Federal Court  Cour fédérale

Date: 20110124

Docket: IMM-2138-10

Citation: 2011 FC 80

Ottawa, Ontario, January 24, 2011

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

NDUE MALOCAJ

Applicant

and

THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated March 15, 2010, concluding that the applicant is not a Convention refugee or person in need of protection pursuant to sections 96 or 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 (the Act) because the applicant does not have a well-founded fear of persecution in Albania on a Convention ground, nor would he be

subject personally to a risk to his life, or to a risk of cruel and unusual treatment or punishment, or to a risk of torture in Albania.

FACTS

Background

[2] The applicant, a 45-year-old citizen of Albania, entered Canada on January 23, 2008, and claimed refugee protection on the grounds that his life is in danger in Albania as a result of a blood feud between his family and a neighbour's family that commenced in 1996.

[3] The applicant had first entered the United States in 1995 (when he was 30 years of age) with a Temporary Green Card and visa to allow him to enter and work in the United States for two years, which he received after his marriage to a United States' citizen. At that time, the blood feud underlying his refugee claim in Canada had not yet commenced.

[4] After two months, the applicant's marriage broke down and the applicant divorced his wife. The applicant applied for renewal of his Temporary Green Card, but was refused a renewal.

[5] In 1999, the applicant made a refugee claim in the United States on the basis of a fear of "political persecution". That claim was denied in September of 1999 and his appeal of that decision was dismissed on June 5, 2002. The applicant is now inadmissible to the United States for ten years, pursuant to United States law applicable to aliens who were unlawfully present in the United States for a period that exceeds one year. The applicant testified that he was advised that he could not seek

protection in the United States on the ground of the blood feud. He does not put forward the ground of political persecution in this present Canadian application.

[6] In 2007, the applicant re-married. His current wife is a permanent resident of the United States and has two children who are United States citizens. His current wife is unable to sponsor the applicant to become a United States citizen for five years.

[7] The applicant bases his refugee claim upon his fear for his life that arises as a result of a blood feud between his family and a neighbouring family, the Nikolli family, in Albania. The applicant testified that in 1996 his cousin shot and killed a member of the Nikolli family. Twenty-four hours later, the Nikolli family declared a blood feud against the male members of the applicant's family.

[8] The applicant testified that twenty male family members went into hiding in 1996, and that two brothers left Albania – one in 1996 and the other in 1997. Five members of his family – his father, uncle, and three cousins – remain in hiding in their homes today. They have been supported for thirteen years by the women of the family, and by money sent by the applicant to them.

[9] The applicant testified that the only time any of the male family members still in hiding have left their home was in February 2003, when one cousin left to take his sick son to the hospital. The cousin was shot in the leg when he ventured outside.

[10] The cousin who murdered the Nikolli family member and began the feud was arrested in 2002 and sentenced to fourteen years in prison. Despite the arrest, and despite the Malocaj family's attempts at achieving reconciliation through mediation, the applicant testified that the blood feud continues today.

Decision under Review

[11] On March 15, 2010, the Board rejected the applicant's refugee claim. The Board stated that there were three determinative issues before it:

1. The credibility of the applicant's testimony;
2. The subjective and objective components of the applicant's well-founded fear of persecution, especially with regard to the alleged agents of persecution; and
3. The availability of an internal flight alternative (IFA) in Albania.

[12] With regard to the question of credibility (the first determinative issue), the Board concluded at paragraph 14:

> ¶14. Credibility was a key issue in this claim. The court ruled in Maldonado that the sworn testimony of the claimant is presumed to be true, unless there is a valid reason to doubts its truthfulness. The panel has credibility concerns with the claimant's material evidence that was not resolved in his favour. The panel found much of the claimant's testimony to be implausible, giving rise to enough reason to rebut the presumption of truthfulness on his part.

[13] The Board provided the following reasons for finding that the applicant was not credible:

1. The Board rejected the claimant's testimony regarding why his male cousin set out to take his child to the hospital in 2003, when between 1996 and 2003 only the women had ventured out of the house. The Board found it implausible that the family would have

endangered the child by having a male family member take him to the hospital. The Board found at paragraph 15:

> ¶15. … It would be reasonable for the panel to expect that since the women were the only ones who had ventured out from 1996 to 2003, on a balance of probabilities, it would have been the female family member who would have taken the child to the hospital and avoid putting the child at risk, given the claimant's testimony that the male was in danger of being shot.

2. the Board also found at paragraph 15:

> ¶15. … It would so be reasonable to expect that, on the balance of probabilities, if the Nikolli family were serious about killing a male member of the claimant's family, that after 13 years of waiting, they would not have left the cousin with simply an injured leg. The panel finds this evidence not credible.

3. The Board also drew a negative credibility inference from the applicant's testimony that his family members had remained satisfied with being confined to their homes. The Board rejected the applicant's explanation that his father remained because he was 75 and willing to die in his home and that the other family members were forced to remain because they did not have the $5000 or $6000 that would have been required to leave at that time. The Board found at paragraph 16:

> ¶15.. . . The panel notes that two of the claimant's brothers managed to leave for Italy and France, respectively. It would be reasonable for the panel to expect that, on a balance of probabilities, that other family members would have made some effort to leave Albania, rather than succumbing to being confined in their homes for 13 years and unable to work to support their families. The panel makes a negative inference from this behaviour. The panel finds this evidence totally untrustworthy and lacking in any credibility and that, on the balance of probabilities, the incidents, as described, never occurred and, therefore, do not believe what the claimant has alleged in his claim.

4. The Board rejected the applicant's evidence of his family's attempt at reconciliation. The applicant had submitted two letters attesting to attempts at reconciliation through the services of village elders. The first letter was dated November 12, 2008, and the second was dated October 7, 2009. The Board concluded:

> In light of the negative credibility finding in this claim the panel places no weight on these documents and determines on a balance of probabilities these documents were manufactured in an attempt to embellish the claim.

5. The Board also rejected a letter from the Peace Reconciliation Missionaries of Albania, which is a body designed to deal with the reconciliation of blood feuds, dated February 10, 2008.

[14] With respect to whether the applicant had a well-founded fear of persecution in Albania (the second determinative issue), the Board found that the applicant had failed to rebut the presumption of state protection. This means no objective or subjective basis for the fear of persecution. At paragraph 15, the Board stated:

> ¶15. … The determinative issue in this claim is the objective component of the well-founded fear of persecution, notably who the claimant fears would persecute him, should he return to Albania.

[15] The Board provided the following reasons for finding that state protection would be available to the applicant's family, and for rejecting his evidence that the family had sought to avail itself of available state protection:

1. The Board found that the documentary evidence supported the fact that there is state protection available to respond to blood feuds. The evidence revealed that the law provides for 20 years to life imprisonment for a killing linked to a blood feud.

2. The Board recognized that the documentary evidence also indicated that there may be individual cases where the level of protection is insufficient. In this case, however, the Board noted that the police did respond to the alleged murder incident and sentenced the applicant's cousin to 14 years in prison.

3. The Board held that the evidence with regard to the applicant's family's attempts to access state protection was insufficient for the following reasons:

    i. The applicant was not in Albania at the time and so was relying upon reports from his family as to their diligence in seeking state protection,

    ii. The documentary evidence outlined the steps to be taken in resolving a blood feud. It stated that there would be preliminary informal meetings between mediators and the parties, followed by a formal request for mediation by one of the families to the reconciliation organization, followed by monitoring conducted by the organization in cooperation with the police and local authorities. The Board noted that the Chairman of

> Nationwide Reconciliation had stated that his group maintains a high degree of confidentiality and only keeps a record of the most important developments in a case. Nevertheless, families seeking assistance are requested to provide additional documentation, including identity documents and a description of the conflict. The Board concluded:
>
> > ¶22. While the claimant's evidence is that his family met with the mediators, there is nothing in evidence that would indicate that any of these family members made serious efforts to arrive at a solution through al available sources, including the police. The panel determines that, while the system of reconciliation and mediation may not be perfect, the government is making serious efforts to address the issue of family feuds.

[16] The Board concluded:

> > ¶23. The claimant has the burden of rebutting the presumption of state protection. This claimant has not presented clear and convincing proof of Albania's inability to protect its own citizens….

[17] With regard to the issue of the availability of an IFA (the third determinative issue), the Board held at paragraph 24:

> > ¶24. The final determinative issue in this claim is the availability of an IFA. The panel determines that even allowing the claimant's family was involved in a blood feud the panel determines that there is a viable IFA in all this claimant's particular circumstances.

[18] The Board recognized that the test with respect to an IFA is two-pronged. First, the Board must be satisfied on the balance of probabilities that there is no serious possibility of the applicant's life being at risk in the proposed IFA. Second, the Board must be satisfied ona balance of probabilities that in all the circumstances, including the circumstances particular to the applicant, the conditions in the proposed IFA are such that it is not unreasonable for the claimant to seek refuge there.

[19] The Board noted that the applicant had testified that nowhere in Albania would be safe because the Nikolli family is large. The Board found, however, that given the applicant's long absence, it was reasonable to conclude that he could safely return:

> ¶27. …The panel notes that this claimant has been living away from Albania for almost 15 years and, therefore, on a balance of probabilities, finds it unreasonable to conclude that the Nikolli family would know the claimant had returned. It would be unreasonable to conclude, on a balance of probabilities, that, after 15 years, the Nekolli family would be seeking the claimant in other cities of Albania. It would be reasonable for the panel to expect that, should the claimant run into problems, he would notify the local authorities….

[20] The Board also found that the conditions in the proposed IFA, Tirana, would be acceptable, considering the applicant's circumstances:

> ¶28. There is nothing to indicate that this claimant could not find adequate employment in Tirana. The claimant has 12 years education and has worked in maintenance and as a truck driver. The claimant has lived in the United States for 13 years and in Canada for two, where he has learned English, no doubt, an additional asset in seeking employment in Tirana. There is no evidence before the panel that this claimant will lack medical attention, or face other physical hardship in Tirana. The panel finds that the kind of hardship this claimant may face in moving to Tirana is the hardship associated with relocation and dislocation, and is not the kind of hardship that renders an IFA unreasonable.

[21] Finally, the Board concluded, at paragraph 29:

> ¶29. I find the claimant's desire to live in Canada is not motivated by fear but by an attempt to remain in North America, following his failed attempts at remaining in the United States, including an asylum claim based on political grounds. While the panel can sympathize with the claimant's motive to remain in North America, it is not a ground for refugee protection. The claimant's motives, if he wishes to live in Canada, must be dealt with under immigration law and not refugee law….

LEGISLATION

[22] Section 96 of the Act, grants protection to Convention refugees:

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 unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	a) soit se trouve hors de tout pays dont elle a la nationalité et 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.

[23] Section 97 of the Act grants protection to persons whose removal would subject them personally to a danger of torture, or to a risk to life, or to a risk of cruel and unusual treatment or punishment:

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 (i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country, (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, (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and (iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant : (i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays, (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) 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) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

ISSUES

[24] The applicant submits the following issues:

1. Whether in concluding that the applicant is not a credible and trustworthy witness, the Board erred in law by basing adverse credibility findings on perceived and not actual inconsistencies or implausibilities;

2. Whether in concluding that the documents presented should be given no weight without first considering these documents, the Board erred in law; and

3. Whether the Board erred in dealing with section 97 and concluding that there is state protection in Albania and a viable IFA.

STANDARD OF REVIEW

[25] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of (deference) to be accorded with regard to a particular category of question": see also *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, per Justice Binnie at paragraph 53.

[26] As I recognized in *Wu v. Canada (Citizenship and Immigration)*, 2009 FC 929, at paragraph 17, credibility and plausibility determinations are factual in nature. Post-*Dunsmuir* jurisprudence has established that the appropriate standard of review applicable to factual determinations is reasonableness: see also, for example, *Saleem v. Canada (Citizenship and Immigration)*, 2008 FC 389, at paragraph 13; *Malveda v. Canada (Citizenship and Immigration)*, 2008 FC 447 at paras. 17-20; *Khokhar v. Canada (Citizenship and Immigration)*, 2008 FC 449 at paras. 17-20, and my recent decision in *Dong v. Canada (Citizenship and Immigration)*, 2010 FC 55, at paragraph 17.

[27] Questions of state protection and IFA concern determinations of fact and mixed fact and law. Recent case law has affirmed that the standard of review for determinations of state protection and IFA is reasonableness. With regard to state protection, see, for example, my decisions in *Corzas Monjaras v. Canada (Citizenship and Immigration)*, 2010 FC 771 at para. 15; and *Rodriguez Perez v. Canada (Citizenship and Immigration)* 2009 FC 1029 at para. 25. With regard to IFA, see, for example, *Mejia v. Canada (Citizenship and Immigration)*, 2009 FC 354, at para. 29; *Syvyryn v.*

Canada (Citizenship and Immigration), 2009 FC 1027, 84 Imm. L.R. (3d) 316, at para. 3; and my decision in *Alvarez Cortes v. Canada (Citizenship and Immigration)*, 2010 FC 770 at para. 15.

[28] The standard of review is therefore reasonableness. In reviewing the Board's decision using a standard of reasonableness, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir, supra*, at paragraph 47; *Khosa, supra*, at paragraph 59.

ANALYSIS

Issue 1: Did the Board err by basing adverse credibility findings on perceived and not actual inconsistencies or implausibilities?

[29] The applicant submits that the Board made two erroneous adverse credibility findings. First, the applicant submits that the Board erred in concluding that it was implausible that the applicant's male cousin would have taken his child to the hospital as opposed to sending one of the women. The applicant submits that the Board failed to put this suspicion to the applicant. Had the Board questioned the applicant, the applicant submits that he would have explained that the male cousin had to take the child because none of the female family could drive, and the child had to be driven to the hospital.

[30] Second, the applicant submits that the Board erred in drawing an adverse credibility finding from the fact that none of the family members remaining in hiding attempted to leave Albania. The applicant submits that the applicant's explanation to the Board – that there was no opportunity to leave because they could not venture outside, because they were unlikely to receive visas, and that

they could not afford the cost of leaving – were reasonable and therefore ought not to have been rejected by the Board.

[31] In *Aguebor v. M.E.I.* (1993), 160 N.R. 315 at paragraph 4, the Federal Court of Appeal recognized that credibility and plausibility determinations are at the heart of the specialized jurisdiction of the Board:

> ¶4. There is no longer any doubt that the Refugee Division, which is a specialized tribunal, has complete jurisdiction to determine the plausibility of testimony: who is in a better position than the Refugee Division to gauge the credibility of an account and to draw the necessary inferences? As long as the inferences drawn by the tribunal are not so unreasonable as to warrant our intervention, its findings are not open to judicial review….

[32] With respect to the first implausibility finding, the Court concludes that this finding was reasonably open to the panel. If only female family members could venture outside their home from 1996 (when the blood feud commenced) to 2003 (when the child needed to be taken to the hospital), it was reasonable for the Board member to conclude that a female family member would be the one to have taken the child to the hospital and this would have avoided putting the child at risk since the claimant testified that a male member was in danger of being shot. At the hearing, counsel for the applicant relied on an affidavit from the applicant to explain that women members of the family could not drive a car, only male members. This evidence was not provided at the hearing. Moreover, it begs many questions. If the female family members were the only ones who ventured outside the house from 1996 to 2003, how could the female members have obtained supplies and done other jobs away from the home without access to an automobile. As well, the Court questions, would the female member not have accompanied the child to the hospital. The maternal instinct is such that a

sick child being taken to the hospital would be accompanied by the mother regardless of who was driving. Then the evidence is that the male member was shot in the leg while driving the child to the hospital. At the hearing, counsel for the applicant stated that this was a drive-by shooting. If the bullets were being shot from one car to another how would the leg have been shot at? The leg would be well protected and only the head and upper body would be exposed to bullets. For these reasons, the Court concludes that the implausibility finding on this subject was reasonably open to the Board.

[33] With respect to the second implausibility finding relied upon by the applicant, the Board notes that of the 20 members of the family in confinement in 1996, only five remained confined in the house at the time of the Refugee Board hearing in 2009. This means that 15 male members of the family were able to leave including the two that went to Italy and France respectively. This supports the Board's implausibility finding that "other family members would have made some effort to leave Albania, rather than succumbing to being confined in their homes for 13 years and unable to work and support their families". This undermines the applicant's contention that if removed to Albania, he would need to be confined in the family home.

[34] Accordingly, the Court concludes that the Board's reasons for rejecting the credibility of the applicant's evidence were reasonably open to the Board and the reasons provided are justifiable, transparent and intelligible. Accordingly, there is no basis for this Court to interfere with the Board's conclusion on credibility.

Issue 2: Did the Board err in concluding that the documents presented should be given no weight without first considering these documents?

[35] The applicant submits that even where the Board finds that a claimant lacks credibility, the Board must analyze the documentary evidence to determine whether it supports the applicant's claim. In this case, the applicant submits that the Board erred by refusing to give weight to the documents submitted by the applicant because of its negative credibility finding. The applicant further submits that the Board erred by failing to provide grounds for rejecting other documents that the applicant submitted to support the existence of the blood feud.

[36] Contrary to the applicant's submissions, the Court finds that the Board did address the applicant's documentary evidence. In support of his submission that the Board must analyze documentary evidence regardless of its findings on credibility, the applicant has pointed to a decision of Justice Nadon in *Hamid v. Canada (Minister of Employment and Immigration)*, [1995] 58 A.C.W.S. (3d) 469. In that case, however, Justice Nadon found that the Board could allow its credibility determinations to impact its consideration of the documentary evidence:

> Consequently, in my opinion, the applicant's assertion that the Board is bound to analyze the documentary evidence "independently from the applicant's testimony" must be examined in the context of the informal proceedings which prevail before the Board. Once a Board, as the present Board did, comes to the conclusion that an applicant is not credible, in most cases, it will necessarily follow that the Board will not give that applicant's documents much probative value, unless the applicant has been able to prove satisfactorily that the documents in question are truly genuine. In the present case, the Board was not satisfied with the applicant's proof and refused to give the documents at issue any probative value. Put another way, where the Board is of the view, like here, that the applicant is not credible, it will not be sufficient for the applicant to file a document and affirm that it is genuine and that the information contained therein is true. Some form of corroboration or independent proof will be required to "offset" the Board's negative conclusion on credibility. [Emphasis added by the Court.]

[37] In this case, the Board found that the two letters were "manufactured in an attempt to embellish the claim." The specifics of the Board's credibility findings – including its questioning of the recent date of both letters, the fact that the applicant was receiving the information second-hand, and the absence of additional evidence of the applicant's family's efforts to resolve the matter – result in a finding that was reasonably open to the Board on the evidence.

Issue 3: Did the Board err in dealing with section 97 and concluding that there is state protection in Albania and a viable IFA?

[38] The applicant submits that the Board failed to adequately engage with documentary evidence that referred to the difficulties that the Albanian state has in providing effective protection to victims of blood feuds. In particular the applicant submits that the Board made the following error in analyzing the documentary evidence regarding state protection:

1. The Board did not sufficiently consider the statements in the Board's country documentation May 2008 Issue Paper that the government is unable to effectively deal with blood feuds and that there is no special law in place to respond to them.

[39] The Board stated the proper test for an IFA and considered the viability of an IFA in light of the applicant's evidence. The Board found that the applicant had been outside the country for 15 years, had already left Albania before the blood feud began, and there was no reason to believe that the Nikolli family was looking for the applicant. Accordingly, the Board found that the applicant could safely return to the proposed IFA, Tirana.

[40] The Court finds that the Board's conclusion on IFA was reasonably open to it based on the evidence before it.

CERTIFIED QUESTION

[41] Both parties advised the Court that this case does not raise a serious question of general importance which ought to be certified for an appeal. The Court agrees.

JUDGMENT

THIS COURT'S JUDGMENT is that:

This application for judicial review is dismissed.

"Michael A. Kelen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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