

Federal Court



Cour fédérale

Date: 20121127

Docket: IMM-856-12

Citation: 2012 FC 1369

Ottawa, Ontario, November 27, 2012

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

SAMIRE GECAJ

Applicant

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 13 January 2012 (Decision), which refused the Applicant's application to be deemed a Convention refugee or a person in need of protection under sections 96 and 97 of the Act.

BACKGROUND

[2] The Applicant is a 27-year-old citizen of the Republic of Kosovo (Kosovo). She seeks protection in Canada from her father.

[3] The Applicant is an ethnic Albanian from Vranoc, Kosovo. Her father is a Muslim Imam cleric. She grew up in a very traditional Albanian family. In September 2009, the Applicant found out she was pregnant. She became pregnant while on vacation with her family in August 2009, and after learning of the pregnancy she never heard from her baby's father again.

[4] The Applicant told her family about her pregnancy and they were very upset. It was not acceptable in her religion or her culture. If people were to find out, the Applicant's father would lose the respect of his mosque. The Applicant's family wanted the Applicant to have an abortion or hide the pregnancy. They even had a doctor come to the Applicant's house to convince her to have an abortion. The Applicant's family threatened that if she did not have an abortion they would take the baby as soon as it was born and give it up for adoption. They even went so far as to say they would find someone to marry the Applicant against her will, no matter who the person might be.

[5] The Applicant did not feel she could seek protection from the authorities in Kosovo. According to her, there is too much corruption and the Applicant's father knows a lot of people who attend his mosque and who work for the government, justice system, and the police. The Applicant went to a friend for help. The friend arranged for a smuggler to take her to Canada.

[6] The Applicant arrived in Canada on 26 February 2010 and claimed refugee protection on 10 March 2010. A hearing was conducted on 17 November 2011. The RPD refused the Applicant's claim for protection on 13 January 2012 and notified her of the Decision on 17 January 2012.

DECISION UNDER REVIEW

[7] The RPD refused the Applicant's claim for protection because it found that she was not credible and she had not shown that Kosovo could not protect her if she returned there. The RPD also found that the Applicant had an Internal Flight Alternative (IFA), so her claim for protection under sections 96 and 97 of the Act failed.

[8] The RPD reviewed the Applicant's claim that her father insisted she have an abortion due to the shame her pregnancy would bring on the family. The RPD found this not to be credible. It said that it "is well known that Islam forbids abortion unless the mother's life is at risk. On a balance of probabilities, I find that the claimant's father would not demand an abortion simply to save face with his neighbours and relatives."

[9] The Applicant also claimed that if she returned to Kosovo her father would take her child away from her and put it up for adoption. The RPD found, on a balance of probabilities, that the Applicant's father would not be able to do this. Most of the Applicant's submissions had to do with domestic abuse, and there was no suggestion that anyone is capable of being above the law with respect to kidnapping a child and putting it up for adoption. If the Applicant returned to Kosovo she could seek state protection to stop her father from taking her child. Further, the Applicant's child is a Canadian citizen, so she would also be able to seek assistance from a Canadian embassy or

consulate. The RPD found, on a balance of probabilities, that the Applicant's father would be unable to take her child and put it up for adoption without her permission.

[10] The RPD also found that the Applicant's father would not be able to force her to marry someone against her will. Based on the law in force in Kosovo, she cannot be forced into an arranged marriage. If the Applicant's father tried to do so, she has recourse to the police or to the Ombudsman. The RPD stated that the police are able to issue a restraining order in cases of emergency, so this would be an option available to the Applicant.

[11] The RPD also reviewed the Applicant's submissions about country conditions in Kosovo. It found that Kosovo is policed not only by local police forces, but also by EULEX, an international police force. An international police force would not be influenced by local people, such as the Applicant's father. The RPD stated that although EULEX's focus is primarily on crimes against humanity committed during the war, it also shares authority over local police. The Applicant's counsel placed a lot of emphasis on corruption in the judiciary, but the RPD found that the Applicant's first step, should she be threatened, would be to go to the police. There was no evidence presented that the police would not respond effectively to allegations of domestic abuse.

[12] The Applicant claimed she did not seek state protection while in Kosovo due to her father's connections. The RPD found there was no evidence presented that influential people have the ability to interfere with the police when called to respond to a domestic situation. The RPD concluded that the Applicant had failed to rebut the presumption of state protection.

