Federal Court  Cour fédérale

Date: 20140812

Docket: IMM-2475-13

Citation: 2014 FC 797

Ottawa, Ontario, August 12, 2014

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

DUSAN KOKY, MILENA KOKYOVA, SARA KOKYOVA, MAXIMILIAN KOKY, LUKAS KOKY, AND TOMAS KOKY

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

[1] **UPON** an application for judicial review of a decision of the Refugee Protection Division [RPD] dated March 14, 2013, pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA];

[2] **AND UPON** considering fully the representations made by counsel for both sides; for the reasons that follow, and in spite of the able argument presented on behalf of the applicants, the application for judicial review must be dismissed.

[3] In a well articulated decision of the RPD, the application made by Dusan Koky and his wife Milena Kokyova, together with their four children, for refugee protection, pursuant to sections 96 and 97 of the IRPA, was rejected. The applicants contend that the RPD was mistaken in applying incorrectly the law as to state protection and the credibility of the principal applicants.

[4] The applicants had centered their attack on the alleged deficiencies about the state protection that can be afforded to citizens of Slovakia of Roma ethnicity. They would want for that issue to be determinative of their judicial review application. However, this Court would conclude that the applicants have not satisfied their burden of showing that the finding that adequate state protection was available is unreasonable.

[5] In essence, the applicants are artfully attempting to turn the burden that is theirs onto the shoulders of the RPD. By relying on case law that has found to be unreasonable the conclusion that adequate state protection was available, they would want for people of Roma ethnicity who are citizens of Slovakia to be eligible for refugee protection in this country on that sole basis. It would be for the decision-maker to show, for all intents and purposes, that adequate state protection for Slovak citizens of Roma ethnicity is available. In my view, the logic of the law is quite different.

[6] The applicants have spent a significant amount of time trying to attack findings made about state protection in this case. The burden is actually on the applicants on judicial review to show that it was unreasonable for the RPD to have concluded that the burden on the applicants before the RPD to rebut the presumption of adequate state protection in Slovakia had not been discharged.

[7] The RPD found that there was, on this record, a preponderance of evidence that the Slovak Republic provides adequate state protection. It was the applicants' burden to show, by clear and convincing evidence, the unwillingness or lack of ability to protect them in an adequate way. They failed before the RPD.

[8] Instead, the applicants tried to argue on the judicial review application that it was not necessary to seek meaningful state protection, relying basically on *Canada (Attorney General) v Ward*, [1993] 2 SCR 689:

> … Moreover, it would seem to defeat the purpose of international protection if a claimant would be required to risk his or her life seeking ineffective protection of a state, merely to demonstrate that ineffectiveness.
>
> Like Hathaway, I prefer to formulate this aspect of the test for fear of persecution as follows: only in situations in which state protection "might reasonably have been forthcoming", will the claimant's failure to approach the state for protection defeat his claim. Put another way, the claimant will not meet the definition of "Convention refugee" where it is objectively unreasonable for the claimant not to have sought the protection of his home authorities; otherwise, the claimant need not literally approach the state.

[9] However, there was not even an attempt to show that the situation encountered by the applicants could rise to the seriousness of the circumstances of Mr Ward. I share the view of

Mosley J, of this Court, who stated recently that each case involving state protection turns on its particular circumstances (*Horvath v Canada (Citizenship and Immigration)*, 2014 FC 670 [*Horvath*]). In that particular case, the applicants' argument seems to have been that since other cases emanating from this Court had found that judicial review had to be granted with respect to Hungarian Roma, it must have been that state protection is inadequate. It would have followed, the argument goes, that the RPD in that case must have been mistaken. The Court declined to follow that reasoning in *Horvath* and I would do the same in this case.

[10] In my view, such an argument misapprehends the role of the Court when conducting judicial reviews. The Court is invited to control the legality of the decision made by the administrative tribunal, not substitute its assessment of the evidence for that of the tribunal or to reweigh the evidence. Judicial reviews that may have found state protection lacking are based on a set of facts presented to the decision-maker in that case. A court that finds in favour of an applicant does so on the basis of the evidence before the tribunal, concluding that the evidence does not support a reasonable finding of adequate state protection. As is now recognized, "certain questions that come before administrative tribunals do not lend themselves to one specific, particular result" (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190). Thus, a reviewing court does not intervene, if the review standard is reasonableness, as long as the decision under review falls within a range of possible, acceptable outcomes.

[11] It is clear that the standard of review for findings on state protection is reasonableness (*Horvath*, *supra*). Since decisions must be examined on a case-by-case basis, unless it is shown that these applicants are in a situation commensurate with that of Mr Ward in that now famous

case, they had to show on judicial review that the RPD findings about state protection were unreasonable. One cannot rely exclusively on other findings of unreasonableness, or for that matter on findings of reasonableness, in other cases.

[12] There has not been an attempt by the applicants to satisfy that burden on the judicial review. No attempt was made to compare the circumstances of these applicants to the situation described in *Ward, supra*. There was no attempt either at showing that the conclusion reached by the RPD in this case with the evidence presented by the parties was unreasonable. The position was rather that, given that other cases had found on judicial review that decisions of the RPD were not unreasonable on the issue of state protection, these applicants did not have to risk their lives seeking ineffective protection of the state. On the facts of this case, it cannot be said that the applicants' circumstances are similar to those of Mr Ward. Furthermore, the availability of state protection is to be assessed on the basis of the evidence before the RPD. It follows that the Court cannot intervene, let alone weigh again the evidence, something that is not appropriate on judicial review.

