Federal Court  Cour fédérale

Date: 20101109

Docket: IMM-1820-10

Citation: 2010 FC 1121

Ottawa, Ontario, November 9, 2010

PRESENT: The Honourable Justice Zinn

BETWEEN:

LESZEK TADEUSZ DOLINSKI
MARIA SABINA GRABOWSKA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants, husband and wife, seek judicial review, pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, of a decision of the Refugee Protection Division of the Immigration and Refugee Board. They submit that the Board erred in giving little or

no weight to a witness they called, the brother of the female applicant, and further erred in determining that they had failed to rebut the presumption of state protection.

[2] I am unable to agree with either submission and for the reasons that follow, this application is dismissed.

Background

[3] The applicants are Roma and Polish. They arrived in Canada and claimed protection under ss. 96 and 97 of the Act in April 2008, primarily on the basis of two incidents.

[4] In the winter of 2004, Mr. Dolinski was attacked by a group of young Poles because of his Roma identity. He was severely injured and spent two months recovering in hospital. While Mr. Dolinski was in hospital, his wife reported the assault to police but they did not come to interview him in the hospital. When Mr. Dolinski was released he went to see the police but was told that they had been unable to find the attackers and that the case was closed.

[5] In January 2008, a group of Poles attacked the applicants' home, throwing stones, breaking windows, and shouting racist slurs. Mr. Dolinski ran upstairs and shouted for help through an open window. The police arrived and took the applicants to the station for their protection but advised them that it would be impossible to find the culprits as the applicants were unable to provide their identity or a description. When the Canadian visa requirement for Poland was dropped in March 2008, the applicants came to Canada and claimed refugee status.

[6] The Board accepted the applicants' story and found that they were credible and that their subjective fear of persecution in Poland was genuine. The Board did, however, note some contradictions, exaggerations, and unsupported allegations in the applicants' testimony. The Board noted that the applicants never availed themselves of access to other European Union (EU) countries after Poland joined the EU in May 2004. The Board also observed that returning to their home was behaviour inconsistent with their alleged fear of being killed by Polish racists.

[7] At their hearing, the applicants called as a witness Adolph Schmidt, the brother of the female applicant. He had fled Poland in 2004 and obtained refugee status in Canada. In Poland he was involved with the Roma community and claimed to be informed about the current situation facing Roma in Poland. The Board gave little weight to Mr. Schmidt's evidence for the following reasons:

> The witness gave his opinion on many subjects. He adduced no independent objective evidence to corroborate these opinions. … Given that the witness has an obvious bias, as an expatriate Roma, as a successful refugee claimant, and as the brother of the principal claimant's spouse, and given the fact that he left Poland in 2004, the year it joined the EU, I find his objectivity and his expertise on current conditions in Poland lacking, and therefore give little or no weight to his testimony and I prefer to rely on the more current documentary evidence produced in the NDP [National Documentation Package] from more objective sources.

[8] Having concluded that the applicants were credible and their fears subjectively well-founded, the Board proceeded to consider whether their subjective fear was objectively well-founded in the context of state protection. The Board found that state protection was available to

the applicants in Poland, and noted that Poland is a democratic state and a member of the EU, and that accordingly there was a strong presumption of state protection, which must be rebutted by the applicants on the basis of "clear and convincing" evidence.

[9] The Board accepted the applicants' argument that the existence of policies promoting human rights and equality is insufficient, by itself, to show state protection, but nonetheless found that Poland was not simply supporting equality rhetorically but was taking concrete measures to assist Roma and other minorities.

[10] The Board also accepted that discrimination against Roma continues in Poland, that Roma have been physically assaulted in Poland and that many obstacles remain to Roma achieving complete equality with ethnic Poles in Poland. However, the Board noted documentary evidence showing that since joining the EU, Poland has taken measures to mitigate discrimination against Roma, including funding education, health, and employment programs targeting Roma.

