Federal Court  Cour fédérale

Date: 20150122

Docket: IMM-5854-13

Citation: 2015 FC 85

Ottawa, Ontario, January 22, 2015

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

TERENTIY KORNIENKO (a.k.a. TERENTIY KOMIENKO)

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter and Background

[1] The Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada determined that the Respondent, Mr. Kornienko, is a person in need of protection under section 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the *IRPA*]. The Applicant, the Minister of Citizenship and Immigration [Minister], applies for judicial review of

the RPD's decision pursuant to section 72(1) of the *IRPA*, asking this Court to set aside the decision and return the matter to a different member of the RPD for re-determination.

[2] Mr. Kornienko is a Russian citizen and a permanent resident of Ukraine. He arrived in Canada on August 14, 2009, and applied for protection on December 8, 2009. He claimed to fear persecution and cruel and unusual treatment or punishment because he was homosexual.

[3] His claim was initially denied by the RPD on March 7, 2012, but Mr. Kornienko successfully applied for judicial review of that decision and his case was sent back to the RPD (see: *Kornienko v Canada (Citizenship and Immigration)*, 2012 FC 1419 (available on CanLII)). Upon re-determining the matter on June 17, 2013, the RPD decided that Mr. Kornienko was a person in need of protection because he would be perceived to be homosexual in Ukraine or Russia and would therefore be at risk of cruel and unusual treatment or punishment in both countries. It is this decision that the Minister now asks the Court to set aside.

II. Decision under Review

[4] The RPD said that the "determinative issue in this case was credibility", but nevertheless observed that a person "may be a liar and a refugee both" (*Canada (Public Safety and Emergency Preparedness) v Gunasinga*m, 2008 FC 181, 73 Imm LR (3d) 151).

[5] The RPD had numerous reservations about many aspects of Mr. Kornienko's evidence, including the following:

- Although Mr. Kornienko said that he planned to claim refugee protection as early as July, 2009, he waited until December 8, 2009, to do so. That was about four months after he arrived in Canada. The RPD decided that the delay undermined his assertion that he subjectively feared persecution, and did not accept his attempt to blame it on an immigration consultant.
- The RPD made a negative inference about Mr. Kornienko's credibility because he gave inconsistent testimony about when he first realized he was gay. In his Personal Information Form narrative, the Applicant said that he had believed gay people were evil until he was about 19 years old, when he had sex with a man for the first time. At his first hearing, however, he had said that he knew he was gay ever since he was 13 years old.
- The RPD stated that Mr. Kornienko's credibility was further undermined because he did not provide medical documentation to prove that he sustained injuries from an alleged homophobic assault in February, 2009, and his excuses for this omission were unconvincing.
- The RPD determined that a medical discharge letter relating to an alleged assault in July, 2009, was irregular, as was the manner by which Mr. Kornienko said that he obtained it. The RPD doubted its reliability and assigned it little weight.
- A forensic medical report related to the same alleged assault in July, 2009, referred to the discharge letter and was thus tainted by the same reliability concerns. As well, Mr. Kornienko was originally unable to identify which of those documents was issued first and the RPD did not accept that mere

nervousness could explain the error. This impugned Mr. Kornienko's credibility further and the RPD also assigned this report little weight.

- In Toronto in May 2012, Mr. Kornienko married a man named Peter Ekimov who was trying to sponsor him as his husband, but the RPD did not believe this marriage was legitimate. The RPD dismissed letters from each of their mothers supporting the marriage and corroborating other aspects of the testimony since Mr. Kornienko and Mr. Ekimov instructed them what to write. As well, Mr. Ekimov and Mr. Kornienko gave contradictory testimony about their relationship and did "not share a familiar and knowledgeable information [*sic*] about each other that one would reasonably expect spouses to have". Because the credibility of both Mr. Kornienko and Mr. Ekimov was questionable, the RPD also gave little weight to photographs of them together, as well as photographs of Mr. Kornienko and his alleged boyfriend in Ukraine.
- Although Mr. Kornienko volunteered at an LGBT [Lesbian, Gay, Bisexual, and Transgender] community centre and attended a pride parade, the RPD found that these facts were not probative evidence of his sexual orientation since anybody can do those things.

[6] Despite the foregoing reservations, the RPD curtly concluded as follows:

> [101] Having considered the totality of the evidence, I find that the claimant, on a balance of probabilities, would personally face a risk of cruel and unusual treatment or punishment in Ukraine or Russia on the basis of his perceived sexual orientation as a homosexual. I conclude that the claimant is a person in need of protection pursuant to s.97 of the *Immigration Refugee Protection Act* and I therefore accept his claim.

III. The Parties' Submissions

[7] The Minister advanced two primary arguments as to why the RPD's decision is not reasonable. First, the RPD's reasons for the decision do not accord with the result. Second, there is no finding that state protection would be absent for Mr. Kornienko in either Russia or Ukraine. According to the Minister, the RPD must undertake some assessment that clarifies why it came to the conclusion that it did and it was unreasonable not to do so. The Minister also says that the RPD failed to make any personalized risk assessment in respect of Mr. Kornienko.

[8] The Minister argues that the RPD's reasons do not " serve the purpose of showing whether the result falls within a range of possible outcomes" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 14, [2011] 3 SCR 708 [*Newfoundland Nurses*]). According to the Minister, the RPD was obliged to assess the objective documentary evidence and determine whether Mr. Kornienko could receive adequate state protection or whether there was clear and convincing evidence to the contrary. Citing *Ghazizadeh v Canada (Minister of Employment and Immigration))*, [1993] FCJ No 465 (QL), 154 NR 236 (CA), the Minister states that the "…concept of a refugee 'sur place' requires an assessment of the situation in the applicant's country of origin after he or she has left it."

[9] Mr. Kornienko responds that the Court must look to the totality of the evidence before the RPD. Although the RPD may not have properly articulated its assessment of the level of state protection for gay men in Russia and Ukraine, the Court needs to ask itself at the end of the day whether the decision is reasonable. In this regard, Mr. Kornienko points to paragraph 6 of the

decision, wherein the RPD clearly "finds, on a balance of probabilities, that the claimant would be perceived as a homosexual in Russia and Ukraine." Mr. Kornienko further points to the fact that the RPD had before it documentation confirming the situation for homosexuals in Russia and in Ukraine, and that the Russian Duma was in the process of passing a new anti-gay law banning the promotion of homosexuality among minors.

[10] Mr. Kornienko further states that, although it might have been better for the RPD to consider the country conditions for homosexuals in Russia and Ukraine expressly, it cannot be said that it did not consider them at all. Furthermore, Mr. Kornienko points out that, although the RPD did not conclusively state or find that Mr. Kornienko is homosexual, his risk is personalized because he is a gay man who would be perceived as such in Russia and Ukraine. Mr. Kornienko submits that the RPD's decision is well within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

IV. Issues and Analysis

A. *Standard of Review*

[11] Neither party argues that the appropriate standard of review in respect of the RPD's decision is anything other than that of reasonableness. Accordingly, the RPD's findings of fact and of mixed fact and law are entitled to deference (*Lin v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1052 at para 13-14 (available on CanLII); *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 53, [2008] 1 SCR 190 [*Dunsmuir*]). The RPD's assessment of the evidence should not be disturbed so long as it was justifiable, intelligible, transparent and defensible in

respect of the facts and the law (*Dunsmuir* at para 47). Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland Nurses* at para 16).

[12] Furthermore, the Court does not have "carte blanche to reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result" (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 54, [2011] 3 SCR 654, citing *Petro-Canada v British Columbia (Workers' Compensation Board)*, 2009 BCCA 396 at para 56, 276 BCAC 135; *Lemus v Canada (Citizenship and Immigration)*, 2014 FCA 114 at paras 29-38, 372 DLR (4th) 567).

B. *Can it be presumed that the RPD considered all the evidence?*

[13] The Minister states that the RPD had to assess the objective documentary evidence and determine whether Mr. Kornienko could receive adequate state protection in Ukraine and Russia. Mr. Kornienko responds that the RPD should be assumed to have considered such evidence, even if it might have been better for the RPD to assess the level of state protection expressly. One of the determinative issues before the Court, therefore, is whether the absence of any apparent analysis by the RPD of the country conditions for homosexuals in Russia and Ukraine renders its decision unreasonable.

[14] Subsection 18.1(4) of the *Federal Courts Act*, RSC 1985, c F-7 [*FCA*], sets out the grounds upon which administrative decisions can be reviewed under subsection 72(1) of the

IRPA (see *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 3, 34-51, [2009] 1 SCR 339 [*Khosa*]; *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at para 37, [2005] 2 SCR 100). Paragraph 18.1(4)(d) of the *FCA* provides the criteria that justify disturbing a tribunal's findings of fact:

18.1 (4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal	**18.1** (4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :
…	…
(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;	*d)* a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;

[emphasis added]

[15] As the Supreme Court observed in *Khosa* at para 46, this paragraph shows that "Parliament intended administrative fact finding to command a high degree of deference," and it gives legislative precision to the content of the reasonableness standard (see *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 at paras 24-40 (available on CanLII) [*Rahal*]). Thus, it must be determined whether the RPD in this case "based its decision … on an erroneous finding of fact that it made … without regard for the material before it".

[16] There is a presumption that a decision-maker such as the RPD "weighed and considered all the evidence presented to it unless the contrary is shown" (*Boulos v Public Service Alliance of Canada*, 2012 FCA 193 at para 11 (available on CanLII) [*Boulos*], citing *Florea v Canada*

(Minister of Employment and Immigration), [1993] FCJ No 598 (QL) at para 1 (CA)). Thus, a failure to refer to some relevant evidence will not typically justify a finding that the decision was made without regard to that evidence. However, that is not always the case, and "… the more important the evidence that is not mentioned specifically and analyzed in the … reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact 'without regard to the evidence' " (*Hinzman v Canada (Citizenship and Immigration)*, 2010 FCA 177 at para 38, [2012] 1 FCR 257 [*Hinzman*], citing *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 (QL) at para 17, 157 FTR 35 (TD) [*Cepeda-Gutierrez*] (ellipses in *Hinzman*)).

[17] The case law in this Court is somewhat divided on whether such an inference can be drawn when the evidence purportedly overlooked is country condition documentation. Such evidence is usually extensive and can be voluminous, including not just the material submitted or specifically referred to by applicants but also everything in the national documentation package for the countries of reference (*Avila Rodriguez v Canada (Citizenship and Immigration)*, 2012 FC 1291 at paras 42, 44, [2014] 2 FCR 254). In *Canada (Citizenship and Immigration) v Balogh*, 2014 FC 932 at para 25 (available on CanLII) [*Balogh*], Mr. Justice Henry Brown recently observed that the RPD's "duty to expressly refer to evidence that contradicts its key findings does not apply where the contrary evidence in question is only general country documentary evidence". This proposition finds support in a number of this Court's decisions (see: e.g. *Shen v Canada (Citizenship and Immigration)*, 2007 FC 1001 at para 6 (available on CanLII) (Pinard J.); *Zupko v Canada (Citizenship and Immigration)*, 2010 FC 1319 at para 38, 94 Imm LR (3d) 312 (Snider J.); *Camacho Pena v Canada (Citizenship and Immigration)*, 2011 FC 746 at

para 34 (available on CanLII) (Zinn J.); *Salazar v Canada (Citizenship and Immigration)*, 2013 FC 466 at paras 59-60 (available on CanLII) (Mandamin J.)). That proposition has also been rejected on occasion though. For example, in *Ponniah v Canada (Citizenship and Immigration)*, 2014 FC 190 at para 16 (available on CanLII), Mr. Justice Michael Manson said that "nothing in *Cepeda-Gutierrez* supports such a narrow reading so as to constrain its precedent to evidence regarding the Applicant's personal situation" (see also *Gonzalez v Canada (Citizenship and Immigration)*, 2014 FC 750 at para 56, 27 Imm LR (4th) 151 (Russell J.)).

