Federal Court  Cour fédérale

Date: 20101021

Docket: IMM-1113-10

Citation: 2010 FC 1030

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, October 21, 2010

PRESENT: The Honourable Madam Justice Bédard

BETWEEN:

VICTOR ANDREEVI SHMAGIN

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated February 12, 2010, which rejected the applicant's claim for refugee protection and declared that he was not a refugee within the meaning of section 96 of the IRPA or a "person in need of protection" within the meaning of section 97.

Background

[2] The applicant is an 80-year-old Russian citizen. Because of a dispute regarding his apartment in Moscow, he fears being the victim of violence at the hands of the son of his former spouse and considers that his life would be in danger if the returned to Russia.

[3] The applicant's first marriage lasted several years. His daughter, who was born of this first marriage, is a Canadian citizen. The applicant's spouse died in 1984. The applicant, who had worked as a chief engineer for the defence ministry, has visited his daughter and grandchildren in Canada several times since 1996.

[4] In 1986, the applicant remarried, and his new wife moved into the apartment in which he had been living since 1970. The applicant alleges that at one point, his spouse registered her son as a resident in the apartment without asking the applicant. In 2005, a new Russian law allowed the applicant to become the owner of his apartment. Because they were married, his spouse became a co-owner of the apartment with him. The relationship between the applicant and his spouse took a turn for the worse following the privatization process of the couple's apartment, and the couple divorced on December 22, 2006. Following the divorce, the applicant continued to cohabit with his former spouse, and they lived [TRANSLATION] "like neighbours".

[5] In June 2007, the applicant came to Canada to visit his daughter and see his grandchildren, in particular his great-grandson, who had been born in February 2007. The applicant alleges that on February 23, 2008, he called the son of his former spouse to congratulate him, as it was Army Day

in Russia, and to notify him of his intention to return to Russia. The son of his former spouse allegedly told him that his apartment did not belong to him any longer and suggested that he not return. Fearing that he could be the victim of violence at the hands of the son of his former spouse, the applicant decided not to return to Russia and claimed refugee protection in Canada.

Impugned decision

[6] The Board's decision was based on two grounds. First, the Board concluded that the applicant had not submitted any credible or trustworthy evidence in support of his application. The Board's conclusion was based on the following points:

- The contradictions between the information in the applicant's visa application regarding his marital status and his divorce certificate;
- The insufficiency of the applicant's explanations regarding his visa's validity period;
- The applicant's failure to include in his personal information form (PIF) the allegation he made at the hearing to the effect that the son of his former spouse had "influence" with the authorities, so he was unable to approach them for help after his conversation with the son-in-law in February 2008.

[7] The Board also concluded that the applicant's behaviour was inconsistent with a fear of persecution.

[8] In addition, the Board concluded that the applicant had not rebutted the presumption of State protection. In this regard, the Board found that the applicant's allusion in his testimony to the alleged influence of the son of his former spouse was insufficient to rebut the presumption.

Issues

[9] The applicant criticises the Board's decision, which raises the following issues:

a. Did the Board err in its assessment of the evidence and the applicant's credibility?

b. Did the Board err in concluding that the applicant had not rebutted the presumption of State protection?

[10] The respondent in turn argues that the applicant has not challenged the Board's conclusion regarding the applicant's subjective fear and that this omission in itself warrants the dismissal of the application for judicial review.

Analysis

[11] It is trite law that the Board's findings of fact, especially its assessment of the evidence and of the applicant's credibility, are subject to the standard of reasonableness. It is not up to the Court to substitute its own assessment of the evidence for the Board's, and it will intervene only if the Board's conclusions are made in a perverse or capricious manner or without regard for the material before it (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 SCR 339; *Martinez v. Canada (Citizenship and Immigration)*, 2009 FC 798, [2009] F.C.J. No. 933; *Alinagogo v. Canada (Citizenship and Immigration)*, 2010 FC 545, [2010] F.C.J. No. 649). The role of the Court when it reviews a decision according to the standard or reasonableness was established in *Dunsmuir*, at paragraph 47:

> . . . 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.

[12] It is also well established that issues regarding the adequacy of State protection are questions of mixed law and fact, which are also subject to the standard of reasonableness (*Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, [2007] F.C.J. No. 584; *Rocque v. Canada (Citizenship and Immigration)*, 2010 FC 802, [2010] F.C.J. No. 983).

