Federal Court  Cour fédérale

Date: 20160720

Docket: IMM-440-16

Citation: 2016 FC 833

Ottawa, Ontario, July 20, 2016

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

ARBEN RECI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application pursuant to s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] for judicial review of the decision of a senior immigration officer [Officer], dated December 16, 2015 [Decision], which rejected the Applicant's Pre-Removal Risk Assessment [PRRA] application.

II. BACKGROUND

[2] The Applicant is a citizen of Albania. He claims that, in 2012, he witnessed an attempted murder in Albania. After identifying the perpetrator to the Albanian police, he began to receive death threats from the perpetrator's family members and was told that his witness testimony should be retracted. At the same time, the Applicant says he was under threats from the victim's family that his life would be in danger if he were to recant his evidence.

[3] In February 2012, the Applicant moved his family to his wife's parent's home in Buzmadh, Albania, a remote town approximately 100 km away from Mamurras, where he had received the threats.

[4] On or around September 1, 2012, the Applicant came to Canada, making his refugee claim in Vancouver, British Columbia on September 14, 2012. In a decision dated May 1, 2014, the Refugee Protection Division [RPD] found that the Applicant had viable Internal Flight Alternatives [IFAs] in Albania in Tirana, Kukes or Elbasan.

[5] On September 16, 2014, the Applicant says that his minor son and nephew were threatened in Mamurras by hooded individuals on motorbikes who said that they would kill the Applicant and his son if the Applicant did not return from Canada. The Applicant's family immediately returned to Buzmadh for safety.

[6] On or around March 12, 2015, the Applicant's brother received an anonymous text message threatening the Applicant's children.

[7] In May 2015, the Applicant applied for a PRRA.

III. DECISION UNDER REVIEW

[8] In the Decision, the PRRA Officer affirmed that the Applicant had a viable IFA in Tirana, Kukes or Elbasan and would therefore not face more than a mere possibility of persecution or a risk of torture, risk to life or risk of cruel and unusual treatment or punishment if returned to Albania.

[9] Following the RPD decision, the Applicant provided psychological and police reports in relation to the threats received by his brother, son and nephew. From these, the Officer accepted that the Applicant's family members had been subjected to, and personally affected by, these threats in Mamurras.

[10] The Officer examined current circumstances in Albania to determine if country conditions have changed significantly since the RPD decision so as to result in a personalized risk to the Applicant. The Officer noted that, while blood feuds are pervasive in Albania, the government and non-governmental organizations have implemented harsher penalties as well as reconciliation support to affected families.

[11] The Officer further noted that, while the Applicant stated his family resided in Buzmadh for two and a half years without incident or threats from the Applicant's aggressors, Buzmadh would not be a viable IFA for the Applicant's family because of difficulties related to food supplies and a lack of schooling and work opportunities.

[12] However, as regards the practicality of Tirana, Elbasan or Kukes as IFAs, the Officer found, as the RPD did, that the Applicant had failed to adduce evidence that his aggressors were looking for him outside of his hometown of Mamurras. Tirana, Albania's capital, is a thriving economic hub and home to the Applicant's sister and brother-in-law. Elbasan and Kukes are smaller in size compared to Tirana, but are developed and offer a range of services to their residents. As a person with sufficient education and work experience, the Applicant should not have trouble establishing himself in one of these locations. The Officer affirmed the finding of the RPD that all three cities were relevant and reasonable IFAs.

IV. ISSUES

[13] The Applicant raises the following issues in this application:

1. Did the Officer apply the proper legal test in his IFA determination in Albania?
2. Did the Officer err in law in determining an IFA with respect to the cities of Tirana, Kukes and Elbasan?

V. STANDARD OF REVIEW

[14] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where

the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[15] The Applicant submits that both issues are questions of law and should therefore be determined using the correctness standard of review. The Respondent, however, asserts that a PRRA officer's treatment of the evidence and conclusions are reviewed on the reasonableness standard: *Manickavasagar v Canada (Citizenship and Immigration)*, 2012 FC 429 at para 23.

[16] Only pure questions of law will attract the correctness standard of review. The first issue asks whether the decision-maker used the proper legal elements as set out in the case law in its application of the IFA test. As this is indeed a question of law, it will be determined on the standard of correctness: *Khosa v Canada (Citizenship and Immigration)*, 2009 SCC 12 at para 44 [*Khosa*].

[17] However, despite the language used by the Applicant, I am inclined to interpret the second issue as a question which goes to the overall reasonableness of the Officer's IFA determination. The decision-maker's application of the IFA test to the facts is a matter of mixed fact and law and involves areas which fall under a PRRA officer's expertise: an evaluation of

particular circumstances and country conditions: *Mohamed v Canada (Citizenship and Immigration)*, 2015 FC 758 at para 19; *Morales v Canada (Citizenship and Immigration)*, 2013 FC 557 at para 38. This second issue will therefore be reviewed using the standard of reasonableness.

[18] 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 para 47, and *Khosa*, above, at para 59. 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."

VI. STATUTORY PROVISIONS

Application for protection	**Demande de protection**
112 (1) A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1).	112 (1) La personne se trouvant au Canada et qui n'est pas visée au paragraphe 115(1) peut, conformément aux règlements, demander la protection au ministre si elle est visée par une mesure de renvoi ayant pris effet ou nommée au certificat visé au paragraphe 77(1).

VII. ARGUMENTS

A. *Applicant*

[19] The two-part IFA test requires that: (i) there is no serious possibility of the individual being persecuted in the IFA area; and (ii) conditions in the proposed IFA must be such that it would not be unreasonable in all the circumstances for an individual to seek refuge there: *Rasaratnam v Canada (Employment and Immigration)*, [1992] 1 FC 706 at 711 (FCA) [*Rasaratnam*]; *Thirunavukkarasu v Canada (Employment and Immigration)*, [1994] 1 FC 589 (FCA).

[20] As regards the first prong of the IFA test, the Applicant submits that the Officer misstated the requirements. The standard with respect to the first prong is not whether the IFA is relevant, but rather whether there is no serious possibility of the Applicant being persecuted in the part of the country in which the IFA is said to exist: *Gallo Farias v Canada (Citizenship and Immigration)*, 2009 FC 1035 at para 34. The Applicant says that it was especially important that the Officer get the first prong of the IFA test right as the Applicant's persecutors were still pursuing him three years after he had witnessed the attempted murder. Misapplying the law for the IFA test is a reviewable error and vitiates the finding: *Mendoza Velez v Canada (Citizenship and Immigration)*, 2013 FC 132.

[21] The Applicant also submits that the Officer erred in the assessment of the second prong of the IFA test. It was clear from the psychological evidence provided by the Applicant that the Applicant's son and nephew were suffering psychological side effects from being threatened.

However, the Officer ignored these personal conditions while assessing the reasonableness of the IFAs. The Applicant argues that, while the Officer is entitled to assess whether the psychological impact on a child is enough to render the IFA unreasonable, it cannot *prima facie* ignore this as a relevant factor to be assessed in the second prong of the IFA test: *Sinnathamby v Canada (Citizenship and Immigration)*, 2007 FC 334. This is especially the case since the RPD had analysed how the children's interests would be affected were they to remain in Buzmadh.

[22] The Applicant asserts that the assessment of the reasonableness of a proposed IFA is not limited to simple considerations of physical safety and involves consideration of some of the same factors that are taken into account in humanitarian and compassionate relief, including situations and factors related to children: *Ramachanthran v Canada (Citizenship and Immigration)*, 2003 FCT 673. Given that the Officer found the threats made against the Applicant's son to be credible, there was an obligation to assess if it was reasonable to require the child to relocate to another part of Albania. In failing to consider relevant psychological evidence related to the Applicant's son, the Officer committed a reviewable error.

B. *Respondent*

[23] The Respondent submits that the Applicant failed to meet his burden of providing "actual and concrete evidence" that his life and safety would be in jeopardy in the proposed IFAs: *Ranganathan v Canada (Citizenship and Immigration)*, [2001] 2 FC 164 at paras 10, 13 and 15. The evidence submitted after the RPD decision only confirms that the Applicant's family would be at risk in Mamurras, which had already been accepted. Albania's small size and the nature of

blood feuds do not inherently preclude IFAs, and the Applicant did not provide any compelling evidence that he cannot safely relocate away from Mamurras.

[24] The Applicant did not submit to the Officer that his son suffered psychological distress such that he could not safely live anywhere in Albania. The brief psychological report provided by the Applicant did not go ignored by the Officer; it only indicated that the son was troubled, scared and anxious when making a police report following the incident in which he and his cousin were threatened. It did not provide any opinion regarding whether the son would face ongoing psychological distress as a result of living anywhere in Albania. The Officer was not obligated to speculate regarding the Applicant's son's prognosis.

