Federal Court  Cour fédérale

Date: 20190418

Docket: IMM-3032-18

Citation: 2019 FC 496

Toronto, Ontario, April 18, 2019

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

SERGEI SEMYKIN
TATIANA SEMYKINA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants seek judicial review of a Refugee Appeal Division [RAD] decision confirming the finding of the Refugee Protection Division [RPD] that the Applicants were neither Convention refugees nor persons in need of protection due to an internal flight alternative

[IFA] in Moscow. As that conclusion was reasonable, and as no other grounds permit this Court to intervene, this judicial review will be dismissed.

II. Style of cause

[2] The Applicants have named Immigration, Refugees and Citizenship Canada as the Respondent in this matter. The correct respondent is the Minister of Citizenship and Immigration (Federal Courts Citizenship, Immigration and Refugee Protection Rules, SOR/93-22, s 5(2); *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], s 4(1)). Accordingly, the Respondent in the style of cause is amended to the Minister of Citizenship and Immigration.

III. Background

[3] The Applicants are citizens of Russia. Around 2014, the male Applicant began attending meetings of the Progress Party in Krasnodar, where he lived.

[4] In August 2015, he was approached by two men, one of whom (Mr. V) told him that he should cease his activities with the Progress Party and focus on his grandchildren if he wished to maintain his safety, job, and reputation. The male Applicant filed a police complaint two days later, but he was informed in October 2015 that no investigation had been initiated. He reduced his participation with the Progress Party following this incident.

[5] In April 2016, the male Applicant was attacked with a knife. He did not see his attackers, but he believes one of them was Mr. V. The attackers told him to stop associating with the Progress Party. The male Applicant was hospitalized. A police detective took his statement and advised him to consider ending his association with the Progress Party.

[6] The following month, while staying with his relative, Inna Naumova, in a different city, the male Applicant received a phone call advising he would not be safe until he ceased his political activities. He did not report this incident to the police given the detective's warning. Shortly thereafter, the male Applicant received a letter from the police advising him that the investigation had been closed and the attackers had not been found.

[7] The Applicants came to Canada on visitor visas in August 2016. Their two sons made claims for refugee protection in Canada in November 2016. In April 2017, while the Applicants were in Canada, they were informed that three people had asked for the male Applicant's whereabouts. In another incident one week later, the male Applicant was informed that someone had set fire to his car. Someone had called the police but was told not to do anything as the fire was deliberate and was meant to send a message.

[8] The RPD found the Applicants credible but found that there was insufficient evidence to tie the events to state authorities or the Federal Security Service [FSB]. The RPD also found that a viable IFA existed in Moscow. The RAD agreed with both findings.

[9] The RAD refused the Applicants' request to admit new documents under rule 29 of the *Refugee Appeal Division Rules*, SOR/2012-257 [*RAD Rules*]. The Applicants had submitted nine documents after their appeal was perfected. They explained that the first eight documents had been improperly faxed; however, the RAD found the record did not support this explanation. Further, the Applicants had not explained how the documents satisfied subsection 110(4) of IRPA and had failed to submit the documents along with an affidavit or statutory declaration, contrary to subrule 37(4) of the *RAD Rules*. The RAD therefore rejected the admission of the documents. However, it noted that some of the documents had been before the RPD and were therefore before it.

[10] The Applicants said the ninth document, a cousin's affidavit, was not available when they perfected their record. The RAD did not accept this explanation and noted they had failed to provide an affidavit or statutory declaration as required by subrule 37(4). Therefore, it declined to admit the cousin's affidavit.

IV. Issues and Standard of Review

[11] The Applicants raise four issues, namely whether the RAD erred by:

1. improperly excluding evidence;
2. making unreasonable findings, including veiled credibility determinations;
3. finding that Moscow was an acceptable IFA; and
4. failing to address the arguments raised on appeal, thereby breaching procedural fairness.

[12] Each of the issues will be assessed below; the first three under a standard of reasonableness (*del Solar v Canada (Citizenship and Immigration)*, 2018 FC 1145 at para 25), and the final procedural fairness issue under the correctness standard (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54).

V. Analysis

1) Did the RAD unfairly exclude evidence?

[13] In their written submissions, the Applicants argued the RAD erred in its treatment of all the new evidence. However, counsel for the Applicants conceded at the hearing that the RAD had noted some of the "new" documentary evidence (Items 1–6) was actually before the RPD and therefore before the RAD. Counsel asserted the RAD overlooked one of these items, the affidavit of Ms. Naumova, which spoke to the three men's visit to her home and the destruction of the Applicants' car. I disagree. This document was clearly before the RPD and the RAD, and was considered by both tribunals. The RAD considered this affidavit but rejected it because it had been improperly filed.

[14] In addition, the Applicants asserted that the RAD unfairly excluded the ninth new document, the cousin's affidavit. I do not agree. The RAD explained why it was excluding the evidence, namely non-compliance with the *RAD Rules*. First, the RAD observed that there was no reason the cousin's affidavit could not have been submitted earlier. Second, it was submitted after the record had been perfected and was late. Third, above and beyond these first two

shortcomings of the evidence, the affidavit was not submitted in accordance with subrule 37(4) of the *RAD Rules*.

[15] Counsel for the Applicants argued that he disagreed with the first two reasons that the RAD provided to exclude the evidence. However, he acknowledged at the hearing that he could not find fault with the third reason and conceded that point.

[16] I note that the RAD is master of its own procedure (*Fu v Canada (Citizenship and Immigration)*, 2017 FC 1074 at para 24). Here, in considering whether to include the evidence, the RAD interpreted its own rules, which fall squarely within its home statute. A reasonableness standard of review flows from that exercise. Certainly, its findings were open to it, and I find all three to be reasonable conclusions. Contrary to the Applicants' assertions, there was nothing unfair about excluding the evidence in question, as explained by Justice Locke at paragraphs 29-30 of *Niyas v Canada (Citizenship and Immigration)*, 2015 FC 878.

2) Did the RAD make unreasonable findings, including veiled credibility determinations?

[17] The RAD, based on the evidence noted above and in conjunction with the other evidence on the record, ultimately agreed with the RPD's conclusion that there was insufficient evidence to conclude the only explanation for the threats and attacks in Russia was that Mr. V was an agent of the Russian state. Based on all the evidence, this conclusion was open to it and entirely reasonable.

[18] The Applicants made several arguments about how Mr. V could be seen as a state agent. These arguments are not persuasive. First, this Court is not here to provide its view of the evidence. Rather, it must review what transpired at the tribunal and pronounce on whether its outcomes were reasonable according to the principles enunciated in *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47. Second, I would observe that such arguments, based on the entirety of the evidence, relate to possibilities rather than probabilities, which does not meet the requisite level of trustworthiness or credibility (see, for instance, *Orelien v Canada (Minister of Employment and Immigration)*, [1991] 1 FC 592 at para 21 (CA)).

[19] Many of the Applicants' arguments raised in this judicial review suffer from these two weaknesses, including the inferences drawn from Mr. V's and his associates' conduct—i.e. they only represent other possible conclusions that might have been reached. However, the Applicants have not convinced me that they were probable outcomes. Indeed, for the RAD to have agreed that Mr. V was an agent of the state would have involved speculation on its part, given the evidence before this Court. Therefore, I cannot agree that the RAD made veiled credibility findings. Rather, the Applicants simply provided insufficient evidence to support their assertions (*Ferguson v Canada (Citizenship and Immigration)*, 2008 FC 1067 at para 27). In other words, an applicant's narrative may be found entirely credible, but that does not mean they have sufficiently proven their theory of why the events befell them.

3) Did the RAD ignore or misapprehend evidence or specific arguments in finding the Applicants had an IFA in Moscow?

[20] As the RAD found insufficient evidence that Mr. V was an FSB agent, the onus was on the Applicants to disprove the existence of an IFA, rather than the RAD having to prove that an IFA exists (*Iyere v Canada (Citizenship and Immigration)*, 2018 FC 67 at paras 35, 57). The RAD identified that a two-part test applies when assessing a proposed IFA: (1) there must be no serious possibility of the individual being persecuted in the IFA, and (2) the conditions in the IFA must be such that it would not be unreasonable for the claimant to seek refuge there. The RAD provided reasons why both prongs of the IFA test were met.

[21] The Applicants argue that the high crime rate in Moscow demonstrates it is not an appropriate IFA and that it would be unreasonable for them to move to Moscow given their past residences, education, professions, history of travel, and their children are in Canada. The fact that Moscow has a high crime rate is something that all residents of Moscow have to live with, as do many around the world in other big cities. None of the arguments made by the Applicants regarding subjective fear, the crime statistics on Moscow, the Jurisprudential Guide TB7-0183, nor their children being in Canada render the IFA findings unreasonable under either part of the IFA test.

4) Did the RAD unfairly fail to address the arguments raised on appeal?

[22] After reviewing all written submissions and listening carefully to all of counsels' arguments at the hearing, I see no issues of procedural unfairness (in fact, Applicants' counsel

did not challenge procedural unfairness at the hearing). For the sake of completeness, I will address this issue briefly.

[23] The only argument that was not addressed as a separate issue by the RAD was the question of state protection. There was, however, no need to address this directly because it was addressed indirectly within the IFA discussion. Indeed, without adequate state protection in Moscow, that finding could not have been made under the two-part test discussed above. In any event, it is trite law that the RAD need not deal explicitly with every argument (*Canada (Attorney General) v Franchi*, 2011 FCA 136 at para 41).

[24] Finally, in the written materials, the Applicants also allege that the incompetence of their counsel before the RAD led to their new evidence being unfairly excluded (see issue #1 above). Once again, this issue was not pursued at the hearing, but for completeness I will also address this component of their unfairness argument.

[25] There were ways to go about challenging former counsel, should the Applicants have felt strongly about doing so, and these have not been pursued. The Federal Court of Appeal made this clear in *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 at paras 67–68. The Respondent also correctly points out that a three-part test applies when challenging the competence of counsel (*Yang v Canada (Citizenship and Immigration)*, 2015 FC 1189 at para 16; *Olayinka v Canada (Citizenship and Immigration)*, 2018 FC 975 at paras 15–16).

[26] Further, this Court has a protocol on this subject in which it sets out a detailed procedure to follow when challenging the competence of counsel. Again, this was not followed (see *Procedural Protocol re Allegations Against Counsel or Other Authorized Representatives in Citizenship, Immigration and Protected Person Cases before the Federal Court* (7 March 2014)).

VI. Conclusion

[27] The Applicants, despite putting their strongest foot forward, have been unable to point to any incorrect or unreasonable conclusions on the part of the tribunal. The application is accordingly dismissed.

JUDGMENT in IMM-3032-18

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.
2. The style of cause is amended to correctly name the Respondent "The Minister of Citizenship and Immigration" rather than "The Minister of Immigration, Refugees and Citizenship", with immediate effect.
3. No questions for certification were argued, and none arise.
4. There is no award as to costs.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	SERGEI SEMYKIN, TATIANA SEMYKINA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
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