Federal Court  Cour fédérale

Date: 20101126

Docket: IMM-1660-10

Citation: 2010 FC 1190

Ottawa, Ontario, November 26, 2010

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

STEVEN SEFA, MIRA SEFA
and MONIKA SEFA

Applicants

and

THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated February 16, 2010, concluding that the applicants are not Convention refugees or persons in need of protection pursuant to sections 96 or 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 (the Act) because the applicants

had not established a well-founded fear of persecution based on a Convention ground, nor that they would be personally subjected to a risk of life, or cruel or unusual treatment or punishment, or a danger of torture, if returned to their country of citizenship, Macedonia.

FACTS

Background

[2] The applicants are three Macedonia citizens: Steven Sefa, the principal applicant, Mira Sefa, the principal applicant's spouse, and Monika Sefa, Mr. and Mrs. Sefa's daughter. The applicants arrived in Canada on October 10, 2007, from the United States, where they had been living for 11 years since 1996. They immediately filed for refugee protection. The claims of all three individuals were heard jointly by the Board.

[3] The principal applicant is a 58 year-old Catholic Albanian and his wife is a 54 year-old Orthodox Serb. Both are Macedonian citizens. They married in 1979 and lived in what is now Macedonia's capital city, Skopje. As a result of their mixed marriage, the applicants were effectively disowned by their families and faced discrimination and harassment from their neighbours and colleagues. Both spouses were discriminated against in their employment. Mrs. Sefa was consistently deprived wage increases and relocated among the stores at which she worked. When private enterprise became available in Yugoslavia, she tried to open her own store to avoid these problems, but the store was consistently vandalized and customers would avoid it so long as there existed other shopping options. As a result, she worked off hours, in order to be open when no one else was. The principal applicant was dismissed from his job and began driving a taxi to earn a living. He was also denied membership in Albanian political organizations because his wife was not

Albanian, but was likewise denied membership in non-Albanian organizations because of his own ethnic Albanian heritage. Their daily lives were characterized by constant verbal altercations with other citizens, which would occasionally escalate to physical altercations. On the few occasions when police were called, the police would diffuse the situation at hand but could not deal with the broader problem. Moreover, the police themselves were disrespectful and insulting towards the mixed couple.

[4] Monika Sefa was born in April 1988. She faced similar discrimination and harassment. She was bullied at school by other students and ignored by her teachers.

[5] When Macedonia gained independence, the applicants felt increased ethnic hatred and feared for their lives. They obtained visitors' visas and fled to the United States in 1996, where they claimed asylum. These claims and subsequent appeals were denied in October 2007, after which the applicants fled to Canada and made the claim that forms the basis of this application.

[6] The applicants' claim for protection is based on the discrimination that Mr. and Mrs. Sefa suffer as a result of their mixed marriage and that Monika suffers as a result of being the child of a mixed marriage. The applicants submit that the discrimination that they suffer rises to the level of persecution.

Decision Under Review

[7] On February 16, 2010, the Board dismissed the applicants' refugee claims because it found that they did not establish a well-founded fear of persecution based on a Convention ground should

they be returned to Macedonia, nor did they establish that they would be personally subjected to a risk to life, or cruel or unusual punishment, or a danger of torture if returned to Macedonia.

[8] All three applicants relied on the principal applicant's narrative, although Mrs. Sefa also testified separately at the hearing and provided an individual affidavit. The Board made an express finding that the principal applicant was a credible witness.

[9] At para. 5 of its reasons, the Board stated the determinative issue before it:

> ¶5. The determinative issue is whether or not the discrimination suffered by the claimants amounts to persecution.

