

Federal Court



Cour fédérale

Date: 20120719

Docket: IMM-6834-11

Citation: 2012 FC 902

Ottawa, Ontario, July 19, 2012

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

MINDAUGAS MARKAUSKAS

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mindaugas Markauskas [the Applicant] applies for judicial review of a decision of a member of the Refugee Protection Division of the Immigration and Refugee Board [the Board] dated August 29, 2011, wherein the Board determined that the Applicant is not a Convention refugee or a person in need of protection [the Decision]. The application is made pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

[2] The Applicant, age 31, is a citizen of Lithuania. However, he lived continuously in the United States [the US] with his parents from 1996 to 2007.

[3] In May 2006, the Applicant met his former girlfriend, Milda Stumbryte [Milda]. She was living in the US without status. Shortly after they met, Milda returned to Lithuania and then informed the Applicant that she was pregnant. Their son, Nojus Stumbrys, was born in Lithuania on February 13, 2007.

[4] Following Milda's return to Lithuania, the Applicant lived in Chicago for one year. Thereafter, he travelled to the city of Kaunas in Lithuania. He and Milda lived together for two months and then were together for several more months on an "on-and-off" basis. The relationship completely ended by December 2008. In February 2009, Milda began to live with her future husband and the Applicant no longer saw his son.

[5] Meanwhile, shortly after the Applicant returned to Lithuania, Milda told him that her father, Aras Stumbrys [Aras], was involved at a relatively high level in a mafia organization that trafficked in drugs. In May 2008, Aras met with the Applicant and told him that, because he was too well informed about Aras' business, he should join Aras and his associates. Aras explained that the Applicant did not have a choice and that the work would involve travel to Spain and Italy.

[6] The Applicant gave excuses to delay becoming involved with Aras, but Aras was impatient and began to threaten him, saying that the Applicant could not hide in Lithuania or anywhere in Europe.

[7] In September 2008, the Applicant went to see the police in Kaunas to complain about Aras' threats. However, according to the Applicant, the police were corrupt and immediately contacted Aras. The next day, the Applicant was stopped by two men on the street and told that he was to leave soon for Spain for his first job and that if he failed to go he should consider himself a "dead man".

[8] The Applicant continued to delay taking the job with Aras by saying that he wanted to take care of his son, that his uncle had committed suicide in December 2008, and that he needed to look after his ailing grandfather.

[9] The Applicant's grandfather passed away in mid-March 2009. When his parents came to Lithuania for the funeral, he asked them for help and they purchased a plane ticket so that he could escape. The Applicant arrived in Toronto on April 15, 2009, and was granted visitor status for a six month period.

[10] According to the Applicant's Personal Information Form [PIF], he had been banned from entering the US for ten years. Nevertheless he attempted to enter the US on September 15, 2009 because he had established a serious relationship with a woman who was living there. The Applicant was denied entry into the US and was held overnight. When he returned to Canada, he was given a three week visa and, although he applied to extend his visitor's status, his request was eventually denied in a letter from Citizenship and Immigration Canada [CIC] dated March 15, 2010. Two weeks later, the Applicant applied for refugee status.

THE DECISION

[11] The Board had two concerns that led it to reject the Applicant's claim: (i) the lack of nexus to a Convention ground and (ii) the Applicant's credibility.

[12] The Board dealt only briefly with the nexus between the Applicant's claimed ground of persecution and the Convention. The Board said that the Applicant's fear of Aras and his criminal organization was related to "plain and simple criminality". The Board cited *Zefi Skeko v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 636, 123 ACWS (3d) 739 and *Bojaj v. Canada (Minister of Citizenship and Immigration)*, [2000] 194 FTR 315, FCJ No 1524 (QL) for the proposition that victims of criminality cannot establish a nexus to the Convention.

[13] The Board had two credibility concerns. First, it found that the Applicant had no valid reason for staying in Lithuania for almost a year after Aras told him in May 2008 that he must join Aras' criminal organization or face punishment. The Board determined that the Applicant's delay in leaving Lithuania was inconsistent with his claim that he feared for his life and that a reasonable person would have escaped as soon as possible.

[14] Second, the Board disbelieved that the Applicant feared for his life because he did not file his refugee claim in Canada for almost a year after his arrival. The Board did not accept that the Applicant needed this entire time to "clear his head and pull himself together" as he claimed. The Board found that this delay also showed a lack of subjective fear of persecution.

THE STANDARD OF REVIEW

[15] The parties agree, and I accept, that reasonableness is the applicable standard of review.

THE ISSUES

[16] The Applicant raises the following issues:

- (i) Did the Board fail to consider whether or not the Applicant is a person in need of protection under section 97 of the Act?
- (ii) Did the Board fail to consider the Applicant's explanations when it made its adverse credibility findings based on delay?

Issue 1 Did the Board fail to consider whether or not the Applicant is a person in need of protection under section 97 of the Act?

[17] In this regard, the Board said the following:

Given the panel's credibility findings and lack of well-foundedness of his fear, I find that, on a balance of probabilities, the claimant is not a person in need of protection under section 97(1)(b), as there is not risk to his life or a risk of cruel and unusual treatment or punishment, should he return to Lithuania. There was also no evidence adduced that would support a finding that the claimant faces a danger of torture under section 97(1)(a).

[18] The Applicant relies, in particular, on the decision of Mr. Justice Martineau in *Kandiah v Canada (Minister of Citizenship and Immigration)*, 2005 FC 181, 137 ACWS (3d) 604 at para 18 in which he said that claims under section 97 of the IRPA must be assessed even if there is a negative determination on the issue of subjective fear.

[19] However, when Justice Martineau's reasons are read as a whole, it becomes clear that they deal with a situation in which documents about country conditions showed that an individual was actually at risk in spite of the absence of a subjective fear. That is not the situation in this case.

[20] In my view, because the delays were not adequately explained, it was reasonable for the Board to conclude that the Applicant was not credible when he said he feared Aras. That conclusion eliminated the only evidence of risk faced by the Applicant. Since there was no objective evidence of any other risk, the Board's decision was reasonable.

Issue 2 Did the Board fail to consider the Applicant's explanations when it made its adverse credibility findings based on delay?

[21] The Applicant says that the Board disregarded six reasons which explained his delay in leaving Lithuania:

- (a) His grandfather's ill health;
- (b) His wish to stay with his son;
- (c) His uncle's suicide;
- (d) His lack of funds;
- (e) His fear of endangering his family in the US;
- (f) His effort to seek police protection.

[22] In my view, it is clear that the first three reasons were excuses given to Aras to delay the Applicant's departure for Spain and not explanations for his delay in coming to Canada.

Nevertheless, the first two were mentioned by the Board. Regarding the other explanations, I am not satisfied that they required mention in the Board's Decision. The lack of funds and fear for his family in the US were not mentioned in his PIF and his reference to the police is hardly an explanation for staying in Lithuania, because contact with them allegedly exacerbated his problems.

[23] Further, there was no evidence that Aras ever threatened the Applicant's family in the US or that his criminal network extended to North America. As well, if his parents were prepared to fund his travel to Canada in March 2007, there is every reason to suppose that, had they been asked earlier, they would have given him money. Finally, the evidence was that the Applicant was no longer seeing his son.

[24] In circumstances in which the explanations are clearly without merit, it is not necessary for the Board to refer to every explanation offered by an Applicant.

[25] Regarding the Applicant's one-year delay in making his refugee claim in Canada, the Board did not believe that he needed the time to clear his mind and pull himself together and that he was afraid to talk to Canadian authorities. These explanations were mentioned in the Decision and, in my view, it was entirely reasonable for the Board to reject them.

CERTIFIED QUESTION

[26] No question was posed for certification under section 74 of the Act.

JUDGMENT

THIS COURT’S JUDGMENT is that, for the reasons given above, this application for judicial review is dismissed.

“Sandra J. Simpson”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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