Federal Court  Cour fédérale

Date: 20180420

Docket: IMM-3868-17

Citation: 2018 FC 427

Ottawa, Ontario, April 20, 2018

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

DARKO DURDEVIC
SLAVICA DURDEVIC
LUKA DURDEVIC
TAMARA DURDEVIC

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review by the Applicants pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of a decision made by the Refugee Appeal Division of the Immigration and Refugee Board [RAD], dated August 18, 2017,

dismissing the Applicants' appeal of the decision of the Refugee Protection Division [RPD] that the Applicants are not Convention refugees nor persons in need of protection.

[2] The application is granted because of a breach of procedural fairness, as described in the following reasons.

II. Facts

[3] The Applicants are citizens of Croatia. The father is Roma by ethnicity [the Principal Applicant] and his wife is Croatian. The couple has two children, a daughter and son who are 13 and 10 years old.

[4] The facts alleged by the Applicants that lead to their coming to Canada and claiming refugee protection in September 2016 are as follows:

- In 2002, the Principal Applicant was attacked, beaten and called derogatory names by a group of "white Croatians" while driving with his father on the road one night. The Principal Applicant also alleges he and his father called the police but no one came to assist them;
- In Croatia, the Principal Applicant worked as a musician. In March 2014, he was physically attacked and beaten by a group of "white Croatians" on his way home from performing in the early hours of the morning. His injuries included a broken nose and lip as well as head injuries. The Principal Applicant claims that when he regained consciousness, he called an ambulance. While receiving medical treatment at a nearby hospital, the police were contacted and came to the hospital. The police promised to look into the matter but never followed up with the Principal Applicant. The Principal Applicant also claims that he asked the police for a document confirming the attack but says that he was refused;
- The Principal Applicant says he was the target of personal harassment and discrimination from a wealthy and notorious harasser of Roma, an ethnic Croatian named "Kloba";

- According to the Principal Applicant, Kloba would telephone him in the middle of the night demanding that he and his band come to perform for him for free. On one occasion, he threatened the Principal Applicant with a gun;
- The children also suffered discrimination at school due to their Roma ethnicity. The children have been abused verbally despite seeking help from the school principal. The son is an accomplished pianist from a young age, but according to the Applicants, his school refuses to support him because he is Roma;
- The wife has been disowned by her family because of her husband's Roma ethnicity; and
- In September 2016, the Applicants left Croatia for Canada.

[5] The Principal Applicant claims to be fearful that if he and his family return to Croatia, they may not be as fortunate as he was in March 2014 to survive a physical attack. Moreover, the Applicants are not optimistic about the situation for Roma in Croatia moving forward.

III. Allegations against Former Counsel

[6] The Applicants were represented by counsel [the First Counsel] to complete their initial Basis of Claim form [BOC] and narrative. The First Counsel "fired" the Applicants as clients two days before the Applicant's BOC was due. The Applicants submitted their BOC themselves.

[7] The Applicants retained new counsel [the Second Counsel] to represent them in their refugee hearing. The Applicants allege Second Counsel did not provide them with proper legal assistance.

[8] According to the Principal Applicant, after days of trying to arrange for a meeting, he met the Second Counsel for the first time just two days before their refugee hearing. The Applicants allege the Second Counsel advised them that their BOC narrative was very poorly written and was not well prepared, but since the hearing was in only two days, they should keep to their

narrative or risk a negative credibility finding. The Applicants allege that they explained to the Second Counsel that their BOC had not been read back to them in detail in Croatian, to which the Second Counsel advised them to have a friend help read it to them.

[9] The Applicants take the position that the RPD refused their application because of credibility concerns stemming from inconsistencies in their testimony and written submissions that could have been avoided if they had received proper representation by their Second Counsel.

[10] The Applicants retained new counsel [the Third Counsel] to represent them before the RAD. She continues to represent them and did so before me.

[11] According to the Applicants, it was not until April 2017, that they learned the extent of the Second Counsel's alleged incompetence. They say that with the help of Third Counsel, they filed a complaint against Second Counsel with the Law Society of Upper Canada [LSUC]. They notified both Second Counsel and the RAD of the incompetence allegations, in accordance with the *Procedural Protocol Re Allegations Against Counsel or Other Authorized Representative in Citizenship, Immigration and Protected Person Cases before the Federal Court*, dated March 7, 2014.

[12] By letter dated June 1, 2017, the Applicants gave Second Counsel notice of their intent to file a complaint with the LSUC.

[13] By letter dated June 16, 2017, the Applicants filed an application with the RAD pursuant to Rule 29 of the *Refugee Appeal Division Rules*, (SOR/2012-257) to admit new evidence for

consideration in their refugee claim appeal, including evidence of alleged incompetence of Second Counsel. They copied this letter to Second Counsel.

[14] By letter dated July 14, 2017, Second Counsel submitted a twenty-three-page single spaced letter to the RAD, refuting the allegations of incompetence made against him. In this letter, Second Counsel provided detailed and extensive arguments and allegations setting out why the evidence the Applicants sought to admit pursuant to Rule 29 was insignificant and "would have added nothing if submitted at the hearing and […] is a continuation of the misrepresentations, inconsistent evidence and untruths put forward by the [Applicants]".

[15] Neither the RAD nor Second Counsel provided the Applicants with a copy of Second Counsel's letter of July 14, 2017.

[16] The RAD dismissed the application to admit new evidence and also dismissed the Applicants' appeal from the RPD, by decision dated August 18, 2017.

[17] The Applicants only became aware of the submissions of Second Counsel upon receipt of the Certified Tribunal Record [CTR] for the RAD decision after leave to apply for judicial review had been granted.

IV. The RPD and RAD Decisions

[18] Briefly, credibility was a primary issue before both the RPD and the RAD.

[19] The RAD rejected the alleged new evidence because its relevance was not explained and or because there was inadequate explanation of why it had not been tendered at the RPD.

V. Standard of Review

[20] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62 [*Dunsmuir*], the Supreme Court of Canada held that a standard of review analysis is not necessary where "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question". In *Canada (Minister of Citizenship and Immigration) v Huruglica*, 2016 FCA 93 [*Huruglica*], at para 70, the Federal Court of Appeal stated that the RAD is to review the RPD's findings on the standard of correctness, but may defer to the RPD on credibility findings "where the RPD enjoys a meaningful advantage." *Huruglica* also determines that reasonableness is the standard of review to be used by this Court when reviewing decisions of the RAD, see paras 31-35.

[21] In *Dunsmuir* at para 47, the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard of review:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[22] The Supreme Court of Canada also instructs that judicial review is not a line-by-line treasure hunt for errors; the decision should be approached as an organic whole: *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34. A reviewing court must determine whether the decision, viewed as a whole in

the context of the record, is reasonable: *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65; see also *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.

[23] Questions of procedural fairness on the other hand are reviewed on the correctness standard: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43. In *Dunsmuir* at para 50, the Supreme Court of Canada explained what is required of a court reviewing on the correctness standard of review:

> When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

VI. Submissions and Analysis

[24] While the parties canvassed a number of issues, the determinative issue is the inclusion of the letter from Second Counsel dated July 14, 2017 in the CTR without notice to or giving the Applicants an opportunity to respond to it. There is no doubt that the Applicants did not receive a copy of this letter. While the Applicants did receive a similar version of this letter dated October 6, 2017. Despite the Respondent's submissions otherwise, the October 6, 2017 letter cannot be of any consequence because it came a month and a half *after* the decision of the RAD (dated August 18, 2017). Obviously, by that late date it could not constitute either proper notice or the required opportunity to respond.

[25] Counsel for the Respondent also submitted that there was no breach of procedural fairness because there is no evidence that the RAD relied on Second Counsel's letter of July 14, 2017, and because the Applicants failed to demonstrate how the letter prejudiced their claim. In my respectful view, neither of these arguments has any merit.

[26] The letter was in the CTR. It is trite law that a decision-maker is presumed to be aware of the record before it. Frankly, there is no way to tell if the letter was relied upon or not. No party, including the Court, has any way of knowing its impact because the RAD did not provide the Applicants a copy of these submissions nor mention them in the decision. Yet, the submissions formed part of the record before the RAD.

[27] The letter forcefully argued that the alleged new evidence should be rejected - and the RAD rejected all the new evidence. Whether there is a causal link between the letter and the decision is unknown. I am asked to find that it was not relied upon. To do so would be speculative on my part.

[28] In any event, the letter from Second Counsel was before the RAD without notice to the Applicants, nor opportunity to respond. In my view, that was not fair. I agree the breach would be more serious if the letter was expressly relied upon. This was noted by Justice Near (as he then was) who confirmed the importance of informing applicants about extrinsic evidence to give them the opportunity to respond to matters raised in the evidence in *Qureshi v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1081 at para 31:

> In general, therefore, the jurisprudence shows that applicants must be given an opportunity to respond to matters raised in extrinsic

> evidence such as anonymous letters. The non-disclosure of anonymous communications which are prejudicial to applicants in the immigration context has generally been considered to be a breach of procedural fairness—particularly when officers have relied on them in their decision-making process. Indeed the court held in *Edobor v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 883, 160 A.C.W.S. (3d) 866, at paragraph 26, that "[t]he importance of giving notice and providing an opportunity to respond to the evidence is accentuated when the board intends to rely on the evidence to make a decision."
>
> [Emphasis added]

[29] In addition, and again with respect, the allegations in Second Counsel's letter were material. The letter is lengthy and detailed, included exhibits and documents. It is a point-by-point analysis going straight to the core of the Applicants' effort to put new evidence before the RAD. It includes a hard-hitting characterization of the Principal Applicant's credibility.

[30] The RAD's failure to disclose this letter to the Applicants and failure to give them an opportunity to respond breached the RAD's duty of fairness. The letter should have been returned to sender unread by the decision-maker, or disclosed to the Applicants, but was neither. Per *Adewole v Canada (Citizenship and Immigration)*, 2014 FC 112 at paras 27-28, disclosure of the letter was necessary to provide the Applicants with a meaningful opportunity to respond.

[31] The consequence of this breach of duty is summarized in the following taken from the Applicants' memorandum filed after they discovered this procedural breach in the CTR. I agree with and adopt these submissions:

> [9] The Applicants are therefore left wondering whether [Second Counsel's] submissions and documents influenced the RAD Member in the decision to reject the Applicants' evidence. The

> reasons fail to address whether or not this evidence was considered, and if so, how it impacted the decision.
>
> [10] As a result, the Applicants are deprived of transparency in the decision-making process. Elements of justifiability, transparency and intelligibility are missing from the RAD Member's decision. I submit that these errors amount to a significant breach of natural justice.

[32] As a consequence, it is not necessary for me to review the other issues in this application.

[33] That said I wish to note the substantial jurisprudence to the effect that the adequacy of state protection should be assessed at the "operational level". In this case, while the RAD asked several questions relating to state protection, it did not ask whether state protection was adequate at the operational level. In my view, it should have. See among many other decisions: *Gjoka v Canada (Citizenship and Immigration)*, 2018 FC 292 per Strickland J at para 30, and the following: *Hasa v Canada (Citizenship and Immigration)*, 2018 FC 270 per Strickland J at para 7; *Paul v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 687 per Boswell J at para 17; *Poczkodi v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 956 per Kane J at para 37; *Mata v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 1007 per McDonald J at paras 13-15; *Benko v Canada (Citizenship and Immigration)*, 2017 FC 1032 per Gascon J at para 18; *Koky v Canada (Citizenship and Immigration)*, 2017 FC 1035 per Gascon J at para 14; *Eros v Canada (Citizenship and Immigration)*, 2017 FC 1094 per Manson J at para 45; *Moya v Canada (Citizenship and Immigration)*, 2016 FC 315 per Kane J at para 68; and *John v Canada (Citizenship and Immigration)*, 2016 FC 915 at para 14, where I came to the same conclusion.

VII. Certified Question

[34] Neither party proposed a question of general importance to certify, and none arises.

JUDGMENT in IMM-3868-17

THIS COURT'S JUDGMENT is that judicial review is granted, the decision of the RAD is set aside, the matter is remitted for redetermination by a differently constituted RAD, no question is certified, and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3868-17
STYLE OF CAUSE:	DARKO DURDEVIC, SLAVICA DURDEVIC, LUKA DURDEVIC, TAMARA DURDEVIC v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	APRIL 10, 2018
JUDGMENT AND REASONS:	BROWN J.
DATED:	APRIL 20, 2018

APPEARANCES:

Ms. Rojan Malekzadeh	FOR THE APPLICANTS
Ms. Julie Waldman	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Rojan Malekzadeh Barrister and Solicitor RM Law PC Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT