

Federal Court



Cour fédérale

Date: 20180731

Docket: IMM-5221-17

Citation: 2018 FC 803

Ottawa, Ontario, July 31, 2018

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

**SIDRIT BUSHATI
EVA BUSHATI**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicants, Sidrit Bushati and his wife Eva, are Albanian citizens. They arrived in Canada in 2015 using false Spanish passports and claimed refugee status at the port of entry. They feared persecution in Albania as Mr. Bushati's family is involved in a blood feud.

[2] The Refugee Protection Division [RPD] rejected the applicants' claims finding that they were neither Convention refugees, nor persons in need of protection. The RPD further concluded the claims were manifestly unfounded.

[3] In bringing this application for judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], the applicants submit that the RPD breached their rights to procedural fairness and that the decision was unreasonable.

[4] For the reasons that follow I am of the view there is no basis for the Court's intervention. The application is dismissed.

II. Background

[5] The applicants report that Sidrit's family, the Bushati family, is involved in a blood feud with the Kotri family. The applicants state the Kotris are a wealthy Albanian family who are supporters of the Socialist Party. The Bushati family supports the Democratic Party in Albania.

[6] The applicants state the blood feud has its roots in the murder of a member of the Kotri family. The murder occurred in 1998 and was motivated by some form of political tension. At the time, full responsibility for the murder was accepted by the member of another family, the Mucas. The Muca and Kotri families reached a truce.

[7] The applicants report that in 2006 the Kotri family learned that a member of the Bushati family played a direct role in the 1996 murder, triggering a blood feud between the Kotri and

Bushati families. As a result of the blood feud Sidrit reports he was forced into hiding and the situation further deteriorated when the Socialist Party came to power. Sidrit reports several unsuccessful attempts to leave Albania. The applicants married in 2014 and with the assistance of Sidrit's uncle they escaped Albania arriving in Canada in 2015.

III. The Decision under Review

[8] After summarizing the claims, the RPD identified nexus and credibility as the determinative issues. The RPD accepted the applicants had established a nexus to a Convention ground, based on “the political environment of animosity” between the Democratic and Socialist parties in Albania, and the allegedly feuding families’ adherence to different parties. The RPD stated it was assessing the claim under what it described as the “lower threshold” of section 96 of the IRPA.

[9] In considering the issue of credibility the RPD found the applicants not credible in a number of areas. In particular, the RPD took issue with: (1) inconsistencies between the applicants’ marriage certificate, oral testimony, and declarations regarding their home address; (2) inconsistent evidence regarding the dates of cohabitation; (3) the failure to list hiding places or time spent in Italy as part of their previous address history; (4) inconsistent dates given for when the blood feud began; (5) the applicants’ decision to return to Albania from Italy despite their stated fear; and (6) a blood feud certificate signed by an individual who had been charged with forgery.

[10] The RPD rejected the applicants' explanations for the identified inconsistencies. With respect to the blood feud certificate, a piece of evidence the RPD described as "perhaps the most important credibility issue," it was noted that the applicants were informed in July 2017 of the RPD's concerns about the forgery charges against the issuer. The RPD further noted the absence of any documentary evidence addressing how the charges against the issuer of the certificate had been dealt with.

[11] The RPD acknowledged the testimony of Sidrit, and his cousin, who stated the certificate's issuer, a Mr. Shalani, was not convicted, but noted that "when pressed about the source of this knowledge" the witnesses acknowledged this was only information they had heard from others, being second or third-hand information. The RPD concluded this explanation was insufficient to alleviate the concerns with the document given the document before the RPD was "drafted by an author that's accused of forgery, [of] the very same used documents."

[12] As a result, the RPD found the blood feud certificate was a fraudulent document, and that the applicants' reliance on this fraudulent document adversely affected their credibility. The RPD then rejected the applicants' claims:

[...] based on these adverse credibility findings I find that the claimants are not generally credible. I find that the claimants are ... so lacking in credibility that I do not believe what they say in support of their claims. I do not believe that the claimants are part of a blood feud or that they're facing any persecution in Albania.

[13] In rejecting the claim and finding it clearly fraudulent and manifestly unfounded the RPD also rejected a number of statements and a police report. In assigning the statements no weight the RPD relied on the applicants' lack of credibility and their access to fraudulent documents –

as evidenced by their ability to obtain fraudulent Spanish passports and the fraudulent blood feud certificate.

[14] In assigning no weight to the police report the RPD noted the report was a recitation of the allegations the RPD had already considered. The RPD concluded that the police were provided the same information and allegations as the RPD noting that placing this information in a police report did not make it more credible.

IV. Issues

[15] As noted above the applicants' raise two issues:

- A. Did the RPD breach the applicants' procedural fairness rights? And
- B. Is the decision unreasonable?

V. Standard of Review

[16] Issues of procedural fairness are to be assessed by a reviewing court against a standard of correctness. In doing so a court must determine, having regard to all of the circumstances, whether a fair and just process was followed (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54, [CPR]).

[17] The RPD's findings of fact and mixed fact and law, including findings of credibility, are to be reviewed against a standard of reasonableness (*Nagornyak v Canada (Citizenship and Immigration)*, 2017 FC 215 at para 11).

VI. Analysis

A. *Did the RPD breach the applicants' procedural fairness rights?*

[18] The applicants claim their procedural fairness rights were breached because: (1) the RPD required evidence that does not and cannot exist; (2) the applicants were not given notice of the case they had to meet; (3) negative credibility findings were made against Eva based on port of entry statements made by her husband; and (4) the applicants were denied a fair hearing.

[19] Ultimately, procedural fairness is about an applicant knowing the case to meet and being provided adequate opportunity to respond (*CPR* at para 56). As I discuss below, I am satisfied that the applicants had the benefit of a fair and just process.

(1) Requiring evidence that does not exist

[20] In arguing a denial of fairness the applicants rely, in part, on the RPD's negative credibility findings arising from what the RPD described as a "serious inconsistency" in the evidence relating to when the events triggering the alleged blood feud occurred. The RPD noted that Sidrit told the interviewing officer at the port of entry that the murder occurred in 2006 but the BOC documentation and testimony before the RPD was to the effect that the murder

occurred in 1998. Sidrit attributed this inconsistency to depression and stress at the time of the port of entry interview.

[21] The RPD rejected Sidrit's explanation noting it was unsupported by "medical or psychological evidence or psychiatric evidence to establish the male claimant's state of mind". The applicants argue it was impossible to provide evidence of Sidrit's state of mind at the time of the interview and to require this corroborating evidence was a breach of fairness. I disagree.

[22] Sidrit's state of mind at the time of the port of entry interview was an issue raised by the applicants' in the course of the RPD hearing. The RPD noted that the date of the murder was central to the claim, that the inconsistency was "a very major mistake" and that all other questions at the time of the port of entry interview appear to have been answered. Having identified, considered, and weighed these factors against the explanation provided, the RPD found "the explanations not credible". The RPD raised the issue and gave the applicants a chance to respond. The fact that the explanation was rejected goes to questions of reasonableness, not fairness.

(2) No notice of the case to be met

[23] The applicants include *Sarker v Canada (Citizenship and Immigration)*, 2014 FC 1168 [Sarker], in their authorities and argue that they did not know the case they had to meet as: (1) the RPD did not raise the absence of medical evidence of Sidrit's mental state in the course of the hearing; and (2) they were unaware they were required to rebut the presumption of state protection in Italy, a country they were not claiming protection from.

[24] In *Sarker* the issue of identity was not raised in the course of the hearing and the applicants were specifically advised identity was not in issue. These are not the facts here. In this case the applicants were aware of the RPD's concerns with the inconsistent evidence regarding the timing of the alleged murder and they were given the opportunity to address those concerns. In providing that explanation the applicants raised the issue of mental state. They had the onus of providing sufficient evidence to establish this assertion and, as I have noted above, it was open to the RPD to conclude they had failed to do so.

[25] On the issue of state protection in Italy, risk in Italy was raised by the applicants. It was in the context of addressing this alleged risk that the RPD engaged in a discussion of state protection. While it may not have been necessary for the RPD to address the issue, in my view the RPD committed no reviewable error in doing so. The applicants were not blindsided by something the RPD raised and pursued on its own initiative.

