Federal Court  Cour fédérale

Date: 20150320

Docket: IMM-820-13

Citation: 2015 FC 361

Ottawa, Ontario, March 20, 2015

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

VINKO DJAK
MAGDALENA DJAK
DAVOR DJAK
LUKA DJAK

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s. 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] for judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board [Board], dated May 15, 2012 [Decision], which refused the

Applicants' application to be deemed Convention refugees or persons in need of protection under ss. 96 and 97 of the Act.

II. BACKGROUND

[2] The Applicants are citizens of Croatia and Bosnia. They are a husband [Principal Applicant] and wife, their nine-year-old son, and their eleven-year-old son. They arrived in Canada on May 27, 2011 and sought refugee protection on June 8, 2011.

[3] The Applicants claim that they have been persecuted in Bosnia because of their Catholic religion. They also say that they have been persecuted in Croatia because of their Bosnian nationality.

III. DECISION UNDER REVIEW

[4] On May 15, 2012, the Board denied the Applicants' claim for refugee protection.

[5] The Board found that the Applicants lacked a well-founded fear of persecution with a nexus to a Convention ground in Croatia. The Board also found that they were not persons in need of protection as removal to Croatia would not subject them personally to a risk of harm.

[6] The Board noted that the Principal Applicant served in the Bosnian Army from 1991-1992 but said that there was insufficient evidence to pursue the issue of exclusion. The Minister declined to intervene because "it is unlikely that the claimant would have been complicit in acts

of war crimes or crimes against humanity." Further, the Principal Applicant testified that he was recruited at sixteen years old and did not participate in combat. He served to guard the offices of his Commander for less than one year.

[7] The Board concluded that the determinative issue was whether the Applicants fear persecution as members of a particular social group (Bosnians living in Croatia) or because of their Catholic religion. The Board said that a well-founded fear of persecution has two components: a subjective fear of persecution and an objective basis for that fear. The Applicants had the burden of showing that there is more than a mere possibility that they would be persecuted in Croatia.

[8] The Board found that the Principal Applicant testified in a straightforward manner but noted that his oral testimony referred to incidents that did not appear in his Personal Information Form [PIF].

[9] The Board concluded that while the Applicants may have experienced discrimination in Croatia, it did not amount to persecution. It said that the worst the Applicants described was name-calling based on their nationality. The Board acknowledged that the documentary evidence indicated that there were ethnic tensions against minorities in Croatia, specifically Roma and Serbs. However, the Applicants are neither. The Board also acknowledged that there were problems of unemployment and restitution of property in Croatia, but the Principal Applicant was employed and the Applicants had a home before leaving for Canada. The Applicants also

testified that they were able to attend church regularly in Croatia. The Principal Applicant also testified that his family lives and works in Croatia.

[10] The Board concluded that there was insufficient persuasive evidence to indicate that the Applicants would be persecuted. The Board did not analyze the Applicant's claim in relation to returning to Bosnia because it was satisfied that the Applicants could return to Croatia.

IV. ISSUES

[11] The Applicants raise a number of issues in this proceeding. They can be summarized as follows:

1. Whether there was a breach of the Applicants' right to procedural fairness and the *Canadian Charter of Rights and Freedoms*, s. 14, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*] due to the quality of the interpretation at the hearing;
2. Whether the Applicants waived their right to complain about the interpretation by not raising the issue at the hearing;
3. Whether the Decision is unreasonable because:
    a. The Board erred in finding that the Applicants lacked credibility;
    b. The Board erred in finding that the Applicants had failed to rebut the presumption of state protection; or,
    c. The Board ignored relevant evidence before it.

V. STANDARD OF REVIEW

[12] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where

the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[13] The issue of the quality of the interpretation raises a question of procedural fairness and is reviewable on a standard of correctness: *Licao v Canada (Citizenship and Immigration)*, 2014 FC 89 at para 18; *Francis v Canada (Citizenship and Immigration)*, 2012 FC 636 at para 2. Whether the Applicants waived their right to object to the quality of the interpretation is a question of fact for the Court to determine on a case-by-case basis: *Mohammadian v Canada (Minister of Citizenship and Immigration)*, [2000] 3 FC 371 at paras 27-29, 185 FTR 144, aff'd 2001 FCA 191 at paras 13-19 [*Mohammadian*].

