Federal Court Cour fédérale

Date: 20190724

Docket: IMM-6107-18

Citation: 2019 FC 991

Ottawa, Ontario, July 24, 2019

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

BLERIM MARKU
FATBARDHA MARKU
VIKTORIA MARKU

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of the Refugee Appeal Division dated November 2, 2018, which dismissed the Applicants' appeal and confirmed the decision of the Refugee Protection Division [the RPD] dated November 4, 2016. The RPD found that the

Applicants 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 [IRPA].

II. Background

[2] The Applicants are Blerim Marku [the Principal Applicant], his wife Fatbardha Marku, and their daughter Viktoria Marku (age 6). They are citizens of Albania.

[3] The Principal Applicant’s father is Esat Marku. Esat had three brothers, Lutfi, Islam, and Hasan Marku, uncles to the Principal Applicant.

[4] In January 1992, after a dispute over family-owned property, Lutfi shot and killed his brother Hasan. Lutfi then threatened to kill Esat. In August 1992, the Republic of Albania District Court of Tirana sentenced Lutfi to 20 years of imprisonment for murder. The Principal Applicant was 8 years old at this time.

[5] On May 12, 2016, a man went to Viktoria’s kindergarten, stating that he was the Principal Applicant’s uncle and wanted to see Viktoria. The kindergarten caregiver did not permit the man to see Viktoria.

[6] The caregiver called Viktoria’s parents, and the Principal Applicant reported the incident to police. The police indicated that they were limited in their actions, but they would investigate.

The Principal Applicant believes that Lutfi was the man who appeared at Viktoria's kindergarten, as he has no other uncles currently living in Albania.

[7] Later on the same day, May 12, 2016, the Principal Applicant received a threatening phone call, where the caller stated he would hurt the Principal Applicant "where it really hurts the most", and repeatedly stated that the Principal Applicant should not go to the police.

[8] The Principal Applicant had been a Captain in the Albanian army, and was soon to be promoted to Major. Fearing his uncle Lutfi, the Principal Applicant made arrangements to resign his post, and the family left for Canada just over a month after the incident, on June 16, 2016.

[9] The Applicants claimed refugee protection in Canada pursuant to sections 96 and 97 of the IRPA.

[10] The Applicants attended a hearing before the RPD on September 1 and September 20, 2016. They were represented by counsel before the RPD. The Principal Applicant testified in English, and Ms. Marku testified by way of an interpreter. Their claims were heard together, and the Principal Applicant was appointed the designated representative of Viktoria.

[11] The RPD determined that there was no nexus to a Convention ground under section 96 of the IRPA, and therefore the Applicants' claims were considered under section 97. The determinative issues for the RPD were credibility and state protection.

[12] The RPD rejected much of the Applicants’ evidence due to a lack of credibility, finding that the Applicants had failed to establish:

(i) that Lutfi was alive or present in Albania;

(ii) that the person who attended Viktoria’s kindergarten had ill intent; and

(iii) that the threatening phone call had occured.

[13] The RPD found that the Applicants had omitted information from their BOC, had embellished aspects of their testimony, and the Applicants’ allegations were not consistent with the documentary evidence of blood feuds in Albania.

[14] The RPD next considered state protection, and concluded that the Applicants had failed to rebut the presumption of state protection. In reaching this conclusion, the RPD noted that the police advised that they would investigate, that the Applicants left the country just over one month later without giving the police sufficient time to investigate, that the documentary evidence indicated adequate state protection, and that the Applicants did not make a serious attempt to avail themselves of state protection.

[15] In a decision dated November 4, 2016, the RPD found that there was insufficient credible evidence to establish a threat to the Applicants, and that the Applicants had failed to rebut the presumption of state protection [the RPD Decision].

[16] The Applicants appealed to the Refugee Appeal Division [the RAD].

III. Decision Under Review

[17] The Applicants sought to admit new evidence before the RAD, including:

(i) a letter from Viktoria's kindergarten caregiver, Ms. Alma Bicci dated December 9, 2016, describing the incident on May 12, 2016 when a man 60 to 70 years of age came to the kindergarten asking to see Viktoria [the Bicci Letter];

(ii) a letter from the Principal Applicant's father, Mr. Esat Marku, dated November 17, 2016, which states that Lutfi is still alive, that the police investigation into the incident at the kindergarten is ongoing, and that Lutfi's daughter had told him Lutfi was inquiring about Esat and his family [the Esat Letter]; and

(iii) a report from the police, dated November 1, 2016, indicating that the police had interviewed both the kindergarten caregiver and Lutfi Marku, and that the police investigation is ongoing [the Police Report].

[18] The RAD declined to admit each piece of new evidence:

(i) The RAD dismissed the Bicci Letter because it described events that occurred before the RPD Decision, there was no explanation for why it could not have been obtained sooner, and therefore the Applicants could have reasonably been expected to place this evidence before the RPD.

(ii) The RAD dismissed the Esat Letter because while the letter post-dates the RPD Decision, the Applicants had failed to show that the events described in the letter post-dates the RPD Decision, and the RAD could not deduce that the information in the letter post-dates the RPD Decision.

(iii) The RAD dismissed the Police Report on two bases: (1) that the Police Report pre-dates the RPD Decision by three days, and the Applicants had failed to explain why they could not have provided it to the RPD in advance of the RPD Decision; and (2) the events described in the Police Report took place over the six months prior to its drafting, and the Applicants had not explained why at least some of the information contained therein was not provided to the RPD prior to its decision.

[19] The RAD did admit as new evidence several documents describing the nature of blood feuds in Albania.

[20] The RAD found that the RPD erred by conducting an overly microscopic credibility analysis, and concluded that the Applicants were credible.

[21] The RAD next found that the Applicants had failed to establish that they face a prospective risk under subsection 97(1) of the IRPA, because:

(i) while the Applicants believe that Lutfi is the person who attended the kindergarten on May 12, 2016, there is insufficient evidence to support their belief, and their belief rests almost entirely on unsubstantiated assumptions;

(ii) the Applicants had failed to show that the person who attended the kindergarten intended to harm their daughter;

(iii) while the Applicants believe the threatening phone call was from Lutfi, there is no evidence upon which to base this assumption;

(iv) there were no further threats made against the family, and Lutfi had not contacted the Applicants, or the Principal Applicant's parents in Albania, since the incident.

[22] In light of this finding, the RAD did not address state protection. In a decision dated November 2, 2018, the RAD dismissed the appeal and confirmed the decision of the RPD for different reasons [the RAD Decision].

IV. Issues

[23] The issue is:

Did the RAD unreasonably assess the admissibility of new evidence and thereby unreasonably assess prospective risk?

V. Standard of Review

[24] The standard of review for the RAD's interpretation of subsection 110(4) of the IRPA is reasonableness (*Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 at para 29 [*Singh*]).

VI. Analysis

Did the RAD unreasonably assess the admissibility of new evidence and thereby unreasonably assess prospective risk?

[25] The general rule is that appeals before the RAD must proceed on the basis of the record that was before the RPD (*Singh,* above at para 51).

[26] However, subsection 110(4) of the IRPA outlines when new evidence may be submitted before the RAD:

> (4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.

[27] Pursuant to subsection 110(4) and the Federal Court of Appeal decision in *Singh* at paragraph 34, the following evidence is admissible as new evidence before the RAD:

(i) evidence that arose after the rejection of the claim;

(ii) evidence that was not reasonably available, <u>or</u>

(iii) evidence that was reasonably available, but that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.

[28] The criteria discussed in *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 at paragraphs 13 to 15 [*Raza*] (credibility, relevance, newness, and materiality), in the context of pre-removal risk assessment applications, are applicable to the subsection 110(4) determination with certain necessary modifications (*Singh* at paras 44-49).

[29] A document's newness is not determined solely by the date on which that document was authored; what is important is the date of the event or circumstance that the document seeks to prove (*Raza,* above at para 16).

[30] If there is any confusion about whether evidence should be admitted under subsection 110(4), the RAD should look to the criteria outlined in *Raza* (*Jeyakumar v Canada (Citizenship and Immigration)*, 2017 FC 241 at para 24).

[31] The Applicants submit that the RAD erred by treating the requirements of subsection 110(4) as conjunctive rather than disjunctive, and thereby unreasonably failing to admit each piece of new evidence.

(1) Bicci Letter

[32] The Bicci Letter details the incident at Viktoria's kindergarten on May 12, 2016.

[33] The RAD rejected the Bicci Letter because while it post-dated the RPD Decision, the letter spoke to events that occurred long before the RPD Decision was rendered, and there was no explanation as to why the letter could not have been placed before the RPD. The Applicants argue that as the Bicci letter post-dated the RPD Decision, it satisfied the first prong of subsection 110(4) by having arisen after the rejection of the Applicants' claim, and therefore the RAD erred by failing to admit it.

[34] The Applicants misconstrue the meaning of new evidence within subsection 110(4), arguing that the mere fact that a document post-dates the RPD Decision is sufficient to render it admissible. Rather, what is important is the date of the event or circumstance the evidence seeks to prove (*Raza* at para 16).

[35] The Bicci Letter speaks to the events of May 12, 2016, which occurred many months before the date of the RPD Decision, and in fact were the crux of the Applicants' claim before the RPD. As was noted by the RAD, the Applicants provided no explanation for why the Bicci Letter could not reasonably have been obtained earlier, or why the Applicants could not reasonably have placed it before the RPD.

[36] Therefore, the RPD reasonably determined that the Bicci Letter was not admissible under any of the three prongs of subsection 110(4) of the IRPA.

(2) Police Report

[37] The Police Report is dated November 1, 2016, three days prior to the RPD Decision, and was originally written in Albanian. It outlines that Lutfi Marku and the kindergarten caregiver were brought in for police questioning, that the matter was subsequently referred to the Prosecutor's Office of Tirane for investigation, and that the investigation remains ongoing.

[38] The RAD rejected the Police Report on the basis that it was authored three days before the RPD Decision, and the Applicants had not provided any explanation for why this document was not reasonably available prior to the RPD Decision, nor why the Applicants could not reasonably have been expected to provide it to the RPD. The RAD further found that while the events described in the Police Report are undated, it could be inferred that at least some of the events described therein occurred well prior to the RPD Decision, and therefore at least some of the information contained in the Police Report should reasonably have been provided to the RPD prior to the date of its decision.

[39] The Respondent argues that the Applicants failed to proffer affidavit evidence why it was not possible to place the police report before the RPD within three days of its authoring. The Respondent's argument ignores what is evident from the face of the document, and requires no affidavit in support – timing precluded the Report from being made available to the RPD before the hearing. As outlined in *Jeyakumar v Canada (Citizenship and Immigration)*, 2017 FC 241 at paragraphs 21 to 22 [*Jeyakumar*], the RAD may err by expecting an applicant to submit a document in an unreasonably tight timeline. Justice McVeigh found that the RAD had erred by

expecting the applicant to have submitted a letter authored by his father in Sri Lanka only eight days before the underlying decision.

[40] I find that in these circumstances, the RAD erred by failing to admit the Police Report. As the Applicants were in Canada, the Police Report was authored in Albania and required translation, and the RPD Decision was dated only three days after the Police Report, the Applicants could not reasonably be expected to have presented the Police Report to the RPD. Additionally, the Police Report outlines the status of an ongoing police investigation which had commenced only six months prior. Given this tight timeline, the Applicants cannot reasonably be faulted for failing to provide an earlier update on the police investigation.

(3) Esat Letter

[41] The Esat Letter is dated November 17, 2016, two weeks after the date of the RPD Decision. The pertinent portion of the Esat Letter reads:

> Since the time that you have left, I have obtained information in the Registrar's Office and the police about Lutfi Marku and they have confirmed to me that he is alive and that they are working to shed light on the event that occurred a few months ago.
>
> I want to notify you as well that Lutfi's daughter, Rukie Murati, came to visit me and she was concerned and said to me that Lutfi after these many years of absence, went and met her and he had asked her information about our family.

[42] The RAD rejected the Esat Letter on the basis that the Applicant had not proven that the events described in the letter arose after the RPD Decision.

[43] I find that the Esat Letter was not reasonably available to the Applicants at the time of the RPD Decision, nor could they have reasonably been expected to present it at the time of the RPD Decision. The RAD had no basis to infer that the incidents described in the letter – Esat receiving information from police and being contacted by Lutfi's daughter - occurred prior to the RPD Decision. In fact, it would seem that Esat is referring to the Police Report when he comments on the ongoing police investigation, and the Police Report pre-dates the RPD Decision by only three days.

[44] Moreover, the Esat Letter provides significant evidence that, contrary to the findings of the RAD, Lutfi is alive, living in Albania, and actively searching for the Applicants. The Applicants should not be denied a meaningful consideration of their prospective risk due to an unreasonably stringent interpretation of subsection 110(4) of the IRPA.

[45] The RAD's failure to properly apply subsection 110(4) of the IRPA is a reviewable error. The RAD was unreasonable in failing to admit the Police Report and the Esat Letter, both of which satisfy one or more of the disjunctive requirements in subsection 110(4), and therefore failed to meaningfully consider the Applicants' risk and the availability of state protection in Albania.

JUDGMENT in IMM-6107-18

THIS COURT'S JUDGMENT is that

1. The application is allowed and the matter is referred to a differently constituted panel for redetermination.
2. There is no question for certification.

"Michael D. Manson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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