Federal Court  Cour fédérale

Date: 20110624

Docket: IMM-5503-10

Citation: 2011 FC 769

Ottawa, Ontario, June 24, 2011

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

SARKA KELLESOVA
RENE KELLES

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 August 19, 2010, wherein the Applicants were determined to be neither Convention refugees nor persons in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, RS 2001, c 27 [IRPA].

[2] Based on the reasons below, this application is dismissed.

I. Background

A. *Factual Background*

[3] The Applicants, Sarka Kellesova (the Principal Applicant, "PA") and her minor son, Rene Kelles (Minor Applicant) are both citizens of the Czech Republic. They arrived in Canada on February 28, 2009 and filed claims for refugee protection at the airport.

[4] The Applicants are Roma. Because of her ethnicity, the PA claims that she first faced discrimination during her school years. As an adult, she had difficulty procuring employment.

[5] The PA's son was born in 1993, and he experienced racism as early as grade one. The other students made derogatory comments to him, and he became fearful of attending school. When he was eight years old, he was physically attacked by two older boys. Again, in November 2008, the Minor Applicant was physically attacked by a Czech white male.

[6] The PA was physically assaulted by a white Czech woman in 2009. Witnesses to the attack did nothing to assist the PA. According to her Personal Information Form (PIF), she visited the police station to file a complaint, but the police would not assist her.

[7] After the latest incident, the PA and her son fled to Canada.

B. *Impugned Decision*

[8] The Board found state protection to be the determinative issue in rejecting the Applicants' claim. The PA had not approached the Czech police since 2006. Although her PIF stated that she sought police assistance in 2009, she testified that her PIF was erroneous. She explained that she did not approach the police following the attack on the Minor Applicant in 2008 because of her previous experience with the police. When the Board questioned her further, she admitted that her previous experience of police inaction was in 2001.

[9] The Board remarked that the PA was not diligent in pursuing state protection. Although the PA allegedly experienced problems prior to moving to the United Kingdom for one month of work, she re-availed to the Czech Republic in 2006. Subsequent to her return, despite allegations of persecutory attacks in 2008 and 2009, she never approached the police for state protection or assistance. Consequently, the Board concluded that she failed to provide clear and convincing evidence of the state's inability to protect her and her son, stating at page 12:

> The Board has considered the principal claimant's testimony, and concludes that her oral testimony is not corroborated by the preponderance of the documentary evidence. She did not approach the police and we do not accept her reasons for not doing so. Her prior experience was dated nine years ago. Although her fears may be subjective, we conclude that there is no objective basis for her fears.

II. Issue

[10] This application raises only one issue:

(a) Was the Board's state protection finding reasonable?

III. Standard of Review

[11] The determinative issue in the present case was state protection. Determining whether the Applicants rebutted the presumption of state protection is an issue of mixed fact and law, which is within the specialized expertise of the Board. As such, it is reviewable on a standard of reasonableness (*Zupko v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1319, 94 Imm LR (3d) 312 at para 5).

[12] As set out in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, reasonableness requires consideration of the existence of justification, transparency, and intelligibility within the decision-making process. It is also concerned with whether the decision falls within a range of acceptable outcomes that are defensible in respect of the facts and law.

IV. Argument and Analysis

A. *Was the Board's State Protection Finding Reasonable?*

[13] The Applicants submit that the documentary evidence they submitted at the hearing was twisted against them in and used in a biased manner by the Board. The Applicants also submit that the Board misconstrued the evidence before it.

[14] The Board rejected the Applicants' claim because they were unable to show that the state was unable to protect them, or that aid would not be forthcoming in the future; thus they failed to rebut the presumption of state protection. The Board came to this conclusion after weighing the documentary evidence, which admittedly had some disparate information. Mrs. Kellesova, who was self-represented at the hearing, failed to show that this finding was unreasonable.

[15] For instance, the Board considered that according to Amnesty International, the Roma continue to suffer discrimination from public officials and private individuals in education, housing, health and employment and that police generally have a negative view of Roma that sometimes includes discriminatory or disrespectful language. However, the Board reviewed evidence showing that EU accessions had led to changes and a positive impact on Czech Roma. The Czech police are obliged by law to respond to all distress calls and notify the parties of the outcome of their complaints. Furthermore, there are active NGO's providing a range of services for Roma, including legal assistance, reemployment support and educational activities.

[16] The Board is not obliged to prove that the Czech Republic can offer the Applicants effective state protection, rather, the Applicants bear the legal burden of rebutting the presumption that adequate state protection exists by adducing clear and convincing evidence which satisfies the Board on a balance of probabilities (*Carillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, 69 Imm LR (3d) 309 at para 30). The test for whether state protection "might reasonably be forthcoming" (as laid out in *Canada (Attorney General) v. Ward*, [1993] 2 SCR 689) is objective and as per Justice Judith Snider in *Judge v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1089, 133 ACWS (3d) 157 at para 13, "[i]t is not sufficient for the Applicant to simply believe that she could not avail herself of state protection."

[17] Absent evidence from the Applicants showing that the state is unwilling or unable to protect them, the Board's finding is reasonable and supported by the evidence in the record. There is no reason for this Court to intervene.

V. Conclusion

[18] No question was proposed for certification and none arises.

[19] In consideration of the above conclusions, this application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

" D. G. Near "

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**IMM-5503-10**
STYLE OF CAUSE:	**KELLESOVA ET AL. v. MCI**
PLACE OF HEARING:	**TORONTO**
DATE OF HEARING:	**APRIL 21, 2011**
REASONS FOR JUDGMENT AND JUDGMENT BY:	**NEAR J.**
DATED:	**JUNE 24, 2011**

APPEARANCES:

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