Federal Court  Cour fédérale

Date: 20111212

Docket: IMM-2918-11

Citation: 2011 FC 1450

Ottawa, Ontario, December 12, 2011

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

XHESIKA LLANA
AHEZON LLANA

Applicants

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 April 7, 2011. The Board determined that the Applicants were not Convention refugees or persons in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA).

[2] For the following reasons, this application is dismissed.

I. Facts

[3] The Applicants, siblings Xhesika Llana and Ahezon (Xhezon) Llana, are citizens of Albania alleging they will be harmed because their father is involved in a blood feud.

[4] In January 2009, their father shot and killed a burglar, Petrit Pjetri. The Pjetri family has sworn to avenge his death. They have openly threatened the Applicants' family and have banged on their door at night.

[5] The Applicants claimed that the family went into self-confinement and informed police who patrolled the area for a period. They have also contacted the Committee for Nationwide Reconciliation (CNR), but the Pjetri family has refused to co-operate.

[6] The Applicants obtained a visa for a summer camp in Canada and made a refugee claim on their arrival. The Applicants' parents and two other siblings remain in Albania.

II. Decision Under Review

[7] The Board raised concerns regarding the Applicants' credibility. It found that if the Applicants' remaining family, especially their father as the primary target, felt themselves truly at

risk of remaining in Albania, they would have taken more proactive steps to escape than just sending the two children.

[8] There was also a significant inconsistency in the evidence regarding the current state of affairs of the Applicants' family in Albania. While there were documents presented indicating that the family had entered self-confinement, testimony suggested that this was only the case for the father. The Board therefore accorded lesser weight to these documents.

[9] Although it was not mentioned in the Applicants' Personal Information Form (PIF), the Applicants testified that the girls in Albania have been followed upon leaving the house. However, there was no evidence that they, or other members of the family, had been threatened or harmed. The Board found that the Applicants would face the same level of risk as their siblings and mother and would not be threatened or harmed.

[10] The Board acknowledged that documentation regarding the adequacy of state protection for individuals threatened by blood feuds in Albania was mixed. Although the state is not always adequately effective in protecting individuals and proceeding with prosecutions, the actual sentences for blood feud murders are higher than for regular murders. At least one document suggested that the deaths caused by blood feuds dropped to zero in 2007. Albania was also seen as making serious efforts to address blood feuds with increased penalties and a serious crimes court dealing with the issue.

[11] The Board suggested that state protection could be adequate, and often is, but this depends on the circumstances of the particular case. In looking at the Applicants' experience, the Board found the police were quite active in proactively protecting the family and reactive, in that they provided patrols on their request.

III. Issues

[12] The Applicants raise the following issues:

(a) Did the Board member's conduct at the hearing raise a reasonable apprehension of bias?

(b) Did the Board breach procedural fairness in addressing the Applicants' claim?

(c) Did the Board err in its assessment of the adequacy of state protection for the Applicants?

IV. Standard of Review

[13] Procedural fairness concerns, including a reasonable apprehension of bias, require the correctness standard (see *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, 2009 CarswellNat 434 at para 43).

[14] The Board's assessment of the adequacy of state protection is, however, reviewed on a standard of reasonableness (see *Hinzman v Canada (Minister of Citizenship and Immigration),*

2007 FCA 171, 2007 Carswell Nat 950 at para 38; *Mendoza v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 119, 88 Imm LR (3d) 81 at paras 26-27). Under this standard, the Court should only intervene if the decision does not fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

V. Analysis

A. *Did the Board Member's Conduct at the Hearing Raise a Reasonable Apprehension of Bias?*

[15] The Applicants allege in their written submissions bias on the part of the presiding Board member based on his conduct during the hearing. They assert that he yawned, looked sleepy during the hearing and sat reclined in his chair. He was impatient and aggressive in his questioning, at times interrupting the testimony of the Designated Representative and subsequent submissions of counsel. This caused the Applicants to fear him. They believe this conduct shows the Board member had made up his mind regarding their claim prior to the hearing.

[16] To establish a reasonable apprehension of bias, the Applicants must demonstrate that an informed person, viewing the matter realistically and practically, and having thought the matter through, would probably conclude that an individual would not decide the matter fairly (*Committee for Justice and Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369).

[17] As the Respondent has highlighted in its submissions, this test establishes an extremely high threshold. Allegations of bias call into question the integrity of the decision-maker. They "cannot rest on mere suspicion, pure conjecture, insinuations or mere impressions of an applicant or counsel. It must be supported by material evidence demonstrating conduct that derogates from the standard" (see *Arthur v Canada (Attorney General)*, [2001] FCJ no 1091, 283 NR 326 at para 8).

[18] I must also agree with the Respondent that the Applicants have failed to provide sufficient material evidence to demonstrate that an informed person would conclude the Board member would not decide the matter fairly. The Board member may not have demonstrated the degree of enthusiasm that the Applicants would have preferred, but this does not amount to bias. He listened to the testimony and reviewed the documents presented. From the transcript, it also appears that he considered additional evidence not previously submitted. Even if the Board appeared tired to the Applicants and their counsel, his questions in direct response to the assertions made, as evidenced in the transcript of the hearing, suggests he was alert to the case before him.

[19] Admittedly, the Board member engaged in intensive questioning, raising counterarguments to the claims in the testimony of the Designated Representative and elder Applicant. At times, he expressed scepticism regarding any broad assertions of the threat of blood feuds or the lack of state protection.

[20] However, this Court has held that vigorous, extensive and energetic questioning does not, in itself, necessarily give rise to a reasonable apprehension of bias or breach of procedural fairness (see for example *Veres v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 124,

[2000] FCJ no 1913 at para 36; *Ithibu v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 288, [2001] FCJ no 499 at para 68). The Board member was attempting to clarify information, address any inconsistency and test the veracity of the Applicants' claims.

[21] The Respondent also goes as far as to suggest that the Applicants' failure to raise a reasonable apprehension of bias at the hearing means that they cannot rely on this argument on judicial review (see for example *Ranganathan v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1367, [2003] FCJ no 1741 at paras 18-20).

[22] I find that the Board member's conduct is insufficient to raise a reasonable apprehension of bias. The Applicants cannot point to any specific comments by the Board member that he prejudged the case or did not take in all of the evidence presented. He simply asked difficult questions. To suggest that bias could result in instances of intensive and sceptical questioning because it intimidates claimants would deprive the Board of the opportunity to properly assess each case before it.

B. *Did the Board Breach Procedural Fairness in Addressing the Applicants' Claim?*

[23] For similar reasons, the Applicants contend in their written submissions that the Board breached procedural fairness in addressing their claim. They reiterate concerns regarding the aggressive approach of the Board member. More specifically, they object to the Board member's interruptions during counsel's submissions. The Applicants also insist that counsel was told and gestured to "hurry up" during the hearing. This made it difficult for counsel to focus or complete

her submissions. The Board was also unable to know the specific references that counsel would have presented in submissions.

[24] They claim that the Board's approach did not enable them to fully and fairly present their case. They note that the right to a fair hearing is "an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have" (*Cardinal v Kent Institution*, [1985] 2 SCR 643, [1985] SCJ no 78 at 661).

[25] The Applicants also rely on the decision of this Court in *Ayele v Canada (Minister of Citizenship and Immigration)*, 2007 FC 126, [2007] FCJ no 174 at para 12 where it was stressed that the "essence of adjudication is the ability to keep an open mind until all evidence has been heard."

[26] However, there is nothing in the Board's decision or transcript to suggest that the Applicants were not given the opportunity to present their case. The counsel was interrupted repeatedly because she proceeded through a lengthy reiteration and reading of the material in the documents. The Board member did not prevent her from continuing but suggested that he would be able to read the documents and asked her to consider simply referring him to particular passages. Whatever gestures the Applicants and their counsel claim to have observed, the Board member never told them to "hurry up".

[27] In *Ayele*, above, a breach of procedural fairness was found because the presiding member suggested that "there's no point calling witnesses […] when the evidence is of no use and calling the witness is futile." In this instance, the Board member did not make a similar suggestion. He did not refuse to consider the evidence presented by counsel, but suggested that he could review the documents without her providing a lengthy reading. At no time did the Board member imply that the evidence was futile or irrelevant, his objection was with counsel's approach to presentation. This did not result in a breach of procedural fairness in the assessment of the Applicants' claim.

C. *Did the Board Err in its Assessment of the Adequacy of State Protection for the Applicants?*

[28] The Applicants assert that the Board ignored evidence regarding the adequacy of state protection for those threatened by blood feuds. They point to additional portions of the documentary evidence that was not specifically addressed by the Board in its reasons. These portions dealt with questions regarding the implementation of laws and effectiveness of prosecutions.

[29] It is trite law that the Board is entitled to weigh the evidence before it and is not required to refer to every piece of evidence (see *Hassan v Canada (Minister of Employment and Immigration)*, [1992] FCJ no 946, 147 NR 318 (FCA)).

[30] I agree with the Respondent that the Board was reasonable in the assessment of the evidence before it. It was acknowledged that there was mixed evidence regarding the adequacy of state protection for those threatened by blood feuds and that this remains a problem in Albania. For

example, it was noted that the prosecutions do not always proceed and sentences are often shorter than appropriate. However, its finding that state protection was adequate was based on the totality of the evidence, including the development of new laws and declining related deaths.

[31] There was also supporting evidence that state protection had been provided to the Applicants in this particular instance. Given that patrols were provided at their family's request, irrespective of their brief duration, this conclusion was reasonable. The failure of the police to arrest anyone for the alleged incidents and threats does not undermine it.

[32] To rebut the presumption of state protection, there must be clear and convincing evidence that state protection is inadequate or non-existent (*Carillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, 2008 CarswellNat 605 at para 38). While state protection must be adequate, it need not be perfect (see *Canada (Minister of Employment and Immigration) v Villafranca* (1992), 99 DLR (4th) 334, 18 Imm LR (2d) 130 at para 7).

[33] Moreover, I cannot accept the Applicants' argument that their situation is identical to previous cases where this Court overturned a decision of the Board in failing to address certain evidence and reach a conclusion that state protection is adequate in Albania. There are equally cases where the opposite result was true. Each case turns on a unique set of facts and documentary evidence at a particular moment in time.

[34] In this instance, for example, evidence of police patrols was understandably highly relevant to the determination that adequate state protection was available to the Applicants in addressing the

threat posed by the blood feud. The Board is entitled to weigh such factors in making its determination. As long as the evidence is considered, as the Board is presumed to have done, its conclusion cannot be unreasonable.

VI. Conclusion

[35] The Applicants have failed to demonstrate that the approach of the Board member raised a reasonable apprehension of bias or related breach of procedural fairness. Having reviewed mixed evidence, the Board was justified in its conclusion that there was adequate state protection in Albania for the Applicants.

[36] Accordingly, this application for judicial review is dismissed.

JUDGMENT

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

" D. G. Near "

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**IMM-2918-11**
STYLE OF CAUSE:	**XHESIKA LLANA ET AL. v. MCI**
PLACE OF HEARING:	**TORONTO**
DATE OF HEARING:	**NOVEMBER 16, 2011**
REASONS FOR JUDGMENT AND JUDGMENT BY:	**NEAR J.**
DATED:	**DECEMBER 12, 2011**

APPEARANCES:

Stella Iriah Anaele	FOR THE APPLICANTS
Amy King	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Stella Iriah Anaele Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANTS
Myles J. Kirvan Deputy Attorney General Canada	FOR THE RESPONDENT