[10] The Board provided what the parties agree was a clear statement of the law regarding when discrimination of the kind suffered by the applicants will rise to the level of persecution sufficient to ground a claim for protection under the Act:

> ¶9. To be considered persecution, mistreatment suffered must be serious[1] and the inflicting harm occurs with repetition or persistence, or in a systematic way.[2] To determine what qualifies as serious one must examine the harmed interest of the claimant and to what extent the interest might be compromised. The courts equate seriousness with a key denial of a core human right.[3] It is the requirement that the harm be serious that has led to a distinction between persecution and harassment. Persecution is characterized by the greater seriousness of the mistreatment involved.[4] The courts have also distinguished between persecution and mere unfairness.[5] At paragraph 54 of the *UNHRC Handbook*[6] it is stated persons who receive less favourable treatment as a result of differences are not necessarily victims of persecution. It is only in certain circumstances that discrimination

[1] *Sagharichi, Mojgan v. M.E.I.* (F.C.A., no. A-169-91), Isaac, Marceau, MacDonald, August 5, 1993, at 2.
[2] *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 20 Imm. L.R. (3d), at 733-734.
[3] Ibid, 85.
[4] *Naikar, Muni Umesh v. M.E.I.* (F.C.t.D., no 93-A-120), Joyal, June 17, 1993, at 2.
[5] *Chen, Yo Long v. M.C.I.* (F.C.T.D., no.IMM-487-94), Rihard, January 30, 1995, at 4.
[6] Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, Office of the United Nations High Commissioner For Refugees, Reedited Geneva, January 1992, p. 15.

> will amount to persecution, such as serious restrictions on one's right to earn a livelihood, right to practice religion or access to normally available educational facilities. Mistreatment may constitute discrimination or harassment and not be serious enough to be regarded as persecution.[7] A finding of discrimination not persecution is within the jurisdiction of the RPD.[8] Acts of harassment, none amounting to persecution individually, may cumulatively constitute persecution.[9] The repeated instances of harassment in the past may lead to a serious possibility of persecution in the future.[10] Whether or not measures of discrimination amount to persecution must be determined in consideration of all the circumstances.

The Court finds that the Board set out a clear and correct statement of the law with respect to this subject.

[11] The Board stated that refugee claimants bear the burden of rebutting the presumption of state protection on a balance of probabilities. The Board considered a 2008 United Stated Department of State Report that recognized the continued strain in relations between ethnic Macedonians and ethnic Albanians in Macedonia and contained reports of agitation for ethnically separate schools. The Board held in paragraph 10 that there is discrimination in Macedonia between the majority Macedonians (64.2% of the population) and the minority Albanians (25.2% of the population). Based on the government's response to that unrest, however, the Board found that the government is making serious efforts to protect its citizens and to prevent ethnic tensions from escalating. The Board further stated that the same report cited ongoing complaints by ethnic Albanians of official discrimination against them in Macedonia.

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[7] *Moudrak, Vanda v. M.C.I.* (F.C.T.D. no. IMM-1480-97), Teitelbaum, April 1, 1998.
[8] *Valdes, Roberto Manuel Olivares v. M.C.I.* (F.C.T.D., no. IMM-1902-97), Pinard, April 24, 1998.
[9] *Madelat, Firouzeh v. M.E.I.*, Mirzabeglui, Maryam v. M.E.I. (F.C.A., nos. A-537—89 and A-538-89), MacGuigan, Mahoney, Linden, January 28, 1991.
[10] *Kadhm, Suhad Mohamed v. M.C.I.* (F.C.T.D., no. Imm-652-97), Muldoon, January 8, 1998.

[12] The Board then considered the applicants' evidence regarding the discrimination that they suffered. The Board noted that the applicants knew when they married that they would face some discrimination. It recognized that their families did not support them, and referred to the supporting evidence provided by a cousin, both in oral testimony and in an affidavit, regarding the poor treatment that the applicants received from their families as a result of their marriage.

[13] The Board considered, at para. 16, the principal applicant's evidence regarding "the most serious incident that caused them to leave Macedonia". The principal applicant's ultimate response, which he provided only after being pushed to identify a single "most serious incident," involved an altercation between himself and a neighbour who owned a competing convenience store. The case was apparently resolved by the courts, and the principal applicant ultimately sold his house and business to the same neighbour. The Board found that this incident was explicable by the business competition between the two, and that the state provided the applicants with help. As a result, the Board concluded that state protection was available to the claimants and that their problems did not amount to persecution.

