Federal Court Cour fédérale

Date: 20181024

Docket: IMM-1928-18

Citation: 2018 FC 1072

Toronto, Ontario, October 24, 2018

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

GAZMEND SOKOLI
REZARTA SOKOLI
AND ODESA SOKOLI AND OLT SOKOLI,
BY THEIR LITIGATION GUARDIAN
GAZMEND SOKOLI

Applicants

and

THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of the decision of the Refugee Protection Division [Board] of the Immigration and Refugee Board of Canada dated April 10, 2018 [Decision], wherein the Board found that the Applicants are not Convention refugees and are not

persons in need of protection. The Board found that while the Applicants were credible, they did not rebut the presumption of state protection in Kosovo. For the reasons that follow, I am granting their application.

II. Background

[2] The Applicants are a family of Kosovars consisting of a husband [the male Applicant], his wife, and their two minor children. The Applicants fear reprisals from Serbian nationalists charged in the murder of the male Applicant's father, who was allegedly killed in 2000 by a group of Serbian nationals called the Bridge Watchers. The male Applicant's mother and brother witnessed the torture and murder of his father.

[3] During the still-ongoing murder investigation and prosecution, these family members in Kosovo say they have received threats to dissuade them from testifying at trial. The three alleged murderers were originally acquitted in their first trial in 2002 due to missing evidence. The Applicants pushed for an appeal.

[4] Ultimately, the case was reopened by Kosovar prosecutors in 2011. At his refugee hearing, the male Applicant claimed that Serbian extremists told his mother that professional assassins had been hired to kill the family, and subsequently both the police and the prosecutor's office denied him and his family witness protection. As a result, the Applicants left their home, went into hiding in a different town, and then fled Kosovo, claiming refugee status in Canada in July 2012.

[5] The male Applicant further submits that, in 2014, the leader of the Bridge Watchers, Oliver Ivanovica, was arrested for war crimes, and in 2017, agreed to a plea deal with the European Union Rule of Law Mission in Kosovo [EULEX], such that he would testify against the men accused in the murder of his father. The male Applicant submits that, although it was classified information, the Bridge Watchers learned of EULEX's plan, and assassinated Oliver Ivanovica in 2018.

III. Decision

[6] In terms of the Sokoli's narrative, the Board raised no issues, concluding that "[t]he claimants were credible and provided details spontaneously in a coherent and candid manner. There were no contradictions or embellishments" (Decision at para 11).

[7] In its Decision, the Board analyzed Kosovo's state protection apparatus and cited material from the country condition documentation, finding that there is no longer a state of civil war, invasion, or breakdown of order. Rather, it found the Kosovar government to be a parliamentary democracy with complete control over its territory, and a climate of rule of law. The Board noted some weaknesses within government, including the fact that endemic corruption, coupled with the lack of punishment for corrupt acts, remains an important human rights problem.

[8] The Board went on to consider the avenues of available state protection, for which it also cited mixed evidence. For instance, it noted that that while the police are believed to be one of the least corrupt services in Kosovo, they are poorly managed, lack vital skills, and their

leadership increasingly lacks training. They have a limited ability to fight organized crime and they have a hostile relationship with public prosecutors. Despite this, the Board observed that the police are the strongest of Kosovo's rule of law institutions.

[9] The Board also considered EULEX, which was put in place by the European Union to support the new government after it declared independence in 2008. EULEX is mandated to monitor, mentor and advise local judicial and law enforcement institutions, and is transferred the most sensitive cases pertaining to war crimes and organized crimes.

[10] Overall, the Board noted that while weaknesses remain, especially in the courts, the rule of law has "clearly improved" since the period of UN interim administration and the government has "taken important steps" in replacing key officials and passing delayed reforms. While the Board noted continued reports of large scale corruption and impunity within EULEX, it harkened back to the "rule of law", writing that "there is a climate of rule of law which should curtail this situation over the years" (Decision at paras 17–18).

[11] After reviewing the Applicants' evidence, the Board concluded that the situation in Kosovo had improved since their departure in 2012, as encapsulated in the following two conclusive paragraphs:

> [27] The panel acknowledge that the claimant and his family members did receive threats between 2000 and 2004 and then in 2011, when the retrial was decided. However, they also received a response to their request to have the case reopened. On a balance of probabilities, the panel comes to the conclusion that the government of Kosovo cannot guarantee the protection of all its citizens at all times, as protection can never be perfect. However, it is necessary that the state be reasonably forthcoming with serious

> efforts to afford protection when needed. E[U]LUX has a witness program since the claimant's departure. The fact that the witness protection was not granted in 2011 is not indicative that the state is not protecting the numerous victims of war crimes. Considering that [there are] the long delays before cases are heard by a judge, the state must have rules and criteria for each case. This information is not before the panel. The panel cannot draw a negative inference based on the overall material before it.
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> [28] The panel finds that state protection would be on balance of probabilities, available to the claimants in Kosovo should they needed it. The claimants did not establish, on a balance of probabilities, that it is more likely than not that the state is unable, or unwilling to afford them protection.

IV. Issues and Standard of Review

[12] The Board's application of the test for state protection is determinative of the application. The jurisprudence has established a clear test for state protection and it is not open to a decision-maker to apply a different test. As such, the issue of whether the proper test was applied is reviewable on a standard of correctness and a conclusion will not be rational or defensible if the decision-maker failed to carry out the proper analysis (*Szalai v Canada (Citizenship and Immigration)*, 2018 FC 972 [*Szalai*] at para 27). In other words, assessment of the legal test for state protection attracts a correctness review, while the application of the correct legal test to the facts attracts a reasonableness review.

V. Analysis

A. *State protection: the test*

[13] The Respondent submits that the test for state protection is adequacy whereas the Applicants state it to be operational adequacy or effectiveness. A quick survey of the law will help to provide the context, as both are correct.

[14] Under section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 a refugee claimant must establish a well-founded, subjective fear of persecution. Adequate state protection speaks to whether a refugee claimant's subjective fear is objectively well-founded (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 (SCC) at 712 [*Ward*]).

[15] In general, states are presumed capable of protecting their citizens, "absent a situation of complete breakdown of state apparatus" (*Ward* at 725), particularly where the state is democratic (*Sow v Canada (Citizenship and Immigration)*, 2011 FC 646 at paras 9–10). In order to rebut this presumption, refugee claimants must bring forward clear and convincing evidence to demonstrate, on a balance of probabilities, that the protection available to them in their country is inadequate or non-existent (*Ward* at 724). There is both an evidentiary and a legal burden – meaning that the refugee claimant must adduce evidence, and must convince the decision-maker, on a balance of probabilities, that state protection is inadequate (*Lakatos v Canada (Immigration and Citizenship)*, 2018 FC 367 [*Lakatos*] at para 20).

[16] Justice Grammond summarized the law of state protection in two recent decisions. First, in *AB v Canada (Citizenship and Immigration)*, 2018 FC 237 [*AB*], he wrote:

> [17] Where a claimant has provided evidence that state protection may not be available, this Court has held that a decision-maker must do more than simply point to efforts made by a foreign country to address shortcomings in the areas of policing and criminal justice, such as the enactment of new legislation or other measures. Those efforts must translate into operationally adequate measures.
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> [18] Failure of state protection is rarely a purely individual issue. It usually has a systemic dimension. In certain cases, the effectiveness of the police apparatus as a whole is impugned. In other cases, biases against particular groups are alleged to be prevalent among police officers. For that reason, evidence of systemic failures will often be highly relevant. What matters is how the police are likely to treat complaints from members of a specific group in the future. The manner in which the police treated a specific individual in the past may be a relevant predictor, but it is not determinative. Systemic evidence is rarely within the reach of individual claimants. This is why the RPD and the RAD rely extensively on information compiled by governments and NGOs about the human rights situation in refugee claimants' countries of origin.
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> [19] Undue focus on individual situations may distract from the forward-looking and systemic aspects of the state protection analysis. For example, it is sometimes said that state protection need not be perfect, and that individual failures of the police to protect a certain individual do not constitute insufficient state protection. It is certainly true that the police are not required to solve each and every crime; state protection does not mean that criminality has to be completely eradicated. Yet, assertions that perfection is not the appropriate yardstick should not be allowed to obscure documented systemic problems. Individual policing failures do not prove that state protection is inadequate, and neither does the fact that the police took some action in an individual case prove the adequacy of state protection.
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> [Citations omitted]

[17] Then, in *Farkas v Canada (Public Safety and Emergency Preparedness),* 2018 FC 658 at para 29, after citing the above paragraphs of *AB*, Justice Grammond summarized the issue of state protection by stating that the "test is not one of good intentions, but operational effectiveness."

[18] Thus, in determining whether state protection is adequate as originally required by *Ward*, the Board must focus on its operational effectiveness, rather than a state's good intentions, best efforts and/or aspirations to protect its citizens (*Mata v Canada (Citizenship and Immigration)*, 2017 FC 1007 [*Mata*] at para 13–14; *Lakatos* at para 27).

[19] Therefore, it is insufficient to simply say that steps are being taken that someday may result in adequate state protection. Rather, the analysis must focus on whether efforts have actually translated into adequate state protection at the time of the application for protection (*Szalai* at para 37). To do otherwise constitutes a reviewable error (*Mata* at para 13).

[20] While best efforts are laudable, one must be able to demonstrate actual results to countenance state protection. Whether this was done will be examined next.

B. *Was the State Protection test correctly applied?*

[21] At the hearing, the Respondent argued that the test for state protection is not at issue in this case, and that the Applicants make bald, generalized statements regarding the test for state protection that do not tie into the Decision. The Respondent argues that the Board did not

pronounce the wrong test, and that the Applicants did not raise this issue in their written submissions.

[22] I disagree. The Applicants first raised an error of law in their Application for Leave and for Judicial Review.

[23] Indeed, the Applicants take issue with the language of the Decision and the way that the Board approached the state protection analysis by focusing on the state's efforts rather than the actual results (*Gjoka v Canada (Citizenship and Immigration)*, 2018 FC 292 at para 30).

[24] In their reply submissions, they wrote:

> [11] The Applicants submit that even if the matter of state protection in this case is measured in accordance with adequacy, pursuant to recent jurisprudence it is still necessary to consider *both* the efforts made by the state, and, importantly the actual results.

[25] In their oral arguments, the Respondent asserted that regardless of the framing of the test for state protection, the Board assessed the facts reasonably.

[26] Here, while the Board addressed Kosovo's efforts to improve protection for its citizens, the key assessment ought to be whether the Board understood the difference between the state's efforts and its operational effectiveness (*Poczkodi v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 956 at para 45) as it pertained to witness protection in the Applicants' actual matrix.

[27] In this assessment, the Board stated that, while no government can guarantee the protection of all its citizens at all times, it is necessary that "the state be reasonably forthcoming with adequate serious efforts to protect its citizens" (Decision at para 25). The Board then reiterated Kosovo's serious efforts, as reproduced above (Decision at para 27).

[28] Given the law, the Board erred by failing to consider the Applicants' particular situation in the context of the ability of the state to protect them. More specifically, in the context within the ongoing prosecution of the Serbian nationalists alleged to have killed the male Applicant's father, the Board stated that the principle to consider was "serious efforts", rather than operational effectiveness, in order to conclude that there was adequate state protection.

[29] Here, while the Board mentioned that Kosovo was "providing adequate protection to its citizens and is attempting to deal with its problems as well as serving citizens adequately", the Decision does not demonstrate that the Board, in fact, considered the actual results of the state protection efforts.

[30] For instance, in making its finding, the Board noted that there are "reports of still large-scale corruption and impunity" (Decision at para 18), and that despite this finding, "there is a climate of rule of law which <u>should</u> curtail this situation over the years" (Decision at para 18 [emphasis added]). However, as discussed, it is the results that matter, not just the efforts.

[31] In *Ruszo v Canada (Citizenship and Immigration)*, 2013 FC 1004 [*Ruszo*] at para 28, the Chief Justice noted that even where the wrong test was applied, a decision can still stand if it can

be shown on the facts that the applicant failed to exhaust all avenues of redress in the home country. Here, the *Ruzso* "exception" does not apply because the Board failed to assess the various steps taken by the Applicants, and their family remaining in Kosovo, to seek protection.

VI. Conclusion

[32] On the particular facts of this case, the Board failed to apply the proper analysis of state protection by focusing on state efforts and by failing to assess whether those efforts provided adequate protection at the operational level in the particular circumstances of the Applicants, who have been threatened by those being prosecuted in an ongoing war crimes case. Therefore, the Board failed to apply the correct test.

[33] The application for judicial review is accordingly granted. The Decision will be set aside and remitted for reconsideration by a different panel. No questions for certification were argued, and I agree that none arise.

JUDGMENT in IMM-1928-18

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted.
2. The RPD's Decision of April 10, 2018 is set aside, and the matter is remitted for reconsideration by a different panel.
3. No questions for certification were argued, and none arose.
4. There is no award as to costs.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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