Federal Court  Cour fédérale

Date: 20190301

Docket: IMM-3805-18

Citation: 2019 FC 258

Ottawa, Ontario, March 1, 2019

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

LESLAW DAWIDOWICZ, DAWID MOJESZ DAWIDOWICZ, DANUTA DAWIDOWICZ, MIRANDA DAWIDOWICZ

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 by the Applicants, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 of a Refugee Protection Division [RPD] decision dated June 27, 2018, concluding the Applicants are neither Convention refugees nor persons in need of protection [Decision].

II. Facts

[2] The Applicants are citizens of Poland and ethnically Roma. They are a family of mother, father, son, and daughter. The Applicants claim refugee protection on the basis of their ethnicity. They fear returning to Poland due to their Roma ethnicity, racially motivated attacks and discrimination, and absence of operationally adequate state protection.

[3] They arrived in Canada on April 15, 2011 and made claims for refugee protection upon arrival. They had a hearing before the RPD that dismissed their claim in 2012, however Justice O'Keefe granted judicial review in *Dawidowicz v Canada (Minister of Citizenship and Immigration)*, 2014 FC 115. He did so because the RPD applied the wrong test for state protection, namely the "serious efforts" test: see para 30.

[4] As will be seen below, the second RPD hearing ordered by Justice O'Keefe has also applied the wrong legal test, in that it failed to assess whether state protection was adequate at the operational level. Therefore the Decision is not defensible on the law as required by the Supreme Court of Canada, and judicial review will be ordered.

III. Issues

[5] The Applicants raised two issues for determination:

> [1] Were the RPD's credibility findings unreasonable?
>
> [2] Was the RPD's finding that the Applicants had failed to rebut the presumption of state protection reasonable?

IV. Standard of review

[6] In *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at paras 57, 62, the Supreme Court of Canada holds that a standard of review analysis is unnecessary where "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question." It is well-established that the reasonableness standard of review is applied to decisions of the RPD such as this: *Ahmed v Canada (Minister of Citizenship and Immigration)*, 2016 FC 828, per Boswell J at para 9; *Li v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1273, per LeBlanc J at paras 13, 21–22; *Sater v Canada (Minister of Citizenship and Immigration)*, 2013 FC 60, per de Montigny J at para 3.

[7] In *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31, per Gascon J at para 55, the Supreme Court of Canada explains what is required of a court reviewing on the reasonableness standard of review:

> [55] In reasonableness review, the reviewing court is concerned mostly with "the existence of justification, transparency and intelligibility within the decision-making process" and with determining "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 14). When applied to a statutory interpretation exercise, reasonableness review recognizes that the delegated decision maker is better situated to understand the policy concerns and context needed to resolve any ambiguities in the statute (*McLean*, at para. 33). Reviewing courts must also refrain from reweighing and reassessing the evidence considered by the decision maker (*Khosa*, at para. 64). At its core, reasonableness review recognizes the legitimacy of multiple possible outcomes, even where they are not the court's preferred solution.

[8] The Supreme Court of Canada also instructs that judicial review is not a line-by-line treasure hunt for errors; the decision should be approached as an organic whole: *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34. Further, a reviewing court must determine whether the decision, viewed as a whole in the context of the record, is reasonable: *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65; see also *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.

V. Analysis

[9] In my view the proper test for state protection is the determinative issue in this application. I make no finding on the credibility issues raised by the Applicants, although I note some appeared to cross the line into memory tests concerning events that happened 18 years ago. At one point, the RDP actually criticized the recall of the mother saying she "was able to remember other key times, like the age of her daughter when the family arrived in Canada." Most people not only know the ages of their children, but also their specific birthdays and in my respectful view it is unreasonable to fault a witness for remembering the ages of her children, while not being able to recall details of decades' old events including as in this case alleged vicious racist attacks.

