

Federal Court



Cour fédérale

Date: 20150409

Docket: IMM-1248-14

Citation: 2015 FC 430

Ottawa, Ontario, April 9, 2015

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

**VICTOR REABOI AND
CLAVDIA ACHIMOVA**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The applicants seek judicial review of the February 10, 2014 decision of the Refugee Protection Division of the Immigration and Refugee Board [Board] which determined that the applicants are neither Convention refugees nor persons in need of protection.

[2] The applicants submit that the decision of the Board is not reasonable because: the Board made two negative credibility findings which are not supported by the evidence, yet made no

overall credibility finding; the Board failed to consider all the evidence; and, the Board failed to consider the key element of the applicants' claim, which was their persecution by non-state actors and the lack of state protection.

[3] For the reasons that follow, the application for judicial review is allowed.

Background

[4] The applicants are citizens of Moldova and are True Orthodox Christians. Moldova has denied the registration of the True Orthodox Christian Church as a religion. The applicants recounted verbal and written threats, harassment by the police, threatening phone calls and physical attacks by extremists due to the practice of their religion. In their Personal Information Form [PIF], the applicants recounted that they were harassed and disrupted by police while they were gathered in a private home to worship in 2008, materials were confiscated and two worshippers were arrested and detained. The applicants also described an incident that occurred while preaching with a group of fellow church members on the street when the group was attacked by two men. The police attended but did not provide any assistance to the group. The applicants recounted harassment by their neighbours, vandalism to their home, assaults on church members, and in May 2010, Ms Achimova was beaten by a group of people and required hospitalization. The applicants explained that they did not report the beating to the police because they did not think the police would help them.

The Decision

[5] The Board made two negative credibility findings. First, the Board drew a negative inference because Ms Achimova responded to a question indicating that she had no “other” involvement with the police in Moldova, then following a break in the hearing she described in more detail the 2008 incident when the police disrupted their worship in a private home and arrested two church members. Second, the Board drew a negative inference from the fact that Ms Achimova had visited family in Ukraine, and then returned to Moldova. The Board noted that she stated that she returned because she thought the situation in Ukraine would be the same as in Moldova but did not elaborate on this explanation. The Board noted that “return to the country of nationality may indicate that a well-founded fear of persecution is lacking...”.

[6] The Board cited reports from Amnesty International, Freedom House and the US Department of State and concluded that: “There was no evidence before the panel to disturb the finding that ‘religious groups, whether registered or not’ have freedom to worship and free access to public places for their activities.”

[7] The Board referred to recent letters provided by the applicants indicating that the religion continues to be practised despite the lack of registration of the church. The Board was not persuaded that the denial of registration of the True Orthodox Church amounted to persecution.

[8] The Board then concluded, based on its consideration of the applicants’ evidence and the objective documentary evidence on country conditions, that it was not persuaded that the applicants face a serious possibility of persecution due to their religion.

[9] The Board also found that there was no personalized risk of communal violence to the applicants in Moldova.

The Issues

[10] The overall issue is whether the decision is reasonable. This requires an assessment of whether the Board's credibility findings were reasonable; whether the Board failed to consider all the evidence; and, whether the Board failed to consider the persecution by non-state actors and the adequacy of state protection.

Standard of Review

[11] The parties agree that the standard of reasonableness applies. Therefore, the role of the Court is to determine whether the Board's decision "falls within 'a range of possible, acceptable outcomes which are defensible in respect of the facts and law' (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190 [*Dunsmuir*]). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome." (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59, [2009] 1 SCR 339).

[12] It is also well-established that boards and tribunals are ideally placed to assess the credibility of refugee claimants (*Aguebor v Canada (Minister of Employment and Immigration)*, 160 NR 315 at para 4, [1993] FCJ No 732 (FCA)); and given its role as trier of fact, the Board's credibility findings should be given significant deference (*Lin v Canada (Minister of Citizenship*

and Immigration), 2008 FC 1052 at para 13, [2008] FCJ No 1329; *Fatih v Canada (Minister of Citizenship and Immigration)*, 2012 FC 857 at para 65, [2012] FCJ No 924). The Board's role in determining credibility was described by Justice Martineau at para 7 in *Lubana v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116, [2003] FCJ No 162, as "the heartland of the Board's jurisdiction".

Were the Board's credibility findings reasonable?

[13] The applicants submit that the Board made two specific credibility findings, both of which were unreasonable, but did not make a clear finding on the applicants' overall credibility.

[14] The applicants submit that the Board questioned Ms Achimova at length about their experience with the police and she became upset due to the questioning that was both specific and general. She responded about a specific incident on the street and did not appreciate that the Board was asking more broadly about other experiences with the police. The applicants submit that it is not reasonable for the Board to consent to take a break, return and resume the same line of questioning, then draw an adverse inference from the fact that Ms Achimova responded that there were other incidents with the police and described these incidents. The applicants note that the Board reiterated its question about "other" incidents and Ms Achimova indicated that she had misunderstood the question before the break. She recounted the 2008 police disruption of their place of worship along with other incidents, all of which were consistent with the claims made in their PIF. The applicants argue that the Board should not have agreed to a break to permit Ms Achimova to regain her composure only to draw a negative inference from her ability to answer the Board's questions after the break.

[15] The applicants also submit that the Board's negative credibility inference arising from Ms Achimova's return to Moldova after a visit to Ukraine was unreasonable. Ms Achimova explained that the situation in Ukraine is similar to that in Moldova. The Board immediately moved on to other questions and did not ask for or provide an opportunity for her to elaborate. The applicants submit that, as in *Caicedo v Canada (Minister of Citizenship and Immigration)*, 2011 FC 749, [2011] FCJ No 965, the Board's inference is unreasonable given the applicant's plausible explanation and the Board's failure to provide any opportunity to elaborate.

[16] The applicants note that, although the Board made two specific credibility findings, it did not make an overall credibility finding. The Board did not state that it disbelieved that the applicants had experienced what they claimed, nor did it state that there was any inconsistency in their testimony and their PIF.

[17] The respondent notes that credibility findings are factual, case-specific, and arise out of the Board's assessment of several factors and are owed significant deference (*Sosa v Canada (Minister of Citizenship and Immigration)*, 2014 FC 428 at para 25, [2014] FCJ No 445).

[18] The respondent submits that both credibility findings are reasonable. The Board repeatedly questioned Ms Achimova about the applicants' experiences with the police and asked about other incidents beyond the police disrupting their preaching on the street, but she did not refer to the 2008 incident. Ms Achimova only recounted the details of the 2008 incident after the break, although the same question was put to her before the break.

[19] The negative inference arising from Ms Achimova's return to Moldova from Ukraine was also reasonable. She provided only a brief answer and did not offer more information. It was open to the Board to draw a negative inference regarding her re-availment and to find that it was not consistent with her subjective fear.

[20] The respondent acknowledges that the decision does not explicitly find that the applicants were not credible or that the Board disbelieved they had experienced what they claimed.

However, the applicants must do more than suggest that the Board could have reached a different conclusion regarding credibility (*Cao v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1398 at para 31, [2012] FCJ No 1503). The respondent argues that the decision sufficiently conveys that the Board considered all the evidence, as stated at paragraph 13 of the decision, including the applicants' testimony and the objective evidence, and was not persuaded that the applicants faced a serious possibility of persecution based on their religion.

The credibility findings were not reasonable

[21] Despite the deference owed to the Board on its credibility findings, I am unable to find that the two specific findings are reasonable. The findings are not justified or defensible on the facts on the record.

[22] With respect to the inference drawn from Ms Achimova's ability to provide details of the 2008 event when the police attended at the applicants' place of worship in a private home and confiscated material, arrested and briefly detained two worshippers, contrary to the Board's finding, Ms Achimova did not change her testimony before and after the break.

[23] A review of the transcript reveals that the Board member questioned Ms Achimova both about a specific incident, which she had described as relating to their preaching on the street, and about “other” incidents with the police, using terms such as “ever” and “always”. The applicants’ counsel made several submissions to the Board regarding its approach to its questioning, noting that Ms Achimova was upset and that the Board’s questions were jumping from specific to general and back in a confusing manner. The applicants’ counsel noted that Ms Achimova was in tears and requested the break to permit her to compose herself. After the break, the Board asked the same questions and Ms Achimova explained that she had previously misunderstood. She then went on to provide details of the 2008 incident as well as several other incidents which had been described in the PIF.

[24] The Board did not suggest that Ms Achimova had refreshed her memory or that any improper coaching of her evidence had been provided. It simply drew an adverse inference.

[25] I agree with the applicants that the Board should not have permitted the break in the hearing only to later use this as a means to draw an adverse inference of credibility, particularly given the nature of the exchange with counsel regarding the Board’s approach to questioning Ms Achimova and the need for the break. More importantly, her testimony was not different after the break; it was a continuation of her answers based on the necessary clarification that was provided and it was consistent with the PIF.

[26] The negative credibility finding arising from Ms Achimova’s return to Moldova from Ukraine was also unreasonable. The transcript reveals that Ms Achimova indicated that in July

2008 she visited her aunt in Ukraine for a week and then returned to Moldova. She responded that she did not remain in Ukraine because the situation there was the same as in Moldova. The Board member then asked if she travelled elsewhere. She replied that she had not. The Board member's questions immediately moved on to ask her what she was afraid of in Moldova today. The Board member did not ask her to elaborate on why the situation in Ukraine is the same as in Moldova nor did he provide any opportunity for her to spontaneously do so.

[27] As noted by Justice Rennie in *Caicedo v Canada (Minister of Citizenship and Immigration)*, 2011 FC 749, [2011] FCJ No 965, it is not reasonable to make a negative credibility finding based on the lack of detail when no opportunity to provide any detail was provided. As he noted at paras 28-29:

[28] I readily accept the Respondent's argument that the onus to establish a claim rests entirely with the claimant throughout the process. Here, however, the Board asked a number of cursory questions, of limited precision, which the male applicant answered. The member asked two questions concerning the delay, first in Mexico, and then in the United States. Answers were given which on their face, were plausible and no further questions were asked. It is unreasonable to predicate a finding of credibility on the basis that the applicant provided "scant detail", when the questions themselves did not prompt or demand details or greater elaboration than the witness provided.

[29] Again, while I readily accept Mr. Doyle's argument that delay of this duration would usually be conclusive (see for example *Espinosa v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1324 or *Nyayieka v Canada (Citizenship and Immigration)*, 2010 FC 690), in this case it is not clear on the face of the record why the explanations for delay were not accepted. Certainly the answers provided, on their face, provide a rational explanation. The member did not ask the male applicant many questions. His questioning takes only three pages in the transcript. The finding that he was not credible by reason of the lack of detail cannot be sustained where no detail was called for or reasonably expected as an integral response to the question.

[28] In the present case, Ms Achimova's explanation was rational and the Board did not probe her response at all.

[29] Apart from the two specific negative inferences, the Board did not clearly state whether it found that the applicants were not credible. Although the respondent submits that this is conveyed by the Board's conclusion that it was not persuaded that the applicants face a serious possibility of persecution, I cannot read between the lines to this extent. It is incumbent on the Board to make a clear credibility finding (*Hilo v Canada (Minister of Employment and Immigration)*, 130 NR 236, [1991] FCJ No 228 at para 6 (FCA)).

Did the Board fail to consider all the evidence?

[30] The applicants argue that the Board erred in finding that there was "no evidence" to disturb the finding that religious groups have freedom to worship and free access to public places for their activities. The applicants note that they were relegated to worship in secret, as they described in their testimony and which was noted in several of their letters of support.

