Federal Court Cour fédérale

Date: 20141110

Docket: IMM-2853-13

Citation: 2014 FC 1056

Ottawa, Ontario, November 10, 2014

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

ZAALI IVANEISHVILI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant sought Canada's protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act]. His request was refused by the Refugee Protection Division of the Immigration and Refugee Board of Canada (the Board). The applicant now asks for judicial review of that decision pursuant to subsection 72(1) of the Act.

[2] The applicant requests that the decision be set aside and the matter returned to the Board for redetermination by a different panel of the Board.

I. Background

[3] Zaali Ivaneishvili (the applicant) is a citizen of Georgia from the city of Kutaisi. He arrived in Canada on June 6, 2011 and applied for refugee protection about a month later. His first hearing before the Board was adjourned due to interpretation issues, but his case was eventually heard on March 12, 2013.

[4] In essence, the applicant's claim centered on his fear of a man named Vakhtang Tsakadze, who is the chief of the Special Measures Department for the Constitutional Security of Kutaisi (also called the Zonderi or Special Forces by the applicant). The applicant alleged that he and his brother operated a successful business back in 2008, but this was interrupted when Mr. Tsakadze tried to extort half of the profits from the applicant's brother. When his brother refused, the applicant said that Mr. Tsakadze framed his brother for a crime and arrested him and his brother was only allowed to go free by promising to pay. Instead though, his brother went to Spain.

[5] This left the applicant unemployed, but he soon started working for the Democratic Movement – United Georgia, a political party opposed to the government. The applicant said that he did this for several years and in 2011, helped organize a demonstration in Tbilisi, the capital city. However, Mr. Tsakadze spotted him at the demonstration and the applicant alleged that he was afterward abducted and beaten by Mr. Tsakadze's special forces. He said that he called

home to discover that the police had been there looking to kill him and he fled the country shortly thereafter.

II. Decision Under Review

[6] By a decision dated March 18, 2013, the Board denied the applicant's claim. For it, the determinative issues were credibility, state protection and internal flight alternative.

[7] After setting out some of the principles of a state protection analysis, the Board noted that it had several credibility concerns. The letter the applicant presented to prove his political involvement essentially only said that he was "really the member of political party the "Democratic Movement – United Georgia."" He did not present the original version of the document. It was in English and it gave no details about his position, role or the dates for which he had been a member. The Board found it useless.

[8] Further, he said in his personal information form (PIF) narrative that both he and his brother had been extorted by Mr. Tsakadze, but changed his mind at the hearing and said that only his brother had been. He could give no explanation for this discrepancy, despite having had an opportunity to correct it when he amended his PIF. He also gave confusing and contradictory answers when being asked about the political situation in Georgia, but the Board chalked that up to a misunderstanding and let it go.

[9] Still, the applicant's testimony was confusing when he talked about the event that triggered his departure too. Despite his earlier testimony that Mr. Tsakadze did not bother him

for three years because he did not know that he was an equal partner in their business, he claimed that Mr. Tsakadze might have targeted him at the demonstration for revenge. Further, he said he was arrested in his PIF, but then only that he was abducted and beaten in his testimony. As well, he claimed the beating resulted in "broken sides and broken head", but soon admitted that he just had bruises and was treated with painkillers. The Board found that he had embellished his injuries.

[10] Finally, the applicant never went to the police after this beating, saying only that he knew he would not have a good day if he did. The Board did not consider that a reasonable explanation. Further, his corroborating evidence was not convincing. The letter from his political organization gave no details and the letter from his father was neither dated nor signed. It also said that he was sentenced to death, which the applicant admitted could not be true.

[11] Consequently, the Board concluded that the applicant had not presented clear and convincing evidence to rebut the presumption of state protection. Also, though the Board accepted that the applicant feared Mr. Tsakadze, the Board did not accept that there was any political motive underlying that.

[12] Had it been necessary, the Board also would have found that Tbilisi would be an internal flight alternative.

III. Issues

[13] The applicant states the issue as follows: "Did the Refugee Division err in fact, err in law, breach fairness or exceed jurisdiction?" In essence, he argues that the Board erred in five ways: (1) by failing to find a political nexus; (2) by failing to consider section 97 grounds; (3) by finding state protection; (4) by finding an internal flight alternative; and (5) by making unreasonable credibility findings.

[14] I will address the issues as follows:

A. What is the standard of review?

B. Was the Board's decision reasonable?

IV. Applicant's Written Submissions

[15] The applicant argues that his evidence showed that he was active in a political party opposing the one to which Mr. Tsakadze belonged. Although personal revenge might have been a factor, so too could politics have been and so the Board erred by ignoring the possibility of a mixed motive. Even if it was only revenge, the applicant says the Board erred by failing to consider whether the risk falls under either paragraph of subsection 97(1).

[16] Further, he argues that the Board's finding on state protection was unreasonable since the agents of persecution were the police and Special Forces. As he explains in his reply memorandum, there were no other authorities to whom he could go.