[10] On the issue of the legal test for state protection, this Court has repeatedly held that state protection must be adequate at the operational level. This requires an assessment not only of the efforts made by the state, but actual results. Some of but by no means all such jurisprudence includes: *Gjoka v Canada (Minister of Citizenship and Immigration)*, 2018 FC 292, per

Strickland J at para 30; *Moya v Canada (Minister of Citizenship and Immigration)*, 2016 FC 315, per Kane J [*Moya*] at para 68; *John v Canada (Minister of Citizenship and Immigration)*, 2016 FC 915, my decision at para 14; *Hasa v Canada (Minister of Citizenship and Immigration)*, 2018 FC 270, per Strickland J at para 7; *Eros v Canada (Minister of Citizenship and Immigration)*, 2017 FC 1094, per Manson J at para 45; *Benko v Canada (Minister of Citizenship and Immigration)*, 2017 FC 1032, per Gascon J at para 18; *Koky v Canada (Minister of Citizenship and Immigration)*, 2017 FC 1035, per Gascon J at para 14; *Mata v Canada (Minister of Immigration, Refugees and Citizenship)*, 2017 FC 1007, per McDonald J at paras 13–15; *Poczkodi v Canada (Minister of Immigration, Refugees and Citizenship)*, 2017 FC 956, per Kane J at para 37; and *Paul v Canada (Minister of Immigration, Refugees and Citizenship)*, 2017 FC 687, per Boswell J at para 17.

[11] In *Moya*, Kane J states at paras 73–76:

> [73] To be adequate, perfection is not the standard, but state protection must be effective to a certain degree and the state must be both willing and able to protect (*Bledy v Canada (Minister of Citizenship and Immigration)*, 2011 FC 210 at para 47, [2011] FCJ No 358 (QL)). State protection must be adequate at the operational level (*Henguva v Canada (Minister of Citizenship and Immigration)*, 2013 FC 483 at para 18, [2013] FCJ No 510 (QL); *Meza Varela v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1364 at para 16, [2011] FCJ No 1663 (QL)).
>
> [74] As noted by the applicant, democracy alone does not ensure effective state protection; the quality of the institutions providing protection must be considered (*Sow v Canada (Minister of Citizenship and Immigration)*, 2011 FC 646 at para 11, [2011] FCJ No 824 (QL) [*Sow*]).
>
> [75] The onus on an applicant to seek state protection varies with the nature of the democracy and is commensurate with the state's ability and willingness to provide protection (*Sow* at para 10; *Kadenko v Canada (Minister of Citizenship and Immigration)*, [1996] FCJ No 1376 (QL) at para 5, 143 DLR (4th) 532 (FCA)).

> However, an applicant cannot simply rely on their own belief that state protection will not be forthcoming (*Ruszo v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1004 at para 33, [2013] FCJ No 1099 (QL)).
>
> [76] Contrary to the applicant's argument, the RAD and the RPD did not rely on the fact that Argentina is a democracy as a "proxy" for state protection, but thoroughly considered the country condition documents.
>
> [Emphasis added.]

[12] The issue of whether state protection is adequate at the operational level is nowhere analyzed or applied by the RPD in its 10-page review of state protection. I appreciate that the Applicants have the onus to rebut the presumption of state protection at the operational level, but nonetheless, the RPD has the duty to state and apply the law. Applying the proper legal test is part of the analysis of whether the decision falls within a range of possible, acceptable outcomes, which are defensible in respect of the facts *and law* set out in *Dunsmuir*, at para 47; I deliberately emphasize the words "and law".

[13] The RPD does state at para 29 of its Decision that "the Polish government is providing adequate protection and has in place policy at the operational level to combat violence and discrimination against the Roma population." Also, at para 48 the RPD notes "there is also evidence that at the operational level, the state is taking action to address the discrimination and violence targeting the Roma population."

[14] However, while the existence of policies is a relevant consideration, a statement to that effect does not support a finding that state protection is adequate at the operational level. Likewise, while whether a state is "taking action to address" discrimination and violence is a

relevant consideration, it does not go far enough. The RDP, at least in my respectful view, must ask the proper question and come to a conclusion on whether or not state protection is adequate at the operational level. This is failed to do.

VI. Conclusion

[15] Failure to apply the proper legal test goes to the core of the RPD's Decision. Stepping back and looking at the Decision as an organic whole, I am of the view it is unreasonable. In the result, the Decision is not defensible on the law, and therefore must be set aside for redetermination.

VII. Certified question

[16] The parties did not propose a certified question and none arises.

JUDGMENT in IMM-3805-18

THIS COURT'S JUDGMENT is that the application for judicial review is granted, the Decision is set aside, and the matter is remanded for redetermination by a different constituted decision-maker.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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