

Federal Court



Cour fédérale

Date: 20111031

Docket: IMM-1613-11

Citation: 2011 FC 1063

Ottawa, Ontario, October 31, 2011

PRESENT: The Honourable Mr. Justice Crampton

BETWEEN:

KLODJAN TRAKO

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

AMENDED REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, Klodjan Trako, is a citizen of Albania who fears death at the hands of members of the Fidas family, who he claims have declared a blood feud against his family.

[2] He submits that the Refugee Protection Division of the Immigration and Refugee Board erred in rejecting his application for refugee protection by:

- i. finding that some of the evidence that he adduced was not credible and failing to provide him with an opportunity to address its credibility concerns;

- ii. determining that he had not rebutted the presumption of state protection; and
- iii. assessing his subjective fear in the context of its analysis under section 97 of the *Immigration and Refugee Protection Act, SC 2001, c 27 (IRPA)*.

[3] For the reasons that follow, this application will be dismissed.

I. Background

[4] In 2005, Mr. Trako fled Albania after being assaulted by armed and masked policemen who threatened him because of his support for the Democratic Party. Upon arriving in the United States, he was arrested and detained for six months. He filed a claim for asylum and settled in Wisconsin following his release from detention.

[5] In November 2006, he began to live with Enkeleda Hervert and her daughter from a prior marriage. Ms. Hervert is also of Albanian ethnicity.

[6] In March 2007, Mr. Trako and Ms. Hervert ceased their romantic relationship, but continued living together.

[7] In June 2008, Ms. Hervert's mother visited the United States and learned of the relationship between Mr. Trako and her daughter. Soon thereafter, Ms. Hervert's father, whose name is Defrim Fidas and who lives in Albania, told Mr. Trako that he could not separate from his daughter because that would harm the Fidas family's honour. A short while later, Mr. Trako allegedly learned that a representative of the Fidas family had declared a blood feud between the two families.

[8] After allegedly being attacked by two Albania men who told him that the attack was a message from Mr. Fidas, Mr. Trako fled to Canada and submitted his claim for refugee protection in April 2010. His claim was based on two grounds, namely, (i) a fear of persecution by reason of his political opinion, and (ii) a fear of death at the hands of the Fidas family.

II. The Decision under Review

[9] The Board identified state protection as being the determinative issue and ultimately found that Mr. Trako had not demonstrated, with clear and convincing evidence, that he would be unable to avail himself of adequate state protection if he were to return to Albania and to require such protection.

[10] The Board also rejected Mr. Trako's claim for protection based on his political activities in Albania. Although it found Mr. Trako to be generally credible with respect to his account of events that occurred in Albania before he fled to the US, it noted that the Democratic Party, which he supported, is currently in power. The Board proceeded to determine that he had not provided sufficient evidence to support that particular claim. Mr. Trako did not contest that aspect of the Board's determination before this Court.

[11] In the course of its decision, the Board also made various credibility findings. In particular, it questioned the credibility of (i) an attestation letter from Gjin Marku, Chairman of the Nationwide Reconciliation Committee (NRC), which confirmed the existence of a blood feud between the Fidas and Trako families, and (ii) a letter from Mr. Trako's father stating that a member of the Fidas family had contacted him to declare a blood feud.

[12] In addition, the Board found that Mr. Trako's departure from the United States, where he had been living since February 2005 and where he had an outstanding claim for asylum, was not consistent with having a subjective fear of being harmed or killed should he return to Albania.

[13] Nevertheless, the Board noted that even if it had found Mr. Trako to be credible, state protection would be reasonably forthcoming to him should he return to Albania.

III. The Standard of Review

[14] With one exception, the issues that Mr. Trako has raised are questions of fact or questions of mixed fact and law that are reviewable on a standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at paras 51-55). In short, the Board's decision will stand unless it does not fall "within the range of possible, acceptable outcomes which are defensible in respect of the facts and law" and is not sufficiently justified, transparent and intelligible (*Dunsmuir*, at para 47).

