Federal Court  Cour fédérale

Date: 20160104

Docket: IMM-2051-15

Citation: 2016 FC 1

Ottawa, Ontario, January 4, 2016

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

RAISA PIDHORNA
MYKOLA PIDGORNYI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicants, Mykola Pidgornyi and Raisa Pidhorna, who are husband and wife, from the Ukraine, seek judicial review of the decision of the Refugee Appeal Division of the Immigration and Refugee Board [RAD] dated April 8, 2015, which confirmed the decision of the Refugee Protection Division [RPD], refusing their claims under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

[2] The RAD concurred with the RPD and found that the applicants had not established a well-founded fear of persecution and also had a viable Internal Flight Alternative [IFA] in Kiev. The RAD's finding that there was a viable IFA in Kiev is reasonable and dispositive of this application. As a result, the application for judicial review is dismissed for the reasons explained below.

I. Background

[3] Ms. Pidhorna recounted that she had been subjected to discrimination and harassment in the Ukraine due to her Roma ethnicity, but noted that her life improved somewhat when she married her husband. She highlighted two specific incidents: through her sewing business, she was discriminated against and faced extortion by the police in 1995 through the "Roma tax", and she was subject to the targeting of Roma homes by pro-Russian militia, including the looting of and assault in her home in 2014.

[4] The applicants described that their circumstances deteriorated in 2013/2014 due to the conflict in the Ukraine as they lived near territories controlled by pro-Russian separatists. They recounted that they sheltered refugees in their home but later moved to stay with Mr. Pidgornyi's relatives in Novoukrainka. They came to Canada in August 2014 once their daughter bought them plane tickets and they were medically fit to travel.

[5] Ms. Pidhorna acknowledged that she does not speak Romani, does not practice any Roma customs, does not look Roma and would not likely be recognised as Roma.

II. The RPD Decision

[6] The RPD found that, on a balance of probabilities, it was not satisfied that Ms. Pidhorna had established that she was Roma or was perceived to be Roma and that the allegations she made about persecution were not due to her ethnicity. As a result, there was no nexus to a Convention ground.

[7] The RPD noted that the documents she provided did not establish her Roma ethnicity; she does not speak Romani; the medical and police documents corroborating her assault did not note her Roma ethnicity; she did not believe that she could be physically identified as Roma; and, her husband's assertion that she could be identified by her darker skin tone would not necessarily identify her as Roma.

[8] The RPD accepted that the applicants sheltered fellow citizens and had their home looted during the civil conflict in the Ukraine. The RPD found that the risk faced by the applicants is generally faced by other individuals in the Ukraine and that the applicants were not treated any differently by these groups than others who were not Roma.

[9] Alternatively, the RPD found that the applicants had an IFA in Kiev. The RPD stated that it had provided notice to the applicants that this IFA would be considered. The RPD considered the applicants' testimony stating that they could not live in Kiev, but found that it had not been established on a balance of probabilities that the applicants would be targeted in Kiev and found that they would not face a risk to life, a risk of cruel and unusual punishment, or a

danger of torture in Kiev. The RPD also found that it was reasonable in all the circumstances that the applicants could relocate to Kiev and that difficulties in relocation raised by the applicants were those inherent in any relocation.

III. The RAD Decision

[10] The RAD stated that, guided by *Huruglica v Canada (Minister of Citizenship and Immigration)*, 2014 FC 799, [2014] 4 FCR 811 it would conduct its own assessment of the evidence and determine whether the applicants are Convention refugees or persons in need of protection, while recognizing and respecting the credibility findings of the RPD where the RPD has a particular advantage.

[11] The RAD based its analysis on the premise that Ms. Pidhorna is Roma, relying on the truthfulness of her statement (*Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302, 31 NR 34 (FCA)), but noted that she does not look different than other Ukrainians and that her evidence before the RPD was that she did not follow Roma customs or culture or speak the language.

[12] The RAD found that the applicants' allegations regarding the 1995 closure of Ms. Pidhorna's sewing business were tax-related issues, not extortion, and that she had not faced any problems until the civil war began in 2014.

[13] The RAD found that the applicants' evidence of the incidents, taken cumulatively, did not establish that Ms. Pidhorna had been persecuted in the past due to her Roma ethnicity and that she was unlikely to face persecution in the future, should she return to the Ukraine.

[14] The RAD agreed with the RPD regarding the existence of an IFA in Kiev, noting that the RPD had stated the proper test for the IFA and had identified a specific city, Kiev, where the applicants had the freedom to relocate. The RAD noted that Ms. Pidhorna testified that they would have to register to move to Kiev, but that this was merely a formality.

[15] Ms. Pidhorna also testified that the applicants had never considered relocating to Kiev and came to Canada at the behest of their daughter who bought their plane tickets. Mr. Pidgornyi testified that it is dangerous to live in Kiev because it is "like military". The RAD considered this testimony, but concluded that the IFA in Kiev was viable.

[16] The RAD confirmed the decision of the RPD, finding that the applicants would not face a risk of persecution by reason of Ms. Pidhorna's Roma ethnicity and that they would not face a risk to life or a risk of cruel and unusual treatment or punishment or a danger of torture in the Ukraine.

IV. The Issues

[17] The applicants argue that the RAD erred in applying an incorrect test for a well-founded fear of persecution. In addition, the RAD erred in finding that they had not been persecuted in the past, which is relevant to the assessment of the risk of future persecution.

[18] The applicants also argue that the RAD erred in finding that they had a viable IFA in Kiev; the RAD based its assessment on the incorrect test for a well-founded fear of persecution and it confused and conflated the evidence in assessing the two parts of the IFA test.

V. The Standard of Review

[19] The applicants' first issue, regarding the articulation of the test for a well-founded fear of persecution is a question of law, reviewable on the standard of correctness (*Ruszo v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1004 at paras 20-22, [2013] FCJ No 1099 (QL) [*Ruszo*]).

[20] The determination whether the applicants have established a well-founded fear of persecution is a question of mixed law and fact and is reviewed on the standard of reasonableness (*Ruszo* at paras 21-22). Similarly, the RAD's determination of the IFA is reviewed on the standard of reasonableness.

[21] The reasonableness standard focuses on "the existence of justification, transparency and intelligibility within the decision-making process" and considers "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). Deference is owed to the decision maker and the Court will not re-weigh the evidence.

VI. The RAD Erred in Applying an Incorrect Test toDetermine Whether the Applicants had a Well-Founded Fear of Persecution (Section 96)

[22] The applicants note that RAD cited the correct test only in the concluding paragraph of the decision, finding that they did not face a serious possibility of persecution, but cited and applied an incorrect test, requiring a higher threshold in at least three other parts of the decision.

[23] The applicants submit that the RAD incorrectly applied a balance of probabilities test, noting that it stated that the issue is whether Ms. Pidhorna "was unlikely to face persecution in the future," found that she "would not likely face persecution," and found that there was no persuasive evidence that she "would be persecuted" for her Roma ethnicity if she were to return to the Ukraine.

[24] In a nutshell, the applicants argue that the RAD elevated the test beyond that required, which is to demonstrate that they would face a serious possibility or reasonable chance of persecution.

[25] The respondent submits that the RAD is presumed to know the law and the applicable test and that it properly cited the test later in its decision. The reasons should be read with this presumption and the record in mind. Moreover, this issue is not determinative, because the IFA conclusion is independently determinative and a sufficient basis to dismiss the application.

[26] I agree that the RAD's choice of words suggests that it considered whether the applicants would be persecuted on a balance of probabilities, which is not the test. The correct approach to

assess risk pursuant to section 96 is to determine whether an applicant would face a serious possibility of persecution, which falls short of establishing that this is likely to occur on a balance of probabilities.

