting from a number of sources and it concluded that state protection mechanisms exist and are available for ethnic minorities. For that reason, the applicants' claims failed under both section 96 and subsection 97(1) of the Act.

Application for Judicial Review

[9] All ten claimants applied for judicial review. However, four of them (Klaudiusz Dawidowicz, Kornela Klaudia Kowalska, Chanel Irena Kowalsk and Juliano Gabriel Kowalski) have since filed a notice of discontinuance.

Issues

[10] The applicants submit two issues for my consideration:

1. Did the Board err by failing to reasonably assess the evidence as a whole and not having regard for the totality of the evidence?

2. Did the Board err in the definition and assessment of persecution and state protection?

[11] The respondent replies that the Board's finding on state protection is reasonable.

[12] I would rephrase the issues as follows:

1. What is the standard of review?

2. Did the Board misunderstand the tests for persecution and state protection?

3. Was the Board's decision unreasonable?

Applicants' Written Submissions

[13] The applicants say that the standard of review is reasonableness and that the decision was unreasonable.

[14] First, the applicants note that the Board did not say anything about the applicants' credibility and should be assumed to have accepted their stories, including those regarding the failure of the police to act. Indeed, at the hearing, the Board took them straight to the issues of

state protection and discrimination versus persecution and asked very few questions. The applicants submit that the short hearing was inconsistent with a reasonable consideration of the issues and that suggests it was unreasonable.

[15] The applicants then say that the Board applied the wrong test. In particular, they take issue with the Board's statement at paragraph 11 that the applicants "do not have a well-founded fear of persecution because of the protections provided by the state and by the European Union within Poland." They suggest that the Board erred by stating this as a causal relationship and for jumping into the state protection analysis without ever assessing whether the cumulative acts of discrimination amounted to persecution (see *Munderere v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 84 at paragraph 42, 291 DLR (4th) 68; *Hegedüs v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1366 at paragraph 2, [2011] FCJ No 1669 (QL); *Bledy v Canada (Minister of Citizenship and Immigration)*, 2011 FC 210 at paragraphs 35 and 36, 97 Imm LR (3d) 243; and others).

[16] The applicants also note that the Board concluded its decision by citing *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 [*Khosa*], and saying that a denial of refugee protection was a reasonable outcome. The applicants say that this is for the Court to determine and the Board was wrong to try and anticipate a judicial review.

[17] The applicants then go on to challenge the Board's state protection analysis and say it applied the wrong test by only requiring "serious efforts to protect." The applicants say that that is not the test. Rather, the Board was required to look at the operational adequacy or actual

effectiveness of those efforts at the present time, which it did not do (see *Bautista v Canada (Minister of Citizenship and Immigration)*, 2010 FC 126 at paragraphs 8, 10 and 15, [2010] FCJ No 153 (QL); *Harinarain Kumati v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1519 at paragraphs 27, 28, 34, 39 and 42, [2012] FCJ No 1637 (QL) [*Harinarain*]; *Orgona v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1438 at paragraphs 11, 12, 15 and 16, [2012] FCJ No 1545 (QL); and others). In the applicants' view, "adequate" means effective protection, though not in every case and not guaranteed.

[18] Had the Board applied the right test, the applicants say the sources consulted by the Board show that no such protection exists on an operational level. Rather, they report the following: police corruption; discrimination and violence against the Roma; segregation of the Roma; 80 percent unemployment among Roma; and efforts to improve the situation have had little impact. Further, they say that the Board misconstrued the response to information request. The applicants say the evidence proves the Board wrong and its failure to deal with the contradictory evidence renders the decision unreasonable (see *Ignacz v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1164 at paragraphs 23 and 30, [2013] FCJ No 1253 (QL); *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 (QL) at paragraphs 15 to 17, 157 FTR 35).

[19] Altogether, the applicants submit that the Board's failure to look at operational adequacy and to properly consider their evidence made the decision unreasonable.

Respondent's Written Submissions

[20] The respondent says the standard of review is reasonableness and the decision was reasonable.

[21] The respondent says that the onus is on the applicants to rebut the presumption of state protection and that the test is adequacy, not effectiveness (see *Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 at paragraphs 30 and 38, [2008] 4 FCR 636). Here, the evidence on Poland's responses to anti-minority incidents were mixed and did not rebut the presumption of state protection. As for the applicants' claim that the Board ignored evidence, the respondent notes that they give no examples of any contradictions between the Board's conclusions and the documentary evidence. There is no reviewable error.

Analysis and Decision

[22] **Issue 1**

What is the standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 57, [2008] 1 SCR 190 [*Dunsmuir*]).

[23] The parties agree that the standard of review for all issues is reasonableness, but I do not. Chief Justice Paul Crampton recently explained the standard of review for decisions on

persecution and state protection in *Ruszo v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1004 at paragraphs 20 to 22, [2013] FCJ No 1099 (QL) [*Ruszo*]. In essence, since the jurisprudence has developed clear tests for both, a board cannot depart from them. Therefore, where applicants allege that a board misunderstood the test, the standard is correctness and no deference is owed to the board's understanding of the relevant tests. However, where applicants challenge how the tests were applied to the facts, those are questions of mixed law and fact and the standard is reasonableness (*Ruszo* at paragraphs 20 to 22; *Gur v Canada (Minister of Citizenship and Immigration)*, 2012 FC 992 at paragraph 17, [2012] FCJ No 1082 (QL); *Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171 at paragraph 38, 282 DLR (4th) 413 [*Hinzman*]). Here, the applicants allege both types of errors, so I will review the former type for correctness and the latter type for reasonableness.

[24] When applying the reasonableness standard, I should not intervene if the Board's decision is transparent, justifiable, intelligible and within the range of acceptable outcomes (see *Dunsmuir* at paragraph 47; and *Khosa* at paragraph 59). As the Supreme Court held in *Khosa* at paragraphs 59 and 61, a court reviewing for reasonableness cannot substitute its own view of a preferable outcome, nor can it reweigh the evidence.

[25] **Issue 2**

Did the Board misunderstand the tests for persecution and state protection?

The applicants' first argument is that the Board failed to consider the well-foundedness of the applicants' fears since it did not assess whether the acts of discrimination cumulatively

amounted to persecution. Rather, it assessed only state protection and decided that the fear was not well-founded since state protection exists.

[26] The Board made no mistake in that regard. In *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at 712, the Supreme Court of Canada said that "if a state is able to protect the claimant, then his or her fear is not, objectively speaking, well-founded." Similarly, in *Hinzman*, the Federal Court of Appeal said the same thing at paragraph 42:

> In determining whether refugee claimants have an objective basis for their fear of persecution, the first step in the analysis is to assess whether they can be protected from the alleged persecution by their home state. […] Where sufficient state protection is available, claimants will be unable to establish that their fear of persecution is objectively well-founded and therefore will not be entitled to refugee status. It is only where state protection is not available that the court moves to the second stage, wherein it considers whether the conduct alleged to be persecutory can provide an objective basis for the fear of persecution.

[27] The Board was therefore correct to approach the issue the way it did. Having found adequate protection, there was no need to go on to consider whether the cumulative acts of discrimination amounted to persecution since such a finding could not have changed the result.

State Protection Test

[28] As for the state protection test, the Board made the following statements in its decision:

> [6] As states are presumed capable of protecting their citizens, an important issue before me is whether there is clear and convincing evidence that Polish authorities would not, on a balance of probabilities, be reasonably forthcoming with serious efforts to protect the claimants if they were to return to Poland now. It was

open to the claimants to rebut the presumption of state protection with clear and convincing evidence that adequate protection would not be reasonably forthcoming to them.

…

[8] According to refugee protection law, states only need to provide adequate protection and do not have to provide perfect protection; in other words, states only have to make serious efforts at protection and do not have to provide *de facto* effective or *de facto* guaranteed protection. Therefore, the state protection issue here is only whether Polish authorities can be reasonably expected to provide the claimants with serious efforts at protection if they were to return to Poland, and not whether those authorities can be reasonably expected to provide the claimants with *de facto* effective or *de facto* guaranteed protection.

…

[12] The latest United States of America (US) Department of State country report indicates that the state of Poland does not condone violence or discrimination against ethnic minorities, and it also indicates that Poland is making serious efforts, both in policy and in practice, to combat violence and discrimination against minorities, as follows:

…

[15] Response to an Information Request POL103089.E further indicates the same thing: while state protection for ethnic minorities in Poland is not perfect, adequate protection mechanisms do exist and are available to them.

…

[17] Based upon my review of the objective country conditions documents referenced above, I find that I am not persuaded on a balance of probabilities that Polish authorities would not be reasonably forthcoming with serious efforts to protect the claimants if they were to return to Poland. I therefore find, on the evidence, that the claimants have not rebutted the presumption of state protection with clear and convincing evidence.

(Footnotes omitted)

[29] In *Harinarain* I wrote:

> [26] The Board's decision, however, frequently invokes the "serious efforts" of a state to provide protection. This concept is invoked at least ten times in its decision, including in its stating of the test for refugee status:
>
> > According to refugee protection law, home states only need to provide adequate protection and do not have to provide perfect protection: in other words, home states only need to make serious efforts at protection and do not have to provide *de facto* effective or *de facto* guaranteed protection.
>
> [27] The use of the phrase "in other words" in the passage is incorrect: "adequate protection" and "serious efforts at protection" are not the same thing. The former is concerned with whether the actual outcome of protection exists in a given country, while the latter merely indicates whether the state has taken steps to provide that protection.
>
> [28] It is of little comfort to a person fearing persecution that a state has made an effort to provide protection if that effort has little effect. For that reason, the Board is tasked with evaluating the empirical reality of the adequacy of state protection.
>
> [29] This Court has affirmed this interpretation of state protection repeatedly. In *Lopez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1176, [2010] FCJ No 1589, Mr. Justice Roger Hughes made this clear (at paragraph 8):
>
> > Another error of law is with respect to what is the nature of state protection that is to be considered. Here the Member found that Mexico "is making serious and genuine efforts" to address the problem. That is not the test. What must be considered is the actual effectiveness of the protection.
>
> [30] In *Garcia Bautista v Canada (Citizenship and Immigration)*, 2010 FC 126, [2010] FCJ No 153, Mr. Justice Michel Beaudry indicated the same principle (at paragraph 10):
>
> > First of all, it weighed the evidence of criticisms of the effectiveness of the legislation against evidence on the efforts made to address the problems of

> domestic violence. This is not enough to ground a finding of state protection; regard must be given to what is actually happening and not what the state is endeavoring to put in place (*A.T.V. v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1229, 75 Imm. L.R. (3d) 215 at paragraph 14).

[31] Most recently, Madam Justice Catherine Kane confirmed the same principle in *Ferko v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1284 at paragraph 44:

> The test is not 'perfect' state protection, but adequate state protection. Still, mere willingness to protect is insufficient; state protection must be effective to a certain degree: *Bledy v Canada (Minister of Citizenship and Immigration)*, 2011 FC 210, 97 Imm RL (3d) 243 at para. 47.

[32] On this point, therefore, the Board clearly misstated the law.
…

[30] In the present case, the Board member does make references to "adequate protection" and "serious efforts, both in policy and in practice". However, in paragraph 17 of the decision, the Board clearly applies the "serious efforts" test and in my opinion, paragraph 17 is a central finding in the decision. As well, in paragraph 8 of the decision, the Board also adopts the "serious efforts" test. Based on these statements, I am of the view that the board applied the wrong test with respect to its state protection finding.

[31] The application for judicial review is therefore allowed and the matter is referred to a different panel of the Board for redetermination.

[32] Because of my finding on this issue, I need not deal with the remaining issue.

[33] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

[34] The respondent, with the consent of the applicants requested that Klaudiusz Dawidowicz, Kornela Klaudia Kowalska, Juliano Gabriel Kowalski (a.k.a. Julianno Gabrie Kowalski) and Chanel Irena Kowalsk (a.k.a. Chanel Irena Kowalska) be removed as applicants. I will grant this request.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed and the matter is referred to a different panel of the Board for redetermination.

2. The style of cause is amended by removing Klaudiusz Dawidowicz, Kornela Klaudia Kowalska, Juliano Gabriel Kowalski (a.k.a. Julianno Gabrie Kowalski) and Chanel Irena Kowalsk (a.k.a. Chanel Irena Kowalska) as applicants in this matter.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

***Immigration and Refugee Protection Act*, SC 2001, c 27**

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.
…	…
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;
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
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 subject them personally	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 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.

FEDERAL COURT

SOLICITORS OF RECORD

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