Federal Court  Cour fédérale

Date: 20120503

Docket: IMM-5953-11

Citation: 2012 FC 516

Ottawa, Ontario, May 3, 2012

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

ALTION ANDONI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 (Act) for judicial review of the decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board, dated 26 July 2011 (Decision), which refused the Applicant's application to be deemed a Convention refugee or a person in need of protection under sections 96 and 97 of the Act.

BACKGROUND

[2] The Applicant is a 37-year-old citizen of Albania who seeks protection in Canada from a blood feud between his family (Andonis) and the Fezjiu family (Fezjius).

[3] The Applicant says that his parents have been trying to arrange a marriage between him and a member of Fezjius since February 2000. In April 2000, his parents completed an arrangement to engage the Applicant to Ela, a member of the Fezjius. After a celebration, the two families were bound together and announced the engagement publicly.

[4] The Applicant told his parents in June 2000 that he did not want to get married because he had fallen in love with another woman called Kole. However, his parents told him he had to get married to Ela because they were bound by the Kanun laws. If they broke the arrangement, they would be in danger from the Fezjius.

[5] Kelia, Ela's brother, met the Applicant in a coffee shop in August 2000 to talk about the wedding. The Applicant told Kelia he did not want to get married anymore. Kelia said that the Applicant was young and would put aside such silly thoughts after he was married. When the Applicant insisted that he did not want to get married, Kelia grabbed him and threatened to kill him, saying that the refusal to marry was the same as killing Ela.

[6] The next day, Ela's parents came to the Applicant's home which he shared with his parents. Ela's parents told the Applicant's parents about Kelia's conversation with him the day before; they also told the Applicant's parents to make the Applicant marry Ela because, if he did not marry her, it would destroy her future. The Applicant's parents spoke with him and told him there would be

trouble if he did not go through with the marriage. Ela's parents telephoned the Applicant's parents several days later to confirm that the wedding was still on. The Applicant's parents gave no answer because the Applicant was still insisting that he did not want to get married.

[7] In September 2000, two of Ela's brothers came to the Applicant's house; they grabbed him and told him they wanted to talk with his parents. When he resisted, Rudi – another of Ela's brothers – pushed the Applicant to the ground and punched him. Neighbours who witnessed this event called the police, who came and separated the Applicant from Ela's brothers. When the Applicant's mother demanded that the police arrest Ela's brothers, the police refused, saying it was a personal family matter. After this event, the Applicant and his family began to receive death threats over the telephone; the people who threatened them told them to watch out because they were in a blood feud.

[8] The Applicant's father went to the Mayor of the municipality where they lived to address the situation between his family and the Fezjius. The Mayor sent the Applicant's father to an elder in Borova, Albania, who dealt with blood feuds. This man went to the Fezjius, but they said this was a problem between them and the Andonis family and no one else. The elder then told the Applicant's father to attempt reconciliation to solve the dispute between the two families.

[9] In January 2001, while he was putting out garbage at the restaurant where he worked, a car drove at the Applicant and knocked him down. Ela's brothers got out of the car and attacked the Applicant, but his co-workers dragged him inside the restaurant to save him from the attack. Ela's brothers left and the Applicant went to the hospital to be treated. His father called the police, but they again said they could not intervene because it was a personal matter. They suggested that the

National Reconciliation Commission (NRC) would help. The police did not interview the Applicant.

[10] Because the blood feud posed a danger to the restaurant, the Applicant's boss gave him some money and told him to leave Albania. The Applicant went home and spoke with his parents. Some days later, a car drove by the Andonis' home and fired gunshots through their living room window.

[11] After this event, the Applicant fled Albania. He went to Athens, Greece on 14 January 2001, and then traveled to Madrid, Spain on 25 January 2001. From Madrid, he traveled to Sau Paulo, Brazil on 29 January 2001. The Applicant then came to Toronto on 14 February 2001. While he was in Toronto, he claimed protection but then went to Detroit, in the United States of America (USA) on 16 February 2001. The Applicant's parents immigrated to the USA from Albania sometime in 2001. He says that, while he lived in the USA, his parents tried to sponsor him to immigrate there. However, in October 2009, when he pled guilty and was convicted of operating a vehicle while visibly impaired, this made sponsorship to the USA impossible.

[12] The Applicant returned to Canada on 12 March 2009 and claimed protection again on 16 March 2009. Because the Applicant had left after he claimed protection in 2001, the RPD invited the Respondent to participate in the Applicant's hearing. The Respondent provided written submissions and said that the Applicant's initial claim was not referred to the RPD because he had not appeared for his initial screening interview. The RPD had not declared his claim abandoned, so he was not excluded from claiming protection in 2009.

[13] The Respondent did not participate in the hearing which the RPD conducted on 8 April 2011.The RPD refused the Applicant's claim for protection on 26 July 2011and notified him of the Decision on 11 August 2011.

DECISION UNDER REVIEW

[14] The RPD refused the Applicant's claim for protection because it found that his actions were not consistent with his stated fear and because he had not shown that Albania could not protect him if he returned there. The RPD also found that the Applicant had no nexus to a Convention ground, so his claim for protection under section 96 of the Act failed.

Credibility

[15] The RPD reviewed the Applicant's testimony that he went to the USA because he believed he would be killed if he stayed in Albania. It noted that he had not claimed protection in the USA in the eight years he had been there, and had explained this by saying that his friends told him the USA does not accept claims arising from blood feuds. The RPD noted the USA offers protection under its Withholding of Removal process, even though blood feuds usually do not establish a nexus to a Convention ground in the USA.

[16] The RPD found there was no evidence that the Applicant approached anyone with knowledge of the refugee process in the USA to find out about claiming protection there. It also found that, if he believed he could not have claimed protection in the USA, he could have returned to Canada and claimed protection. The RPD noted that Canada has offered protection to claimants

from Albania since 2002. The RPD found that living in the USA for eight years without claiming protection there was inconsistent with the Applicant's stated fear.

[17] The RPD also reviewed the Applicant's testimony about the blood feud. When it asked him why he thought his family was in a blood feud with the Fezjius, he said it was because he refused to go through with the marriage. He testified that his neighbours told him to watch out because he was in a blood feud and that the Fezjius told the neighbours they were in a feud with the Andonis. The RPD noted the Applicant had not mentioned the Fezjius telling his neighbours about the feud in his PIF and that a formal declaration is usually sent through an emissary to initiate a blood feud. Since the neighbours did not indicate they were delivering a message for the Fezjius, the RPD found that there was no declaration of a blood feud.

[18] The RPD found that, if the Applicant expected the police to take action to protect him, he would have needed to file a report with them. It reviewed his testimony about the incident at the restaurant in January 2001, noting he had not filed a police report. The RPD also reviewed the incident at the Applicant's home in September 2000, where Ela's brothers attacked him, but no one was injured. It found that it was not unusual for the police not to make an arrest where there were no injuries. It also found that the Applicant had not reported to the police the threats the Andonis family received over the telephone or the gunshot through their window. These incidents did not satisfy the RPD that the police would not assist the Applicant or his family.

[19] The Applicant testified that, when he went to the hospital after the attack at the restaurant, he was bleeding from the outside of his ear; the RPD said he wrote in his PIF that he was bleeding from the inside of the ear and was held for observation at the hospital. Although he made submissions that the location of the bleeding was not important, the RPD found that bleeding on the

outside of the ear would not usually result in being held overnight for observation, so it found this account was not credible.

[20] Although the Applicant submitted a letter from Gjin Marku (Marku), the Chair of the NRC (Reconciliation Letter), the RPD gave this letter little weight to establish that the Applicant is at risk in Albania. It noted that the details in the Reconciliation Letter were the same as those in the Applicant's PIF, except that the Reconciliation Letter did not say anything about any attempts to contact the police. The RPD expected that the NRC would have assisted the police where there was evidence that Albanian law was being ignored. It also noted that the Reconciliation Letter did not show from which sources it drew its information. The RPD found that there might be reasons why two families would mislead Marku. This had happened before.

[21] The RPD also found that two letters (Verification Letters) the Applicant submitted – one from the Mayor of Ersecke Municipality in Albania (Mayor) and one from the Elders of Borove Village, also in Albania (Elders) – provided insufficient evidence of his risk of harm. Both letters confirmed a blood feud between the Andonis and the Fezjius arising from the Applicant's cancelled marriage to Ela and said that efforts to reconcile the families had failed. The RPD said, however, that these documents did not provide specifics about the efforts made to reconcile, or how the authors learned of the blood feud between the Andonis and the Fezjius.

State Protection

[22] The RPD found the Applicant had not provided reliable and probative evidence that state protection would be inadequate if he returned to Albania and the Fezjius found and approached him.

It also found he had not made reasonable efforts to approach Albania for protection when he was living there.

[23] When it analyzed state protection, the RPD looked first to the country condition documentation before it which showed that killings related to blood feuds were decreasing in Albania. A report from the Federal Department of State in the USA – *Country Reports on Human Rights Practices for 2009: Albania* (DOS Report) – found that blood feud killings had decreased and fewer families were in self-confinement in the Shkoder area of Albania.

[24] The RPD also examined Response to Information Request (RIR) ALB103570.E which indicated there were sometimes false reports of blood feuds. The RIR also included comments from Marku where he said the NRC investigates the possibility of mediation where it receives appropriate information. The RPD said that parties to mediation could mislead the NRC and it would not be able to discover this deception in the field. It also said that two families could falsely create the appearance of a blood feud to support a family member's claim for protection or to exaggerate the scope of the blood feud problem.

[25] Although the NRC kept track of blood feuds, the RPD found that, because its statistics were based on self-reporting and were gathered by volunteers, its information may not be as accurate as Marku claimed. Marku said in the Reconciliation Letter that revenge killings had increased since December 2009. The RPD put little weight on Marku's statements as reported in RIR 103570.E and in his letter.

[26] The RPD also referred to an issue paper (Issue Paper) authored by the Immigration and Refugee Board (IRB). It noted that this paper relied on information which, although dated, was

generally accepted by all of the sources. The Issue Paper noted that some academics had concerns about the validity of letters, such as the one the Applicant submitted from the NRC. The RPD found that it was plausible Marku had been mislead into believing the Applicant was in a blood feud.

[27] Although the Issue Paper included quotations from people who believed that families involved in blood feuds would not receive adequate protection from the authorities in Albania, the RPD noted that these quotations seemed to be opinions and did not include examples of failures of state protection. The Issue Paper also reported on laws in Albania specific to blood feuds, which Marku had criticized because prosecutors did not always lay charges. Further, the Issue Paper included quotations from Marku which said police intervention sometimes increased the bloodshed. However, there were no examples of how this occurred.

[28] Ultimately, the RPD said that the Issue Paper relied on many sources which were not always consistent and could be used to support any position. The RPD found that there are many families in self-confinement in Albania and that there are more blood feuds in Northern Albania than in other areas. It also found that authorities in Albania had successfully reduced the number of blood feuds through prosecutions, though some times charges were reduced.

[29] The RPD concluded that there was insufficient evidence that police were unwilling to investigate credible threats which were part of blood feuds. Where there were witnesses to a threat, as in the Applicant's case, claimants must show they sought protection in Albania before they can ask for protection in Canada. It was not enough for the Applicant to have sent his father to the police when his father had no first-hand information about what was happening to him. On this basis, the RPD concluded that the Applicant had not made reasonable efforts to seek Albania's protection. It

also concluded that Albania is making serious efforts to protect citizens from blood feuds. The Applicant had not established he would be harmed or killed in Albania.