[27] The test was established by the Federal Court of Appeal in *Adjei v Canada (Minister of Employment and Immigration)*, [1989] 2 FC 680 at 683, [1989] FCJ No 67 (QL):

> What is evidently indicated by phrases such as "good grounds" or "reasonable chance" is, on the one hand, that there need not be more than a 50% chance (i.e., a probability), and on the other hand that there must be more than a minimal possibility. We believe this can also be expressed as a "reasonable" or even a "serious possibility", as opposed to a mere possibility.

[28] In the present case, when read in the context of the reasons as a whole and the record before the RAD, I cannot find that the RAD member had the correct test in mind and applied it to the evidence before him.

[29] Although the RAD confirmed the decision of the RPD, unlike the RPD, it did so after accepting that Ms. Pidhorna is Roma. The RPD stated it would conduct an independent assessment of the evidence and did so. It is the RAD's decision that is the subject of judicial review.

[30] The RAD's analysis of the record focuses on whether, based on the key incidents described above and Ms. Pidhorna's lack of Roma features, she would be "unlikely to face persecution in the future." The RAD found that there was no persuasive evidence that "she *would be persecuted* for her Roma ethnicity" [emphasis added]. Despite the final paragraph which

correctly refers to a "serious possibility" of persecution, the RAD's analysis appears to be based on an elevated standard, which is not the correct test.

[31] However, the application of the incorrect test is not determinative, given the IFA finding.

VII. The RAD Did Not Err in its Assessment of the Evidence of Past Persecution

[32] The applicants submit that the RAD ignored evidence of Ms. Pidhorna's past persecution as a Roma in her childhood, in 1995 when she was forced to close her sewing business in the market for not paying the "Roma tax", and in 2014 when their home was looted and the looters demanded "Gypsy Gold". The applicants argue that this past persecution is an indicator of a serious risk of persecution upon their return to the Ukraine.

[33] I do not agree that the RAD ignored the evidence. The RAD relied on the applicants' own testimony regarding their experiences. The RAD did not address the applicants' claim that the looters sought "Gypsy Gold", but noted the applicants' evidence was that the Russian insurgents looted all the houses in the area. The RAD rejected Ms. Pidhorna's claim that she was assaulted because she was Roma, noting that her own evidence was that she did not look Roma and would have only been identified to the Russians as such if a neighbour identified her. There was no evidence before the RAD that this was the case. The RAD found that the tax imposed in 1995 was a neutral tax and not extortion. The RAD concluded that the incidents recounted did not constitute persecution and were not based on Ms Pidhorna's ethnicity.

[34] The decision is not a model of clarity, given that the RAD states, "[b]ased on the following, I find that she was not persecuted in the past", then goes on to cite *Horvath v Canada (Minister of Citizenship and Immigration)*, 2014 FC 313, [2014] FCJ No 330 (QL), yet all the incidents relied on, as noted above, preceded this reference.

[35] However, reading the reasons in a holistic manner, the RAD considered the applicants' evidence and reasonably concluded that cumulatively, these incidents did not amount to past persecution.

VIII. The IFA Finding is Reasonable and Determinative

[36] The applicants argue that the RAD erred in finding that an IFA in Kiev was reasonable because the RAD misstated and misunderstood the test for refugee protection, which tainted its IFA analysis, and also confused the two pronged test by considering factors relevant to the second prong in the context of the first prong.

[37] The applicants submit that their evidence demonstrated that the situation in Kiev was that of a civil war, that they faced persecution for previously sheltering refugees and that Ms. Pidhorna had faced persecution in the past due to her Roma identity.

[38] The respondent submits that the IFA finding was based on the application of the correct test and is reasonable; once an IFA was identified in Kiev, the onus was on the applicants to demonstrate, on a balance of probabilities, that they would be at risk of being persecuted there and they did not do so.

[39] The test for an IFA is well established. There is a high onus on the applicant to demonstrate that a proposed IFA is unreasonable (*Ranganathan v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 164, [2000] FCJ No 2118 (FCA)).

[40] The two part test for an IFA was established in *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589, [1993] FCJ No 1172 (QL) (FCA) [*Thirunavukkarasu*]. The test is: (1) the Board must be satisfied, on a balance of probabilities, that there is no serious possibility of the claimant being persecuted in the proposed IFA; and, (2) conditions in the proposed IFA must be such that it would not be unreasonable, upon consideration of all the circumstances, including consideration of a claimant's personal circumstances, for the claimant to seek refuge there.

[41] As noted in *Thirunavukkarasu*:

> [14] An IFA cannot be speculative or theoretical only; it must be a realistic, attainable option. Essentially, this means that the alternative place of safety must be realistically accessible to the claimant. Any barriers to getting there should be reasonably surmountable. The claimant cannot be required to encounter great physical danger or to undergo undue hardship in travelling there or in staying there. For example, claimants should not be required to cross battle lines where fighting is going on at great risk to their lives in order to reach a place of safety. Similarly, claimants should not be compelled to hide out in an isolated region of their country, like a cave in the mountains, or in a desert or a jungle, if those are the only areas of internal safety available. But neither is it enough for refugee claimants to say that they do not like the weather in a safe area, or that they have no friends or relatives there, or that they may not be able to find suitable work there. If it is objectively reasonable in these latter cases to live in these places, without fear of persecution, then IFA exists and the claimant is not a refugee.

[42] In *Argote et al v Canada (Minister of Citizenship and Immigration)*, 2009 FC 128 at para 12, [2009] FCJ No 153 (QL), the Court noted that the onus is on an applicant to establish on objective evidence that the relocation to the IFA is unreasonable:

> […] Whether the relocation to the IFA is unreasonable is an objective test and the onus is on the applicants to establish on objective evidence that the relocation to the IFA is unreasonable. It is not for the Board to prove that it is reasonable, as the applicants suggest. [...]

[43] The RAD concurred with the RPD's finding regarding the IFA, noting that the RPD had cited the proper test.

[44] I do not agree with the applicants' submission that, although the RAD noted that the RPD cited the proper test, the RAD did not consider the two parts of that test and the relevant evidence with respect to each part, but rather muddled it all up.

[45] Again, the RAD decision could have better distinguished the two parts of the test, but when read holistically, it is apparent that the RAD applied the evidence to the appropriate part of the test. Moreover, the RAD indicated that it concurred with the findings of the RPD, which were more detailed with respect to each part of the test.

[46] The RAD found that the applicants would not face a section 96 risk (as Convention refugees with a serious risk of persecution) or a section 97 risk (as persons in need of protection) in Kiev, relying on the evidence of Ms. Pidhorna that she would not be identified or perceived to be Roma in Kiev. The Board also considered Mr. Pidgornyi's testimony that it would be

dangerous to live in Kiev because it is "like military", but did not find that this would expose them to a serious risk of persecution.

[47] The applicants were given notice that an IFA in Kiev would be considered. They did not meet the onus upon them to satisfy either the RPD or the RAD that they faced a serious possibility of persecution in Kiev and that it would be unreasonable, given all the circumstances, including their personal circumstances, to relocate to Kiev.

[48] It is trite law that seeking refugee protection of another country should be the last resort and that internal relocation must first be considered. In the present case, the RAD noted the applicants' own evidence that they did not consider relocating within the Ukraine, but rather came to Canada where their daughter resides.

[49] The applicants rely only on Ms. Pidhorna's statement that they would have to register in Kiev if they moved there, and Mr. Pidgornyi's statement that the situation was "like military", along with their allegations of persecution in the past, which the RAD found were not persecution, to support their position that the IFA was not reasonable.

[50] As noted in more detail by the RPD, the applicants were educated in the Ukraine; have work experience in the Ukraine, including in Kiev; have lived in the Ukraine for their entire lives; are now retired; speak Russian and Ukrainian; face no cultural or linguistic barriers; and, had already been separated from their daughter for many years. While relocation to Kiev may not

be their preference, it was not unreasonable for the RAD to concur with the RPD to find that they had a viable IFA in Kiev.

[51] As noted above, the standard for judicial review is that of reasonableness. The Court can find no error in the RAD's assessment of the IFA.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question for certification.

"Catherine M. Kane"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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