[15] The issue of procedural fairness and natural justice that Mr. Trako has raised is reviewable on a standard of correctness (*Dunsmuir*, above, at paras 55, and 79; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339, at para 43).

IV. Analysis

A. *Did the Board err in finding that certain evidence adduced by Mr. Trako was not credible, and in failing to provide him with an opportunity to address its credibility concerns?*

[16] Mr. Trako submits that it was unreasonable for the Board to identify "serious credibility concerns" with Mr. Marku's attestation letter, when:

- i. a recent response to information request that appears on the Board's website recognizes that the NRC "is the only blood feud organization authorized by the Albanian government to verify the authenticity of blood feuds and to issue attestation letters";
- ii. other documentation on the Board's website notes that a Canadian embassy official, presumably located in Albania, "stated that the authenticity of blood feuds may be verified by contacting the chairperson of the [NRC]"; and
- iii. this Court has on numerous occasions found Mr. Marku and the NRC to be credible and has relied on evidence provided by Mr. Marku to others on behalf of the NRC to set aside decisions by the Board.

[17] I disagree.

[18] The Board made it very clear that, even if it had found Mr. Trako's claims with respect to the blood feud to have been credible, state protection would be reasonably forthcoming to him should he return to Albania.

[19] That said, the fact that the NRC may be recognized by the Board to be the only organization that is authorized by the Albanian government to verify the authentic city of blood feuds does not preclude the Board from questioning the credibility of attestation letters written by Mr. Marku on behalf of the NRC in certain cases. As legal counsel to Mr. Trako conceded during the hearing on this application, attestation letters written by Mr. Marku or others on behalf of the NRC are not determinative sources of evidence regarding the existence of a blood feud. While such letters will often merit considerable weight, there may be circumstances in which it will be reasonably open to

the Board to question the credibility of such a letter, particularly when its contents cannot be reconciled with the preponderance of the other evidence before the Board. That is precisely what happened in this case.

[20] As both Mr. Marku and the Board recognized, the facts supporting his claim in this particular case are unusual. Among other things, the alleged blood feud in question was declared after Mr. Trako had been living in the United States for over two years. In addition, other letters provided by Mr. Trako to the Board made no reference to the blood feud. In particular, neither the letter written by Ms. Hervert dated November 27, 2010 nor the undated letter written by Mr. Trako's cousin, Hasime Trako, made any mention of the alleged blood feud. Moreover, no letters or other evidence was provided on behalf of the friends who allegedly witnessed the attack on Mr. Trako by two Albanian men in the United States, which Mr. Trako claims precipitated his flight to Canada. A letter from the Community of Lazarat confirming that Mr. Trako's father no longer lives in that village also failed to refer to the alleged blood feud.

[21] In short, no explanation was provided regarding why evidence that appeared to be available to corroborate the existence of the blood feud was not adduced. As a result, the only corroboration of the existence of that blood feud were the attestation letter written by Mr. Marku and the letter from Mr. Trako's father.

[22] The Board devoted almost four pages of its decision to discussing Mr. Marku's attestation letter as well as a second, lengthy, letter written by Mr. Marku to Professor Philip Alston, the United Nations' Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions. That second letter, dated April 16, 2010, responded to an e-mail, dated March 9, 2010, and appears to have been part of a longer exchange of correspondence between Mr. Marku and Professor Alston. Unfortunately,

while the letter itself was part of the Board's National Documentation Package, the related correspondence was not available to the Board. As a result, the Board appropriately noted that it was placed in the difficult position of considering "Mr. Marku's letter out of its full and proper context, and without being able to view Professor Alston's side of the exchange." Given the nature and length of Mr. Marku's response to Professor Alston, it is reasonable to wonder what Professor Alston may have said about the NRC to provoke such a response.

[23] The Board also appropriately observed that Mr. Marku's letter contained a variety of information and numerous statistics, but little indication of the source of that information. In this regard, the Board noted that Mr. Marku strongly disputed (i) statistics with respect to blood feuds issued by the Albanian government figures, and (ii) certain conclusions that were reached by Mr. Alston in a report that he was drafting at the time and that ultimately was finalized on May 10, 2010 (the "Alston Report"). The Board then questioned why Mr. Marku had not provided sources for the information he claimed should be preferred.

[24] Relying on the Alston Report, the Board proceeded to identify a concern regarding "Mr. Marku's objectivity in the matter of blood feuds." Specifically, the Board observed that the Alston Report had identified "wide discrepancies in statistics regarding blood feuds," which it attributed, in part, "to the incentive for some non-governmental organizations to over-state the magnitude of the blood feud problem in order to obtain funding." The Board noted that "similar criticism has come in previous years from other sources, one of whom referred to, '... reconciliation groups' practice of inflating the number of blood feuds in order to justify their continued involvement in this area,' while another stated that some reconciliation committees focus mainly on raising funds for their organizations."

[25] Although the Alston Report did not specifically identify the NRC as being among the reconciliation groups that he believes may inflate their statistics, the Board observed that Mr. Marku's letter to Professor Alston did not acknowledge or address "objective evidence indicating that his organization does receive financial support from international nongovernmental organizations and from foreign governments and agencies." On the evidence before it, the Board found that "Mr. Marku and his organization to have a financial incentive to overstate the magnitude of the blood feud problem."

[26] Based on all of the foregoing, and the fact that "there is no indication that Professor Alston has such a lack of objectivity," the Board decided to give more weight to his report than to Mr. Marku's letter to him. Among other things, that report stated Professor Alston's "carefully considered view ... that the correct numbers [of blood feud disputes in recent years] are much closer to those provided by the government, especially relation to killings."

[27] In my view, for the reasons given by the Board, it was reasonably open to the Board to give greater weight to the Alston Report than to Mr. Marku's letter to Professor Alston and other documentation that predated the Alston Report. Having done so, it was also reasonably open to the Board to question the credibility of Mr. Marku's attestation letter, which, among other things, stated that the "number of feud cases have increased in Albania lately." This statement was directly contradicted by (i) Professor Alston's statement that "the numbers of blood feud killings in Albania has decreased steadily over the past five years...", and (ii) other country documentation, cited by the Board, which reported that the number of blood feud killings "has dropped to close to zero in more recent years."

[28] It bears underscoring that my conclusion on this point should not be interpreted as suggesting in any way that it will be reasonably open to the Board to routinely raise questions regarding the credibility of attestation letters from Mr. Marku or others associated with the NRC, based solely on the contents of the Alston Report. Each case will turn on its own particular facts and on the evidentiary record as a whole.

[29] In the case at bar, the Board was forced to choose between, on the one hand, an unusual claim that strained credulity, and on the other hand, attestation letters written by Mr. Marku and Mr. Trako's father. On the particular facts of this case, I am satisfied that it was reasonably open to the Board to give those two attestation letters less weight than they may have warranted in other circumstances. I am satisfied that the Board's decision was appropriately justified, transparent and intelligible. It was also within the range of acceptable outcomes in fact and law (*Dunsmuir*, above, at para 47).

[30] Once it had reasonably raised a question with respect to the credibility of Mr. Marku's evidence, the letter from Mr. Trako's father provided the sole remaining corroboration for Mr. Trako's claim regarding the alleged blood feud. In the circumstances, it was not unreasonable for the Board to reject that letter in favour of the preponderance of remaining evidence, which did not support the credibility of Mr. Trako's claims. In rejecting that letter, the Board did not err by observing that Mr. Trako's father has an interest in the outcome of this case and had not been made available to be cross-examined on his letter.

[31] The principle of judicial comity does not assist Mr. Trako, particularly given (i) the unusual nature of the claim made by Mr. Trako, (ii) the fact that the Alston Report was issued after the date of many of the decisions relied upon by Mr. Marku, and (iii) the fact that there is no evidence to

indicate that the Alston report was part of the evidentiary record in the remaining decisions (including *Murati v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1324) cited by Mr. Marku (*Almrei v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1025, at para 62)).

[32] Mr. Trako also submits that he was denied natural justice when the Board failed to give him an opportunity to address the credibility concerns that it identified with respect to Mr. Marku's attestation letter.

[33] I disagree.

[34] Mr. Alston's report was contained in the publicly available National Documentation Package dated October 29, 2010, approximately two months before the Board's hearing in this matter, which was held on December 23, 2010. As widely available country condition evidence, it did not have to be specifically addressed by the Board during its hearing with Mr. Trako. It was entirely open to the Board to raise a question regarding the credibility of Mr. Marku's letter, after considering the contents of the Alston Report, and without giving Mr. Trako an opportunity to specifically address the issue of Mr. Marku's possible motivation to confirm the existence of a blood feud that was not otherwise substantiated by the preponderance of the evidence.

B. *Did the Board err by determining that Mr. Trako had not rebutted the presumption of state protection?*

[35] Mr. Trako submitted that the Board erred by failing to adequately weigh and assess material contradictory evidence in concluding that state protection would be reasonably forthcoming to him should he return to Albania. In this regard, he essentially repeated his submissions that it was unreasonable for the Board to fail to give weight to the letters of his father and Mr. Marku. He also

noted that the Board failed to consider a particular document that reported that Albanian police often do not get involved in blood feud disputes until a crime has taken place.

[36] I disagree. For the reasons discussed in Part IV.A above, I am satisfied that the Board did not err by failing to give greater weight to the attestation letters of Mr. Trako's father and Mr. Marku.

[37] In reaching its conclusion with respect to state protection, the Board cited extensively to a document entitled *2009 Human Rights Report: Albania*, issued by the United States Department of State. It also referred to a 2008 *Issues Paper* published by the Board, the Alston Report, a document authored by the United Kingdom Border Protection agency, and other sources.

[38] I am satisfied that the Board's treatment of the aforementioned country documentation was fair, balanced and reasonable. The Board explicitly addressed certain information that did not support the conclusion that it reached with respect to the adequacy of state protection in Albania. Among other things, it observed the following:

- i. There are concerns about police corruption and impunity, and the overall performance of law enforcement is weak.
- ii. Problems remain despite judicial reforms which have brought new improvements.
- iii. Due to corruption and political pressure, the judiciary does not always function independently.
- iv. Police efforts at combating blood feuds are not always supported by prosecutors or the courts.

- v. In many cases, the killer is arrested, prosecuted and sentenced; yet, some cases remain unsolved.

[39] After reviewing the country documentation, the Board explicitly noted that the “objective evidence regarding state protection in Albania is mixed.” In short, the Board noted that while various measures that have been taken by the state to protect its citizens have had some success, a number of weaknesses remain apparent.

[40] Having regard to all of the evidence, which included the fact that the number of blood feud killings has dropped to close to zero in recent years, the Board concluded, on a balance of probabilities, that Mr. Trako had failed to provide clear and convincing evidence to rebut the presumption that adequate state protection would be available to him should he return to Albania.

[41] Based on the evidence that was before the Board in this particular case, I am satisfied that the Board’s conclusion on this point was (i) within the range of possible, acceptable outcomes which are defensible in respect of the facts, and (ii) sufficiently justified, transparent and intelligible.

[42] The burden was on Mr. Trako to adduce clear and convincing evidence to satisfy the Board, on a balance of probabilities, that adequate state protection would not likely be available to him if he were required to return to Albania (*Ward v Canada (Attorney General)*, [1993] 2 SCR 689, at 724-725; *Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, at para 54; *Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, at para 30). In this case, the Board reasonably found that Mr. Trako had failed to discharge that burden.

[43] At the oral hearing on this application, Mr. Trako also submitted that the Board erred by failing to specifically address his father's evidence that on the one occasion when he reported the alleged blood feud to the police, he was simply referred to the NRC. On the particular facts of this case, I am satisfied that this did not constitute a reviewable error, particularly given that the Board explicitly noted, in its assessment of state protection, that (i) "[p]olice have cooperated with nongovernmental reconciliation organizations to combat blood feuds," and (ii) while there were over forty blood feud murders per year in the late 1990s, that number has dropped to close to zero in more recent years.

C. Did the Board err by assessing subjective fear in the context of its analysis under section 97 of the IRPA?

[44] Mr. Trako submits that the Board erred by assessing his subjective fear, after having concluded that he had not established a nexus to a Convention ground of persecution, as set forth in section 96 of the IRPA. He asserts that, at a minimum, the Board's analysis of his subjective fear is confusing and unintelligible and breaches the Board's duty to provide adequate, intelligible and transparent reasons.

[45] I disagree.

[46] The Board's decision explicitly stated that state protection was the determinative issue. For the reasons discussed in Part IV.B above, that section of the Board's decision was appropriately justified, transparent and intelligible. Moreover, for the reasons discussed in Part IV.A above, the Board's treatment of the credibility of the only evidence which corroborated Mr. Trako's claims was also appropriately justified, transparent and intelligible. The fact that the Board may have also addressed Mr. Trako's subjective fear did not render unreasonable its otherwise reasonable decision.

[47] That said, on a reading of the Board's decision as a whole, it is readily apparent that the Board's assessment of Mr. Trako's subjective fear formed the initial part of its assessment of the credibility of his claim with respect to the blood feud.

[48] At paragraph 16 of its decision, the Board stated the following: "In reference to credibility, I will first address [Mr. Trako's] allegations regarding events that took place in Albania prior to entering the US. I will address credibility as to his fear of the more recent blood feud later in these reasons." With respect to the events that took place in Albania prior to his departure from that country, the Board found Mr. Trako to be generally credible. However, it found that there was no support in the National Documentation Package for his claimed fear of harm at the hands of persons associated with the Socialist Party.

[49] The Board then turned to Mr. Trako's claims with respect to the blood feud. It was at this point in its decision that the Board explained, in three short paragraphs, why it believed that he had not behaved in a manner consistent with having a fear of death or other harm should he return to Albania. Among other things, the Board noted that he had abandoned his outstanding claim for asylum in the United States and had failed to report the alleged attack on him to authorities in that country. The Board then immediately proceeded to address the documentary evidence that he adduced in support of the alleged blood feud.

[50] At paragraph 44 of its decision, the Board stated its conclusion with respect to the credibility of Mr. Trako's claim regarding the blood feud. After briefly noting that it had considered his documentary evidence and had previously found his actions to have been inconsistent with having a subjective fear of harm should he return to Albania, the Board stated that its view that his allegations with respect to the blood feud were not credible. In my view, it was reasonably open to

the Board to consider, in this context, Mr. Tracko's actions and whether they were consistent with the claims that he had made with respect to the blood feud.

V. Conclusion

[51] The application for judicial review is dismissed. No question was proposed for certification and none arises.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

“Paul S. Crampton”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1613-11

STYLE OF CAUSE: KLODJAN TRAKO v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Calgary, Alberta

DATE OF HEARING: August 15, 2011

**AMENDED REASONS
FOR JUDGMENT
AND JUDGMENT:** Crampton J.

DATED: October 31, 2011

APPEARANCES:

Bjorn Harsanyi FOR THE APPLICANT

Rick Garvin FOR THE RESPONDENT

SOLICITORS OF RECORD:

Bjorn Harsanyi FOR THE APPLICANT
Barrister and Solicitor
Calgary, Alberta

Myles J. Kirvan FOR THE RESPONDENT
Deputy Attorney General of Canada