

Date: 20090730

Docket: IMM-343-09

Citation: 2009 FC 792

Vancouver, British Columbia, July 30, 2009

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

ARSIM SADA

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant is a refugee claimant from Kosovo. He fled to Canada after having allegedly suffered a series of acts of persecution in Kosovo.

[2] The Applicant's claim to protection as a Convention refugee was heard by a Member of the Immigration and Refugee Board. A decision rejecting that claim was given by the Member on January 5, 2009. This is the decision under review. During the course of that hearing and the events surrounding the hearing, the Applicant, who has only a limited ability in one of Canada's official languages, English, was self-represented.

[3] The determination of this application for judicial review rests on a single issue, that of procedural fairness. The Applicant's counsel has raised other issues attacking the merits of the decision itself, however, I do not need to comment on these arguments since the issue of procedural fairness, or lack thereof, is determinative. As such, it is not necessary to consider questions such as the standard of review.

[4] Prior to the hearing, the Applicant was sent a package of documents known as a Screening Form. On the bottom of one page of the documents in that package, the following instructions were given:

INSTRUCTIONS TO COUNSEL/CLAIMANT

Please ensure that you provide this office with a copy of all documents, translated as necessary, at least 20 days prior to the hearing. This should include identity documents, and any other evidence that would support your claim. Please provide translated documents relating to your status in Germany and please provide translated copies of any UNMIK documents in your possession.

[5] I presume that the acronym UNMIK stands for United Nations Mission In Kosovo.

[6] The Applicant did not produce some of these documents prior to or at the hearing despite being advised to do so. However, at the end of the hearing, the following exchange between the Member and the Applicant was recorded at page 51 of the transcript (p. 53 of the Tribunal Record):

PRESIDING MEMBER: All right. Well, I'm not going to render a decision orally today. I want to thank you, sir, for coming in to tell me your story. You'll receive written notification about the outcome of your case. You must make sure that your address is up-to-date

and current with the Refugee Protection Division, so we know where to mail it to you.

We're giving you back your original documents and whatever the outcome of the decision is, I sincerely wish you the best for the future.

This concludes the matter.

CLAIMANT: I just have something to add.

PRESIDING MEMBER: Yes?

CLAIMANT: If you do need the UNMIK document, I have a possibility of getting that. I can bring it 100 percent, no problem. I do possess that document, I just don't have it here.

PRESIDING MEMBER: Okay. Thank you for offering that. If I do need it, I'll let you know.

--- PROCEEDINGS CONCLUDED

[7] Neither the Member nor anyone on the Member's behalf after this exchange let the Applicant know that such documents would be needed. The Member simply made a decision including stating in paragraph 21 of that decision that the documents were "important" and that the Board had made a "specific request" for them. If they were important, the Board should have followed up on the undertaking to request them if needed. Further, the decision is simply wrong in stating that the documents were "specifically requested". No such request was made following the Member's undertaking to the claimant. The member wrote at paragraph 21 of the decision:

[21] The panel explained to the claimant why the UNMIK documents were so important. Foremost, they would establish the claimant was indeed located in Kosovo, during the period he alleges. It is also odd that when travelling within, and later departing the country, he did not travel with the UNMIK documents. These were

valid, well-recognized methods to establish identity. The panel is left questioning why he would leave such important documents in Kosovo. The panel finds the claimant has not been credible and forthright about producing these important documents, especially in that the Board made a specific request that the claimant produce them. The panel finds that it raises important questions about whether this claimant was indeed in the country during the times alleged. These concerns are further exacerbated in that most of his personal identity documents are from the early 2000's.

[8] The Member may have forgotten that he undertook to request the UNMIK documents “if needed.” He wrote in his decision several times that the documents were “important” therefore the undertaking to request the documents cannot be overlooked or be said to be insignificant. The matter must be returned to a different Member for rehearing and redetermination.

[9] There is no question for certification. No order as to costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application is allowed;
2. The matter is sent back for rehearing and redetermination by a different Member;
3. There is no question for certification;
4. No Order as to costs.

“Roger T. Hughes”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-343-09

STYLE OF CAUSE: ARSIM SADA v. MCI

PLACE OF HEARING: Vancouver, BC

DATE OF HEARING: July 30, 2009

**REASONS FOR JUDGMENT:
AND JUDGMENT:** HUGHES J.

DATED: July 30, 2009

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