Date: 20060314

Docket: IMM-2631-05

Citation: 2006 FC 330

BETWEEN:

HYSEN LEVANAJ
SANIE LEVANAJ

Applicants

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT

O'KEEFE J.

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated April 6, 2005, which determined that the applicants are neither Convention refugees nor persons in need of protection.

[2] The applicants seek an order setting aside the decision and referring the matter for redetermination by a differently constituted panel of the Board.

Background

[3] The applicants are an elderly married couple. They fled their country of nationality, Albania, because they were persecuted by state authorities for the political activism and anti-Communist, pro-Monarchist views of their family, in particular, of their son Eduard. Eduard left Albania and came to Canada in March 2001, after having been detained and beaten by the police on numerous occasions for his political activities with the Legality Movement Party (LMP or LP), a party in favour of a constitutional monarchy. Eduard's claim for refugee status was rejected by the Board on October 6, 2003 because the Board found that he was not credible, he was only an ordinary member of the LP, and the documentary material did not corroborate that members of the LP other than high-level leaders would face a serious possibility of persecution.

[4] By order dated October 28, 2004, this Court allowed the application for judicial review of Eduard's negative refugee determination and ordered that the claim be remitted for redetermination by a differently constituted panel. Justice Mactavish for the Court found that the Board's findings with respect to Eduard's credibility and the

plausibility of his claim were simply not supported by the evidence and were sufficiently central to the Board's analysis to require that the decision be set aside.

[5] The applicants in the present application came to Canada in October 2002 and claimed refugee protection. In the narrative to their Personal Information Form (PIF), they adopted Eduard's reasons for fleeing Albania and emphasized that Eduard was an executive member of the LP and a founder of a trade union.

[6] The applicants related the following additional information in their PIF narrative. In April 2001, police officers came to their home in Lac looking for Eduard. When the applicants told the police that their son had left the country and they knew nothing further, the police beat them. In August 2001, the applicants went with their nephew to the town of Dukas to find out what was happening with their ancestral property, which had been confiscated during the Communist regime. They approached the local authorities and asked for the return of their land. A government official called in the police, who detained and beat the applicants. The male applicant was so badly beaten that he had to be hospitalized. In January 2002, the female applicant was attacked by socialist youths while returning home from shopping. In May 2002, prominent socialists fired shots at the applicants' apartment. The male applicant reported this incident to the police, but the police roughed him up and demanded that he stop making false accusations against upstanding citizens.

[7] The applicants entered Canada on a visitor visa. In Canada, they lived in the same home as their son Eduardo. The applicants' refugee claim was heard on June 25, 2004. By decision dated April 6, 2005, the Board refused their claim.

[8] An unfortunate development to this story occurred after the Board rendered its decision on the applicants' claim. On April 15, 2005, the applicants received notice of this decision by way of a letter. Their son Eduard read the decision that day, and he became depressed and upset. He told his parents that the Board had for the second time misunderstood the basis of their refugee claim. The next day, on April 16, 2005, at approximately 5 a.m., Eduard told his parents that he was unwell. Paramedics were immediately called in to assist, but despite their efforts, Eduard was pronounced dead in their home. At the time of his passing, the Board had yet to reschedule a hearing to redetermine his refugee claim.

[9] This is the judicial review of the Board's decision which refused the applicants' claim.

Reasons for the Board's Decision

[10] The Board stated that the determinative issue is whether the applicants have established an objective basis for their fear of persecution because of their own and their son's affiliation with the LP.

[11] The Board found that, on a balance of probabilities, the applicants' son was an ordinary member of the LP. The Board also found that the male applicant is affiliated with the LP because of his son's membership in that party, and that the family as a whole is anti-Communist and pro-Monarchist.

[12] The Board found that the documentary evidence did not support the applicants' allegation that people at their level of the LP or pro-monarchists are persecuted. The Board preferred the documentary evidence over the applicants' evidence because the documentary evidence was gathered by reputable third-party agencies with no interest in the outcome of this claim.

[13] The Board made the following observations from the documentary evidence:

1. Albania's human rights record remained poor in some areas, as police beat and otherwise abused suspects, detainees and prisoners.

2. There is no widespread persecution of those opposed to the government; there are no confirmed cases of detainees being held strictly for political reasons; and there is currently no systematic state persecution of members of opposition parties.

3. Although in the past, LP supporters have had problems with the authorities, there is no recent credible documentary evidence that LP supporters have been subjected to maltreatment or violence simply on account of their political opinion or because they have relatives in the party. The Board noted that the leader of the LP, Ekrem Spahiu, had been arrested on September 24, 1998, on charges of carrying out violent acts against state institutions.

4. Only the active ranks or leadership of the party may be subjected to "harassment" for their political opinion.

[14] Based on the preponderance of the documentary evidence, the Board found that the applicants did not suffer the attacks alleged in their PIF narrative. Therefore, the Board concluded that the applicants would not face a serious possibility of persecution in Albania because of their political profile, or anti-Communist or pro-Monarchist views.

[15] The Board also concluded that the applicants are not persons in need of protection, as they do not have the political profile alleged such that their removal to Albania would subject them personally to a risk to their lives or a risk of cruel and

unusual treatment or punishment. Further, there were no substantial grounds to believe that their removal to Albania would subject them personally to a danger of torture.

Issues

[16] The applicants, in their memorandum, submitted the following issues for consideration:

1. Was the Board's assessment of the country conditions made in a perverse and capricious manner and without regard for the evidence before it?

2. Was the Board's assessment of the applicants' credibility made in a perverse and capricious manner and without regard for the evidence before it?

3. Did the Board err in finding that the applicants had not corroborated their evidence with documents and therefore the alleged events of past persecution had not taken place?

4. Was the Board's decision influenced by the previous decision of another Board panel made in respect of the claim of the applicants' son, and did the Board err in failing to give notice that it was taking this decision into its consideration such that the applicants did not know the case they had to meet?

5. Was there a reasonable apprehension of bias in that there are strong indications that the Board's decision was influenced by the decision of another Board panel in respect of the claim of the applicants' son?

Applicants' Submissions

[17] The applicants submitted that the evidence in their son's PIF narrative accorded him a profile that is much more substantial than that of an ordinary member of the LP. In his narrative, Eduard described in great detail his involvement with the Democratic Party at different periods of his life, his role as one of the founding members of the first independent miners union in Albania, his role as a member of the executive committee of the LP in Lac, and how these various associations and his political activism resulted in many instances of arrest, detention and physical assault at the hands of agents of the state. It was submitted that the Board did not provide any reasons as to why it discounted the son's status as an executive member of the LP or his other political roles, and in so doing, the Board acted with perverse and capricious disregard for the evidence before it. The applicants submitted that the level of their son's participation in the LP was a determinative issue, because the Board found that there was no serious possibility of persecution for ordinary members of the LP.

[18] The applicants submitted that the Board's decision contains phrases which are very similar to those found in the Board's prior decision on their son's claim. The applicants submitted that the parallel phrasings are strong indications that the Board relied on the prior decision without conducting its own independent analysis.

[19] The applicants submitted that they were not given notice that the Board would take into consideration the prior decision in respect of their son, and as a result, they did not have full knowledge of the case they had to meet. If they had been given such notice, they would have had the opportunity to make known to the Board that the prior decision of the Board had been quashed by this Court on judicial review. It was further submitted that this Board must be deemed to have knowledge of decisions of this Court that set aside one of the Board's decisions. A claimant cannot be faulted if the Board relieed upon a previous decision of the Board without ascertaining whether it had been quashed by this Court.

[20] The applicants submitted that as in this case, where the earlier decision is not formally in evidence before the Board, where the Board appears to have resorted to that decision covertly, and where the earlier decision was quashed by this Court several months before the decision at bar was made, the Board had made a patently unreasonable decision and acted in bad faith. The applicants submitted that the decision of *Dinehroodi* v. *Canada (Minister of Citizenship and Immigration)*, 2003 FCT 758 is precisely on point. In that case, Justice Rouleau determined that it was patently unreasonable for the Board to rely upon another panel's adverse credibility finding in support of its own adverse credibility finding, even though the claimant knew that the previous finding was being admitted into evidence and had an opportunity to make representations with respect to that evidence. It was submitted that the jurisprudence

makes it clear that the Board's reliance on the findings of another panel must be "limited, careful and justified".

[21] The applicants submitted that the Board's analysis was oversimplified because it was limited to considering whether persons affiliated with the LP are persecuted, and ignored the complex political history set out in the applicants' son's narrative.

[22] The applicants submitted that the documentary evidence contradicted the Board's conclusion that:

> . . . there is no recent credible documentary evidence before me that members, associates or supporters of this [Legality] party have been subjected to maltreatment or violence simply on account of their political opinion or because they have relatives among the ranks of the party, as the principal claimant alleges.

It was submitted that the documentary evidence showed that there are many instances in which supporters of the opposition parties have been victimized by the police. For instance, the excerpts cited by the Board in its reasons state that LP supporters in the Shkoder and the Mat region, are subjected to physical abuse and harassment from police.

[23] The applicants further submitted that the Board selectively cited from the documentary evidence and ignored passages which indicate that political repression,

recrimination and vengeance are very serious problems. It was submitted that the documentary evidence refers to the arrest of the LP leader and followers who protested the assassination of the Democratic Party parliamentarian, Azem Hajdari. The applicants pointed out that these events were specifically referred to in their son's PIF narrative, as he was detained and assaulted by police for protesting the unfair arrest and treatment of the LP leader.

[24] The applicants submitted that nowhere did the Board state that their testimony was internally inconsistent or otherwise contradictory. The Board presented the findings with respect to the applicants' credibility in footnote 23 of the decision. The Board faulted the applicants for failing to substantiate the key elements of their story with corroborating documents, and concluded, "Given the lack of documentary evidence, I conclude that the claimants were not subject to attacks and beatings by the Socialists and the police as they allege". It was submitted that failure to produce supporting documentation cannot reflect adversely on the applicants' credibility in the absence of evidence which contradicts the applicants' testimony (see *Miral v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 254 at paragraph 23 (T.D.) (QL)).

[25] The applicants submitted that there is a reasonable apprehension of bias because the Board based its determination on a negative decision in respect of the applicants' son.

Respondent's Submissions

[26] The respondent submitted that a review of the reasons demonstrated that the Board's finding that the applicants' son was merely an ordinary member of the LP is not central to the decision, as the problem with the claim was the lack of an objective basis to the fear of persecution.

[27] The respondent submitted that the onus was on the applicants to make the Board aware of any Federal Court decision, such as the decision allowing the judicial review in respect of their son's refugee claim. It was submitted that the Board was entitled to have regard to the applicants' son's negative refugee determination, given that the applicants stated in their PIF that they were adopting the PIF of their son. It was submitted that the fact that the applicants' counsel did not give the Board notice of the Federal Court decision does not vitiate the Board's decision, since the Board operated with the evidence it had before it at the time.

[28] The respondent submitted that the Board was correct to find that a person of the applicants' profile would not be targeted, as the documentary evidence referred to "outspoken" persons as targets and the applicants are not outspoken persons, but are simply affiliated with the LP through their son.

[29] In response to the applicants' argument that the Board selectively quoted from the evidence, the respondent submitted that the Board referred to the most relevant portion of the articles and it is unrealistic to expect the Board to quote every piece of documentary evidence. The respondent also submitted that it is open to the Board to prefer documentary evidence to the applicants' testimony.

Analysis and Decision

[30] For the purpose of this judgment, I propose to deal with the following issue:

Did the Board err in relying on a previous decision of the Board in making its decision that the applicants faced no serious possibility of persecution?

To answer this question, it must first be determined whether the Board did, in fact, rely on a previous decision of the Board, namely, the decision on the applicants' son's claim. The Board did not specifically refer to or cite from a previous decision in its reasons, nor did the Board give notice to the applicants that it was relying on the previous decision. The applicants, however, contended that the Board covertly based its decision on the previous decision, because there are parallel phrasings between the two decisions, which were written by different panel members. The applicants cited the following examples.

The decision with respect to Eduard Levanaj contains this passage:

> The panel finds the country documentation does not support the claimant's allegation that people at his level of the Legality Party are persecuted for a Convention ground. This documentation was

> gathered by reputable third-party agencies that do not have an interest in this claim. (See application record, page 270.)

A parallel phrasing is found in the decision with respect to the applicants, which states:

> I find that the documentary evidence does not support the claimant's allegation that people at his level of the Legality Party or pro-monarchists are persecuted for a Convention ground. This documentation was gathered by reputable third-party agencies that do not have an interest in the outcome of this claim. (See application record, page 12.)

The decision with respect to Eduard Levanaj states:

> Based on the preponderance of the documentary material, the panel finds, on the balance of probabilities, the claimant did not suffer the attacks he alleges in his PIF. (See application record, page 272.)

A similar passage is found in the decision with respect to the applicants:

> Based on the preponderance of the documentary evidence before me, I find, on the balance of probabilities, that the claimants did not suffer the attacks they allege in their PIF narratives. (See application record, page 16.)

The decision with respect to Eduard Levanaj makes the following finding:

> Therefore, based on weighing all the evidence, the panel finds, on the balance of probabilities, he was an ordinary member of the LP in Albania. (See application record, page 272.)

The same finding was made in the decision with respect to the applicants:

> Based on the documents supplied by counsel, I find on a balance of probabilities that the claimants' son was an ordinary member of the Legality Party. (See application record, page 12.)

[31] I am of the opinion that because of the similarity of these statements, the Board's decision relating to the applicants' son Eduard, was referred to and used in the preparation of the decision relating to the applicants. At the commencement of the hearing, the Board member gave no indication that the decision in Eduard's case would be used in the present case. The decision was not tendered in evidence nor did the applicants know that it would be utilized.

[32] It must now be determined what is the effect of the Board's use of a prior decision in making credibility findings in another decision with different applicants, without notifying the applicants that a prior decision is being relied on.

[33] The applicants argued that it was a breach of natural justice for the Board to rely on their son's earlier decision without first giving notice to the applicants that this decision would be used. The respondent submitted that the Board was entitled to make use of the applicants' son's decision because the applicants adopted the PIF of their son. However, the issue is whether the Board should have told the applicants it was going to make use of Eduard's decision so as to allow the applicants to address the findings of that decision.

[34] I agree with the applicants that the failure to apprise the applicants of the intention to make use of Eduard's decision to make credibility findings for the applicants' decision is a breach of the duty of procedural fairness. This is particularly so since Justice Mactavish of this

Court found that the Board's findings with respect to Eduard's credibility and the plausibility of his claim were simply not supported by the evidence, and consequently, set aside the decision.

[35] The Board's decision is therefore set aside and the matter is referred to a differently constituted panel of the Board for redetermination.

[36] Because of my finding on this issue, I need not deal with the other issues raised by the applicants.

[37] The parties shall have one week from the date of this judgment to submit any proposed serious question of general importance for my consideration for certification and a further three days for any reply.

"John A. O'Keefe"

Judge

ANNEX

Relevant Legislation

Paragraph 95(1)(b) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 provides that refugee protection is conferred on a person who is determined by the Board to be a Convention refugee or a person in need of protection.

95. (1) Refugee protection is conferred on a person when	95. (1) L'asile est la protection conférée à toute personne dès lors que, selon le cas:
. . .	. . .
(b) the Board determines the person to be a Convention refugee or a person in need of protection; or	b) la Commission lui reconnaît la qualité de réfugié ou celle de personne à protéger;

Section 96 and subsection 97(1) define “Convention refugee” and “person in need of protection” as follows:

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques:
(a) is outside each of their countries of nationality and is	a) soit se trouve hors de tout pays dont elle a la nationalité et

unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or

ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée:

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant:

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires

generally by other individuals in or from that country,	de ce pays ou qui s'y trouvent ne le sont généralement pas,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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