Federal Court Cour fédérale

Date: 20150210

Docket: IMM-6854-13

Citation: 2015 FC 168

Ottawa, Ontario, February 10, 2015

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

TOMAS GABOR

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is a decision which could have been, in all likelihood, positive to the Respondent; however, it was not adequate in its articulation to grant refugee status to the Respondent. This is due to its vagueness as it has no reference to the significant subjective and objective evidence whatsoever.

[2] The fragility or vulnerability of the human condition of the Respondent appears evident from the credible evidentiary record; however, the Refugee Protection Division [RPD] says nothing of significance to demonstrate the encyclopaedia of references, the dictionary of terms, the gallery of portraits and the harmony between the subjective and objective evidence.

[3] This decision is an editorial; thus, it is not a reasonable decision with adequate reasons, be they even brief. A decision, to be reasonable, must show, not tell; otherwise, the decision becomes an editorial. Reasons, in a decision must describe, by the trier of fact, albeit briefly, how the trier of fact reached a conclusion; that is not shown in this case. The watch words must be: "show, don't tell".

II. Background

[4] This is an application for judicial review by the Applicant Minister pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of a decision dated September 6, 2013, wherein the RPD accepted the Respondent's claim for refugee protection under section 96 of the IRPA.

[5] The Respondent is a 20-year old man of the Roma ethnic group and citizen of the Czech Republic. The Respondent is deaf and communicates through sign language.

[6] The Respondent has been subjected to harassment and verbal abuse on account of his Roma ethnicity. At the age of twelve, on his way home from school, the Respondent was attacked, pushed and kicked to the ground by skinheads.

III. Impugned Decision

[7] The RPD rendered its decision orally on July 24, 2013 and issued written reasons on September 6, 2013.

[8] The RPD's analysis of the Respondent's claim is limited to five paragraphs.

[9] First, relying on a letter provided by the Respondent's school principal, the RPD finds that the Respondent would not be able to effectively access state protection in the Czech Republic because of his intellectual and communicational difficulties.

[10] Second, the RPD concludes that, "given that he is likely to face problems based on being Roma and [m]any other issued, and this lack of the ability to access state protection", the Applicant is a Convention refugee under section 96 of the IRPA (RPD Decision, at para 9).

IV. Analysis

[11] The issue central to the application is whether the RPD's decision is reasonable.

A. *Availability of State Protection*

[12] The jurisprudence establishes that in order for a finding to be made under section 96 of the IRPA, a refugee claimant must establish both a subjective and an objectively well-founded fear of persecution (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 [*Ward*]).

[13] In assessing the availability of state protection, the RPD is required to conduct a case-by-case analysis, on the basis of the documentary evidence before it and having regard to a claimant's particular circumstances (*Ward*, above at p 724; *Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171 at para 44 [*Hinzman*]; *Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 at para 36).

[14] Moreover, the burden of proof which lies upon claimants in rebutting the presumption of state protection is directly proportional to the level of democracy in the country considered (*Hinzman*, above at para 45; *Kadenko v Canada (Minister of Citizenship and Immigration)*, [1996] FCJ 1376).

[15] Accordingly, the RPD is required to assess the availability of state protection at the operational level. The RPD must not only consider the practical effectiveness of measures taken by the state in protecting its citizens, but also evidence of a claimant's concrete efforts in seeking such protection (*E.Y.M.V. v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1364 at para 16; *Lakatos v Canada (Minister of Citizenship and Immigration)*, 2014 FC 785 at para 30; *Kovacs v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1003 at para 66 [*Kovacs*]; *Csurgo v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1182 at para 26).

B. *Adequacy of Reasons*

[16] In determining the reasonableness of the RPD's decision, the Court is required to consider the RPD's reasons "together with the outcome", while serving "the purpose of showing whether the result falls within a range of possible outcomes". By corollary, the Court is required

to show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 14 [*Newfoundland Nurses*]; *Juncaj v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1183 at para 5; *Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at para 48 [*Dunsmuir*]).

[17] Although, insufficiency of reasons is not, in and of itself, a ground upon which a decision may be overturned, this Court has found that the RPD's reasons must nevertheless meet a minimal threshold:

> [4] While the decision of the Board should not be read hyper-critically, it must meet certain standards. If the reasons for decision given by the Board are so inadequate that they fail to provide a clear basis for the reasoning behind its decision, the decision will be quashed (*Hussain v. Canada (Minister of Employment and Immigration)* (1994), 174 N.R. 76 at paragraph 3 (F.C.A.)). As stated in *Via Rail Canada Inc. v. Canada (National Transportation Agency)*, [2001] 2 F.C. 25, (2000) 193 D.L.R. (4th) 357 at para. 22, "the reasoning process followed by the decision-maker must be set out and must reflect consideration of the main relevant factors". Most importantly, a rejected claimant (and this Court) should be able to understand the reasons why the claim was rejected. In this case, that is impossible.
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> (*Contreras v Canada (Minister of Citizenship and Immigration)*, 2007 FC 589 at para 4).

[18] Moreover, notwithstanding the presumption that the RPD considered the evidence as a whole, its burden of considering specific evidence increases with the relevance of the evidence to the disputed facts (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ 1425 at paras 15 and 17; *Balogh v Canada (Minister of Citizenship and

Immigration), 2014 FC 771 at para 48; *Flores v Canada (Minister of Citizenship and Immigration)*, 2008 FC 723 at para 15).

[19] In *Newfoundland Nurses*, the Supreme Court provides guidance in assessing the adequacy of reasons:

> [16] Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion [citation omitted]. In other words, 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, the Dunsmuir criteria are met. [Emphasis added.]
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> (*Newfoundland Nurses*, above at para 16).

C. *The Reasonableness of the RPD's Decision*

[20] The RPD's reasons are minimal, and rather opaque. In determining the availability of state protection, the RPD failed to adequately consider the evidentiary record before it in conjunction with evidence attesting to the Respondent's particular circumstances (*Kovacs*, above at para 83). The RPD provides little – if any – guidance as to how it came to its conclusion.

[21] Mindful of the deference owed by this Court towards the RPD's decision and the Supreme Court's reasoning in *Newfoundland Nurses*, the Court finds that the requirements of adequacy of reasons and overall reasonableness of the RPD's decision have not been met

(*Canada (Minister of Citizenship and Immigration) v Kornienko*, 2015 FC 85 at para 28; *Newfoundland Nurses*, above at para 12).

[22] Indeed, it is insufficient for a decision maker to simply state a conclusion (*Sketchley v Canada (Attorney General)*, 2004 FC 1151; *Rolfe v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1514; *De Alvarez v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1287). Similarly, Justice Douglas R. Campbell states in *Buri v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1538:

> [5] In my opinion, in a forward looking analysis of a claim under s. 96 and s. 97 it is first necessary to accurately describe who it is and what it is against which protection is to be provided, and then to determine whether the protection that is provided is, in fact, adequate. In the present case, in reaching the conclusion that "there is adequate state protection in Hungary", I find that the RPD's cursory analysis of the issue certainly fails to meet this reasonable expectation.

V. Conclusion

[23] In light of the above, by failing to provide minimal reasons and analysis in rendering its decisions, the RPD’s decision fails to meet the requirements of justification, transparency and intelligibility within the decision-making process (*Dunsmuir*, above; *Newfoundland Nurses*, above at para 13; *Canada (Citizenship and Immigration) v Khosa*, [2009] 1 SCR 339).

[24] The application for judicial review must therefore be granted.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted;

2. There is no serious question of general importance to be certified.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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