(3) Negative credibility findings

[26] The applicants also submit the RPD unfairly made an adverse credibility finding against Eva resulting from the statements Sidrit made at the port of entry. There is no merit to this submission. The applicants were informed that credibility was in issue at the outset of the hearing and it is evident on the record that Eva adopted Sidrit's narrative in support of her claim.

(4) Denial of a fair hearing

[27] The applicants further submit they were denied a fair hearing as the RPD consistently failed to consider their explanations on issues that were determinative of the claim. Again there is no merit to this submission. The RPD did acknowledge the explanations and submissions provided by the applicants but choose not to accept those explanations. While it may be open to argue whether these RPD's findings were unreasonable, no question of fairness arises.

[28] In submissions, the applicants also point to an off-the-record discussion between the RPD and the interpreter relating to street addresses in Albania stating that "this is arguably a breach of natural justice".

[29] The transcript of the hearing discloses the content of the conversation was reported to counsel for the applicants upon recommencement of the hearing and counsel did not object or raise any concern at that time. While decision-makers should refrain from engaging in off-the-record discussions of circumstances relevant to matters before them with interpreters, no argument was advanced before the RPD, where it should have appropriately been raised, that any procedural fairness concerns arose from the discussion. Before this Court, the matter has been flagged but no substantive argument was advanced. I have therefore not considered the issue further; especially given the content of the conversation was disclosed to counsel for the applicants upon the hearing recommencing.

[30] The RPD did not breach the applicants' procedural fairness rights.

B. *Is the decision unreasonable?*

(1) Negative credibility findings

[31] The applicants' evidence was replete with inconsistencies, discrepancies, and omissions:

A. The address of their residence in Albania was inconsistent - the applicants reported two separate addresses and their marriage certificate disclosed a third;

B. The timing of Eva's move from Tepe to Salo Halili was inconsistent - three different years having been reported;

C. Evidence relating to the date of the murder which resulted in the blood feud was inconsistent - 1998 or 2006;

[32] In regard to each of these matters the applicants argue that the RPD unreasonably rejected their explanation of the inconsistencies. I disagree.

[33] Contradictions, omissions, and discrepancies in the evidence of a refugee claimant has long been recognized as a basis for a finding of lack of credibility (*Rajaratnam v Canada (Minister of Employment & Immigration)* (1991), 135 NR 300, 1991 CarswellNat 851 at para 14 (WL Can) (FCA); *Fang v Canada (Citizenship and Immigration)*, 2013 FC 241 at paras 16-18).

[34] In this case the RPD highlighted the inconsistencies and omissions in the evidence. The RPD acknowledged and addressed the applicants' explanations, and in each instance set out its reasons for rejecting those explanations. The applicants advance arguments highlighting that a

different and more favourable inference or finding was available to the RPD. However, it is well recognized that, as stated in *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47:

[47] [...] certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions.

[35] I am not convinced that the RPD's individual negative credibility findings were unreasonable. On the basis of each of the individual findings I am also satisfied that it was reasonably open to the RPD to conclude the applicants lacked credibility.

(2) Blood feud certificate

[36] In addition to the negative credibility findings noted above the applicants take issue with the RPD's conclusion that the blood feud certificate relied upon was fraudulent. I am similarly unable to conclude this finding was unreasonable.

[37] The RPD's concerns related to the fact that the issuer of the certificate had been charged with forging blood feud certificates in Albania and it was reported that the issuer had stated in 2011 that no further certificates would be issued. The applicants were aware of the RPD's concerns with the authenticity of this document in advance of the hearing.

[38] In response to the RPD's concerns Sidrit and his cousin testified that the forgery charges against Mr. Shalani were dropped, but neither of the witnesses were able to explain how they knew this to be true. In the absence of any evidence clarifying the status of the issuer of the

certificate and in light of the evidence that the issuer had ceased issuing certificates in 2011, it was reasonably open to the RPD to reach the conclusion it did.

(3) Was the claim established through the cousin's evidence?