STATUTORY PROVISIONS

[30] The following provisions of the Act are applicable in this proceeding:

Convention refugee	**Définition de « réfugié »**
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;
[…]	[…]
Person in Need of Protection	**Personne à protéger**
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	*a*) soit au risque, s'il y a des motifs sérieux de le croire,

torture within the meaning of Article 1 of the Convention Against Torture; or	d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	*b*) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,	(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(ii) the risk would be faced by the person in every part of that country and is not faced 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.
[…]	[...]

[31] The following provision of the *Refugee Protection Division Rules* SOR/2002-228 (Rules) is applicable in this proceeding:

18. Before using any information or opinion that is within its specialized knowledge, the Division must notify the claimant or protected person, and the Minister	18. Avant d'utiliser un renseignement ou une opinion qui est du ressort de sa spécialisation, la Section en avise le demandeur d'asile ou la personne protégée et le ministre

if the Minister is present at the hearing, and give them a chance to	— si celui-ci est présent à l'audience — et leur donne la possibilité de:
(a) make representations on the reliability and use of the information or opinion; and	a) faire des observations sur la fiabilité et l'utilisation du renseignement ou de l'opinion;
(b) give evidence in support of their representations.	b) fournir des éléments de preuve à l'appui de leurs observations.

ISSUES

[32] The Applicant raises the following issues in this application:

a. Whether the RPD's credibility finding was reasonable;

b. Whether the RPD's state protection finding was reasonable;

c. Whether the RPD provided adequate reasons;

d. Whether the RPD applied the incorrect test for state protection;

e. Whether the RPD breached his right to procedural fairness by denying him the opportunity to respond, denying him the right to counsel, and failing to consider his submissions.

STANDARD OF REVIEW

[33] The Supreme Court of Canada in *Dunsmuir v New Brunswick* 2008 SCC 9 held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the

reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[34] In *Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 (FCA) the Federal Court of Appeal held that the standard of review on a credibility finding is reasonableness. Further, in *Elmi v Canada (Minister of Citizenship and Immigration)*, 2008 FC 773, at paragraph 21, Justice Max Teitelbaum held that findings of credibility are central to the RPD's finding of fact and are therefore to be evaluated on a standard of review of reasonableness. Finally, in *Wu v Canada (Minister of Citizenship and Immigration)* 2009 FC 929, Justice Michael Kelen held at paragraph 17 that the standard of review on a credibility determination is reasonableness. The standard of review on the first issue is reasonableness.

[35] In *Carillo v Canada (Minister of Citizenship and Immigration)* 2008 FCA 94, the Federal Court of Appeal held at paragraph 36 that the standard of review on a state protection finding is reasonableness. This approach was followed by Justice Leonard Mandamin in *Lozada v Canada (Minister of Citizenship and Immigration)* 2008 FC 397, at paragraph 17. Further, in *Chaves v Canada (Minister of Citizenship and Immigration)* 2005 FC 193, Justice Danièle Tremblay-Lamer held at paragraph 11 that the standard of review on a state protection finding is reasonableness. The standard of review on the second issue is reasonableness.

[36] In *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)* 2011 SCC 62, the Supreme Court of Canada held at paragraph 14 that the adequacy of reasons is not a stand-alone basis for quashing a decision. Rather, "the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of

possible outcomes." The adequacy of reasons, therefore, is to be analysed along with the reasonableness of the Decision as a whole.

[37] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa* 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[38] The opportunity to respond, right to counsel, and right to have submissions considered are all elements of the duty of procedural fairness. In *Canadian Union of Public Employees (C.U.P.E.) v Ontario (Minister of Labour)* 2003 SCC 29, the Supreme Court of Canada held at paragraph 100 that "It is for the courts, not the Minister, to provide the legal answer to procedural fairness questions." Further, the Federal Court of Appeal in *Sketchley v Canada (Attorney General)* 2005 FCA 404 at paragraph 53 held that the "procedural fairness element is reviewed as a question of law. No deference is due. The decision-maker has either complied with the content of the duty of fairness appropriate for the particular circumstances, or has breached this duty." The standard of review on the fifth issue is correctness.

[39] In *Saeed v Canada (Minister of Citizenship and Immigration)* 2006 FC 1016, Justice Yves de Montigny held at paragraph 35 that, when examining the RPD's application of the test for state protection, the appropriate standard of review is correctness. Justice Paul Crampton made a similar

finding in *Cosgun v Canada (Minister of Citizenship and Immigration)* 2010 FC 400 at paragraph 30. The standard of review on the fourth issue is correctness.

ARGUMENTS

The Applicant

[40] The Applicant argues that the RPD's Decision is unreasonable because no reasonable tribunal could find on the evidence which was before the RPD that the Applicant is not a Convention refugee.

Unreasonable Credibility Finding

[41] The RPD's finding that he was not credible was unreasonable because it was based on errors of fact. The RPD relied on the availability of protection in the USA when it found he was not credible because he had lived there for eight years without claiming status. There was no evidence before the RPD that protection is available in the USA for victims of blood feuds. The RPD did not notify the Applicant of the evidence it was relying on to make this finding and thus denied him the opportunity to respond and to know the case he had to meet.

[42] Under section 18 of the Rules, the RPD can rely on specialized knowledge to ground a finding of fact. However, it must give notice to claimants and allow them the opportunity to respond. The RPD did not mention in the hearing that the availability of protection in the USA was in issue, so it breached section 18 of the Rules when it relied on this specialized knowledge. If the RPD expected the Applicant to show that protection was not available in the USA, it was under a duty to put this expectation to him; since it did not, the Decision must be overturned.

