Federal Court  Cour fédérale

Date: 20110112

Docket: IMM-1789-10

Citation: 2011 FC 27

[UNREVISED CERTIFIED TRANSLATION]

Ottawa, Ontario, January 12, 2011

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

ROBERT MUHARI, ANKA OLAH and UROS MUHARI

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of a decision by the Refugee Protection Division of the Immigration and Refugee Board (the panel) dated March 10, 2010, that the applicants are neither Convention refugees nor persons in need of protection under the Act.

Facts

[2] Robert Muhari, his wife Anka Olah and their son Uros Muhari are Serbian citizens of Hungarian origin who lived in the region of Voïvodine. They fear persecution by reason of their Hungarian origin and the situation in their country following Kosovo's unilateral declaration of independence.

[3] They allege that they grew up in a climate of armed conflict after the breakup of the former Republic of Yugoslavia and that they have always suffered discrimination because of their Hungarian origin.

[4] On January 20, 2008, the applicants arrived in Canada on a visitor's visa. They went to visit an uncle and aunt in Hawkesbury, Ontario, to assist the aunt who was suffering from terminal cancer.

[5] On February 14, 2008, Kosovo unilaterally declared its independence from Serbia. Afraid of being involved in another armed conflict, the applicants went to the office of the Member of Parliament representing the riding that includes the town of Hawkesbury in order to obtain information.

[6] On March 8, 2008, they went to Ottawa to file a claim for refugee status with the Refugee Protection Division. Because there was no interpreter available, the claim was not filed until March 18, 2008.

Impugned decision

[7] The panel found that the applicants were credible. It rejected their claim on the ground that the discrimination the principal applicant suffered because of his Hungarian origin was not severe. The panel also found that the applicants' fear caused by the conflict in Kosovo did not meet the requirements of section 97(1)(*b*) of the Act since the situation did not target them personally.

[8] The decision shows that the applicants were not represented and that the hearing was held in Ottawa.

Issues

[9] This application for judicial review raises the following issues:

1. Did the panel err by excluding certain documentary evidence that corroborated the applicants' position?
2. Was it reasonable for the panel to find that the applicants were neither refugees nor persons in need of protection by reason of their ethnic origin?

Analysis

A. *Standard of review*

[10] The question of whether a panel's reasons are sufficient is reviewable on a standard of correctness (*Vila v Canada (Minister of Citizenship and Immigration)*, 2008 FC 627, [2008] FCJ No. 823 (QL) at paragraph 9; *H.L. v Canada (Minister of Citizenship and Immigration)*, 2009 FC 521, 2009 FCJ 645 (QL) at paragraph 15).

[11] Questions involving the assessment of facts are reviewable on a reasonableness standard (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 53).

B. *Panel's exclusion of certain documentary evidence*

[12] In their memorandum, the applicants criticize the panel for ignoring the documentary evidence they filed regarding the protection available in Serbia, specifically in the Voïvodine region, to persons of Hungarian origin and for not questioning them as to whether the Serbian state could adequately protect minorities.

[13] The jurisprudence of this Court is clear and consistent with respect to the requirement that a panel consider all the relevant evidence on an issue (*Gill v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 656, 35 Imm LR (3rd) 202).

[14] The panel must, at the very least. provide sufficient reasons for disregarding the applicants' evidence. As Mr. Justice Evans wrote in *Cepeda-Guttierez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35, 83 ACWS (3rd) 264 at paragraph17:

> [T]he more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence": *Bains* v. *Canada (Minister of Employment and Immigration)*, (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent

> on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact.

[15] On this point, it is interesting to point out Mr. Justice Martineau's findings in *Avila v Canada (Minister of Citizenship and Immigration)*, 2006 FC 359, 295 FTR 35, in which he determined that the Board could not simply choose to disregard relevant evidence that could have supported the applicants' position.

[16] In the decision that the applicants are challenging, the panel refers to one piece of documentary evidence they filed. The panel cites a passage from it but accepts only the part that supports its conclusion. The panel should have, at the very least, explained why it rejected the passages that describe acts of vandalism, discrimination and violence against the Hungarian minority in the province of Voïvodine.

[17] Counsel for the respondent filed a copy of the decision in *Sokola v Canada (Minister of Citizenship and Immigration*), 2010 FC 168, [2010] FCJ No. 188 (QL), to support her position that the panel was not required to respond to each item of documentary evidence that the applicants filed. In that case, Mr. Justice Near stated that the Board had validly concluded that the applicant should have first sought state protection. He wrote the following at paragraphs 28 and 29:

> The Applicant argues that the Board ignored contradictory evidence of the state's failure to protect Hungarians and other minorities. However, the Board is not required to make reference to each item of documentary evidence or summarize all the documentary evidence introduced (see *Florea v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 598 (F.C.A.)) and the reasons of administrative agencies are not to be read hypercritically . . .

> In this case, the Board referenced the Applicant's evidence in page 1 of its reasons and stated on page 6 that "on the evidence" the Applicant had not rebutted the presumption of state protection. This was reasonable.

