

Date: 20091019

Docket: IMM-693-09

Citation: 2009 FC 1061

Toronto, Ontario, October 19, 2009

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

**LIOUBOMIR IVANO NALESNIK
OLGA NALESNYK**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF
PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (“*IRPA*”), for judicial review of a decision of a Pre-Removal Risk Assessment Officer (“the Officer”), dated January 16, 2009, rejecting the applicants’ application for a Pre-Removal Risk-Assessment.

[2] Liubomir Ivano Nalesnyk and his wife Olga Nalesnyk (together, “the Applicants”) are citizens of Ukraine.

[3] In 1994, criminal gangs attempted to extort money from Mr Nalesnyk, who operated a small business, and started attacking him after he refused to give in to their demands. First, Mr Nalesnyk was stabbed; then, his store was set on fire. The Applicants' house was also set on fire, and members of Mrs Nalesnyk's family were assaulted. The Applicants say that they have complained to the police, but nothing was done to protect them or bring the attackers to justice.

[4] Fearing further attacks, the Applicants came to Canada in 1994 on visitors' visas, and have resided in Canada ever since.

[5] The Officer accepted the Applicants' submissions, which were supported by extensive documentary evidence, with respect to the attacks in 1994.

[6] However, he rejected their submissions with respect to the alleged continued attacks on their family after they left Ukraine, as the record contained "no submissions from any family members confirming the continuing threats made by the gangs since the applicants left Ukraine."

[7] As a result, taking into account the fact that the original attacks on the Applicants had taken place 14 years ago, the Officer concluded that the Applicants "provided insufficient objective evidence indicating they continue to be at risk from the gang members."

[8] Furthermore, the Officer concluded that the evidence submitted by the Applicants is "insufficient ... to rebut the presumption of state protection in Ukraine." The Officer noted the lack

of detail in the Applicants' explanations of their attempts to seek state protection. While he recognized the pervasiveness of police corruption and of organized crime in Ukraine, he also noted the progress being made by that country in bringing order to its police forces. In sum, he found that the Applicants failed to discharge their burden to rebut the presumption of protection by presenting the "clear and convincing proof" the Supreme Court required in its decision in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 at 726.

[9] The Applicants submit that the Officer made an implicit negative credibility finding against them. They note that the Officer rejected their claims that their relatives have been harassed and attacked after their departure from Ukraine, and are still being attacked or harassed "once or twice a year."

[10] The Respondent submits that the "Officer's negative determination in this regard amounts simply to a determination based on the assessment of the evidence and the sufficiency of the evidence and not to a finding of credibility or lack thereof." The Respondent notes that the Officer accepted the Applicants' version of the 1994 incidents, which was backed up by evidence. His rejection of the Applicants' version of subsequent events was due to lack of evidence, not to any credibility finding.

[11] I agree with the Respondent. The Applicants have not submitted any documents in support of their claims that their relatives are still being attacked and harassed, and it was open to the Officer to find that the mere assertions made in the Applicants' affidavits are not sufficient to tip the balance

of probabilities in their favour. As pointed out by the Respondent, this was their legal burden, *Carillo v. Canada*, [2008] F.C.J. no 399, 2008 FCA 94 at paragraphs 17 and 18.

[12] The Officer's finding that the Applicants' evidence was simply not persuasive is not unreasonable given the paucity of and the lack of detail in that evidence.

[13] Thus, the issue of state protection and of the burden of proof to be discharged by a refugee claimant or an applicant for protection does not arise.

[14] For these reasons, the application for judicial review of the decision is dismissed. There is no need to certify a question for an appeal for the Court of Appeal on the quality of evidence required to rebut the presumption of the state protection.

JUDGMENT

THIS COURT ORDERS that the application for judicial review of the decision be dismissed. There is no need to certify a question for an appeal for the Court of Appeal on the quality of evidence required to rebut the presumption of the state protection.

“Danièle Tremblay-Lamer”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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STYLE OF CAUSE: LIUBOMIR IVANO NALESNIK OLGA NALESNYK v.
THE MINISTER OF CITIZENSHIP AND IMMIGRATION
AND THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: OCTOBER 19, 2009

**REASONS FOR JUDGMENT
AND JUDGMENT:** TREMBLAY-LAMER J.

DATED: OCTOBER 19, 2009

APPEARANCES:

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