[14] At para. 17 the Board recognized, however, that the principal applicant stated that the incident with his neighbour was "not the deciding factor in leaving for the United States." It noted that although the principal applicant claimed that matters were worse for them after the disintegration of the Yugoslavia, he was "unable to clearly explain what was better or worse after the Federation divided." As a result, the Board found on a balance of probabilities that the onus of establishing a well-founded fear of persecution had not been discharged.

[15] The Board also considered evidence regarding the mistreatment suffered by the principal applicant's wife and daughter. The Board noted the evidence regarding the employment problems suffered by Mrs. Sefa, and described the principal applicant's testimony regarding an incident where Monika's shoes were taken by bullies at school, which he told in response to a question regarding whether anyone had ever physically attacked him.

[16] The Board reviewed the principal applicant's testimony regarding why he felt that persecution would persist were the family to return to Macedonia today.

[17] The Board concluded at para. 23:

> ¶23. Having considered all of the evidence, I find the claimants are neither Convention refugees nor persons in need of protection.

LEGISLATION

[18] Section 96 of the Act grants protection to Convention refugees:

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(b) not having a country of	

nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country	b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

[19] Section 97 of the Act grants protection to persons whose removal from Canada would subject them personally to a risk to their life, or of cruel and unusual punishment, or to a danger of torture:

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if (i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country, (ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country, (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international	b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant : (i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays, (ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas, (iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes

standards, and (iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	internationales — et inhérents à celles-ci ou occasionnés par elles, (iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

ISSUES

[20] The applicants raise two issues:

1. Did the Board properly consider whether the discrimination suffered by the applicants amounted to persecution?; and
2. Did the Board err in its finding that there was state protection available?

STANDARD OF REVIEW

[21] The determination of whether incidents of discrimination or harassment amount to persecution is a question of mixed fact and law: *Liang v. Canada (Citizenship and Immigration)*, 2008 FC 450 at para. 12. Similarly, questions of state protection concern determinations of fact and of mixed fact and law. They concern the relative weight assigned to evidence, the interpretation and assessment of such evidence, and whether the Board had proper regard to all of the evidence when reaching its decision. It is clear as a result of *Dunsmuir* and *Khosa* that questions of fact or mixed fact and law are to be reviewed on a standard of reasonableness: see, for example, *Liang* at para. 15; and my decisions in *Corzas Monjaras v. Canada (Citizenship and Immigration)*, 2010 FC 771 at para. 15; and *Rodriguez Perez v. Canada (Citizenship and Immigration)* 2009 FC 1029 at para. 25.

[22] In reviewing the Board's decision using a standard of reasonableness, the Court will consider “the existence of justification, transparency and intelligibility within the decision-making process” and “whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law”: *Dunsmuir v. New Brunswick*, 2008 SCC 9, at paragraph 47; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, at para. 59.

ANALYSIS

Issue No. 1: Did the Board properly consider whether the discrimination suffered by the applicants amounted to persecution?

[23] The applicants submit that although the Board correctly stated the law regarding when acts of harassment or discrimination may constitute persecution, it failed to apply this law to the facts of the case. The applicants stress that the law is, as the Board stated, that “[a]cts of harassment, none amounting to persecution individually, may cumulatively constitute persecution.” The applicants submit that the Board did not consider whether the individual acts of harassment that the Board recognized as evidence of discrimination could together rise to the level of persecution.

[24] The applicants cite *Soto v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 768 (Fed. T.D.), at paragraph 10:

> The distinction between persecution and other acts of harassment not warranting international protection will not always be easy to make. It is a mixed question of law and fact to be determined on case-by-case basis by the Board.

[25] In *Rajudeen v. Canada (Minister of Employment and Immigration)*, [1984] F.C.J. No. 601, 55 N.R. 129 (Fed. C.A.), the Federal Court of Appeal relied on the dictionary for guidance on the meaning of *persecution*, which is not defined in the Act and was not defined in the former version of the Act considered in *Rajudeen*. In *Rajudeen* the Federal Court of Appeal stated that to "persecute" is:

> To harass or afflict with repeated acts of cruelty or annoyance; to afflict persistently, to afflict or punish because of particular opinions or adherence to a particular creed or mode of worship.

It continued that "persecution" is:

> A particular course or period of systematic infliction of punishment directed against those holding a particular (religious belief); persistent injury or annoyance from any source.

[26] The applicants point to three aspects of the Board's decision that they submit demonstrate that the Board failed to properly determine the issue of whether the discrimination found in this case rises to the level of persecution:

1. the Board ignored documentary evidence regarding the systemic and societal discrimination and harassment prevalent and institutionalized in Macedonia;

2. the Board failed to consider whether the applicants' evidence regarding the denial of employment opportunities, the denial of opportunities to join political organizations, and the denial of protection for the applicants' daughter amounted to persecution as a denial of their basic rights; and

3. the Board's sustained consideration of certain aspects of the applicants' narrative – in particular, the principal applicant's testimony with respect to a particular instance of harassment at the hands of his neighbour – and its erroneous findings regarding the principal applicant's character – namely, its finding that he is one who discriminates, which was based on a miscommunication – demonstrate a failure to properly apply the law to the facts presented.

[27] The Board set out a comprehensive explanation of when mistreatment and harassment amounting to discrimination rises to the level of persecution. To rise to the level of persecution, the mistreatment must occur with repetition or persistence, and must be "serious." Serious mistreatment will be found where there is a severe restriction or denial of a core right, including the right to participate in the political process, earn a livelihood, practice a religion or access normally available educational facilities.

[28] With regard to its assessment of the documentary evidence, it is generally assumed that the Board has considered all of the evidence before it. However, the Board does have an obligation to refer to relevant evidence with regard to disputed facts, and may not dispense with this obligation by making a blanket statement that is has considered all of the evidence: *Cepeda-Gutierrez v. Canada (MCI)* (1998), [1998] F.C.J. No. 1425, 157 F.T.R. 35, at para. 17.

[29] This Court is satisfied that the Board's reasons evince a consideration of all of the documentary evidence. At para. 10, the Board recognizes that the documentary material evidences discrimination and ethnic tensions in Macedonia. This could include the Report entitled "Social Distance and Attitudes Towards Ethnically Mixed Marriages" which is a Board document. The Board explicitly considered the 2008 U.S. Department of State Report on Macedonia, and recognized that it indicates that there are "strained relations" between ethnic Macedonians and ethnic Albanians. At para. 11, the Board notes reports of ethnic agitation in schools, but finds that the same reports demonstrate that "the government is making serious efforts to protect its citizens and to prevent ethnic tensions from escalating."

[30] The Board further recognizes that different ethnic groups complain of official discrimination, of employment discrimination, and of political discrimination.

[31] The Board's reasons also demonstrate that it considered the totality of the applicants' testimony regarding the discrimination that they faced in Macedonia. Although the Board detailed specific incidents, in particular, the principal applicant's problems with his neighbour and business rival, its reasons demonstrate that the Board focused upon these incidents only in order to explore the severity of the discrimination faced, and not because the Board was neglecting to consider whether the cumulative impact of the discrimination amounted to persecution.

[32] The Board considered the employment problems experienced by the principal applicant's spouse and the bullying that his daughter faced at school. Although the Board did not explicitly connect the applicants' evidence regarding their difficulties of political participation or employment difficulties with its consideration of the extent to which such infringements constitute a denial of the applicants' core rights, it is clear that the Board considered all of this evidence in reaching its decision.

[33] The Board also explicitly referred to the principal applicant's statements regarding the danger that he fears upon returning to Macedonia, including that he fears being killed and fears for his daughter's future. At para. 21 the Board concluded:

> ¶21. . . . I find on a balance of probabilities that the claimant's [sic] may face discrimination but not persecution. . . .

