Federal Court  Cour fédérale

Date: 20150825

Docket: IMM-7773-14

Citation: 2015 FC 1008

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, August 25, 2015

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

SASA MILOVIC
DRAGAN MILOVIC

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

I. Introduction

[1] Sasa and Dragan Milovic are two brothers of Croatian nationality, but of Serbian ethnicity. They are challenging a decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada (RPD), dated October 25, 2013, which determined that they were

neither refugees nor persons in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act).

[2] The applicants are part of a family that has lived for generations in a Serbian majority village located near the town of Sibenik in Croatia. When war erupted in former Yugoslavia, the family fled to Serbia. In October 2006, at the end of the armed conflict, the family returned to the village, and, from that time, it allegedly faced numerous problems: the family home had apparently been looted and damaged, and, like many other members of the Serbian community, the family was reportedly harassed and threatened by local Croatians.

[3] Finding their narrative credible, the RPD summarized the applicants' particular situation as follows:

> [4] Claimant Sasa recovered the family home with his parents in October 2006. He worked in Croatia until January 2008, when his parents decided to make him leave the village with his brother Dragan after Dragan was attacked and after they were both threatened by some Croatians. In June 2008, after staying in Serbia for about six months, claimant Sasa returned to Croatia to help his parents repair their home. When he returned, he noted that the threats had continued, in particular, through anonymous graffiti on the house. In September 2008, Sasa left his village again, this time with his parents, to return to Serbia because the situation had become dangerous for the family and they wanted to avoid the conflicts. In March 2010, the whole family returned to the village to reunite with the claimants' grandparents, who had stayed alone in the family home, which they never left. The family also returned to Croatia because they believed that the situation of Serbs had improved because of Croatia's application to join the European Union (EU). In April 2010, the principal claimant left for Montréal because the situation had not changed. He stayed there until December 2010, when he decided to return to Croatia to convince his family members to take refuge in Canada. He returned to Montréal with his brother Dragan on January 21, 2011, and they both claimed refugee protection four weeks later.

> [5] With regard to claimant Dragan, here is a summary of the alleged facts of his particular case. He reunited with his family in Croatia in September 2007 because he had to complete his studies in Serbia first. In January 2008, he was stabbed by unknown youth in Kistane, a neighbouring village, and was treated at the hospital. Following this attack, he left Croatia with his brother because he could no longer take the insults and the discrimination. Claimant Dragan left for Subotica, Serbia, in January 2008 and stayed there until March 2010, when he returned to Serbia with his brother and parents. He was attacked once again by unknown youth in early November 2010 while he was visiting his grandfather at the hospital in Sibenik, a city located about 15 kilometres from his village. One month later, in December 2010, claimant Dragan decided to leave his village to return to the home of an aunt in Subotica. After staying in Serbia for a few weeks, he returned to Croatia with his brother Sasa to celebrate New Year's with the family and stayed there for about three weeks before leaving for Montréal.

[4] However, the RPD rejected the applicants' refugee protection claim on the basis that the treatment they were subjected to did not constitute persecution but rather discrimination, and that, because of their frequent voluntary returns to Croatia, their behaviour was, in any case, incompatible with that of persons fearing for their lives.

[5] The applicants argue that the RPD erred in three ways. First, they allege that it adopted too restrictive an interpretation of the concept of "persecution" in failing to note, contrary to the principles enunciated n *Ward v Canada (Attorney General)*, 2002 SCC 17, [2002] 1 SCR 569, that they were subject to a sustained or systemic violation of fundamental human rights, in this case, the right to life and the right to bodily integrity. Second, they argue that the RPD breached its duty of fairness by relying, in support of its decision, on a document that was not communicated to the parties. Finally, they contend that the RPD failed to identify and comment

on pieces of documentary evidence contradicting its conclusions on certain crucial points of its decision.

II. Issue and standard of review

[6] The issue in this case is whether, in determining as it did and in the way that it did, the RPD committed an error warranting the Court's intervention, in accordance with section 18.1 of the *Federal Courts Act*.

[7] It is well established that the issue of whether a refugee claimant is a refugee or a person in need of protection under sections 96 and 97 of the Act is a mixed question of fact and law within the expertise of the RPD, and that, accordingly, it is reviewable on the reasonableness standard (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at paragraph 47; *Olvera v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1048, 417 FTR 255, at paragraph 28; *Malvaez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1476, 423 FTR 210, at paragraph 10; *Portillo v Canada (Minister of Citizenship and Immigration)*, 2012 FC 678, 409 FTR 290, at paragraph 26).

[8] According to this standard of review, the Court must show deference to the RPD's findings and will therefore intervene only if those findings lack justification, transparency or intelligibility and fall outside a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, above, at paragraph 47). Also according to this standard, it is certainly not the Court's role to substitute its own assessment of the evidence on the record

for the assessment made by the RPD (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339, at paragraph 59).

