Federal Court Cour fédérale

Date: 20120524

Docket: IMM-6987-11

Citation: 2012 FC 596

Ottawa, Ontario, this 24th day of May 2012

Before: The Honourable Mr. Justice Pinard

BETWEEN:

Janos BALAZS, Katalin FARKAS,
Vanessza BALAZS

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision of M. Pettinella, member of the Refugee Protection Division of the Immigration and Refugee Board (the "Board"), pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act"). The Board dismissed the applicants' claim for refugee protection, concluding they were not Convention refugees or persons in need of protection under sections 96 and 97 of the Act.

[2] Janos Balazs (the "applicant"), his common-law spouse Katalin Farkas and their minor daughter Vanessza Balazs (together "the applicants") are Roma citizens of Hungary. They claim a fear of persecution due to their ethnicity, Vanessza's claim being based on her parents'. The applicants allege they were verbally abused by skinheads, Vanessza was harassed and their son was beaten.

[3] On June 18, 2007, the applicant claims to have been physically assaulted and threatened by six skinheads on his way home from work. Consequently, he alleges that he was hospitalized for three weeks, suffering from fractured ribs, missing teeth and having had his face cut. Three to four months after being released from the hospital, the applicant alleges that he was threatened, being called a gypsy, such threats supposedly re-occurring a couple of times in 2008. Whereas his spouse was also called a "dirty gypsy" and a "gypsy whore" by skinheads on the bus.

[4] As a result, the applicants left Hungary for Canada on September 16, 2009 and filed for refugee protection the same day. Their claim was heard by the Board on September 12, 2011. On September 15, 2011, the Board rendered its negative decision, denying the applicants' refugee claim.

[5] The applicants raise a number of issues, the disposition of two of which I find to be determinative of this application for judicial review.

[6] First, I intend to deal with the applicants' argument that they were denied a fair hearing due to the incompetence of their legal counsel at the time, contrary to the principles of natural justice. It is trite law that the applicable standard of review to such an issue is correctness.

[7] The applicants submit that they were denied a fair hearing due to the incompetence of their legal counsel at the time of the hearing, her breath smelling like alcohol on a previous occasion and having only met her twice before. At the hearing before me, counsel for the applicants pointed to the "poor representations" of their legal counsel in the transcript of the hearing before the Board.

[8] Incompetence of counsel has been recognized as a breach of natural justice where there is evidence to support a finding of incompetence (see *Sheikh. v Canada (Minister of Employment and Immigration*), [1990] Imm. L.R. (2d) 81 [*Sheikh*]; *Shirwa v. Canada (Minister of Employment and Immigration*), [1994] 2 F.C. 51 (T.D.) [*Shirwa*]; *Siloch v. Canada (Minister of Employment and Immigration*), [1993] F.C.J. No. 10 (F.C.A.) (QL), 151 N.R. 76 [*Siloch*]; *Mathon v. Canada (Minister of Employment and Immigration)* (1988), 28 F.T.R. 217 [*Mathon*]).

[9] At the end of their memorandum, the applicants reassert that they were denied a fair hearing, relying on *Siloch*, above and *Baker v. Canada (Minister of Citizenship and Immigration*), [1999] 2 S.C.R. 817). However, the applicants fail to explain why the hearing was conducted unfairly.

[10] Inversely, the respondent asserts that although applicants' counsel may have been incompetent, the applicants have not provided evidence of problems which may have arisen as a

result; or how their claim was prejudiced, failing to establish that their right to a fair hearing was compromised. Thus, there was no breach of natural justice.

[11] The respondent is correct: the applicants have failed to prove how their legal counsel's behavior at the time of the hearing prejudiced them. While the circumstances of this case are very different than the cases relied on by the applicants, these cases do establish that the incompetence of counsel at the hearing can result in a denial of a fair hearing and provides grounds for judicial review on the basis of a breach of natural justice (*Shirwa*, above at para 11). Thus, where by no fault of the applicant, counsel's misconduct results in the applicant being denied the opportunity to a hearing, a reviewable breach occurs (*Shirwa*, above at para 11; *Mathon*, above). However, the applicants were not denied a hearing: their refugee claim proceeded. Thus, in such a case, the Board's decision can only be reviewed where extraordinary circumstances are proven, such that "there is sufficient evidence to establish the 'exact dimensions of the problem'" (*Shirwa*, above at para 12). Thereby, where the incompetence or negligence of counsel is sufficiently specific and supported by the evidence, such behavior is inherently prejudicial to the applicants, resulting in a denial of a fair hearing (*Shirwa*, above at para 12). However, the applicants have not adduced any such evidence.

[12] The applicants have not explained how their counsel's behavior prejudiced them, besides their refugee claim being denied. Counsel showed up for the hearing, made representations, questioned the applicants and appears to have followed their instructions (compare with *Mathon*, above). Thus, counsel seems to have exercised the standard of care required, bringing reasonable care, skill and knowledge to the performance of her legal services (*Mathon*, above, citing *Central*

Trust Company v. Rafuse, [1986] 2 S.C.R. 147). Absent any evidence of misconduct or prejudice, this Court cannot conclude that the applicants were denied a fair hearing.

[13] Rather, counsel was chosen by the applicants and they had sufficient time before the hearing to find a new lawyer if they had concerns. As stated by Justice Marshall Rothstein in *Huynh v. Canada (Minister of Employment and Immigration)* (1993), 65 F.T.R. 11 at para 16 [*Huynh*]:

> . . . That the applicant's story was not told or did not come out clearly may have been a fault of counsel or it may have been that the applicant did not properly brief counsel. As I understand the circumstances, counsel was freely chosen by the applicant. If counsel did not adequately represent his client, that is a matter between client and counsel.

[14] Since the applicants have not proven that they were denied a fair trial, this Court cannot intervene: "the failure of counsel, freely chosen by a client, cannot, in any but the most extraordinary case, result in an overturning of a decision" (*Huynh*, above at para 23). Having filed a complaint with the Law Society of Upper Canada, the applicants are aware that they have other forms of relief against their legal counsel if she was truly incompetent.

[15] Secondly, the applicants argue that the Board erred in fact, basing its decision on erroneous findings made in a perverse or capricious manner or without regard to the evidence before it. The applicable standard of review to this issue is reasonableness (see *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 [*Dunsmuir*]). Thus, this Court must determine whether the Board's findings are justified, transparent and intelligible, falling within the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above at para 47).

[16] The applicants specifically take issue with the following conclusions made by the Board: (*i*) the assault never occurred; (*ii*) the applicant never reported the incident to the police; and (*iii*) the applicant never spent time in the hospital. In coming to these conclusions, the Board ignored the evidence before it, specifically the medical reports, the corroborating evidence of the children and the documentary evidence, thereby committing a reviewable error.

[17] Furthermore, the applicants take issue with the Board's credibility finding, believing the Board erred by failing to provide reasons. Rather, the Board had to consider the totality of the evidence and explain why it did not consider the applicants credible, which it failed to do in the applicants' opinion.

[18] At the outset, it is important to correct the applicants: the Board never stated that the applicant's attack was never reported nor that he was never hospitalized. Rather, the Board concluded that the applicant did not report the threats he supposedly received and that he was hospitalized, but not for three weeks, contrary to his allegations.

[19] It should be reminded that the determination of the applicant's credibility is completely within the Board's jurisdiction, for "it has a well-established expertise in the determination of questions of fact, particularly in the evaluation of credibility and the subjective fear of persecution" of applicants (*Mohacsi v. Canada (Minister of Citizenship and Immigration)*, [2003] 4 F.C. 771 (T.D.) at para 18 [*Mohacsi*]).

[20] The Board's findings and decision are reasonable, being considered as a whole (*Ogiriki v. Minister of Citizenship and Immigration*, 2006 FC 342 at para 13 [*Ogiriki*]). Even if one of the several reasons provided by the Board was wrong, other facts remain to support its decision (*Ogiriki*, above at para 14). The Board clearly explained why it disbelieved the applicant's story: there were several inconsistent versions of the applicant's attack and the latter failed to provide a satisfactory explanation for these inconsistencies, these explanations being explicitly addressed by the Board in its reasons (compare with *Mohacsi*, above at para 28).

[21] Furthermore, contrary to the applicants' allegations, the Board did not ignore the evidence before it. It specifically addressed the police and medical reports, the applicants' testimony and the documentary evidence (compare with *Ameir v. Minister of Citizenship and Immigration*, 2005 FC 876 at paragraphs 27 and 31). Thereby, the Board did not fail to consider the evidence before it, having no obligation to mention every piece of evidence, but rather considered the totality of the evidence and justified its finding of a lack of credibility in "clear and unmistakable terms" (*Hilo v. Canada (Minister of Employment and Immigration)*, [1991] F.C.J. No. 228 (F.C.A.) (QL), 130 N.R. 236; *Mohacsi*, above at para 19; *Gondi v. Minister of Citizenship and Immigration*, 2006 FC 433 at para 16). A general finding of a lack of credibility on the part of the applicant may extend to all evidence emanating from his testimony (*Sheikh*, above at para 8). Thus, the Board's finding that the applicants were not credible amounted to a finding of a lack of credible evidence on which to base their refugee claim (*Grinevich v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 444 (T.D.) (QL) at para 6). This finding, further to my above disposition of the natural justice issue, is sufficient to dispose of the present application for judicial review without the necessity of dealing with any other issues raised by the applicants.

[22] For the above-mentioned reasons, the application for judicial review is dismissed.

[23] Counsel for the applicants has submitted the following questions for certification:

1. Are criminal acts of violence, directed at person(s), based on race or ethnicity, always “persecution”, subject to a state protection analysis?
2. Or, put another way, can criminal acts of violence, based on race or ethnicity ever constitute mere “discrimination”?

[24] Considering the specific reasons provided above in support of the dismissal of this application for judicial review, the proposed questions are clearly not determinative of the application for judicial review and, therefore, cannot be certified (see *Liyanagamage v. Canada (Secretary of State)* (1993), 71 F.T.R. 67).

JUDGMENT

The application for judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada determining that the applicants were not Convention refugees or persons in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, is dismissed.

"Yvon Pinard"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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