We agree that a panel is not required to make reference to all the documentary evidence submitted. However, where the evidence deals with an element that is crucial to the dispute, the panel's obligation is quite different. It must refer to that evidence and explain why it did not accept it (*Singh v Canada (Minister of Citizenship and Immigration*), 2009 FC 485, [2009] FCJ No. 616 (QL) at paragraph 15).

[18] This error appears to us to be fatal in the circumstances because the evidence in question goes to the very heart of the application, namely that Serbs of Hungarian origin living in Voïvodine fear persecution. In fact, the document the applicants filed describes acts of violence against persons of Hungarian origin and the passive attitude of the Serbian authorities in this situation. This evidence could have established the applicants' objective fear of persecution.

C. *Ethnic origin of the applicants*

[19] The panel found that the applicants, particularly the principal applicant, had not suffered severe discrimination. In addition, since they were not persecuted in Serbia, they could not claim refugee protection in Canada.

[20] In *H.L.*, above, Mr. Justice Martineau stated the following at paragraphs 21 and 22:

> Discrimination in itself does not amount in every case to persecution. It may, however, if it manifests as "sustained or systemic violation of basic human rights demonstrative of a failure of state protection" (Hathaway, James C. *The Law of Refugee Status*. Toronto:

> Butterworths, 1991, pp.104-105 as cited in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689) . . .
>
> 53. The UNHCR Handbook provides the following guidance on when discrimination may constitute persecution:
>
> > 53. In addition, an applicant may have been subjected to various measures not in themselves amounting to persecution (e.g. discrimination in different forms), in some cases combined with other adverse factors (e.g. general atmosphere of insecurity in the country of origin). In such situations, the various elements involved may, if taken together, produce an effect on the mind of the applicant that can reasonably justify a claim to well-founded fear of persecution on "cumulative grounds". Needless to say, it is not possible to lay down a general rule as to what cumulative reasons can give rise to a valid claim to refugee status. This will necessarily depend on all the circumstances, including the particular geographical, historical and ethnological context.

[21] The applicants, particularly the principal applicant, claim to have been the subject of separate acts of discrimination because of their Hungarian origin. More than one situation was alleged not counting the upsurge in violence against the Hungarian minority following the events in Kosovo.

[22] Counsel for the respondent pointed out certain Federal Court decisions that deal with how severe discrimination must be to constitute persecution. The decisions in *Am Nwaeze v Canada* (*Minister of Citizenship and Immigration*), 2009 FC 1151, [2009] FCJ No. 1436 (QL) and *Tazawa v Canada* (*Minister of Citizenship and Immigration*), 2007 FC 255, [2007] FCJ No. 325 (QL), cited by the respondent, are distinguishable from this case on their facts. Both those cases involved discrimination against persons who had entered into interracial marriages, not against members of a

specific ethnicity. The distinction is important because the documentary evidence introduced by the applicants in this case described systemic and existing discrimination against an entire ethnic group, namely persons of Hungarian origin. Therefore, the decisions cited by the respondent do not apply in this case.

[23] Certainly, the panel has sole jurisdiction over the facts. Nonetheless, it is with considerable deference that we note that, although the panel acknowledged that some discrimination had occurred, its analysis did not take into consideration the cumulative effect of the discrimination alleged by the principal applicant.

[24] As Mr. Justice Martineau wrote at paragraph 26 of *H.L.*, above:

> I am not, therefore, satisfied that the Board dealt adequately with the central issue of the claim: namely, whether the applicants had a well-founded fear of persecution. Completely absent is any discussion of the cumulative effect of their experiences in Indonesia, whose veracity was not challenged. The Board's consideration of this issue was cursory, at best, and in my view warrants the intervention of this Court.

[25] In this case, we have come to the same conclusion with respect to the panel's failure to specifically analyze the discrimination against both the principal applicant and the entire Hungarian minority in the province of Voïvodine (*Fi v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1125, [2007] 3 FCR 400 at paragraphs14 to 16). This omission and the lack of explanations as to why the panel disregarded some of the applicant's evidence justify the intervention of this Court. The application for judicial review should accordingly be allowed. None of the parties proposed a question for certification, and I do not see any.

[26] For all these reasons, this application for judicial review is allowed, and the matter is remitted to a differently constituted panel for reconsideration and redetermination. No question is certified.

JUDGMENT

THE COURT ORDERS as follows:

1. The application for judicial review is allowed;
2. The matter is remitted to a differently constituted panel for redetermination; and
3. No question is certified.

"André F.J. Scott"
Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1789-10
STYLE OF CAUSE:	**ROBERT MUHARI, ANKA OLAH ET UROS MUHARI v. MINISTER OF CITIZENSHIP AND IMMIGRATION**
PLACE OF HEARING:	Montréal
DATE OF HEARING:	December 15, 2010
REASONS FOR JUDGMENT:	SCOTT J.
DATED:	January 12, 2011

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