[14] Whether the Board erred in its factual findings, including its treatment of the evidence and any credibility findings, is reviewable on a standard of reasonableness: see *Aguebor v Minister of Employment and Immigration* (1993), 160 NR 315 (FCA); *Mercado v Canada (Citizenship and Immigration)*, 2010 FC 289 at para 22; *De Jesus Aleman Aguilar v Canada (Citizenship and Immigration)*, 2013 FC 809 at para 19.

[15] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": see *Dunsmuir*, above, at para 47; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

VI. STATUTORY PROVISIONS

[16] The following provisions of the Act are applicable in this proceeding:

Convention refugee	**Définition de « réfugié »**
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(b) not having a country of nationality, is outside the country of their former	b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa

habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Person in need of protection

Personne à protéger

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by

(iv) la menace ou le risque ne

the inability of that country to provide adequate health or medical care.	résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
Person in need of protection	**Personne à protéger**
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

VII. ARGUMENT

A. *Applicants*

[17] The Applicants submit that whether their testimony was properly interpreted is a question of procedural fairness. The right to have a hearing properly interpreted is also enshrined in the *Charter*. The Federal Court of Appeal has held that a refugee claimant has a right to "continuous, precise, impartial, competent and contemporaneous" interpretation at a refugee hearing: *Mohammadian*, above, at para 4.

[18] The Applicants say that they have identified a number of issues with the interpretation in the hearing transcript. For example, the Applicants say that at times the Board Member spoke directly to the Principal Applicant. The Applicants say the errors in the transcript reveal that the Decision was not based on their actual testimony.

[19] The Applicants submit that whether they waived their right to complain about the interpretation by not objecting at the hearing is a question of fact to be determined on a case-by-case basis. They say that the relevant question is whether the circumstances of the case are such that it was reasonable to not object at the hearing: *Mohammadian*, above, at paras 12-17; *Faiva v Minister of Employment and Immigration*, [1983] 2 FC 3, 145 DLR (3d) 755 (CA). The Applicants say it was clear that both the Board Member and their counsel noticed discrepancies between what the interpreter was saying and what the Applicants were saying. The Applicants submit that the Board Member should have adjourned the proceeding to ensure that the Applicants' right to an interpreter was respected.

[20] The Applicants also submit that it was unreasonable for the Board to find them not credible when there was no reason not to believe their claim. They say there were no omissions between the Principal Applicant's oral testimony and his PIF.

[21] The Applicants also submit that the Board erred in finding that there was adequate state protection available to the Applicants in Croatia. The Applicants say their evidence indicates that they approached the police and were denied protection. They say this evidence was ignored in the Decision.

[22] Finally, the Applicants submit that the Board erred in applying the test for persecution: *Canada (Attorney General) v Ward*, [1993] 2 SCR 689. They submit that the acts committed against them amount to a sustained, systemic violation of their basic fundamental rights. The Applicants say that in finding they had not established persecution, the Board ignored relevant

portions of both the documentary evidence and the Principal Applicant's testimony: *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 at paras 13-15. The Federal Court has held that "the 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'": *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35 at para 17, citing *Bains v Minister of Employment and Immigration* (1993), 63 FTR 312.

B. *Respondent*

[23] The Respondent submits that the Applicants waived their right to raise issues with the interpretation by not raising any issues at the hearing. If a claimant becomes aware of an interpretation issue at a hearing, he or she must raise the issue at the hearing: *Mohammadian*, above, at paras 12-17. Neither the Applicants nor their counsel raised any problems during their hearing. The Applicants say they were aware of the issues at the hearing and have not explained why they should be able to raise the issue at this stage of the proceeding. Regardless, the Applicants have also failed to present any evidence of material problems with the interpretation.