[13] As acknowledged by the applicants, the finding of state protection is determinative. Nevertheless, the RPD examined carefully the credibility of the principal applicants and a few comments may be apposite.

[14] The review by a court of the credibility findings made by an administrative tribunal is to be governed by the standard of reasonableness. Thus, as for the issue of state protection, it will

be the applicants' burden to satisfy a Court that the decision rendered is not reasonable in that it does not fall within the range of possible, acceptable outcomes.

[15] Having reviewed the record, it strikes me that the RPD had ample reasons to find significant credibility gaps. The applicants tried, without success in my view, to challenge the credibility findings of the RPD because, they claim, credibility findings may not be made on the basis of a lack of corroborative documentary evidence.

[16] It will not be necessary to comment on the old case law cited by the applicants in support of that proposition. That is because that was a less than significant issue in this case, the RPD having already found the applicants not credible. And it was clearly open to the RPD to so find on this record. Furthermore, I am less than convinced that a lack of supporting documentation has to be ignored.

[17] The RPD found that, on its own, the credibility of the applicants was clearly lacking and that lack of credibility was not redeemed by documentation, given that there was very little that was offered in support of the claimants' story. In fact, it is the version of events that is implausible, where the credibility of a witness is challenged and documentary or other corroborative evidence is not offered in support. Indeed, there may be circumstances in which a reasonable expectation would exist that a claimant would have in his possession, or would procure, documentary evidence readily available. An otherwise credible witness is not likely to be impeached by a lack of corroborative evidence when the story stands on its own. However, the witness whose version of events is already somewhat implausible will not see his credibility

enhanced by not providing other evidence readily available. In circumstances like these, the trier of fact may reasonably infer that the claimant is seeking to hide that which may expose facts unfavourable to the witness. Such a proposition appears to me to be based on common sense and human experience. However, as high an authority as *Wigmore on Evidence* (James H. Chadbourn, rev, *Wigmore on Evidence* (Boston: Little, Brown and Company, 1979) vol 2, §285) makes the point vividly:

> **§285. Failure to produce evidence, as indicating unfavorable tenor of evidence: (1) In general.** The consciousness indicated by conduct may be, not an indefinite one affecting the weakness of the cause at large, but a specific one concerning the defects of a *particular element* in the cause. The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so; and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstances which make some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted.
>
> The nonproduction of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its *tenor is unfavorable to the party's cause*. Ever since the case of the Chimney Sweeper's Jewel, this has been a recognized principle:

[18] The same general proposition was endorsed by the Supreme Court in *Lévesque v Comeau et al*, [1970] SCR 1010; Pigeon J, for the majority, wrote:

> … She alone could bring before the Court the evidence of those facts and she failed to do it. In my opinion, the rule to be applied in such circumstances is that a Court must presume that such evidence would adversely affect her case. The fact that those witnesses all live in Montreal does not make the rule any less

> applicable. Appellant Lola Levesque should, if necessary, have applied for a rogatory commission… [pages 1012-1013]

For another illustration of the rule, see also *Johnston v Murchison*, [1995] PEIJ No 23 (QL), 53 ACWS (3d) 786 at para 36.

[19] Evidently, the use of the failure to produce evidence must be done with caution. Its weight will vary with different circumstances. Whether corroborative evidence is available is a question of fact to be determined in each case and its relative importance must be assessed with care. Drawing the appropriate inference must also be done reasonably. However, it would be incorrect in my view to state that the failure to produce evidence cannot be of use.

[20] Furthermore, the examination conducted by the RPD was in no way microscopic or selectively engineered to defeat the claim as alleged by the applicants. Some statements made by the applicants at their hearing were central to their claim. However, this part of the story was not offered originally and it is difficult to argue with the RPD when it concludes that "I find, on a balance of probabilities, that the claimants have included this allegation in an attempt to bolster their claim." There was nothing microscopic about the examination of that allegation. Indeed, the RPD found later that "on a balance of probabilities, that her testimony relating to the contrary, having arisen only after credibility concerns were indicated to her at the hearing, were forwarded in an attempt to explain away the numerous discrepancies and omissions central to her claim." An examination of the transcripts supports that finding.

[21] Actually, it was reasonable to find significant discrepancies between the Personal Information Form [PIF] that was filled out with the assistance of counsel and the evidence that was given before the RPD. That made the RPD conclude that, "[b]ased on the totality of the evidence as it relates to the PIF, I find that the claimants have not been honest or forthright and I draw a severe negative inference with regards to their credibility as a result. […] I do not accept that they omitted the most traumatic and significant events, yet were able to recall other, less significant, events in some detail." These findings are in my view perfectly reasonable.

[22] The presumption of state protection had to be rebutted with clear and convincing evidence. That burden was that of the applicants throughout the process. They did not show on this judicial review that the findings made by the RPD were unreasonable. The same can be said of the credibility findings. As a result, the application for judicial review is dismissed.

[23] The parties did not suggest that a serious question of general importance ought to be stated.

ORDER

THIS COURT ORDERS that the application for judicial review is dismissed. There is no serious question of general importance for certification.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	DUSAN KOKY, MILENA KOKYOVA, SARA KOKYOVA, MAXIMILIAN KOKY, LUKAS KOKY, AND TOMAS KOKY v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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