Federal Court  Cour fédérale

Date: 20140227

Docket: IMM-3808-13

Citation: 2014 FC 187

Ottawa, Ontario, this 27th day of February 2014

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

And

Mirela GRDAN
Sasa GRDAN
Korina GRDAN
Borna GRDAN

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review made by the Minister of Citizenship and Immigration pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the "Act"). The Minister argues that the Refugee Protection Division of the Immigration and

Refugee Board of Canada (the "Board") was wrong to conclude that the respondents are persons in need of protection, in accordance with section 97 of the Act.

[2] The Minister challenges the findings made by the Board that the respondents would not benefit from state protection if they were to be returned to Croatia and that there is not in the circumstances a reasonable Internal Flight Alternative [IFA]. The Minister urges the Court to reverse those findings as being unreasonable.

[3] Because the Minister was late in filing his application for leave to commence an application for judicial review, an extension of time must be granted. The parties argued before the Court on the extension at the start of the hearing. I note that in his Order of November 27, 2013, Justice Sean Harrington had already granted the said extension in the following terms:

> 1. The application for an extension of time and for leave is granted and the application for judicial review is deemed to have been commenced.

At any rate, I would also have granted the extension of time. The matter before the Court needs to be addressed on its merit.

[4] I am not prepared to find in favour of the applicant on the basis that is proposed, i.e. that findings about state protection and an IFA are unreasonable in view of the evidence put forward. Rather I would quash the decision for a slightly different reason. I have found the reasons given by the Board to be wholly unsatisfactory, to the point of not being able to permit the Court to understand why the Board concluded as it did, and, on that basis, the matter has to be returned for a new determination by a different panel.

[5] Given the conclusion reached, it will not be necessary to delve into the facts of this case. Suffice it to say that the principal respondent was abused for years by her father in Croatia. Now that he has been released from prison in Croatia, the respondent contends that there have been a small number of encounters with him and she fears for her safety and that of her family. The Board, in short reasons, delivered orally, concluded that the respondents are persons in need of protection, in application of section 97 of the Act.

[6] The parties are in agreement that the two issues raised are to be reviewed on a standard of reasonableness (*Burai v The Minister of Citizenship and Immigration*, 2013 FC 565; *Velez v The Minister of Citizenship and Immigration*, 2013 FC 132).

[7] It is a given that the adequacy of reasons is not enough, in and of itself, to quash a decision. I readily accept that reasons do not have to be perfect or that they do not have to include all arguments and other details reviewing judges might be interested in. Indeed, reviewing courts must "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" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 at paragraph 17).

[8] The reason why this matter has to be sent back is because the decision does not satisfy the test found in *Newfoundland and Labrador Nurses' Union*. It reads:

> [16] . . . 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.

[9] The reference to *Dunsmuir* is with respect to the Court's comments at paragraph 47 (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190). In it, one finds the following passage:

> [47] . . . A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[10] With respect, what is missing in this case is that justification, transparency and intelligibility that would support a finding of reasonableness. Without any reason, I fail to see how it can be said that a decision is reasonable, as opposed to arbitrary. The only way a reviewing judge would be able to conclude that the outcome is reasonable is if he agrees with that outcome. But he would do so for his own reasons as opposed to ruling on the reasonableness of the reasons of the decision-maker that make the outcome one within a range of possible, acceptable outcomes. However, that is not the role to be played by a reviewing court. Indeed, the expertise resides, and ought to reside, with the tribunal whose decisions are subject to judicial review. A judge should not have to come to his own conclusion about the merits of a case to be decided on a reasonableness standard; his role is rather to control the legality of decisions made by administrative tribunals in their areas of expertise.

[11] I find myself in agreement with Justice Donald J. Rennie, of this Court, who wrote in *Komolafe v The Minister of Citizenship and Immigration*, 2013 FC 431:

> [11] *Newfoundland Nurses* is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made or to speculate as to what the tribunal

> might have been thinking. This is particularly so where the reasons are silent on a critical issue. It is ironic that *Newfoundland Nurses*, a case which at its core is about deference and standard of review, is urged as authority for the supervisory court to do the task that the decision-maker did not do, to supply the reasons that might have been given and make findings of fact that were not made. This is to turn the jurisprudence on its head. *Newfoundland Nurses* allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn. Here, there were no dots on the page.

In the case at bar, we ended up at the hearing looking for evidence in the record and speculating as to what the Board may have meant. The reviewing court is not there "to supply the reasons that might have been given or make findings of fact that were not made". It does not matter that the decision is rendered orally or after deliberations.

[12] As for state protection, the only justification offered by the decision-maker is this:

> As for state protection, in light of your particular circumstances, I find that it would be objectively unreasonable for you to seek the protection of the state. I find that the actions of your father, the revenge that you fear, would clearly be acts of criminality which would not be sanctioned by the Croatian authorities.
>
> That being said, I note that you have sought assistance from the police on more than one occasion. Mr. and Mrs. Grdan, you both testified as to these occasions, I note three separate incidents when you attempted to have protection from the police and the results were inadequate. This led you to believe that the protection from the authorities in Croatia for you was not adequate.

[13] This is very thin. First, the comment that acts of criminality would not be sanctioned by Croatian authorities does not seem to be supported by the evidence. Mrs. Grdan's father, whom she fears and is the reason why she sought refuge in Canada, appears to have spent eight years in prison for offences committed against his daughter and others. It is less than clear that encounters since his

release from jail are anything but chance encounters. Furthermore, the mere fact that the respondent's father spent eight years in prison is an indication that acts of criminality are sanctioned.

[14] Second, the decision-maker refers to three separate incidents to suggest that state protection would not be forthcoming. As pointed out by the Minister, it is unclear what those incidents might be. None is connected to actions of the respondent's father. If we are to judge by the respondents' view of these three incidents, they would be when Mrs. Grdan was attacked by a security guard before her father went to prison many years ago; second, when there was a complaint for some noise at the family's apartment building and the police action was less than forthcoming, and, third when the police would have refused to intervene during a burglary when Mr. Grdan was a security officer. If these were the incidents the Board was referring to, that deserved a better explanation than what is offered in order to displace the presumption that state protection exists absent a complete breakdown of state apparatus (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689). It is not clear, to say the least, how such evidence would be enough to meet the test of clear and convincing to rebut the presumption.

[15] Finally, the Board limits its analysis to the subjective fear of the respondents. More than subjective fear of the respondent's father's revenge is needed (*Carrillo v Canada (Minister of Citizenship and Immigration)*, [2008] 4 FCR 636). There must be a measure of reasonableness.

[16] The justification for the conclusion that there would not be an IFA is even more limited. In a short paragraph, the Board states:

> As for Internal Flight Alternative, I have considered whether a viable Internal Flight Alternative exists for you and I find that, on a balance of probabilities, there is a risk to life or a risk of cruel and unusual treatment or punishment throughout the country of Croatia.

[17] With respect, I find it impossible, as a reviewing court, to understand how the decision-maker reached the conclusion we have on this record. Indeed it is not clear what test the Board applied in order to reach the conclusion that there is no viable IFA.

[18] I do not wish to be seen as commenting on whether or not there is adequate state protection in Croatia or that there exists an IFA in that country. That was an invitation that was made by the Minister that I am not willing to take. It is for the Board to make that determination which would be controlled in due course by this Court using a standard of reasonableness. What I have found however is that the reasons for the decision are wholly unsatisfactory and deficient to the point of making it impossible for the Court to understand how the decision was made. As such, the decision must be quashed and the matter sent back to the Board for a re-determination by a different panel.

[19] The parties did not submit any serious question of general importance and none is certified.

JUDGMENT

The application for judicial review is allowed. The decision rendered on April 5, 2013 by the Refugee Protection Division of the Immigration and Refugee Board of Canada is quashed and the matter is sent back for re-determination by a different panel.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3808-13
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APPEARANCES:

Me Patricia Nobl	FOR THE APPLICANT
Me Éric Taillefer	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada	FOR THE APPLICANT
Handfield et Associés, Avocats Montréal, Quebec	FOR THE RESPONDENTS