

Federal Court



Cour fédérale

**Date: 20120615**

**Docket: IMM-6500-11**

**Citation: 2012 FC 762**

**Ottawa, Ontario, June 15, 2012**

**PRESENT: The Honourable Mr. Justice Russell**

**BETWEEN:**

**VITOR MERNACAJ; DRITA MERNACAJ;  
ROMEO MERNACAJ**

**Applicants**

**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 29 July 2011 (Decision), which refused the Applicants' applications to be deemed Convention refugees or a persons in need of protection under sections 96 and 97 of the Act.

## BACKGROUND

[2] The Principal Applicant is a 38-year-old citizen of Albania. The Secondary Applicants are his wife Drita, who is 33, and their son Romeo, who is 18.

[3] In 1999, Genc Nilo (Nilo), an Albanian, killed the Principal Applicant's cousin in Perugia, Italy. While attempting to avenge his son's murder, the Principal Applicant's uncle, Gjeloš Mernacaj (Gjeloš), mistook Artan Dervishi (Dervishi), for Nilo. Gjeloš shot and killed Dervishi, who was sitting with Sokol Nilo, Genc's brother. Sokol Nilo was wounded in this attack. The Applicants say that this killing touched off a blood feud with the Dervishi family which puts them at risk on return to Albania. After Gjeloš killed Dervishi, the Principal Applicant fled Albania to the United States of America (USA) in December 1999. The Secondary Applicants joined him there in January 2001.

[4] The Principal Applicant claimed asylum in the USA, but the Certified Tribunal Record (CTR) does not show how the authorities in the USA determined his claim. However, it is clear that he was unsuccessful. Drita filed an asylum claim separate from her husband. This claim was also unsuccessful. A memorandum Drita filed to support her asylum claim in the USA (at page 310 of the CTR) suggests that she based her claim on abuse arising out of the blood feud. After their asylum claims in the USA were unsuccessful, the Applicants were at risk of removal. Fearing for their safety if they returned to Albania, the Applicants came to Canada on 21 September 2009.

[5] The Applicants claimed protection on 21 September 2009. In their Personal Information Forms, the Secondary Applicants adopted the Principal Applicant's narrative as their own. The RPD joined their claims under subsection 49(1) of the *Refugee Protection Division Rules* SOR/2002-228

(Rules) and appointed the Principal Applicant as his son's representative. The RPD heard the Applicants' claims on 15 April 2011.

[6] After the hearing, the Applicants submitted a document from the Fier Judicial District Court (Court Document), a trial court in Albania (page 112 CTR). This document establishes that Gjelosh was convicted of murder in October 2000. He appealed to the Court of Appeal in Vlore, Albania, which returned his case for retrial on 21 November 2001. After retrial, the Fier Judicial District Court acquitted him of Dervishi's murder on 25 May 2001 and ordered him released from custody. The Court of Appeal in Vlore, however, overturned the acquittal and ordered a third trial on 28 December 2001; the Supreme Court in Tirana, Albania, upheld this verdict on 25 October 2002. After the third trial, the Fier Judicial District Court convicted Gjelosh of murder a second time on 23 March 2004. The court convicted Gjelosh *in absentia* because he had been released in May 2001. The Court of Appeal in Vlore upheld this verdict and the Supreme Court in Tirana did not accept Gjelosh's appeal.

[7] The RPD made its Decision on 29 July 2011 and notified the Applicants of the outcome on 1 September 2011.

#### **DECISION UNDER REVIEW**

[8] The RPD denied the Applicants' claims because it found the Principal Applicant was not credible.

[9] The RPD began by reviewing the events in Albania which led to the Applicants' flight to the USA, their unsuccessful claims in the USA, and their travel to Canada. It then examined the Principal Applicant's credibility.

[10] The Principal Applicant testified that when he made his asylum claim in the USA his American lawyer presented it on the basis of persecution for his membership in the Democratic Party, a group opposed to the government of Albania. The RPD asked what documents he had submitted to prove his membership in the Democratic Party, and the Applicant produced a membership booklet which was issued to him in 1992. The RPD found that the booklet was in mint condition with no signs of wear and without any indication of donations to the Democratic Party.

