Federal Court  Cour fédérale

Date: 20170913

Docket: IMM-86-17

Citation: 2017 FC 829

Ottawa, Ontario, September 13, 2017

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

ERIC WILLIAM ENDRES
MELGEORG JACOBUS DE LANGE
ANNATJIE DE LANGE
SONJA ENDRES
ANDREW ENDRES
JENNIFER ENDRES

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

I. Introduction

[1] This is an application for judicial review of a decision of the Refugee Protection Division ("RDP") of the Immigration and Refugee Board of Canada, dated November 16, 2016, rejecting

the Applicants' refugee claim under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the "Act").

II. Context

[2] The relevant facts to this case can be summarized as follows. The Applicants are six (6) members of the same family: Eric Williams Endre and Sonja Endres are husband and wife. Andrew and Jennifer Endres are their two minor children (the "Minor Applicants") and Melgeorg Jacobus De Lange and Annatjie De Lange are Ms. Endres's parents. They are all white South Africans who claim to be at risk of persecution due to their race.

[3] Ms. Endres' parents were the first to leave South Africa. They did so on September 1, 2009 and travelled to Brazil. From there they made their way to Belize. The rest of the family left South Africa six years later, in July 2015. They met Mr. and Ms. De Lange in Belize and then they all travelled to rejoin with family members who live in Canada. They all crossed the border on April 14, 2016 as visitors and made their refugee claim on April 24, 2016.

[4] The Applicants' claim is based on a number of incidents that occurred between 1995 and 2014, that is:

a) In 1995, Mr. De Lange's car was hijacked and never recovered. The police did not issue a report as he was unable to describe the people involved in the incident.

b) In 2004, Ms. Endres and Ms. De Lange, while living on a farm, were assaulted by four black men who entered their home and robbed them of their belongings. The

men were chased away by Ms. De Lange. Ms. Endres and Ms. De Lange reported the incident to the police but could not identify the assailants.

c) In 2013, the Endres's home was burglarised. The incident was reported but the police were too busy to follow-up with the case.

d) In 2014, Ms. De Lange's car was stolen in front of her house. The vehicle was returned the same day by the police with one indicator light on the vehicle broken.

e) Again, in 2014, three unidentified black men tried to steal Ms. Endres' cell phone while she was working at a video store. The security company employed by the store arrived on the scene before the police did. The assailants escaped and could not be found.

[5] The RPD found that the Applicants had not established that they were Convention refugees or persons in need of protection within the meaning of sections 96 and 97 of the Act. In particular, it rejected the claim that the Applicants had a nexus to Convention grounds because they are white South Africans, more specifically Afrikaners. It held that there was no reliable evidence supporting the claim that the Applicants were attacked due to their race. Rather, the RPD found that it was more probable than not that the Applicants were randomly attacked or that the assailants were targeting them to illegally obtain their possessions.

[6] With respect to the section 97 component of their claim, the RPD concluded that the Applicants were subject to criminal risks generally faced by the population in South Africa and that there was no persuasive evidence that they would face a personalized or individualized risk to their lives or of cruel and unusual treatment or punishment if they were to return to that

country. In so concluding, the RPD pointed out that the Applicants' allegations of persecution contained sporadic, infrequent events over the course of a 20-year period.

[7] Finally, the RPD held that although a full state protection analysis was not required as the Applicants had failed to establish that they would face a forward-looking risk if they returned to South Africa, the presumption that state protection exists for them in that country was not rebutted by clear and convincing evidence.

III. Issue and Standard of Review

[8] The four adult Applicants are not challenging these findings. The sole basis - and sole issue - of the present judicial review proceeding is rather whether the RPD committed a reviewable error by failing to address the Minor Applicants' claim. As is well settled, such an issue, which raises questions of mix facts and law, is to be reviewed on a standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 51; *Nava Flores v Canada (Citizenship and Immigration)*, 2010 FC 1147, at paras 25-27; *Navaratnam v Canada (Citizenship and Immigration)*, 2015 FC 274, at para 33).

IV. Analysis

[9] The Applicants contend that the RPD did not consider the claims that:

a) The children cannot not play in parks and be safe in South Africa;

b) The young boy, Andrew, was bullied in school for more than two years and had to be pulled out of school;

c) Ms. Endres feared to walk with her kids as she believed that they could be assaulted, raped or killed;

d) Mr. Endres believed that his family will be killed or seriously harmed because they are white;

e) Mr. Endres wants to put his kids in a school where skin color is not an issue; and,

f) Mr. Endres believes his kids would have to fight for their lives upon their return to South Africa.

[10] They submit that these are substantial matters for consideration in light of international law instruments on the rights of the child. They say that these matters, which were stated over and over again in a variety of ways, engage the Minor Applicants' right to education, right to play, and general safety and had to be considered together to determine if they amounted to persecution. As such, they claim that the RPD entirely failed to determine whether both children would face persecution as a result of being members of a particular social group, namely "children". This, they contend, is inexcusable and warrants the Court's intervention.

[11] The Respondent contends that the RPD did not fail to consider the Minor Applicants' claim. It submits that the risk pertaining to the children was either "so vague that it fell within the scope of the [RPD]'s findings on "generalized risks" or was based on patently unreliable racist propaganda materials that did not warrant the [RPD]'s consideration or attention" (Respondent's memorandum, at para 14). He further contends that the allegations of risks to the children put forward by the adult Applicants are broad assertions of risks that these Applicants also face,

namely the risk of generalized crime in South Africa. As it stands, the RPD's conclusion regarding that risk encapsulates the children as well as their parents and grandparents.

[12] In particular, as for the allegations that the Minor Applicants were at risk of being raped, the Respondent argues that these allegations are meritless and highly offensive as the country conditions information relied on is white-supremacist hate literature. He submits that it was therefore reasonable for the RPD to ignore the article entirely.

[13] The Respondent also refutes the Applicants' argument that Mr. and Ms. Endres' son, Andrew, had to be pulled out of school for two years due to bullying as there is no evidence that Andrew was actually pulled out of school. Rather, Ms. Endres's Basis of Claim ("BOC") indicates that Andrew refused to go to school because he was being bullied. Further, a third grade report card shows that he was enrolled and attended school right up until the family's departure from South Africa. Therefore, the Respondent contends that there is no evidence that Andrew was denied his right to education.

[14] The Respondent further contends that the Applicants never submitted in their written and oral submissions to the RDP that the Minor Applicants would face persecution as a result of being members of a particular social group of "children". This argument was brought up by their new counsel in the context of the present judicial review proceedings. In fact, Andrew's BOC indicated that his claim was "based on the same information" as his parents and Jennifer's BOC was mostly blank. The substance of the Applicants' claim has always been that South Africa was

dangerous for whites, not that it is dangerous for whites adults and that the Minor Applicants are at risks for being members of a separate social group.

[15] However, the Respondent's main contention is that the Applicants' failure to rebut the presumption of state protection is fully dispositive of their refugee claim, regardless of whether or not the RPD failed to specifically consider the risks the Minor Applicants would face upon returning to South Africa. He points out in this regard that the Applicants have not even attempted to challenge the RPD's state protection finding.

[16] I agree that the availability of state protection is dispositive of the Minor Applicants' claim. It is trite law that the responsibility towards a refugee first lies with the state of which the refugee is a citizen. As the Supreme Court of Canada stated in *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, at 709 [*Ward*]:

> International refugee law was formulated to serve as a back-up to the protection one expects from the state of which an individual is a national. It was meant to come into play only in situations when that protection is unavailable, and then only in certain situations. The international community intended that persecuted individuals be required to approach their home state for protection before the responsibility of other states becomes engaged. For this reason, James Hathaway refers to the refugee scheme as "surrogate or substitute protection", activated only upon failure of national protection; see *The Law of Refugee Status* (1991), at p. 135. […].

[17] It is also settled law that absent a complete breakdown of state apparatus, it is presumed that a state is capable of protecting its citizens and that this presumption can only be rebutted by the refugee claimant with clear and convincing evidence (*Ward*, at para 57; *Ruszo v Canada (Citizenship and Immigration)*, 2013 FC 1004, at para 29 [*Ruszo*]).

[18] As I have just pointed out, the Applicants are not challenging the RPD's finding that they have failed to provide clear and convincing evidence that the authorities in South Africa cannot protect them. A review of the record further shows no mention whatsoever of particular issues with South Africa's ability to protect its children. During the hearing before the RPD, Ms. Enders indicated that she was concerned about her children and their safety while Mr. Endres said that he "finds it very hard to be in a place where his children can't play in their front yard without supervision" (Certified Court Record, at p 861). Yet, neither spoke about state protection of their children. At the end of the hearing, the RPD invited the former counsel for the Applicants to make submissions on the issue of state protection. Those submissions were filed on November 7, 2016 but they contained no new information on state protection and no mention even of the children.

[19] At the hearing of the present judicial review proceedings, the Applicants' current counsel insisted that the RPD state protection finding was not necessarily applicable to the Minor Applicants as children are inherently more vulnerable than adults so that what is adequate state protection for South African adults is not necessarily adequate state protection for South African children.

[20] This argument must fail. The burden was on the Applicants to show, with clear and convincing evidence, that adequate state protection in South Africa is not available to the Minor Applicants (*Ruszo*, at para 29). As we have seen, that claim was not even advanced, let alone proven, before the RPD and there was certainly no duty on the part of the RPD to figure that out by itself.

[21] This, in my view, is fatal to the present judicial review application.

[22] The Applicants' judicial review application was filed late. Given my conclusion that their application ought to be dismissed, there is no need to decide whether an extension of time is warranted in this case.

[23] Neither party proposed a question for certification.

ORDER

THIS COURT ORDERS that:

1. The judicial review application is dismissed;

2. No question is certified.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	ERIC WILLIAM ENDRES, MELGEORG JACOBUS DE LANGE, ANNATJIE DE LANGE, SONJA ENDRES, ANDREW ENDRES, JENNIFER ENDRES v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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