[25] The Respondent further submits that there is no merit to the Applicant's submission that the Officer applied the wrong legal test for IFAs. The language of "relevant and reasonable" has been used by the Court and is used in the United Nations High Commissioner for Refugees guidelines. See, for example, *Osuna v Canada (Citizenship and Immigration)*, 2011 FC 588 at para 9.

[26] The Officer observed that, without evidence to the contrary, the Applicant's aggressors have limited their search for him to his hometown of Mamurras. The Officer squarely considered the applicable legal test: whether there was no serious possibility that the Applicant would be persecuted in Tirana, Elbasan and Kukes.

VIII. ANALYSIS

A. *Wrong Legal Test*

[27] The Applicant says that the Officer mistakes the legal test for the first prong of the IFA analysis test. Instead of asking whether there is a serious possibility that the Applicant would be persecuted in one of the three proposed IFAs in accordance with *Rasaratnam*, above, the Officer asked whether the IFAs were "relevant."

[28] The Officer does indeed use the word "relevant" in his conclusions:

> In the two-pronged test of establishing an IFA as an option, the IFA in question must be relevant and reasonable. As was mentioned earlier, the RPD has already considered Tirana, Elbasan and Kukes to be viable IFA cities for the PA. The burden of establishing that an IFA does not exist, or that it would be unreasonable to require him to return to an IFA, rests with the PA. Given the information provided and my research, I find that the PA has not discharged this burden. Therefore, I conclude that for this PA, a relevant and reasonable IFA exists for him in Tirana, Elbasan or Kukes. Therefore, I am unable to conclude that there is more than a mere possibility that he will be at risk of persecution if he returns to Albania. Similarly, I am unable to conclude that he would likely be at risk to a danger of torture, risk to life, or risk of cruel and unusual treatment or punishment.

[29] It is clear that the Officer is fully aware that there is a "two-pronged test" for an IFA analysis. It is also clear from the Decision as a whole that the Officer assesses the risk to the Applicant in accordance with the jurisprudence on point. Throughout the Decision, the Officer is concerned with determining whether there is a serious possibility that the Applicant will be in danger from those who have threatened him if he and his family relocate to one of the proposed IFAs. And, as the Officer points out, the RPD has already found "Tirana, Elbasan and Kukes to

be viable IFA cities for the PA" in accordance with the two-prong test. The Court refused leave to review the RPD decision, so that decision stands and all the Officer was required to do was examine the new evidence to see if risk and reasonableness had changed. This is precisely what he did. The Applicant says that, because the Officer used the word "relevant," it is not clear what legal test he applied to the first prong of the IFA analysis. So, the Applicant is attempting to use mere terminology (use of the word "relevant") to establish a reviewable error. However, there is no suggestion in the Decision that the Officer means anything else by "relevant" other than that the Applicant will not be at risk if he and his family relocate to one of the three IFAs. In other words, the IFAs are "relevant" to the Applicant's situation because there is no serious possibility of persecution in these locations.

[30] The Court cannot place form ahead of substance. The paragraph of the Decision in which the word appears makes it clear what the word means. The Officer refers to the RPD decision and points out that the RPD "has already considered Tirana, Elbasan and Kukes to be viable IFA cities for the PA." The two prongs of the test are referred to when the Officer says that the "burden of establishing that an IFA does not exist, or that it would be unreasonable to require him to return to an IFA, rests with PA." An IFA does not exist in a location where there is a serious possibility of s 96 persecution, or s 97 risk on a balance of probabilities. If there is a serious possibility of s 96 persecution, then it is not a relevant IFA location for purposes of the second prong of the test. There is nothing in the Decision as a whole to suggest that the Officer did not assess the proposed IFAs for risk when considering the new evidence.

[31] There is no reviewable error on this issue.

B. *Reasonableness*

[32] The Applicant also argues that, in considering the second prong of the IFA test established in *Rasaratnam*, above, the Officer failed to consider whether the psychological report dealing with the Applicant's son renders the IFAs unreasonable in all of the circumstances. In other words, he says that the Officer "ignored the psychological impact of the threats on Mr. Reci's son as a relevant factor in assessing the reasonableness of the ifa and in doing so has erred in law."

[33] The report in question reads in translation as follows [*sic* throughout]:

> STATEMENT
>
> I Florinda Jakaj a psychologist at Kurbin Police Station stated that on September 17, 2014 I was present at the time of the interrogation of two juveniles **Flogest Arben Reçi** who is 11 (eleven) years old and **Eglis Bardhyl Reçi** who is 12 (twelve) years old, resident in Mamurras.
>
> Concerning the case that parents have denounced the police bodies as both are threatened with life by two motorcycle.
>
> In their statement to the police two juveniles have been able troubled psychological, scared and anxious.
>
> We issue this statement at the request of the applicant.
>
> Laç on October 20, 2014

[34] This report tells us no more than that the children were "troubled psychological [*sic*], scared and anxious" when they made their statements to the police about what had been said to them by the people on the motorcycles who had approached them and made threats. The report

was obviously submitted as evidence that the threats had occurred and have to be taken seriously. The Officer accepted this evidence and took it into account.

[35] The report says nothing at all about the psychological impact of moving the children to a safe IFA, so that there is no psychological evidence on the impact of removal to an IFA that the Officer failed to consider.

[36] Clearly, the children were frightened by the threats and there is no evidence to suggest that their fears would not be allayed if they moved to one of the proposed IFAs, or that they would suffer in any other way if they moved to an IFA. In fact, the evidence as a whole suggests that the children need to be moved away to a place where normal life can resume and they can go to school.

[37] The evidence in question cannot really be called a psychological report. It merely says in translation that "In their statement to the police two juveniles have been able troubled psychological, scared and anxious." No psychological condition is stated here that the Officer could consider and the Applicant did not ask the Officer to consider the psychological condition of the children in his IFA considerations. The cases relied upon by the Applicant deal with substantive reports or situations where children are left in Canada when parents are returned, or where teenagers were being returned to Somalia where they have no relatives. This is in no way an analogous situation where there is psychological evidence to assess or where moving the children creates an obvious danger that should have been addressed.

[38] The Applicant also says that the Decision is unreasonable because the Officer failed to consider whether the escalating and changing nature of the threats found in the new evidence revealed that the agents of harm would have the motivation and the ability to pursue him and his family in the IFAs.

[39] There was nothing in the nature of the threats themselves to suggest that the agents of harm would be willing and/or able to find the Applicant and his family in the IFAs. The Decision itself, however, makes it clear that the Officer was alive to this issue and considered it. The Officer points out that the village of Buzmadh "has provided the PA's family members the refuge they needed for several years," even though it would not be a reasonable IFA under the second prong of the IFA test. The Officer also points out that the RPD "found that the PA did not adduce evidence to demonstrate that his aggressors were looking for him outside of the town of Mamurras and in the absence of objective and corroborative evidence, the Board Member concluded that the locations of Tirana, Elbasan and Kukes were objectively reasonable IFA cities for the PA and his family."

[40] When it comes to the new evidence before the Officer, the Decision is clear that the Officer considers the evidence but does not think the risk of harm extends beyond Mamurras:

> The PA raises the issue of the city of Tirana as being "too close to Mamurras," where the PA alleges risk of serious harm. I note from a Google search "Mamurras to Tirana" that it is approximately an hour drive from Mamurras to Tirana (53 minutes). I accept the distance between Tirana and Mamurras is relatively close. However, I note that from the PA's RPD hearing, the Board Member that [*sic*] there was "no credible evidence" before her that would lead her to conclude that the PA's aggressors were looking for him outside of his hometown of Mamurras. I further note that in the PRRA application, the PA has not provided evidence to

> refute the Board Member's statement in regard to the risk of harm cited by the PA being, according to evidence presented at the hearing, confined to Mamurras. Additionally, the new evidence that has been adduced outline [*sic*] incidents that occurred back in Mamurras. Therefore, on a balance of probabilities, I find that it is more likely than not, without evidence to the contrary, that the PA's aggressors have limited their search for the PA in his hometown only.

[41] This analysis makes it clear that proximity to Mamurras was a factor in the Applicant's own assessment of the risk he faces, and that the Officer considered the new evidence as confirming that the aggressors are not disposed to search for the Applicant or his family beyond Mamurras. The Applicant may disagree with this conclusion but, in my view, he cannot say that the matter was not considered or that the Officer's conclusions on point fall outside of the range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[42] In conclusion, I don't think that the Applicant has demonstrated a reviewable error in the Decision.

[43] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. There is no question for certification.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-440-16
STYLE OF CAUSE:	ARBEN RECI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	JULY 13, 2016
JUDGMENT AND REASONS:	RUSSELL J.
DATED:	JULY 20, 2016

APPEARANCES:

Shane Molyneaux	FOR THE APPLICANT
Alison Brown	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Shane Molyneaux Law Office Barrister & Solicitor Vancouver, British Columbia	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT