Federal Court  Cour fédérale

Date: 20160420

Docket: IMM-2800-15

Citation: 2016 FC 441

Ottawa, Ontario, April 20, 2016

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

ZEF LESI, SANJA LESI AND SANY LESI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review brought pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The underlying issues in this judicial review stem from a decision of the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada [IRB] rejecting the applicants' refugee claim finding they are neither Convention refugees nor persons in need of protection and a decision of the

Refugee Appeal Division [RAD] of the IRB, dismissing the appeal from the RPD for a lack of jurisdiction. There are several decisions identified and addressed later in this Judgment and Reasons that may be captured within the scope of the application.

[2] This is the third judicial review application brought by these applicants regarding the RPD and the RAD decisions. Counsel for the applicants was the same on each of the judicial review applications. The respondent submits this application is an abuse of this Court's process constituting special reasons for awarding costs against the applicants within the meaning of Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 [FC IRPR] and potentially against their solicitor personally.

[3] The application fails in respect of all the potential decisions under review for the reasons that follow.

II. Background

[4] The applicants are a family, the principal applicant [PA] Zef Lesi, his wife Sanja Lesi and their child Sany Lesi. They are all citizens of Croatia. Zef is Roman Catholic and ethnically of Albanian descent. Sanja is of mixed Croat-Albanian ancestry.

[5] They arrived in Canada on October 27, 2011 and claimed refugee protection upon arrival due to their race and nationality under section 96 of the IRPA. They also claimed protection under section 97 of the IRPA. In advancing their claim the applicants made the following allegations:

A. The PA experienced persecution for his entire life in Croatia due to being ethnically Albanian;

B. On September 4, 2006 four Croatian men beat Sanja, she went to the hospital but the police did nothing because they were Albanian;

C. On September 24, 2011, five Croatian men attacked and beat the PA. He knew three of them and one of them was a police officer. He did not report the attack to the police because nothing would have been achieved; and

D. On September 28, 2011 individuals broke into the applicants' home and wrote racist death threats on the walls. Again the applicants did not seek police protection on the basis that they believed it would be worthless to do so.

[6] Their application was heard by the RPD in March, 2014. In April, 2014 the RPD dismissed the applicants' claim concluding the applicants were not credible and disbelieved their narrative on the basis that:

A. There were no references in the documentary evidence to discrimination or persecution of Roman Catholics of Albanian descent in Croatia;

B. The applicants failed to provide any objective evidence to support their alleged fear, particularly after the PA testified that "We had some. But not here" (Certified Tribunal Record at page 403) notwithstanding the three years the applicants had to identify such documentation;

C. The applicants undermined their credibility after failing to claim protection in safe third countries on three occasions, as such their actions were inconsistent with

their subjective fears, particularly in light of the PA's testimony that the applicants always feared for their lives in Croatia;

D. The applicants' failed to provide any corroborative evidence such as police or medical reports in respect of three alleged incidents of persecution;

E. The applicants' own evidence relating to education, access to health care and employment in Croatia does not support the allegation of experiencing discrimination at the level of persecution in Croatia; and

F. The objective documentary evidence refers to Croatia as a democratic state, that ethnic relations were stable overall despite some instances of violence against ethnic minorities, particularly ethnic Serbs and Roma. The RPD found this evidence contradicted the applicants' subjective fear, and also supported a conclusion that even if the applicants did have genuine subjective fears, that these fears were not objectively well-founded.

[7] The RPD further held that even if the applicants were credible, it would reject the claim on the issue of state protection. The RPD concluded that the applicant's allegation that there would be no point in seeking police protection, without providing objective evidence to corroborate the allegation beyond the one negative interaction with the police does not constitute clear and convincing evidence rebutting the presumption of state protection in Croatia.

[8] The applicants appealed the RPD's decision to the RAD. The RAD dismissed the appeal for lack of jurisdiction. The RAD explained that the *Balanced Refugee Reform Act*, SC 2010, c 8 as amended by the *Protecting Canada's Immigration System Act*, SC 2012, c 17 provides that a

decision made by the RPD in respect of a claim for refugee protection referred to the RPD before August 15, 2012 is not subject to appeal to the RAD. The RAD decision notes that the applicant's refugee claims were referred to the RPD on October 27, 2011.

[9] The applicants filed an application for judicial review (IMM-4247-14) in this Court and identified the RPD and RAD's decisions [the First Application]. They then filed a motion for an extension of time to file their application record.

[10] On August 12, 2014, Justice Michel Shore denied the motion for an extension of time to file the application record on the basis that there had been a failure to demonstrate a continuing intention to pursue the matter [the Justice Shore Decision].

[11] On September 30, 2014, a Registry Officer with the Court certified that Chief Justice Paul Crampton ordered, on August 28, 2014, that the application for leave is dismissed due to the failure to file an application record [the Chief Justice Crampton Decision].

[12] On December 3, 2014, the Canada Border Services Agency [CBSA] granted the applicants a deferral of removal until July 3, 2015 in order to allow the minor child to finish the school year [the Notice of Deportation].

[13] On February 27, 2015 the applicants filed a second application for judicial review to this Court (IMM-975-15) and identified (1) the Notice of Deportation to take effect in July of 2015; and (2) the above referenced RAD and RPD decisions [the Second Application]. The applicants

requested, among other things, (1) an order granting the stay of deportation; (2) that the previous order for dismissal of judicial review be vacated and judicial review be allowed to proceed; and (3) that the applicants be granted a pre-removal risk assessment [PRRA].

[14] On March 2, 2015, the applicants filed a motion seeking to stay their removal to Croatia scheduled for July 3, 2015 and to re-open the First Application.

[15] On April 28, 2015 Justice Sandra Simpson dismissed the application for leave and the stay motion on the basis that the stay motion was premature and that the Court has no jurisdiction to re-open the First Application [the Justice Simpson Decision].

[16] On June 8, 2015, the applicants requested a further deferral of their removal on the basis of Ms. Lesi's pregnancy and the best interests of the applicant's child Sany Lesi. On June 11, 2015, a CBSA Enforcement Officer denied the request to defer the removal order because there was not a sufficient basis to warrant a deferral of the execution of removal from Canada [the CBSA Decision].

[17] On June 16, 2015 the applicants filed a third application for judicial review with this Court (IMM-2800-15) [the Third Application]. The applicants stated they sought judicial review of (1) the Notice of Deportation to take effect on June 29, 2015 and (2) the RAD and RPD decisions.

[18] On June 16, 2015, the applicants filed a motion to stay their removal scheduled for June 29, 2015.

[19] On June 26, 2015, Justice René LeBlanc granted the applicants' motion for the stay of their removal to Croatia scheduled for June 29, 2015 until the final disposition of the applicant's application for leave and judicial review against the CBSA Decision [Justice LeBlanc Stay Order].

[20] On October 22, 2015, Justice LeBlanc granted leave for judicial review of the RPD's decision for the purpose of the Third Application [the Justice LeBlanc Leave Application Order].

III. Issues

[21] The application raises the following issues:

A. What is the applicable standard of review;

B. What is the effect of the Justice LeBlanc Leave Application Order in light of the previous Justice Shore Decision, Chief Justice Crampton Decision and Justice Simpson Decision;

C. Which decision is this Court reviewing;

D. Is the Notice of Deportation reviewable;

E. Did the Justice LeBlanc Stay Order and the Justice LeBlanc Leave Application Order [the Justice LeBlanc Orders] render judicial review of the CBSA Decision moot;

F. Was the RAD's decision correct in law;

G. Was the RPD's decision reasonable; and

H. Does this Third Application constitute an abuse of process that gives rise to special reasons for the purpose of Rule 22 of the FC IRPR justifying an order of costs against the applicants and/or their solicitor personally?

IV. Anaylsis

A. *Standard of Review*

[22] With the exception of the RAD decision, the decisions potentially engaged on the Third Application involve questions of fact and mixed fact and law to which the reasonableness standard of review applies (*Alhayek v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1126 at paras 49-50, 418 FTR 144). The impugned RAD decision on the other hand engages a true question of jurisdiction to which a correctness standard of review applies (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at para 59 [*Dunsmuir*]).

B. *Justice LeBlanc's Leave Application Order*

[23] The circumstances arising in the Third Application are analogous to those found in *Guzman v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 15 at para 5, 215 FTR 299 [*Guzman*]. *Guzman* dealt with the applicant's second application for judicial review of a decision by the Minister's Delegate's that found the applicant a danger to the public. The first application had been dismissed, however, leave was granted on a second application by Justice Lemieux. The respondent requested that Justice Marc Nadon dismiss the second application on

the grounds of abuse of process and/or *res judicata*. Justice Nadon recognized that the second judicial review application was identical to the first noting at paragraphs 4 to 5 and 7:

> [4] **I start with the proposition that Mr. Justice Lemieux ought not to have granted leave to the applicant to commence a second judicial review application. That proposition is, in my view, clearly supported by the authorities** [emphasis added], and in particular, by the judgment of the Federal Court of Appeal in *Metodieva v. Canada* (1998), 132 N.R. 38. In *Metodieva*, the applicant, whose first application for leave to commence judicial review proceedings in respect of a decision of the Refugee Board was dismissed by Hugessen J.A. on December 18, 1990, filed a second application for leave on May 15, 1991, in regard to the same decision. Décary J.A., who wrote the Reasons for the Court of Appeal, referred, at page 43, to a passage from the decision of Jackett C.J. in *Lamptey-Drake v. M.E.I.*, [1980] 1 F.C. 64, where the Chief Justice stated, at page 67, that:
>
> > [...] Once having considered and dismissed an application for leave to appeal, the court has, in my view, no jurisdiction to hear another application for leave to appeal in the same matter.
>
> [5] After quoting from *Lamptey-Drake*, supra, Décary J.A. went on to state the following, at page 43:
>
> > [6] [...] The applicant is seeking to obtain indirectly with respect to the order of December 18, 1990, what she could not obtain directly through the procedure prescribed by the Rules. I certainly could not acquiesce in such a development, which is completely contrary to the rule of res judicata and the stability of the judicial process.
>
> [...]
>
> [7] Lastly, at page 43 of his Reasons, Décary J.A. makes it clear that the Court did not have jurisdiction to hear the second leave application:
>
> > [7] I think it is important to point out that the court does not have jurisdiction to decide the matter again, and that this is so whatever the reason for dismissing the first application for leave. In the case at bar, the order of December 18, 1990, read as

> follows: 'The application, being unsupported by affidavit or other material, is dismissed" [...]

[24] Notwithstanding Justice Nadon's disagreement with Justice Lemieux's granting of leave on the second application, Justice Nadon concludes that he is not in a position to disregard the subsequent decision to grant leave and dismiss the judicial review application as *res judicata*, he states at paragraphs 8, 10 to 11 and 16:

> [8] Consequently, it seems to me, with respect, that it cannot be seriously disputed that the applicant's second leave application ought to have been dismissed. However, my colleague Lemieux J. granted the applicant leave to commence a second application.
>
> […]
>
> [10] [T]he fact of the matter is that Lemieux J. granted the applicant leave to commence a second judicial review application. Is it now open to me to disregard his decision and dismiss the judicial review application on grounds of abuse process and/or *res judicata*? **In my view, it is not…there was *res judicata*, in my view, with respect to whether the applicant ought to have been allowed to commence a second judicial review application. Although it is clear, in my view, that leave ought not to have been granted, leave was granted. Since no appeal can be taken from a decision granting or refusing leave, Lemieux J.'s decision is final** [emphasis added].
>
> [11] I am supported in this view by the decision of the Federal Court of Appeal in *Canada (Solicitor General) v. Bubla*, [1995] 2 F.C. 680.
>
> […]
>
> [16] Strayer J.A. states in unequivocal terms that a judge of the Trial Division cannot review a decision made by another judge of the Trial Division. Strayer J.A. also states in clear and unambiguous terms that the hearing of an application for judicial review cannot serve as a disguised appeal from the decision granting leave to commence that judicial review application. I conclude from the Court of Appeal's decision in *Bubla*, supra, that **I cannot review or set aside, directly or indirectly, the decision**

> **made by Lemieux J. to grant leave to the applicant to commence this judicial review application** [emphasis added].

[25] As was the case in *Guzman*, I am of the opinion that leave should not have been granted on the Third Application, at least insofar as it sought review of either the RPD or RAD decisions. In my opinion these matters were *res judicata*, a view reflected in the Justice Simpson Decision. However, as was the case in *Guzman*, my disagreement with the decision to grant leave, a decision that I expect arose out of the repetitive and unclear nature of the Third Application, is not a basis to refuse to consider the judicial review application, leave having been granted (*Pascale v Canada (Minister of Citizenship and Immigration)*, 2011 FC 881 at paras 41-44, 394 FTR 208).

C. *Which Decisions are being reviewed*

[26] The Court must determine which decision(s) it is reviewing on this judicial review. The multiple decisions, the lack of clarity in the Third Application and the content of the Justice LeBlanc Orders generate a number of possibilities.

(1) Justice LeBlanc's Orders

[27] Justice LeBlanc's Stay Order states "The Applicants' removal to Croatia, scheduled for June 29, 2015, is stayed until final disposition of the Applicants' Application for Leave and Judicial Review against the Canada Border Services Agency decision, dated June 11, 2015, not to defer removal." However, the Justice LeBlanc Leave Application Order refers to "an application for judicial review of the decision of the Refugee Protection Division of the

Immigration and Refugee Board dated April 24, 2014." The Justice LeBlanc Orders leave open the possibility that the Court could be reviewing (1) the CBSA Decision and/or (2) the RPD decision.

(2) Notice of Application for the Third Application (IMM-2800-15)

[28] The applicants in this Third Application state the following:

> The applicant seeks leave of the Court to commence an application for judicial review of:
>
> Notice of Deportation to take effect June 29, 2015; **and** [emphasis added]
>
> [A]n application to the Immigration Appeal Division for review of the decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board dated April 24, 2014 (decision) served April 28, 2014, which refused the Applicants' application to be deemed Convention refugees or persons in need of protection under sections 96 and 97 of the Act. The matter was appealed to the RAD and decision dismissed for lack of jurisdiction, the parties having entered Canada in 2011 prior to the s. 36 cut off date. The decision was served on May 27, 2014 to the principal claimant prior to permitting perfection of the Appeal, in accordance with written direction given by the Case Management Officer, RAD dated May 13, 2014.

[29] The language used in identifying the RAD and RPD decisions is almost identical to that used in the First and Second Applications.

[30] The applicants seek the following relief, which is identical to that sought in the Second Application:

1. That the Order be granted staying the deportation of the Applicants;

2. That the previous Order for dismissal of judicial review be vacated and allowed to proceed in accordance with the timely filed Notice of Application;
3. That the Applicants be granted a pre-risk assessment prior to removal in accordance with fairness, while giving them an opportunity to be heard on the merits with new evidence;
4. That this Honourable Court extend the time in the event it is needed to grant the relief sought; and
5. To grant such relief as this Honourable Court deems just.

[31] To complicate the matter even further, the applicants in the Third Application identify the RAD as the recipient of the Notice of Application but makes reference to the RPD file numbers. The applicants' Memorandum of Argument is similarly unclear, identifying the Third Application as one being made to the "Immigration Appeal Division for review of the decision of the Refugee Protection Division" in paragraph 1 and identifying the RPD as the decision under review at paragraph 6.

[32] The Notice of Application for the Third Application can be interpreted as asking the Court to review; (1) the Notice of Deportation; (2) the Justice Simpson Decision and the Chief Justice Crampton Decision to dismiss the applications for judicial review of the RAD decision; (3) the RAD's decision; and (4) the RPD's decision. At no time do the applicants specify that they are seeking an exemption from Rule 302 of the *Federal Courts Rules*, SOR 98-106 [*Federal Courts Rules*].

[33] Although both the applicants' materials and the Justice LeBlanc Orders identify the RPD's decision, they inconsistently identify other decisions which this Court should review. In the interests of disposing of the issues possibly raised in the Third Application clearly and finally, I will address each of the potential decisions falling within the broad and unstructured Third Application filed by the applicant and within the scope of the Justice Leblanc Orders.

(3) The Notice of Deportation/Direction to Report

[34] As the respondent submits and as reflected in the Justice Simpson Decision, a Notice of Deportation, is an informational communication, known as a Direction to Report, it is not a decision, and it is not subject to judicial review (*Bergman v Canada (Minister of Public Safety and Emergency Preparedness*), 2010 FC 1129 at para 18, 194 ACWS (3d) 1223).

D. *The CBSA Decision (June 11, 2015 Refusal to Defer Removal)*

[35] Although the Justice LeBlanc Stay Order stayed the applicants' removal to Croatia "until the final disposition of the Applicants' Application for Leave and Judicial Review against the Canada Border Services Agency decision dated the June 11, 2015, not to defer removal", I am of the view that Justice Leblanc's Leave Application Order, coupled with the passage of time has had the effect of rendering the judicial review of the CBSA Decision moot.

[36] In *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, 309 DLR (4th) 411 [*Baron*], Justice Nadon writing for the majority held the granting of a stay of removal causing the passing of the date of removal does not necessarily render an

application for judicial review of a decision not to defer removal moot in every case. Justice Nadon further held at paragraphs 29 to 31 that whether such an application is moot due to the passing of the removal date will depend on the proper characterization of the controversy that exists between the parties:

> [29] I agree entirely with the parties that the determination of the mootness issue depends on the proper characterization of the controversy that exists between them. In this regard, the parties implicitly concede that if the characterization of the dispute as found by the Judge, i.e. "whether an applicant should be removed, and is obliged to leave, on the scheduled removal date" (paragraph 45 of her Reasons), is correct, then the judicial review application is moot. However, they submit that the proper characterization is whether the appellants should be removed prior to the determination of their H&C application. At paragraph 33 of his Memorandum of Fact and Law, the respondent formulates his submission as follows:
>
> > [33] The correct characterization of the controversy, however, is whether an applicant should be removed *prior to the happening of a particular event*, such as prior to the determination of a pending H & C application. It is then not the passing of the removal date which renders the judicial review application moot, but the happening of the event. This characterization of whether removal is reasonably practicable prior to the happening of the event is entirely consistent with the enforcement officer's mandate under section 48 of the *IRPA* to execute a removal order as soon as reasonably practicable. It is this characterization of the controversy that the Applications Judge should have adopted, and erred in failing to do so.
>
> [30] Since the appellants' H&C application had not been dealt with at the time of the hearing before the learned Applications Judge [and I am not aware of any determination having been made since Dawson J. rendered her decision], the parties take the position that the controversy still exists between them and thus that the matter is not moot.
>
> [31] In my view, the parties have properly characterized the nature of the controversy which exists between them. I find support for this view in the Reasons given by Strayer D.J. in

> *Amsterdam v. M.C.I.*, 2008 FC 244, where he dismissed an application for judicial review of the decision of an enforcement officer who had refused to defer the applicant's removal from Canada. Although Strayer J. was of the view that on the facts before him, the judicial review application was moot, he nonetheless exercised his discretion to decide the application on its merits.

[37] In this circumstance, unlike *Baron*, the controversy between the parties related to Ms. Lesi's pregnancy, with an approximate due date of October 13, 2015, and the risks of travel by plane on the scheduled date for removal, June 29, 2015, presented to her health and the health of her unborn child. The Justice LeBlanc Stay Order granted the stay of removal until the final disposition of the judicial review of the CBSA Decision not to defer removal. The Justice Leblanc Leave Application Order granted leave on October 22, 2015 for judicial review of the RPD decision. This had the effect of surpassing the two dates that were in issue before Justice Leblanc on the stay motion: June 29, 2015 and October 13, 2015. This judicial review of the Third Application was heard on January 19, 2016, over three months after the approximate due date of October 13, 2015. As a result, no live controversy exists between the parties as it relates to the CBSA Decision effectively rendering the matter moot.

[38] Even if the live controversy between the parties extended beyond October 13, 2015, that controversy relates to the RPD and RAD's decisions both of which are identified in the Third Application. Therefore, judicial review of the CBSA Decision is moot.

(1) RAD Decision

[39] The RAD decision was based on subsection 36(1) of the *Balanced Refugee Reform Act*, SC 2010, c 8 as amended by section 68 of the *Protecting Canada's Immigration System Act*, SC 2012, c 17 which provides that an RPD decision in respect of a claim for refugee protection referred to the RPD before the day on which that section comes into force is not subject to an appeal to the RAD. As the RAD noted, that provision came into force on August 15, 2012 (*Order Fixing August 15, 2012 as the Day on which Certain Sections of the Act Come Into Force*, SI/2012-65, (2012) C Gaz II, 1917). The relevant provisions state:

Balanced Refugee Reform Act, SC 2010, c 8:

36. (1) A decision made by the Refugee Protection Division before the day on which this section comes into force is not subject to appeal to the Refugee Appeal Division.	36. (1) N'est pas susceptible d'appel devant la Section d'appel des réfugiés la décision de la Section de la protection des réfugiés rendue avant la date d'entrée en vigueur du présent article.

Protecting Canada's Immigration System Act, SC 2012, c 17 amended subsection 36(1) of the *Balanced Refugee Reform Act*, SC 2010, c8:

68. Sections 36 to 37.1 of the Act are replaced by the following:	68. Les articles 36 à 37.1 de la même loi sont remplacés par ce qui suit :
36. (1) A decision made by the Refugee Protection Division in respect of a claim for refugee protection that was referred to that Division before the day on which this section comes into force is not subject to appeal to the Refugee Appeal Division.	36. (1) N'est pas susceptible d'appel devant la Section d'appel des réfugiés la décision de la Section de la protection des réfugiés à l'égard de toute demande d'asile qui lui a été déférée avant la date d'entrée en vigueur du présent article.

Order Fixing August 15, 2012 as the Day on which Certain Sections of the Act Come into Force, SI/2012-65, (2012) C Gaz II, 1917:

His Excellency the Governor General in Council, on the recommendation of the Minister of Citizenship and Immigration, pursuant to subsection 42(1) of the *Balanced Refugee Reform Act*, chapter 8 of the Statutes of Canada, 2010, fixes August 15, 2012 as the day on which section 2, subsection 15(4) and section 36 of that Act come into force.	Sur recommandation du ministre de la Citoyenneté et de l'Immigration et en vertu du paragraphe 42(1) de la *Loi sur des mesures de réforme équitables concernant les réfugiés*, chapitre 8 des Lois du Canada (2010), Son Excellence le Gouverneur général en conseil fixe au 15 août 2012 la date d'entrée en vigueur de l'article 2, du paragraphe 15(4) et de l'article 36 de cette loi.

[40] Referral of the applicant's application to the RPD occurred on October 27, 2011(Certified Tribunal Record at page 58). The RAD did not err in determining it lacked jurisdiction to consider the applicant's appeal from the RPD as it had been referred to the RPD before August 15, 2012.

(2) RPD Decision

[41] The applicants argue that the RPD erred in (1) failing to consider relevant evidence; (2) failing to provide adequate reasons for rejecting the evidence; and (3) in conducting a flawed state protection analysis. I respectfully disagree.

[42] The RPD disbelieved the applicants' narrative on a balance of probabilities due to multiple issues with credibility and rejected the claim on the basis of credibility alone.

[43] The RPD reasonably drew a negative credibility inference from the applicants' failure to claim protection in the UK in 2006 when visiting that country for six months and again when the PA failed to provide a reasonable explanation for not claiming protection in the UK in 2010 when he visited for a funeral (*Sahin v Canada (Minister of Citizenship and Immigration)*, 2013 FC 664 at paras 40-43). The RPD considered the failure to claim protection when presented with the opportunity to do so in the context of the PA's evidence that he had feared persecution in Croatia throughout his life.

[44] In addition to the credibility concerns arising out of the applicants' admitted failure to claim protection in the UK, the applicants did not produce any objective documentary evidence to demonstrate that Roman Catholics of Albanian descent faced persecution in Croatia. In this regard the RPD notes that the applicants had approximately three years to identify and produce documentary evidence in support of their claim. In addition the RPD drew a negative inference from the applicants' inability to produce any impartial documentary evidence in the form of police or medical reports to corroborate the three major incidents of alleged violence.

[45] The credibility issues in totality provided the RPD with a rational basis upon which to conclude that the applicants lacked a genuine subjective fear of persecution in Croatia and to give little weight to the documentary evidence the applicants provided in the form of letters and a diagnosis report (*Lopez v Canada (Minister of Citizenship and Immigration)*, 2009 FC 972 at paras 31-32, 190 ACWS (3d) 236).

[46] Despite finding that credibility was determinative of the claim, the RPD went on to address the issue of state protection. The applicants argue that the RPD analysis was flawed as the RPD conflated serious state efforts at protection with the adequacy of state protection in the circumstances of the applicant. Again I disagree. Finding that the applicants had failed to rebut the presumption of state protection was within the range of possible acceptable outcomes based on the facts and the law (*Dunsmuir* at para 47).

[47] The applicants reported that in September, 2006 they approached the police for assistance, but the police did not respond because the applicants were ethnically Albanian. The applicants did not attempt to complain of this alleged police inaction to the Prosecutor's Office or approach the National Ombudsman after its establishment in 2009. The RPD determined that the single negative interaction with the police was not enough to rebut the presumption of state protection in a democracy such as Croatia (*Ruszo v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1004 at para 51, 440 FTR 106). As such the applicants could not rely on this one incident as an excuse for failing to approach the police or other state authorities when further incidents occurred in 2011. While the applicants may disagree with this finding and may well be able to advance other reasonable interpretations of the evidence, their disagreement does not render the finding unreasonable (*Dunsmuir* at para 47).

V. Costs

[48] Rule 22 of the FC IRPR provides that costs are not awarded or payable for an application for leave, application for judicial review or an appeal under the FC IRPR unless "special reasons" exist. The term "special reasons" is not defined and no definition has been developed in

the jurisprudence (*Ndungu v Canada (Minister of Citizenship and Immigration*), 2011 FCA 208 at para 6, 423 NR 228 [*Ndungu*]). A finding that special reasons for costs exist under Rule 22 of the FC IRPR triggers this Court's discretionary power over the amount and allocation of costs under Rule 400 of the *Federal Courts Rules* (*Almrei v Canada (Minister of Citizenship and Immigration*), 2014 FC 1002 at paras 64-65, 31 Imm LR (4th) 92 [*Almrei*]).

[49] The respondent argues that the applicants actions in refiling the Third Application for leave, arising from the same matters which the Court already dismissed on two earlier occasions, amounts to an abuse of process, giving rise to special reasons for costs. In support of this position the respondent relies on *Coombs v Canada (Minister of National Revenue – MNR*), 2015 FC 869 at para 28, 254 ACWS (3d) 980, where Justice Denis Gascon held: "Abuse of process is a common law principle permitting courts to stop proceedings that have become unfair or oppressive. This includes situations where a party re-litigates essentially the same dispute when earlier attempts at relief have failed." The respondent further notes that the refiling of a claim after it had been dismissed for delay has also been held to be an abuse of process (*Sauve v Canada*, 2002 FCT 721 at para 20, 115 ACWS (3d) 205).

[50] The respondent notes striking similarities between the three applications and, relies on *Johnson v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1262 at para 26, 275 FTR 316, where Justice Eleanor Dawson held "Special reasons may be found if one party has unnecessarily or unreasonably prolonged proceedings, or where one party has acted in a manner that may be characterized as unfair, oppressive, improper or actuated by bad faith."

[51] The applicants submit that the Federal Court has jurisdiction to hear immigration and refugee matters, and that in accordance with the general principle reflected in Rule 22 of the FC IRPR costs should not be awarded to the respondent in this case. However, the applicants argue that if costs are to be awarded they should be awarded to the applicants on the basis of the respondent's delay and inappropriateness (*Ndungu* at paragraph 7).

[52] It should have been clear, if not to the applicants then their counsel, Ms. Holly that Leave for Judicial Review of the RAD and RPD decisions had been denied not once but twice. Despite orders from this Court in the First Application (IMM-4247-14) and the Second Application (IMM-975-15) the applicants' counsel filed the Third Application identifying these very decisions.

[53] Where litigation is an attempt to re-litigate a matter which the Court has previously determined the proper administration of justice is undermined. This has been held to be an abuse of process (*Almrei* at para 45). Again, this is the applicants' third challenge of the same RAD and RPD decisions; almost identical applications were filed in each instance. Furthermore, this is the applicants' second challenge of the Chief Justice Crampton Decision. The Justice Simpson Decision is also challenged in the Third Application notwithstanding that Decision clearly stated the Court has no jurisdiction.

[54] All of these circumstances point to a potential finding that special reasons exist for an award of costs against the applicants pursuant to Rule 22 of the FC IRPR. Furthermore, the applicants' counsel Ms. Holly advanced the Third Application on behalf of her clients. The

respondent has submitted that where counsel has contributed directly to the process abuse then costs could be awarded against counsel personally, a possibility contemplated by rule 404 of the *Federal Courts Rules*.

[55] Ms. Holly was made aware of the possibility of an award of costs payable by her personally both through the respondent's written submissions and in the hearing of this matter and she was provided the opportunity to be heard. In the course of her submissions Ms. Holly made clear that she was not acting in bad faith but rather seeking to vigorously advance the interests of her clients and that she was acting in a *pro bono* capacity.

[56] In the circumstances of this case, I find the applicants and their counsel's above-referenced actions, while not pursued in bad faith, were inappropriate and improper, amounting to an abuse of process that could constitute special reasons for an award of costs under Rule 22 of the FC IRPR. While I have struggled with the question of costs in this case, such orders are discretionary and I have decided not to order of costs against the applicants or against their counsel personally who acted *pro bono* in this case.

VI. Conclusion

[57] In summary:

A. The Notice of Deportation is not a "decision" and is not subject to review by this Court;

B. The Justice Simpson Decision and Chief Justice Crampton Decision are not reviewable by this Court for the reasons set out above, and in the Justice Simpson Decision;

C. Judicial review of the CBSA Decision is moot;

D. The RAD's decision to dismiss the applicants' appeal from the RPD for want of jurisdiction was correct in law;

E. I am satisfied that the RPD did not commit any reviewable errors in denying the applicants' claim; and

F. Costs are not awarded under Rule 22 of the FC IRPR.

[57] The application is denied. The parties did not identify a question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is denied; and

2. No question is certified.

"Patrick Gleeson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2800-15
STYLE OF CAUSE:	ZEF LESI, SANJA LESI AND SANY LESI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JANUARY 19, 2016
JUDGMENT AND REASONS:	GLEESON J.
DATED:	APRIL 20, 2016

APPEARANCES:

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