Federal Court  Cour fédérale

Date: 20180417

Docket: IMM-4538-17

Citation: 2018 FC 415

Ottawa, Ontario, April 17, 2018

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

DINO BRDAR

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Were he to be returned to Croatia, would Mr. Brdar face a serious risk of persecution because he is gay? The Immigration and Refugee Board (IRB) thought not on the grounds that Croatia would provide him with adequate protection. This is the judicial review of that decision.

I. Refugee Claims in Canada

[2] Canada is party to the *United Nations Convention Relating to the Status of Refugees* which is given effect through the *Immigration and Refugee Protection Act* (*IRPA)*.

[3] Section 96 of *IRPA* provides that a Convention refugee is one who has a well-founded fear of persecution in his or her home country for reasons of race, religion, nationality, membership in a particular social group or political opinion. Mr. Brdar falls within a particular social group because of his sexual orientation. (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at p 739; *Chan v Canada (Minister of Employment & Immigration),* [1993] FCJ No 742 at para 15).

[4] *Ward,* above, is a leading refugee case. Mr. Ward was a citizen of both the Republic of Ireland and the United Kingdom. Fleeing to Canada is a last resort and is not available unless the applicant's country is unwilling or unable to adequately protect him. Although it had been decided that the Republic of Ireland was unable to protect him, there had been no assessment of the protection which would be available to him in the United Kingdom. Consequently, the matter was sent back for re-determination.

[5] In this case, Mr. Brdar is a citizen of both Croatia and Bosnia-Herzegovina. Since the IRB found there was adequate state protection available in Croatia, it was not necessary to consider his situation were he to be returned to Bosnia-Herzegovina.

[6] As enunciated in *Ward*, and in other cases, state protection need not and indeed cannot be perfect. However, it has to be adequate. Consideration is not limited to the law as it appears on the books but also as to whether in practice there is operational protection (*Hercegi v Canada (Citizenship and Immigration)*, 2012 FC 250 at para 5; *Boakye v Canada (Citizenship and Immigration)*, 2015 FC 1394 at para 11; *Fazekas v Canada (Citizenship and Immigration)*, 2018 FC 289 at para 23).

[7] As stated in *Ward*, the burden is upon the applicant. The bar is higher if the home state is a functioning democracy as Croatia was found to be.

II. The Facts

[8] Mr. Brdar was born out of wedlock in Split, in the former Yugoslavia, to a Roman Catholic Croatian mother and a Muslim Bosniak father, with whom he had very little contact. Split is now in Croatia. However, as a young child, he moved with his mother to Livno, now a part of Bosnia-Herzegovina, which nevertheless was predominantly Croatian. He began homosexual relationships in 1992 but was worried that homophobes would attack him as indeed they did before and during the Pride March in Split in June 2011. He was also beaten in Split, Zagreb, and Livno. His attempts to report incidents to the police were futile as they were at best indifferent.

[9] He also suffered discrimination as employers would not hire him or refuse to pay him, subjecting him to persistent racial, ethnic and sexual discrimination.

[10] He came to Canada in 2012.

III. The Decision under Review

[11] Although Mr. Brdar was found to be a credible witness, and although the Member of the Refugee Division of the IRB who heard his case seems to have assumed that the cumulative incidents in Croatia amounted to persecution, she determined that he was not a Convention refugee under s 96 of *IRPA* or otherwise in need of Canada's protection under s 97 thereof.

[12] The Board Member recognized that homophobia is deeply imbedded in Croatian society and that while the statute books prohibit discrimination based on sexual orientation and gender identity, police and judges do not always handle these matters consistently.

[13] Because Mr. Brdar had left Croatia in 2012, and since refugee protection is forward-looking, more recent conditions in Croatia were considered in depth. The Member noted that subsequent to 2011, gay prides were held in a number of cities without incident and that the attitude of Croatian authorities towards the lesbian, gay, bisexual, transsexual, queer, intersex (LGBTQI+) community had improved. Police regularly participated in sensitisation training sessions. It was also noted that in some areas of the country such as Dalmatia (where Mr. Brdar never lived), there were incidents of victimization and hostility by the police.

[14] Mr. Brdar also raised the issue of his mixed ethnicity. Regard was had to the Immigration and Refugee Board Chairperson's Guideline 9: "*Proceedings before the IRB Involving Sexual*

Orientation and Gender Identity and Expression" which became effective last May. It is well established that these Guidelines are not law, are not hard and fast rules, but are useful in providing a reasonable interpretation of a given provision of *IRPA* (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909). The Member took due note of the Guideline and in no way fettered her discretion.

[15] The Guideline deals with cases involving sexual orientation, gender identity and expression (SOGIE). More to the point, s 8.5.2 deals with "intersectionality". Some individuals such as Mr. Brdar may face additional risks because of, among other things ethnicity, religion and faith.

[16] There was nothing in the record to show Mr. Brdar would be worse off because he had a Bosniak father rather than a Croatian one. He was not visually different. There was no evidence that he had a different accent, and he was raised a Roman Catholic by Croatians. There is some discrimination against Bosniaks because they may be Muslim.

IV. Analysis

[17] The applicable standard of review is reasonableness. I find that the decision was reasonable. Notwithstanding the heroic attempts by Mr. Brdar's counsel, I do not think that the analysis of country conditions was selective. Rather, it was very well balanced. It may well have been open to the Member to reach a different conclusion. That is the essence of reasonableness, which does not necessarily lead to a single result.

[18] I find the decision fits well within para 47 of *Dunsmuir v New Brunswick* which states:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. 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.

[19] During oral argument, I also referred to the decision of Mr. Justice Iacobucci speaking for the Supreme Court in *Canada (Director of Investigation and Research) v Southam Inc.*, [1997] 1 SCR 748. Prior to that decision, the two standards of review were correctness and patent unreasonableness. That case introduced the third standard of reasonableness.

[20] He said at para 56:

> An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it. An example of the former kind of defect would be an assumption that had no basis in the evidence, or that was contrary to the overwhelming weight of the evidence. An example of the latter kind of defect would be a contradiction in the premises or an invalid inference.

[21] At para 80 he warned reviewing judges to resist the temptation to intervene because he or she might have come to a different conclusion if he or she were the original decision-maker. Some restraint is necessary.

[22] One of the grounds of judicial review set forth in s 18.1(4) of the *Federal Courts Act* is that there was an erroneous finding of fact made in a perverse or capricious manner or without regard to the material before it.

[23] One case strongly relied upon by Mr. Brdar was *Galogaza v Canada (Citizenship and Immigration)*, 2015 FC 407, in which it was held in fairly similar circumstances that Croatia did not provide adequate effective protection. In *Varga v Canada (Citizenship and Immigration)*, 2014 FC 510, I dealt with the IRB's inconsistent treatment of Hungarian Roma. I said at para 20:

> What conclusion, if any, can we draw from these statistics? Each case turns on the particular history of the claimant, the record, the adequacy of the analysis by the Tribunal and, indeed, the appreciation of that evidence by various judges of this Court (*Banya v Canada (Citizenship and Immigration*), 2011 FC 313, [2011] FCJ No 393 (QL), at para 4.

See also *Horvath v Canada (Citizenship and Immigration)*, 2014 FC 670. So it is in this case.

[24] In my opinion, looking forward, the decision was reasonable, made with regard to the material before it and was neither perverse nor capricious.

JUDGMENT IN IMM-4538-17

For reasons given, this application for judicial review is dismissed. There is no serious question of general importance to certify.

"Sean J. Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Arghavan Gerami	FOR THE APPLICANT
Joanie Roy	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Gerami Law Professional Corporation Barristers & Solicitors Ottawa, Ontario	FOR THE APPLICANT
Attorney General of Canada Department of Justice Canada Ottawa, Onbrtario	FOR THE RESPONDENT