Federal Court Cour fédérale

Date: 20141121

Docket: IMM-1975-13

Citation: 2014 FC 1106

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, November 21, 2014

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

VITALY SAVIN
ARTEM GARANIN

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA), for judicial review of a decision of the Refugee Protection

Division (RPD), dated February 6, 2013, according to which the applicants are not "Convention refugees" or "persons in need of protection" under sections 96 and 97 of the IRPA.

II. Facts and summary of proceedings

[2] The applicants, Mr. Savin and Mr. Garanin, are homosexual males and citizens of Russia, and are 32 and 26 years of age respectively. They claim that they have been persecuted in Russia because of their sexual orientation. The applicants contend that homosexuals are discriminated against and persecuted by the civilian population and by the authorities, and that the situation has deteriorated in recent years, namely by the enactment of laws directed at [TRANSLATION] "gay propaganda" in Russia. In addition, Mr. Garanin claims that because if his sexual orientation, he risks not having access to adequate medical care regarding his HIV-positive status.

[3] The applicants allege that they have been victims of numerous discriminatory acts in terms of, among other things, employment, family, education and social activities. In particular, the applicants allege that they were attacked by a homophobic group in September 2011, which caused Mr. Savin to become depressed and which prevented him from working for a few weeks.

[4] The applicants decided to leave Russia for Canada on November 6, 2011, and claimed refugee protection on November 24 of the same year.

[5] Following a hearing that took place before the Immigration and Refugee Board (IRB) on January 23, 2013, the RPD found that the discriminatory acts experienced by the applicants in Russia do not constitute persecution. The RPD also acknowledged the existence of an internal

flight alternative in St. Petersburg. As a result, the RPD found that the applicants are not "Convention refugees" or "persons in need of protection" within the meaning of sections 96 and 97 of the IRPA.

[6] On March 14, 2013, the applicants filed an application for judicial review of the RPD's decision with the Court. On November 21, 2013, an order was issued, requiring the parties to file supplementary memoranda concerning the developments in Russia regarding the situation of sexual minorities.

[7] As such, on September 2, 2014, the applicants filed supplementary memoranda and new evidence, as ordered by the Court on November 21, 2013.

III. Relevant statutory provisions

[8] The following sections state the criteria to be established in support of a claim for protection under the IRPA:

Convention refugee	**Définition de « réfugié »**
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,	*a*) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte,

unwilling to avail themself of the protection of each of those countries; or

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.

Person in need of protection

Personne à protéger

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 habitual residence, would subject them personally

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 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

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

country,

(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.

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

Exclusion – Refugee Convention

Exclusion par application de la Convention sur les réfugiés

98. A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.

98. La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.

IV. Issues

[9] The following issues are put to the Court:

(a) Do the circumstances justify granting an extension of time for filing the application for judicial review?

(b) Can the new evidence submitted by the applicants, in accordance with the directions issued by the Court, be considered?

(c) Is the RPD's decision based on unreasonable findings or errors of law that would enable the Court to allow the application?

V. Analysis

a. Extension of time to hear the application for judicial review

[10] The application for judicial review was filed after the 15 days set out in paragraph 72(2)(*b*) of the IRPA. The Court must assess whether the applicable criteria, as set out in *Canada (Attorney General) v Hennelly*, (1999) 244 NR 399 (FCA) at paragraph 3, justify an extension of time being granted. The burden is on the applicant to demonstrate the following:

(a) a continuing intention to pursue his or her application;

(b) that the application has some merit;

(c) that no prejudice to the respondent arises from the delay; and

(d) that a reasonable explanation for the delay exists.

[11] The Court finds that those conjunctive tests justify granting an extension of time, in order to do justice between the parties (*Khalife v Canada (Minister of Citizenship and Immigration)*, 2006 FC 221 at paragraph 15). The Court finds that the applicants' explanation regarding the delay is reasonable and founded. By filing an application for judicial review the day after being informed by the IRB that they were unable to appeal to the RAD, the applicants demonstrated a continuing intention to pursue their application.

b. Admissibility of the new evidence submitted by the applicants in accordance with the directions issued by the Court

[12] According to the applicants, the documentation they submitted following the directions issued by the Court establishes the following:

(a) The application of the Russian statute prohibiting [TRANSLATION] "gay propaganda" has significantly and alarmingly increased the violation of gay rights in Russia;

(b) The Russian authorities take steps with non-governmental organizations that are allegedly [TRANSLATION] "foreign agents" to attack groups that advocate for the rights of sexual minorities;

(c) The situation exists on a national scale.

(Applicants' supplementary memorandum, at paragraph 21).

[13] On the one hand, the applicants contend that the oral direction issued on November 21, 2013, by the Court is consistent with the principles of the rule of law and section 7 of the *Canadian Charter of Rights and Freedoms* (Charter). In particular, the applicants raise the

lack of an available recourse to argue their rights as well as the Court's corresponding obligation to allow parties to submit new evidence, where the circumstances so warrant (see *Aden v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 625).

[14] On the other hand, the respondent maintains that the Court cannot consider new evidence that was not part of the record created before the RPD. The respondent argues that that the evidence should instead be assessed by an immigration officer responsible for pre-removal risk assessments (PRRA). The Court noted the substantial significance of *Canada (Minister of Public Safety and Emergency Preparedness) v J.P.*, 2013 FCA 262—the Court is reminded that an inadmissibility finding does not breach the rights protected by section 7 of the Charter because the case is not at the removal stage; and, the essential judgments of the Federal Court of Appeal summarized in its previously cited decisions reach the same conclusion (see, in particular, paragraphs 116, 120, 123, 124 and 125 of the decision itself). The Court also notes *Arduengo v Canada (Minister of Citizenship and Immigration)*, [1997] 3 FC 468.

[15] In a decision with similar circumstances, Justice Yvon Pinard asked the parties to make further submissions following the earthquake in Haiti, which occurred after a PRRA decision had been rendered. Justice Pinard found that he could not consider the events that occurred in the country subsequent to the impugned decision, even if they were determinative in that decision (*Nicholas v Canada (Minister of Citizenship and Immigration)*, 2010 FC 452). The following excerpt from Justice Pinard's decision is instructive:

> [42] In conducting a judicial review of the PRRA decision, the Court itself also may not have regard to that later event. It is settled law that it is not the role of the Court in that situation to assess

> fresh evidence and substitute its decision for the decision of the PRRA officer.
>
> [43] In *Isomi*, above, my colleague Justice Simon Noël stated:
>
>> [10] I do not see how the factual situation described by the applicant or the argument submitted could call into question the case law of this Court. Under section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, an application for judicial review of a decision is considered on the basis of the evidence submitted to the decision-maker. Any addition to this evidence would change the role of the judge hearing such cases. The judge would be able to make a determination by taking new evidence into consideration, which would effectively remove the judge from his or her role as a judge hearing an application for judicial review. Moreover, the applicant has an alternative at his disposition, namely section 165 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations), which allows the filing of a new PRRA application and the use of "new" evidence in support of this application. Accordingly, I do not see how the Charter may be of any use, given the situation in this case.
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>> [Emphasis in original.]

[16] The Court is bound by the record submitted before the RPD. The possibility for the Court to admit extrinsic evidence to the record submitted before the RPD is limited "to those circumstances in which the only way to get at the want of jurisdiction is by the bringing of such new evidence before the reviewing Court" (*Gitxsan Treaty Society v Hospital Employees' Union*, [1999] F.C.J. No 1192 at paragraph 13). The role of the Court, as a forum for judicial review, is not to engage in a *de novo* assessment of the record that was submitted before the RPD.

[17] <u>However, the applicants could raise the new recognized evidence in a PRRA</u>, so that an officer could do an in-depth assessment of the documentation prepared by the applicants concerning sexual minorities in Russia, namely the situation stemming from the enactment of the law prohibiting [TRANSLATION] "gay propaganda".

c. The reasonableness of the RPD's decision

[18] Based on the testimony of the applicants and the documentary evidence in support of their claim, <u>the RPD recognized</u> both <u>the applicants' credibility</u> regarding their homosexuality and the existence of discrimination against members of the lesbian, gay, bisexual and transgender (LGBT) community in Russia. Nevertheless, the RPD found that the discrimination and violence experienced by the applicants do not constitute persecution. In reaching that finding, the RPD did an in-depth review of the applicants' record, of the relevant case law, as well as of the principles of the *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*. In addition, the RPD carried out an analysis to determine whether those discriminatory acts, taken on a cumulative basis, may create fear of persecution (RPD Decision, at paragraphs 44-48).

[19] The RPD concluded the following at paragraphs 35-36:

> [35] The panel understands the desires of the claimants to be recognized as a couple, to have the power to make legal decisions for each other and even to be able to open a joint bank account as a couple. While no doubt discrimination against homosexuals exists in Russia, the situation would appear to be slowly changing, as evidenced by the recent Supreme Court decision concerning the propaganda ban. Members of the claimant's families, friends, Vitaly's employer and the choir director in which Artem sang, were just some of the people who accepted the claimant's

> homosexuality, even though these may not be the views of the majority of Russians.
>
> [36] The panel does not find, however, that there was persuasive evidence before it to suggest that the claimants experienced widespread or systematic mistreatment rising to the level of persecution.

[20] In its reasons, the RPD analyzed the discrimination suffered by the applicants, the efforts undertaken by the applicants to report those discriminatory acts to the Russian authorities, the applicants' trips to Sweden and Italy in 2011 and their opportunity to claim refugee protection in those countries, the existence of groups advocating for the rights of members of the LGBT community in Russia and their activities, the applicants' involvement in that same community and the impact of the laws created in Russia limiting the rights of members of the LGBT community. The RPD raised doubts regarding the credibility of the applicants concerning certain alleged facts, namely with respect to the dismissal of Mr. Savin in 2009 because of his sexual orientation.

[21] Furthermore, regarding an internal flight alternative, the RPD assessed the opportunity for the applicants to settle in St. Petersburg. In particular, the RPD found that before arriving in Canada, the applicants spent one month in St. Petersburg and did not experience any particular problems. The RPD also raised some deficiencies with respect to the applicants' credibility, in particular regarding their alleged fear and an internal flight alternative:

> [54] The panel does not accept that the claimants have a well-founded fear of persecution in Russia for the reasons mentioned above. St-Petersburg has a thriving gay community. While the claimants stated some of their friends have attempted to go live there and were quickly disillusioned, this would depend on the ability of a person to find employment in the city. The claimants are both educated persons with solid work experience. They spent

> a month in that city before coming to Canada and were not harmed. The inter-regional Russian LGBT Network, formed in 2006, provides legal and psychological assistance, monitors violations of human rights, and aims at eliminating discriminations based on sexual orientation and gender identity and it has regional offices in St-Petersburg. "Coming out", a LGBT organization in St-Petersburg, was officially registered by the Russian government; it was reportedly the first time an organization which openly declared its goal of advocating for the LGBT community was registered on the first attempt without court intervention (ILGA Europe 16 Feb. 2009). The panel finds that, should they not wish to return to Samara, the claimants would have a viable internal flight alternative in St-Petersburg.
>
> (RPD Decision, at paragraph 54).

[22] The Court is of the opinion that the RPD did not commit any error that could warrant the intervention of the Court. Instead, the RPD's analysis shows an in-depth review of the applicants' record and of the documentation submitted by the parties in order to reject the applicants' claim for refugee status.

VI. Conclusion

[23] The Court is of the view that in light of the above-mentioned reasons, the Court's intervention is not warranted. The application for judicial review is dismissed.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that

1. The application for judicial review is dismissed;

2. There is no question for certification.

"Michel M.J. Shore"
Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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