[13] The Applicant was asked at the hearing whether she could live in Pristina, a much larger city. The Applicant replied that her father would always be able to find her. The RPD stated there is

even less evidence that her father would hold any influence in Pristina. He is a local Imam, and there is no evidence that he is above the law. While the judiciary is biased and plagued by delays, the RPD found that the state is taking steps to deal with the problem. The RPD found that the Applicant would be able to get to Pristina and have access to the police there for protection.

[14] The RPD concluded that the Applicant lacked credibility and had not rebutted the presumption of state protection. The Applicant had not established that there is a serious possibility she would face persecution or be subject personally to a risk to her life if returned to Kosovo. The RPD found that the Applicant was not a Convention refugee or person in need of protection and rejected her claim under sections 96 and 97 of the Act.

STATUTORY PROVISIONS

[15] The following provisions of the Act are applicable in this proceeding:

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

[...]

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;

[...]

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

(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

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) 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.

[...]

[...]

ISSUES

[16] The Applicant raises the following issues in this application:

- a. Whether the RPD's credibility finding was reasonable;
- b. Whether the RPD's state protection finding was reasonable;
- c. Whether the RPD's IFA finding was reasonable.

STANDARD OF REVIEW

[17] 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.

[18] In *Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 (FCA) the Federal Court of Appeal held 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 *Negash v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1164, Justice David Near held at paragraph 15 that the standard of review on a credibility determination is reasonableness.

The standard of review on the first issue is reasonableness.

[19] In *Carillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, the Federal Court of Appeal held at paragraph 36 that the standard of review on a state protection finding is reasonableness. This approach was followed by Justice Luc Martineau in *Bibby-Jacobs v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1176, at paragraph 2. Further, in *Chaves v Canada (Minister of Citizenship and Immigration)*, 2005 FC 193, Justice Danièle Tremblay-Lamer held at paragraph that the standard of review on a state protection finding is reasonableness. The standard of review on the second issue is reasonableness.

[20] The existence of an IFA is a matter of mixed fact and law, and is reviewable on a reasonableness standard (see *Davila v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1116 at paragraph 26; *Nzayisenga v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1103 at paragraph 25; *M.A.C.P. v Canada (Minister of Citizenship and Immigration)*, 2011 FC 81 at paragraph 29). The standard of review on the third issue is reasonableness.

[21] 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.”

ARGUMENTS

The Applicant

Unreasonable Credibility Finding

[22] The Applicant submits that the RPD’s finding that she was not credible was based on unreasonable plausibility findings. The RPD only dealt with credibility in the first paragraph of the Decision, finding that because Islam forbids abortion the Applicant’s father would not demand an abortion simply to save face. The Applicant submits that this is erroneous in two ways: firstly, the RPD confused credibility with plausibility; and, secondly, the finding on plausibility was based on unreasonable assumptions.

[23] The Applicant submits that credibility involves things such as the Applicant’s demeanour, consistency in testimony, and contradictions or omissions. Plausibility involves an assessment of what constitutes rational behaviour considering the circumstances. The RPD’s finding of what it expected the Applicant’s father would or would not do is a plausibility finding; the RPD did not make a single finding of inconsistency, incoherency, or contradiction that actually went to the Applicant’s credibility.

[24] As there was no clear adverse finding as to the Applicant’s credibility, her testimony is deemed to be the RPD’s findings of fact (*Addo v Canada (Minister of Employment and Immigration)*, [1992] 142 NR170 (FCA)). There is a presumption that sworn testimony is true unless there is reason to doubt its truthfulness (*Maldonado v Canada (Minister of Employment and*

Immigration), [1980] 2 FC 302 (FCA) [*Maldonado*]). As such, the RPD should be deemed to have accepted the Applicant's testimony.

[25] The Applicant also submits that the RPD's plausibility finding had no grounding in the evidence before it. Plausibility findings must be approached with caution and made only in the clearest of cases; different cultural backgrounds might make plausible events appear implausible in a Canadian context (*Divsalar v Canada (Minister of Citizenship and Immigration)*, [2002] FCT 653 (FCTD)).

[26] When it comes to drawing inferences about what a reasonable person would do in the circumstances, the RPD is in no better position than the Court (*Ilyas v Canada (Minister of Citizenship and Immigration)*, [2004] FCJ No 1522). If the RPD makes a negative credibility finding based on inferences about the plausibility of the evidence, there must be a basis in the evidence to support those inferences (*Miral v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 254 (FCTD)). The RPD had an obligation to articulate why the Applicant's testimony is clearly out of line with what would be reasonably expected in the circumstances, and to include references to the relevant evidence (*Badri v Canada (Minister of Citizenship and Immigration)*, 2000 CarswellNat 3052 (FC)).

