Federal Court  Cour fédérale

Date: 20111014

Docket: IMM-1790-11

Citation: 2011 FC 1165

Ottawa, Ontario, October 14, 2011

PRESENT: The Honourable Madam Justice Bédard

BETWEEN:

TATYANA LEBEDEVA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada (the Board), dated November 24, 2010, whereby the Board decided that the applicant was neither a Convention refugee nor a person in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The Board found that the applicant had a viable Internal Flight Alternative (IFA).

I. Background

[2] This is a sad story. The applicant is a citizen of Russia and is of Russian Orthodox faith. She fears persecution from skinhead groups in Russia who targeted her, harassed her and attacked her because of her connection to Jewish people and to Israel.

[3] In 1999, the applicant's daughter married a Jewish man and moved to Israel. In October 2004, the applicant travelled to Israel to visit her daughter. While she was away, her husband was killed at the family home in Orenburg. His assailants were not identified.

[4] Shortly after the applicant's husband was killed, her colleagues at work began avoiding her and treating her with hostility. They whispered "Jewish" behind her back. The applicant lost her job in January 2005.

[5] In September 2006, the applicant went to Moscow where she lived with a friend for a period of eight months while taking a course. While she was there, she experienced no problems. She returned to Orenburg in April 2007.

[6] In May 2007, the applicant went to Israel to be with her daughter who was in the process of getting a divorce. Upon returning to Orenburg six months later, she noticed that her neighbours were no longer talking to her. She started receiving threatening phone calls and garbage was thrown at her door. Young people would shout "Jewish" at her as she passed by in the street.

[7] On December 3, 2007, the applicant encountered a group of skinheads. She tried to avoid them, but one of them tripped her and she fell to the ground. The group laughed at her and mocked her.

[8] On January 31, 2008, she was returning home from visiting with her aunt when she was approached by another group of skinheads. They surrounded her and said “Here comes our foreigner. We want to send hello to you from Israel.” The group started beating the applicant. They stopped when they were spotted by a group of passers-by. Before leaving, they told the applicant that they would be back. The applicant filed a complaint with the local police department.

[9] On February 10, 2008, the applicant’s son was beaten by a group of young people who had asked him for a “light from his Jewish cigarette.” His jaw was fractured and he suffered a concussion. He spent five days in the hospital.

[10] The applicant was terrified, so she returned to the police. An officer told her, off the record, that the police department did not have the resources to protect her 24 hours a day and that she should withdraw her complaint to avoid even more serious danger. The officer explained that there was a large group of skinheads in the city that was responsible for numerous attacks and murders. He advised her to leave.

[11] On March 3, 2008, the applicant was hit in the back of the head as she was on her way home from the local grocery store. She was beaten and spent the day in the emergency room.

[12] On March 21, 2008, the Canadian Embassy in Russia issued the applicant a visitor visa so that she could come to Canada to visit her friend in Toronto. The applicant travelled to Canada on April 19, 2008.

[13] In June 2009, the applicant's son was involved in another incident in Russia. He and his family were pursued while they were driving to visit the applicant's mother. The son lost control of his vehicle and drove into a ditch. No one was seriously injured, however, the children suffered from significant shock.

[14] When the applicant was informed that she was unable to get an extension for her temporary status in Canada, she applied for refugee protection on December 21, 2009. She indicated that she feared being subjected to continued physical harm if she were returned to Russia.

II. The decision under review

[15] On December 15, 2010, the Board rendered its decision on the applicant's claim for protection. It took no issue with the applicant's credibility or the veracity of her allegations but found that she was not a Convention refugee or a person in need of protection based on the fact that there was a viable IFA in Russia – namely, the city of Yekaterinburg.

[16] In considering the first prong of the test for an IFA, the Board found that the threat to the applicant was a localized one as it was based on information being spread within her home community about her daughter and about her past travels to Israel.

[17] The Board found that the applicant had not established that such a targeting by association would happen in another city. The Board Member acknowledged that the Country conditions evidence confirmed that there continued to be racially motivated attacks against Jews in Russia. He held however that the applicant did not carry the usual risk factors since she was not herself Jewish and indicated that he had "not found any other evidence of anti-Semitism against non-Jews based on a family member marrying a Jew or based on a person's having made a trip to Israel."

[18] It concluded that "Although a skinhead group in Orenburg appears to have labelled and bullied the claimant on this basis, there is no reason to believe that a perception of the claimant as being Jewish would follow her to another city in Russia." The Board Member added that his findings were confirmed by the fact that the applicant testified that she did not experienced any problems when she lived in Moscow from September 2006 to May 2007.

[19] The Board concluded that the applicant had not discharged her burden of establishing that there would be a risk in the IFA.

[20] In considering the second prong of the IFA analysis, whether it would be reasonable in the applicant's circumstances to relocate to Yekaterinburg, the Board found that the applicant would be able to register and seek out employment there. It acknowledged that the applicant might not be able to make as much money in Russia as she could with her job as a nanny in Canada and that she did not have friends or relatives in Yekaterinburg. However, it indicated that this kind of hardship did not render an IFA unreasonable.

[21] Finally, the Board considered the Guidelines on *Refugee Claimants Fearing Gender-Related Persecution* [Gender Guidelines]. With respect to the first prong of the IFA test, the Board concluded that the applicant had not provided evidence to indicate that the harm she feared was based on her gender, "considering that she testified that her son face[d] similar targeting". The Board also considered the Gender Guidelines in assessing the reasonableness of the applicant's recourse to the proposed IFA, and concluded that, taking into account her personal circumstances, the applicant would not face gender-related difficulties moving within Russia.

III. Issues

[22] The main issue that arises for consideration on this application is the following:

Did the Board err in finding that an IFA was available to the applicant in Russia?

[23] At the hearing, counsel for the applicant also raised, for the first time, an issue of procedural fairness; he alleged that the applicant's right to counsel was denied at the hearing before the Board because she was prevented from asking questions to her counsel. The respondent submitted that the Court should not entertain this new argument which had not been canvassed in her memorandum of fact and law. The respondent underscored that it would be prejudiced if the Court were to allow the applicant to raise this new argument at the hearing since it did not have the opportunity to prepare submissions to counter this argument or even evidence to counter the allegation.

[24] This new issue has nothing in common with the issues on which leave was granted. Furthermore, Rule 309(1) of the *Federal Courts Rules*, SOR/98-106, states that the parties'

allegations should be canvassed in the memorandum of fact and law. This does not mean, however, that the Court can never allow a party to raise a new argument.

[25] In *Al Mansuri v Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 22, 314 FTR 54 [*Al Mansuri*], Justice Dawson (as she then was) dealt with a new argument raised for the first time in the applicant's further memorandum of fact and law. She rejected the idea that there was either a right to advance new arguments this late in the process or a blanket prohibition against it. She outlined that the jurisprudence recognized that it was, in any case, within the Court's discretion to decide whether or not to allow the new argument. The Court will exercise its discretion in light of the special circumstances of each case.

[26] In *Al Mansuri*, at paragraph 12, Justice Dawson identified factors that can be of assistance in the exercise of the Court's discretion:

> (i) Were all of the facts and matters relevant to the new issue or issues known (or available with reasonable diligence) at the time the application for leave was filed and/or perfected?
>
> (ii) Is there any suggestion of prejudice to the opposing party if the new issues are considered?
>
> (iii) Does the record disclose all of the facts relevant to the new issues?
>
> (iv) Are the new issues related to those in respect of which leave was granted?
>
> (v) What is the apparent strength of the new issue or issues?
>
> (vi) Will allowing new issues to be raised unduly delay the hearing of the application?

[27] One should not forget that in *Al Mansuri* these factors were enunciated with respect to a new argument raised in the applicant's further memorandum of fact and law. Where the new argument is raised for the first time at the hearing, thus giving no opportunity to the respondent to prepare a response to the new issue, the Court must be even more cautious when applying the suggested factors.

[28] In this case, none of these factors militate in favour of allowing the new issue to be argued even though the issue relates to procedural fairness.

[29] First, this issue is entirely new and has nothing in common with the issues raised in the application for leave and judicial review. Second, the applicant never raised this argument in her memorandum of fact and law or in her memorandum in reply. Third, the respondent rightly contended that it was prejudiced as it did not have an opportunity to file evidence and/or arguments in response to this new issue.

[30] In *Al Mansuri*, at paragraph 16, Justice Dawson stressed the importance of assessing the merits or the apparent strengths of an argument when the issue is entirely new:

> Finally, as can be seen from the exposition of the issues as framed in the leave application and the initial memorandum of fact and law, the new issues have nothing in common with the issues upon which the Court granted leave. It is an entirely new case. Given that Parliament has provided that an application for judicial review may only be brought with leave under the *Immigration and Refugee Protection Act*, in my view caution must be exercised when allowing new issues to be raised that were not the subject of the leave application. The exercise of this caution may lead to an assessment of the merits or the apparent strength of the new issues. …

[31] In this case, I am of the view that the new issue raised by the applicant has no merit. I read the entire transcript of the hearing and I am satisfied that the applicant was not denied procedural fairness. It is true that, at one point, the applicant asked the Board Member if she was allowed to confer with her counsel before answering a question that the Board Member had asked her. The Board member replied that, for that time being, she was being asked question by him and that her counsel would later have an opportunity to question her. She chose not to answer the question and the Board did not force her to answer or did not take issue with the fact that she did not answer. Moreover, it is clear from the transcript that the applicant was not prevented from telling her story to the Board Member. Therefore, I find that the allegation that the Board breached its duty of procedural fairness has no merit.

IV. Standard of review

[32] The parties do not dispute that a decision dealing with the availability of an IFA is reviewable under the reasonableness standard of review (*Rodriguez Diaz v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1243 at para 24, [2009] 3 FCR 395). Determinations as to the availability of an IFA warrant deference because they involve not only the evaluation of the applicant's circumstances, as related by their testimony, but also an expert understanding of the country conditions involved (*Sivasamboo v Canada (Minister of Citizenship and Immigration)*, [1995] 1 FC 741 at para 26, 52 ACWS (3d) 136 (TD)).

[33] In assessing the reasonableness of the Board's decision, the Court will consider the existence of justification, transparency and intelligibility within the decision-making process, as

well as whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190).

V. Analysis

A. *Did the Board err in finding that an IFA was available to the applicant in Russia?*

[34] The question of whether or not an IFA exists is integral to the determination of a refugee claim (*Rasaratnam v Canada (Minister of Employment and Immigration)* (1991), [1992] 1 FC 706, 140 NR 138 (CA) [*Rasaratnam*]). Once an IFA is raised, the applicant bears the burden of proving that it either does not exist or that it is unreasonable in the circumstances (*Thirunavukkarasu v Canada (Minister of Employment and Immigration)* (1993), [1994] 1 FC 589 at para 12, 109 DLR (4th) 682 (CA) [*Thirunavukkarasu*]). An IFA assessment involves two parts. First, the Board must be satisfied, on a balance of probabilities, that there is no serious possibility of the claimant being persecuted, subject to a danger of torture, a risk to life, a risk of cruel and unusual treatment or subject to a risk of punishment in the proposed IFA. Second, it must be reasonable for the claimant to see refuge there, given the conditions in the proposed IFA, (*Rasaratnam*, above; *Thirunavukkarasu*, above).

[35] The applicant takes issue solely with the Board's analysis under the first prong of the IFA analysis. She argues that the Board unreasonably concluded that there was no serious possibility that she would be persecuted or subject to risk in the proposed IFA.

[36] The applicant's primary submission in this regard is that it was unreasonable for the Board to find that there was "no evidence" that the applicant would be perceived to be Jewish in Yekaterinburg. She submits that, on the contrary, the fact that she was perceived to be Jewish in Orenburg was "some evidence" that she might be perceived as being Jewish elsewhere in Russia. She contends that the same reasons she was perceived as being Jewish in Orenburg – that her daughter married a Jewish man, that her daughter lives in Israel, and that she visited her daughter in Israel – would equally apply if she lived elsewhere in Russia. Ultimately, the applicant submits that the Board made an unreasonable determination in finding that there was "no evidence" when, in fact, there was some evidence.

[37] It is true that the Board accepted that a skinhead group in Orenburg had "labelled and bullied" the applicant based on the fact that her daughter had married a Jewish man and that the applicant had visited Israel. It is also true that the Board found that there was "no evidence that such targeting by association would happen to her in another city" and that there was "no reason to believe that a perception of the claimant as being Jewish would be carried with her to another city". However, when these statements are read in their entire context, it is clear that the Board did not discount the applicant's experience in Orenburg as irrelevant to the question of her future potential treatment in the proposed IFA. Instead, the Board indicated that what had happened to the applicant and her son in Orenburg was unique, in the sense that there was no country conditions evidence suggesting other instances of similarly based persecution in Russia. In addition, the treatment the applicant experienced was localized in the sense that it arose because of the way certain information spread through her local community. On this basis, the Board found that there was nothing, beyond

the applicant's unique and localized experience in Orenburg, to suggest that a similar type of mistreatment would arise if she moved to a different part of Russia.

[38] Given that the Board's reasons are to be assessed as a whole, as opposed to on a microscopic basis (*Medina v Canada (Minister of Employment and Immigration)* (1990), 120 NR 385, 23 ACWS (3d) 797 (FCA); *Ahmed v Canada (Minister of Employment and Immigration)* (1993), 156 NR 221, 42 ACWS (3d) 113 (FCA)), I cannot find that the Board committed a reviewable error simply because it used the words "no evidence" as opposed to "no additional evidence". The Board's rationale is clear from a full reading of the reasons.

[39] The applicant further argues that it was unreasonable for the Board to assume that she could move somewhere else and be free from the misperception that she was Jewish. She argues that "gossip spreads" and that people would eventually find out about her daughter in Israel and about her past trips there. She argues in her written submissions, "Innocent information given to friends can be passed on to people who are not friends."

[40] I agree with the respondent that the applicant's opinion regarding the potential for gossip to spread does not constitute a basis for quashing the Board's decision. Aside from what had occurred in Orenburg, which the Board determined was unique and localized in nature, there was no evidence to suggest that the information regarding the applicant's ties with Israel would spread beyond Orenburg, that the misperception based on that information would arise outside of Orenburg, or that the persecution based on the misperception would follow her.

[41] In this regard, the applicant submits that the only way she could have provided the Board with the evidence it was seeking was if she had moved to another community in Russia and waited for the rumours, misperceptions and persecution to follow her. She cites *Thirunavukkarasu*, above, for the proposition that a person does not have to expose themselves to danger simply for the purpose of establishing a claim for refugee protection. The applicant also cites *Martinez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 600 at para 9 (available on CanLII), to support the submission that there is no onus on an applicant to personally test the viability of an IFA before seeking surrogate protection in Canada.

[42] While I agree that there is no onus on an applicant to personally test the viability of an IFA, I do not find that this is what the Board was asking the applicant to do. The onus was on the applicant to demonstrate that she would face the same risk outside of Orenburg that she faced within Orenburg. To that end, the applicant could have submitted evidence of similarly situated individuals of Orthodox faith who had been persecuted by skinhead groups in Russia. She could have submitted country conditions evidence to demonstrate that skinhead groups in Russia exchanged information about targets. She could have submitted evidence that the rumours and misperceptions about her had spread outside of the city of Orenburg, or that she had been mistreated outside of Orenburg. None of this type of evidence was provided.

[43] Instead, the evidence showed that the applicant spent eight months in Moscow between 2006 and 2007 and experienced no problems whatsoever. At the hearing before the Board, the applicant indicated that she felt “really good” during the period that she lived in Moscow. When

asked whether she could move back to Moscow, her objection was not that she would face a similar type of mistreatment, it was that she would be unable to secure employment.