[11] The Board reviewed the events on the night when the applicants' home was vandalized, noting that the police took the applicants to the police station, and observed that between the night their home was attacked and their departure for Canada there was no further incident. The Board noted that following the two incidents, the applicants did not approach other state organizations, such as the Commission for Civil Rights or the Prosecutor's Office. The Board clearly stated that the state did provide protection to the applicants, and that the Commission for Civil Rights and the Prosecutor's Office provide additional avenues to access state protection.

[12] The Board relied on *Camacho v. Canada (Minister of Employment and Immigration)*, 2007 FC 830, for the proposition that in the absence of a compelling explanation, a failure to pursue state protection will be fatal to a refugee claim. The Board found that "[m]istrust and dislike of all Poles are not compelling reasons which rebut the presumption that state protection exists in Poland." The Board concluded that the applicants had failed to provide clear and convincing evidence rebutting the presumption of state protection in Poland and accordingly dismissed their claims.

Issues

[13] The issues in this application are the following:

1. What is the appropriate standard of review?
2. Whether the Board erred by assigning little weight to Mr. Schmidt's evidence.
3. Whether the Board erred in its finding of state protection.

Analysis

1. *Standard of Review*

[14] The applicants submit that the Board's formulation of the test for state protection is reviewable on the correctness standard and say that the test applied by the Board was whether Poland had shown a "commitment to human rights."

[15] The standard of review for the Board's assessment of state protection is reasonableness: see *Cervantes v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 680; *Ruiz v. Canada*

(Minister of Citizenship and Immigration), 2009 FC 337; *Popov v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 898.

[16] If the Board errs in stating the proper test for state protection then the applicant may be correct that this finding would be subject to the correctness standard. I have concluded, however, that the applicants' submission in this case regarding the formulation of the test for state protection is based on a misinterpretation of the Board's reasons. The Board never said commitment to human rights was the test for state protection; it merely considered this as one factor when examining state protection.

[17] Accordingly, the errors alleged by the applicants are all reviewable on the standard of reasonableness.

2. *Weighing Evidence*

[18] The applicants submit that it was inappropriate for the Board to discount the evidence of their witness, Mr. Schmidt. The applicants note that they presented the Board with evidence of his credibility, including a letter from Steven Spielberg and other evidence of his work as a community leader and contributor to an effort to document oral evidence about the Holocaust in Eastern Europe (both of the applicants had family members interned or murdered in concentration camps).

[19] The applicants submit that in finding Mr. Schmidt's evidence outdated, the Board ignored his testimony regarding how he had kept informed about the situation facing Roma in Poland

through regular contact with Roma still living there. The applicants also say that the Board's decision ignored the fact that the witness was a "similarly situated person" with extensive knowledge of the Roma population and the problems Roma face in Poland. The applicants submit that none of the reasons cited by the Board for not giving much weight to Mr. Schmidt's testimony suggest that the evidence he provided is untrustworthy.

[20] The applicants submit that the Board's finding that Mr. Schmidt had an "obvious bias" raises a reasonable apprehension of bias, and rely on *Gonzalez v. Canada (Minister of Citizenship and Immigration)*, [1991] F.C.J. No. 408 (C.A.), where the Court of Appeal found that the Board's refusal to hear from a witness who was a refugee from the same country as the claimant raised a reasonable apprehension of bias. The applicants say that although their witness was not excluded from testifying, he was effectively excluded when the Board disregarded his testimony. The applicants say the testimony was relevant as evidence of a similarly situated person and showed why the applicants could not have accessed state protection by approaching other state organizations. The applicants also say that by preferring documentary evidence the Board suggested that documentary evidence should always be preferred to a refugee claimant's evidence – logic that was sharply criticized by Justice Snider in *Coitinho v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1037.

[21] I agree with the applicants that some of the reasons the Board offered for dismissing Mr. Schmidt's testimony (his Roma background, status as a refugee, and relation to the applicants) were unreasonable. However, the decision with regards to the testimony was not unreasonable as a

whole because the Board offered a distinct alternative and valid reason for rejecting his testimony: his knowledge was outdated. In any case, the Board found that state protection had in fact been provided to the applicants, regardless of any presumption which Mr. Schmidt's evidence may have helped to rebut.

[22] In *Ray v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 731, at para. 39, Justice Teitelbaum, in the context of a PRRA application, made it clear that association to an applicant, by itself, is not grounds for giving evidence little weight:

> I agree with the Applicant that the PRRA Officer erred by granting little probative value to the letters on the basis that the letters support the applicant's personal interest. The mere fact that the letters were written by the Applicants' relatives is insufficient grounds, without other evidence of dishonesty or other improper conduct on the relatives' part, to accord their letters little weight.

In *Obeng v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 61, Justice de Montigny declined to certify a question about evidence from family members and friends on the basis that the issue had already been addressed in *Ray*.

[23] The Board's finding that Mr. Schmidt had "obvious bias" because of his status as an expatriate Roma and as a refugee claimant was therefore unreasonable.

[24] Despite these problems, it is clear that the main reason for not assigning Mr. Schmidt's testimony much weight was that his evidence was outdated because he had left Poland in 2004. The Board, as it was entitled to do, weighed the evidence before it and preferred more current

documentary evidence. This was reasonable, especially considering that the changes in Poland which occurred after it joined the EU in 2004 were an important part of the Board's analysis regarding state protection. For this same reason the applicants' submission regarding Mr. Schmidt being a "similarly situated person" must fail, given the Board's clear finding that the current situation facing Roma in Poland is not the same as it was in 2004, when Mr. Schmidt left Poland. Furthermore, Mr. Schmidt was not purporting to provide any evidence specifically relating to the applicants. His evidence was directed to general country conditions and was available from other sources.

[25] In my assessment, the Board's analysis of Mr. Schmidt's testimony falls short of disclosing a reasonable apprehension of bias. This is not the same situation as in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, where the officer's notes demonstrated a closed mind and the influence of stereotypes. The Board made no negative findings about Mr. Schmidt's credibility, but rather found that he lacked objectivity and that his evidence was outdated.

3. *State Protection Analysis*

[26] A reading of the decision makes it clear that the Board found not only that the applicants had failed to rebut the presumption of state protection, but also that the applicants had in fact been provided with state protection. At paras. 20-21 of the Board's decision, the Member wrote that:

> The principal claimant then testified that he asked the police to take him and his wife to the police station for their safety as he feared the assailants might be hiding. He was asked if they took him to the police station and he and his wife said yes. The claimants later went to a cousin's home and returned to their house the next day where they remained until their departure for Canada without further

> incident. The principal claimant was asked if he thought that when the police took him and his wife to the police station the night of the January 2008 rock throwing incident that this represented the provision of state protection and he said no.
>
> He was asked to explain why it did not represent state protection. He said it did not because he had asked them to take he and his wife to the station and "if they wanted to help me they would have taken fingerprints." Asked what he expected them to take fingerprints from, the principal claimant said the broken window glass and other people. Given that, according to their narrative and their oral testimony rocks were thrown at the windows thereby breaking them, I cannot see how the police could reasonably be expected the check for prints on window glass when according to the claimants' own testimony the windows were broken by thrown rocks.

[27] A finding that state protection has been provided is fatal to the argument that the subjective fear is supported by the objective evidence.

[28] I do not accept the submission that the Board erred in failing to find that the applicants faced persecution based on "cumulative grounds". In *Madelat v. Canada (Minister of Employment and Immigration),* [1991] F.C.J. No. 49 (C.A.), the Court of Appeal held that analyzing events in isolation defeats the purpose of cumulative determination. However, it is clear that in this case the Board did not improperly focus on one event, but considered the cumulative effect of the applicants' experiences.

[29] None of the arguments raised by the applicants bring the decision outside of "the range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v. New Brunswick,* 2008 SCC 9. The Board reasonably found that the applicants had been provided

with state protection and had failed to provide clear and convincing proof rebutting the presumption of state protection in Poland. Accordingly, this application is dismissed.

[30] Neither party proposed a question for certification.

JUDGMENT

THIS COURT'S JUDGMENT IS that:

1. This application is dismissed; and

2. No question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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