Delay in Claiming

[43] The Applicant challenges the RPD's finding that he had lived in the USA for eight years without claiming status. This finding is also based on an error of fact. As he said in his PIF, his parents immigrated to the USA in June 2001 and were attempting to sponsor him; he also testified at the hearing that they lived there. The Applicant says he was aware of his options in the USA and was being sponsored to regularize his status. However, as soon as his immigration status in the USA was put in doubt by his arraignment on charges on 24 February 2009, he moved quickly to claim protection in Canada. The RPD's credibility finding was unreasonable because it was made on the basis of an erroneous finding of fact.

No Efforts in the USA

[44] The RPD also erred when it found that the Applicant had not approached anyone to find out about his options to regularize his status in the USA. He testified that he asked his friends and lawyers about the refugee process in the USA.

No Declaration of a Feud

[45] When the RPD found that there was no declaration of a blood feud, it ignored evidence before it that this actually happened. The Applicant testified at the hearing that his neighbours told the Andonis family about the blood feud and that the neighbours knew about the blood feud because the Fezjius told them. The RPD ignored this testimony. The formal declaration came from the neighbours. The RPD also did not refer to any evidence which showed that anything more than this statement from the neighbours was required to initiate a blood feud. If the RPD relied on its

specialized knowledge to show that more was required, it had to give the Applicant notice and allow him the opportunity to respond. Its failure to do either breached his right to procedural fairness.

Blood from the Ear

[46] The RPD mischaracterized the evidence with respect to the injuries he suffered after the attack at the hospital. The Applicant notes that he wrote in his PIF that he was bleeding from the ear and that he testified that he was kept overnight at the hospital because staff there thought he might have a concussion. The RPD only refers to scratches on his ear in the Decision, even though it knew at the hearing that hospital staff were concerned about a concussion. This shows that the RPD failed to consider the Applicant's testimony on a matter directly related to its credibility finding.

Corroborating Documents

[47] The RPD also unreasonably rejected the Marku Letter. The RPD did not refer to any evidence that the Applicant or his family attempted to mislead Marku, though it said this appeared to be the case. The RPD's reasons are inadequate because they do not show how it came to this conclusion.

[48] Further, when the RPD rejected the Reconciliation Letter it relied on a report that was not in evidence. In the Decision, the RPD referred to the *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston: Preliminary Note on the Mission to Albania*, (Alston Report). The RPD found this report included evidence that letters from the NRC are not always factual. The Applicant says that the author of this report, Philip Alston, did not make the comments the RPD says he did.

[49] The RPD also alleged that he and his family have attempted to perpetrate fraud on the RPD, but did not put this allegation to him during the hearing or give him an opportunity to address it. He says that it would be impossible to deceive the Elders, who wrote a letter on his behalf. The RPD's failure to put this allegation to him is a breach of his rights under section 7 of the *Charter of Rights and Freedoms*. The Elders have no interest in defrauding the RPD and it has given no reason why other families would jeopardize themselves simply to support his claim for protection.

[50] If the RPD alleges that the documents a claimant has put before it are fraudulent, it must compare those documents with something and show specific evidence of fraud (see *Moin v Canada (Minister of Citizenship and Immigration)* 2007 FC 473).

Inadequate Reasons

[51] The RPD provided inadequate reasons for giving little weight to the letters the Applicant submitted to prove his claim. Although the RPD gave the letters from the Mayor and Elders insufficient weight to establish the risk he faced, these letters still establish a blood feud, even if reduced weight is put on them. Other documents which were before the RPD established the risk of harm from blood feuds, so the RPD was obligated to assess his claim from the perspective that the letters prove a blood feud. Further, there was no evidence before the RPD that a blood feud did not exist and the RPD was bound to explain its finding on this issue. When it did not explain why it determined there was no feud, the RPD provided inadequate reasons.

Verification Letters

[52] The RPD's treatment of the Verification Letters was unreasonable. Although it found these letters did not contain specifics about reconciliation or how their authors learned of the feud, the facts support the Applicant's position and the RPD came to an unreasonable conclusion.

[53] The RPD also erred in its treatment of these letters when it rejected them because they did not contain information that is superfluous. Specifics about the reconciliation efforts and how the authors knew about the feud do not impact the weight these documents were given and it was unfair for the RPD to require them to contain such details. The RPD also did not provide adequate reasons as to why it expected this information to be included.

State Protection

[54] The RPD breached the Applicant's right to procedural fairness when it found he would need to personally make a report about what happened at the restaurant in order to engage state protection. There was no evidence before the RPD that a personal report is required in Albania to get the police to act. The RPD did not put the evidence it was relying on to establish this fact to the Applicant so that he could respond. He notes that *Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 (FCA) establishes a presumption of truthfulness with respect to the testimony of refugee claimants.

The Issue Paper

[55] The RPD made an unreasonable state protection finding when it did not consider the Issue Paper which says that "According to Standish, relatively few blood feud cases go to court and the

sentences for the cases that do are particularly derisory." This sentence, which the RPD did not consider, establishes that blood feuds occur with impunity, a fact contrary to the RPD's conclusion. The RPD's failure to consider this evidence renders its Decision unreasonable. In *Salguero v Canada (Minister of Citizenship and Immigration)* 2009 FC 486 Justice Michel Beaudry held at paragraph 13 that

> While one assumes that a panel has examined all of the evidence, where there exists significant evidence which contradicts the panel's findings, it must provide reasons to explain why this evidence is deemed to be neither relevant nor reliable

Alston Report

[56] Although the RPD relied in part on the Alston Report, it did not appropriately apply the facts contained in that report. The RPD found the report was correct; it shows that blood feuds continue until the wronged family achieves revenge or forgives the other family. Having concluded that the Alston Report was correct, the RPD was bound to find that families in blood feuds get no protection from the government. The RPD failed to apply the facts it found in the report which supported the Applicant's claim.

Breach of Procedural Fairness

[57] The Applicant says the RPD breached his right to procedural fairness by not providing adequate reasons, denying him the right to counsel, and failing to consider his submissions. The RPD did not address every issue he raised in his written submissions, even though the Alston Report supported his position. The RPD's reasons are inadequate because they do not show that it considered his submissions. Reasons must address the major points in issue and deal fully with a

claimant's allegations. Where the RPD does not meet this obligation, its decision must be overturned. Further, when the RPD ignored his submissions, it eliminated the possibility for effective representation, so the RPD breached the Applicant's right to counsel.

Test for State Protection

[58] The RPD did not make any finding as to the availability of state protection in Albania, even though the Alston Report shows that the Albanian government's response to blood feuds is inadequate. He points to *Bautista v Canada (Minister of Citizenship and Immigration)* 2010 FC 126 and says that the RPD must look at what is happening on the ground, rather than the efforts the state is making to protect. The RPD did not consider material evidence on state protection.

Internal Flight Alternative

[59] The RPD based its state protection finding on the possibility of flight to Tirana, Albania's capital city, but the RPD failed to consider evidence which showed the Applicant would be at risk there. The Applicant testified that the Fezjius have contacts in Tirana who could hurt him. He says that the RPD's failure to address this evidence means its conclusion on state protection is unreasonable.

The Respondent

[60] The Respondent says the RPD's credibility and state protection findings were reasonable because they were based on all the evidence which was before it. The Applicant has not demonstrated any reviewable error.

Credibility Finding was Reasonable

No Claim in the USA

[61] The RPD reasonably concluded the Applicant was not credible because he lived in the USA for eight years without seeking protection there. The Applicant did not provide evidence that he had sought protection in the USA, even though the onus was on him to establish that he had a subjective fear of persecution. The RPD made five reasonable findings of fact related to the Applicant's failure to claim in the USA:

a. He lived in the USA for eight years without status;

b. He did not claim protection in the USA because his friends said claims like his would not be accepted;

c. There was no evidence he approached anyone with appropriate knowledge to ask about his options;

d. He claimed protection in Canada in 2001, but left before his claim could be completed;

e. He could have returned to Canada to pursue his claim if he believed he would be returned to Albania from the USA.

[62] Although the Applicant has sworn in his affidavit on judicial review that he consulted a lawyer in the USA, the Respondent says that there was no evidence before the RPD that he had done this. He did not mention the lawyer in either his PIF or his oral testimony. Judicial review only deals with the record before the decision maker. It is inappropriate for the Applicant to try and bolster his claim in this way, particularly where the PIF instructs claimants to include "all significant events and reasons that have led you to make a claim for refugee protection in Canada."

[63] On the basis of the evidence before it about the Applicant's failure to claim in the USA, the RPD found the Applicant was not credible. The RPD fully understood the facts of his case, but remained concerned that he had not explored all of the options available to him to avoid going back to Albania. The Applicant was not credible because his failure to claim in the USA was inconsistent with his fear of being returned to Albania. This finding was reasonable.

Inconsistencies in the Applicant's Evidence

[64] The RPD also reasonably found that the Applicant was not credible based on inconsistencies in his evidence. It is open to the RPD to make negative credibility findings based on contradictions, inconsistencies, and implausiblities (see *Sheikh v Canada (Minister of Employment and Immigration)*, [1990] FCJ No 604 and *Leung v Canada (Minister of Employment and Immigration)*, [1990] FCJ No 908. Several inconsistencies in the Applicant's evidence led the RPD to conclude he was not credible.

[65] First, the Applicant testified that neighbours told his family about the feud, but his PIF did not include this detail. The RPD found there was no blood feud based on the Applicant's testimony about how his family learned about it. He testified that his family had received threatening telephone calls and that neighbours told them to watch out because they were in a blood feud. Given this inconsistency, it was reasonable for the RPD to find that the Applicant was not credible.

[66] Although the Applicant says in his affidavit on judicial review that the neighbours acted as emissaries to inform his family that the blood feud was on, this was not in his PIF or testimony at the hearing. The Court should not consider the new evidence the Applicant seeks to introduce in this respect.

[67] Second, although the Applicant has suggested the RPD's analysis is unreasonable because it puts insufficient weight on the Reconciliation Letter, the RPD considered this letter as objective evidence that a blood feud existed. However, it was reasonable for the RPD to assign little weight to this letter because the NRC does not independently verify whether incidents leading to blood feuds have actually occurred.

[68] Third, there were inconsistencies in the Applicant's evidence about the injuries he says he suffered after the incident at the restaurant. He testified that he was bleeding from the back of his ear after the attack, but wrote in his PIF that blood came from inside his ear. The Applicant claimed that he was held overnight in the hospital because of his injuries. Hence, the source of the blood from his ear was relevant to his credibility on this aspect of his testimony.

State Protection Finding was Reasonable

Applicant has not Rebutted the Presumption

[69] The Respondent notes that *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 establishes a presumption that states are capable of protecting their citizens. *Ward* also establishes that refugee protection is not available if claimants have made inadequate efforts to engage the protections their home states. Further, *Hinzman v Canada (Minister of Citizenship and Immigration)* 2007 FCA 171 teaches that claimants bear a heavy burden to rebut the presumption of state protection in countries where there is a well-developed protection apparatus.

[70] In this case, the Applicant simply did not do enough to engage Albania's protection before he fled. All that he did was send his father and neighbours to contact the police, which is insufficient. The RPD also found that the Albanian police responded when they were called to his

home in September 2000. The Applicant did not report to police personally after the attack at the restaurant in January 2001. The Applicant's family also did not call the police when gunshots were fired through their living room window. On this evidence, it was reasonable for the RPD to conclude that the Applicant had not rebutted the presumption of state protection.

