

Federal Court



Cour fédérale

Date: 20101208

Docket: IMM-1239-10

Citation: 2010 FC 1251

Ottawa, Ontario, December 8, 2010

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

**GABRIEL BARBU and
DANIELA GEORGIANA BARBU**

Applicants

and

**MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

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 (Act) for judicial review of the decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board, dated 8 February 2010 (Decision), which refused the applications of both the Male Applicant and the Female Applicant to be deemed persons in need of protection under section 97 of the Act.

BACKGROUND

[2] The Male and Female Applicants are married citizens of Romania. They entered Canada as visitors on October 2006 and made a refugee claim the following spring, in April 2007. They allege a risk to their lives or a risk of cruel and unusual punishment or torture if they return to Romania.

[3] The Male Applicant owned a transport company in Bucharest. He and the Female Applicant were dating, and she worked in the company, attending to the accounts and the bookkeeping. In April 2004, the Male Applicant, who was having financial difficulties in his company, borrowed 30,000 Euros from a loan shark named Vasile Sergiu Daniel (“Sergiu”). The money, plus interest, was to be paid back in September of that year. The Male Applicant was two days late with the payment. Consequently, Sergiu charged him additional fees. That same month, the Male Applicant reported Sergiu’s actions to the police. The next day, Sergiu and three other men forced their way into the Male Applicant’s house, beat him and forced him to agree to withdraw his police complaint.

[4] Between 2004 and 2006, Sergiu extorted from the Male Applicant between 78,000 and 80,000 Euros, causing the Male Applicant to sell or lose his car, his apartment and trucks used in his business. During each of the more than 20 different meetings between the men, Sergiu slapped and threatened the Male Applicant.

[5] The Male and Female Applicant were married in June 2006. The day after the wedding, Sergiu and his men came to the Female Applicant's family home. They stole the money given as wedding gifts. They threatened the Male Applicant, and they told the family to advise the Male Applicant to do something if they did not want their daughter dead. This was apparently the first time that the Female Applicant had heard of the Male Applicant's trouble with Sergiu. Sergiu was arrested in Italy shortly thereafter for an unrelated crime.

[6] The Applicants decided then that they would leave the country. They travelled to Bulgaria and Turkey, collecting money owed to the business and eventually returning to Romania. Their visitors' visas were issued in October 2006, at which time they flew to Canada where, nearly six months later, they made their refugee claims.

[7] The Applicants allege that, after their departure from Romania, Sergiu began harassing the Male Applicant's father to reveal the Applicants' whereabouts. The father reported the harassment to the police. In April 2007, the father was killed when he lost control of his car and an accident ensued. The Applicants allege that the brake lines of the vehicle had been cut, that Sergiu was responsible for the death and that he and his men attended the funeral in order to seize the Male Applicant if he presented himself.

[8] The Applicants appeared before the RPD on 9 December 2009 and 15 January 2010. They were represented by counsel and an interpreter was present. The RPD rendered its oral decision on 15 January 2010 and its written Decision on 8 February 2010. The RPD stated in its written

Decision that the Male and Female Applicants were not persons in need of protection under section 97 of the Act. The RPD also found that the Applicants were not Convention refugees, although they had not, in fact, applied for Convention refugee status. This is the Decision under review.

DECISION UNDER REVIEW

[9] The RPD accepted that the evidence of the Applicants was true. It also found, however, that neither Applicant faced a risk to life or a risk of cruel and unusual punishment or torture upon return to Romania. In its determination, the RPD considered the following four factors.

[10] First, the “primary incident” in which the Male Applicant was physically assaulted by Sergiu occurred in September 2004, yet the Male Applicant continued to live in Romania for the next two years. He was not significantly harmed, he did not flee and he did not make any claim for his safety or protection.

[11] Second, Sergiu had numerous opportunities to kill the Male Applicant, but he availed himself of none of them. Clearly, his interest was in extorting money from the Male Applicant and not in killing him.

[12] Third, the RPD doubted the seriousness of the Male Applicant’s problems with Sergiu. That the Female Applicant could have remained ignorant of the Male Applicant’s problems until they were married, despite the fact that she had been dating him since 2000 and was responsible for the

accounting at the trucking business, suggested to the RPD that the threat to their lives was “not a serious consideration” and that the problems with Sergiu were not as grave as the Applicants indicated.

[13] Finally, the Male Applicant’s evidence that he resolved to flee Romania only after the post-wedding assault suggested to the RPD that his true reason for leaving was “because he did not want to draw others into his problems with Sergiu” and not because he feared for his life.

[14] The RPD rejected the death of the Male Applicant’s father as relevant to the determination of the claim because the person responsible was never identified and Sergiu was never implicated.

[15] Having failed to establish a risk to life or a risk of cruel or unusual punishment or torture, neither the Male Applicant nor the Female Applicant could successfully establish a valid refugee claim.

ISSUES

[16] The Applicants state the following issue:

Did the RPD err in finding that the “primary incident ... occurred in 2004” when, according to the Male Applicant’s evidence, there were two major incidents, the second being when he was beaten in June 2006?

STATUTORY PROVISIONS

[17] The following provision of the Act is applicable in these proceedings:

Person in need of protection	Personne à protéger
<p>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</p>	<p>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 :</p>
<p>(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or</p>	<p>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;</p>
<p>(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if</p>	<p>b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :</p>
<p>(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,</p>	<p>(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,</p>
<p>(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,</p>	<p>(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,</p>
<p>(iii) the risk is not inherent or incidental to lawful sanctions,</p>	<p>(iii) la menace ou le risque ne résulte pas de sanctions</p>

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

Person in need of protection

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

Personne à protéger

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

STANDARD OF REVIEW

[18] The Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[19] The Applicant has brought an issue before the Court concerning the RPD's treatment of the evidence before it. In considering whether the RPD ignored certain evidence or misunderstood

the evidence, the appropriate standard is one of reasonableness. See *Dunsmuir*, above, at paragraphs 51 and 53.

[20] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with “the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.” See *Dunsmuir*, above, at paragraph 47. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the “range of possible, acceptable outcomes which are defensible in respect of the facts and law.”

ARGUMENTS

The Applicants

[21] The Applicants argue that, although the Male Applicant was threatened and physically assaulted by Sergiu more than 20 times, two incidents in particular stand out: the initial assault in September 2004; and the final assault in June 2006 on the day following the wedding.

[22] The Applicants insist that it was the second incident that precipitated their departure from Romania. It was not until he got married and his wife became involved in the problem that the Male Applicant thought of running away. The evidence concerning the second incident goes to a determinative issue of the claim, namely the nature and severity of the risk to life that the Applicants

would face if they are returned to Romania and the threat they face from the agent of persecution. However, in stating at paragraph 18 of the Decision that “the primary incident ... occurred in 2004,” the RPD overlooked the significance of the second incident and thereby committed a reviewable error.

[23] The repercussions of this oversight are evident in the remainder of the Decision. The RPD concluded that because the Male Applicant continued to meet with Sergiu between 2004 and 2006 and suffered no serious harm as a result, then the threat to their lives was “not a serious consideration.”

[24] The significance of the second incident was made clear in an exchange between the Male Applicant and the RPD during the hearing, and the RPD erred by not referring to it in the Decision.

The Respondent

[25] The Respondent argues that the RPD had the discretion to weigh the evidence before issuing its Decision. See *Aguebor v. Canada (Minister of Employment and Immigration)* (1993), 160 N.R. 315 (F.C.A.). That the RPD chose not to refer to every piece of evidence before it is not fatal to the Decision and provides no grounds for intervention by the Court. In *Akram v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 629 at paragraph 15, Justice Richard Mosley stated that a Board is “assumed to have weighed and considered all evidence before it, unless the contrary is shown.”

[26] In the instant case, the Applicants have simply taken issue with the RPD's assessment of how much weight to assign to a particular incident. They have not shown that the evidence regarding the second incident was overlooked. Indeed, the RPD did refer to the robbery and the threats of 4 June 2006 at paragraphs 8 and 18. Nonetheless, it found that the Applicants had lived in Romania between September 2004 and June 2006, that the Male Applicant had continued to meet with Sergiu and that, despite many opportunities to do so, Sergiu had not seriously harmed either Applicant. The Court has held that an applicant's disagreement with how the RPD has assessed the weight of the evidence is not a ground for judicial review. In *Singh v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1146, [2003] F.C.J. No. 1451 at paragraph 11, Justice Judith Snider stated as follows:

Disagreement with the manner in which the Board weighed the evidence is not a ground for judicial review. Further, the Board is not obligated to accept every explanation offered to it by the Applicant and is entitled to reject explanations that it finds to be not credible based on inconsistencies, contradictions or implausibilities

[27] To qualify as persons in need of protection under section 97 of the Act, the Applicants had the burden of demonstrating that they personally face a risk to life or a risk of cruel or unusual punishment or torture should they return to Romania. Having properly considered the evidence, the RPD found that the Applicants failed to establish their claims. The Respondent argues that the Decision is reasonable and, therefore, should not be disturbed.

ANALYSIS

[28] The Applicants say that the RPD failed to refer to the 2006 incident which precipitated their departure from Romania, and stated incorrectly that there was only one principal incident which occurred in 2004.

[29] The Applicants are relying upon terminology rather than substance and they are reading that terminology out of context.

[30] To begin with, the 2006 incident is clearly referred to, believed, and taken into account in the Decision. This is clear from paragraphs 8 and 18.

[31] When the RPD uses the word “primary” in subparagraph 18(1), the 2004 incident is primary only in the sense that it involved “physical assault or physical danger,” or in the sense that this was the “first” serious incident.

[32] The 2006 incident, and its significance, is again referred to and discussed in subparagraph 18(3) of the Decision. The evidence was that this incident involved robbery and threats.

[33] The Applicants have pointed the Court to pages 402 and 403 of the certified transcript where the following exchange occurs:

a. If I count every time that he was slapping me, slapping my face, when I was bringing him money and threatening me to bring him more money and so on, I believe that will be more than 20 times in 2005/2006. But the major one, like it happened in September 2004, happened only once when I got married in June 2006.

Q. So the major beatings were only in September 2004 and June 2006?

A. When I say major -- when I say major events, I mean events when they break and entry, they practically burst into our house. The first time it was into my house and the second time was into my wife's house.

So when the Male Applicant talks about "major events," he does not mean that he was beaten in 2006 as well as in 2004; in 2006, he means "events when they break and entry, they practically burst into our house." This is confirmed in the Applicants' PIF narrative at page 110 of the certified record. There was break and entry and threats in 2006, but no beating.

[34] The Applicants' narrative is that it was the 2006 incident which precipitated their departure from Romania. But there is nothing in the Decision to suggest that the RPD did not appreciate this (the full narrative is recited and believed), or that the RPD's reading of this incident was unreasonable or did not conform with the evidence before it.

[35] The Male Applicant had been beaten (as opposed to slaps) by Sergiu only in 2004 after he complained to the police and Sergiu wanted him to withdraw the complaint. Apart from this primary incident of physical abuse, the evidence was that Sergiu used slaps and threats and was

more interested in extorting money than in causing physical harm. This is precisely what the RPD found. It is possible to disagree with this finding but I cannot say that the Decision lacks justification, transparency or intelligibility, and I cannot say that it falls outside of the range of possible, acceptable outcomes which are defensible in respect of the facts and law. See *Dunsmuir*, above, at paragraph 47.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application for judicial review is dismissed.
2. There is no question for certification.

“James Russell”

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-1239-10

STYLE OF CAUSE: GABRIEL BARBU and DANIELA GEORGIANA
BARBU

Applicants

- and -

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

PLACE OF HEARING: Calgary, Alberta

DATE OF HEARING: November 3, 2010

**REASONS FOR JUDGMENT
AND JUDGMENT:** HON. MR. JUSTICE RUSSELL

DATED: December 8, 2010

APPEARANCES:

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