Federal Court  Cour fédérale

Date: 20170606

Docket: IMM-4989-16

Citation: 2017 FC 555

Ottawa, Ontario, June 6, 2017

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

DAVID KERDIKOSHVILI

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Defendant

JUDGMENT AND REASONS

[1] This is an application for judicial review of the decision of the Refugee Appeal Division ("RAD") of the Immigration and Refugee Board of Canada, dated November 8, 2016, confirming the decision of the Refugee Protection Division ("RPD") that the Applicant is not a Convention refugee or person in need of protection pursuant to s 96 and 97, respectively, of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA").

[2] The Applicant is a 31 year old male from Tbilisi, Georgia. He claims that he suffered harm due to his Ossetian ethnicity and that the state cannot protect him.

RPD's Decision

[3] The Applicant claimed that he had suffered five attacks because of his ethnicity between 2008 and 2015. The RPD conducted a review of the objective documentary evidence and found, on a balance of probabilities, that it offered insufficient proof that Ossetians are persecuted in Georgia. The RPD also found that in three of the incidents the Applicant was not attacked because of his Ossetian ethnicity. And, while the other two attacks may have been based on his ethnicity, both were dealt with appropriately by the police. Further, they were isolated incidents which, even taken together, did not rise to the level of persecution given the lack of supporting objective evidence. The RPD also found that while the Applicant's loss of a job because of his Ossetian ethnicity was discriminatory, it was not evidence of persecution. Further, after one of the attacks the police came to the hospital to interview the Applicant. When he was released from hospital he followed up with the police and was told that the investigation was still in progress. The Applicant did not follow up again. The RPD found that it could not conclude that the police were unwilling to assist the Applicant as his evidence was that they were investigating the complaint. In the second incident the Applicant claimed that he was attacked by a customer because of his Ossetian ethnicity. The RPD noted his evidence that, within 30 seconds, the police broke up the fight and that no one was injured. It found, although charges were not laid, that this was a reasonable response. Given the police investigation and intervention, the Applicant had not provided clear and convincing evidence of the state's inability to protect him and, therefore, had not rebutted the presumption of state protection.

The RAD Decision

[4] This is the decision under review. The RAD found that, in some instances which were not specified, the RPD had speculated as to the reasons for the attacks without considering assertions made by the Applicant with respect to his ethnicity. Further, that the Applicant's credibility had not been impugned. However, the determinative issue was state protection. More specifically, whether the Applicant had rebutted the presumption of state protection with clear and convincing evidence of the state's inability to protect its citizens and whether the objective evidence supported his allegations. The RAD made reference to the European Commission Against Racism and Intolerance Report of Georgia, Council on Europe, published on March 1, 2016 ("ECRI Report") and noted legislative progress aimed at eliminating discrimination and providing for access to the Public Defender, an independent institution elected by Parliament authorized to examine complaints of discrimination. Further, while the letter of the Ombudsman maintained that there is ethnical aggression in Georgia, the documentary evidence was silent on any ethical aggression or violence against Ossetians, other than some language discrimination. The RAD also referred to the United States Department of State Country Report for Georgia on Human Rights Practices for 2015 ("US DOS Report") and the establishment of the Investigation Department of Crimes Committed in the Course of Legal Proceedings in the Prosecutor General's Office.

[5] The RAD concluded, given the level of democracy in Georgia and the agencies it had identified to which the Applicant could have sought help, that the Applicant had not rebutted the presumption of state protection. While he had sought police protection on several occasions,

there was no evidence that any higher authority was approached and it was incumbent upon the Applicant to at least reach out to agencies who could provide recourse to him in light of his allegations that the police did not assist him. The RAD went on to find that it must consider the well foundedness of the Applicant's fears and, in that regard, it concurred with the RPD that the preponderance of the documentary evidence did not indicate persecution against Ossetians in Georgia. It also agreed with the RPD that the Applicant had failed to establish that the Georgian state would not offer him adequate protection had he made efforts to engage the state.

Issue and Standard of Review

[6] The parties agree that the sole issue in this matter is whether an error arises from the RAD's state protection analysis. The RAD's assessment of state protection involves questions of mixed fact and law, therefore, it attracts the reasonableness standard of review (*Tan v Canada (Citizenship and Immigration)*, 2016 FC 876 at para 15; *Kandha v Canada (Citizenship and Immigration)*, 2016 FC 430 at para 15). In reviewing a decision for reasonableness, the role of the Court is to determine whether the 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). There may be several reasonable outcomes but "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 (Citizenship and Immigration) v Khosa* , 2009 SCC 12 at para 59).

Analysis

[7] In *Ward v Canada (Minister of Employment and Immigration)*, [1993] 2 SCR 689, the Supreme Court of Canada held that, absent a complete breakdown of state apparatus, it should be assumed that the state is capable of protecting a claimant. The rationale for this is that international protection comes into play only when a claimant has no other recourse available. Where the state has not conceded its inability to protect a claimant, as in this case, an applicant must provide clear and convincing confirmation of a state's inability to protect him or her. In situations where protection might reasonably be forthcoming, refugees are required to approach their own state for protection (also see *Canada (Minister of Employment and Immigration) v Villafranca*, [1992] FCJ No 1189 (FCA) at para 6; *Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 at para 25; *Malik v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 453 at para 17; *Navarrette Andrade v Canada (Citizenship and Immigration)*, 2013 FC 436 at para 22).

[8] The Applicant submits that the RAD's assessment of Georgia as a democratic country was superficial and flawed, ignoring relevant evidence in determining where Georgia falls on the "democracy spectrum". According to the Applicant, the RAD erred in finding that country conditions should lead to a conclusion that the Applicant faced a high burden in rebutting the presumption of state protection and whether it was reasonably practical for him to seek state protection (*Guerrero Hidalgo v Canada (Citizenship and Immigration)*, 2016 FC 222 at paras 8-10; *Rodriguez Capitaine v Canada (Citizenship and Immigration)*, 2008 FC 98).

[9] In my view this argument cannot succeed. The RAD, in its description of general principles, referenced case law indicating that a claimant's burden of proof is directly proportional to the level of democracy in the state in question: the more democratic the state's institutions, the more a refugee claimant must have done to exhaust all courses of action open to them and, in a functioning democracy, a refugee claimant will have a heavy burden when attempting to show that they should not have been required to exhaust all of the reasonable recourses available to them domestically before claiming refugee status (*Kadenko v Canada (Solicitor General)*, [1996] FCJ No 1376 (FCA) ("*Kadenko*"); *Hinzman v Canada (Citizenship and Immigration)*, 2007 FCA 171 at para 57)

[10] The RAD did not err in this approach. Nor did it find, as submitted by the Applicant, that Georgia "has a high level of democracy". Rather, it found that according to the documentary evidence Georgia is a democratic state. It also did not err in this regard as the documentary evidence in this matter does not suggest that Georgia is not a functioning democracy, that it is a failed state or even that its ability to function as a state is significantly compromised. The RAD acknowledged that state protection may not be perfect but correctly stated that perfection is not required and its absence does not establish an inability to protect its citizens. It went on to state that, in rebutting the presumption of state protection, an applicant must show that he or she has taken all reasonable steps in the circumstances to seek protection of the state in the context of the country, the steps taken and the applicant's interaction with the authorities. In that regard it was necessary to examine the nature of the human rights violations, the profile of the alleged abuser, the efforts of the applicant to seek state protection, the response of the authorities and the documentary evidence.

[11] Accordingly, I do not agree that the RAD applied an overly high burden on the Applicant and that its decision was, therefore, unreasonable.

[12] The Applicant also submits that his evidence was that on several occasions he approached the state for protection and this was effectively denied because of his Ossetian ethnicity. Accordingly, that his unimpugned evidence rebuts the presumption of state protection. In that regard, he claimed that in 2011 his girlfriend became pregnant, her parents forced her to have an abortion and her father and brother and other relatives beat the Applicant, causing him to be hospitalized. Doctors called the police but the police did not contact the Applicant. After his release from hospital the Applicant went to the police station and was told his case was pending. He stated in his Basis of Claim narrative ("BOC") that one officer asked him why he had chosen a Georgian girl, that he should have chosen an Ossetian girl and that he should say his thanks that he was not killed. In the spring of 2013, following the celebration of a religious holiday, the Applicant and others were attacked by Georgians and he was again hospitalized. Doctors again called the police and the Applicant spoke with the police but does not recall the details, having suffered a concussion. A month after his release from hospital he went to the police to inquire about his complaint and was told that it was in process and they would let him know once they finished the investigation. However, the police never did contact him. And, in 2014, in the course of his employment he visited a home to install internet services and was attacked. The police arrived and intervened but, asked him if he was Ossetian, why he came to the house of Georgian refugees from South Ossetia. The Applicant submits that the blaming of the incident on the Applicant goes to the adequacy of state protection that would be available to him in the

future and that his experiences demonstrate that the state has no interest in doing anything about his complaints and that his ethnicity was a factor in their inaction.

[13] It may well have been open to the RAD to take issue with the Applicant's failure to make further inquiries of the police who were investigating his complaints or to raise his concern with their inaction with a higher level within the police (*Malik* at para 18 citing *Kadenko* at p 534). Or, as the RPD had done, to question, given the police response, whether these incidents established the state's unwillingness or inability to protect the Applicant. However, the RAD instead found that the Applicant should have sought help from one of the agencies it identified in its reasons, that it was incumbent upon him to do so as those agencies could provide recourse in light of his allegations that the police did not assist him and, therefore, that he failed to rebut the presumption of state protection.

