

Federal Court



Cour fédérale

**Date: 20180307**

**Docket: IMM-3700-17**

**Citation: 2018 FC 270**

**Ottawa, Ontario, March 7, 2018**

**PRESENT: The Honourable Madam Justice Strickland**

**BETWEEN:**

**ANA HASA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

[1] The Applicant, Ana Hasa, seeks judicial review of a decision of the Refugee Protection Division (“RPD”) of the Immigration and Refugee Board of Canada, dated August 1, 2017, which denied her application as a Convention refugee or person in need of protection pursuant to ss 96 and 97(1), respectively, of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (“IRPA”).

[2] The Applicant is a 24 year old citizen of Albania. She claims to be at risk as a bi-sexual woman and as a result of a family blood feud. The RPD rejected her claim, however, on consent of the parties, this Court allowed her judicial review of that decision. On re-determination, the RPD again denied her claim. This is the judicial review of that decision.

[3] The RPD accepted that the Applicant is bi-sexual, that her family is involved in a blood feud with the Daci family and overall found her to be credible. However, it denied her claim on the basis that she had not rebutted the presumption that there is adequate state protection available to her in Albania. The RPD found that there was no evidence that her parents or brother made any effort to complain to a higher ranking officer or the internal affairs department of the police when they were dissatisfied with the police investigation into an assault, in November 2010, by the Dacis on her brother and father. The RPD also considered that in May 2012 the Applicant and her mother were assaulted by two men who identified themselves as being from the Daci family. She and her mother went to the hospital, the police were called and said they would investigate. However, when her mother called the police to follow up, they did not take the matter seriously and said the Dacis were honourable people who would not attack women. The RPD noted that the Applicant and her mother attributed this police inattention to the complainant's gender, but found that there was no evidence that a report was submitted to the prosecutor's office, the ombudsman or the commissioner for protection from discrimination for assistance with gender discrimination concerns about police misconduct. Nor was there evidence to support the Applicant's claim that she could not obtain state protection because the Dacis are a wealthy and powerful family whose influence over the police could subvert her state protection efforts. The fact that one officer stated that the Dacis were an honourable family was

simply the view of one individual police officer and refusal to provide protection at the local level did not constitute a broader failure to provide protection. The RPD concluded that the Applicant did not adequately test state protection by reasonably engaging with the state.

[4] The RPD stated that state protection must be assessed on the basis of whether the state has the capacity to provide protection and that the evidence demonstrated that Albania had that capacity. Upon review of the documentary evidence that the RPD described, it found that Albanian laws revealed a liberal policy shift towards lesbian, gay, bisexual, transgender and intersex (“LGBTI”) issues and that the Applicant had not provided clear and convincing proof of inadequate state protection. The RPD stated that Albania has undergone a period of transition and reform that has improved state protection and is addressing corruption. The progress made in strengthening democracy and criminal justice demonstrated that reforms for LGBTI issues will be implemented effectively. This also translated into adequate protection against blood feuds as Albania has a strong framework for law enforcement and criminal justice and is working to address corruption.

[5] Following a review of the documentary evidence primarily concerning corruption, efforts to improve police accountability, drug trafficking and blood feuds, the RPD stated that it had considered Albania’s failures, efforts and results and the evidence on state protection was not sufficient to overcome the Applicant’s responsibility to seek it out more exhaustively.

## Issues and Standard of Review

[6] The determinative issue in this matter is the reasonableness of the RPD's decision concerning state protection. The reasonableness standard applies to the RPD's assessment of evidence relating to the adequacy of state protection as this raises questions of mixed fact and law (*Lakatos v Canada (Citizenship and Immigration)*, 2018 FC 20 at para 9; *GS v Canada (Citizenship and Immigration)*, 2017 FC 599 at para 12; *Horvath v Canada (Citizenship and Immigration)*, 2013 FC 95 at para 31).

## Analysis

[7] The test for state protection is whether a country is able and willing to provide adequate protection to its citizens (*Molnar v Canada (Citizenship and Immigration)*, 2013 FC 296 at para 16, citing *Cosgun v Canada (Citizenship and Immigration)*, 2010 FC 400 at paras 45-52; *Martinez v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 23 at para 15; see also *Flores Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 (“*Flores Carrillo*”). Because adequate protection and serious efforts at protection are not the same thing (*Kumati v Canada (Citizenship and Immigration)*, 2012 FC 1519 at paras 27-28), the required analysis involves an examination of whether there exists adequate state protection at the operational level (*Majoros v Canada (Citizenship and Immigration)*, 2013 FC 421 at para 12; *Meza Varela v Canada (Citizenship and Immigration)*, 2011 FC 1364 at para 16). Failing to conduct that analysis is a reviewable error (*Mata v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 1007 at para 13; *Kotlaraova v Canada (Immigration, Refugees, and Citizenship)*, 2017 FC 444 at paras 21-22; *Castro v Canada (Citizenship and Immigration)*, 2017

FC 13 at para 11). A claimant bears the onus of rebutting the presumption of state protection using clear and convincing evidence (*Flores Carrillo* at para 38; *Smith v Canada (Citizenship and Immigration)*, 2012 FC 1283 at paras 50-51; *Cheema v Canada (Citizenship and Immigration)*, 2015 FC 441 at para 24; *LA v Canada (Citizenship and Immigration)*, 2016 FC 1334 at para 18).

[8] The RPD's analysis as to protection afforded to members of the LGBTI community revolves primarily around policy shifts as opposed to operational effectiveness. For example, the RPD states that an analysis of Albanian laws reveals a liberal policy shift towards LGBTI issues, quoting the Astrea Lesbian Foundation for Justice as stating that in the last five years the Albanian government has passed some of the most progressive LGBTI protections in the Western Balkans and its public officials have demonstrated a unique willingness and ability to partner with LGBTI activists to pass reforms (as found in the UK Home Office document "Country Information and Guidance Albania: Sexual orientation and gender identity", version 2.0, August 2016 ("Home Office Report")). The LGBTI community has celebrated several "encouraging reforms".

[9] The RPD also references the Home Office Report as noting that in May 2015 Albania's parliament approved a resolution on the protection of rights and freedoms of persons belonging to the LGBTI community. This called for an action plan, further legislative amendments and other measures in support of LGBTI people and made the ombudsman responsible for monitoring its implementation. As a result of the resolution, consultative meetings on LGBTI rights were reported to have been held to provide input on the action plan for non-discrimination

of LGBTI people for 2015-2020. As to implementation, in May 2016 the Council of Ministers adopted the National Plan of Action, and, in August 2016 by order of the prime minister, the National Group of Implementation and Coordination to implement the action plan was established. The action plan seeks to improve legal and institutional framework for protecting LGBTI persons.

[10] The RPD makes further references to signals of change, encouraging advances and actions of law makers that are highly encouraging. All of these references by the RPD to the documentary evidence concern efforts to protect the LGBTI community from discrimination. None of them speak to the operational adequacy of those efforts.

[11] The RPD also stated that the progress made in strengthening democracy and criminal justice demonstrates that reforms for LGBTI issues “will be implemented effectively”. In its conclusion, the RPD states that it had considered Albania’s failures, efforts and results and the evidence on state protection was not sufficient to overcome the Applicant’s responsibility to seek it out more exhaustively. While the reference to results suggests a consideration of operational adequacy, the RPD in the next sentence states the described implementation of criminal justice reform demonstrated “that the legal advances in relation to blood feuds and LGBTI protection *will also be implemented*”. Therefore, the RPD could not conclude that the Applicant is unlikely to get adequate state protection, “given the operational successes that have taken place”. This statement seems to suggest that the hope of LGBTI protection is based on an expectation that there will be future implementation of measures, which expectation is based on other events.

[12] I acknowledge that the RPD also referenced the Home Office Report statement that there are protections in law, avenues of redress and non-government LGBTI organizations that can assist a complainant and that effective protection is generally available for sexual minorities. Further, that the commissioner for protection from discrimination has registered complaints from LGBTI individuals and organizations and issued appropriate sanctions. However, it is concerning that the RPD's reasons were very much focused on aspirational efforts, without assessing their operational effectiveness.

[13] Ultimately, however, the decision is unreasonable because of the RPD's failure to address evidence within the record which contradicts the RPD's conclusions as to the risk of violence and adequacy of state protection for the Applicant as a LGBTI person.

[14] In that regard, the Applicant submits that the RPD cited the lack of reports relating to police ill-treatment against LGBTI associations in the last 5 years to support its finding that this signals change in Albania with respect to state protection. However, the RPD did not analyze the documentary evidence of police abuse against LGBTI individuals in Albania or the documentary evidence that persons similarly situated to the Applicant have been unable to access state protection.

[15] The Applicant references an opinion poll conducted by the National Democratic Institute, the United States Agency for International Development, the Gay and Lesbian Victory Institute and Civil Rights Defenders which showed a majority of LGBTI people in Albania experienced verbal harassment and a third of them violence due to sexual orientation (National Document

Package (“NDP”), item 6.3 ILGA-Europe, “Albania Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans, and Intersex People in Europe 2016, May 2016 (“ILGA-Europe”).

[16] The Applicant also points out that the evidence of Ms. Polina Rakina was not addressed. Ms. Rakina works at the 519 Community Centre in Toronto and testified before another RPD panel in January 2017. The Applicant submitted a transcript of Ms. Rakina’s testimony to the RPD to illustrate police violence experienced by LGBTI community members and the lack of police protection. The Applicant submits that the documentary evidence corroborates this testimony, also noting that violent attacks on sexual minorities are underreported due to police abuse as indicated in the Home Office Report.

[17] I note that in its reasons, as to violence against LGBTI individuals, the RPD makes only one reference to the documentary evidence. That is in reference to violence by police against the LGBTI community at a gay pride parade 5 years ago. However, that the Home Office Report reported that there are no longer reports of the Albanian police ill-treating known members of the LGBTI associations and, at subsequent parades, there were no violent incidents and the police ensured the activists’ safety. The RPD does not address the transcript of evidence of Ms. Rakina. This testimony was that over 3 years she has worked with 20 Albanian LGBTI individuals, about 70% of which claimed experiencing violence based on their sexual orientation, and some also claimed the police beat them. The RPD specifically accepted the transcript because it was recent and addressed state protection, but did not refer to it in its reasons. While the testimony is anecdotal and may not have the same weight as the NDP documents, having



accepted it, the RPD erred by failing to address it in its reasons as it appears to contradict the RPD's implicit finding that the Applicant is not at risk of violence in Albania as a result of her sexual orientation (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35 at para 17; *Shahzad v Canada (Citizenship and Immigration)*, 2017 FC 999 at para 38).

[18] Nor did the RPD address the Applicant's affidavit evidence that she could never disclose her sexual orientation to her family as they would beat her and try to marry her off to any man that would take her to cure her of what her family would consider to be a disease or to get her problem away from them. I note that at the close of the hearing the RPD accepted the Applicant's sexual orientation. The Applicant had also previously severed her claim from her brother's because she did not want him to know that she was bi-sexual. When appearing before the RPD she was asked if her parents knew she is bi-sexual, she replied absolutely not. She testified that she had not acted upon or disclosed this to anyone in Albania because having a different sexual orientation is considered to be a disease and abnormal there. She testified that if she lived openly as a bi-sexual there she would be bullied, be treated badly and might even be killed. Counsel for the Applicant pointed out that the submissions made to the RPD referenced the ILGA-Europe report, which singled out domestic violence as a significant issue for the LGBTI community. This report states that domestic violence episodes are common, with many verifiable cases of physical assault against LGBTI persons because their family found out they belonged to a sexual minority. Given that the RPD found the Applicant to be credible, it should have engaged with this issue and this evidence to determine if she was at risk of violence and, if

so, if state protection was available to her as an LGBTI individual. Its failure to do so renders the decision unreasonable.

[19] Given this finding, it is not necessary for me to address the other issues raised by the Applicant.

**JUDGMENT IN IMM-3700-17**

**THIS COURT'S JUDGMENT is that**

1. The application for judicial review is granted. The decision of the RPD is set aside and the matter is remitted for re-determination by a different panel;
2. No question of general importance is proposed by the parties and none arises; and
3. There will be no order as to costs.

“Cecily Y. Strickland”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-3700-17

**STYLE OF CAUSE:** ANA HASA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** FEBRUARY 26, 2018

**JUDGMENT AND REASONS:** STRICKLAND J.

**DATED:** MARCH 7, 2018

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