Federal Court  Cour fédérale

Date: 20170629

Docket: IMM-2308-16

Citation: 2017 FC 638

[ENGLISH TRANSLATION]

Toronto, Ontario, June 29, 2017

Present: The Honourable Madam Justice Roussel

BETWEEN:

NEBOJSA BUKVIC
TIJANA BUKVIC
FILIP BUKVIC, minor
SARA BUKVIC, minor
MARKO BUKVIC, minor

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The applicants are seeking judicial review of a decision by the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada, dated May 12, 2016, denying

their claims for refugee protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] For the reasons that follow, the application for judicial review is dismissed.

II. Background

[3] Nebojsa Bukvic, his spouse Tijana Bukvic and their three minor children are citizens of Croatia of Serbian ethnicity, and are Orthodox Christians. They entered Canada on December 4, 2012, and made a claim for refugee protection two days later.

[4] Mr. Bukvic alleges that he suffered from discrimination amounting to persecution when he was a police officer in Croatia. He states that he was a victim of discrimination, intimidation and harassment from his Croatian colleagues and that he was denied promotions in his employment because of his Serbian ethnicity, creating a wage gap between him and his Croatian colleagues.

[5] According to Mr. Bukvic, the discrimination increased when a Croatian general was exonerated by a tribunal in The Hague. Mr. Bukvic was questioned twice in Croatia regarding war crimes because of his military service in Serbia.

[6] In October 2012, the family home was burned, rendering it uninhabitable. Although the police were unable to identify the cause of the fire, Mr. Bukvic believes that the fire was set

intentionally because of the family's ethnicity. Fearing for his family's safety, Mr. Bukvic left Croatia for Canada with his spouse and children.

[7] Mr. Bukvic also states in his Personal Information Form [PIF] that his eldest child suffered from discrimination at school because he had been placed in a class made up of Serbian and Romani children, separated from the Croatian children.

[8] The RPD heard their claims for refugee protection on November 19, 2015. It began by confirming that Mr. Bukvic was the designated representative of the children and excusing the minor applicants from the hearing room at the request of their counsel. Only the adult applicants testified at the hearing.

[9] In a decision rendered on May 12, 2016, the RPD concluded that the applicants did not satisfactorily demonstrate that they had a well-founded fear of persecution or that, on a balance of probabilities, they were persons in need of protection.

III. Analysis

[10] The applicants submit that the RPD violated the principles of natural justice and procedural fairness, first by excluding the minor applicants from the hearing room without questioning them, and second by failing to provide reasons in their decision regarding the lack of a connection between the fire at the family residence and the applicants' Serbian ethnicity. The applicants also submit that the RPD erred in its application of sections 96 and 97 of the IRPA and in its assessment of state protection.

A. *Standard of judicial review*

[11] It is well established that the standard of review applicable to issues of natural justice or procedural fairness is the standard of correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43 [*Khosa*]). The issue in this case is not necessarily whether the decision was "correct", but rather whether the process followed by the decision-maker was fair (*Majdalani v Canada (Citizenship and Immigration)*, 2015 FC 294 at para 15; *Hashi v Canada (Citizenship and Immigration)*, 2014 FC 154 at para 14).

[12] The issue of whether the RPD had applied the proper tests for what constitutes "persecution" within the meaning of section 96 of the IRPA or for the assessment of state protection is also reviewable on a standard of correctness (*Ruszo v Canada (Citizenship and Immigration)*, 2013 FC 1004 at paras 20–22 [*Ruszo*]). However, the application of these tests to the facts in the case raises questions of mixed fact and law, and it is settled law that the applicable standard of review is reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 53 [*Dunsmuir*]; *Ruszo* at paras 21–22; *Balazs v Canada (Citizenship and Immigration)*, 2013 FC 62 at para 25).

[13] When the standard of reasonableness applies, the role of the Court is to determine whether the decision falls "within the range of possible, acceptable outcomes which are defensible in respect of the facts and law". If "the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility", it is not open to this Court to substitute its own view of a preferable outcome (*Dunsmuir* at para 47; *Khosa* at para 59).

B. *Was the RPD's decision rendered in violation of the principles of natural justice or procedural fairness?*

[14] In its introduction, the RPD noted that at the time of the hearing, the three children were minors and that Mr. Bukvic was their designated representative. It stated that it had allowed the minor applicants to leave the hearing room during the testimony because of their young age and that it did not require them to testify, as the allegations of the minor applicants simply referred to those of their parents.

[15] The applicants claim that the decision to exclude the children from the hearing room without questioning them on the grounds that their claim for refugee protection was tied to that of their parents constitutes a violation of natural justice and procedural fairness. They allege that Mr. Bukvic had stated in his claim for refugee protection that the children were having problems at school because the Serbian children were placed in classes with Romani children. The children's claim therefore had two bases, first as members of the family and second as children of Serbian ethnicity, exposed to persecution in their own right. The applicants argue that the RPD failed to consider the children's right to be heard in accordance with the *Chairperson Guideline 3: Child Refugee Claimants: Procedural and Evidentiary Issues* [Guideline 3] and the best interests of the children. According to the applicants, the RPD should have taken the time to question the children, or at least to verify their ability to testify and whether there was a conflict of interest between the children's claim and that of the parent appointed as their designated representative.

[16] The Court is of the view that the RPD's decision was rendered in accordance with the principles of natural justice and procedural fairness.

[17] When they arrived in Canada, the minor applicants were one, four and seven years old. According to the Certified Tribunal Record [CTR], the RPD sent a first letter to Mr. Bukvic on December 13, 2012, proposing that he be appointed designated representative for the three minor children (CTR, p 182). This letter advised Mr. Bukvic that his interests must not conflict with those of his children and that he must act in their best interests. Mr. Bukvic was also informed of the role and functions of a designated representative. These include the following: (1) to retain counsel and instruct counsel or assist the child in instructing counsel; (2) to make decisions with respect to the proceedings or to help the child make those decisions; (3) to inform the child about the various stages and proceedings of the claim; (4) to assist in obtaining evidence in support of the claim, provide evidence and be a witness in the claim; and (5) generally to act in the best interests of the child and present the best case possible to the RPD. The RPD informed Mr. Bukvic that unless he informed them otherwise within ten days of receiving the letter, it would deem him to have accepted the role and functions of the designated representative.

[18] In preparation for the hearing of this claim, the RPD sent a new letter to Mr. Bukvic dated September 23, 2015, for the purpose of confirming his designation as representative of the minor children in accordance with subsection 167(2) of the IRPA. It explained that the children were minors and would not be able to appreciate the nature of the proceedings. The RPD reiterated to Mr. Bukvic that his interests must not conflict with those of the minor children he represented, that he must act in the best interests of the children and that he must be present at

the hearing. It also attached a copy of the *Designated Representative's Guide* containing information on the role and responsibilities of the designated representative. (CTR, pp 161–162).

[19] Finally, the RPD confirmed once again at the hearing that Mr. Bukvic accepted and understood his role as designated representative of his minor children.

[20] Subsection 167(2) of the IRPA provides that a representative is designated in cases where a refugee claimant is under 18 years of age or is unable to appreciate the nature of the proceedings. The designation process and the responsibilities of the representative are set out in section 20 of the *Refugee Protection Division Rules*, SOR/2012-256. According to these provisions, the designated representative must act in the best interests of the claimant and act in the place of the claimant where the claimant is not able to do so due to age or for other reasons (*Aguirre v Canada (Citizenship and Immigration)*, 2015 FC 281 at para 53).

[21] As the designated representative of his minor children, it was Mr. Bukvic's responsibility to protect the interests of the minor applicants and decide whether they had to testify.

[22] On the contrary, the hearing transcript demonstrates that it was at the request of the counsel representing the applicants that the children left the hearing room. Before allowing the children to leave the hearing room, the RPD nevertheless confirmed with Mr. Bukvic that he was still their designated representative, and it reminded him of his role in this respect. Mr. Bukvic then asked the RPD whether the children could return home or whether they would have to wait outside. The RPD informed Mr. Bukvic that it saw no reason for the children to have to remain

on the premises (CTR, pp 426–427). Mr. Bukvic did not object to the children's departure, nor did he ask that they be allowed to testify.

[23] The applicants submit that the RPD simply accepted counsel's request to exclude the minor children at the beginning of the hearing, and they rely in particular on the decisions of this Court in *Nagy v Canada (Citizenship and Immigration)*, 2011 FC 723 [*Nagy*], and *Andrade v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 1007 [*Andrade*]. In *Nagy*, Russel W. Zinn J. allowed the application for judicial review on the basis that the tribunal had made no findings with respect to the risk the minor child might face as a person of Romani ethnicity in Hungary. This is not the case here, as the RPD did consider and make determinations on all of the risks alleged by the applicants, including those that specifically concerned the minor applicants.

[24] In *Andrade*, René LeBlanc J. held that the RPD member should have made inquiries and determined for herself whether it was preferable for the child to be present and testify. That decision is easily distinguishable from this case because the minor in *Andrade* was 17 years old. Moreover, he had been personally targeted by the Revolutionary Armed Forces of Colombia and was at risk of losing his permanent resident status and being excluded from Canada because of actions taken by his parents. It was in this context that LeBlanc J. found that the member should have asked the minor applicant whether he wanted to testify.