RPD Considered all the Evidence

[71] Even though the RPD may not have mentioned every piece of evidence before it in its reasons, this is not an error that requires reconsideration. *Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (FCA) establishes that the RPD is presumed to have considered all the evidence, even if it does not mention everything in its reasons. In this case, the RPD's reasons show that it grasped the issues and relevant evidence before it. The RPD examined the Alston Report, the DOS report, and the 2009 *European Union Progress Report* as well as evidence from Marku. The RPD explained why it assigned the weight it did to the evidence before it. The RPD reasonably found there was no evidence that state protection would not be forthcoming if the Applicant returned to Albania.

The Applicant's Reply

[72] In response to the Respondent's objection to the introduction of new evidence in his affidavit, the Applicant notes that his affidavit was filed on judicial review. It follows that the affidavit was not before the RPD when it made its Decision. He also says that he testified at the hearing that he consulted a lawyer with respect to his asylum claim.

[73] The Applicant says that his failure to claim in the USA is not part of "all the significant events and reasons that have led [him] to make a claim for refugee protection," so he was not required to address this in his PIF. However, he also says that he mentioned in his PIF that, when his conviction in the USA made it impossible for him to claim asylum there, he claimed protection in Canada. All the information the RPD needed to adjudicate his claim was before it. The Respondent's objection to the information he put in his affidavit shows that the RPD should have addressed additional facts in its reasons. The Respondent relies on the Applicant's affidavit as justification for the RPD's failure to refer to relevant evidence, but this evidence was actually before the RPD and it did not consider or refer to it.

The Respondent's Further Memorandum

[74] The Respondent points to *Sanchez v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 536 and says that the Applicant's failure to mention important facts in a PIF which he later described in his oral testimony was a legitimate basis for the RPD to conclude he was not credible. Although the Applicant said at the hearing that he spoke to a lawyer about claiming asylum, he did not mention this in his PIF. In a similar way, the Applicant did not mention in his PIF the head wound, which led to his being kept overnight in the hospital, so it was reasonable for the RPD to conclude he was not credible on this basis.

[75] Although the Applicant takes issue with the RPD's finding that the USA offers two forms of protection, the Respondent says that the RPD simply described the forms of protection the USA offers. This information did not enter the RPD's analysis and specialized knowledge was not used. No error arises from this aspect of the Decision.

ANALYIS

[76] It is difficult to determine the true grounds of this Decision. The following paragraphs from the Decision set out the framework and the general findings:

> 4. The claimant's actions in the US are not consistent with his stated fear. The claimant did not establish that for him the effort of the state would provide inadequate protection. Parts of his evidence were not credible. Hence, I reject the claim.
>
> …
>
> 17. Concerning the issue of state protection, today, if the claimant were to live in the capital, I have reviewed the current documents.
>
> …
>
> 32. Ten years ago, the claimant did not make reasonable efforts to seek the assistance of the state. Today, I am satisfied the claimant did not establish with reliable and probative evidence that if he was found and approached, that the state would provide inadequate protection.
>
> IN SUMMARY:
>
> - The claimant's actions in the US were inconsistent with his stated fear
> - The claimant did not make reasonable efforts to access the protection of the state prior to leaving Albania
> - The claimant's account of the declaration of a blood feud was inconsistent with that of the documentary evidence
> - The claimant's account of his injuries was inconsistent and hence not credible
> - The current country documents show Albania is making serious efforts to protect its citizens who fear harm as a result of the declaration of a blood feud, these efforts are most successful in the capital
> - Nexus was not established

[77] It looks to me as though the RPD is saying that:

a. The Applicant's behaviour in the US is not consistent with subjective fear;

b. The Applicant has not rebutted the presumption of adequate state protection;

c. Some of the Applicant's evidence is not credible.

[78] What is not clear from the Decision as a whole is:

a. Is there a finding that the Applicant lacked subjective fear? The fact of his actions in the US being inconsistent with his stated fear is not, in my view, the same thing as saying that the Applicant has not established he has subjective fear on all the evidence;

b. Is the adequate state protection finding based upon a notional assumption that the Applicant's narrative is true, or is it based upon the RPD's rejection of the Applicant's account of his past attempts to elicit the protection of the state, either because those past efforts are accepted as true but are insufficient to rebut the presumption, or because the RPD finds non-credible the Applicant's past attempts to secure state protection?

c. In looking forward at current state protection, is the finding of failure to rebut state protection as it exists today stand-alone or, because so much time has now elapsed, do the Applicant's earlier dealings with the police remain a relevant part of the analysis for the current level of state protection?

[79] The RPD does not say its state protection finding is a stand-alone determinative ground for refusing the claim.

[80] Also, when the RPD says that Albania's "serious efforts" are "most successful in the capital," has the RPD addressed the "operational adequacy" of those efforts, and is the RPD saying the Applicant will only be safe in the capital? These important issues are just not clear.

[81] In my view, the Decision lacks a logical framework and this makes it confusing and difficult to assess. This confusion is not alleviated when the details of the analysis are examined.

[82] For example, if I look at the finding that the "claimant's actions in the US are not consistent with his stated fear" the RPD's analysis is as follows:

> [5] The claimant testified that when he entered the US, he believed he would have been killed, if he had remained in Albania. He had no status in the US, but he made no claim for protection. His only explanation was that he had heard from a number of friends in the US that claims of blood feuds would not be accepted.
>
> [6] The US offers two forms of protection, and while blood feuds usually lack a nexus to a Convention ground, this is not the case for protection under Withholding of Removal.
>
> [7] There is no evidence the claimant actually approached anyone with knowledge of the refugee process in the US to inquire as to his options. If in fact, the claimant believed he could not make any form of claim in the US, which has not been established, the claimant had started a claim process in Canada that he abandoned before it was referred to the Board. If the claimant believed he would be murdered if deported to Albania, he could have returned to Canada and made a claim for protection. In 2002, Canada, after the implementation of the *Immigration and Refugee Protection Act (IRPA)*, was certainly accepting claims from Albania, pursuant to section 97 of the *IRPA*. I do not accept that remaining in the US for eight years without status and without exploring all options, including returning to Canada, is inconsistent with his stated fear. Hence, I make a negative credibility finding.

[83] There are a number of problems with these findings. First of all, the Applicant gave evidence at the hearing as follows:

Member: So, why didn't you make any attempt to obtain some form of legal status in the United States?

Claimant: I knew that the United States did not -- do not [*sic*] take into consideration claims based on blood feuds.

Member: How did you know that?

Claimant: I have a number of friends in the US who had claimed on similar cases and they had not been successful. So, I knew from them, and I've asked lawyers as well.

[84] So there was evidence that the Applicant not only asked his friends, but also consulted lawyers. Does the RPD believe that lawyers have no knowledge of US law? Does the RPD find non-credible the Applicant's statement that he went to see lawyers? Is the significant point that the Applicant did not come to Canada? If so, what is the relevance of his not "exploring all the options," and is consulting lawyers considered an option that he did not explore when he says he did? What is the evidence (there is no reference) that the RPD is relying upon that blood feuds usually lack a nexus in the USA, but not under "Withholding of Removal," and why was this matter never put to the Applicant? If the RPD was relying upon its own knowledge here, section 18 of the Rules means it had an obligation to put the matter to the Applicant to give him a chance to explain. Maybe the lawyers consulted by the Applicant gave him advice on this matter. Why was the Applicant's explanation as to why he had remained in the USA for eight years not addressed by the RPD? The Applicant went to the USA because his parents, who were legally there, were sponsoring him. There is nothing to suggest this sponsorship would not succeed until the Applicant was charged and

convicted of driving under the influence, at which point he came straight to Canada and claimed protection. Why is this explanation not considered reasonable?

[85] There was no need for the RPD to accept any of this, but it is impossible to tell from the Decision whether the explanation was even considered and, if it was, why it was rejected as a reason for the delay in making a claim.

[86] Similar problems can be found elsewhere in the Decision, perhaps none of which would matter if the adequate state protection finding was clearly stand-alone and determinative, but the RPD fails to make it clear that this is the case and my reading of the Decision as a whole does not clear up the confusion.

[87] For example, if I examine the central issue of how the Applicant knew about the blood feud and the RPD's response, I find similar problems:

> The claimant was asked why he suspected his family was in a blood feud. He replied that he knew after he refused to go through with the marriage that a blood feud would be declared. Further, neighbours told us to watch out since we are in a blood feud. The evidence is that the Fejzui family made threats by telephone but never declared a blood feud in any formal manner. When asked directly how the neighbours knew a blood feud was declared, the claimant responded that the Fejzui family had told them (the neighbours). According to the claimant's Personal Information Form (PIF), Exhibit C-1, there is no reference of the neighbours being told a blood feud was declared. It is generally accepted that a blood feud such as this, occurs when a formal declaration is sent by the wronged family through an emissary to announce the declaration. I am satisfied, since the neighbours did not indicate they were delivering a message from the Fejzui family, that there was no declaration of a blood feud.

[88] There is no reference to what the RPD is relying upon for the statement that "It is generally accepted that a blood feud such as this, occurs when a formal declaration is sent by the wronged

family through an emissary to announce the declaration." If the RPD is relying upon its own knowledge, this matter was never put to the Applicant for his response.

[89] The CTR reveals the following exchange on point:

Member: Well, sir – I'll try to shorten it. Was there any point before you left that your ex-girlfriend or your ex-fiancée's family either approached your family personally or sent others to approach your family to tell your family that, because of your actions in refusing their daughter, they have taken this as an insult and they are declaring a blood feud?

Claimant: Yes.

Member: When did that happen?

Claimant: In September of 2000.

Member: And what happened in September of 2000.

Claimant: It was the incident that happened with the two brothers who came to our home.

Member: Oh, I heard all that. Where's the part in that incident where they say that the family is in a blood feud?

Claimant: Well, the thing is, right after this incident, my neigh -- our neighbour, Pandi Demiri ---

Interpreter: Pandi Demeri. P-a-n-d-i. The last name is D-e-m-e-r-i.

Claimant: --- came and told us, said, "Be careful because the other family has declared blood feud against you."

Counsel: P-a-n-t-i?

Interpreter: Pandi, P-a-n-d-i.

Counsel: Okay.

Interpreter: And the last name D-e-m-e-r-i.

Claimant: I didn't write his name in the PIF.

Counsel: No problem.

Member: And how did you [*sic*] neighbour know that a blood feud had been declared?

Claimant: Because (inaudible) family has told him.

Member: Is that the way a blood feud is usually declared?

Claimant: I don't know how they usually do it. I know how they did it in our case.

[90] It looks as though the RPD is here noting a discrepancy between the PIF narrative and the Applicant's oral testimony. In the PIF, the Applicant had written at paragraph 9 of his narrative that

> After this incident [i.e. the assault on the Applicant by the two Fejziu brothers] we began getting death threats over the phone. Neighbours came round who knew both our families. They told us to watch out because we were in blood feud.

[91] It is unclear how or why the RPD reaches a negative credibility finding on this point. The PIF says the family received death threats over the phone, but it was the neighbours who told them they were in a blood feud. This is not inconsistent with the oral testimony. So, the RPD hangs its finding on the fact that "there is no reference of the neighbours being told a blood feud was declared." But the Applicant explains in the PIF that the neighbours had overheard the altercation between the families and it was probably them who called the police; and that the neighbours who came around to tell them they were in a blood feud "knew both our families." Is it really a material omission from the Applicant's PIF or an embellishment if the Applicant did not say directly that the Fejziu family told the neighbours? After all, if the neighbours knew both families and knew of the

dispute between them, who else would be likely to tell the neighbours that there was a blood feud? And wouldn't the Applicant assume if he wrote what he did write in his PIF that it would be pretty obvious who told the neighbours? Can this really be described as a material omission from his PIF? I do not think so.

[92] Or is it the RPD's point that the blood feuds are only started by "formal declaration" and neither the PIF nor the oral testimony mentions a formal declaration? If this is the point, then the RPD would need to indicate what evidence it is relying upon for this finding and, to be procedurally fair, it should have put that evidence to the Applicant and given him an opportunity to respond.

[93] The Philip Alston Report, praised by the RPD for its objectivity, says that blood feuds are governed by "culturally understood rules," but the content of these rules "differs from region to region over time." I can find no evidence on the record that the culturally understood rules in the Applicant's region require a formal declaration of some kind. In my view, the negative credibility finding against the Applicant on this issue is both unreasonable and procedurally unfair

[94] The Decision is not clear on the extent to which the negative credibility findings and/or past attempts to elicit the protection of the police informed the adequate state protection analysis. There is clear evidence in the PIF that, as far as past incidents are concerned, the police informed the family that they would not interfere in the dispute because it was a personal family matter. This occurred after the assault by the two Fejziu brothers and after the Applicant was knocked down by a car driven by the same brothers and the Applicant had to be hospitalized. The Applicant is criticized for not going to the police, but the police were called on both of these occasions and said they would not get involved. It is a significant omission by the RPD not to have addressed this.

[95] When the RPD says at paragraph 31 of the Decision that it has "insufficient evidence to cause me to find police are unwilling to investigate credible cases of threats as part of a blood feud," it is not possible to tell whether the member is completely discounting the Applicant's own evidence of what the police have said to his family in the past. The RPD certainly seems to have the past in mind for this finding because, in the same paragraph 31, it finds that

> Simply having his father, who had no first hand information, go to the police and not the claimant or his boss does not establish state protection would be inadequate.

[96] The Applicant's evidence as to why his father went to the police was because the Applicant was taken to the hospital. His father was told by the police that "it was a personal thing, and not something for them to bother with." Having told the father this, there would be little point in the Applicant going to the police himself. In addition, there is strong evidence in the Alston Report, praised as objective by the RPD, that "a belief in the practice of the vindicating honour and blood outside the regular legal system remains well entrenched in certain parts of society" (emphasis added), and that its "elimination will require additional measures to those taken so far." While this does not mean that the state will not offer protection when asked, it does not contradict the Applicant's own experiences with the police. The police told his mother and his father when they attempted to obtain protection for the Applicant, in situations where he had been knocked to the ground or was in the hospital after being hit by a car, that they would not get involved because it was a personal family matter.

[97] In addition, I think there are two basic factual errors the RPD has made in its Decision which make the Decision unreasonable.

[98] First, the RPD concluded the Applicant's account of the injuries he suffered after he was hit by the Fezjia's car was not credible. The Decision says "the claimant testified what when he was taken to the hospital, his ear was bleeding from cuts and scratches on the back of the ear. His written evidence was that blood was coming from inside the ear." From the Decision, it would appear that there is an unequivocal discrepancy between what the Applicant said and what he wrote in his PIF. However, on a close reading of the PIF, there is really no inconsistency. What the Applicant wrote was "Later, I was taken to the hospital, because I was bleeding, including out of my ear and they were concerned." This could be taken to mean from the inside of the ear, but it could also mean the outside of the ear. At the hearing, the Applicant clarified what he had written, but the RPD did not even address his explanation.

[99] The RPD felt this mattered because it apparently thought blood coming from the inside of the ear would corroborate the Applicant's story of being held in the hospital overnight for observation, but blood coming from the outside of the ear would not. This seems to call for a medical judgment, when there is nothing to show that the RPD member is a medical doctor or has any expertise in trauma medicine. At any rate, as I have already noted, if the RPD had specialized knowledge it was relying on, it had to put this to the Applicant for his comment (see section 18 of the *Refugee Protection Division Rules* SOR/2002-228).

[100] Second, the RPD concluded that the Applicant's actions in the USA were inconsistent with his stated fear because "he had no status in the US but he made no claim for protection" and "I do not accept that remaining in the US for eight years without status and without exploring all options, including returning to Canada is [not] inconsistent with his stated fear." As I have noted, there was evidence before the RPD that the Applicant had attempted to regularize his status in the USA

through a sponsorship application by his parents. If this was true, and the RPD does find it is not, then it would seem that the Applicant's actions in the USA were at least not inconsistent with his stated fear.

[101] As I read the Decision, the RPD was concerned that the Applicant's behaviour in the USA showed he did not actually fear persecution in Albania; had he actually had this fear, he would have tried his hardest to remain in the USA, where he was safe. However, in addition to the unreasonable analysis of his reasons for not claiming asylum there, the RPD assumed that the only way he could have gained status in the USA was through an asylum claim. It did not address whether the outstanding sponsorship application by his parents made it unnecessary for him to claim asylum.

[102] It is also important to note that Applicant's counsel spoke to this at the hearing and explained why the Applicant would not have claimed asylum in the USA

> Therefore, there was no point to making a claim. It would be unreasonable because there was no prospect of success.
>
> So I submit, in fact, given the information he had, legal counsel and people in the same position, multiple people in the same position, if he made the claim, it would have served to draw attention to himself and hasten his deportation or removal from the US. Therefore, it would be a move against his own interests to do that. Unless there was some foreseeable chance of success, going to the authorities in that instance could only have hurt him. He didn't want to be removed from the States, therefore he didn't do it, given no foreseeable chance of success.

The RPD does not bother to address this explanation, so I think its conclusion on this point is unreasonable.

[103] All in all, I think that the lack of clarity in the grounds, the procedural fairness issues and the unreasonable findings noted render this Decision unsafe and that the matter should be returned for reconsideration.

[104] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is allowed. The decision is quashed and the matter is returned for reconsideration by a differently constituted RPD.

2. There is no question for certification.

"James Russell"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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