[39] The applicants further argue that (1) as the RPD made no express findings in relation to the cousin's credibility, and (2) the cousin testified that his family came to Canada as a result of the alleged blood feud and the feud was ongoing, the basis of the claim was established. I disagree.

[40] The RPD did not specifically find that the cousin lacked credibility, however, it is clear from the decision that the RPD: (1) did not accept the cousin's evidence concerning the issuer of the blood feud certificate; (2) found the blood feud certificate to be fraudulent despite the cousin's testimony to the contrary; and (3) concluded that "the claimants have failed to adduce any credible or trustworthy evidence to establish that the blood feud, in fact, exists as alleged." This is a clear rejection of the cousin's evidence. When one reads the decision as a whole, as I must, it is clear the RPD did not accept the cousin's evidence. His credibility was not, as the applicants have submitted, untrammelled.

(4) Reavailment

[41] The applicants also argue it was unreasonable for the RPD to find their decision to return to Albania from Italy undermined the credibility of their claim. In considering this issue I agree with and adopt the respondent's submissions. A failure to claim protection while present in a

country that is a signatory to the *Convention Relating to the Status of Refugees* and then returning to the country of origin can be considered in assessing a claimant's subjective fear (*Kabengele v Canada (Minister of Citizenship and Immigration)* (2000), 197 FTR 73, 2000 CanLII 16629 at para 41 (TD)). In this instance it was reasonable for the RPD to conclude that the applicants return to Albania from Italy undermines the credibility of their claim.

(5) Independent analysis of additional evidence

[42] Finally the applicants argue the RPD erred by failing to engage in an independent analysis of additional evidence produced in support of the claim. The applicants argue that: (1) the RPD was not entitled to reject evidence based on earlier credibility findings without doing some independent analysis of the evidence itself; (2) the mere fact of having access to fraudulent documents does not negate the requirement to analyse the evidence; and (3) the case law shows that discounting statements from relatives and friends because they are self-serving is an error.

[43] In *Canada (Citizenship and Immigration) v Sellan*, 2008 FCA 381 [*Sellan*], the Federal Court of Appeal states:

[3] [...] where the Board makes a general finding that the claimant lacks credibility, that determination is sufficient to dispose of the claim unless there is independent and credible documentary evidence in the record capable of supporting a positive disposition of the claim. The claimant bears the onus of demonstrating there was such evidence.

[44] In this case, I am satisfied that the decision clearly discloses that the RPD turned its mind to the nature of the evidence contained in the statements and in the police report. In considering the additional evidence the RPD addressed the issue of whether the documentary evidence was

independent and credible. It concluded it was not and set out its reasons for doing so. The RPD approach was consistent with *Sellan*.

[45] It has been held that the threshold for finding a claim to be manifestly unfounded is high (*Yuan v Canada (Minister of Citizenship and Immigration)* 2018, FC 155 at para 45). In finding a claim to be clearly fraudulent pursuant to section 107.1 of the IRPA a decision-maker must consider whether the falsehoods or deceptions in issue go to an important or material aspect of the claim (*Warsame v Canada (Minister of Citizenship and Immigration)* 2106 FC 596 at para 30). The RPD's negative credibility findings in this case were numerous and each related to material aspects of the claim being advanced. In the circumstances, I am unable to conclude the RPD erred in concluding the applicants lacked credibility and that the claim was manifestly unfounded.

VII. Conclusion

[46] I am satisfied that the RPD's decision reflects the elements of transparency, intelligibility, and justifiability in the decision-making process and the outcome is within the range of reasonable, possible outcomes based on the facts and law. The application is dismissed.

[47] The parties have not identified a serious question of general importance for certification and none arises.

JUDGMENT IN IMM-5221-17

THIS COURT'S JUDGMENT is that:

1. The application is dismissed; and.
2. No question is certified.

"Patrick Gleeson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5221-17

STYLE OF CAUSE: SIDRIT BUSHATI EVA BUSHATI v THE MINISTER
OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JUNE 26, 2018

JUDGMENT AND REASONS: GLEESON J.

DATED: JULY 31, 2018

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