[44] The Board viewed the applicant's eight month stay in Moscow as support for its finding that there was no reason to believe that she would be persecuted outside of Orenburg. The applicant argues that in order for the Board to have drawn any conclusion from this evidence, she would have had to live in Moscow for a lot longer than eight months due to the time that it takes for information to spread. Ultimately, I find that the applicant is asking the Court to re-weigh the evidence in this regard. That is not this Court's role. I cannot find that it was unreasonable for the Board to view the fact that the applicant lived in Moscow for eight months without incident as support for finding that her risk was localized to Orenburg.

[45] The applicant further argues that the Board was being "too particular" when it indicated that it could not find other evidence, aside from the applicant's personal experiences in Orenburg, "of anti-Semitism against non-Jews based on a family member marrying a Jew or based on a person's having made a trip to Israel." I agree with the applicant that this is quite specific. However, this was only one part of the Board's broader finding that the applicant did "not have any of the risk factors noted in [the] documentation". She was fair-skinned and of Orthodox faith and, thus, the Board found that the mistreatment faced by the applicant in Orenburg was localized and, in a sense, unusual. I cannot find that the Board erred in this regard.

[46] The applicant argues that the Board erred in finding that she did not have any of the "risk factors" noted in the objective country conditions documentation. She points out that being Jewish

was a risk factor mentioned in the US DOS report, and although she is not Jewish, her risk must be considered from the perspective of her persecutors. Her persecutors, she argues – i.e. the skinheads in Orenburg - believed that she was Jewish. Thus, the applicant submits that it was unreasonable for the Board to "quote country condition information noting anti-Semitism and then say it is not noted".

[47] I cannot find that there is any merit to this argument either. While it is true that the skinheads in Orenburg believed that the applicant was Jewish – or, at the very least, they had decided to persecute her based on her associations with Jewish people and with Israel – the Board had decided that this perception was localized to Orenburg and was a result of the way the information about her daughter and about her past travels had spread in her community. For the purposes of determining whether the applicant would face persecution in Yekaterinburg, outside of Orenburg, it was useful to note that the applicant did not have any of the "risk factors" noted in the documentation.

[48] Finally, the applicant argues that the Board applied the Gender Guidelines incompletely and inaccurately. In particular, she contends that the Board erred when it concluded that the harm she feared in Orenburg was not based on her gender simply because her son had faced similar targeting. This, she submits, demonstrates that the Board failed to consider that she was, as a woman, at a heightened vulnerability as compared to her son.

[49] With respect, I disagree. First, at no point did the applicant claim that she had been persecuted on the basis of her gender. The Gender Guidelines indicate that when the risk factor is

not sexual status, then the "substantive analysis does not vary as a function of the person's gender". That is the case here. Second, the Board Member indicated that it considered the applicant's personal circumstances in reaching his conclusion with respect to the reasonableness of the IFA:

> [19] … My above consideration of the reasonableness of an IFA for the claimant does take into account her personal circumstances, and I do not find that the claimant faces gender-related difficulties in moving within Russia, such that a move would be considered unreasonable in her situation.

[50] For all the foregoing reasons, this application for judicial review is dismissed.

[51] Counsel for the applicant proposed the following questions for certification:

1. Is evidence that a refugee protection claimant has a well founded fear of persecution in one locality at least some evidence of the unavailability of an internal flight alternative when there is nothing location-specific about the evidence that the applicant has a well founded fear of persecution in the first locality?

2. Is the fact that a person is perceived in one location by feared agents of persecution to have a specific race, religion, political opinion, nationality or membership in a social group at least some reason or some evidence that the person would be perceived by the feared agents of persecution to have the same specific race, religion, political opinion, nationality or membership in a social group in another location, when there is nothing location specific about factors which led in the first location to the perception of the feared agents of persecution?

3. Is the right to counsel denied if the Refugee Division of the Immigration and Refugee Board, at any time during a hearing, prevents a refugee claimant from asking her counsel a question?

4. Must a Board Member who refuses to allow a question by counsel as leading, in a case where counsel is not a lawyer, rephrase the question in a manner which is not leading in order to comply with the duty to fairness?

5. Must the Refugee Protection Division of the Immigration and Refugee Board, in determining whether Gender Guidelines apply, consider gender vulnerability, or is it sufficient for the Board to consider whether the harm the applicant fears is based on her gender?

[52] The respondent opposes the certification of all five questions. The respondent contends that the first two questions do not meet the requirement of generality as they "are determinations that are factually driven and case-specific and cannot possibly transcend the facts of the instant applications." The respondent further submits that the third or the fourth questions would not be dispositive of the appeal as they both involve issues that were not raised in the proceedings until the hearing before the Federal Court. The respondent also submits that the fifth question would not be determinative of the application because the Board did consider the issue of whether the applicant's fear was specifically based on her gender and the issue of the "gender vulnerability".

[53] Paragraph 74(d) of the IRPA requires that only "serious question[s] of general importance" be certified. In *Zazai v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89, 129 ACWS (3d) 578, the Federal Court of Appeal (FCA) set out the threshold test for certifying a question at paragraph 11: "Is there a serious question of general importance which would be dispositive of an appeal?" In terms of the "general importance" requirement, the FCA, in *Boni v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 68, 152 ACWS (3d) 902, clarified, at paragraph 8, that the question must "transcend the decision in which it arose." In the earlier *Canada (Minister of Citizenship and Immigration) v Liyanagamage*, 51 ACWS (3d) 910 at para 4, 176 NR 4, the FCA indicated:

> In order to be certified… a question must be one which, in the opinion of the motions judge, transcends the interests of the immediate parties to the litigation and contemplates issues of broad significance or general application…

[54] In this case, I am of the view that none of the proposed questions meet the test.

[55] The first two questions cannot be assessed in a vacuum. They are not dissociable from a specific set of facts. Furthermore, they would not be determinative of this application. The Board found that the evidence did not lead to a conclusion that the applicant's past experience would reproduce itself in the IFA but it cannot be said that the Board disregarded her past experience when it assessed whether or not the applicant would be at risk in the IFA. The applicant merely raises a disagreement with the weight that the Board afforded to the evidence which illustrates that the issue is factually-driven.

[56] Given my conclusion that the Court need not deal with the issues of procedural fairness that were raised for the first time at the hearing, questions 2 and 3 could not be determinative of the matter. Furthermore, I am of the view that, like the first two questions, the determination of the two questions is factually driven and cannot be decided on a theoretical basis.

[57] I also consider that the fifth question would not either be determinative of this application. The applicant suggests that the Gender Guidelines impose a duty on the Board to consider gender vulnerability during the first branch of the IFA test, even if the claim is not based on a gender-related fear of persecution. With respect, I consider that the applicant's proposition amounts to requiring the Board to assess whether there is a gender-vulnerability on the part of the applicant every time the claimant is a woman, even though the claimant herself does not allege that her fear of persecution is gender-related. With all due respect, I consider that the Gender Guidelines cannot lead to such an assertion. It is clear that in order for the Gender Guidelines to come into play, the applicant must suggest that her fear is somewhat related to her gender. This is coherent with the jurisprudence of this Court on the subject (*Walcott v Canada (Minister of Citizenship and Immigration*), 2010 FC 505 (available on CanLII); *Plaisimond v Canada (Minister of Citizenship and Immigration)*, 2010 FC 998, 92 Imm LR (3d) 275). In this case, the applicant never indicated that she feared gender-related persecution and no evidence was adduced suggesting such an allegation. On the contrary, the applicant recounts the similar treatment received by her son and his family. At one point in the hearing before the Board, she even mentioned that she feared more for her son than for herself.

[58] There is a caveat. The Gender Guidelines request, in an IFA assessment, that the Board consider the ability of women, because of their gender, to travel safely to the IFA and to stay in the IFA without facing undue hardship. That is exactly what the Board did in this case. It considered the applicant's gender in assessing the reasonableness of the IFA and the applicant did not challenge this finding.

[59] Therefore, I consider that the fifth proposed question should not be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed. No questions are certified.

"Marie-Josée Bédard"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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