[13] For the following reasons, I find that the Board's conclusions are reasonable and do not warrant the Court's intervention.

a. Did the Board err in its assessment of the evidence and the applicant's credibility?

[14] The applicant basically criticizes the Board for having focused on inconsistencies and discrepancies concerning incidental and technical questions rather than on the essential elements of his claim. Counswl for the applicant also submits that the Board did not take Guideline 8 into account (Guideline on Procedures with Respect to Vulnerable Persons Appearing Before the Immigration and Refugee Board of Canada) and should have considered the applicant's age and vulnerability and shown him some leniency when he gave explanations about the duration of the validity period of his visa. With respect, I do not agree with the applicant's opinion.

[15] First, I have read the transcript of the hearing before the Board, the Board's record and the applicant's PIF very carefully. There is nothing that would indicate that the applicant was confused

and stressed when he testified, that he was vulnerable or that his age affected his ability to testify or the quality of his testimony such that the Board should have shown leniency or compassion for him. Likewise, the evidence does not show that the applicant was in a vulnerable state when he completed his visa application in March 2007. In any event, there is nothing to suggest that the Member was not lenient or compassionate toward the applicant. Finally, the applicant's supposed vulnerability was never raised at the hearing to justify the taking of special measures.

[16] It is not enough to raise the applicant's vulnerability after the fact, and age is not in itself a sufficient ground for concluding that the applicant was vulnerable and that this vulnerability should be considered in assessing his testimony or his behaviour.

[17] The contradictions noted by the Board are consistent with the evidence.

[18] There is no doubt that there is a contradiction regarding the applicant's marital status. In the visa application he submitted in February 2007, he stated that he was married and had one child. In his testimony, he stated that he had been divorced since December 22, 2006. The divorce decree is to the same effect. The explanations the applicant gave to the Board regarding this contradiction were vague and not specific (he originally said that he might have made an error out of habit, later claimed he no longer remembered and finally stated that he completed his application in December 2006). I find that it was not unreasonable for the Board to draw a negative inference about the applicant's credibility from this contradiction and that in this case it was not an incidental and unimportant factor.

[19] It is also true that the applicant failed to state in his PIF that the son of his former spouse had a “certain level of influence” over the authorities, whereas this was the explanation he gave for not going to the authorities. This was important, and it was not unreasonable for the Board to draw a negative inference from this omission.

[20] The Board’s finding regarding the vagueness of the applicant’s explanations about the validity period of his visa also seems to me to be reasonable. The applicant originally stated that he had a one-year visa. When questioned by the Member, he then stated that it was his daughter who had applied to renew his visa.

[21] The Board also concluded that the applicant’s behaviour was inconsistent with his alleged fear. The Board held that the fact the applicant had continued to live with his former spouse following his divorce and that he had left Russia in June even though his visa had been valid since March 2007 was inconsistent with his allegation that his life had been a nightmare since 2005. The Board also noted that the applicant had stated that he wanted to remain in Canada until his grandson’s birthday on February 2, 2008, but at the end of the month he still had not taken steps to leave the country.

[22] Taken in isolation, these factors are perhaps inconclusive, but when considered together with other factors and the contradictions in the evidence, it was not unreasonable for the Board to find that this showed a lack of fear on the applicant’s part.

[23] I therefore find that the Board’s analysis of the evidence was reasonable, that its finding regarding the applicant’s credibility was based on the evidence, that the contradictions and

omissions noted did not concern incidental or accessory factors and that its conclusion is within the range of possible acceptable outcomes which are defensible in respect of the evidence.

[24] Although credibility is determinative in this case, I will nevertheless deal with the Board's conclusions regarding the applicant's subjective fear and State protection.

2) Did the Board err by concluding that the applicant had not rebutted the presumption of State protection?

[25] The Board stated its conclusion as follows:

> [15] Overreaching all this of course is the issue of State protection. The claimant, who testified to privatizing his apartment in 2005, alleges that he can no longer return there because his step-son would have him incarcerated in a psychiatric institution. Yet the claimant himself admits that after the phone call of February 23rd, he did not have any contact with anyone in Russia. He made no attempts to either engage the services of a professional (lawyer) or the authorities to assist him in this problem.
>
> [16] States are presumed to be able to protect their own citizens. The burden is thus on the claimant to demonstrate that State protection would be unavailable or not forthcoming. The only intimation the claimant makes in his testimony (although not in his PIF) is the alleged "influence" of his former step-son. In the panel's mind, this is not sufficient in order to rebut the presumption. Russia is a democracy with a functioning judiciary. There are laws and regulations. The claimant produced evidence that he had title to at least part of this apartment. Thus it would appear that any presumed or alleged activities of his step-son would he be illegal and in violation of this contract. The fact that the claimant made absolutely no attempt to contact any authority in Russia in order to protect his rights shows that he has not demonstrated with clear and convincing evidence an absence of State protection. He is not a person in need of protection.

[26] First, the Board's statement of the applicable principles is consistent with the state of the law (*Rocque v. Canada (Citizenship and Immigration)*, 2010 FC 802, [2010] F.C.J. No. 983). Second, I do not think it was unreasonable to conclude that the alleged "influence" of the ex-spouse's son was insufficient to reverse the conclusion. The onus was on the applicant to submit clear and convincing evidence of the State's inability to protect him. The evidence submitted by the applicant was clearly insufficient. First, the applicant's allegation regarding the influence of the ex-spouse's son was made in very general terms:

> [TRANSLATION] A. I called to notify them that I was coming back, coming home, but he told me that this apartment, for you, there is nothing. So, his mother was not going to live with me, and I asked him this question: how come I am registered over there. But he told me that there was nothing for me over there and suggested that I never come back.
>
> Q. So what did you do, sir?
>
> . . .
>
> A. So, what did I do? So, I understood that if, if I went back there I would have no protection there. I had no more family, no brother, no sister there, so if I went back, you know, to Moscow, where there are thousands and thousands of pensioners, retired people who go missing, they are either murdered or never found again, and all that is just the beginning of the fight for apartments. So, I did not want to go back and get killed or abused, have a heart attack, so I knew that I had nothing to gain over there.
>
> – But sir, I, you did not directly answer my question, which was quite straightforward.
>
> Q. Did you do something, this gentlemen here has no right to tell you not to come back to your own apartment, so did you do something, initiate proceedings, contact a lawyer over there, do something, even from here in Canada?

A. So, I only know his abilities, what he can do, what my son-in-law is capable of, my spouse's son, but he

is a , he is connected with the police, he has close connections with the police. There are lawyers in his company, therefore I knew that I was not going to gain, would not have gained anything. I was not going to have justice.

– I do not understand sir.

Q. What did that gentleman have?

A. But you know that he had this quote-unquote special police protection, and there were policemen in his office who were armed with rifles but worked there after their shift, so what else do I have to tell you.

Q. What does this gentleman do?

A. He is an entrepreneur, so he makes, he is in parts, things, automobile repair. He also has connections in Canada.

. . .

A. I do not know what he would have done if I had gone back there, do I have, maybe would have had a coronary, a heart attack, I don't know. I was neither young enough or strong enough for that and did not have friends in Moscow anymore, so, and here I sent documents, so that would simply have gone back to the police. They would have been returned to the police.

[27] This general allegation, together with the applicant's inaction, does not meet the test required by the case law.

[28] The applicant also criticizes the Board for not having taken into consideration the documentary evidence which dealt with the corruption of the Russian authorities or the fact that the applicant had already tried to seek the help of the police when the son of this former spouse allegedly registered himself illegally as a resident of his apartment.

[29] The documentary evidence to which the applicant refers deals with corruption in general and not with situations similar to the applicant's. As regards the allegation to the effect that the applicant had already allegedly tried to obtain the help of the police is concerned, it is true that the Board did not mention it in its decision. However, this allegation, which was made in the PIF, was never repeated by the applicant in his testimony, and it directly contradicts that testimony.

[30] In his PIF, the applicant stated that his former spouse and her son took over his apartment, that he had no place to live and that he contacted the local police station, which allegedly told him they would have to settle their problems themselves. However, in his testimony, the applicant instead explained that his failure to seek help from the authorities was due to his step-son's "influence". Moreover, at the hearing, he stated that he and his former spouse had lived together in the apartment until he left for Canada, which is in complete contradiction to the statement he made in his PIF.

[31] I therefore find that the Board's conclusion that the applicant did not submit any evidence rebutting the presumption of State protection was reasonable and does not warrant the intervention of this Court.

[32] The parties did not propose any question for certification, and no question will be certified.

JUDGMENT

THIS COURT ORDERS that the application for judicial review be dismissed. No question is certified.

"Marie-Josée Bédard"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1113-10
STYLE OF CAUSE:	VICTOR ANDREEVI SHMAGIN v. MCI
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DATED:	October 21, 2010

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