[9] The applicable standard for procedural fairness issues is correctness, which means that the Court need show no deference to the RPD's decisions in those matters (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at paragraphs 54, 79 and 87; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339, at paragraph 44).

III. Analysis

[10] The RPD's conclusion that the applicants' behaviour was inconsistent with that of persons fearing for their lives seems determinative to me in this case because, regardless of the outcome of the issues raised by the applicants, in my view, that conclusion provides a rational basis for the rejection of the refugee claim.

[11] Indeed, it is well established that a refugee claimant's voluntary return to his or her country of origin is behaviour that is incompatible with a subjective fear of persecution, risk to his or her life or cruel and unusual treatment (*Munoz v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1273, at paragraph 20).

[12] In this case, the RPD noted that, after returning to his native village in October 2006, Sasa

a. left Croatia for the first time in January 2008;

b. returned there several months later, namely, in June;

c. left his country of origin again in September of the same year;

d. returned in March 2010;

e. left for Canada one month later;

f. did not claim refugee protection there;

g. returned to Croatia in December 2010; and

h. came back to Canada in January 2011 together with Dragan.

[13] With respect to Dragan, the RPD noted that, after he returned to his native village in September 2007,

a. he left Croatia in January 2008 after he had been stabbed;

b. he returned there again in March 2010;

c. he left his country of origin again after being attacked a second time in the fall of 2010;

d. He returned there again to celebrate the New Year's Holiday in December 2010 before leaving for Canada together with Sasa in January 2011; and

e. During his stays in Croatia, he took dozens, if not hundreds, of trips to Hungary and back to purchase food.

[14] In my opinion, the RPD had sufficient evidence before it to find that the applicants' behaviour was inconsistent with the existence of a subjective fear of persecution, of risk to their life or of cruel and unusual treatment under sections 96 and 97 of the Act. At the very least, the evidence on the record makes it possible to find that the RPD’s conclusion falls within the range

of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, above, at paragraph 47).

[15] The applicants explain their frequent trips between Croatia, Serbia, Canada and Hungary by the fact that they are part of a close family who has tried several times, unsuccessfully because of the damage done by the war, to recover its Croatian lands in the hopes of resuming a normal life there. Clearly, the situation experienced by the applicants' family is not easy, but as the law currently stands, their trips remain inconsistent with the behaviour of persons fearing for their lives, which is sufficient to reject a refugee claim.

[16] To this is added, in Sasa's case, the fact that he did not claim Canada's protection during his first stay in the country. Sasa justified his inaction by the fact that, even though he was aware of the existence of the process for claiming refugee protection in Canada, he was not certain whether he could make a claim and whether he could convince the Canadian authorities of its merits if he did. The RPD considered his explanations unsatisfactory, among other things, because the applicant stated that he had returned to Croatia after his first stay in Canada in order to convince his family members to leave Croatia for Canada. It seemed highly unlikely to the RPD that Sasa would take such a step if he was as uncertain as he claimed to be of the possibility of seeking protection from the Canadian authorities.

[17] Although a delay in claiming refugee protection is not determinative with respect to the outcome of a refugee claim it may constitute sufficient grounds for rejection in itself, in the right circumstances. This would generally be the case when the refugee claimant cannot provide a satisfactory explanation for the delay in claiming (*Duarte v Canada (Minister of Citizenship and*

Immigration), 2003 FC 988, at paragraph 14; *Velez v Canada (Minister of Citizenship and Immigration*), 2010 FC 923, at paragraph 28; *Licao v Canada (Minister of Citizenship and Immigration)*, 2014 FC 89, at paragraphs 49 to 53). According to the RPD, this was the case here. Based on the evidence on the record, I cannot say that this conclusion falls outside a range of possible, acceptable outcomes which are defensible in respect of the facts and law. In other words, that conclusion does not seem unreasonable to me.

[18] As I stated above, the finding I made regarding the basis of the RPD decision with respect to the inconsistency of the applicants' behaviour with the existence of a subjective fear of persecution, risk to their life or cruel and unusual treatment is sufficient to dispose of this judicial review. In other words, it will not be necessary to determine whether the RPD erred in stating that the acts the applicants were victims of were discriminatory or in failing to comment on or communicate to the parties certain excerpts of documentary evidence dealing with the treatment of the Serbian minority in Croatia, because even if I were to find that the RPD erred, that would not change my finding hat it was still reasonable for the RPD to reject the refugee claim.

[19] Neither party requested the certification of a question for the Federal Court of Appeal pursuant to paragraph 74(*d*) of the Act. I am also of the view that no question should be certified.

ORDER

THE COURT ORDERS that

1. The application for judicial review is dismissed;

2. No question is certified.

"René LeBlanc"

Judge

Certified true translation
Margarita Gorbounova, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Manuel Centurion	FOR THE APPLICANTS
Thi My Dung Tran	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Manuel Centurion, Counsel Montréal, Quebec	FOR THE APPLICANTS
William F. Pentney Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT