Federal Court  Cour fédérale

Date: 20140718

Docket: IMM-5685-13

Citation: 2014 FC 719

Ottawa, Ontario, July 18, 2014

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

GORAN DIMITRIJEVIC

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], of a decision dated August 6, 2013 of the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada. The Board Member [the Member] determined that the applicant, Goran Dimitrijevic, was not a convention refugee or person in need of protection under sections 96 and 97 of *IRPA*.

[2] For the reasons that follow, the Court finds that its intervention is required in this case and allows the application for judicial review.

II. Background

[3] The applicant is a citizen of Serbia and of Roma ethnicity. He fled from Serbia to Canada and sought refugee protection on the basis that he suffered discrimination in Serbia as a Roma person.

[4] In the initial version of his Personal Information Form [PIF], the applicant did not mention any specific incidents of persecution that he had suffered, but rather spoke of the various ways in which he felt that the Roma were discriminated against in Serbia.

[5] In a modified response to question 31 of his PIF [the amended PIF], the applicant stated that on June 15, 2012, his wife left him, taking their daughter with her. On November 21, 2012 their divorce was finalized.

[6] The applicant alleged that subsequently, Serbian nationalists did not allow his daughter to return and be with her father, as she wished. He alleged that he was assaulted by men who burned his cow's food and told him to leave the country or they would kill him. He never complained about this incident to the authorities.

[7] He also alleged that the police would repeatedly stop him and bring him to the police station, though he, at least on one occasion, claimed never to have committed any crimes.

III. Impugned decision

[8] The Member did not find the applicant credible.

[9] The Member determined that the applicant did not refer to any specific acts in his PIF, but rather spoke only of general discrimination against Roma. In his amended PIF, he mentioned for the first time that if something were to happen in the village, the police would systematically come and bring him to the station so they could beat him until he would admit to a crime that he did not actually commit, and that they would keep him for two to three days.

[10] The Member emphasized contradictions between the applicant's PIF and amended PIF and his testimony, which he was unable to explain. The Member found that if the applicant had been subject to such systematic discrimination, he would have mentioned it in his first PIF.

[11] In his amended PIF he spoke of a death threat that he did not mention in his first PIF, and again was unable to explain the discrepancy.

[12] Furthermore, the Member found that the applicant had failed to rebut the presumption of adequate state protection. The applicant's allegations of maltreatment at the hands of local policemen were insufficient, since local failures to provide effective policing do not amount to a lack of state protection.

[13] The Member also cited an Operational Guidance Note from the UK Border Agency which discusses improvements in the treatment of Roma in Serbia.

[14] As a result of his conclusions on credibility and state protection, the Member found that the applicant was not a Convention refugee.

IV. Standard of review

[15] The standard of review applicable to a finding on credibility by the Board is reasonableness (*Wei v Canada (Citizenship and Immigration)*, 2012 FC 911 at paragraph 28; *Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732; *Elmi v Canada (Minister of Citizenship and Immigration)*, 2008 FC 773 at paragraph 21, and *Wu v Canada (Minister of Citizenship and Immigration)*, 2009 FC 929 at paragraph 17).

[16] In reviewing the Officer's consideration and treatment of evidence, the appropriate standard of review is reasonableness (see, for example, *Y.Z. v Canada (Minister of Citizenship and Immigration)*, 2009 FC 749, [2009] FCJ No 904 at paragraph 22.)

V. Issues

[17] There are two relevant issues in the case at bar:

1. Was the Member's credibility finding reasonable?

2. Whether the Board's reasons on state protection sufficiently explain its decision to permit determination of whether the conclusion is within the range of acceptable reasonable outcomes?

VI. Analysis

A. *Member's credibility finding*

[18] In his decision, the Member concluded that the determinative issues raised by the applicant's claim were his credibility and available state protection. The applicant contends that the only basis for the Member's negative finding of credibility was the more general nature of the allegations in his first PIF, as opposed to the more specific allegations he raised in his amended PIF.

[19] The applicant contends that the Member failed to analyze or even refer to the applicant's "mental state of mind" as the explanation for his omission of important facts from his initial PIF. He refers to a forensic psychological report obtained by counsel concluding that he suffered from severe depression, Post-Traumatic Stress Syndrome and that simple thoughts of his past impaired his attention and concentration.

[20] It is trite law that credibility assessments are the heartland of the Board's jurisdiction. The Member emphasized the fact that in the initial version of his PIF, the applicant did not refer to any specific persecutory acts, but rather spoke of general discrimination against the Roma. It was only in the amended PIF that he spoke of mistreatment by the police. The applicant

explained this omission by alleging that he suffers from chronic depression and post-traumatic stress disorder, and as a result, was unable to complete his PIF properly. The applicant was assisted by counsel on the preparation of the PIF and it is difficult to accept that any possible mistreatment by the police or other authorities would not have been canvassed with him.

[21] Moreover, in reviewing this report of the psychologist, the opinion was provided with the view to bolstering the subjective "well-foundedness" of the applicant's fear from being returned to Serbia. The report was not written to sustain the conclusion that the applicant would not have been able to properly complete his PIF under the guidance of his counsel and it contains no opinion to that effect.

[22] Refugee claimants who make material omissions from their PIF do so at their own risk. Attempts to bootstrap credibility lapses of important omissions from documents by retaining forensic medical experts, particularly when made under the guidance of counsel, are doomed to failure and cannot displace the role of the decision-maker in assessing the credibility of the witness. As Justice Pinard made clear in *Jin v Canada (Citizenship and Immigration)*, 2012 FC 595 [*Jin*] at paragraph 22, the onus is on the applicant to include all relevant facts in his PIF, and the RPD is entitled to draw negative inferences from omissions in a PIF (*Jin* at para 11).

[23] The Member also based his credibility finding on contradictions in the applicant's testimony. When questioned about his interactions with the police, he both confirmed and denied having committed crimes at different junctures in his testimony. If the police were systematically stopping him for no reason, this fact should have been mentioned in his first PIF because it is

central to his narrative. Contradictions and omissions of significant events from the applicant's PIF entitle the Member to draw a negative credibility conclusion (see *Aragon v Canada (Citizenship and Immigration)*, 2008 FC 144 at para 22).

[24] As a result, I conclude that the Member's credibility findings are sustained by the evidence before him and do not constitute a reviewable error.

B. *Sufficiency of Reasons on State Protection*

[25] Despite the negative credibility findings, the applicant acknowledges that the Board must still fully consider and assess the documentary evidence demonstrating risk to similarly situated individuals, given that his claim is based on his profile and the treatment of similarly situated individuals in Serbia today; see *B231 v Canada (Citizenship and Immigration)*, 2013 FC 1218 (Kane J.), citing *Maimba v Canada (Minister of Citizenship and Immigration)*, 2008 FC 226 at para 22, 70 Imm LR (3d) 305; *Kanesaratnasingham v Canada (Minister of Citizenship and Immigration)*, 2008 FC 48 at para 8, [2008] FCJ No 61.

[26] I agree with the applicant that the Member inexplicably chose to reference only two outdated documents in the comprehensive National Documentation Package on Serbia [the Package] , ignoring more recent documents containing contradictory evidence, without any attempt to provide an analysis or explain his reasoning.

[27] For example out of the extensive number of documents making up Package, the Board chose only to refer from the UK border agency of the EC Progress report Serbia 2007 and USSD

2007. The brief conclusory reference from these documents was to the effect that despite societal discrimination against Roma, it was not sufficient to amount to persecution, noting as an option the possibility of internal relocation to another part of Serbia to avoid facing persecution.

[28] The reasons contained no reference to any of the contradictory documentation in the Package, including for example the 2012 United States country report on human rights practices for 2011. Under the titles Internally Displaced Persons and National/Racial/Ethnic Minorities it stated as follows:

> There were approximately 22,000 officially registered Romani displaced persons in the country. However, the UNHCR estimated that 40,000 to 45,000 displaced Roma lived in the country, many of whom presumably lacked personal documents necessary to register their status. While some displaced Roma lived in government-supported collective centers, living conditions for Roma (both local and displaced) were generally extremely poor. Local municipalities often were reluctant to accommodate them. If Roma did stay, they often lived near major cities or towns in unauthorized, isolated, informal settlements without electricity, water, sanitation, or other public services.
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> Roma, who constituted 1.4 percent of the population in the 2002 census but whose actual number was believed to be approximately 5.4 percent, continued to be the most vulnerable minority community and were the targets of police violence, societal discrimination and verbal and physical harassment.
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> On June 27, six individuals were convicted for inciting racial and national hatred and intolerance in Jabuka village in June 2010. All six were given sentences below the legally prescribed minimum, one to eight years of imprisonment. Four were sentenced to five months of probation and two, who were convicted as minors, were sentenced to "correctional measures".
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> [Emphasis added]

[29] The jurisprudence is clear that there is a presumption of state protection and a claimant seeking to rebut it must adduce " . . . relevant, reliable and convincing evidence which satisfies the trier of fact on a balance of probabilities that the state protection is inadequate" (see *Canada (Minister of Citizenship and Immigration) v Carrillo*, 2008 FCA 94 at paragraph 30 [*Carrillo*]). In addition, before this Court the applicants must demonstrate that the Board's decision on adequacy of protection (accepting it as the determinative issue) falls outside of the range of acceptable reasonable outcomes on the basis of the facts and the law or is insufficiently articulated to allow the reviewing court determine that the decision is reasonable.

[30] I adopt the following reasoning of Justice Hansen in *Polgari v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 626 concerning the failure to analyze or address contradictory documentation at stated at paragraph 32:

> Second, the documents tendered by the applicants and those contained in the RCO disclosure materials cast doubt and indeed contradict the availability and effectiveness of state protection for Hungarian Roma. While it may have been reasonably open to the panel to make the findings it did, the absence of any analysis of the extensive documentation contained in the Hungarian Lead Case Information Package and the materials in the RCO disclosure package or the documents submitted by the applicants coupled with the failure to adequately address the contradictory documents and explain its preference for the evidence on which it relied warrants the Court's intervention. [Emphasis added]

See also the cases of *Mohacsi v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 429 at para 54 and *Sivapathasuntharam v Canada (Minister of Citizenship and Immigration)*, 2012 FC 486 at para 22.

[31] The respondent attempted to engage the Court in a review of the evidence contained in the record to demonstrate that they reasons were sufficient based on the Supreme Court decision in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62. However, in that case the Court explained the role of reasons in the reviewing process as follows at paras 14 and 16:

> [14] Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses — one for the reasons and a separate one for the result (Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at §§12:5330 and 12:5510). It is a more organic exercise — the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes" (para. 47).
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> …
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> [16] Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382, at p. 391). 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. [Emphasis added]

[32] To the same effect, the Supreme Court in the decision of *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654,

released the day after *Newfoundland Nurses* commented on the limits of the court's capacity to reformulate the reasons of the tribunal at paragraph 54 as follows:

> 54. I should not be taken here as suggesting that courts should not give due regard to the reasons provided by a tribunal when such reasons are available. The direction that courts are to give respectful attention to the reasons "which could be offered in support of a decision" is not a "carte blanche to reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result" (*Petro-Canada v. Workers' Compensation Board (B.C.)*, 2009 BCCA 396, 276 B.C.A.C. 135, at paras. 53 and 56). Moreover, this direction should not "be taken as diluting the importance of giving proper reasons for an administrative decision" *(Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 63, *per* Binnie J.). On the contrary, deference under the reasonableness standard is best given effect when administrative decision makers provide intelligible and transparent justification for their decisions, and when courts ground their review of the decision in the reasons provided. [Emphasis added]

[33] In accordance with these directions, I conclude that the reasons of the Board were selective in their reliance upon an outdated country report in the 2012 National Package, while failing to consider the contradictory materials contained therein, or to conduct any analysis supporting their preference in weighing the materials, such that I am unable to understand why the Board made its decision or to permit me to determine whether the conclusion is within the range of acceptable outcomes.

[34] I note that the respondent attempted as well, to raise the issues of the applicant's failure to seek recourse for protection from the police or to suggest that local conditions should not be presumptive of the conditions in the rest of the country. These issues were not mentioned in the

Board's analysis and are neither germane nor determinative of the Court's decision in light of my conclusions described above.

VII. Conclusion

[35] The application for judicial review is allowed. The matter is sent back for a redetermination before a newly constituted panel.

[36] No question of general importance was raised for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. this application for judicial review is allowed; and

2. no question of general importance is certified.

"Peter Annis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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