[14] The difficulty with this is that this Court has previously held that the police are presumed to be the main institution mandated to protect citizens and other government or private institutions are presumed not to have the means or mandate to assume that responsibility (*Graff v Canada (Citizenship and Immigration)*, 2015 FC 437 at para 24 ("*Graff*"); *Katinszki v Canada (Citizenship and Immigration)*, 2012 FC 1326 at para 15 ("*Katinszki*"); *Flores Zepeda v Canada (Citizenship and Immigration)*, 2008 FC 491 at paras 24-25). Here the Applicant claimed that he had been physically attacked, thus the actions complained of were not just discriminatory, but were criminal in nature. However, the RAD did not explain, and it is not apparent from the record, how any efforts undertaken by the agencies it identified would translate into state protection for the Applicant at the operational level as against future ethnically motivated attacks

(*Graff* at paras 21-23; *Majoros v Canada (Citizenship and Immigration)*, 2013 FC 421 at para 20 ("*Majoros*"); *Ignacz v Canada (Citizenship and Immigration)*, 2013 FC 1164 at para 23; *Katinszki* at para 14).

[15] The ECRI Report referenced by the RAD states that the Public Defender can hear a case and reach a conclusion as to whether someone was the victim of discrimination. The Public Defender can also make a recommendation as to how to restore the violated equality, but its conclusions and recommendations are not legally binding and cannot be enforced. In such cases victims of discrimination still have to bring their case to the courts. The ECRI Report does not suggest that the Public Defender can provide the Applicant with an avenue of protection as against physical assaults. I note that the US DOS Report states that NGOs viewed the Public Defender's Office, which has a mandate to monitor human rights and investigate allegations of abuse and discrimination, as the most objective of the government's human rights bodies. However, that the Public Defender's authority does not include the power to initiate prosecution or other legal actions. It has the right to make non-binding recommendations to law enforcement agencies to investigate particular human rights cases. The RAD also referenced documentary evidence indicating that the General Inspection Service of the Ministry of Internal Affairs ("Ministry") imposed fewer disciplinary measures on enforcement officers in 2015 than in the prior year. However it is again unclear how disciplinary action imposed by the Ministry would translate into the Applicant being afforded actual state protection.

[16] That said, the RAD also found that the documentary evidence did not support a finding that Ossetians face ethnic discrimination or violence in Georgia and, upon my review of the

record, I conclude that the RAD did not err in that finding. Thus, this is not a situation such as *Majoros* where the documentary evidence suggested that persecution against Roma in Hungary was widespread and indiscriminate and, therefore, unless the attacks were by the same person, continued attempts by the applicants to engage the authorities would not necessarily result in future state protection. In those types of cases, documentary evidence, rather than individual attempts to seek protection may be more relevant to a state protection analysis (*Majoros* at paras 14-16). In this matter, in at least two of the attacks the assailants were known to the Applicant, so it is possible that complaints to the Public Defender or the Ministry could have resulted in those cases being progressed, but this is not identified by the RAD as the recourse it envisioned as available to the Applicant, nor does the RAD assess whether protection from those sources may have been reasonably forthcoming in the Applicant's circumstances or address the totality of the claimed attacks.

[17] Viewed in whole, while the RAD's reasons recite at length the underlying principles of state protection and reference extracts from the documentary evidence, the RAD devotes only a single paragraph to its analysis. Given that the RAD explicitly acknowledged that the Applicant's credibility had not been impugned but did not address his evidence of prior attacks which he attributed to his Ossetian ethnicity, and, did not explain how turning to the agencies that it identified would serve to provide actual state protection to the Applicant from further physical attacks, in my view, its conclusion that the Applicant failed to rebut the presumption of state protection is unreasonable.

[18] Further, while the RAD does not err in its finding, and in its agreement with the RPD that the preponderance of the documentary evidence does not support persecution against Ossetians generally in Georgia, it does not tie that finding into its state protection finding or otherwise explain its significance to the decision. It has been held that, when undertaking a contextual approach in determining whether a claimant has rebutted the presumption of state protection, a number of factors are to be considered which must be situated against available documentary record as the record may serve to inform whether the circumstances of the case are plausible within the context of a given country (*Torres v Canada (Citizenship and Immigration)*, 2010 FC 234 at paras 37 and 43). Perhaps this is what the RAD intended. Yet it accepted that the Applicant was credible and made no clear adverse plausibility findings concerning his claim that the attacks were ethnically motivated. It may be surmised that in the absence of documentary evidence supporting current persecution of Ossetians in Georgia, being an objective basis for the Applicants' fear, the RAD felt that there could not be clear and convincing evidence to rebut the availability of protection to the Applicant. Again, however, the RAD did not address the Applicant's evidence of attacks which he attributed to his Ossetian ethnicity and acknowledged that the Applicant's credibility was not impugned. Accordingly, in my view, as this is not reconciled in the RAD's reasons, the decision is also unreasonable as it is unintelligible.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed;

2. No question of general importance is proposed by the parties and none arises; and

3. There will be no order as to costs.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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JUDGMENT AND REASONS:	STRICKLAND J.
DATED:	JUNE 6, 2017

ORAL AND WRITTEN REPRESENTATIONS BY:

Richard M. Addinall	FOR THE APPLICANT
Prathima Prashad	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Richard M. Addinall Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE DEFENDANT