[27] The RPD made a subjective assumption that a Muslim Imam would never encourage his unwed daughter to have an abortion because it is contrary to Islam. This is an unreasonable assumption, and there is nothing implausible about the Applicant's father strongly wanting to keep her pregnancy a secret. Under times of stress people do not act in accordance with their religious beliefs; Imams are still human. There is nothing about this scenario that suggests that it could "not

reasonably possibly have happened,” and the Applicant submits that the RPD’s finding in this regard cannot stand.

State Protection

[28] The Applicant also submits that the RPD misconstrued the evidence as to the police and the judicial system in Kosovo, and selectively read the evidence about the effectiveness of state protection. According to the United States Department of State Country Report, 2010, Kosovo, EULEX stands for “EU Rule of Law Mission.” This report says that EULEX possesses authority in areas such as organized crime, corruption, war crimes, witness protection, money laundering, terrorist financing, and international police cooperation. Its shared authority with local police is limited to the Serb-majority areas in the north. The RPD’s conclusion that EULEX would be of assistance to the Applicant does not make sense. It is illogical to think that a specialized EU police force would have anything to do with a domestic violence matter, especially a force that has authority only in a very limited area of the country.

[29] The Applicant also submits that it was unreasonable for the RPD to consider the police force and the judiciary separately, without recognizing that they are each part of an overall system of state protection. The RPD essentially said that even if the judiciary is corrupt and ineffective, if the Applicant went to the police and they responded appropriately she would be adequately protected. The police alone do not make up an entire state protection system; once the matter is investigated it must be handed over for completion to the prosecution and the courts.

[30] Documentary evidence was submitted that indicates the state protection mechanisms in place in Kosovo for victims of domestic abuse are not effective. According to the 2010 United

States Department of State Report, convictions for domestic violence are rare. It says that “Traditional attitudes towards women in the male-dominated society contributed to the high-level of domestic abuse and low number of reported cases.” Another document prepared by the Kosova Women’s Network, says that the culture in Kosovo is one that considers domestic violence an “internal affair,” and that the police are hesitant to intercede in what are considered private matters. It also says that women who report violence risk having their children taken away by family members. This document also indicates a lack of available shelters, and a tendency for officials to force abused women to return to their homes. Poverty also plays a large role because a woman’s economic situation may force her to return home.

[31] A document titled “Life in Kosovo Discusses Violence Against Women,” prepared by the Balkan Investigative Reporting Network in December 2007, says that legislation against domestic violence exists, but it is not being implemented. The RPD concluded that a restraining order could be issued against the Applicant’s father if necessary, but the Kosova Women’s Network document says “Although courts are required to respond to protection order requests within fifteen days and emergency protection orders within 24 hours from the date the petition is filed, OSCE evidenced in its report four cases where the courts delayed decisions for six weeks to nearly a year, placing victims in grave danger.”

[32] The Applicant submits that it is clear upon review of the documentary evidence that Kosovo is experiencing significant problems in providing state protection to victims of domestic violence. The RPD did not discuss any of these issues in its reasons. The RPD found that there was no evidence that influential people would be able to interfere with police who are called to respond to an allegation of domestic abuse; the Applicant asserts that the RPD again misconstrued the evidence

by looking only at the police and not at the justice system. In fact, the RPD stated “the local justice system is biased and subject to outside influence and is plagued by delays.”

[33] The RPD also found that Kosovo is taking steps to deal with corruption, but arrived at this conclusion without conducting any meaningful analysis. The RPD cited two instances where Kosovo officials were charged with corruption; this was the extent of the analysis. There was no discussion of the effectiveness of the measures, or how they relate to the availability of state protection to the Applicant. The RPD also cited three documents in footnote 9 of the Decision to support its findings on corruption, two of which do not discuss corruption at all.

[34] The one document that does discuss corruption, the US Department of State Report, does not support a finding that adequate state protection is available to the Applicant. In fact, that document says that the government interferes with the security forces and the judiciary, and that judicial inefficiency and corruption are major problems. It says that laws are not implemented effectively, and that problems of a lack of political will and weakness of the judicial system are widespread. Essentially, the one relevant document cited by the RPD supports the opposite conclusion to the one it reached.

[35] In addition, focusing only on a state’s efforts at state protection to the exclusion of an analysis of the effectiveness of those efforts is an error (*J.B. v Canada (Minister of Citizenship and Immigration)*, 2011 FC 210 at paragraphs 47 and 49; *Bobrik v Canada (Minister of Citizenship and Immigration)*, (1994) 85 FTR 13 (FCTD); *Alli v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 479; *Balogh v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 809). The Applicant submits that the RPD ignored the issue of the effectiveness of state protection, and in

doing so ignored crucial evidence that supported the Applicant's assertion that she cannot avail herself of state protection in Kosovo.

[36] The Applicant also says that it is troubling that the RPD appeared completely unfamiliar with Kosovo, inquiring as to whether it was an independent country. In fact, the RPD required the Applicant to submit post-hearing, written submissions on this point, which are attached to the Applicant's Affidavit as Exhibit "D." Though there is no clear indication as to how this affected the Decision, the Applicant submits that it demonstrates that the RPD may not have been fully prepared and familiar with the country conditions in Kosovo. In sum, the Applicant submits that the RPD ignored important evidence about country conditions in Kosovo, and this renders the Decision unreasonable.

Internal Flight Alternative

[37] The RPD also found that a viable IFA exists for the Applicant in the city of Pristina. It rejected the Applicant's submission that her father would be able to find her there, stating that there is no evidence that her father would have any influence in Pristina, and that she would have access to the police there. The Applicant submits that the RPD's finding in this regard was purely speculative.

[38] The Applicant's testimony was sworn and uncontradicted, and so must be accepted as truthful (see above). The RPD submitted no evidentiary foundation for rejecting her testimony that her father would be able to find her in Pristina. Further, Pristina is a city of only 200,000 people, so there is no basis for simply rejecting that the father's influence would extend that far. The RPD's conclusion is simply a bald statement, unsupported by the evidence.

[39] Further, the RPD's IFA analysis was based upon its state protection findings. The RPD did not simply conclude that the Applicant's father would not be able to find her in Pristina; it also concluded that even if he did find her she would be protected by the police. If the RPD erred in its state protection analysis, those same errors apply to its IFA analysis. As previously discussed, the Decision is unreasonable in this regards, and the Applicant requests that it be quashed.

The Respondent

Credibility

[40] The Respondent says the RPD's finding that the Applicant's father would not be able take her child from her and put it up for adoption was reasonable. The RPD is entitled to address plausibility based on common sense and rationality. The Respondent submits that the RPD is entitled to dismiss uncontradicted evidence if it is not consistent with the probabilities affecting the case as a whole (*Kanyai v Canada (Minister of Citizenship and Immigration)*, [2002] FCJ No 1124 at paragraph 11; *Akinlolu v Canada (Minister of Citizenship and Immigration)*, [1997] FCJ No 296 at paragraph 13; *Aguebor v Canada (Minister of Citizenship and Immigration)*, (1993) 160 NR 315 (FCA) at paragraph 4; *Shahamati v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 415 (FCA) at paragraph 2).

[41] It was open for the RPD to find, based on common knowledge of the Muslim faith, that abortion is prohibited unless a mother's life is at risk and that it is improbable that an Imam would insist his daughter have an abortion. In any event, this point is now moot as the child has been born. Further, the RPD's credibility findings in this regard were not determinative of the Decision.

[42] The Respondent submits that it was reasonable for the RPD to find that it was improbable that the Applicant's father would be able to take her child away from her or force her to marry someone against her will. The onus was on the Applicant to establish her claim, and she adduced no evidence indicating that her father is above the law in Kosovo. As such, she would be able to avail herself of the state's protection, which is the issue that the RPD's findings turned upon.

State Protection

[43] It was reasonable for the RPD to find that the Applicant had the option of approaching the police, or other authorities in Kosovo, but did not do so. The onus was on the Applicant to rebut the presumption of state protection, and to rebut this presumption she must produce "clear and convincing confirmation of a state's inability to protect" (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at 709, 724-725). State protection need not be perfect, only adequate (*Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171 at paragraphs 41, 43-44; *Carillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 at paragraphs 18, 30).

[44] The RPD found that if the Applicant's father tried to kidnap her child and put it up for adoption she would be able to approach the police for help. At no point did the Applicant approach the authorities for help, but simply claimed that she could not do so because her father's influence spanned all of Kosovo. The Applicant's assertions in this regard are not enough to establish that this is in fact the case, and absent this evidence she had an obligation to make reasonable efforts to seek state protection. It was open to the RPD to consider the reasonable probabilities of the case as a whole (i.e. that the Applicant came from a small village), and find that the evidence did not support her claims. It was reasonable for the RPD to find that there was no evidence that her father had such sweeping influence that it would prevent her from receiving state assistance anywhere in Kosovo.

