

Federal Court



Cour fédérale

Date: 20160720

Docket: IMM-5326-15

Citation: 2016 FC 838

Ottawa, Ontario, July 20, 2016

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

JETMIR HIRAJ

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review pursuant to s 72(1) of the *Immigration and Refugee Protection Act*, SC 2011, c 27 [the Act] of a decision rendered by Refugee Appeal Division of the Immigration and Refugee Board [RAD], dated November 4, 2015, confirming the decision of the Refugee Protection Division [RPD] that the Applicant was neither a Convention refugee nor a person in need of protection under sections 96 and 97 of the Act.

II. Background

[2] The Applicant, Mr. Jetmir Hiraj, is a citizen of Albania.

[3] On April 17, 2012, the Applicant learned of a dispute between his uncle and a drug lord, Mr. Sphendi Basha [Basha]. In an effort to resolve the dispute, the Applicant and his cousin went to see Basha, who attempted to stab the Applicant and fired a weapon in the Applicant's direction as he and his cousin were leaving. The Applicant's cousin later returned and shot Basha in the leg.

[4] In connection with this incident, the Applicant's cousin was arrested and following a trial, sentenced to over four years in prison.

[5] In March 2014, Basha was found murdered. The Applicant alleged that Basha's family believed he and his cousin were involved in the murder and began threatening and harassing him.

[6] In September 2014, while staying with a friend in Delvine, the Applicant alleges men came looking for him and shot at his friend's house. The friend made a complaint to the police that same day, although the Police Report in evidence is dated November 26, 2014, when the Applicant was already in Canada.

[7] On October 15, 2014, the Applicant was attacked by three unknown men, but did not notify the authorities, believing that because Basha had been a known drug lord, his family had contacts in the police.

[8] The Applicant left Albania on October 8, 2014, stopped in Greece and Spain on route, and arrived in Canada on October 29, 2014, making a refugee claim that same day.

[9] On February 16, 2015, the RPD rejected the Applicant's claim, citing various credibility issues and concluding that the Applicant had not rebutted the presumption of state protection.

[10] The RAD affirmed the RPD decision that the Applicant was neither a Convention refugee nor a person in need of protection under sections 96 and 97 of the Act by decision dated November 9, 2015.

[11] The RAD determined that the RPD had conducted a combined credibility and state protection analysis and had found that (a) the Applicant had not provided sufficient evidence to establish that he had a nexus to a Convention ground, (b) that some of his evidence lacked credibility and (c) that he had not rebutted the presumption of state protection. The RAD found it was clear from the decision that the RPD had correctly considered the tests under both sections 96 and 97 to arrive at its decision.

[12] The RAD noted that the Applicant had travelled to Italy seven times between 2012 and 2014, and to France and to Spain in 2014, and that his explanations for not claiming protection in

any of these countries were not reasonable. The RAD reasoned that if the Applicant feared Basha's family as alleged, it did not make sense that he would risk travelling to Canada on fraudulent documents, instead of claiming protection in countries he had previously entered legally on a number of occasions. The RAD also took judicial notice that Italy, France and Spain were highly democratic states with effective police forces and that it would have been reasonable for the Applicant to seek immediate protection there. The RAD found that the Applicant's actions indicate his testimony that he fears harm at the hand of Basha's family are therefore not credible.

[13] The RAD also concluded that the Applicant's repeated re-availment in 2012, 2013 and 2014, undermined his general credibility and his specific credibility, as it related to his allegations of risk of harm in Albania.

[14] The RAD found that the Applicant's credibility was further undermined because, although he alleged that his family in Italy had been threatened by Basha's family, this allegation had been omitted from his Basis of Claim [BOC] form and from his narrative. The Applicant could not provide a reasonable explanation for this omission, despite the fact it was a pivotal allegation, going to the heart of his claim.

[15] Regarding the RPD's assessment of the Applicant's credibility, the RAD found that "although the RPD did not clearly reject certain evidence or make a global credibility finding, its credibility concerns remain as is and are mentioned in its state protection analysis". The RAD

concluded that the state protection findings stood on their own, even though the RPD was not wrong to note credibility concerns and make credibility findings.

[16] The RAD further decided that the documentary evidence on the effectiveness of state protection in Albania was fairly general and mixed, and emphasized the importance of an individualized analysis of the Applicant's claim. The RAD also noted that the RPD was presumed to have considered all the evidence before it and was not required to refer to each document in the record. It found there was documentary evidence indicating that the government had taken steps to resolve the problem of organized crime in Albania in general and in Lazarat in particular. The evidence suggested that the police were willing and able to arrest those suspected of crime, including members of organized criminal organizations, and that Albania had taken measures that had increased the presumption of state protection.

[17] The RAD did not give any weight to a letter and declaration from the Delvina police chief. The declaration was dated two months after the Applicant's departure for Canada and was missing specific details that one would otherwise expect to find in such a letter. Moreover, the RAD determined it would be absurd for the Delvina police chief to comment on the Applicant's specific situation, given that it originated in another jurisdiction and that the Applicant had not sought police protection in Delvina or in his own district. The letter also contradicted objective evidence indicating that the situation in Lazarat had been quelled, which the RAD preferred, as it as highly credible, reliable and probative.

[18] The RAD noted that the Applicant had made no effort whatsoever to seek police protection, when his own evidence suggested that the police would have investigated had there been a complaint. The police investigate criminal allegations, and perpetrators of crime are persecuted – which resulted in the arrest of the Applicant’s cousin. The RAD therefore concluded that the Applicant had failed to take all reasonable steps in the circumstances to seek state protection in Albania and that this failure was fatal to his claim.

III. Issues

[19] The issues are:

- A. Did the RAD err in not stating its credibility findings in clear and unmistakable terms?
- B. Did the RAD err in conducting the state protection analysis?

IV. Standard of Review

[20] The appropriate standard of review is reasonableness.

[21] The parties agreed at the hearing that there is no issue with respect to the correct standard of review pursuant to the recent decision of the Federal Court of Appeal in *Canada (Minister of Citizenship and Immigration) v Huruglica*, 2016 FCA 93.

V. Analysis

A. *Did the RAD err in not stating its credibility findings in clear and unmistakable terms?*

[22] The Applicant submits that the RAD erred in accepting the RPD's flawed and unclear credibility findings. The decision-maker is required to articulate in clear and unmistakable terms whether they believe the Applicant or not. Moreover, the Applicant claims that the state protection analysis should not have been carried out without first establishing fear of persecution.

[23] The Applicant also submits that the RAD's negative credibility finding regarding the omission in his BOC of threats to his family is unreasonable because it was not a "pivotal allegation", but simply added detail and clarification to the Applicant's story. The RAD also failed to explain why it found his explanation for the omission unreasonable.

[24] I find that the RPD, and subsequently the RAD, did in fact articulate sufficiently clearly what parts of the Applicant's evidence were not believed.

[25] The RAD found that the Applicant's travel to several safe countries over the span of two years, and his failure to seek protection in Spain, France or Italy "undermines his credibility regarding the nature and degree of his fear of return and undermines the allegation that the drug lord's family is so powerful that the police would not be able to help him in Albania". The RAD did not believe the Applicant's account for why he did not claim in these countries prior to October 2014. It clarified that "his actions indicate that his testimony that he fears great harm at

the hands of the drug lord are, on a balance of probabilities, not credible”, and do not speak to the Applicant’s lack of subjective fear – an irrelevant consideration under section 97.

[26] Further, the RAD found that the Applicant’s continued re-availment to Albania “undermined his credibility as it is related to his allegations of a risk of harm in Albania and further finds that it undermines his general credibility”.

[27] These above findings relate specifically to the credibility of the Applicant’s claim regarding the risk the Applicant faced, his fear of persecution, and the profile of the persecutors, which speaks to the issue of whether the Applicant’s fear is objectively reasonable.

