Federal Court  Cour fédérale

Date: 20100430

Docket: IMM-4607-09

Citation: 2010 FC 485

Ottawa, Ontario, April 30, 2010

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

LIJANA PRECECTAJ (a.k.a. Liljana Precetaj)
KLARA PRECETAJ
AND KLAUDIO PRECETAJ

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicants, Lijana Precectaj and her two children, apply for judicial review, pursuant to section 72 of the *Immigration and Refugee Protection Act*, (2001, c. 27) (*IRPA*) and section 18.1 of the *Federal Courts Act*, (R.S.C., 1985, c. F-7), of September 1, 2009 decision of the Immigration and Refugee Board (the Panel) refusing their claim for refugee protection.

BACKGROUND

[2] The principal Applicant and her children are from Shkoder, Albania and request refugee protection as a result of a blood feud declared against the Applicant husband's family.

[3] In May 2003, the Applicant, her husband and children fled Albania and moved to the U.S. They filed asylum claims in the U.S. based on their political activities in Albania. Their claims were denied in 2004. Their appeals were likewise denied in July 2007. The Applicant's husband was deported to Albania on September 28, 2007 but made his way to Montenegro. The Applicant and her children did not attend their deportation hearing and fled to Canada on August 27, 2007. They filed their refugee protection claims on September 5, 2007.

[4] In 2005, after the Applicant and her family had left Albania, the Applicant's cousin-in-law, Gjovalin Precectaj was involved in a property dispute with Naim Shabaj and his family. In November 2005, Gjovalin shot and killed Naim Shabaj in revenge for an earlier beating. Gjovalin Precectaj fled to Italy.

[5] A few days later, an elder from Shabaj's village declared on behalf of the Shabaj family a blood feud against the Precectaj family. In the fall of 2006, a member of the Shabaj family fired a gun into the backyard of Gjovalin Precectaj's house and wounded Gjovalin's wife, Pashke Precectaj.

[6] The Applicant states the family contacted the local police when the feud was declared and again after the wounding of Pashke Precectaj. On each occasion the police promised to follow up but took no further action. After the second incident the family inquired into the progress of the police investigation. The police told the family they had closed the case. The Precectaj's attempted to resolve the dispute with the help of a local alderman and a charity specializing in reconciliation, but their efforts failed.

DECISION UNDER REVIEW

[7] The Panel rejected the application for refugee protection finding the Applicant was not a refugee pursuant to section 96 or paragraph 97(1)(b) of *IRPA*. This finding was based on the following conclusions:

1. There was no nexus between the Applicant and a ground for refugee protection as defined by the Convention.
2. Adequate state protection is available in Albania to protect the Applicant and her children from the blood feud.

[8] The Panel referred to *Zefi v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 636 at para. 39 to support the proposition a family caught in a blood feud is not part of a "particular social group" as contemplated by the Convention protecting refugees.

[9] Further, since the Applicant was in the USA when the Shabaj family declared the feud, she had no way of testing the degree of state protection available to her in Albania. The Panel therefore considered other sources to assess if state protection was available.

[10] The Panel considered the evidence provided by Gjin Marku, an Albanian who is recognized as knowledgeable on the subject of blood feuds. The Panel rejected Mr. Marku's evidence in a large part because of his hyperbolic statement that, "…there is no justice. There is no State. There is no rule of law. And people find no place where they can seek protection" was contradicted by the documentation confirming Albania was a parliamentary democracy under the control of civilian authorities who in turn had control of the security forces.

[11] The Panel found Albania is a parliamentary democracy with an independent judiciary. Furthermore, the country's criminal code specifically condemns murder committed in pursuit of a family feud. It also criminalizes "serious threats of revenge or blood feud to a person or a minor [causing them] to stay isolated…" that offence is punishable by fine or imprisonment up to the three years.

[12] The Panel preferred the analysis on Albanian blood feuds found in reports by the US Department of State and the UK Border Agency over Mr. Marku's testimony. It found the Albanian government set up a special crimes court and a witness protection program. It found there have been prosecutions of blood feud crimes and stated:

> There is no evidence to indicate that individual Albanians fearing the actions of those seeking to carry out blood feud cannot access protection from the Albanian police and pursue these through legal mechanisms that have been set up to deal with blood feuds.

[13] The Panel recognized the Albanian police were not highly effective in dealing with the threat of blood feuds, but paraphrased Mr. Justice James Hugessen's writing when he sat on the Court of Appeal in *Minister of Employment and Immigration v. Villafranca*, (1992), 18 Imm. L.R. (2d) 130 (F.C.A.) where he wrote:

> "…where a state is in effective control of its territory, has military, police and civil authority in place, and makes serious efforts to protect its citizens from terrorist activities, the mere fact that it is not always successful at doing so will not be enough to justify a claim that the victims of terrorism are unable to avail themselves of such protection."

[14] The Panel concluded that states are presumed to be capable of protecting their citizens citing: "Local failures to provide effective policing do not amount to a lack of state protection, unless they are part of a broader pattern of state inability or refusal to provide protection" *Zhuravlvev v. Canada (Minister of Citizenship and Immigration)*, [2000] 4 F.C. 3 (T.D.) at para. 31.

[15] The Panel also found statistics showing a decrease in reported cases of blood feud murders were likely reliable because of Albania's eagerness to join the European Union. It found Albanian officials would not risk international censure by making figures up.

[16] The Panel concluded by finding the Applicants are not Convention Refugees and also found their removal to Albania would not subject them personally to a risk of life, or risk of cruel or unusual treatment or punishment under section 97(1)(b) of *IRPA*.

ISSUES

[17] The Applicants argue two issues:

1. Did the Board err in law by misapplying the definition of a Convention refugee and/or person in need of protection as it relates to the concept of state protection?

2. Did the Board err in law by failing to consider the totality of the evidence before it, thereby disregarding credible and trustworthy evidence, which, if properly considered would have resulted in a positive finding of Convention refugee status/person in need of protection?

[18] In my view, the issue is essentially a question of fact and law or of fact alone. The Panel's decision concerning state protection is a question of fact and law based on the evidence before it. Any factual error would be reviewable under section 18.1 (4)(d) of the *Federal Courts Act* where the court finds an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before the decision maker.

[19] The issue in this proceeding is whether or not the Panel erred in concluding there is adequate state protection for the Applicants from the ongoing blood feud in Albania between the Precectaj and Shabaj families.

LEGISLATION

Federal Courts Act, (R.S.C., 1985, c. F-7)

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.	18.1 (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.
…	…
(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal	(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :
(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;	a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;
(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;	b) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;
(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;	c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;
(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;	d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;
(e) acted, or failed to act, by reason of fraud or perjured evidence; or	e) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;
(f) acted in any other way that was contrary to law.	f) a agi de toute autre façon contraire à la loi.

Immigration and Refugee Protection Act, (2001, c. 27)

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 :
…	…
(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 generally by other individuals in or from that country,	(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires 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.

STANDARD OF REVIEW

[20] Given the Panel's expertise in immigration and refugee matters and the guidance of the Supreme Court in its decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9 and *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12 (*Khosa*) alleged errors of fact and law and fact are reviewed on the standard of reasonableness.

DISCUSSION

[21] The Applicant disputes the Panel's findings. For example, where the Panel finds Albania is a parliamentary democracy with control over its police, the Applicant points to sources indicating democracy in Albania is nascent and its police are weak and corrupt. Where the Panel sites statistics demonstrating a decrease in the number blood feud murders, the Applicant points to evidence that the Albanian government is reclassifying crimes to make it appear the blood feud problem is diminishing. The Applicant contends the Panel is selecting evidence that suits its conclusions. Where the Panel addresses contradictory evidence, the Applicant says it is merely summarizing other evidence, not considering it.

[22] The Minister submits the Applicant is asking this Court to reweigh the evidence. So long as the Panel's findings fit comfortably within the principles of justification, transparency and intelligibility, "it is not up to a reviewing court to substitute its own view of a preferable outcome, nor is it the function of the reviewing court to reweigh the evidence". (*Khosa*, para. 59) It argues the decision must be perverse or grossly wrong to justify review. Furthermore, it argues the Applicant must rebut the presumption of state

protection with clear and convincing evidence. *Minister of Citizenship and Immigration v. Carillo*, 2008 FCA 94 at paras. 18-19, 20, 24, 26, 30)

[23] The Minister also relies on Mr. Justice Hugessen's judgment in *Florea v. Canada (M.E.I)*, [1993] F.C.J. No. 598 (F.C.A.) at para. 1.

> "The fact that the Division did not mention each and every one of the documents entered in evidence before it does not indicate that it did not take them into account: on the contrary, a tribunal is assumed to have weighed and considered all the evidence presented to it unless the contrary is shown. As the tribunal's findings are supported by the evidence, the appeal will be dismissed."

ANALYSIS

[24] The Supreme Court in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 called for "clear and convincing confirmation" to rebut the presumption of state protection. In that case, the state at issue admitted it could not protect the applicant, nevertheless, the court concluded with respect to similar cases where there is no such admission at para. 50:

> Where such an admission is not available, however, clear and convincing confirmation of a state's inability to protect must be provided. For example, a claimant might advance testimony of similarly situated individuals let down by the state protection arrangement or the claimant's testimony of past personal incidents in which state protection did not materialize. Absent some evidence, the claim should fail, as nations should be presumed capable of protecting their citizens. Security of nationals is, after all, the essence of sovereignty. Absent a situation of complete breakdown of state apparatus, such as that recognized in Lebanon in Zalzali, it should be assumed that the state is capable of protecting a claimant.

(emphasis added)

[25] The Court justified the stringent “clear and convincing confirmation” standard for two reasons. The first is the Court’s finding all nations owe protection to their nationals. When this protection fails and nationals become refugees other countries provide protection as a surrogate to the refugee applicant’s home country.

[26] The second justification is to temper the broad operation of the presumption of a well founded fear. The Court found, “A subjective fear of persecution combined with state inability to protect the claimant creates a presumption that the fear is well-founded”.

[27] Justice Cullen considered when review of a Panel’s findings of fact is appropriate in *Hristova v. Canada (Minister of Employment and Immigration)*, 75 F.T.R. 18 at para. 22:

> It is also clear that a court can review and set aside a board's evidentiary findings under circumstances provided for in section 18.1(4) of the Federal Courts Act. The question is whether the Board made an error sufficient to be caught under s-s. 18.1(4). In Gurmeet Singh and Jaswant Narang v. M.E.I. (October 8, 1993) Action No. IMM-888-93 (F.C.T.D.) [Please see [1993] F.C.J. No. 1034], Reed J. indicated that a board's findings of fact can be reviewed under two different circumstances. First, the findings could be reviewed where there was no evidence presented that would support those findings. Second, even if there was some evidence to support those findings they might still be reviewable if, on an assessment of the evidence as a whole, those findings were unreasonable.

[28] And Mr. Justice John O'Keefe found in *Kanaku v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 394 at para. 49:

> I agree that the officer does not have to refer to every piece of evidence in the decision, the jurisprudence also makes it clear that the officer must refer to and deal with evidence that goes to the issue raised by the applicant. As the officer did not reference this evidence, I am of the view that the decision is unreasonable.

[29] I find there are two flaws in the Panel's decision.

[30] First, the Panel fails to discuss statements in the very documentary evidence it relies on supporting the Applicant's contention she and her children are at risk of death or serious injury from the blood feud should they return to Albania.

[31] Addressing this first question, the Panel relied on reports by the US Department of State and the UK Border Agency. The former, the US DOS report, while acknowledging conflicting evidence with respect to the number of blood feuds, confirms their existence in Albania:

> Societal killings continued during the year, resulting from vigilante action (including both generational "blood feud" killings and revenge killings), criminal gangs, and organized crime.
>
> Statistics varied on blood feud activity. According to the Interior Ministry, there were four blood feud related killings, out of a total of 85 murders during the year, a decrease from previous years. According to the Ministry of the Interior, this is the lowest number in 18 years. Police restarted investigations in some older cases, and uncovered the perpetrators of 81 murder cases from previous years. Nongovernmental organizations (NGOs) cited higher levels of

> blood feud activity and numbers of families effectively imprisoned in their homes out of fear of blood feud reprisals. The tradition of blood feuds stems from a traditional code of honor that is followed in only a few isolated communities. In 2007 the parliament amended the criminal code to criminalize blood feuds and make them punishable by a three-year sentence. The Court of Serious Crimes tried blood feud cases. The law punishes premeditated murder, when committed for revenge or a blood feud, with 20 years' or life imprisonment.
>
> (emphasis added)

[32] The UK Operational Guidance Note specifies it must be read in conjunction with the [UK] COI Service Albania Country of Origin. This latter document makes reference the issues paper prepared by the Research Directorate of the Immigration and Refugee Board, *Issue Paper, Albania: Blood Feuds*, May 2008. The Panel makes no mention of this document although it is part of the country documentation before it. What is significant in the IRP Issue paper is the degree to which it appears to substantiate the principal Applicant's story.

[33] The IRB Issue Paper explains Albanian blood feuds are not only revenge killings; they are part of an archaic customary law called the Kanun. Blood feuds are triggered by offences against honour. A dishonour may only be "cleansed" by the spilling of blood from the family of the offender. The Kanun has re-emerged in some places in the absence of an effective national justice system. Blood feuds are predominant in the north but occur over most of Albania. The number of blood feuds in the country is a matter of dispute between Albanian officials at home and abroad. For their part, Non-governmental agencies estimate higher levels of occurrence. The Albanian government denounces

blood feuds but it is unable to deal with them effectively. Albanian legislators have acknowledged that, “in Albania, there is an ‘absence of the rule of law’ ”.

[34] The IRB Issue Paper also provides information germane to the Applicants, a woman and two children from Shkoder. In Shkoder, a known blood feud negotiator was murdered. And while women were traditionally exempt from blood feuds, they have become targets of killings in modern iterations of the custom. Children are also affected because they must be confined to the home and deprived of the opportunity for education.

[35] It seems to me these are important details in a Report that should be explicitly considered by a Panel asking itself about the adequacy of state protection in Albania for victims of a blood feud. Failure to consider the IRB Issue Paper lends credence to the Applicants’ claim the Panel has selectively reviewed the evidence. While the Panel need not accept the information in a report by its own Research Directorate, it ought to consider information relevant to an applicant’s claim since assessing a claim in light of documentary evidence is part of its area of expertise. However, I need not decide if this omission by the Panel is a reviewable error having regard to the second flaw in the Panel’s decision.

[36] The UK Operational Guidance Note, while finding state protection adequate, acknowledges that the level of state protection in individual cases may be inadequate:

> 3.6.11 Conclusion. In general, the Albanian Government is able and willing to offer effective protection for its citizens who are the

> victims of a blood feud; however, there may be individual cases where the level of protection offered is, in practice, insufficient. The level of protection should be assessed on a case by case basis taking into account what the claimant did to seek protection and what response was received. Internal relocation may be appropriate in some cases.
>
> (emphasis added)

[37] The Panel adopts this conclusion, stating in its decision:

> The panel recognizes that the police in Albania may have difficulties in dealing with blood feuds. There may be individual cases where the level of protection offered is, in practice, insufficient and there were some local cases of police corruption.
>
> (emphasis added)

[38] The Panel's conclusion derived from the documentary evidence points to the second flaw in the Panel's decision. The Panel, having conducted a general analysis on the subject of blood feuds, fails to address Applicant's individual circumstances despite its acknowledgement there may be individual cases where police protection is insufficient.

[39] The Applicant's evidence of a blood feud between the Shabaj and Precectaj families was not disputed. Her documentary evidence from the Alderman of Gradec Village substantiates the Applicant's evidence. And there were no adverse findings of credibility.

[40] The Applicant gave evidence of a reported retaliatory attack involving a gunman shooting into the back yard of the family home. A member of the Precectaj family was shot and her injury is confirmed by medical documentation. The family reports the police were unwilling to take any action because the incident stemmed from a blood feud. The Alderman, the Peace Missionaries Union of Albania and the Nationwide Reconciliation Committee (Mr. Marku) all provide documentary evidence showing efforts to reconcile the two families have failed. This evidence points a threat exists against all the members of the Precectaj family, including the Applicant should she and her children return.

[41] The experience recounted by the Precectaj family in Albania with respect to the failures of the police to investigate their situation is that of "similarly situated individuals" to the Applicants as contemplated in *Ward*.

[42] The principal Applicant's evidence is the police were contacted by members of the Precectaj family but refused to provide any protection or pursue the perpetrators of any of the attacks in connection to this blood feud. This evidence is consistent with the documentary evidence that police may be reluctant or unwilling to intervene in a blood feud because they fear reprisal.

[43] The nature of blood feuds in Albania requires the Panel to assess the Applicant's claim on an individualized basis in order to determine whether adequate police protection is available to her and her children. In this case, the Panel made a generalized conclusion without regard to the evidence that relates to the Applicants' individual circumstances.

[44] In coming to its decision the Panel made a finding without regard for the material before it. I find this is a reviewable error.

[45] The Application for Judicial review is granted. The matter will be remitted to a differently constituted panel to be re-determined.

[46] I do not certify any question of general importance.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The Application for Judicial review is granted. The matter will be remitted to a differently constituted panel to be re-determined.

2. No question of general importance is certified.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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