[11] The RPD found that the booklet was fraudulent and had been created solely to establish his membership in the Democratic Party at the RPD hearing. It said the Principal Applicant had taken an oath to tell the truth in both the RPD hearing and his asylum hearing in the USA. A finding that the booklet was fraudulent impugned the Principal Applicant's credibility. The RPD found the Principal Applicant not credible because he had not provided any documents to show what his asylum claim in the USA was based on, or why it was rejected. The RPD concluded that the Principal Applicant had not been truthful before the Immigration Judge in the USA because the documents he had submitted to prove his claim in the USA were fraudulent. The RPD reasoned that if the Principal Applicant had been truthful before the Immigration Judge in the USA, he would have been able to document his claim there. The RPD also found that the Principal Applicant was not a member of the Democratic Party.

[12] To support the Principal Applicant's story about the blood feud, the Applicants submitted an article (at page 466 CTR), dated 24 March 2004 and printed from the website of the Koha Jonë, a

daily newspaper published in Albania. This article said that Gjelosh killed Dervishi in a restaurant in 1999 and escaped the murder scene in an Audi motor car. The Koha Jonë Article also said that Gjelosh had been found guilty and sentenced to 25 years imprisonment *in absentia*. In his PIF narrative, the Principal Applicant wrote that Gjelosh had been captured by the police in Albania and was currently serving time for murder. When the RPD asked him to explain this inconsistency at the hearing, the Applicant confirmed that his uncle was in jail.

[13] The RPD said that the Koha Jonë Article and the Principal Applicant's oral testimony could not both be true. In post-hearing submissions, the Applicants pointed out that the sequence of events shown by the Court Document demonstrated that the Principal Applicant's testimony and the Koha Jonë Article could both be true. What the Principal Applicant was referring to in his testimony was Gjelosh's third conviction, for which he was currently serving time.

[14] The RPD found that the Koha Jonë Article would not have said that Gjelosh had escaped in an Audi if he had simply left the prison when he was released. It also expected the Principal Applicant to know about the events surrounding Gjelosh's trial. Although the Principal Applicant said that newspapers can write what they want, the RPD took the position that the Koha Jonë Article was the Principal Applicant's document. The RPD questioned why he would have provided this article if it was not factual, and concluded that both the Principal Applicant's oral testimony and the Koha Jonë Article were false. On that basis, it made a negative credibility finding.

[15] The RPD also found that no blood feud had been declared between the Applicants' family and the Dervishi family. The Principal Applicant testified that the Dervishi family told his neighbours the feud was on and the neighbours then told his family. He said this was how he found out about the feud. The RPD, however, found that this was not a normal way of declaring a blood

feud. It also did not accept his testimony that village elders sent by his family to the Dervishi family to attempt reconciliation had returned and told them that a feud was on. The RPD reasoned that, if a blood feud had been actually declared, the Principal Applicant would have been able to spontaneously indicate how he knew about the declaration; since he could not, this established that no blood feud had ever been declared.

[16] The RPD also drew a negative inference as to the Principal Applicant's credibility from inconsistencies in the evidence about when his family went into self-confinement. He testified at the hearing that his family's self-confinement began when Gjelosh was arrested. When in self-confinement, the men in the family who were more than fifteen years old either did not leave their homes or went into exile to avoid being killed. The Principal Applicant also testified that his family went into self-confinement when they received a message which informed them they were in a blood feud. The RPD found that the written evidence showed the family went into self-confinement when they found out Gjelosh had murdered Dervish, which was when he was arrested. Since the Principal Applicant could not recall when the family went into self-confinement, the RPD drew a negative inference as to his credibility.

[17] The RPD said that it had considered the Court Document the Applicants submitted after the hearing. Although this document established that a blood feud existed, the Principal Applicant had not established that it involved him.

[18] The RPD also rejected a letter the Applicants submitted from the House of Justice and National Reconciliation Institute in Albania (Reconciliation Letter). The Reconciliation Letter said that the Dervishi family accused the Applicants' family of Dervishi's murder and that the Applicants' family had left Albania because their lives were in danger. The RPD rejected this

document because it relied on information from the two families involved, and so was not independent. The RPD found that there were numerous reasons why one family would say there was a blood feud even when one does not exist and the Principal Applicant had shown he was prepared to mislead the RPD to gain refugee status. On this basis, the RPD gave the Reconciliation Letter insufficient weight to offset its credibility concerns.

[19] In an attestation, the Chairman of the Applicants' Bardhaj Village said that Dervishi was murdered in 1999 and Nilo was wounded. The RPD said that this letter was not consistent with the facts and that it did not offset other credibility concerns.

### **Conclusion**

[20] The RPD found that the Principal Applicant was not a credible witness and had not established a serious possibility of persecution or risk of harm in Albania. The RPD therefore rejected the Applicants' claims for protection.

### **ISSUES**

[21] The Applicants raise the following issues in this proceeding:

- a. Whether the RPD's credibility finding was reasonable;
- b. Whether the RPD erred by excluding evidence from its consideration.

### **STANDARD OF REVIEW**

[22] 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.

[23] In *Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 (FCA) (QL) the Federal Court of Appeal held at paragraph 4 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 applicable to the first issue in this case is reasonableness.

[24] The Applicants frame the RPD's rejection of some of their evidence as a breach of procedural fairness. A failure to consider arguments or evidence raised can be a breach of procedural fairness. See *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 (QL) at paragraph 22. However, in substance the Applicants challenge the RPD's conclusion that the evidence was not reliable. The RPD's conclusion the evidence is not reliable is reviewed on the reasonableness standard. See *Ogbebor v Canada (Minister of Citizenship and Immigration)* 2011 FC 1331 at paragraph 15 and *Walcott v Canada (Minister of Citizenship and Immigration)* 2010 FC 505 at paragraph 18. The standard of review on the second issue is reasonableness.



[25] 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.”

## STATUTORY PROVISIONS

[26] The following provisions of the Act are applicable in this case:

### Convention refugee

**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,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

[...]

### Person in Need of Protection

### Définition de « réfugié »

**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) 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;

[...]

### 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

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(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,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care

**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) 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) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(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) 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) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

[...]

[...]

## **ARGUMENTS**

### **The Applicants**

[27] The Applicants argue that the RPD's credibility finding was unreasonable because: it did not appropriately assess the evidence; made findings which are not supported by the evidence; misinterpreted the evidence before it; and excluded relevant evidence from its consideration.

#### **Koha Jonë Article**

[28] The Applicants say that the RPD unreasonably assessed the Koha Jonë Article. The RPD misinterpreted this article and managed to confuse the Principal Applicant into rejecting his own evidence which cast doubt on the Principal Applicant's credibility.

[29] The RPD found that the Koha Jonë Article's account that Gjeloš escaped in an Audi and was currently wanted by the authorities contradicted the Principal Applicant's testimony that Gjeloš had been tried and convicted, and serving a jail sentence. The Applicants say their post-hearing submissions establish that Gjeloš was not in jail on 24 March 2004 – when the Koha Jonë Article was written – because he was acquitted after his second trial on 25 May 2001. Subsequently, when the Fier Judicial District Court convicted and sentenced him a third time on 23 March 2004 he became a wanted man, which is what the Koha Jonë Article says. In the seven years between the RPD hearing and when the Koha Jonë Article was written, it is entirely possible that Gjeloš was arrested and jailed, which is consistent with the Principal Applicant's testimony. The RPD's

negative credibility inference was based on a misapprehension of the facts, so it was unreasonable for it to conclude that the Principal Applicant was not credible on this basis.

[30] The RPD's misunderstanding of the facts is also shown by its finding that "if [Gjelosh] had left, after being released [...] then the news report would not have read that [he] escaped." The Koha Jonë Article says no such thing; all it says is that Gjelosh left the scene of Dervishi's murder in an Audi. It does not say that he escaped from custody. Rather than appropriately analysing the Koha Jonë Article, the RPD misled the Applicant by convincing him that it contradicted his story.

[31] The information before the RPD was sufficient to reconcile all the evidence which was before it, but it closed its mind to this possibility. Even if the Applicants had not submitted evidence which established the sequence of Gjelosh's criminal proceedings, the RPD should have applied common sense to understand that the facts in 2004 as reported by the Koha Jonë Article could easily have changed by the time of the hearing in 2011.