[28] Though the Applicant takes issue with the RAD’s analysis regarding his BOC omission, I do not find it unreasonable for the RAD to conclude that allegations of threats to the Applicant’s family from his alleged persecutors are significant, and would reasonably be expected to be in the BOC. The RAD found the Applicant did not provide a reasonable explanation for the omission, and was entitled to draw a negative inference in that regard (*Aragon v Canada (Minister of Citizenship & Immigration)*, 2008 FC 144; *Abdurahimov v Canada (Minister of Citizenship and Immigration)*, 2015 FC 827 at para 15). In any event, this portion of the analysis was not influential to the determinative issue upon which the Applicant’s claim was rejected, particularly in light of the other facts weighing against the Applicant.

[29] I find that both cases cited by the Applicant in support of his allegation that the credibility findings rendered the decision unreasonable – *Mendoza v Canada (Citizenship and*

Immigration), 2015 FC 251 and *Farkas v Canada (Citizenship and Immigration)*, 2014 FC 210 – are distinguishable. Unlike in those cases, I do not find that the RAD decision was contradictory, took into account irrelevant considerations, or was unclear in conveying that the Applicant was found not credible in relation to the harm he faced upon return, the power and threat of the agents of persecution as being outside the reach of state protection, and the credibility of his claim in general.

[30] Further, I do not read the RAD’s statement that “the RPD did not clearly reject certain evidence or make a global credibility finding, its credibility concerns remain as is and are mentioned in its state protection analysis” as admitting that the RPD made an error, as argued by the Applicant. Rather, it is a recognition that, in the circumstances, the RPD did not have to reject specific evidence, or to find the Applicant generally not credible, given that the state-protection issue was determinative. This is made evident by the RAD’s successive statement to the above phrase:

The RPD found that state protection was the determinative issue in the [Applicant’s] claim. The RAD agrees and finds, for the reasons outlined below, that the state protection findings stand on their own, without the support of the credibility concerns noted above.

[31] Reviewing the RAD decision as a whole, I find that the RAD was sufficiently clear in delineating its credibility findings, as they relate to the determinative issue – state protection.

[32] While there is some ambiguity arising from the apparent merging of both of the sections 96 and 97 tests by the RPD and the RAD, I find that in a contextual analysis of the decision by

the RAD, each element of each test was properly considered in reaching the decision, and there was no error by the RAD.

B. *Did the RAD err in conducting the state protection analysis?*

[33] The Applicant submits that in light of the mixed nature of the evidence regarding operational effectiveness of state protection in Albania, the RAD could not analyze state protection without making clear credibility findings.

[34] As above stated, I do not find the RAD erred by making unclear credibility findings, and thus the RAD was able to properly conduct a state protection analysis.

[35] The Applicant also submits it was unreasonable for the RAD to conclude that the Albanian government could offer adequate state protection to the Applicant from a document detailing a one-time police operation, likely linked to Albania's membership bid for the European Union. Moreover, the Applicant's first interaction with the police with regard to his situation resulted in his cousin being arrested. It was therefore reasonable for him not to approach the police a second time. The fact that the police chose to investigate his cousin, rather than Basha in that instance is not a sign of a functional or operationally effective system.

[36] The Applicant argues as well that the RAD ignored significant objective evidence which shows that organized crime and corruption remain serious problems in Albania without explaining why it did so. The RAD therefore failed to conduct a proper individualized and contextualized state protection analysis.

[37] An applicant has the burden of rebutting the presumption of state protection on a balance of probabilities with clear and convincing evidence (*Canada (AG) v Ward*, [1993] 2 SCR 689; *Flores Carillo v Canada (Citizenship and Immigration)*, 2008 FCA 94). State protection need not be perfect, and gaps or deficiencies in state protection are not sufficient to rebut the presumption of state protection (*Salazar v Canada (Citizenship and Immigration)*, 2007 FC 793 [Salazar]; *Canada (Citizenship and Immigration) v Kadenko* (1996), 143 DLR (4th) 532 (FCA) [Kadenko]; *Awamleh v Canada (Citizenship and Immigration)*, 2013 FC 925). Moreover, a failure to pursue state protection opportunities within the state will usually be fatal to a refugee claim (*Salazar*, above).

[38] The RAD noted that the documentary evidence on state protection in Albania was fairly general and mixed. However, it found there was sufficient evidence to establish that Albania was able to protect the Applicant. In particular, the RAD noted the Albanian government had instigated a police raid in the village of Lazarat itself, which had dismantled the criminal organization operating in that location and thereby demonstrated the determination of the Albanian government to curb crime and corruption.

[39] The RAD also found that the Applicant's own evidence showed a state willingness and an ability of the local police to investigate criminal incidents and arrest the perpetrators when there is sufficient evidence. The Applicant had testified that the police conducted interviews with him and his father following his cousin's shooting of Basha, and that his cousin had been arrested and convicted after that incident. This evidence is directly related to operational effectiveness, not merely a willingness or efforts by the state.

[40] Moreover, the RAD reviewed general evidence originating from European Union reports on the eligibility of Albania as a member country and found that it demonstrated that Albania had made tangible progress towards the rule of law, and has a level of democracy which strengthened the presumption of state protection, and thus the burden of proof on the Applicant to rebut it (*Kadenko*, above, at para 5).

[41] The Applicant cites numerous other reports evincing the shortcomings of adequate protection, the high rate and entrenchment of corruption in Albania, and the problem with organized crime, particularly in Lazarat. This evidence was before the RAD, and the RAD explicitly discusses the Applicant's concern that the RPD did not consider all the evidence or properly assess operational effectiveness. The RAD decision acknowledges that "Albania has experienced problems with crime and corruption in the past", and that "there is evidence of police corruption, especially related to the drug trade". However, in weighing this evidence against the documentary evidence suggesting state protection would have been reasonably forthcoming, and the Applicant's own testimony, which the RAD found demonstrated the police do investigate and persecute crimes, the RAD preferred the latter. Absent an indication the RAD completely ignored contrary evidence, the Court should not reweigh this evidence.

[42] As well, I find that the documents relied upon, though relatively general, were sufficiently individualized and contextual to the Applicant's situation, as they pertained to police practices in the location in which the incidents took place, and organized crime and the drug trade.

[43] In these circumstances, it was reasonable for the RAD to give little weight to a letter from the police chief in Delvina, where a friend of the Applicant lived. It found that the information conveyed in the letter was not consistent with the objective evidence compiled in the same period and was missing information that one would have otherwise expected to find in such a letter; namely who the Applicant was suspected of murdering, when the murder occurred or when armed individuals attempted to attack the Applicant. The RAD also found it was unlikely that the police chief would personally comment on the Applicant's situation, when the Applicant lived in another district and had not complained to either his local police station or the Delvina police station himself. Moreover, the letter was dated two months after the Applicant had arrived in Canada. The RAD provided cogent reasons why it gave no weight to this document that were independent from any previously noted credibility concerns.

[44] The RAD noted that the Applicant failed to take all reasonable steps in the circumstances to seek state protection in Albania before seeking surrogate protection internationally. In the absence of a compelling explanation, a failure to pursue state protection opportunities within the home state will usually be fatal to a refugee claim (*Camacho v Canada (Minister of Citizenship & Immigration)*, 2007 FC 830 at para 10). The Applicant made no effort whatsoever to seek state protection in Albania, and the RAD did not find that the Applicant's explanation – that the persons the Applicant fears are involved in organized crime – absolved the Applicant from approaching police for protection.

[45] This finding, and the resulting conclusion that the Applicant had not rebutted the presumption of state protection with clear and convincing evidence of Albania's inability to

protect its citizens, were reasonable in the circumstances of this case and on the evidence before the RAD.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.
2. There is no question for certification.

"Michael D. Manson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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