[34] While the Board could have been clearer in its reasons regarding its factual finding of the cumulative impact of the many incidents of discrimination provided in the evidence, its reasons demonstrate that it considered all of the applicants' evidence regarding discrimination, and nevertheless found that such acts did not amount to persecution. Such a finding was reasonably open to the Board on the evidence.

Issue No. 2: Did the Board err in its findings regarding the adequacy of state protection in Macedonia?

[35] The applicants submit that the Board erred by failing to conduct a sustained and focused assessment of the adequacy of state protection in Macedonia. The applicants note that the Board's findings regarding the availability of state protection are scattered throughout the reasons and submit that the Board's statements are simply unsupported statements. The applicants further submit that the Board ought to have been concerned with the effectiveness of the government's actions, and not merely its intent to control persecution. The applicants submit that in cases where the alleged persecution is the result of the cumulative effect of harassment, the Board must conduct a more nuanced assessment of state protection, because individual instances of harassment may not warrant attention by state authorities.

[36] There is a presumption that a state that is not in complete breakdown is capable of protecting its citizens: *Canada (Attorney General) v. Ward,* [1993] 2 S.C.R. 689. The onus is upon the applicants to rebut this presumption with "clear and convincing" evidence confirming the state's inability to provide protection: *Ward*, supra, at 724-725. The evidence that state protection is unavailable must satisfy the Board on a balance of probabilities that state protection is inadequate – no state is expected to provide perfect protection to all its citizens at all times (see, e.g., *Canada*

(Minister of Employment and Immigration) v. Villafranca (1992) 18 Imm. L.R. (2d) 130, 99 D.L.R. (4th) 334 (F.C.A.)).

[37] The Board reasonably concluded that the applicants had failed to meet their burden of rebutting the presumption of the availability to them of adequate state protection. The Board stated that the applicants' evidence was that on each occasion that the applicants sought state protection the state authorities acted to resolve the issue. For example, when the principal applicant complained to the police about stones being thrown at him, the police took a report and gave the perpetrators a warning. After the Board asked the principal applicant to describe the "most serious incident" that caused them to leave Macedonia and received the story about the problems with his neighbour, the Board considered the state's response. The Board found that the police were involved and that the courts ultimately adjudicated the dispute and found both parties guilty.

[38] As a result of this evidence, the Board held that state protection was available to the claimants. This Court is satisfied that this conclusion was reasonably open to the Board based upon the evidence before it.

[39] The Board also attempted to explore whether there had been some change in conditions that would put the applicants at risk should they be returned to Macedonia now, after having spent 13 years outside of the country. The Board found, however, that the applicants' evidence in this regard was not convincing. At para. 22 the Board concluded:

> ¶22. I find the claimants are citizens of Macedonia who have experienced discrimination in the past. I conclude they have failed to establish they would face a reasonable chance of persecution on a Convention ground or be personally subjected to a risk to life, or

> cruel or unusual treatment or punishment, or a danger of torture if they were to return to Macedonia.

[40] This conclusion makes clear that the Board recognized the discrimination but found that the applicants had failed to demonstrate that the discrimination rose to the level of persecution. The Court is satisfied that the reasons are justifiable, transparent and intelligible and that the decision falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law.

CONCLUSION

[41] In all of the evidence provided by the applicants, the applicants have not satisfied, according to the finding of the Board, their onus to establish that the discrimination did inflict the type of harm, did affect their core human rights or was of such seriousness that it amounted to persecution. The Court reviews this finding on a reasonableness standard, and finds that this conclusion of the Board was reasonably open to it.

CERTIFIED QUESTION

[42] Both parties advised the Court that this case does not raise a serious question of general importance which ought to be certified for an appeal. The Court agrees.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

This application for judicial review is dismissed.

"Michael A. Kelen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1660-10
STYLE OF CAUSE:	*Steven Sefa, Mira Sefa and Monika Sefa v. The Minister of Citizenship and Immigration*
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