

Federal Court



Cour fédérale

Date: 20180206

Docket: IMM-3066-17

Citation: 2018 FC 131

Toronto, Ontario, February 6, 2018

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

VLLAZNIM KOLA

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] By the present Application the Applicant challenges a Pre-Removal Risk Assessment (PRRA) Decision dated May 31, 2017 on grounds that, on the basis of new evidence, he will face the probability of risk of harm should he be required to return to Kosovo as a gay man.

[2] The Officer who rendered the Decision under review began the risk analysis by quoting the following passages from the negative decision rendered by the Refugee Protection Division (RPD) with respect to the Applicant's claim for protection:

To summarize, the claimant alleges he faces persecution from his family and members of society due to his sexual orientation, namely he is homosexual.

The panel finds the determinative issues are credibility, identity, state protection, and exclusion. There were a number of credibility concerns that lead the panel, on the balance of probabilities, to make a determination that the claimant is not a credible and trustworthy witness. After a review of all the information, including the claimant's testimony, documentary evidence and Counsel's submissions, the panel finds, on a balance of probabilities, that the claimant has not established his identity as a homosexual.

The claimant's failure to give clear, consistent and cogent evidence concerning material aspects of his claim impugns his credibility. The claimant has not provided satisfactory evidence of his alleged perceived sexual identity as homosexual.

[Emphasis added]

(Decision, p. 4)

[3] However, at page 13 of the Decision, the Office made this important new evidence finding:

- another document which has been submitted by counsel on behalf of the applicant is a statutory declaration, which is dated May 27, 2016, from Brandon Michael Lee in Toronto, who states, "I would also like to state that I have had intimate encounters with him [the applicant] on more than one occasion, and can attest to the fact that he identifies as a gay man."
- I give the statutory declaration some weight, and I will consider it as one piece of evidence within the totality of the evidence before me.

[Emphasis added]

[4] Thus, the Officer accepted the new evidence establishing that the Applicant identifies as a gay man. However, at page 14 of the Decision the Officer made the following findings:

- in a PRRA application, the burden of proof is on the applicant claiming protection;
- it is up to the applicant to establish that protection must be granted to him;
- I am of the opinion that there is insufficient objective, new evidence before me to indicate that any groups or individuals would be interested in pursuing the applicant or in targeting him for harm upon his return to Kosovo;
- I make this statement, cognizant of the fact that the documentary evidence before me indicates that LGBT people in Kosovo face societal pressure to hide their sexual orientation;
- it is clear from the documentary evidence before me that even though Kosovo is a parliamentary democracy, societal violence and discrimination against homosexuals still occurs there;
- however, it is my opinion that the documentary evidence does not support a conclusion that police protection would not be available to the applicant if he ever required protection;
- although state protection is not perfect in Kosovo, this does not rebut the presumption that the state is able to protect its citizens;
- clearly no government in any jurisdiction can *guarantee* [emphasis in the original] the protection of all of its citizens at all times;
- however, I am of the opinion that the applicant has not met the evidentiary burden of providing clear and convincing proof that the state would not be reasonably forthcoming with serious efforts to protect him from any groups or individuals, if such protection were necessary in Kosovo;
- furthermore, it is my opinion that the evidence before me, when considered in its totality, does not support a conclusion that the applicant would face a risk as outlined in section 97 of the IRPA if he were removed to Kosovo.

[Emphasis added]

[5] In my opinion, the Officer's decision-making is unintelligible.

[6] The Officer accepts new evidence that the Applicant is a gay man, but then provides no reason for only attributing “some weight” rather than full weight to an accepted fact. The Officer proceeds to state that there is insufficient objective new evidence “to indicate that any groups or individuals would be interested in pursuing the applicant or in targeting him for harm upon his return to Kosovo”, but then makes the contrary finding that “societal violence and discrimination against homosexuals still occurs” in Kosovo. Nevertheless, the Officer finds that state protection exists in Kosovo for the harm that the Applicant will face upon return but cites no evidence in support of such an expansive conclusion.

[7] As a result, I find the decision is unreasonable.

JUDGMENT

THIS COURT'S JUDGMENT is that the decision under review is set aside and the matter is referred back for redetermination by a differently constituted panel.

There is no question to certify.

“Douglas R. Campbell”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3066-17

STYLE OF CAUSE: VLLAZNIM KOLA v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JANUARY 30, 2018

JUDGMENT AND REASONS: CAMPBELL J.

DATED: FEBRUARY 6, 2018

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