[31] The applicants argue that, moreover, the Board's finding misses the key point of their claim, which was that they were persecuted by non-state actors and the police would not protect them from this persecution. The Board did not consider the adequacy of state protection at all.

[32] The respondent submits that the Board did not ignore any evidence. It need not refer to every piece of evidence. In addition, the letters of support provided only general information and did not corroborate the applicants' specific allegations.

[33] The respondent adds that the Board did assess the allegations of persecution by non-state actors through its assessment of the objective documentary evidence but found that there was none.

[34] There was no requirement for the Board to assess the adequacy of state protection because the Board found that any risk the applicants may face is a generalised risk faced by other persons in Moldova (*Stephen v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1054 at para 48, [2013] FCJ No 1334).

[35] The respondent also submits that the Board considered the applicants' subjective fear in the context of Ms Achimova's re-availment to Moldova, noting that her return from the Ukraine "may indicate that a well-founded fear of persecution is lacking where the claimant's conduct is inconsistent with such fear."

The Board erred by not considering relevant evidence

[36] First, the Board erred in finding that there was no evidence to disturb the finding that religious groups have freedom to worship.

[37] Although the Board need not comment on every piece of evidence submitted by the applicants, the Board cannot make a categorical statement that there is "no evidence" to disturb the finding regarding freedom to worship when such evidence was before the Board. If the Board did not find the evidence to be credible or attributed low weight to that evidence, it was required to so indicate.

[38] The applicants' own testimony was that they were relegated to worship in private homes and in secret and that their attempts to preach on the streets were disrupted by police. In addition, there were several letters from other church members that referred to the need to worship in secret. The Board appeared to acknowledge these letters, but only for the purpose of supporting its conclusion that the members of the church continued to worship and practice the sacraments of their religion. It is not reasonable for the Board to accept some of the contents of the letters and not other aspects without any explanation.

[39] Second, the Board failed to consider the applicants' claim of persecution by non-state actors.

[40] In *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 at paras 14-16, the Supreme Court of Canada elaborated on the requirements of *Dunsmuir*, noting that reasons are to "be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes" and that courts may "look to the record for the purpose of assessing the reasonableness of the outcome".

[41] Although I have read the decision along with the complete record, this does not assist in supporting the reasonableness of the outcome. I cannot fill in the gaps to conclude that the Board considered the whole of the evidence, including the claims of persecution by non-state actors.

[42] At the hearing, the Board specifically asked Ms Achimova what she was afraid of if she were to go back to Moldova “today”. She responded that: “we are afraid that the authorities would not protect us the way they didn’t protect us before”. The Board then asked: “Are you expecting problems targeting [sic] from the state or that the state would not protect you from other people who do not agree with your faith or both?” Ms Achimova responded that she was afraid of both - that government officials would not protect them and that they would continue to experience the same problems. Similar questions were put to Mr Reaboi who also responded that he was afraid of both lack of protection from the police and the ‘persecution’ by others due to their faith.

[43] The applicants claimed persecution by non-state actors in their PIF and in their testimony before the Board. In addition, the medical evidence and the letters of support referred to the treatment they had endured by non-state actors, including extremists and their own neighbours.

[44] The Board’s decision does not refer at all to the claim of persecution from non-state actors. The Board appears to have only assessed persecution by state actors; i.e, whether religious groups, registered or not, have freedom to worship and free access to public places for their activities.

[45] The Board erred in not addressing this aspect of the applicants’ claim, which should have also led it to consider the adequacy of state protection for the applicants.

Conclusion

[46] The Board failed to consider a key element of the applicants' claim and made unreasonable credibility findings. The application for judicial review is allowed and the applicants' claim for refugee protection must be redetermined by a differently constituted panel of the Board.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Application for Judicial Review is allowed; and
2. No question of general importance is certified.

"Catherine M. Kane"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1248-14

STYLE OF CAUSE: VICTOR REABOI AND CLAVDIA ACHIMOVA v
THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: MARCH 31, 2015

JUDGMENT AND REASONS: KANE J.

DATED: APRIL 9, 2015

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