[45] The documentary evidence also supports the RPD's conclusions about conditions in Kosovo. The state of Kosovo was recently established in 2008, and there is extensive international support in the country, such as EULEX. There was nothing unreasonable in the RPD referring to EULEX as a policing agent, as there are many references in the documentary materials (see U.S. Department of State Report; Exploratory Research on the Extent of Gender-Based Violence in Kosovo and its Impact on Reproductive Health) to EULEX engaging in policing functions and supporting the local police departments, specifically in northern Kosovo, near where the Applicant lived.

[46] There is also little evidence that the police would not have assisted the Applicant if necessary. The documentary evidence indicates that domestic abuse is a problem in Kosovo, but the police receive special training in this regard and there were no reports of them responding inappropriately. In fact, some of the documentary evidence praises the way in which police officers in Kosovo have responded to incidences of family violence.

[47] The Respondent submits that it was also not unreasonable for the RPD to find that Kosovo is addressing its problems with corruption, as there were multiple examples of arrests and investigations cited in the U.S. Department of State Report in regards to corruption. The RPD is not obligated to cite every piece of documentary evidence that contradicts its findings (*Rachewiski v Canada (Minister of Citizenship and Immigration)*, 2010 FC 244 at paragraph 17). Essentially, the Applicant is simply asking the Court to reweigh the RPD's findings in this regard. The Respondent submits that it was open to the RPD to find that the Applicant had not rebutted the presumption of state protection, and that this finding should not be disturbed.

Internal Flight Alternative

[48] The onus rests with the Applicant to demonstrate that her father had influence throughout Kosovo, as that was the basis of her claim. If her father does not present a risk outside her village, she has the option of moving to another city and seeking police protection there. An individual is not a refugee if state protection is available in other parts of the country, and it can be reasonably expected that a claimant will move to the part of the territory where protection is available

(Rasaratnam v Canada (Minister of Employment and Immigration), [1992] 1 FC 706 (FCA);

Thirunavukkarasu v Canada (Minister of Employment and Immigration), [1994] 1 FC 589 (FCA)).

The RPD found that the Applicant had the option of moving to Pristina, the largest city in Kosovo, and the Respondent submits that this was reasonable.

[49] The Applicant merely asserted, based on her personal belief, that her father would be able to find her anywhere in the country. The RPD was not obliged to accept this; it had the option of finding there was insufficient evidence to support this claim. It was open to the RPD to find that the Applicant had the option of moving to Pristina, and though she has little education there are social services available in Pristina for children and the Applicant is capable of low-level entry jobs. Based on the evidence, this was a reasonable determination. The RPD's Decision was reasonable and this application should be dismissed.

ANALYSIS

[50] The RPD tells us in its Decision that this "case turns on state protection and credibility."

However, the only credibility finding in the Decision relates to the abortion issue. This issue is now entirely moot because the child has been born and is a Canadian citizen.

[51] There are no negative credibility findings concerning the rest of the Applicant's testimony, so that the presumption of truth operates in her favour. See *Maldonado*, above.

[52] The Applicant testified clearly that she faces the following risks if returned to Kosovo:

- a. She fears her family, especially her parents and brothers (CTR, p. 319);
- b. If she goes back, the family will kidnap her child (CTR, p. 322);
- c. If she goes back, she will be forced to marry someone against her will (CTR, p. 322);
- d. Her parents will seek revenge against her for the shame she has brought upon the family, and she thinks they will kill her (CTR, p. 319, line 51, p. 320, line 51, p. 321, lines 6-8, p. 325, lines 37-41);
- e. She would still be in danger in Pristina because, as she puts it, "I would be in particular danger, because I would be a single mother with a young child not married, a female. Yes, people can do anything to somebody unprotected" (CTR p. 326, lines 12-14).

[53] As is clear from the Decision, these risks are acknowledged and accepted by the RPD.

[54] Given these risks, the RPD concludes that, if the Applicant returns to Kosovo, she can seek the protection of the state and that she has failed to rebut the presumption of adequate state protection.

[55] The Applicant did not seek state protection before leaving Kosovo, but she explains why in her testimony:

- a. Her father has many connections with the police and justice system and the people who work within that system are Muslim who “go in the Mosque regularly, like my father” (CTR p. 321 lines 32-36) and “her father is in the Mosque so they respect my father a lot. These people go and ask my father to pray for them, to offer prayers for them. So they know him and they respect them, they listen to him” (CTR p. 322 lines 20-24);
- b. She cannot go to a police station of a greater size because “Kosovo is a small place and people know each other” and because “Domestic violence is widespread in Kosovo and they do not help in these cases” (CTR p. 321);
- c. Lone women like her do not receive help from the police in Kosovo and any shelter provided is only temporary (CTR p. 323 lines 34-38).

[56] As regards the threat of kidnapping the child, the RPD says that there is “no evidence that anyone is above the law with respect to kidnapping a child and putting it up for adoption.” This is not really the issue. The Applicant’s evidence is to the effect that women living in highly traditional families, such as hers, have no real choice in these matters and that, if they complain, no one will listen or come to their assistance.

[57] The cultural and social milieu to which the Applicant and her family belong are never mentioned or assessed. Even in Canada we have had fairly recent examples of fathers and brothers doing horrendous things to female family members who, from a male perspective, are seen to be disrespectful to their family honour. The Applicant’s evidence that she comes from a traditional, religious family and that her father and brothers will revenge themselves on her is not questioned. This may involve kidnapping her child, killing her, or both. The unquestioned evidence is that the

Applicant is at severe risk from her family and others in a cultural milieu where women are controlled by their families (particularly the male members). The RPD does not say that it does not believe the Applicant when she says she is in danger; it says there is no specific mention in counsel's submissions that "anyone is above the law with respect to kidnapping a child and putting it up for adoption." There is no reference to any particular law and there is no consideration of the reality that women face within traditional families who have threatened them.

[58] As regards a forward-looking analysis on this issue, the RPD concludes that, if the Applicant returns to Kosovo:

- a. She can seek state protection with respect to keeping her child from the hands of her father;
- b. The Applicant's son is a citizen of Canada. Should the Applicant have problems with her father, she could also seek protection from Canada through an embassy or a consulate.

No authority is cited for these assertions.

[59] Similar findings are made in relation to the risk of a forced marriage:

- a. The Kanun is not the law of Kosovo;
- b. Should the Applicant's father try to force her into a marriage against her will, she has recourse to the police and to the Ombudsman;
- c. The police can issue restraining orders in cases of emergency;
- d. In addition to local police, Kosovo is also policed by EULEX, "an international police force, which is not subject influence (*sic*) of local persons, including the claimant's father, a local Iman";

- e. There is no evidence that the police do not respond appropriately to rape or allegations of domestic abuse;
- f. There is no evidence that influential people can interfere with police who are called to respond to allegations of domestic abuse.

[60] My review of the evidence pertaining to the mandate and role of EULEX shows that

EULEX's international police officers, prosecutors, and judges deployed in the country have broad discretion to intervene in any particular criminal matter. However, as a practical matter, most policing duties and responsibilities were in the hands of the local police. (CTR p. 66) [Emphasis added]

I think the evidence is clear that EULEX is not a realistic possibility for someone in the Applicant's position and that she would have to seek assistance from local police.

[61] As regards the local scene, there was a considerable body of evidence before the RPD that contradicts the RPD's conclusions, and so should have been addressed and weighed. See *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 at paragraph 17.

[62] As the Applicant points out with respect to how the police, prosecution and courts collectively respond to domestic violence in Kosovo, the documentary evidence on record shows as follows (underlining added for emphasis):

The law criminalizes rape; however, spousal rape is not specifically addressed.

Observers believed that rape was significantly underreported due to the cultural stigma attached to victims and their families.

Domestic violence against women, including spousal abuse, remained a serious and persistent problem. The law prohibits domestic violence, and convictions carry prison terms of six months to five years. The law treats domestic violence cases as civil cases unless the victim suffers bodily harm. Failure to comply with a civil court's judgment relating to a domestic violence case is a criminal offense and can be prosecuted. When victims did press charges, police domestic violence units conducted investigations and transferred cases to prosecutors. According to the special prosecutor's office, family loyalties, poverty, and the backlog of cases in both civil and criminal courts contributed to the low rate of prosecution.

In November 2009 the OSCE provided an update to its 2007 report on domestic violence. OSCE monitors reported continued problems in the adjudication of domestic violence cases, including unlawful delays in scheduling hearings or in deciding on protection orders, failure to involve representatives of the Center for Social Work in civil domestic violence proceedings, misapplication of relevant laws by courts, and failure to prosecute domestic violence crimes.

Convictions for domestic violence were rare, and sentences ranged from judicial reprimands to imprisonment. Traditional social attitudes towards women in the male-dominated society contributed to the high-level of domestic abuse and low number of reported cases.

Women possess the same legal rights as men but traditionally have a lower social status, which affected their treatment within the legal system.

United States Department of State Country Report, 2010, Kosovo, page 138, under the subheading "Women".

Experts have identified various reasons as to why domestic violence is underreported, including a culture that considers domestic violence an "internal affair"; extended families and informal dispute resolution techniques; the hesitancy of SSOs and police to intercede in private disputes; and the woman's fear of bringing "shame" to herself or her family. Women who report violence also risk being ousted from their home, having their children taken away by family members, or vengeance from perpetrators.