[25] In this case, the RPD considered the right of the children to be heard. It explicitly mentioned this at paragraph 3 of its decision. It decided, however, that it was not necessary to

have them testify because of their young age, the reference to their parents' allegations and the appointment of a designated representative.

[26] Unlike in *Andrade*, the children in this case were four, seven and ten years old at the time of the hearing. Moreover, the narrative in each of the claims for refugee protection presented by the minor children contains no information apart from a statement referring the reader to the parents' PIF.

[27] Mr. Bukvic's narrative deals essentially with the harassment and discrimination that he suffered in the course of his work as a police officer in Croatia and the burning of the family residence. Although it was mentioned in a "note" that the children had problems at school because Romani and Serbian children were placed in the same classes, Mr. Bukvic's narrative contained no details that would support an obligation to have the children testify.

[28] While Guideline 3 does provide for the right of a minor to testify at his or her refugee proceedings, the Court reiterates that Guideline 3 does not have the force of law, even though it does reflect the recognition of the guiding principles on the protection of refugee children established by the international community (*Andrade* at para 13). Under Guideline 3, the RPD has first and foremost the obligation to take into account the best interests of a child by ensuring that a representative is designated for all child claimants. While the child has a right to be heard, absent a request to this effect, it is for the RPD to determine whether the child has the capacity to testify and whether the RPD requires his or her testimony.

[29] Given the broad allegation of segregation, the age of the children, and the fact that only one of the minor children was of school age and that he had been attending school for less than a year, the RPD could reasonably conclude that the children's testimony was not required and that their interests would be better served by the testimony of their parents.

[30] It appears from the hearing transcripts that Ms. Bukvic testified about the allegations of segregation at school even though she was not the designated representative of the minor children. She stated that her eldest son was seven years old when he started school. Although he was normally very sensitive and introverted, she noted a change in him after about two and a half months of school when he began questioning her about Serbs and their conflict with the Croatians. She testified that her eldest son began to change and withdraw. Ms. Bukvic told the RPD that she and her husband were able to protect the children before her eldest began school. They had no problems before then because the two eldest attended a private daycare.

[31] Later in her testimony, Ms. Bukvic testified that there were four first-grade classes, and it was obvious that one of the classes was made up Serbian and Romani children. She added that certain Croatian children whose parents had supported the Serbs during the war were also found in the class. The RPD questioned her further about the segregation of the children at school. Ms. Bukvic then specified that she had discussed it with her son's teacher, who had also been her own teacher when she had gone to school. She testified that she could have filed a complaint with the school administration, but that she had not done so because she was pleased that her son was being taught by a teacher she knew well and respected.

[32] In its decision, the RPD noted that the applicants' children had access to an education in Croatia and that the applicants had failed to demonstrate in either their narrative or their testimony that this education would be limited. It also noted that the sole alleged ground of persecution arose from the fact that the applicants' children had to attend separate classes with Romani children. After considering the effects of the segregation on the children and the possibility that they would receive an education of lesser quality, the RPD determined that the applicants did not sufficiently demonstrate that this discrimination amounted to persecution.

[33] The applicants submit that the RPD did not give them an opportunity to submit additional evidence to address the gaps in the evidence when it held in paragraphs 29, 30 and 47 of its decision that the applicants had not satisfactorily demonstrated that the children would face persecution or the impact on their psychological well-being.

[34] This criticism is unjustified and does not take into account the fact that the burden of producing evidence in support of their claims lies with the applicants (*Radics v Canada (Citizenship and Immigration)*, 2014 FC 110 at para 33; *Segura Agudelo v Canada (Citizenship and Immigration)*, 2009 FC 465 at para 24; *Gill v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1498 at para 25). Even taking into account the special status that may apply to a child claiming refugee status, it is not for the RPD to prove the applicants' case. The applicants were represented by counsel and a representative had been designated for the children.

[35] The applicants also claim that the RPD breached procedural fairness by failing to provide adequate reasons for its finding that there was no connection between the burning of the applicants' home and the Convention grounds.

[36] The Court cannot accept this argument. First, it is well established that the adequacy of reasons does not in itself constitute a breach of procedural fairness, except where no reasons are provided whatsoever (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 14–16 [*Newfoundland Nurses*]; *Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431 at para 11). The administrative decision maker's reasons need not be perfect or comprehensive and the reviewing court must look at them in the context of the process, the parties' submissions and the evidence (*Newfoundland Nurses* at para 18).

[37] Second, the RPD did provide reasons for its decision on this point. It wrote in paragraph 39 of its decision that the applicants had stated in both their narrative and their testimony that their family residence had been destroyed by an act of arson. The RPD noted that the applicants were unable to identify the individuals responsible. Therefore, the RPD held that it had not been demonstrated that the fire was linked to their nationality.

[38] In short, the Court is of the view that the RPD's process had been fair. The RPD took into account the best interests of the children with the appointment of a designated representative. It ensured that the representative's interests were not in conflict with those of the children. It considered whether the children should testify, taking into account the grounds for their claims

identified in their PIFs, their young age and the fact that they were represented. It also heard and considered the applicants' arguments regarding segregation in Croatian schools. The applicants have not demonstrated that the RPD failed to meet its obligations with respect to natural justice and procedural fairness.

C. *Did the RPD err in finding that the discrimination did not amount to persecution?*

[39] The applicants submit that the RPD also erred in applying two different tests for violence and discrimination. At paragraph 41, the RPD [TRANSLATION] "states that the evidence before the tribunal does not establish that Serbs in Croatia face systemic violence." They maintain that the proper test involves asking whether the refugee protection claimants are fundamentally subjected to a systemic violation of their fundamental rights.

[40] The Court is of the view that the RPD applied the appropriate test for determining whether the applicants had a well-founded fear of persecution and that its statements must be understood in their proper context.

[41] The RPD began by recognizing that the applicants had a subjective fear of persecution. It added, however, that this fear had to be reasonably founded on a Convention ground. The RPD also recognized that Serbs are subjected to discrimination in the areas of employment and housing and that Mr. Bukvic had been harassed by his colleagues. However, it held that the evidence in the record did not support a finding that the applicants had been persecuted because of their Serbian ethnicity.

[42] The RPD noted in particular that the adult applicants had full-time employment before leaving Croatia and that Mr. Bukvic had in fact obtained his job as a police officer because of an initiative of the Croatian authorities dictating that 10% of the police forces be made up of Serbs. It specified that the absence of a promotion did not constitute a human rights violation. As for housing discrimination, the RPD noted that the applicants lived in a house in Croatia. During the hearing, Mr. Bukvic even admitted that his family was relatively well off financially (CTR, p 436), and Ms. Bukvic testified that her family was liked by neither Serbs nor Croatians for that reason (CTR, 9 446).

[43] As discussed above, the RPD also considered the education system in Croatia. It noted that the applicants' children had access to an education in Croatia and that the sole alleged ground of persecution arose from the fact that they had to attend separate classes with Romani children. After considering the effects of segregation on the children and the possibility that they would receive an education of lesser quality, the RPD held that the applicants had not sufficiently demonstrated that this discrimination amounted to persecution.

[44] The RPD also examined the situation of the Serbs in Croatia with respect to their access to other services and took into account the fact that the applicants had not alleged any particular difficulties in that respect.

[45] Finally, the RPD considered the incidents of violence against the Serbs in Croatia. It stated that it could not establish whether there had been an increase in violence against Serbs in Croatia because the evidence on this point was divided. Because the applicants were unable to

identify those responsible for the fire in their family residence or their motivations, the RPD held that it could not establish a link based on the applicants' Serbian ethnicity. It also noted that Mr. Bukvic had not received any physical threats despite any harassment he may have suffered at the hands of his Croatian colleagues at work.

[46] The RPD concluded that even if all the discriminatory incidents were considered together, the discrimination suffered by the applicants did not amount to persecution.

[47] In *Nyembua v Canada (Citizenship and Immigration)*, 2015 FC 970, the Court stated at paragraph 20, "[i]n order for mistreatment to be considered persecution, it must be serious and the infliction of harm occurs with repetition or persistence, or in a systematic way". Serious mistreatment will be found where there is a severe restriction or denial of a core right, including the right to participate in the political process, earn a livelihood, practice a religion or access normally available educational facilities (*Sefa v Canada (Citizenship and Immigration)*, 2010 FC 1190 at para 27). In this case, the events reported by the applicants do not meet these criteria.

[48] On the contrary, the evidence shows that the two adult applicants were not prevented from holding jobs, they lived in a house, the children had access to the education system and the violence they did face did not amount to persecution when considered cumulatively. Mr. Bukvic testified at the hearing about an incident at work in which one of his Croatian colleagues intervened to defuse a tense situation with another Croatian colleague (CTR, pp 438–439).

[49] The Court is therefore of the view that the RPD's finding regarding the absence of persecution is reasonable in light of the evidence.

D. *Did the RPD err in its assessment of state protection?*

[50] The applicants claim that the RPD erred in finding that the Croatian authorities were willing and able to provide protection to the applicants, when the proper test is the effectiveness of that protection. The existence of anti-discrimination provisions in itself is not proof that state protection is available in practice; a "reality check" with claimants' own experiences is necessary in all cases. Moreover, improvements and progress are not proof that the existing provisions constitute effective protection.

[51] The applicants maintain that the RPD erred in finding that they had not presented clear and convincing evidence rebutting the presumption of state protection. It was reasonable for Mr. Bukvic not to complain to the police because he was a police officer himself and was being persecuted at work. In addition, the fact that a year and a half after the fire, the police simply confirmed that the cause was unknown demonstrates that it was unreasonable to expect that the applicants would obtain further assistance from the police. According to the applicants, the RPD had to take into account the measures taken by the refugee protection claimant in light of the situation in Croatia and his interactions with the police. The applicants submit that they did not need to put their lives at risk to demonstrate that the state protection was inadequate.

[52] It is well-established law that there is a presumption that a state is capable of protecting its citizens (*Canada v Ward,* [1993] 2 SCR 689 [*Ward*]; *Canada (Citizenship and Immigration) v*

Flores Carrillo, 2008 FCA 94 at para 30 [*Flores Carrillo*]). This presumption may be rebutted if the applicants demonstrate that they are unable to avail themselves of this protection or are unwilling to do so because of a reasonable fear of persecution (*Ward*; *Ruszo* at para 30). A refugee protection claimant wishing to rebut the presumption of state protection must adduce "relevant, reliable and convincing evidence which satisfies the trier of fact on a balance of probabilities that the state protection is inadequate" (*Flores Carillo* at para 30). The case law requires that state protection be adequate. Serious efforts by the state are not sufficient (*Dawidowicz v Canada* (*Citizenship and Immigration*), 2014 FC 115 at para 29).

[53] Again, the Court is of the view that the applicants are citing the tests applied by the RPD out of context. They emphasize the words "willing and able" without considering the use of the word "adequate" with respect to the RPD's finding that [TRANSLATION] "the Croatian authorities are willing and able to provide the applicants with adequate state protection to the applicants" (at para 75 of the decision).

[54] The RPD reviewed the documentary evidence. It demonstrated that discrimination and harassment against the Serbian minority do exist in Croatia. However, there is also legislation prohibiting discrimination and hate crimes. In both cases, procedures are in place to allow victims to complain. It adds that, unfortunately, victims to not file complaints systematically.

[55] The RPD then considered the applicants' particular circumstances. It noted that Mr. Bukvic had testified that he was aware of the complaint mechanism within the police force, but that he had not availed himself of it, feeling that his efforts would be in vain, and because a

colleague had told him that filing a complaint would negatively affect his family. The RPD held that because Mr. Bukvic was a police officer, he would have been reasonably aware of the mechanisms open to him.

[56] It concluded, on the basis of the applicants' particular circumstances and its assessment of the documentation on state protection in Croatia, that the Croatian authorities were willing and able to offer adequate state protection and that the applicants had failed to present clear and convincing evidence rebutting the presumption that their country of origin was capable of protecting them.

[57] The Court is of the opinion that this conclusion is reasonable and supported by the evidence in the record. The Court notes in particular that Mr. Bukvic was hired by the police because of a Croatian policy promoting the hiring of Serbian police offices. The Court also notes that following the burning of the house, the police launched an investigation and took photographs. The fact that the investigation did not produce the desired result does not mean that there is no state protection. Refugee protection claimants are not entitled to greater protection in their home country than is available in Canada (*Ruszo* at para 40). As for the segregation suffered by the applicants' eldest child, Ms. Bukvic testified that they ultimately did not file a complaint with the school administration because Ms. Bukvic wished to keep her son with the teacher he had (CTR, pp 446–447).

[58] The applicants may disagree with the RPD's findings, but it is not open to this Court to reweigh the evidence or substitute its own appreciation of the evidence for that of the RPD (*Khosa* at para 59; *Dunsmuir* at para 47).

[59] The Court finds that the RPD's decision falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" and that it is justified in a manner that meets the test of transparency and intelligibility in the decision-making process (*Dunsmuir* at para 47). Moreover, the Court can identify no valid basis in this case for a finding that the principles of natural justice or procedural fairness have been violated.

[60] For all of these reasons, the application for judicial review is dismissed. Neither party proposed a question for certification.

JUDGMENT in IMM-2308-16

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. The style of cause is amended to replace "Marko Bujvic, minor" with "Marko Bukvic, minor";

3. No question is certified.

"Sylvie E. Roussel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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