[18] A pragmatic approach to this issue is the one adopted by Mr. Justice John O'Keefe in *Vargas Bustos v Canada (Citizenship and Immigration)*, 2014 FC 114 at paras 35-39, 24 Imm LR (4th) 81 [*Vargas Bustos*]. Justice O'Keefe did not subscribe to the notion that unmentioned country documentation can never support an inference that it was overlooked, but he acknowledged that it would often be administratively impractical for the RPD to specifically discuss every conflicting source of information. Therefore, he said that "if the board explains what documentary evidence it relies on and that evidence is reliable and reasonably supports its conclusions, then finding a few contrary quotations that it did not specifically explain away will not make the decision unreasonable" (*Vargas Bustos* at para 39; see also *Hernandez Montoya v Canada (Citizenship and Immigration)*, 2014 FC 808 at paras 35-36, 50-51 (available on CanLII) (LeBlanc J.)). To similar effect, Madam Justice Mary Gleason has said that "[i]t would be overwhelmingly burdensome for the Board to specifically cite every point in the evidence that runs contrary to its determinations. All it was required to do was to review the evidence and reasonably ground its findings in the materials before it…" (*Kakurova v Canada (Citizenship and Immigration)*, 2013 FC 929 at para 18 (available on CanLII)).

[19] It should be remembered that the principle which emerges from *Hinzman* and *Cepeda-Gutierrez* is not mandatory. It is only where the unmentioned evidence is "critical and contradicts the tribunal's conclusion that the reviewing court *may* decide that its omission means that the tribunal did not have regard to the material before it" (*Rahal* at para 39 (emphasis in original)). Also, this principle does not supplant the ordinary reasonableness standard of review, under which courts must "be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful" (*Newfoundland Nurses* at para 17). So long as the reasons "allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland Nurses* at para 16), then there is no cause to infer that contrary evidence was overlooked (*Herrera Andrade v Canada (Citizenship and Immigration)*, 2012 FC 1490 at paras 11-13 (available on CanLII)). The RPD's job is only to explain its decision in a particular case, not to write treatises on the existence of persecution or state protection in any given country.

[20] In this case, the RPD's reasons are bereft of any analysis whatsoever of the country conditions for homosexuals in Russia and Ukraine. The absence of such an analysis, however, does not automatically render the RPD's decision unreasonable. In this case, it was incumbent upon the Minister to rebut the presumption that the RPD weighed and considered all the evidence presented, but the Minister failed to do so. The record here shows national documentation packages for Russia and Ukraine were before the RPD, together with various other documents concerning the situation for homosexual men in those countries. While the absence of any explicit analysis by the RPD of the adequacy of state protection in its reasons is

not desirable, it cannot be said that the RPD made its decision without regard for the material before it. This case is not like those mentioned above where unmentioned country condition documentation supports an inference that it was overlooked in the face of other, contradictory documentation relied upon by the tribunal. The Court should be cautious about substituting its own view of the proper outcome by designating certain omissions in the reasons to be fatal.

[21] Nevertheless, the RPD's decision can only be defended on the basis that it implicitly found that state protection was inadequate, which in turn raises the next issue.

C. *Can a finding of inadequate state protection be presumed in the absence of analysis?*

[22] In addressing this issue, there is an absence of clear guidance in the case law because, typically, applications for judicial review of the RPD's decisions are brought by refugee claimants who have no interest in challenging a decision that there is inadequate state protection. In this case, however, it is the Minister who challenges the RPD's decision. The Minister argues that the RPD must undertake some assessment that clarifies why it came to the conclusion it did and, in the absence of any explicit analysis or even mention of state protection, the RPD's decision was not reasonable.

[23] In *Canada (Minister of Citizenship and Immigration) v Rennock*, 2003 FCT 101 at para 7 (available on CanLII) [*Rennock*], Mr. Justice Douglas Campbell held that there was an obligation on what was then the Convention Refugee Determination Division [CRDD] to "determine whether the claimant's home state is able to protect him or her from the source of persecution in those instances where the threat does not emanate from the state itself". The CRDD's decision in

Rennock was set aside because "[i]n its reasons, the CRDD made no reference to the availability of state protection" (*Rennock* at para 8).

[24] In *Canada (Minister of Citizenship and Immigration) v Chen*, 2004 FC 1403, 42 Imm LR (3d) 19 [*Chen*], Mr. Justice Edmond Blanchard dealt with a situation where the RPD had referred to evidence about state protection, but nonetheless still granted the application for judicial review because "no analysis was conducted in respect of the sufficiency of evidence to rebut the presumption of state protection" (*Chen* at para 27). Justice Blanchard stated at paragraph 29 that:

> I am unable to determine from the reasons whether the Board properly applied the test in *Ward* in respect to state protection. It would be speculative to find that the Board was satisfied that there was clear and convincing evidence on the record of the state's inability to protect. There is simply no analysis that would allow for such a conclusion.

[25] In *Canada (Minister of Citizenship and Immigration) v Abad*, 2004 FC 866 (available on CanLII) [*Abad*], Madam Justice Judith Snider also set aside a decision that was "nearly devoid of any analysis on the issue of state protection" (*Abad* at para 10). The claimant in *Abad*, like Mr. Kornienko, had been found to be a liar, and Justice Snider said that: "[i]f the claimant himself testified that he would not have left his country of nationality but for an incident that has been determined to be a complete fabrication, then it seems imperative that a thorough analysis of the issue of state protection must follow" (*Abad* at para 13).

[26] Although these three cases were decided before *Newfoundland Nurses*, similar results have been reached more recently. For example, in *Balogh*, the RPD recited the law of state protection correctly, but Justice Brown nevertheless decided that "the critical failure was to leap

from that legal summary to the conclusion that the presumption of state protection was rebutted. It is simply not possible for this Court to determine how that result was obtained" (*Balogh* at para 28; see also *Canada (Citizenship and Immigration) v Viljanac*, 2014 FC 276 at para 20 (available on CanLII); and *Canada (Citizenship and Immigration) v Grdan*, 2014 FC 187 at paras 12-15 (available on CanLII).

[27] Unlike the present case and *Rennock*, most of the foregoing cases included an express finding of inadequate state protection, and still they were considered unreasonable. That tends to support a conclusion that the decision in this case is unreasonable too.

[28] Of course, *Newfoundland Nurses* teaches that a reviewing court must not only give respectful attention to the actual reasons but also to the reasons "which could be offered in support of a decision" (*Newfoundland Nurses* at para 12), and that a "decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (*Newfoundland Nurses* at para 16; see also *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65 at para 3, [2012] 3 SCR 405). However, it is difficult in this case to say that state protection is merely a subordinate element of Mr. Kornienko's claim. The Supreme Court has called state protection the "lynch-pin of the analysis" with respect to whether a fear of persecution is well-founded *(Canada (AG) v Ward*, [1993] 2 SCR 689 at 722, 103 DLR (4th) 1), and it is equally determinative of a claim under paragraph 97(1)(b) because of subparagraph 97(1)(b)(i).

[29] Accordingly, the RPD's failure in this case to even mention, let alone analyze, the inadequacy of state protection cannot be justified since this was a fundamental basis upon which its decision was premised. Indeed, the failure to even mention state protection raises an additional concern, since there is no way to tell whether the RPD appropriately understood the law in this regard.

[30] Lastly, it should be noted that there is no determination by the RPD in this case that Mr. Kornienko was at risk of cruel and unusual punishment from the state itself, in which case the RPD would have had no duty to expressly analyze the availability of state protection (*Rennock* at para 7). As noted in *Zhuravlvev v Canada (Minister of Citizenship and Immigration)*, [2000] 4 FCR 3 at para 19, 187 FTR 110, if the agent of persecution is the state itself, "one need not inquire into the extent or effectiveness of state protection; it is, by definition, absent".

V. Conclusion

[31] In the result, the RPD's reasons in this case do not permit the Court to understand why it made the decision it did. Accordingly, the application for judicial review should be and is hereby allowed and the matter is returned to the RPD for re-determination by a different panel member. Neither party suggested a question for certification; so, no such question is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed and the matter returned to the Refugee Protection Division for re-determination by a different panel member. No serious question of general importance is certified.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5854-13
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION v TERENTIY KORNIENKO, (a.k.a. TERENTIY KOMIENKO)
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 10, 2014
JUDGMENT AND REASONS:	BOSWELL J.
DATED:	JANUARY 22, 2015

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