Date: 20091015

Docket: IMM-593-09

Citation: 2009 FC 1047

Ottawa, Ontario, October 15, 2009

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

LAVDIMIR PREKAJ and
EDMONDA PREKAJ

Applicants

and

MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72 (1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (Board), dated January 19, 2009 (Decision) refusing the Applicants' application to be deemed Convention refugees or persons in need of protection under sections 96 and 97 of the Act.

BACKGROUND

[2] The Applicants, husband and wife, are citizens of Albania. The male Applicant fled to the United States in 2000 where he claimed political asylum after an assault. The female Applicant fled to the United States in 2002. The Applicants were married in 2002 and now have three children. Two of the children are citizens of the United States. One child is a citizen of Canada. The Applicants and their children fled to Canada after learning their claim for asylum had been denied and they were to be deported from the United States.

[3] The Applicants fear returning to Albania because of a blood feud in the male Applicant's family. His uncle killed a man and the victim's family is seeking to kill a male member of the male Applicant's family. As a result, the male members of the Applicant's family live in hiding. The Applicants fear being returned to the scene of the blood feud and came to Canada to seek refugee status.

DECISION UNDER REVIEW

[4] The Board found that the Applicants did not have a well-founded fear of persecution. Moreover, the Board determined that they were not people in need of protection and that their removal to Albania and the United States would not subject them to a risk to their lives or to cruel and unusual treatment or punishment.

[5] The Board determined that state protection was the main issue in this case. Because the Democratic Party is in power in Albania, the male Applicant is no longer a member of a particular social group. Moreover, a risk to his life and a threat of cruel and unusual punishment no longer exists.

[6] The Board cited the Federal Court decision of *Zefi v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 636 (*Zefi*) in finding that vendettas and blood feuds do not have a nexus to the Convention. Moreover, the government of Albania has made sweeping statutory changes regarding blood feuds. Such changes include a twenty-five year prison sentence for those who kill in a blood feud and stiff penalties for those who threaten retaliation. These changes have begun to diminish the blood feud custom.

[7] The Board was satisfied that the Albanian government was making serious efforts to address the problem of blood feuds. Expanded governmental efforts include an amendment to make blood feuds illegal and a recent pledge of 65,000 Euros to promote reconciliation. The Board was also satisfied that the occurrence of blood feuds was reasonably low. The Board noted that Albania is a parliamentary democracy and generally respects the rights of its citizens.

[8] The Board found that the Applicants had not presented the clear and convincing evidence necessary to rebut the presumption of state protection. While the protection offered by Albania was not perfect, the Board was satisfied that the country was making serious efforts.

ISSUES

[9] The Applicants submit the following issues on this application:

1) Did the Board err in law in its interpretation and application of the definition of Convention refugee and a person in need of protection as per sections 96 and 97 of the Act?
2) Did the Board base its Decision on an erroneous finding of fact or facts that it made in a perverse or capricious manner or without regard for the material before it?
3) Did the Board base its Decision on findings of plausibility based on inferences that were not reasonably open to it?
4) Did the Board fail to observe a principle of natural justice, procedural fairness or other procedure that it is required by law to observe?

However, not all of the formal grounds for review are raised by the Applicants in their submissions. Essentially, the Applicants argue that the Board's findings on state protection are unreasonable.

STATUTORY PROVISIONS

[10] The following provisions of the Act are applicable in these proceedings:

Convention refugee	**Définition de « réfugié »**
96. A Convention refugee is a person who, by reason of a	**96.** A qualité de réfugié au sens de la Convention — le

well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

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;

(*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Person in need of protection

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

Personne à protéger

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 torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s'il y a des motifs sérieux de le croire, 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

b) soit à une menace à sa vie

risk of cruel and unusual treatment or punishment if

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.

Person in need of protection

Personne à protéger

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

STANDARD OF REVIEW

[11] In *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9, the Supreme Court of Canada recognized that, although the reasonableness *simpliciter* and patent unreasonableness standards are theoretically different, "the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review" (*Dunsmuir* at paragraph 44). Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of "reasonableness" review.

[12] The Supreme Court of Canada in *Dunsmuir* also held that the standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the 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.

[13] The Board's interpretation of the Act will be reviewed on a correctness standard, while the Board's application of the law to the facts will be considered on a standard of reasonableness (*Dunsmuir* at paragraph 164). Reasonableness will also be used to consider whether the Board erred in making its finding of credibility: *Aguirre v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 571.

[14] Reasonableness is the appropriate standard when reviewing the Board's consideration of state protection, since state protection is a question of mixed fact and law: *Guzman v. Canada (Minister of Citizenship and Immigration),* 2008 FC 490. Questions of fact also attract a standard of reasonableness (*Dunsmuir* at paragraph 51). Thus, in considering whether or not the Board relied on erroneous findings of fact, a standard of reasonableness will apply.

[15] 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" (*Dunsmuir* at paragraph 47). Put another way, the Court should only intervene 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."

[16] The Applicants have also raised legal error and procedural fairness issues to which the standard of review is correctness: see *Suresh v. Canada (Minister of Citizenship and Immigration),* 2002 SCC 1 and *Dunsmuir* at paragraph 60.