[24] The Respondent also submits that the Board did not make any credibility findings against the Applicants. The Board pointed to some omissions in the Principal Applicant's PIF but ultimately concluded that the Applicants had presented insufficient evidence of the risk that they alleged. The Board's findings on the omissions were not determinative of the claim.

[25] The Respondent further submits that the Board is entitled to rely on documentary evidence over a claimant's evidence, even if it finds the claimant trustworthy and credible: *Zhou v Canada (Minister of Employment and Immigration)*, [1994] FCJ no 1087 (QL)(FCA); *Aleshkina v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 589. Further, a finding of discrimination rather than persecution is within the Board's jurisdiction: see *Kwiatkowsky v Minister of Employment and Immigration*, [1982] 2 SCR 856; *Sagharichi v Minister of Employment and Immigration* (1993), 182 NR 398 (FCA).

C. *Applicants' Reply*

[26] The Applicants submit that they have not waived their right to raise an issue regarding the quality of the interpretation at the hearing. They say the issue was not raised at the hearing for two reasons: first, their counsel did not speak Croatian and so was unable to recognize the interpretation issues; second, they did not speak English at the time and so did not understand what was being translated to the Board. The Applicants submit, for example, that the Principal Applicants' family does not live safely in Croatia. Rather, his family lives in Croatia under severe pressure and will be expelled from their community soon. In addition, the Principal Applicant did not have steady work in Croatia.

[27] The Applicants also submit that the Decision failed to analyze the Principal Applicant's claim that he was also persecuted because his father is Roma and his mother is Serbian. Finally, the Applicants raise the issue of whether the Board was biased.

D. *Respondent's Further Memorandum*

[28] The Respondent takes issue with an affidavit submitted by the female Applicant on November 6, 2014. The order granting leave provided that affidavits were required to be submitted by October 20, 2014. Further, the affidavit is dated October 23, 2014 and there is no explanation for the Applicants' delay in filing it. The Respondent submits that the Court should not consider this affidavit and the Principal Applicant's affidavit of October 18, 2014 because they merely re-state their allegations of risk. In the alternative, the Respondent asks that the female Applicant's affidavit of October 23, 2014 be struck because it was not filed in a timely manner.

[29] Finally, the Respondent submits that there is no evidence that the interpreter did not understand the Applicants. The transcript reveals that where there was a lack of clarity in relation to specific words, the interpreter consistently provided an explanation. These explanations did not affect the hearing or the final determination of the claim.

VIII. ANALYSIS

[30] The Applicants raise a range of issues, some of which (credibility and state protection) are not part of the Decision and others (bias and incorrect test under s. 97) that are argued for the first time in reply. These issues are not properly before the Court and will not be considered as part of this review.

A. *Interpretation Issues*

[31] The principal ground of review concerns alleged problems with interpretation. Mr. Vinko Djak in his affidavit asserts that the "Board decision was based on incorrect interpretation of the Interpreter of Croatian language" (Applicants' Record at 14), but he makes no effort to tell the Court what mistakes in interpretation may have been made.

[32] This is a bald allegation. The Applicants have placed no evidence before the Court that would establish any interpretation errors or the impact they had upon the Decision. Such unsupported assertions tell the Court nothing it needs to know to assess this issue. Hence, the Respondent has had no opportunity to address these interpretation allegations. They may have been entirely immaterial, for all the Court knows. In a second affidavit of Mr. Vinko Djak, dated October 18, 2014, no mention is made of interpretation problems.

[33] The Applicants appear to think that a bald assertion that there were interpretation problems is sufficient to establish procedural unfairness. It is not. A bald assertion is not sufficient proof without the detail and evidence to back it up. The onus is upon the Applicants to establish their case:.see *R v Tran*, [1994] 2 SCR 951 at 980; *Ramos Contreras v Canada (Public Safety and Emergency Preparedness)*, 2009 FC 525 at para 20. The Applicants have failed to establish any kind of case for interpretation problems.

[34] The Applicants have not established procedural unfairness as a result of interpretation problems.

B. *Other Issues*

[35] Apart from credibility and state protection, which are not part of the Decision, the Applicants raise very little else that could support a finding of reviewable error. Their submissions are either unsupported assertions (e.g. the Board ignored evidence) or simple disagreement with the Board's conclusions. Disagreement is not, *per se*, a ground of reviewable error. The Applicants are obliged to demonstrate why this Decision lacks justification, transparency and intelligibility within the decision-making process, or whether it falls outside the range of possible, acceptable outcomes which are defensible in respect of the facts and law. The Applicants have failed to do this.

[36] In their reply, the Applicants raise a number of new issues (e.g. bias, incorrect test under s. 97) that are not proper reply. Once again, however, even if they had been raised appropriately, there are the same problems with bald assertions that the Decision and the record do not support.

[37] At the heart of the Decision lies a finding that the evidence does not establish s. 96 persecution or s. 97 risk (CTR at 7-8):

> [14] The male claimant said that they left Bosnia because they had nothing left there. When they went to Croatia, he said they were considered to be Bosniaks, notwithstanding that they are Catholic and of Croatian ethnicity. He said he is afraid of having to go back because they are now settled and happy in Canada.
>
> [15] The female claimant also testified, and added that when the children were in school or at play in Croatia they were taunted and beaten. She said that Davor was insulted; the teacher would not take responsibility and the administration did little to intervene. She said that they reported incidents to the principal sometimes but she did not know what action was taken. She said Luka was unable to play outside without serious problems with other children.

> [16] The male claimant said his family lives in Croatia and are gainfully employed with the government. He also said that there are no Croatians living in his neighbourhood. He was asked why he did not move his family to the area where his family is, and he said he could not afford it and the female claimant said that where they lived was close to her husband's work.
>
> [17] I find that the claimants may have experienced some discrimination while they were in Croatia, but that this discrimination did not amount to persecution. The worst thing they described was social rejection and name calling because they were from Bosnia. Recent documents refer to some ethnic tensions against minorities, especially Roma. As for problems of Serbs, the problems seem to be centered in the hinterlands. They are neither Serbs nor Roma. The documents indicate there are some problems of unemployment and restitution of property. The male claimant was able to get work and they were able to have a place to live until they left for Canada.
>
> [18] The onus is on the claimants to show that there is more than a mere possibility or reasonable chance they would be persecuted in Croatia. There [*sic*] evidence does not indicate this. They are devout Catholics and were able to attend church regularly. The male claimant's family is living safely in Croatia and they are gainfully employed.
>
> [19] I have considered the claimants' testimony carefully, and conclude that there is insufficient persuasive evidence to indicate that the claimants would be persecuted because of their birth in Bosnia.
>
> [footnote omitted]

[38] When I went over these findings with the Principal Applicant at the hearing he simply said that he had not given evidence to support the Board's finding. He said he has no family in Croatia who were gainfully employed with the government or otherwise. He said he was forced to quit his job once "it was found out he had married a Serb." He said he was told to move-on by neighbours because of his mixed marriage. He said he told the Board he would be killed if he

returned to Croatia. He said he told the Board that he went to the church but the priest attacked him. He said that all of his family had left Croatia before he came to Canada.

[39] Unfortunately, there are considerable discrepancies between what the Principal Applicant says he told the Board and what appears in the transcript of the refugee hearing. Once again, the Principal Applicant says he never said these things and that it must be a translation problem. Unfortunately, once again, he has not placed before the Court any evidence that disproves the accuracy of the transcript of the hearing and what he testified to at the hearing.

[40] Because the Applicants are representing themselves, I have carefully reviewed the record to see if there is any evidence of the kinds of problems they have raised in this application:

(1) Interpretation Issues

[41] My review of the transcript leads me to conclude that there were no interpretation problems. There are a couple of instances where the interpreter did not know a particular word:

> **Q**: (Inaudible) a chance to fire at the target just to see if you know how to use it?
>
> **A**: No. No, they gave me a gun, and the belt –
>
> **INTERPRETER**: And I don't know how to call the part where you put your gun. Is there a name for it?
>
> **COUNSEL**: Holster.
>
> [CTR at 290]
>
> **Q**: So I understand then you'd wear the uniform during the day. What times of day did you actually -- do you recall the time of day you actually served in the services?

> **A**: Well, from seven to seven, and I had to be home by seven-thirty or the latest eight o'clock because they had this policy but you're not supposed to be moving.
>
> **INTERPRETER**: Policy.
>
> **MEMBER**: Curfew.
>
> [CTR at 291]
>
> **CLAIMANT**: Year, he's very lively he can climb a tree.
>
> **MEMBER**: Pardon?
>
> **INTERPRETER**: He's very -- how would I say?
>
> **MEMBER**: Agile?
>
> **INTERPRETER**: Agile. Agile. He can climb a tree.
>
> [CTR at 303]

[42] Each of the instances was clarified immediately and I do not think they amount to mistakes in the interpretation, never mind material mistakes. They have nothing to do with the Board's finding that the Applicants may have experienced discrimination but face no risk of persecution.

(2) Evidence of persecution or discrimination

[43] I have gone through the record and the hearing transcript. The Applicants did not provide any evidence of persecution. There were a couple of newspaper articles and an affidavit from someone with the same family name who says that the children used to tell her about the name-calling they experienced in Croatia.

[44] The transcript does not support what the Principal Applicant told the Court at the hearing. The Principal Applicant testified that his mother, father and three brothers live in Croatia (CTR at 297). He said he could not live in their area because "[i]t's a very expensive area to live in" and he could not fit his family into his parents' home (CTR at 316). He said that his father has been self-employed for thirty or forty years, that two of his brothers work for the government, and his third brother is disabled and does not work (CTR at 298-300).

[45] The Principal Applicant testified that he worked for the government for five years, that he probably had a pension, and that he voluntarily left his job the month the family came to Canada (CTR at 300). He says he had some friends at work but also experienced name-calling there (CTR at 301); he does not suggest that was the reason he left the job.

[46] The Principal Applicant and female Applicant testified regarding two incidents of persecution in Bosnia that pre-empted their move to Croatia. Specifically, the Principal Applicant said he was slapped in a store once in Bosnia because he had a Croatian driver's license (CTR at 310-311). The female Applicant said their car was vandalized in Bosnia (CTR at 306). Neither of these were mentioned in the PIF. The Decision, however, was in reference to Croatia, and there was no evidence of any persecution in Croatia.

[47] The Principal Applicant testified that the family came to Canada because the children were beaten and called names (CTR at 302). The Principal Applicant said he went to the police about the bullying but it made the situation worse (CTR at 303). In his PIF, the Principal Applicant said he thought about calling the police but knew it would make things worse. The

Decision states that the Principal Applicant "said he thought about calling the police, but realized that would make things worse" (CTR at 4). In my view, this is not a material error. He provided inconsistent evidence regarding whether he did or did not go to the police. If he did go to the police, he said it was in relation to the bullying which the Board found did not constitute persecution or risk. Further, this is not a decision about state protection.

[48] The Board twice asked the Principal Applicant about the family's ability to attend church. He said that they attended church regularly, not just on holidays (CTR at 281). He said that some people would look at the family strangely and make comments about the fact that they were Bosnian (CTR at 301). There was no mention of any attack.

[49] The Applicants also claim that the Board ignored the fact that they were persecuted because the Principal Applicant's father is Roma and his mother is Serbian, and that he "married a Serb." I do not see this information mentioned anywhere in the record. The Member actually asked him whether their problems were because they are a mixed family (CTR at 281):

> **MEMBER**: So the problems that you were having were not because there's a mixture in the family but because you're different than the people where you lived. Is that correct?
>
> **CLAIMANT**: Yes.

[50] The Board explicitly said it had no credibility concerns (CTR at 309). I do not see any basis in the record for what the Principal Applicant says he told the Board. Counsel's submissions were to the point that the teasing and discrimination amounts to persecution over time. In my view, the record provides ample support for the Board's finding that there was insufficient evidence of persecution or any risk.

[51] The parties agree there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. There is no question for certification.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-820-13
STYLE OF CAUSE:	VINKO DJAK, MAGDALENA DJAK, DAVOR DJAK, LUKA DJAK v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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