Federal Court  Cour fédérale

Date: 20150408

Docket: IMM-3625-13

Citation: 2015 FC 426

Ottawa, Ontario, April 8, 2015

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

ALBAN XHELI
RUDINA XHELI
FOTIS XHELI

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Defendant

ORDER AND REASONS

I. Introduction

[1] The Applicants seek judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada (the RPD), dated April 25, 2013, wherein the RPD determined that they were neither Convention refugees nor persons in need of protection

within the meaning of sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act).

[2] The Applicants, Alban Xheli (Mr. Xheli), as well as his spouse Rudina Xheli and son Fotis Xheli, are citizen of Albania. They arrived in Canada on April 30, 2011 and applied for refugee protection on the basis that they feared the Krasniqi clan who they claim have declared a blood feud against their family. This is allegedly a result of the 1992 shooting death of a member of the Krasniqi clan suspected of smuggling, at the hands of Mr. Xheli's father, a retired police officer.

[3] They claim that the blood feud between the families was declared in 2010 by the two sons of the victim in order to revenge their father's death. Mr Xheli's father then left his home in Tirana to seek shelter in his native village of Suhe, in southern Albania. He further advised and arranged for the Applicants to leave Albania.

[4] In support of their refugee protection claim, the Applicants adduced four pieces of evidence: namely, (i) a declaration from the Committee on National Reconciliation confirming it has been handling the case of the blood feud between the Applicants' family and the Krasniqi clan; (ii) a notarized statement from Mr. Xheli's father; (iii) an attestation from the Police Commissariat in Tirana confirming the denunciation of a blood feud made by Mr. Xheli's father; and (iv) a letter from the Commune of Qender stating that Mr. Xheli's father now resides there in his native village due to the blood feud threats he received in Tirana.

[5] The RPD found the Applicants' refugee protection claim to be neither credible nor supported by the evidence. In particular, it gave very little value to the documentary evidence submitted by the Applicants in their attempt to show that a blood feud had been declared against them.

[6] The declaration from the Committee on National Reconciliation was disregarded based on a Response to Information Request explaining that the signatory, Mr. Gjin Marku, had issued false documentation in the past. Although this was denied by the Chairman of the Committee on National Reconciliation, the RPD found that this information casts doubt on the declaration. The notarized statement executed by Mr. Xheli's father was also disregarded based on the implausibility that Mr. Xheli's father would have left the safety of his home if he were truly the target of a blood feud. The same was said about the police statement, whereby the RPD indicates that Mr. Xheli's father's "freedom of movement" and not remaining "housebound" was inconsistent with "the rules governing blood feuds", thus undermining the credibility of the claim. As for the letter from the Commune, the RPD considered it self-serving as it lacked authentication by the appropriate Albanian authorities.

[7] The RPD noted that the Response for Information Request referred to above also declares in part "The official of the Albanian Ministry of Interior indicated that the police, prosecution office, and the courts are the state institutions that handle blood feud problems, and that the courts and prosecution office are the only agencies authorized by the government to issue certificates related to blood feuds". According to the RPD, the Applicants had failed to adduce an official authentication of the blood feud.

[8] The RPD also found it implausible that Mr. Xheli's father, as a long-serving policeman, would not have obtained "a declaration from his former colleagues among the authorities authorized to issue certifications of blood feuds, namely, a competent court or prosecutor's office."

[9] It bears noting that the RPD did not analyze the issue of state protection available to the Applicants in Albania.

II. Issue and Standard of Review

[10] The main issue in this case is the assessment of the evidence made by the RPD, resulting in adverse credibility findings. As is well settled, this question is reviewed under the standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at paras 51-55; *Trako v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1063, at para 14 [*Trako*]). Indeed, assessment of evidence and credibility are two areas considered by this Court to be at the heart of the RPD's jurisdiction (*Zhou v Canada (Citizenship and Immigration)*, 2013 FC 619 at para 26; *Lubana v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116, 228 FTR 43 at paragraph 7; *Shatirishvili v Canada (Citizenship and Immigration)*, 2014 FC 407, at para 19).

However, this does not mean that the credibility findings made by the RPD are immune from review (*Rajaratnam v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1071, at para 45; *Rezmuves v Canada (Citizenship and Immigration)*, 2013 FC 973, at para 34; *Mason v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1380, at para 27; *Shaheen v Canada*

(Minister of Citizenship and Immigration), 2003 FC 1485, at para 32; *Sheikh v Canada (Minister of Citizenship and Immigration)*, 190 FTR 225, [1] [2000] FCJ No. 568 (QL), at para 22).

III. Analysis

[11] I find that the RPD's adverse findings are problematic in three respects.

A. *The implausibility of Mr. Xheli's Father's Mobility*

[12] The Respondent argues that the implausibility findings made by the RPD on the mobility of Mr. Xheli's father, despite the existence of a blood feud, were based on the documentary evidence, common-sense and rationality and thus, were reasonable.

[13] I disagree.

[14] The principle to be applied here is that the RPD may make adverse credibility findings based on the implausibility of an applicant's story in the clearest of cases. That is, when the facts as presented are outside the realm of what could reasonably be expected, or where the documentary evidence demonstrates that the events could not have happened in the manner asserted by the applicant (*Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776, [2001] FCJ No. 1131 (TD)(QL), at paras 7-8; *Ansar v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1152, at para 17). Furthermore, the RPD is under a very clear duty to justify its credibility findings with specific and clear reference to the evidence (*Leung v*

Canada (Minister of Employment and Immigration) (1994), 81 FTR 303, at p. 307; *Santos v Canada (Minister of Citizenship and Immigration)*, 2004 FC 937, at para 14 [*Santos*]).

[15] The RPD, in its decision-making, ought to have referred to the relevant evidence which could have had potentially refuted its conclusion that the blood feud lacked credibility based on Mr. Xheli's father's freedom of movement. In this case, the Applicants point to documentary evidence to contradict this implausibility finding. Indeed, the Alston Report, found in the Tribunal Record (p. 71), explains that different levels of self-isolation exist in cases of blood feuds. This report clearly states that some individuals will leave the house quite often despite the existence of a blood feud. This report is nowhere mentioned in the RPD's decision.

[16] I find that the RPD could not have reasonably concluded that the blood feud story was implausible while ignoring cogent documentary evidence to the contrary. By doing so, the RPD has committed a reviewable error (*Sierra v Canada (Minister of Citizenship and Immigration*), 2009 FC 1048, 354 FTR 243, at para 41; *Ali v Canada (Minister of Citizenship and Immigration)*, 2008 FC 448 [*Ali*]; *Santos, above*).

B. *The Declaration of the Committee on National Reconciliation*

[17] The RPD gave no weight to the declaration from the Committee on National Reconciliation adduced by the Applicants and made adverse credibility findings on the basis of allegations of improprieties on the part its signatory, Mr. Gjin Marku.

[18] First, I disagree with the Respondent that the RPD can use the information found in the Response to Information Request to assign little weight to this document the way it did. In fact, the declaration from the Committee on National Reconciliation was found to be not credible with very little explanation on the part of the RPD. Whilst it states an excerpt from the Response to Information Request which mentions an incident of false documentation issued by Mr. Marku, it fails to explain what happened to the rest of the excerpt, where this claim is strongly denied by the Committee on National Reconciliation. The RPD's decision is silent on the way it sought further information or weighed this fact.

[19] It is not the first time that the RPD is confronted with attestation letters from Mr. Marku, and neither is it for this Court. In *Trako*, above, the RPD had "devoted almost four pages of its decision to discussing Mr. Marku's attestation letter" (at para 22) and Chief Justice Crampton found this assessment to be reasonable (at para 27). However, he warned, at para 28 of the decision, that:

> (…) my conclusion on this point should not be interpreted as suggesting in any way that it will be reasonably open to the Board to routinely raise questions regarding the credibility of attestation letters from Mr. Marku or others associated with the NRC, based solely on the contents of the Alston Report. Each case will turn on its own particular facts and on the evidentiary record as a whole.

[20] A similar concern was raised by my colleague Justice Yvan Roy in *Razburgaj v Canada (Minister of Citizenship and Immigration)*, 2014 FC 151, at para 38, who dismissed the application for judicial review on the ground of state protection but nevertheless mentioned the issue with the credibility findings made by the RPD:

> As pointed out, a finding that there is available adequate state protection renders an examination of arguments about credibility

> moot. I wish however to add in passing that evidence relied on in the past coming from one Gjin Marku, the chairman of an organization called the Albanian Committee of Nationwide Reconciliation, is now under a cloud. The Board quoted extensively from a recent report on Albania in the National Documentation Package; it seems that false documents have been issued by this organization, which only adds to the murkiness about the phenomenon of blood feuds and their prevalence. Given that those reports are already 14 months old, it may be that the investigations into the activities of Mr. Marku and his organization have concluded and an update would be welcome.

[21] In light of all the information available to the RPD, it was reasonable to expect a discussion on the weight it gave to the declaration from the Committee on National Reconciliation and, more importantly, to the weight it gave to both sides of the story of Mr. Marku and the issuance of false declarations. In this respect, the RPD's decision was rendered without regard to the evidence before it and lacks transparency and intelligibility.

C. ***Lack of "Official" Authentication of the Blood Feud***

[22] I cannot agree with the Respondent that it was reasonable for the RPD to draw adverse credibility findings based on the expectation that more supporting documentation should have been filed on the part of the Applicants to establish the blood feud, including authentication from "competent Albanian authorities."

[23] What is reasonable for the RPD to expect depends on the facts of each case: (*Lopera v Canada (Minister of Citizenship and Immigration)*, 2011 FC 653; *Wokwera v Canada (Minister of Citizenship and Immigration)*, 2012 FC 132 at para 39). In view of the facts and the evidence adduced in this case, the requirement for another document attesting the existence of the blood

feud, when a declaration from the Committee on National Reconciliation and an attestation from the police were already submitted to the RPD, is problematic.

[24] Furthermore, there seems to be an ongoing debate, or at least uncertainty, with regards to which authority can issue a declaration or attestation of a blood feud. Even the Response to Information Request, referred to and quoted by the RPD in its decision, states that the police, the prosecution office and the courts are the state institutions handling blood feud problems and that, whilst the courts and the prosecutor's office are the two entities authorized to issue certifications of blood feuds, two NGOs indicated that this was not the case.

[25] Thus, in requesting an official authentication of the blood feud, the RPD failed to consider the documentary evidence before it which pointed to the fact that there was no authority in Albania authorized to authenticate a blood feud. At the very least, the availability of evidence on whether or not such authority exits being uncertain, the RPD needed to contemplate or mention this uncertainty.

[26] The Respondent also argues that not mentioning a document or a piece of evidence in a decision does not mean it was ignored by the RPD. The presumption that all documentary evidence has been weighed and considered, unless the contrary is shown, is well known (*Florea v Canada (Minister of Citizenship and Immigration),* [1993] FCJ No. 598 (FCA) (QL)).

[27] However, the RPD may make a reviewable error if it fails to mention and analyse important evidence that points away from its own conclusions, as the Court infers from this

silence that the RPD has made erroneous findings without regard to the evidence before it (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 157 FTR 35, [1998] FCJ No 1425 (QL), at para 17; *Tahmoursati v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1278, at paragraph 37; *Omoregbe v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1189, at paras 26-27; *Ali*, above, at para 24).

[28] As this Court pointed out in the recent case of *Vargas Bustos v Canada (Citizenship and Immigration)*, 2014 FC 114 [*Bustos*], sheer volume and diversity of country conditions documents will often make it administratively impractical to require a decision-maker to spell out exactly how much weight it assigns to every document (*Bustos*, at paras 35-39). However, as this Court also pointed out in *Bustos*, above, if the overlooked contrary evidence is overwhelming and the decision-maker does not explain what documentary evidence supports its conclusions, then it may be easier to conclude that the decision was unreasonable (*Bustos*, at para 39).

[29] The Alston Report, to which I have already referred, was completely ignored in the RPD's decision. Of course, the RPD was not "required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (*Newfoundland Nurses*, above, at para 16; *Herrera Andrade v Canada (Citizenship and Immigration)*, 2012 FC 1490, at para 21). However, it failed to explain why this report was disregarded. This is crucial with respect to the issue of authentication as the report makes no reference to government agencies being empowered to issue authentication certificates concerning blood feuds, thereby strongly suggesting, contrary to the RPD's reading of the evidence before it, that there are none.

Furthermore, this same report has been relied upon and found of great help when assessing blood feud cases both by the RPD and this Court. In *Andoni v Canada (Minister of Citizenship and Immigration)*, 2012 FC 516, at para 93, the Court had this to say in this respect:

> The Philip Alston Report, praised by the RPD for its objectivity, says that blood feuds are governed by "culturally understood rules," but the content of these rules "differs from region to region over time." I can find no evidence on the record that the culturally understood rules in the Applicant's region require a formal declaration of some kind. In my view, the negative credibility finding against the Applicant on this issue is both unreasonable and procedurally unfair.

[30] Therefore, I find that the RPD failed to explain why this evidence was rejected, making it impossible for this Court to understand the RPD's reasons and treatment of the evidence before it.

[31] Had these three elements of the Applicants' refugee protection claim been properly assessed by the RPD, it may have shred a different light on the evidence that was found to be self-serving by the RPD, which are the letters from the police and the Commune, as well as the notarized statement by Mr. Xheli's father. It is worth mentioning here that refugee protection claimants will always have a vested interest in the outcome of their claims and that to disregard their evidence on the sole basis that it is self-serving goes against the principle that the evidence they adduce is presumed to be true (*Nasufi v Canada (Citizenship and Immigration)*, 2011 FC 586 at para 29; *Nilam v Canada (Minister of Citizenship and Immigration)*, 2008 FC 689 at para 16; *Coitinho v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1037 at para 7).

[32] In sum, the RPD's finding that the Applicants have not credibly established that they are the subject of a blood feud and that, as a result, they face a personalized risk to their life or of cruel and unusual treatment or punishment upon return to Albania, is, in my view, unreasonable.

[33] Therefore, the judicial review application will be granted and the matter remitted back for redetermination by a different member of the RPD. Assuming the Applicants then succeed in establishing that they would face such a risk upon returning to Albania, the issue of whether the state is able and willing to protect them will presumably need to be addressed (*Trako*, above), something, as I indicated previously, the RPD did not feel necessary to do in the present case. This issue is therefore presumably left for another day.

[34] Neither party proposed a question of general importance. None will be certified.

ORDER

THIS COURT ORDERS that:

1. The application for judicial review is granted.
2. The decision of the Refugee Protection Division of the Immigration and Refugee Board, dated April 25, 2013, is set aside.
3. The matter is referred back to a different member of the Refugee Protection Division for determination.
4. No question is certified.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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