ARGUMENTS

The Applicants

[17] The Applicants recognize that a well-founded fear is based on the existence of both a subjective and an objective component. They cite and rely on the Federal Court of Appeal decision in *Adjei v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 680 which held that the objective component of the test is defined in terms of a "reasonable chance" that the persecution would occur if the Applicants were returned. The Court expanded this test in *Ponniah v. Canada (Minister of Employment & Immigration)*(1991), 13 Imm. L.R. (2d) 241, in finding as follows:

> "Good grounds" or "reasonable chance"… is less than 50 % chance (i.e. a probability), but more than a minimal or mere possibility. There is no intermediate ground: what falls between the two limits is "good grounds". If the claimant, as the Board said, "…may face slightly more than a mere possibility…" of persecution, he had crossed the lower limit and had made his case of "good grounds" or a "reasonable chance" for fearing persecution.

[18] The Applicants submit that state protection is a question of fact because seeking state protection depends on the unique circumstances of each case. In this instance, the Board noted that the state's protection was marginal, that there was a low level of police professionalism, and that little police help was available.

[19] The Applicants submit that they rebutted the presumption of state protection. Their documentary evidence highlighted blood feud killings and revenge killings. Moreover, this evidence showed that blood feuds are responsible for more than a thousand families being imprisoned in their homes for fear of retaliation.

[20] The Applicants contend that the number of families imprisoned in their homes demonstrates that state protection in Albania is not effective with regard to blood feuds. Moreover, the evidence shows that Albanian police prefer not to get involved in situations regarding blood feuds. Other evidence provided by the Applicants shows that, in some situations, leaving Albania is the only solution to a blood feud.

[21] Finally, the Applicants submit that the National Committee of Reconciliation helps to resolve blood feuds because state protection is ineffective in these cases.

[22] The Applicants believe that the Board misconstrued the evidence on state protection. Furthermore, inferences made by the Board regarding the documentary evidence were not reasonable, and the decision should be quashed. See *Giron v. Canada (Minister of Employment and Immigration)*(1992), 143 N.R. 239.

The Respondent

[23] The Respondent argues that the Board was correct in its consideration of state protection. Specifically, the Board noted that, in the past year in Albania, only 2 murders out of 96 have been related to blood feuds. The Board also considered evidence that the government was enacting steep penalties for blood feud killings which were helping to decrease the practice. The Respondent contends that the Board's reasons demonstrate a full understanding of the documentary evidence.

[24] In order to show that the Board erred in its finding of state protection**,** the Applicants must show that some reliable and probative evidence was not considered by the Board. Moreover, the Applicants must demonstrate that protection would not be forthcoming from the state: *Carillo v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94.

[25] The evidence relied upon by the Applicants does not show an error in the analysis of the Board, and does not show that state protection is inadequate. Simply showing that blood feuds are still a problem in Albania does not discharge the Applicants' burden.

ANALYSIS

[26] This matter must be returned for reconsideration. A review of the evidence before the Board reveals an extremely partial selectiveness in order to support conclusions that the evidence in total may well contradict.

[27] For example, the Board quotes and relies upon Exhibit C-10 for the following quotation:

> Statistics vary on blood feud activity. According to the Interior Ministry, of the 96 murders during the year, two were related to blood feuds, with the number of blood killings dropping due to an increase in investigations … .

[28] However, it is very telling that the Board does not quote the very next sentence from the same document:

> However, the Committee for National Reconciliation, a nongovernmental organization (NGO), continued to cite high levels

> of blood feud activity including over 1,000 families imprisoned in their homes for fear of blood feud reprisals against them.

[29] Counsel for the Respondent has suggested to the Court that the reason this evidence was disregarded was its source: the Committee for National Reconciliation. The Board is, of course, entitled to prefer some evidence over other. However, where no explanation is provided for the failure to refer to contradictory evidence, then the Court may well conclude that it was simply ignored or was overlooked. See *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, (1998) 157 F.T.R. 35.

[30] The Response for Information Request (RIR) that was part of the document package contained unequivocal evidence that "Albanian authorities were unable to protect victims of blood feuds," that "blood feuds continue regardless of improvements" because "the Albanian state remains somewhat ineffective." There is also evidence that the police and the judiciary are ineffective and are reluctant to become involved in blood feud disputes because they fear that they may become targets themselves.

[31] None of the contradictory evidence is addressed in the Decision. Counsel for the Respondent suggests that the reason why the Board failed to refer to this evidence is because the RIR is dated September 2006, so that the Board was entitled to rely upon more recent documentation that refers to improvements in the situation and action by the Albanian Government to deal with blood feuds. However, this completely ignores the advice of the Protection Officer which appears at page 270 of the Certified Tribunal Record and which refers to a May 2008 paper,

and makes it very clear that, notwithstanding legislative changes and government initiatives, the Government of Albania "is unable to deal with blood feuds effectively or offer significant protection to citizens. Albanian legislations have acknowledged that in Albania there is an absence of the rule of law." All of this is ignored by the Board. The Officer simply selects incomplete references and evidence to support a finding that the Applicants have not rebutted the presumption of state protection. The Decision is entirely unreasonable for this reason. See *King v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 774.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application is allowed. The Decision is quashed and the matter is returned for reconsideration by a different officer.
2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT FILE NO.:	IMM-593-09
STYLE OF CAUSE:	LAVDIMIR PREKAJ and EDMONDA PREKAJ v. THE MINISTER OF CITIZENSHIP AND MMIGRATION
PLACE OF HEARING:	TORONTO, ON
DATE OF HEARING:	October 1, 2009
REASONS FOR JUDGMENT:	RUSSELL J.
DATED:	October 15, 2009

WRITTEN REPRESENTATIONS BY:

John Rokakis	FOR THE APPLICANTS
Bridget A. O'Leary	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Mr. John Rokakis Barrister & Solicitor Windsor, Ontario	FOR THE APPLICANTS
JOHN H. SIMS, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT