Federal Court  Cour fédérale

Date: 20150129

Docket: IMM-6344-13

Citation: 2015 FC 258

Toronto, Ontario, January 29, 2015

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

ATTILA BALOGH
ATTILANE BALOGH
HAJNALKA BALOGH
BETTINA BALOGH
VIKTORIA BALOGH
(A.K.A. VICTORIA BALOGH)

Respondents

JUDGMENT

UPON APPLICATION for judicial review by the Minister of Citizenship and Immigration [the Applicant] under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision by the Immigration and Refugee Board of Canada, Refugee Protection Division [the RPD], dated September 9, 2013, wherein the RPD determined

that Attila Balogh, Attilane Balogh, Hajnalka Balogh, Bettina Balogh and Viktoria Balogh [the Respondents] were Convention refugees;

AND UPON reading the written submissions and hearing the oral submissions of counsel for the parties;

AND UPON determining that this application should be allowed for the following reasons:

The Respondents are husband, wife and three children, all of whom are citizens of Hungary and of Roma ethnicity. They allege discrimination and harassment based on their Roma ethnicity. They allege the following in support of their refugee protection claim:

1. The husband has been subjected to discrimination and harassment since elementary school and had difficulties finding a job as a dark skinned Roma.

2. His wife also faced racism in school as she was younger. She applied for a course but didn't get it because of her ethnicity despite having scored 94% on her test. When she gave birth to her second child, she was mistreated by the doctor who also made racist comments.

3. The husband was assaulted and wounded by knife on July 23, 2001 by a group of five skinheads as he was walking through a park from a store. The ambulance and the police were called.

4. The husband and his friend were attacked by skinheads at Varoshaz Square on March 15, 2005. Police took him to the emergency for his wounds but could not catch the attackers.

5. On May 7, 2007, the husband was confronted by skinheads and Guardists as he was coming back from work. They spat on him and slapped him, but fled when they heard someone coming. The police never showed up despite receiving a phone call about the incident.

6. On January 22, 2009, the wife came home with bruises. Two skinheads had followed her on her way back home from the store, pushed her down, kicked her in the head and trampled the food that she had bought. The husband called the police and she was taken to the emergency. The case was closed unresolved.

7. In May 2011, the husband's mother was attacked by Guardists when she came to visit him. His son called the police but they did not do anything as they were unable to identify the attackers. His mother had further issues with racists who smeared her apartment with racist graffiti.

8. The children avoid playing in a local playground as skinheads hang around nearby. They experienced harassment and prejudice in school, except the middle child who does not appear Roma.

The husband left Hungary for Canada on August 27, 2011. His wife and children came a month later. The RPD accepted the Respondents' refugee protection claim on September 9, 2013. The Applicant was granted leave on October 29, 2014.

The RPD was satisfied as to the Respondents' identities. While various words were used, the RPD found the Respondents' evidence credible. The RPD noted that Country documents on Hungary indicated that there are problems of racial extremists and persecution of Romas in Hungary. It also noted that critical corroborative material had been filed. Then, without more, the RPD concluded:

> [12] Consequently, the panel is persuaded to believe, on balance of probabilities, his allegation that he and members of his family were subjected to harassment and attacks that, due to their recurrence in various forms, amount to persecution.
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> [13] On the basis of the foregoing and taking into account the totality of the evidence adduced, the panel finds that the claimants have (a) a fear of persecution and not just discrimination and/or harassment, (b) that there exists a serious possibility of persecution should they be returned to Hungary, and (c) that there is a demonstrable failure of State Protection and no viable Internal Flight Alternative for them in their country of origin.

The RPD consequently determined that the Respondents were Convention refugees and accepted their claims. The issue now is whether the RPD erred in its reasons finding (a) failure of state protection, (b) lack of viable Internal Flight Alternative [IFA], and (c) persecution. In my view the RPD erred at least in respect of state protection, and therefore the decision must be set aside and remitted for re-determination and because of that, I will not deal with the issues of IFA and persecution.

As to the standard of review, in *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62 [*Dunsmuir*], the Supreme Court of Canada held that a standard of review analysis is unnecessary where "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question." Importantly for this

case, in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 14, 22 [*Newfoundland Nurses*], the Supreme Court of Canada held that the adequacy of reasons is not a stand-alone basis for quashing a decision and that any challenge to the reasoning/result of a decision should therefore be made within the reasonableness standard of review. In *Dunsmuir* at para 47, the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard of review:

> 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.

In *Newfoundland Nurses* at para 16, the Supreme Court explained what is required of a tribunal's reasons in order to meet the *Dunsmuir* criteria:

> 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.

This case is similar to another judicial review by this Court of a RPD decision involving different parties: *Canada (Citizenship and Immigration) v Balogh*, 2014 FC 932 [*Balogh*]. There, I found the RPD reasons did not comply with the requirements of *Dunsmuir* and *Newfoundland*

Nurses and set the decision aside. I do wish to point out that *Balogh* was decided after the RPD made its determination in the case at bar. There are few if any material differences between *Balogh* and the case at bar. The facts differed, and it was argued that the nature and quality of the factual issues differ, which to some extent they do.

Balogh outlined the statute and case law both of which required the RPD to give proper reasons. After noting the statutory obligation to give reasons set out in section 169 of the IRPA, *Balogh* summarized the law which has not changed:

> [20] Accordingly, this Court has held that a refugee claimant, the Minister, and the public at large equally have the right to know the reasons for which a claim was or was not allowed (see *Canada (Minister of Citizenship and Immigration) v Shwaba*, 2007 FC 80 at para 23; *Canada (Minister of Citizenship and Immigration) v Mokono*, 2005 FC 1331 at para 14).
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> [21] In *VIA Rail Canada Inc v Canada (National Transportation Agency)*, (2001) 193 DLR (4th) 357 at paras 17-20, the Federal Court of Appeal listed some of the beneficial purposes served by reasons:
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> > [17] [...] Reasons serve a number of beneficial purposes including that of focusing the decision maker on the relevant factors and evidence. In the words of the Supreme Court of Canada:
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> > > Reasons, it has been argued, foster better decision making by ensuring that issues and reasoning are well articulated and, therefore, more carefully thought out. The process of writing reasons for decision by itself may be a guarantee of a better decision.
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> > [18] Reasons also provide the parties with the assurance that their representations have been considered.
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> > [19] In addition, reasons allow the parties to effectuate any right of appeal or judicial review that they might have. They provide a basis for an

> assessment of possible grounds for appeal or review. They allow the appellate or reviewing body to determine whether the decision maker erred and thereby render him or her accountable to that body. This is particularly important when the decision is subject to a deferential standard of review.
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> [20] Finally, in the case of a regulated industry, the regulator's reasons for making a particular decision provide guidance to others who are subject to the regulator's jurisdiction. They provide a standard by which future activities of those affected by the decision can be measured.

Balogh also noted the decision of this Court in *Navarrete Andrade v Canada (Citizenship and Immigration)*, 2013 FC 436 at para 28:

> [28] The Board must actually analyse the evidence it references and consider how that evidence relates to the issue of state protection. It is insufficient to merely summarize large volumes of evidence and then state a conclusion that state protection is adequate. The evidence and the conclusion must be connected with a line of reasoning that is transparent and intelligible.

Also as the Court noted in *Balogh*:

> [34] The applicant rightly refers to *Canada (Public Safety and Emergency Preparedness) v Ramirez*, 2013 FC 387 at para 36 and *Ralph v Canada (Attorney General)*, 2010 FCA 256 at paras 17-19 to the effect that:
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> > [36] … the reasons for decision must contain enough information about the decision and its bases so that, first, a party can understand the basis for the decision and decide whether or not to apply for judicial review, and second, the supervising court can assess, meaningfully, whether the panel met minimum standards of legality. A decision is therefore justified and intelligible when its basis has been given and the basis is understandable, with some discernable rationality and logic.

> [35] In *Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431 at para 11 this Court held:
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> > [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… *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 this case, and dealing only with the issue of state protection, the RPD nowhere stated the legal framework within which its state protection analysis took place. It did not mention the presumption of state protection where there is a democracy. It said nothing as to how that presumption varies with the strength of the democracy. Nowhere does the RPD appear alive to or acknowledge that it is the refugee claimant who has the legal burden to rebut the presumption of state protection. Nowhere does the RPD recognize that a claimant may only rebut the presumption of state protection with "clear and convincing evidence". The RPD said nothing about the nature of state protection or what exactly it is, i.e., operational adequacy. Its only comment on state protection is the bare conclusion that "there is a demonstrable failure of State Protection". The RPD provided no reasons or analysis as to its analytical process or why it found a failure of state protection, let alone how it concluded there was "demonstrable" failure of state protection. Obviously it had a view on the issue, but that is not the point. It failed these claimants by not providing guidance on how it came to the conclusion it reached.

This is a reviewing Court. In light of the above, I cannot tell how the RPD defined state protection, nor if it had the correct legal definition and principles in mind. I am not able to tell if

the correct law was applied to the facts found by the RPD. Nor am I able to determine what those facts were. Where nothing is said of the law or the facts, as here, the decision must be set aside.

Given this flawed state of the reasons, process and analysis, I was asked to review the evidence on state protection. I was pointed to various reports and documents. It was argued that I should take that evidence together with the testimony of the Respondents (which was believed), and consider it with the outcome and sustain this conclusory decision as reasonable as defined by *Dunsmuir*. No doubt *Newfoundland Nurses* permits courts to look at the record to supplement weak or inadequate reasons. But here, several difficulties prevent the Court from doing so. First, the documentary evidence on state protection is contradictory, some progress being noted in some areas, while it is clear that many difficulties remaining regarding the treatment of Romas in Hungary. Second, the request as I see it asks the Court in effect to "fill in" the reasons with those parts of the record favourable to the Respondents. But even if there is evidence on which if accepted the RPD could find that the presumption of state protection was successfully rebutted, its acceptance by this Court would by implication require both the balancing and rejection of the other conflicting evidence. And then there is the testimony of the Respondents which is for the panel, not the Court to assess in combination with the documentary record. The RPD has many advantages not available to a reviewing court in the assessment of evidence before it. Finally, there is a difference between reasons that might be supplemented by the record, and no reasons at all. Here we have, in reality, no reasons at all. No reasons at all constitutes a breach not only of the IRPA, *Dunsmuir*, and *Newfoundland Nurses* but, we should remember, also breaches the duty of procedural fairness, attracts the standard of correctness on review, and is entitled to little and more generally, no deference.

The courts are not here to provide reasons that were not given by the RPD, nor do they have licence to guess what findings might have been made or to speculate as to what the panel might have been thinking. I want to emphasize again that the task of finding whether or not there is adequate operational state protection is for the RPD not the Court to determine. There is a line. These reasons cannot be cured by *Newfoundland Nurses*.

In summary, on the issue of state protection, the RPD's reasons do not allow me to understand how or why it reached its decision, nor to determine whether its conclusion is within the range of acceptable outcomes without guessing what findings might have been made or speculating on what the RPD might have been thinking on the conflicting evidence before it. The RPD's decision clearly lacks "justification, transparency and intelligibility", and is therefore unreasonable as the law is stated in both *Dunsmuir* and *Newfoundland Nurses*. It must therefore be set aside.

Given the result, I will not deal with the RPD's findings regarding the IFA and persecution.

Neither party proposed a question to certify, and I find none to certify.

THIS COURT'S JUDGMENT is that the application for judicial review is granted, the decision below is set aside, the matter is remitted to a differently constituted panel of the RPD for re-determination, no question is certified and there is no order as to costs.

"Henry S. Brown"

Judge