

Federal Court



Cour fédérale

Date: 20160524

Docket: IMM-4891-15

Citation: 2016 FC 568

Fredericton, New Brunswick, May 24, 2016

PRESENT: The Honourable Mr. Justice Bell

BETWEEN:

FILONA GJATA

Applicant

and

**MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

(Delivered orally from the Bench on May 5, 2016)

I. Overview

[1] Filona Gjata [Ms. Gjata] seeks judicial review of a decision of the Refugee Appeal Division [RAD] dated October 7, 2015, in which the RAD dismissed an appeal from the Refugee Protection Division's [RPD] determination that Ms. Gjata is not a Convention refugee or a person in need of protection pursuant to ss 96 and 97 of the *Immigration and Refugee Protection*

Act, SC 2001, c 27 [the Act]. For the reasons that follow, I would allow the application for judicial review.

II. Background

[2] Ms. Gjata was born on January 24, 1991, and is a citizen of Albania. When she was a child, she moved to Greece with her family. She lived in Greece as a permanent resident until she returned to Albania in 2013. In 2008, she entered into a relationship with Bledar Cani [Mr. Cani] and agreed to move in with him and his family. Ms. Gjata testified that during the course of the relationship, Mr. Cani and his family abused her. Ms. Gjata claims she was not allowed to go to school or to go outside alone, and that she was kept inside the home to cook and clean for Mr. Cani and his family. She also testified that Mr. Cani threatened and beat her. In January 2010, after an assault, Ms. Gjata ended the relationship and returned to her parents' home. I would note that in 2010, Ms. Gjata was 18 or 19 years of age. She testified that in April and June of that year, Mr. Cani assaulted and raped her. During the assault in June, Mr. Cani, while holding a knife, threatened to cut her in pieces. Ms. Gjata reported the matter to the Greek police who arrested and detained Mr. Cani. He was charged with assault and possession of cannabis. The latter charge was later withdrawn. He was incarcerated until trial or for a maximum of one year. In March 2011, Ms. Gjata recanted her allegations in the form of a sworn affidavit and asked that the criminal proceedings be stopped. She later testified before the RPD that she had recanted her testimony under pressure and threats from Mr. Cani's family and because she wanted the matter to end. Despite her recantation in March 2011, Mr. Cani remained in prison for the full year, until June 2011. Ms. Gjata testified that in November of that year, Mr. Cani assaulted her again for which she required hospitalization. While the record is unclear as to how

the police came about to visit her at the hospital, she did not reveal the name of her assailant to them.

[3] Ms. Gjata also claimed that Mr. Cani drove by her place of employment in 2012 and looked angry. This fact was not mentioned in her Basis of Claim [BOC] form and formed the basis for a lack of credibility finding by the RAD. In December 2012, she moved to a different city in Greece. Ms. Gjata further testified that in September 2013, a friend told her that Mr. Cani was seeking her out so he could kill her because she had left town without his permission. She moved back to Albania and lived in a village with her uncle. Three days before she left Albania, Ms. Gjata married an Albanian citizen.

III. Issue

[4] The issue before this Court is whether the RAD's decision meets the test of reasonableness.

IV. Standard of Review

[5] I am mindful of the instructions in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*] as it applies to judicial reviews of administrative tribunals' decisions. I am satisfied that the standard of review in this case is one of reasonableness. I appreciate that this Court should not interfere if the administrative tribunal's decision is justified, transparent and intelligible, or if it falls "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above at para 47). I am also aware that on evidentiary

and credibility issues, this Court is required to show deference to the administrative tribunal's findings. I am cognizant of the jurisprudence, including *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 [*Newfoundland Nurses*'], which permits courts to review, in addition to the decision, the record, in order to determine whether the *Dunsmuir* test is met. In doing so, the reviewing court may overlook some minor discrepancies or sometimes major discrepancies with respect to the evidence if, on the whole of the evidence and the record, the reasons and the outcome can be found to be reasonable within the *Dunsmuir* criteria.

V. Analysis

[6] Ms. Gjata contends the RAD erred in one of its findings of fact. That finding relates to the length of time during which the agent of persecution, Mr. Cani, was in a position to assault or carry out his threats of assault against Ms. Gjata. The RAD concluded that Mr. Cani and Ms. Gjata lived in the same town for two years following the November 2011 incident. However, as shown by the evidence in the record, they were in the same town for approximately one year after November 2011, not two years as found by the RAD. While counsel for the Minister recognized this error of fact, he submits that Ms. Gjata and Mr. Cani nevertheless lived in Greece during the two-year period. On that issue, I turn to the reasons for the decision. At paragraph 19 the RAD states:

[...] The RAD notes that after the Appellant was assaulted by Bledar in November of 2011, she continued to live in the same town as Bledar until September 2013 and at no time was she threatened or assaulted by him. [...]

[7] That statement causes this Court some concern. Both parties and the Court know that that statement is inaccurate. While one such erroneous statement may not taint the whole of the decision, the same mistake is repeated several times throughout the RAD's decision. Further in paragraph 19, the RAD says:

[...] The RAD has difficulty believing that the agent of persecution would not personally threaten or harm the Appellant while they were living in the same town [...].

[8] Four lines further, still in paragraph 19, the RAD states:

[...] it seems reasonable that he would have taken the opportunity to do so when the agent of persecution and the Appellant were residing in the same town. [...]

[9] The observations made in paragraphs 7 and 8 above clearly relate to the two-year period referred to at the beginning of paragraph 19 of the decision. At paragraph 21 the RAD repeats its focus upon this apparent concern that Mr. Cani and Ms. Gjata resided in the same town for two years:

[...] I find it implausible that the agent of persecution would not have continued to threaten her between November 2011 and September 2013 when they were both residing in the same town. [...]

[10] Finally, later in paragraph 21, the RAD states:

[...] if [Mr. Cani] would have been interested in continuing to harm the Appellant either verbally or physically it is reasonable to expect that he would have taken the opportunity to do so between November 2011 and September 2013 when they were residing in the same town. [...]

[11] In my view, it is evident that the RAD misapprehended the evidence when it concluded the agent of persecution and the persecuted lived in the same town for two years. Such an error might not be sufficient to allow an application for judicial review if, on a reading of the whole of the decision and the record, that fact was not particularly relevant. However, this erroneous finding of fact constituted a serious preoccupation for the RAD and one upon which it clearly and erroneously anchored its decision.

[12] There are other aspects of the RAD's evidentiary findings that I find concerning. At paragraph 15 of its decision, the RAD is critical of Ms. Gjata's failure to include in her BOC the fact that Mr. Cani drove by her place of employment on several occasions looking angry. Her response before the RPD when questioned about this matter was that she recounted in her BOC those occasions when the agent of persecution (Mr. Cani) hurt her. On this issue, it is important to here state that Ms. Gjata's testimony concerning the severe beatings and the rape, as well as the hospitalization, were never contradicted and were accepted by the RPD and the RAD. Yet, Ms. Gjata's statement as it relates to the agent of persecution driving by her workplace was considered by the RAD to be "major evidence". When I consider the facts of this case and the extreme violence suffered by Ms. Gjata, I find the RAD unreasonably interpreted the 'drive-by' as "major evidence", the omission of which would undermine Ms. Gjata's credibility.

[13] Still on evidentiary issues, I note the RAD concluded that certain statements made by Ms. Gjata's friend, Ms. Alike Korda, and attributed to the agent of persecution, were "nonsensical". Briefly summarized, the RAD concluded that Ms. Korda contended that Mr. Cani implored Ms. Gjata to return so he could kill her. The RAD, rightly in view, concluded such a

contention was 'nonsensical'. Why would anyone, even Mr. Cani, realistically expect someone to return to her persecutor to be killed? In my view the RAD may have misapprehended the evidence. An equally plausible interpretation, one that would not have been nonsensical, was that if Ms. Gjata did not return, Mr. Cani would kill her. As observed in *Newfoundland Nurses*' at para 16, an administrative tribunal's reasons must allow the reviewing court to understand how it arrived at its conclusion, and it must permit the reviewing court to determine whether the findings fall within the range of possible, acceptable outcomes. In my view, this was not done by the RAD with respect to Ms. Korda's testimony. The RAD made a bare assertion that its (the RAD's) interpretation of Ms. Korda's testimony was nonsensical. However, in the circumstances, Ms. Korda's testimony required further analysis and a consideration of interpretations which might render it 'sensible'.

[14] I am satisfied the clear errors made by the RAD with respect to some of the evidence and its misapprehension of other evidence, taints its decision as it relates to whether or not Ms. Gjata had a well-founded fear of persecution. However, that does not end the matter because states are presumed to be capable of protecting their citizens. Albania is no exception to that presumption.

[15] I am mindful there are a number of factors to be considered in assessing the availability of state protection. Without providing an exhaustive list, some of those factors include the profile of the alleged agent of persecution, the efforts of the claimant to seek protection, the response of the authorities and, of course, available documentary evidence. In this case, it is clear that Ms. Gjata took no efforts to seek the protection of the state in Albania. There was significant evidence before the RPD and the RAD with respect to country conditions.

[16] I consider the profile of the agent of persecution to be a significant factor in this case. While Mr. Cani's profile as a very violent person was known and identified by the RAD, it did not mention of his citizenship. Citizenship is important. Obviously, if Mr. Cani were an Albanian citizen living in Greece, he could re-enter Albania at any time. I considered his citizenship sufficiently important to ask counsel for Mr. Gjata whether he (Mr. Cani) was Albanian or Greek. Neither Ms. Gjata's counsel nor I knew the answer to that question. In the highest of ethical standards and demonstrative of the Crown's duty of fairness, Mr. James Todd, counsel for the Minister, directed this Court to evidence of Mr. Cani's Albanian citizenship. Given my own observations during the hearing, Ms. Gjata's counsel's response to my question regarding Mr. Cani's citizenship and the failure by the RAD to refer to Mr. Cani's Albanian citizenship, I am of the view the RAD overlooked a very important part of Mr. Cani's profile; namely, the fact he is Albanian and would have easy access to Ms. Gjata should she return to Albania.

VI. Conclusion

[17] Given my observations with respect to the erroneous factual conclusions made by the RAD and my conclusion that the RAD overlooked an important aspect of the profile of the agent of persecution in its analysis of state protection, I am satisfied the decision does not meet the test of reasonableness as set out in *Dunsmuir*. I would therefore allow the application for judicial review and remit the matter to a different panel of the RAD for redetermination.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed;
2. The matter is remitted to a different panel of the RAD for redetermination;
3. There will be no order of costs; and
4. There is no question certified.

"B. Richard Bell"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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DATED: MAY 24, 2016

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