[32] The Applicants also say that the RPD tainted the Principal Applicant's oral testimony and this affected its analysis of the documentary evidence, including the Reconciliation Letter. The RPD rejected that letter because the Applicant "has already shown he is prepared to attempt to mislead the Board to obtain refugee status."

### **The Chairman's Letter**

[33] The RPD also disregarded evidence in its analysis of the Chairman's letter when it said that

The chairman of the village, item three [page 462 CTR] indicates/states that not only was S. Dervishi murdered but also the brother of the original assassin was wounded. Since this letter is not

consistent with the facts before me, I give it insufficient weight to offset the credibility concerns.

[34] The Applicants note that other evidence they submitted shows that the Chairman's Letter is consistent with the facts of their case. The Koha Jonë Article says that Nilo was injured when Gjelosh killed Dervishi and that Nilo is a brother to the man who killed Gjelosh's son. The Chairman's letter independently corroborated the existence of the blood feud between the Applicants' and Dervishi's families. The RPD unreasonably dismissed the Chairman's Letter without regard to the evidence before it.

### **Misinterpretation and Credibility**

[35] The Applicants further say that the RPD's misinterpretation of the evidence resulted in prejudice against the Principal Applicant and this affected its credibility finding. They note that the RPD found the Principal Applicant was not credible partly because he was not able to spontaneously indicate how he knew about the blood feud. The Principal Applicant said in oral testimony that his family feared a blood feud as soon as they heard Gjelosh had been arrested; their suspicions were confirmed when the mediators they sent to reconcile with Dervishi's family returned with news that a feud was on.

[36] Although the RPD found that the way they found out about the feud was not the normal way a blood feud is declared, Kanun laws – the rules which govern blood feuds in Albania – are evolving, which is established by evidence before the RPD. While a formal declaration was once necessary to begin a blood feud, such declarations are used less often now because they show respect for an adversary. It was unreasonable for the RPD to hold that formal declarations are made

in all modern blood feuds. When it analysed the Principal Applicant's testimony about how he found out about the feud, the RPD had already made up its mind not to believe him. The RPD's approach is contrary to this Court's jurisprudence which holds that plausibility findings must only be made in the clearest of cases (see *Valtchev v Canada (Minister of Citizenship and Immigration)*, [2001] FCJ No 1131).

### **Asylum Claim in the USA**

[37] The RPD's treatment of the evidence surrounding the Principal Applicant's claim for asylum in the USA was unreasonable. The statement that "if the claimant was truthful before the US judge he would have been able to document his US claim" shows that the RPD unreasonably believed that claims are always false unless they are corroborated by evidence. The Applicants refer to *Pinedo v Canada (Minister of Citizenship and Immigration)* 2009 FC 1118, where Justice Michel Beaudry held at paragraph 13 that

A panel cannot draw a negative inference from the mere fact that a party failed to produce any extrinsic documents corroborating his or her allegations, except when the applicant's credibility is at issue....

[38] The Principal Applicant's credibility with respect to any persecution he suffered in Albania based on his political beliefs was not in issue before the RPD, so it was an error to draw a negative inference from the lack of evidence about his claim in the USA. Further, the Principal Applicant's asylum claim in the USA has no bearing on the basis for his claim in Canada: the risk he faced from the blood feud. Even so, the RPD drew three negative inferences from his claim for asylum in the USA:

- a. His membership booklet was fraudulent because it was in mint condition;
- b. He did not produce documents corroborating his claim in the USA;

- c. His claim for asylum in the USA was based only on political persecution and not on the blood feud.

[39] The Applicants point to *Vijayasingham v Canada (Minister of Public Safety and Emergency Preparedness)* 2010 FC 395, and say that a perfunctory consideration of irrelevant factors requires this Court's intervention.

### **Reconciliation Letter**

[40] The RPD breached the Applicants' right to procedural fairness when it excluded the Reconciliation Letter from its consideration. The RPD unreasonably rejected this document because it was not independent because it relied upon information from the two families. The RPD also found that the Principal Applicant was prepared to mislead it, and there were many reasons why a family would say a blood feud existed when it did not.

[41] The RPD did not refer to any evidence which showed why the Reconciliation Letter was false and did not refer to any evidence which showed the Applicants' family would concoct a blood feud or that they tricked the Reconciliation Institute. Thus the RPD made a general statement without any connection to the facts of the Applicants' claim. The RPD made a similar error in *Sierra v Canada (Minister of Citizenship and Immigration)* 2009 FC 1048, which prompted the Court to grant judicial review. Further, it was not enough for the RPD to dismiss the Reconciliation Letter solely because it relied on information from the families involved in the feud. Although the RPD said that a police report would be independent, the Applicants point out that a police report would also rely heavily on evidence from the families involved. There was no rational basis for the RPD to reject this evidence.

## **The Respondent**

[42] The Respondent argues that the RPD's finding that the Principal Applicant was not credible was reasonable. This finding was based on inconsistencies between his oral evidence, his PIF, and a reasonable conclusion that he had submitted a fraudulent document.

### **Inconsistencies in the Principal Applicant's Evidence**

[43] In *Sellan v Canada (Minister of Citizenship and Immigration)* 2008 FCA 381, the Federal Court of Appeal held at paragraph 3 that a general finding that a claimant lacks credibility is enough for the RPD to reject a claim where there is no credible independent evidence to support a positive determination. In this case, the Principal Applicant's evidence about the blood feud was inconsistent, so it was reasonable for the RPD to find he was not credible. There was no credible documentary evidence that could have led the RPD to find the Applicants are Convention refugees or persons in need of protection.

#### *Notification of the Blood Feud*

[44] The RPD reasonably concluded that the Principal Applicant's inability to clearly and spontaneously say when he was notified of the blood feud demonstrated that no blood feud was ever declared against his family. The Principal Applicant's testimony on this point was inconsistent. At various times in oral testimony he said that he was notified of the feud before Gjelosh's arrest, when Gjelosh was arrested, after Gjelosh's arrest, and by peace missionaries. The Principal Applicant's oral testimony was also inconsistent with his PIF in which he said that he received two notifications of the blood feud, one from his neighbours and one from an official envoy.



[45] The RPD noted at one point in the hearing that “Up until now I believe that he is saying that [the blood feud notification was] somehow delivered by the peace missionaries.” Applicants’ counsel concurred with this statement, and the Principal Applicant later testified the peace missionaries were the only way the blood feud was confirmed. In the next exchange, the RPD asked the Principal Applicant if the Dervishi family sent an official envoy to confirm the blood feud, and he said he believed they had. Although the Applicants have said that the Principal Applicant’s testimony was unequivocal about how he learned of the blood feud, the inconsistencies in his testimony show that this was not the case.

#### *Family’s Self Confinement*

[46] The RPD reasonably drew a negative inference from the Principal Applicant’s inability to recall when his family went into self-confinement. He testified at the hearing and in his PIF that the family went into self-confinement after Gjelosh was arrested and then received a message confirming the blood feud. He later testified that they went into self-confinement after they received a message confirming the blood feud. Although the RPD attempted to clarify the situation, the Principal Applicant could not give a clear account of this event, which was material to the Applicants’ claims for protection.

#### *Membership Booklet*

[47] The RPD also reasonably concluded that the Principal Applicant’s membership book from the Democratic Party was fraudulent. It was also reasonable for the RPD to draw a negative inference as to his credibility from this finding. The Principal Applicant testified that he had carried the book in his pocket from 1992 to 1996, but the RPD noted that the book showed no signs of

wear. He had also testified that he made donations to the Democratic Party, but those donations were not recorded in the membership book he submitted. The Respondent points out that the Principal Applicant did not introduce any evidence to corroborate the authenticity of the membership book, even though the RPD put its concerns on this point to him at the hearing.

[48] The RPD properly considered the evidence relating to the Applicants' asylum claims in the USA. The Principal Applicant said at the hearing that his claim was based on his Democratic Party membership. The RPD reasonably concluded that a finding that the membership book is fraudulent undermined the Principal Applicant's credibility.

### **Documentary Evidence**

[49] The RPD's treatment of the other documentary evidence submitted by the Applicants was reasonable.

### *Court Document*

[50] The RPD reasonably found that the document from the Fier Judicial District Court does not show that the Principal Applicant was involved in a blood feud, even though the document established a blood feud had been started.

[51] The Respondent agrees with the Applicants that this document shows the Koha Jonë Article and the Principal Applicant's testimony could both be true. However, this does not show that the RPD's conclusion was unreasonable. The Applicant submitted documentary evidence which indicated that Gjesh was still at large, so it was open to the RPD to conclude that his testimony was inconsistent with the Koha Jonë Article.

[52] The RPD was not required to speculate as to what events might have occurred that could make the Principal Applicant's testimony consistent. The Applicants have argued that the RPD should have applied common sense to find that the facts of the case could have changed between 2004 and 2011, but the onus was on them to establish the material aspects of their claims. The Applicants were able to produce the document from the Fier Judicial District Court, so it was reasonable for the RPD to expect them to provide documentary evidence that Gjeloš was in jail.

#### *Reconciliation Letter*

[53] In *Grozdev v Canada (Minister of Citizenship and Immigration)*, [1996] FCJ No 983, Justice John Richard held that the RPD is entitled to assess whether documents are trustworthy and probative. Based on independent sources, the RPD found that the Reconciliation Letter was not trustworthy and reasonably assigned it little weight. Further, Justice Paul Crampton recently held that letters such as the one the Applicants submitted are not conclusive proof of blood feuds (see *Trako v Canada (Minister of Citizenship and Immigration)* 2011 FC 1063 at paragraph 19). The RPD may also reject corroborating documents where the preponderance of the evidence before it does not support a claimant's credibility (*Trako* at paragraph 30). In the instant case, the RPD's other credibility concerns were more than sufficient to cast doubt on the Applicants' claims. The Applicants did not meet the onus on them to establish their claim.

#### *Chairman's Letter*

[54] The Chairman's Letter does not prove that the Applicants were targets of a blood feud. Although this letter is consistent with the Koha Jonë article, Justice Russel Zinn held in *Ferguson v Canada (Minister of Citizenship and Immigration)* 2008 FC 1067, at paragraph 26, that

If the trier of fact finds that the evidence is credible, then an assessment must be made as to the weight that is to be given to it. It is not only evidence that has passed the test of reliability that may be assessed for weight. It is open to the trier of fact, in considering the evidence, to move immediately to an assessment of weight or probative value without considering whether it is credible. Invariably this occurs when the trier of fact is of the view that the answer to the first question is irrelevant because the evidence is to be given little or no weight, even if it is found to be reliable evidence. For example, evidence of third parties who have no means of independently verifying the facts to which they testify is likely to be ascribed little weight, whether it is credible or not.

[55] There was no way for the Chairman to independently verify the allegations he attested to in the letter, and he did not specifically indicate that the Applicants were targeted. It was reasonable for the RPD to put little weight on this document.

## **ANALYSIS**

[56] It is well established in this Court that credibility findings are within the heartland of the discretion of triers of fact and that it is not the job of the Court to substitute its opinion for that of the RPD. See, for example, *Li v Canada (Minister of Citizenship and Immigration)* 2011 FC 941, paragraph 33. Consequently, substantial deference is owed to the RPD's Decision in this case.

[57] The RPD had reason to be suspicious of the Principal Applicant's narrative. He seemed confused and inconsistent as to how he was notified of the blood feud. The same problem occurred when he was asked when his family went into self-confinement. However, I think the inconsistencies over notification and self-confinement, and the RPD's growing suspicions about the Principal Applicant's credibility, led to a less objective assessment when it came to other areas of evidence.

[58] The RPD was obviously concerned that the Principal Applicant had made an asylum claim in the USA based upon political opinion, while his claim in Canada was based upon blood feud. The RPD finds that the Applicants were not truthful with the USA authorities and this causes the RPD to conclude that the Principal Applicant could not be believed in Canada. The reasoning appears to be that the Principal Applicant swore in the USA his asylum claim there was true and this oath included his assertion in the USA he was a member of the Democratic Party. To support this assertion, he produced his membership booklet to the American authorities. The membership booklet was fraudulent, so the Principal Applicant tendered false evidence to the American authorities. He therefore broke his oath to tell the truth by tendering false documents. This shows he is a liar, so the RPD did not believe him.

