Federal Court  Cour fédérale

Date: 20190802

Docket: IMM-6360-18

Citation: 2019 FC 1044

Ottawa, Ontario, August 2, 2019

PRESENT: Mr. Justice Annis

BETWEEN:

ANTE JURIC-CIVRO AND TAMARA JANDRIC

Applicants

and

THE MINISTER OF CITIZENSHIP & IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of the decision of the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada, dated November 30, 2018 brought pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

II. Statement of Facts

[2] Tamara Jandric [the Female Applicant], who was born on June 18, 1988 in Bosnia-Herzegovina, Bosnia and Ante Juric-Civro [the Male Applicant], who was born on June 14, 1984 in Knin, Croatia, are citizens of the Republic of Croatia, who are seeking the protection of Canada pursuant to sections 96 and 97 of the IRPA.

[3] Pursuant to Rule 55 of the *Refugee Protection Division Rules*, SOR/2012-256, the claims for refugee protection were heard jointly. Each claim, however, was decided on its own merits.

[4] The Applicants are from two different ethnic nationalities. The Female Applicant is Bosnian by birth and a naturalized citizen of Croatia, and the Male Applicant is Croatian by birth.

[5] The Female Applicant describes herself as a Christian Bosnian-Croat. She alleges that Croatians do not accept the Bosnia-Croats and that they are treated as second class citizens. She indicates that she was discriminated against in school, in healthcare, in employment, in housing, in religion, and in the public realm. According to the Female Applicant, she is unable to return to Bosnia-Herzegovina because her family home was burned down during the war. Currently, according to the Female Applicant, the majority of people living there are Muslims, who “hate” the Catholics and the Croatians.

[6] The Male Applicant alleges that he fears Serbians, who have come back to reclaim their homes in Knin, Croatia following dislocations that occurred because of the war. On one occasion in 2011, the Male Applicant was physically assaulted by a group of Serbian males who told him to leave "their" town.

[7] The Male Applicant was also purportedly targeted because of his relationship with the Female Applicant. Due to the racism against Bosnian-Croats, the Male Applicant alleges that he was discriminated against and harassed because of his wife's ethnicity. In addition to losing friends, his employment and his access to housing were affected as a result of his marriage.

[8] The RPD finds that the Applicants have not satisfied the burden of establishing a serious possibility of persecution on a Convention ground or that they would be personally subjected, on a balance of probabilities, to a danger of torture, or a risk to life, or a risk of cruel and unusual treatment or punishment upon return to Croatia based on the nexus of actual or perceived ethnicity. Therefore, the RPD found that the Applicants are neither Convention refugees nor persons in need of protection pursuant to sections 96 and 97(1) of the IRPA.

[9] The RPD considered the evidence but found that the discrimination the Applicants may have experienced from 1996 to 2011 did not amount to persecution. Noting that refugee protection is forward-looking, and that the Applicants left seven years ago, the Board found that the recent objective evidence did not support the Applicants' allegations. Specifically the RPD noted as follows:

> (a) The 2012 report from the Centre for Peace Studies, which the Applicants heavily relied upon in support of the

allegation of discrimination was six years old and could not be corroborated by the Research Directorate of the RPD;

(b) A 2017 article about a mayoral candidate's posters being defaced with the slogan "stupid Bosnian" also indicates that his opponents and colleagues condemned the incident;

(c) The recent objective documentation does not refer to difficulties faced by Bosnian-Croats specifically, but does note that ethnic minorities like the Roma and Serbs face discrimination;

(d) A 2016 report from Freedom in the World says that "respect for minority rights has improved";

(e) The Applicants left Croatia in 2011 – seven years ago.

[10] The RPD further noted that the Applicants had failed to rebut the presumption of state protection. The evidence indicates that Croatia is parliamentary democracy, with control over its security forces, and that the government took significant steps to prosecute and punish individuals committing human rights abuses.

III. Issues

[11] This application for judicial review raises the following issues:

1. Whether the discrimination of the Applicants amounts to persecution?
2. Whether the Applicants have rebutted the presumption of state protection?

IV. Standard of Review

[12] Questions of mixed fact and law "where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness" (*Dunsmuir v New Brunswick*,

2008 SCC at para 51). However, in such circumstances, the standard of review is based upon the factual component, such that the higher standard of deference applies limiting the setting aside of the question only when the error is plain to see (*Jean Pierre v Canada (Immigration and Refugee Board)*, 2018 FCA 97; *Housen v Nikolaisen*, 2002 SCC 33 at para 36). In this regard, it is not for the Court to reweigh the evidence or carry out a reasonability analysis, placing itself in the shoes of the Board.

V. Analysis

[13] The RPD concluded with respect to both Applicants that they had failed to claim protection in a safe third country. However, it was acknowledged that this failure cannot be determinative (*Martinez Requena v Canada (Citizenship and Immigration)*, 2007 FC 968; *Pelaez v Canada (Citizenship and Immigration)*, 2012 FC 285).

[14] Nonetheless, the Court concludes that the RPD's determination is reasonable that the discrimination and harassment faced by the Applicants in Croatia did not rise to the level of persecution.

[15] In this regard, there is no statement of principle to assist a court in determining whether repeated acts of discrimination and harassment rise to a level of persecution, making the distinction difficult to determine. The Court of Appeal observed in *Sagharichi v Canada (Minister of Employment and Immigration)* (1993), 182 NR 398, 42 ACWS (3d) 494 (FCA) that "the dividing line between persecution and discrimination or harassment is difficult to establish",

but did not suggest a guiding principle that might assist in delineating that dividing line, perhaps with one exception.

[16] It would appear that the Federal Court of Appeal laid out some ground rules, based upon Supreme Court teachings that might serve to distinguish between acts of discrimination and harassment that constitute persecution as demonstrating sufficient degree of risk to an applicant.

[17] In *Cheung v Canada (Minister of Employment & Immigration),* 1993 CanLII 2946 (FCA), [1993] 2 FC 314, 102 [*Cheung*], Justice Linden (speaking for the Court) was faced with the task of describing the threshold of harm necessary to constitute persecution involving a threat of a single act of forced sterilization. The reviewing Court concluded that forced sterilization did not constitute persecution where generally acceptable economic and social objectives were being applied to control the harmful social and economic effects of exponential population growth. In reversing the reviewing Court, the Court of Appeal focused on the severity of the intrusiveness of the conduct on the person's mental and physical integrity.

[18] Justice Linden adopted the threshold of harm for persecution as "a serious intrusion on the physical and mental integrity of the person" (*Cheung* at para 91). In doing so, the Court relied on the text of James Hathaway, *The Law of Refugee Status*, at page 125 in terms of focusing on the persecutory effect, and the Supreme Court of Canada decision of *E (Mrs) v Eve*, 1986 CanLII 36 (SCC), [1986] 2 SCR 388. In regard to the latter, he stated that "the Supreme Court of Canada has recently forbidden non-therapeutic sterilization as a 'serious intrusion on the basic rights of the individual'; as 'in every case a grave intrusion on the physical

and mental integrity of the person'; and, as a 'grave intrusion on a person's rights [leading to] certain physical damage'."

[19] In *E (Mrs) v Eve*, the Supreme Court was attempting to determine "where the line is to be drawn between therapeutic and non-therapeutic sterilization". It stated: "[O]n this issue, I simply repeat that the utmost caution must be exercised commensurate with the seriousness of the procedure. Marginal justifications must be weighed against what is in every case a grave intrusion on the physical and mental integrity of the person."

[20] The test of an intrusion on the physical and mental integrity of the person was applied on one occasion in this Court by Justice Muldoon in the matter *Kadhm v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 12; 1998 CanLII 7257 (FC), 140 FTR 286; 77 ACWS (3d) 157 [*Kadhm*]. She claimed persecution based on her husband's desertion of the army and that she was unable to obtain employment in Iraq due to her refusal to join the Ba'ath Party. The Board stated that: "[T]he claimant, as noted above, described the questioning as 'harassing'. In our opinion, this is precisely what it is: harassment and not serious harm to fundamental human rights normally equated to persecution."

[21] The Court was attempting to determine whether the actions complained of did not amount to persecution but were harassing in nature. The Court did not adopt the test employed by the Board of "serious harm to fundamental human rights normally equated to persecution." Instead, it stated at paragraph 12 as follows with my emphasis:

> [12] It is worth recalling that in general the courts have recognized, in *Rajudeen v. Canada (Minister of Citizenship and*

> *Immigration)* (1984), 55 N.R. 129 (F.C.A.) 133; *Retnam v. Canada (Minister of Employment and Immigration)* A-470-89, May 6, 1991 (C.A.); *Ovakimoglu v. Canada (Minister of Employment and Immigration)* (1983), 52 N.R. 67 (F.C.A.) at 69 and *Hassan v. Canada (Minister of Employment and Immigration)*, (1992), 141 N.R. 381 (FC.A.) that harassment in some circumstances may constitute persecution if sufficiently serious and it occurred over such a long period of time that it can be said that a claimant's physical or moral integrity is threatened.

[22] None of the jurisprudence mentioned in *Kadhm* referred to the concept of sufficiently serious as an intrusion on the person's physical or moral integrity. While serious harm to fundamental human rights may capture the legal concept, I would agree with the reasoning in *Kadhm* that the factual description of what conduct amounts to persecution is that, which amounts to a grave or sufficiently serious intrusion on the physical or moral integrity of the person to express the degree of risk required under sections 96 and 97 if it were to somehow apply to harassing conduct. Both provisions are intended to describe a situation where choices are fundamentally removed from the person, who if an opportunity is provided, must flee so as to maintain his or her or physical or moral integrity.

[23] In any event, even without this definitional distinction between discrimination and harassment from persecution, the onus rests with the Applicants to demonstrate that the RPD member was plainly wrong and unreasonable in his assessment that the level of harassment and discrimination they suffered did not constitute persecution.

[24] Furthermore, in terms of the persecutory conduct, the Applicants claimed their persecution in Bosnia arose primarily because their marriage was one of mixed ethnicities. In this regard, they relied upon information contained in the Immigration and Refugee Board of Canada's Response to

Information Request which detailed the discrimination and harassment against ethnic Croats from Bosnia-Herzegovina, which I cite as follows:

> According to the representative of the CMS, for economic and social reasons, ethnic Croats who originated from Kosovo and Bosnia-Herzegovina are treated differently by the majority. She explained that these individuals are poorer, having arrived in Croatia with limited resources. She further stated that they settled in former Serb areas and tend to live in their own "ghettos," finding it difficult to obtain employment even if there were no other applicants. In some cases, ethnic Serbs have returned and reclaimed their homes. According to the CMS specialist, ethnic Croat from Kosovo and Bosnia-Herzegovina also have their own identifiable way of speaking. She stated that they are subject to prejudice and to stereotyping and may be seen as "not really Croa". She added that they may face discrimination in employment, schooling and in hospitals.
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> The lecturer likewise explained that a large number of ethnic Croats came from Bosnia-Herzegovina during the 1992-1995 war and that "[s]ome domestic Croats (i.e., those born in Croatia) resent the presence in Croatia of Bosnian Croats. They regard the latter as uneducated, culturally inferior, and as a burden on Croatia's economy and resources". The lecturer added that while visiting the town of Knin in Western Croatia in April 2012, local people "often" told her that, "in Knin today, relations are actually better between Croats and Serbs than they are between domestic Croats and the Bosnian Croats."
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> Exhibit 4, Item 13.5, Immigration and Refugee Board, Response to Information Request HRV104109.E (February 5, 2013): "Croatia: Situation and treatment of persons of mixed ethnicity, people in mixed marriages and ethnic Croatians from other areas of former Yugoslavia; availability of state protection" [Emphasis Added]
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> This document further describes how individuals in mixed marriages are viewed negatively in Croatian society, and experience "mistreatment and discrimination".

[25] The Respondent pointed out that the RPD member specifically considered these passages and was advised that the Board's Research Directorate indicated that they were unable to corroborate information provided in any of the reference material accompanying the statement. The

RPD member indicated after reviewing all of the documentation that there was no reference to any difficulties specifically faced by Bosnian Croats in the numerous human right reports and other objective documentation in the recent National Documentation Package on Croatia, citing extensively from different reports, other than the 2013 Response to Information Request referred to by the Applicants.

[26] The RPD also noted that the Croatian government continues to struggle with issues of ethnic discrimination among this population, but that the recent objective country condition evidence does not suggest that Croats born in Bosnia face significant discrimination, while circumstances have improved since 2001 when the Applicants arrived in Canada.

[27] Given the deference owed to the RPD member in the assessment of the evidence, and the fact that the RPD member's conclusions are supported by evidence, I have no difficulty in concluding that the decision is reasonable and falls within a range of possible acceptable outcomes which are defensible in respect of the facts and law; besides being justified by a transparent and intelligible decision-making process.

[28] Accordingly, the application for judicial review is dismissed. No questions are certified for appeal.

JUDGMENT in IMM-6360-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. No questions are certified for appeal.

"Peter Annis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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