Federal Court  Cour fédérale

Date: 20160510

Docket: IMM-5358-15

Citation: 2016 FC 519

Ottawa, Ontario, May 10, 2016

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

DRITAN MUHAMETI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background

A. *Nature of the Application*

[1] This application, brought pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], seeks to set aside the October 20, 2015 decision of the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada. The RPD

rejected the applicant's refugee claim finding he was neither a Convention refugee nor a person in need of protection under sections 96 and 97 of the IRPA respectively.

[2] The application is granted for the reasons that follow.

B. *Facts*

[3] The applicant, Dritan Muhameti is a male citizen of Albania who arrived in Canada on June 13, 2012 and claimed refugee protection on June 15, 2012 on the basis that he faced persecution arising out of a blood feud between his family and the Muska family in Albania.

[4] He alleged that his family lost vast tracts of land to the communists who came to power in Albania after World War II. After the fall of communism the family was only able to reattain a small portion of their lost land. They learnt that the vast majority of their land had been improperly returned to the Muska family who had paid bribes to government officials. There was long-standing enmity between the applicant's family and the Muska family.

[5] The long-standing dispute was rekindled as the result of attempts to develop land owned by the applicant's family. The dispute resulted in the beating of the applicant's brother Fatos by the police, a force where Muska family members hold positions of influence. The applicant was subsequently beaten on the street, an incident observed by the police. This incident in turn led to the brother Fatos stabbing a Muska and then fleeing.

[6] As a result of the stabbing the police, including members of the Muska family broke down the applicant's family's door looking for Fatos. Not finding Fatos, the applicant was beaten.

[7] The Muskas then declared a blood feud and the applicant's family went into self-confinement. The police, including members of the Muska family went to the applicant's house several more times and beat the applicant and his father accusing them of hiding Fatos. The applicant escaped to Greece and then Canada.

C. *Decision under Review*

[8] The RPD found the applicant's allegations credible with one exception that the RPD found not to be central to the claim. However, the RPD rejected the applicant's claim finding no nexus existed to a Convention ground under section 96 and that the applicant would not face a risk of life under section 97 of the IRPA.

[9] The RPD found that a family's victimization alone cannot form the basis of membership in a particular social group and that victims of blood feuds are not members of a particular social group as their fear is based on criminality. Moreover, there was no nexus with political opinion under section 96 as the Muska's family's historical association with the Communist Party and the applicant's family's association with the National Front Party was not the basis of the present day conflict.

[10] The RPD concluded that the applicant does not face a likely risk to his life, noting at paragraph 21 of the decision that the Muskas and the police officers continually beat up the applicant and members of his family more than a dozen times, entering the applicant's home contrary to the *Kanun* but never killed any of them:

> If the Muskas were willing to violate the *Kanun* by entering the family home, they could have carried out their revenge by killing a member of the claimant's family. Since they did not do so the last 13 times, I do not find it likely that they would in the future. I find that assault is as far as the Muskas are willing to take this matter, and therefore there is no risk to the claimant's life, on a balance of probabilities. Their past behaviour does not demonstrate they would escalate to murder.

[11] The decision is silent on the risk of cruel and unusual treatment or punishment the applicant might face if returned to Albania, as well as the availability of state protection in that country.

II. Issues and Analysis

[12] The sole issue I need address in this application is whether or not the RPD applied the correct test in considering the question of protection under paragraph 97(1)(b) of the IRPA. The correctness standard of review applies (*Parmanathan v Canada (Minister of Citizenship and Immigration)*, 2012 FC 338 at para 11; *Ospina v Canada (Minister of Citizenship and Immigration)*, 2011 FC 681 at paras 19, 25, 2 Imm LR (4th) 73).

[13] The parties do not dispute that the RPD reasonably concluded that the applicant's claim did not demonstrate a nexus to any Convention ground under section 96 of the IRPA. The issue was whether or not the applicant had established that he would be subject to a risk to life or to a

risk of cruel and unusual treatment or punishment if returned to Albania under paragraph 97(1)(b) of the IRPA.

[14] The parties also do not dispute that the RPD analysis of the paragraph 97(1)(b) risk was limited to a risk to life.

[15] The applicant argues that the failure of the RPD to consider the question of cruel and unusual treatment or punishment is an error in law.

[16] The respondent adopts the novel position that the RPD had no obligation to consider anything more than risk to life as the question of cruel and unusual treatment or punishment only need be considered in a paragraph 97(1)(b) analysis where the conduct is instigated or condoned by public officials operating in an official capacity. In this case the RPD at paragraph 18 of its decision made an express finding that the police officers involved in the alleged persecution of the applicant were "rogue officers who have abused their authority for their own personal reasons". The respondent cites no law in support of this interpretation of paragraph 97(1)(b) of the IRPA.

[17] I am not at all persuaded by the respondent's position. Interpreting the risk of cruel and unusual treatment or punishment under paragraph 97(1)(b) to require that the risk arise from the conduct of the state itself would render the requirement under subparagraph 97(1)(b)(i) that the claimant is unable or, because of that risk, unwilling to avail themselves of the protection of that country, redundant and meaningless. Facing a risk under paragraph 97(1)(b) does not require the

risk derives from state actors but rather that the person will face such a risk if they cannot receive state protection, in addition to the other requirements under that provision. Moreover, case-law relating to blood feuds in Albania which the applicant cited shows that subsequent to a finding of no nexus to a Convention ground under section 96, the determination of the existence of risk under paragraph 97(1)(b) of the IRPA often requires resolving the issue of state protection, not whether the risk arises from state conduct (*Murati v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1324 at paras 7, 24-25, 39, 384 FTR 1; *Taho v Canada (Minister of Citizenship and Immigration)*, 2015 FC 718 at paras 18-19, 43-44).

[18] In light of the RPD's finding the applicant's narrative credible with one minor exception, the RPD's failure to in any way consider the question of risk to cruel and unusual treatment or punishment is a reviewable error and on that basis the matter is returned for reconsideration.

[19] The parties have not identified a question of general importance for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is granted the matter is returned for reconsideration by a differently constituted Board. No question is certified.

"Patrick Gleeson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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