Kosova Women's Network, Exploratory Research on the Extent of Gender-Based Violence in Kosova and its Impact on Women's

Reproductive Health, 2008, at page 159, paragraph 2 under the subheading “Domestic Violence”.

Similarly, institutional violence (a term used more by women’s NGOs than institutions) involves unequal access to public services and programs because of one’s gender, such as education, justice, and social support. Gender-based institutional violence in Kosova could include the failure of the Ministry of Education to finance schoolbooks, transportation, and other costs that would enable girls from economically challenged homes to attend higher levels of education (currently boys in such situations are sent because they have greater chances of securing employment later in life); public institutions failing to actively hire more qualified women to serve as public servants; public institutions not adopting and implementing policies against sexual harassment in the workplace; the slow processing of protection orders by the justice system, which places women already experiencing violence in greater danger;

Kosova Women’s Network, Exploratory Research on the Extent of Gender-Based Violence in Kosova and its Impact on Women’s Reproductive Health, 2008, at page 170, paragraph 2.

The Ministry for Labour and Social Welfare (MLSW) acts through the Department for Social Welfare (DSW), which has the responsibility to protect children; prevent and reduce abuse and neglect of children; support families experiencing difficulties; and address reports of risk or violence to ensure safety and support. DSW coordinates the 32 Centres for Social Work (CSWs) in each municipality (two in Mitrovica). MLSW is responsible for monitoring the performance of CSWs. As a Ministry, MLSW must ensure the implementation of the Kosova Constitutional Framework and human rights conventions and declarations therein. Therefore, Social Service Officers (SSOs) working at CSWs must ensure that they do not discriminate against women in situations where gender-based violence has occurred, including domestic violence.

If a SSO learns that a perpetrator has committed a crime as defined by the Regulation on Protection against Domestic Violence and the perpetrator is related to the victim according to the same Regulation, the SSO must offer to assist with filing a protection order. SSOs must also ensure that individuals experiencing violence understand the types of protection available. If a CSW refers a woman to a shelter, the SSO remains responsible for follow-up, monitoring, and issues that may affect the woman or her children. Even after officers have placed clients in the care of a shelter, they are still responsible for: assisting with the recovery of the client; cooperating with the shelter;

developing and implementing a plan in close cooperation with the client; and communicating this plan and progress towards its implementation with the shelter. During court cases, the CSW must provide “an expert opinion” in cases related to divorce and custody rights.

Shelter representatives said SSOs rarely fulfil these duties. Shelters often struggled to secure basic information from SSOs, largely due to inadequate human resources and finances in CSWs. OSCE monitored cases where CSW representatives should have been present in domestic violence court cases to present their expert opinion concerning children, but were not. Training for SSOs improved the performance of some officers, shelter representatives said, but many problems persisted in 2007. “They have received training,” a shelter representative said. “We attended the same training and saw them there. But they told us, ‘We don’t believe in this gender nonsense. We’re just here to have a good time.’”

According to shelter representatives and UNICEF, some SSOs preferred forcing women to return to violent family environments rather than empowering women to identify and choose the best solution for their future. “Due to a lack of resources and alternatives for victims of violence there is still a tendency to try to effect reconciliation within the family,” UNICEF wrote.

Kosova Women’s Network, Exploratory Research on the Extent of Gender-Based Violence in Kosova and its Impact on Women’s Reproductive Health, 2008, at page 196-197, under subheading 1.2.

At the same time, many SSOs interviewed expressed frustration that they did not have adequate funding to carry out their responsibilities:

We don’t have enough cars. For example, when the police call us we don’t have a car to go there. Another problem is that we can’t help them enough. For example, when she has to leave the shelter, she doesn’t have a place to go. Very often she must return home again and in most of these cases the situation is worse because the husband is angrier.

We give them [women who experienced violence] information about their rights. But we can’t do anything about their economic situation and very often it is their main need. Very often we don’t have space for her children when we take the victim for an interview.

Also we don't have budget for during the protection process, for example buying water for her or buying something to eat. They are closed in shelters, and in that way they are victimized to stay there like in prison. The lack of professional services results in victims returning home to the abuser where they don't have protection from violence.

Also, the lack of material goods and transport is another difficulty in our work. For example, when the client needs something when we take her to the doctor, we have to buy something for her with our own money. Another thing is the lack of an adequate approach toward violated victims on behalf of institutions. For instance, we send a client to visit a psychiatrist, and we have to wait with other people there.

Also KPS doesn't have a special office for taking her testimony, so the anonymity of client is at risk.

Kosova Women's Network, Exploratory Research on the Extent of Gender-Based Violence in Kosova and its Impact on Women's Reproductive Health, 2008, at page 198, paragraph 1.

Vuniqui and Macula pointed out that there were laws, regulations and international conventions which protected women and which had been approved by Kosovo's parliament, but the problem was that the institutions were not applying them in practice.

"They do exist in our legislation, but they are not being implemented", Vuniqui said.

"Our government needs to take care of the implementation, and to fill in the gaps that exist in the legislation", Macula said.

Qosaj-Musa agreed with her saying that what existed under the current law amounted to next to nothing in practice. She blamed the existing legislature and the judicial system for not interpreting and implementing the laws in the right way. Qosaj-Musa pointed out that there were gaps in Kosovo's Penal Code regarding domestic violence and the trafficking of human beings.

Balkan Investigative Reporting Network, "Life in Kosovo Discusses Violence Against Women", December, 2007, page 256, paragraph 2 onward.

[63] With respect to the Member's conclusion that a restraining order can be issued, and failure to comply with civil court judgment is a crime that can be prosecuted, the evidence shows that in fact this rarely happens:

Despite the introduction of new laws and mechanisms like VAAD, judges and lawyers lack adequate training on sexual and domestic violence and how to approach women who have experienced violence. The justice system is slow to prosecute perpetrators, placing victims at high risk of further violence. "The number of sexual violence and domestic violence cases processed in courts was marginal compared with the number of such victims," UNFPA reported.

Indeed, from the 557 cases of domestic violence reported from January to June 2007, KPS had on record only 26 protection orders and 52 emergency protection orders, a mere 14 percent of reported cases. In July 2007, the OSCE Department of Human Rights, Decentralization and Communities, Legal System Monitoring Section expressed concern over the justice system's implementation of the Regulation on Protection against Domestic Violence. OSCE reported that the health and safety of persons experiencing violence may have been jeopardized by "unlawful delays" related to protection orders and hearings.

Although courts are required to respond to protection order requests within fifteen days and emergency protection orders within 24 hours from the date the petition is filed, OSCE evidenced in its report four cases where the courts delayed decisions for six weeks to nearly a year, placing victims in grave danger.

OSCE was also "concerned" with "the failure of the authorities to *ex officio* prosecute criminal offenses that occur during domestic violence as required by law." Further, CPWC wrote in 2003 that the justice system was failing to prevent future crime by releasing perpetrators with conditions or minimal sentences. When asked whether any action was taken against the perpetrator after the most recent incident of violence, only 12 of the 51 women interviewed by KWN said the perpetrator was arrested and in nine cases issued a citation.

Kosova Women's Network, Exploratory Research on the Extent of Gender-Based Violence in Kosova and its Impact on Women's Reproductive Health, 2008, at page 200, paragraph 1.

[64] It is clear from the above evidence that state protection for victims of gender violence in Kosovo is extremely problematic. The RPD discusses none of this in its reasons.

[65] There is an IFA finding, but it is inadequate and is, in any event, associated with state protection issues:

The claimant was asked if she could live in Pristina. She replied that she could not because her father could always find out. There is even less evidence that her father would be influential in Pristina. He is a local Iman, who is not above the law and should he threaten the claimant in Pristina, on a balance of probabilities, I find that the claimant would have access to the police for protection.

[66] First of all, the father's "influence" in Pristina is not the issue. The Applicant has testified that her family intend to kill her to redeem family honour. This evidence is not in question. So the issue is whether the father and brothers, who want to harm her, could find her in Pristina, a city only approximately 50 kilometres away with a population of 200,000, and in a country where the Applicant's unquestioned evidence is that "Kosovo is a small place and people know each other." This issue is never addressed.

[67] The alternative finding that state protection would be available in Pristina is fraught with the same problems as those referred to above in my discussion of state protection generally.

[68] In this case, a young woman gives unquestioned evidence that her life is threatened by her father and brothers in a country where, for cultural reasons, women are highly vulnerable, and where there is considerable evidence that the state has neither the will nor the ability to provide her with the protection she needs. Notwithstanding what is at stake, the Decision is cursory and fails to address the evidentiary record in an accurate or comprehensive way. This is extremely worrying, and renders the Decision unreasonable.

[69] 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 referred back 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-856-12

STYLE OF CAUSE: SAMIRE GECAJ

- and -

**MINISTER OF CITIZENSHIP AND
IMMIGRATION**

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: November 7, 2012

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

DATED: November 27, 2012

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