[17] Moreover, the applicant says the Board's finding that Tbilisi was an internal flight alternative was incomprehensible. Tbilisi was the very place that he was captured and beaten. Besides, Tbilisi is only 200 kilometres away from Kutaisi. He says there is nowhere he could hide that a chief of the Special Forces could not find him.

[18] Beyond that, the applicant concedes that most of the Board's credibility analysis was reasonable. However, he takes issue with its finding that his injuries were not severe since he did not seek treatment right away. He argues that the Board does not have the medical expertise to make that inference.

V. Respondent's Written Submissions

[19] The respondent says that the standard of review is reasonableness.

[20] The respondent says that the state protection finding was reasonable and that is determinative under both section 96 and subsection 97(1) of the Act. Specifically, the applicant never made a single attempt to approach the state for protection, so he hardly provided the clear and convincing evidence necessary to overcome the presumption of adequate state protection.

[21] Further, the respondent says that the Board never believed that the applicant had been targeted or detained by Mr. Tsakadze. The respondent says that these credibility findings were many and persuasive.

[22] As for the internal flight alternative, the respondent says it was reasonable to find that Tbilisi would be safe. That finding was superfluous since the other grounds were dispositive.

VI. Analysis and Decision

A. *Issue 1 - What is the standard of review?*

[23] I agree with the respondent that all of the applicant's arguments raise questions of fact or of mixed fact and law. Consequently, the standard of review is reasonableness (see *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 53, [2008] 1 SCR 190 [*Dunsmuir*]; *Ruszo v Canada (Citizenship and Immigration)*, 2013 FC 1004 at paragraphs 21 and 22, [2013] FCJ No 1099).

[24] This means that I should not intervene if the decision is transparent, justifiable, intelligible and within the range of acceptable outcomes (see *Dunsmuir* at paragraph 47; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59, [2009] 1 SCR 339 [*Khosa*]). Put another way, I will set aside the Board's decision only if I cannot understand why it reached its conclusions or how the facts and applicable law support the outcome (see *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paragraph 16, [2011] 3 SCR 708). I cannot substitute my own view of a preferable outcome, nor can I reweigh the evidence (*Khosa* at paragraphs 59 and 61).

B. *Issue 2 - Was the Board's decision reasonable?*

[25] With respect to credibility, the applicant only takes issue with the Board's finding that the applicant's injuries were not as severe as he made them out to be. He says that required medical

expertise and was therefore an impermissible basis for a credibility finding (see *Iantbelidze v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 932 at paragraphs 32 and 33, 222 FTR 300; *Arsan v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1252 at paragraph 22, 94 Imm LR (3d) 302).

[26] However, in those cases, the Board was drawing inferences about the person's health from their activities. That is not what happened here. Rather, the Board reasoned as follows:

> When asked the nature of his injuries, he responded that he had "broken sides and broken head", yet when further questioned, he wasn't treated, until he reached Luthuania [*sic*] some days later, for bruises with painkillers. The Board concludes that this was an attempt on the part of the claimant to embellish the merits of his claim.

[27] Though it is a little unclear, the Board was not saying that his injuries could not have been severe since he waited before seeking treatment. Rather, the Board tested the applicant's statement that he had a broken head and broken sides and the applicant subsequently admitted that all he had were bruises and no broken bones. She inferred that his first claim was exaggerated to bolster his claim. That is a reasonable finding.

[28] As for state protection, the Board's decision was reasonable. In *Ruszo* at paragraphs 32 and 33, Chief Justice Paul Crampton relied on a wealth of jurisprudence to make the following observations:

> 32 An applicant for refugee protection is required to demonstrate that he or she took all objectively reasonable efforts, without success, to exhaust all courses of action reasonably available to them, before seeking refugee protection abroad (*Hinzman*, above, at para 46; *Dean v Canada (Minister of Citizenship and Immigration)*, 2009 FC 772, at para 20; *Salamon*,

> above, at para 5). Among other things, this requires claimants for refugee protection "to approach their home state for protection before the responsibility of other states becomes engaged" (*Ward*, above, at para 25; *Kim v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1126, at para 10 [*Kim*]; *Hassaballa v Canada (Minister of Citizenship and Immigration)*, 2007 FC 489, at paras 20-22); *Camacho v Canada (Minister of Citizenship and Immigration)*, 2007 FC 830, at para 10; *Del Real v Canada (Minister of Citizenship and (Immigration)*, 2008 FC 140, at para 44; *Ramirez v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1214, at para 28; *Stojka v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1371, at para 3; *Ruiz Coto v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1211, at para 11; *Matthews v Canada (Minister of Citizenship and Immigration)*, 2012 FC 535, at paras 43-45; *Kotai v Canada (Minister of Citizenship and Immigration)*, 2013 FC 693, at para 31; *Muli v Canada (Minister of Citizenship and Immigration)*, 2013 FC 237, at paras 17-18; *Ndoja v Canada (Minister of Citizenship and Immigration)*, 2013 FC 163, at paras 16-18, 25; *Dieng v Canada (Minister of Citizenship and Immigration)*, 2013 FC 450, at para 32).
>
> 33 In this regard, doubting the effectiveness of state protection without reasonably testing it, or simply asserting a subjective reluctance to engage the state, does not rebut the presumption of state protection (*Ramirez*, above; *Kim*, above). In the absence of a compelling or persuasive explanation, a failure to take reasonable steps to exhaust all courses of action reasonably available in the home state, prior to seeking refugee protection abroad, typically will provide a reasonable basis for a conclusion by the RPD that an applicant for protection did not displace the presumption of state protection with clear and convincing evidence (*Camacho*, above).

[29] In this case, the applicant chose not to report the assault to the police. The Board asked him why in the following exchange:

> MEMBER: Did you go to the police?
>
> CLAIMANT: No.
>
> MEMBER: Why not?
>
> […]

> CLAIMANT: I did not trust them.
>
> MEMBER: You did not trust them; why not?
>
> CLAIMANT: I knew that if I would show up at the police I would not have a good day.
>
> MEMBER: What do you mean by that?
>
> CLAIMANT: Tsakadze's order was to destroy me and that is why I would not be able to show up at the police.

(transcript of hearing (12 March 2013) at page 40)

[30] The applicant objects to the Board's expectation that he should go to the police, saying that the police and the Special Forces were the agents of persecution.

[31] However, it is not actually clear from the record what agency the Special Forces are or in what way they are connected to the police. The claimant tended to use the words interchangeably. For instance, in his PIF narrative, he said that after the assault, his father told him that "police had raided our home that day looking for me and threatening to kill me." However, in the letter purportedly from his father, his father described that event as follows: "Employees of Special Forces came. They were asking my son's whereabouts."

[32] Even accepting that Mr. Tsakadze controlled the police, the applicant testified that he was only the chief in his city, Kutaisi (transcript of hearing (12 March 2013) at pages 37 and 38). He also said that the people who grabbed him were a "special group of people with masks," who he believed "were from my city, police and the head, who is the head of the … Tsakadze". (transcript of hearing (12 March 2013) at page 43).

[33] The crime happened in Tbilisi however, and the applicant presented no clear and convincing evidence that Mr. Tsakadze had any influence in Tbilisi. He simply said that he did not think he would have a good day if he reported the crime there. At most, this demonstrates only a subjective reluctance to approach the state for protection and it was reasonable for the Board not to be persuaded by that.

[34] The applicant also argues that the documentary evidence showed that police acted with impunity, citing: United States Department of State, *Country Reports on Human Rights Practices for 2011 – Georgia* at pages 2, 9 and 10. However, that document reports mixed results in that regard, also listing a number of punishments visited against police officers for abuse. It is not so compelling that it would be objectively unreasonable for the applicant to have even tried to approach the state for help (see *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at 724, 103 DLR (4th) 1; *Ruszo* at paragraph 45).

[35] Consequently, the Board's state protection analysis was reasonable and that makes the applicant's other complaints irrelevant.

[36] After all, a fear of persecution is not well-founded where state protection exists (*Ward* at 712), so it does not matter if there is any nexus to political opinion. In any event, the Board did not ignore the possibility of a mixed motive. It expressly found that "the perpetrator is seeking revenge, rather than a political motive."

[37] As well, a state protection requirement is incorporated into subparagraph 97(1)(b)(i).

[38] As for a danger of torture under paragraph 97(1)(a), the applicant presented no evidence that Mr. Tsakadze was acting in an official capacity and the Board expressly found that Mr. Tsakadze was motivated by personal revenge. Given that finding, it is evident that the Board concluded that there was no danger of torture as that term is defined by article 1.1 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85.

[39] As such, the Board's finding that the applicant had not rebutted the presumption of state protection was dispositive and there is no need to consider whether its finding of an internal flight alternative was also reasonable.

[40] I would therefore dismiss this application for judicial review.

[41] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"John A. O'Keefe"

Judge

ANNEX

***Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85**

PART I

Article 1

1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

PREMIERE PARTIE

Article premier

1. Aux fins de la présente Convention, le terme « torture » désigne tout acte par lequel une douleur ou des souffrances aiguës, physiques ou mentales, sont intentionnellement infligées à une personne aux fins notamment d'obtenir d'elle ou d'une tierce personne des renseignements ou des aveux, de la punir d'un acte qu'elle ou une tierce personne a commis ou est soup-çonnée d'avoir commis, de l'intimider ou de faire pression sur elle ou d'intimider ou de faire pression sur une tierce personne, ou pour tout autre motif fondé sur une forme de discrimination quelle qu'elle soit, lorsqu'une telle douleur ou de telles souffrances sont infligées par un agent de la fonction publique ou toute autre personne agissant à titre officiel ou à son instigation ou avec son consentement exprès ou tacite. Ce terme ne s'étend pas à la douleur ou aux souffrances résultant uniquement de sanctions légitimes, inhérentes à ces sanctions ou occasionnées par elles.

***Immigration and Refugee Protection Act*, SC 2001, c 27**

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.
…	…
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former	97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel

habitual residence, would subject them personally

elle avait sa résidence habituelle, exposée :

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

FEDERAL COURT

SOLICITORS OF RECORD

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