Federal Court  Cour fédérale

Date: 20130215

Docket: IMM-3243-12

Citation: 2013 FC 163

Ottawa, Ontario, this 15th day of February 2013

Present: The Honourable Mr. Justice Roy

BETWEEN:

PAULIN NDOJA, VALBONE NDOJA,
GERALDO NDOJA, AMARILDO NDOJA

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review made pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27, of a decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada (the "Board" or "RPD"). In its decision rendered on February 27, 2012, the Board refused the application for refugee protection made by Paulin Ndoja and his family.

[2] The applicants are Paulin Ndoja (the "principal applicant"), his wife Valbone and their children Amarildo and Geraldo. They are citizens of Albania.

[3] It is not disputed that the principal applicant, while he was carrying out his mandatory military service during the communist regime in Albania, would have been jailed and eventually released when the communist regime toppled. The principal applicant was tortured and forced to perform hard labour, starved and kept in solitary confinement during this time. He suffers from post-traumatic stress disorder as a result of the treatment he received in 1998.

[4] The applicant's family was known to be anti-communist and, as a result, the principal applicant suffered at the hands of the then communist regime. A blood feud with a neighbouring family, presumably fuelled by the same political differences, resulted from the principal applicant's brother killing one of the men in that neighbouring family. Members of the said neighbouring family caused a severe injury to Geraldo when, in January 2002, as they were looking for the principal applicant, Geraldo fell from his mother's arms. He suffered serious burns which required medical treatment in the United States. According to the record, the mother, Valbone, and Geraldo left for the United States six months after the injury was suffered and the principal applicant and Amarildo followed three years later.

[5] The applicants failed in their application for asylum in the United States. They then came to Canada and made a claim for refugee protection the same day, October 21, 2009.

[6] The applicants state in their Memorandum of Argument that "credibility is not an issue. The RPD did not conduct a credibility assessment in the Decision. The sole determinative issue is whether there is adequate state protection in Albania." The Court agrees. In spite of some conflicting statements in the written materials produced on behalf of the applicants, the parties stated clearly that credibility is not an issue in this case.

Applicants' argument

[7] Basically, the applicants argue that the Board erred in concluding that there is adequate state protection in view of the on-going blood feud in Albania. In doing so, the applicants rely principally on the case of *Precectaj v Canada (Minister of Citizenship and Immigration)*, 2010 FC 485, as they try to draw an analogy between their situation and that present in that case. In *Precectaj*, judicial review was granted where the Court concluded that the Immigration and Refugee Board failed to fully consider the evidence before it, in the context of a family feud having occurred in Albania and, in particular, it failed to address individual circumstances in spite of an acknowledgement that there are cases of insufficient police protection. In that case, the principal applicant's family had gone to the police twice, only to be advised that the case was closed.

[8] In essence, the applicants in this case submit that the Board committed an error in that it was critical of the fact that the applicants had not sought protection from the authorities back in 2002, and the three years following. Furthermore, the applicants submit that the panel overlooked the fact that the principal applicant was detained and tortured by the Albanian police for political reasons and it failed to consider that factor in assessing why the applicants would not have gone to those same authorities for protection.

[9] During the hearing before the Board, the principal applicant explained that he had not approached the authorities for protection in Albania with regard to the blood feud with the neighbouring family because the authorities would do nothing to help them, and because it might aggravate the said neighbouring family. An attempt at reconciliation led by the Committee for National Reconciliation proved to be unsuccessful.

[10] Relying on documentary evidence, the applicants argue that Albanian authorities are unable to deal with blood feuds effectively or offer protection to its citizens. Finally, the applicants complain that the Board did not address sufficiently their submissions in denying them refugee status. As a result, they claim, their submissions were not adequately considered.

Respondent's argument

[11] The respondent argues that the presumption of state protection has not been rebutted in this case. Indeed, the applicants never went to the police or any other authorities following the incident of June 2002. Contrary to the applicants' argument, the Board specifically assessed their particular circumstances and found that they chose not to go to the police. It was opened to the Board, according to the respondent, to find that the applicants had not exhausted all avenues offered by the state. All in all, the Board noted both positive and negative evidence and it acknowledged that the overall picture of state protection was mixed with respect to blood feuds in Albania.

Issues

[12] The applicants put the following issues before the Court:

a. Did the Board err in concluding there is adequate state protection for the applicants due to the on-going blood feud in Albania between his family and another family?

b. Is the Board's failure to refer to counsel's submissions a reviewable error?

Analysis

[13] As repeated abundantly by the applicants' counsel at the hearing, the sole issue in this case is the availability of state protection, a mixed question of fact and law.

[14] As has been found in many cases considering the issue of state protection in the context of a family feud, the standard of review is one of reasonableness. It follows that the decision will go undisturbed if it falls "within the range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v. New Brunswick*, [2008] 1 SCR 190 at para 47). The decision must be sufficiently justified, transparent and intelligible. The question is not whether or not the applicants had established a subjective fear. Rather they had to satisfy the Board that the presumption of adequate state protection had been rebutted in this case. That such a presumption exists should not be disputed. In *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, one can read at paragraph 50:

> … a claimant might advance testimony of similarly situated individuals let down by the state [page 725] protection arrangements or the claimant's testimony of past personal incidents in which state protection did not materialize. Absent some evidence, the claim should fail, as nations should be presumed capable of protecting their citizens. … Absent a situation of complete breakdown of state apparatus, … it should be assumed that the state is capable of protecting a claimant.

[15] There is no allegation of a complete breakdown on state apparatus in Albania, such that the existence of the presumption is not challenged. The question then becomes whether the Board was unreasonable it reaching its conclusion that the presumption has not been rebutted. I do not think that such unreasonableness has been shown in this case.

[16] Not only are we faced with a case where the applicants failed to seek state protection between 2002 and 2005, but the documentary evidence submitted in order to show that Albania is incapable of protecting its citizens is at this stage mixed. Case-by-case analysis is required.

[17] The Board addressed its mind to the issue before concluding at paragraph 16 of its decision that "mechanisms of state protection do exist, although in any one case they may not be effective, or may not operate." Perfection is not the test. Mere attempts at improving the situation may not suffice. But mechanisms that are efficient without being perfect will. Deficiencies exist, concluded the Board, but that does not mean that state protection is non existent.

[18] Indeed in this case the principal applicant did not submit evidence personal to him and his family other than the incident in 2002. He stayed in Albania until December 2005, yet there is not any indication that he was in jeopardy then, or that there is danger now. The issue of the blood feud was really a generalization without much in terms of details or currency. The fact that he did not go to the authorities for the matter to be prosecuted or addressed suggests that the subjective fear of persecution was not prevalent, especially in view of the fact that the principal applicant and one of his children remained in Albania for some three years.

[19] As for the documentary evidence provided to the Board, it does not allow the conclusion that state protection is inefficient. The burden on the applicants is both evidentiary and legal: not only does the applicant need to introduce evidence that protection will be inadequate, but that evidence must be probative enough to meet the standard of balance of probabilities (see *Minister of Citizenship and Immigration v. Carillo*, 2008 FCA 94).

[20] The applicants' counsel, in his able submissions to the Court, insisted at some length on *Precectaj, supra*. He saw in that case a significant similarity which, he argues, must lead the Court to grant the remedy sought.

[21] It was noted by respondent's counsel that the facts of the two cases differ, in that the applicant's family complained to the police twice in *Precectaj*. I am not convinced that the cases can be distinguished on that sole basis. I find much more telling that the Court has found in more recent cases that state protection in Albania can be found to exist (see *Trako v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1063; *Krasniqi v Canada (Minister of Citizenship and Immigration)*, 2010 FC 350; *Llana v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1450; *Pepaj v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 296, and *Pulaku v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1048). The nature of refugee protection is not static: it is forward-looking. Clear and convincing evidence of the state's inability to protect is needed.

[22] More importantly perhaps, the *ratio decidendi* in *Precectaj* is concerned with the adequacy of the reasons given by the Board to conclude that state protection was sufficient. As we have found

out since, "reasons may not include all the arguments, statutory provisions, jurisprudence or other details, the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis" (see *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 SCR 708 at para 16).

[23] The evidence before the Board allowed it to come to the conclusion it reached. It is one of those decisions that falls within a range of possible outcomes. As it was put in *Andrade v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1490, by my colleague Justice Gleason:

> [11] … the reviewing court must afford significant deference to the tribunal's factual findings, particularly where, as here, the impugned determination falls within the core of the tribunal's expertise. Assessments of risk and of the availability of adequate protection for refugee claimants in foreign states lies at the very core of the competence of the RPD and are matters that Parliament has mandated to fall within the RPD's jurisdiction (see IRPA at para 95(1)(*b*); *Pushpanathan v. Canada (Minister of Employment and Immigration)*, [1998] 1 S.C.R. 982, [1998] S.C.J. No. 46 at para 47; *Saldana Fajardo v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 830 at para 18; *Kellesova v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 769 at para 11).

[24] The applicants complained that the Board failed to refer to counsel's submissions, refute them specifically. It seems to me that the Board addressed squarely the gist of the submissions of counsel. Decision-makers do not have to refer to every piece of evidence that is contrary to their finding and to give a full explanation of how they have been dealt with (see *Newfoundland and Labrador*, above, and *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35). In this case, the Board explained itself sufficiently for everyone to know why

the application was denied or, in the words of Justice Abella, for the Court, in *Newfoundland and Labrador*, *supra*, at paragraph 16:

> … if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

[25] In the case at bar, the reasons of the Board were intelligible in my view and transparent. Indeed, it was reasonable for the Board to conclude that clear and convincing evidence has not been adduced to rebut the presumption of state protection (*Ward*, *supra*).

[26] The fact that the principal applicant had been detained and allegedly tortured by the communist regime of Albania can hardly be retained against a subsequent regime. I see little point in the Board discussing this type of evidence.

[27] As a result, the application for judicial review has to be dismissed.

[28] I agree with counsel for the parties that this is not a matter for certified questions pursuant to section 74 of the *Immigration and Refugee Protection Act*.

JUDGMENT

The application for judicial review of the decision made by the Refugee Protection Division of the Immigration and Refugee Board of Canada on February 27, 2012 is dismissed.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3243-12
STYLE OF CAUSE:	PAULIN NDOJA, VALBONE NDOJA, GERALDO NDOJA, AMARILDO NDOJA v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	January 31, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	Roy J.
DATED:	February 15, 2013

APPEARANCES:

Me Omar Shabir Khan	FOR THE APPLICANTS
Me Melissa Mathieu	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Omar Shabir Khan Hamilton, Ontario	FOR THE APPLICANTS
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT