Federal Court  Cour fédérale

Date: 20140321

Docket: IMM-3807-13

Citation: 2014 FC 276

Ottawa, Ontario, March 21, 2014

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

ZELJKO VILJANAC, RADMILA VILJANAC, MARKO VILJANAC, NATASA VILJANAC

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated April 30, 2013 wherein the Board determined that the respondents are Convention refugees.

FACTS

[2] The principal respondent (male respondent), his spouse (female respondent), and their two minor children are all citizens of Croatia, a designated country of origin pursuant to section 109.1 of the Act.

[3] The respondents are of Serbian ethnicity. They assert that because of their membership in the Serbian community, they have had difficulty in obtaining work, suffered discrimination in the workplace, and were verbally harassed.

[4] The respondents' son alleges having suffered multiple events of aggression by other children, including an incident in September, 2011 where a 15 year-old neighbour planted a kitchen knife in the ground and yelled that he would slaughter him as he is a Serb.

[5] They also allege that on or about November 18, 2012, an unknown individual threw a brick through the bathroom window of the family residence and returned later to shout insults at the female respondent.

[6] The respondents came to Canada on January 12, 2013 and claimed refugee status.

THE DECISION UNDER REVIEW

[7] The Board issued a very succinct decision finding that the respondents were Convention refugees.

[8] The Board found that for the majority of their testimony, including the discrimination they had suffered as well as the acts of physical violence suffered by their son, the respondents were credible witnesses. However, it did not accept the respondents' testimony about a final series of events where the respondents had claimed that a man had presented himself at their residence to threaten them. Inconsistencies and adjustments in testimony led the Board to conclude that these events never happened, and that the respondents had attempted to mislead the Board by adding this event to their otherwise credible testimony.

[9] The Board found that the incessant and repeated number of acts of discrimination suffered by all members of the family by reason of their nationality, particularly their son being beaten and the discrimination suffered by the female respondent in finding employment, amounted to persecution.

[10] The Board found that state protection would not be reasonably forthcoming in this particular case. The respondents had made several attempts to obtain protection from police authorities and the Board considered that although the police responded on every occasion, they consistently failed to provide an adequate level of protection to the family.

[11] Addressing an internal flight alternative (IFA), the Board found that the documentary evidence confirmed that discrimination against ethnic Serbs exists throughout Croatia, and that on a balance of probabilities the respondents would not likely be able to find gainful employment in all of Croatia.

ISSUES

[12] The issues in this application are:

1) Was the Board's analysis as to the presence of discrimination that amounts to persecution reasonable?

2) Was the Board's analysis of state protection reasonable?

3) Was the Board's analysis of the presence of a viable IFA reasonable?

STANDARD OF REVIEW

[13] The Board's findings relating to discrimination, state protection, and IFA are all questions of fact or mixed fact and law and are all reviewable on a standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 53 [*Dunsmuir*]; *Smirnova v Canada (Minister of Citizenship and Immigration)*, 2013 FC 347 at para 19; *Sefa v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1190 at para 21; *Velez v Canada (Minister of Citizenship and Immigration)* 2013 FC 132 at para 24).

[14] In reviewing the Board's decision on the standard of reasonableness, the Court should not intervene unless the Board came to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (*Dunsmuir*, at para 47; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59).

ANALYSIS

Discrimination suffered by the respondents

[15] The applicant acknowledges that an asylum claimant may demonstrate that the cumulative nature of the discrimination suffered amounts to persecution (*Kanto v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1049 at para 38), however this is not the case here.

[16] I agree. The recognition of the cumulative effect of discriminatory acts does not mean that a claimant will meet their burden by simply alleging repeated acts of harm. As the Federal Court of Appeal found in *Munderere v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 84 at para 45, addressing this same issue of cumulative discrimination, "whether a claimant relies on a single or a number of events taken together, he still has the obligation to satisfy the Board that, at the time of the hearing, he has a well founded fear of persecution in regard to the country from which he seeks protection". While the Federal Court of Appeal in *Sagharichi v Canada (Minister of Citizenship and Immigration)*, [1993] FCJ No 796 at para 3 found that the line between persecution and discrimination is "difficult to establish", it held that "in all cases, it is for the Board to draw the conclusion in a particular factual context by proceeding with a careful analysis of the evidence adduced and a proper balancing of the various elements contained therein, and the intervention of this Court is not warranted unless the conclusion reached appears to be capricious or unreasonable".

[17] Here, the Board's decision does not demonstrate a careful analysis or a proper balancing of the evidence and is therefore unreasonable. The Board's finding that the "incessant and repeated number of acts of discrimination suffered by all the members of the family" amounted to persecution simply does not accord with the evidence before it. While there is evidence that the

respondent's son was ostracized by certain classmates and neighbourhood children, the Board's finding of repeated physical violence is not substantiated. In the respondent's own Basis of Claim (BOC) form, he alleged only one incident of physical violence against his son. Further, while the Board described the 2011 incident as one where a 15 year-old neighbour "beat your children", it is clear from the evidence that while threats were uttered, there was no physical act committed. The discriminatory acts suffered by the respondent's son were neither endorsed nor encouraged by the Croatian state authorities, and he was able to pursue his education, including his religious education, in Croatia. The Board's finding of discrimination amounting to persecution in the workplace context is similarly not supported by the evidence. Contrary to the Board's finding that the female respondent was unable to find employment for "numerous years", a review of the inconsistent work history provided shows that apart from a short period between 2008 and 2009, the female respondent was able to find work in Croatia. Similarly, there is no indication that the male respondent had difficulty finding work; in fact he had held the same job as a gravedigger for 16 years before leaving Croatia. The Board's findings were not grounded in the evidence before it and its analysis of the cumulative effect of the discriminatory acts and the presence of persecution was inadequate.

State Protection

[18] The applicant submits that the Board failed to apply the legal principles governing a state protection analysis. Moreover, the applicant argues that the Board's conclusions do not result from a careful analysis of the evidence, and that its analysis is quasi-inexistent.

[19] Again, I agree. The Board's state protection analysis and its treatment of the evidence submitted were entirely inadequate. The Board's finding that the police "consistently failed to provide an adequate level of protection to your family" was not grounded in the evidence before it. It is recognized that the police responded on every occasion that they were called by the respondents and there was no evidence that the police failed to follow through on any investigations or failed to provide any services. This is especially true given the lack of police reports submitted and the fact that the respondents did not follow up with the police after the 2011 incident.

[20] There is a presumption of state protection that the respondents had the burden to rebut (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at 725, 726) and this burden is even more difficult to meet in a democratic state like Croatia (*Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171 at para 57). The Board's overly brief treatment of state protection does not address any of these legal principles and does not provide a reasonable basis upon which the Board could have decided as it did (*Alberta (Information and Privacy Commissioner) v Alberta Teacher's Association*, 2011 SCC 61 at para 53).

Internal Flight Alternative

[21] When considering whether a claimant has a viable IFA, the test is two-pronged. First, the Board must determine that there is no serious possibility of the claimant being persecuted or being at risk in the chosen IFA. Secondly, the Board must determine if it is objectively reasonable to seek safety in the designated IFA (*Zablon v Canada (Minister of Citizenship and Immigration*, 2013 FC 58 at para 20).

[22] The applicant submits that it appears that the Board erroneously combined these two steps into a single test, finding that discrimination against ethnic Serbs exists throughout Croatia, especially in relation to accessing employment and that the respondents would not be able to find gainful employment throughout Croatia. The Board also failed to consider if a city in Croatia outside a war affected region could be designated as an IFA.

[23] Once again, I agree with the applicant. The Board's treatment of the existence of an IFA was deficient. It concluded that given the respondents' "limited skills and employment history", on a balance of probabilities they would not likely be able to find gainful employment in all of Croatia. Considering both the inconsistencies raised in the record as to the female respondent's employment history as well as the lack of evidence showing that employment as a gravedigger, cleaning person or personal aid would not be reasonably transferable to other areas of the country, the Board's finding is not grounded in the evidence before it.

CONCLUSION

[24] Unfortunately for the respondents, the Board's decision is so deficient that it cannot be saved by the reasoning in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62. As this Court recently noted in *Komolafe v Canada (Minister of Citizenship and Immigration)*, 2013 FC 431 at para 11, "*Newfoundland Nurses* is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made or to speculate as to what the tribunal might have been thinking". In this case the Board failed to properly consider the evidence before it, and its analysis and reasons are so inadequate that they cannot be considered reasonable.

[25] For these reasons, I would allow the application for judicial review. The matter is remitted for reassessment by a differently constituted panel.

JUDGMENT

THIS COURT'S JUDGMENT is that:

This application for judicial review is allowed and the matter is remitted for reassessment by a differently constituted panel.

"Danièle Tremblay-Lamer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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