[59] There is evidence that the Principal Applicant did not raise the blood feud in the USA because the USA does not recognize this ground as a basis for an asylum claim. This does not mean that the Principal Applicant fabricated a claim in the USA based upon political opinion. It just means he had reason not to use the blood feud ground in that country. And the fact that he did not use political opinion as a ground for his claim in Canada is consistent with a change of conditions in his life.

[60] The RPD purports to examine the genuineness of the Principal Applicant's claim in the USA on the basis of the Democratic Party booklet that he produced for examination in Canada. The RPD found that this booklet had been "created to be provided at the hearing to establish the claimant's membership in the Democratic Party." The RPD concludes that the booklet is fraudulent, and then concludes, on this basis, that his claim in the USA was not genuine and that this undermined his credibility in Canada.

[61] It seems to me that the problem with this reasoning is that the genuineness of the booklet cannot be gauged in isolation from the other evidence which the Principal Applicant produced in the USA to support his claim, which evidence was not before the RPD. The RPD's reasoning on this issue is found at paragraph 14 of the Decision:

The claimant provided no documents that show the basis of his US claim or the reasons for its rejection. I am satisfied that if the claimant was truthful before the US Judge he would have been able to document his US claim including documents he put in evidence in the US to support his membership in the DP. Since I have found that the only documents before me on this issue to be, on a balance of probabilities, non genuine, and lacking evidence to the contrary, I am satisfied it is more probable than not the claimant was not a member of the DP and was not truthful in his evidence before the US Immigration Judge.

[62] The Principal Applicant's claim in Canada was based upon blood feud. Even if his political claim in the USA had been fraudulent, this does not mean that his claim in Canada is fraudulent. Nowhere in his submissions to the RPD did the Principal Applicant say he was at risk because of his membership in the Democratic Party. The Principal Applicant was unable to claim asylum in the USA on the basis of blood feud. If the Principal Applicant genuinely fears for his life because of a blood feud and is unable to claim asylum in USA on that basis, it seems entirely reasonable to me that he would seek some other basis for an asylum claim in that country. This does not show him to be an invariably dishonest person. Such behaviour is equally consistent with a genuine fear of returning to Albania. It is not insignificant that his wife included blood feud in her claim in the USA. It does not follow that the Principal Applicant is not truthful because he does not place before the RPD documents to authenticate his wife's USA claim. The documents related to the USA claim are simply not relevant to a claim based upon blood feud, and the RPD is in no position to conclude, based upon its assessment of the Democratic Party booklet, that "it is more probable than not the

claimant was not a member of the DP, and was not truthful in his evidence before the US Immigration Judge.”

[63] The RPD’s treatment of the USA claim reveals that the panel was less than objective when it came to assessing some aspects of the Principal Applicant’s claim. It is my view that this lack of objectivity led to reviewable error.

[64] As the Applicants point out, the RPD made an unreasonable and reviewable error at the time of assessing the Koha Jonë Article. This article was crucial to the Principal Applicant’s claim as it provided the strongest independent proof at the hearing of the fundamental event that set off the blood feud: Dervishi’s murder by the Principal Applicant’s uncle, Gjelosh. This article was also subject of considerable examination.

[65] As the Applicants point out, after misreading and misinterpreting the Koha Jonë article, the RPD proceeded to confuse the Principal Applicant into rejecting his own evidence, and managed to simultaneously cast doubt on the credibility of his testimony and on the veracity of the Koha Jonë article.

[66] The RPD made it clear that, upon reading the Koha Jonë Article from March 2004, it believed “the uncle escaped the scene in an Audi and is still wanted by the authorities.” Thus, the RPD found that the Principal Applicant’s insistence that his uncle had been tried and convicted and was currently serving time in jail was contradictory and concluded its analysis of the evidence by stating that “on a balance of probabilities, [I am] satisfied both are false and hence, make a negative credibility finding.”

[67] However, as shown by the Fier Judicial District Court decision and counsel's submissions to the RPD on 30 April 2011 – both of which were submitted into evidence at the RPD's request – the Principal Applicant's uncle was not in jail on 24 March 2011. After his third trial, the Fier Judicial District Court convicted Gjeloš *in absentia* on 23 March 2011 and sentenced him. The Koha Jonë Article in question was written the day after this decision and, as Gjeloš had been previously released following his acquittal, he was a "wanted" man again.

[68] The RPD knew these facts through counsel's submissions and the accompanying Fier Judicial District Court decision. The RPD acknowledged this information, but remained adamant and says that "[i]f the uncle had left, after being released, as indicated in counsel's sequence of events, then the news report would not have read the uncle escaped." In fact, the Koha Jonë Article never mentions anywhere that Gjeloš had "escaped." It only states that "[h]e then left the scene [of the crime] in vehicle type Audi bearing foreign license plates."

[69] As the Applicants point out, even if the RPD had never received notice of this judicial process, and even if a reasonable person could believe that Gjeloš had been a fugitive since the murder, the RPD should have realized that the March 2004 article could not tell the complete story up to the date of the hearing. In those seven years, the Principal Applicant's uncle could have easily been caught or turned himself in (as did in fact occur), thus making the Principal Applicant's testimony about his current incarceration entirely accurate.

[70] Instead, the RPD badgered the Principal Applicant and convinced him that the Koha Jonë Article completely contradicted his oral testimony to the point. The Principal Applicant was forced to say that he did not write the newspaper article and that "[t]he newspapers could write anything but the fact is all the evidence is that my uncle is in jail and charged with 25 years." The RPD



continued to press the Principal Applicant on the issue and he had to reiterate that all he knew was that his uncle was currently in jail.

[71] It also seems to me the RPD made other mistakes when it reasoned as follows:

The claimant's only explanation as to why in his oral evidence he is sure his family went into self-confinement when the message was sent that they were in a blood feud, but the written evidence was when the family discovered what the uncle had done i.e. when the uncle was arrested. The claimant simply restated his answer when he received the message of the blood feud. I am satisfied the claimant would recall, consistently, when the family went into self-confinement. Again, I make a negative credibility inference.

I considered if the existence of the court document disclosed, post-hearing, was sufficient to establish the claimant's risk of harm upon returning to Albania. While the document may establish the existence of some blood feud, however, since the claimant's knowledge of his blood feud is so problematic, I am satisfied the claimant has not established there is a blood feud that involves him.

In Exhibit C-4, counsel's disclosure, at item 2, is a letter from the Reconciliation Institute. This letter relies on information provided by the two families. As such, it is not independent as would be a police report. As the claimant has already shown he is prepared to attempt to mislead the Board to obtain refugee status and as I have, often stated, [*sic*] there are numerous reasons the other family would support there is a blood feud when one does not exist. I gave this letter insufficient weight to offset my credibility concerns.

[72] There was no evidence to suggest the Reconciliation Letter was inauthentic, or that the Reconciliation Institute had not independently examined the situation or had been duped by either of the families. The RPD is using bare speculation to discredit and reject the Reconciliation Letter. This speculation is underscored by the RPD's general low opinion of the Principal Applicant's credibility, which general low opinion rests at least in part upon mistakes made by the RPD about the evidence before it.

[73] This is a difficult Decision to review because it seems to me that the RPD had reason to doubt and question the Principal Applicant's credibility. However, instead of assessing and weighing all of the evidence objectively, it overlooked or rejected some evidence that supported the Principal Applicant's case on the basis of its general suspicions. All in all, I think this renders the Decision unsafe and unreasonable. I am not saying that the Principal Applicant is a reliable witness. However, as it stands, I do not think that his claim has yet been reasonably assessed.

[74] 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**

**DOCKET:** IMM-6500-11

**STYLE OF CAUSE:** **VITOR MERNACAJ; DRITA MERNACAJ;  
ROMEO MERNACAJ**

- and -

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** March 8, 2012

**REASONS FOR JUDGMENT  
AND JUDGMENT:** HON. MR. JUSTICE RUSSELL

**DATED:** June 15, 2012

**APPEARANCES:**

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