Federal Court  Cour fédérale

Date: 20211104

Docket: IMM-286-21

Citation: 2021 FC 1181

St. John's, Newfoundland and Labrador, November 4, 2021

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

SAMI DAFKU

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant seeks judicial review of the decision of an immigration officer [Officer] refusing his Pre-Removal Risk Removal Assessment [PRRA] application.

Background

[2] The Applicant is a citizen of Albania. He claims that in 2007, he was being targeted by Artan Cala, a police officer who, among other things, repeatedly took food and cash from the

Applicant's supermarket in Kamez City, Albania. At first, the Applicant did not resist these actions because the police officer was a member of the powerful Cala family, which has financial and political influence within the ruling Socialist party and is involved in criminal activity. However, as time went by, the police officer's actions threatened to destroy the Applicant's business and he told the police officer to stop. The officer later returned, tried to take money by force and a fight ensued. The Applicant claims that he killed the police officer in self-defence. The Applicant turned himself in to police who beat him for killing a fellow Socialist police officer. In 2008, the Applicant was convicted of killing Artan Cala and sentenced to prison. He alleges he was mistreated in prison because of his Democratic Party ties.

[3] During the Applicant's imprisonment, the Cala family swore to kill him to avenge the death of the police officer, triggering a blood feud. The Applicant's family attempted several peace overtures which were refused. Upon his release from prison in 2017, the Applicant confined himself to his home as, under traditional Albanian law, the Kanun, it is forbidden to take a man's life in his own home. The Applicant attempted to escape by car to the north of Albania but the road was blocked by boulders. On December 15, 2018, the inspector of police and another officer went to the Applicant's home. They told him that his murder was imminent and that they could only warn him of this, not protect him. The Applicant's family contacted the local government for assistance, but none was given. The Applicant fled to Canada, arriving on December 20, 2018.

[4] On February 19, 2019, the Applicant was found to be ineligible for refugee protection because of his conviction for murder. He then applied for a PRRA, which was refused on November 18, 2020. This is the judicial review of that decision.

Decision under review

[5] The Officer's reasons acknowledge that the risk identified by the Applicant is his allegation that the police officer was a member of the Cala family, a powerful criminal organization having prominent members in the Socialist government, family members who are police officers, and which has the wealth and power to intimidate and bribe judges and officials. The Officer notes that the Applicant fears returning to Albania because the Calas will kill him. The Officer states that "the Applicant also alleges that his family contacted the police but but [sic] they did not provide assistance to them".

[6] The Officer states that because the Applicant had been found to be inadmissible on grounds of serious criminality, that pursuant to s 112(3)(b) of the IRPA, his application for protection was assessed only on the basis of s 97 of the IRPA. Further, that the Applicant's PRRA application and submissions, including documentary materials, were considered and that a consideration of general country conditions would form a part of the Officer's assessment.

[7] The Officer then refers to the United Kingdom Home Office Country Policy and Information Note Albania – Blood Feuds [UK Home Office Report] stating that it reported the information that followed. The next eight pages of the Officer's reasons are comprised exclusively of extracts from the UK Home Office Report.

[8] The Officer then states that in applying s 97 and assessing whether the Applicant has a risk to his life or of cruel and unusual treatment or punishment, it must also be determined if the Applicant had and will continue to have access to any reasonable domestic protection. The Officer states that the Applicant may rebut the presumption of state protection if they provide clear and convincing proof of the state's inability or unwillingness to protect them. The Officer states that, although not necessarily perfect, as no government can guarantee the protection of all of its citizens all of the time, the protection needs to be adequate, citing *Canada (Attorney General) v Ward*, 2 SCR 689 [*Ward*] and *Canada (MEI) v Villafranca*, 1992 CanLII 8569 (FCA) [*Villafranca*] in support of that proposition. The Officer then found that the documentary evidence supports that Albania "is making serious efforts to protect its citizens" that there are resources available in Albania for the assessment, prosecution, and the granting of remedies resulting from police officers' failure to conduct their work. Further, that Albania "has made serious efforts to combat blood feuds" (underlining in original). The Officer found the presumption that state protection would be forthcoming was not rebutted and that it was reasonable to expect the Applicant to seek that protection in Albania before seeking international protection. The Officer concludes by stating that they acknowledge that the Applicant stated that his family went to the police for assistance but that accessing police "is about more than just going to see an on-duty constable" and that the Applicant had not demonstrated, with clear and convincing proof, that state protection is not available to him in Albania.

Issue and standard of review

[9] The sole issue in this matter is whether the Officer's state protection analysis was reasonable. The parties submit, and I agree, that the standard of review is reasonableness

(*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65[*Vavilov*] at paras 10, 23 and 25).

State Protection

Applicant's position

[10] The Applicant submits that the Officer erred in their assessment of Albania's ability to provide state protection. The Officer found that Albania had made "serious efforts" to combat blood feuds and treated that finding as determinative of state protection. The Applicant submits that the Officer failed to assess whether those efforts were operationally effective. Further, even where there is evidence that state protection provides operationally adequate protection to the general public, an officer must still consider evidence of failures specific to the individual applicant. The Applicant submits that the Officer ignored country conditions evidence indicating a general failure of state protection against agents of persecution with high ranking government connections as well as the Applicant's evidence as to his particular circumstances, being that his agents of persecution include members of the police, secret police and Albanian Parliament. That is, the Officer failed to conduct an individualized risk assessment. The Applicant submits that the Officer's failure to complete a full state analysis under s 97 of the IRPA and failure to engage with critical general and case-specific evidence of deficiencies in state protection is fatal.

[11] The Applicant also submits that the Officer did not address the various circumstances which explained the Applicant's reasonable distrust of the Albanian authorities, including police corruption, that he had been tortured by the police while in custody, and had been warned by

them, after his release, that they could not protect him. The Applicant submits that he was not required to make efforts to obtain state protection that he knew would likely not be effective, nor to put himself at risk to prove the ineffectiveness of state protection. The Officer also misapprehended the Applicant's efforts to seek protection.

Respondent's position

[12] The Respondent submits that the Officer reasonably found that the Applicant did not rebut the presumption that state protection was available to him. The Respondent submits that the Officer did not err by quoting *Villafranca*, as the substance of the Officer's reasons demonstrate that they did not apply the wrong test as they turned their mind to the adequacy of state protection. The Respondent submits that the Officer also did not err in only mentioning the UK Home Office Report as the Officer also took other documentary evidence into account or can be assumed to have done so. Further, the UK Home Office Report was the most up-to-date evidence of general country conditions, incorporating multiple reports and sources. The Respondent submits that the Officer preferred the evidence in the UK Home Office Report to the evidence submitted by the Applicant. The Respondent also submits that the Applicant only approached the local police seeking protection and failed to exhaust all of the recourses available to him before seeking international protection.

Analysis

[13] I agree with the Applicant that the Officer erred in their state protection analysis.

[14] The Officer quoted from the 1992 decision of the Federal Court of Appeal in *Villafranca*, adding underlined emphasis, as follows "….where the state is in effective control of its territory, has military, police and civil authority in place, and is making serious efforts to protect its citizens from terrorist activities, the mere fact that it is not always successful at doing so will not be enough to justify a claim that the victims of terrorism are unable to avail themselves of such protection". The Officer then stated that they found, according to the documentary evidence, that Albania "is making serious efforts to protect its citizens, even if not always successful, since a government cannot guarantee the protection to its citizens at all times… Albania has made serious efforts to combat blood feuds". The further underlining emphasis is the Officer's.

[15] As noted by the Applicant, subsequent to *Villafranca* there has been significant jurisprudence from this Court holding that a decision maker cannot simply rely on the efforts of the state, without actually considering the adequacy of state protection. I have previously addressed this in *Ruszo v Canada (Citizenship and Immigration)*, 2019 FC 397 [*Ruszo*]:

> [32] In my view, the Officer also erred in failing to consider the operational adequacy of the state's efforts. The Respondent submits that the Federal Court of Appeal in *Villafranca* articulated the measure of assessing state protection as the state's "serious efforts to protect its citizens" (*Canada (Minister of Employment and Immigration) v Villafranca*, [1992] 99 DLR (4th) 334, 1992 CanLII 8569). However, there is significant subsequent jurisprudence from this Court, some of which is relied upon by the Applicant, which holds that a decision-maker cannot simply rely on the efforts of the state, without actually considering the adequacy of state protection. As Justice Diner states in *Lakatos v Canada (Citizenship and Immigration)*, 2018 FC 367:
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> > [21] In considering whether state protection is adequate, a decision-maker must focus on actual, operational adequacy, rather than a state's "efforts" to protect its citizens (*Lakatos v*

> *Canada (Citizenship and Immigration)*, 2018 FC 20 (CanLII)at para 12 [*Lakatos*]). Efforts must have actually translated into adequate protection at the present time (see *Hercegi v Canada (Citizenship and Immigration)*, 2012 FC 250 (CanLII) at para 5). In other words, lip service does not suffice. The protection must be real, and it must be adequate.

(See also *Gjoka v Canada (Citizenship and Immigration)*, 2018 FC 292 at para 30; *Kumati v Canada (Citizenship and Immigration)*, 2012 FC 1519 at paras 27-28; *Lakatos v Canada (Citizenship and Immigration)*, 2018 FC 20 at paras 13-16; *Olah v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 899 at paras 25-35; *Majoros v Canada (Citizenship and Immigration)*, 2013 FC 421 at para 18; *Csurgo v Canada (Citizenship and Immigration)*, 2014 FC 1182 at para 26).

[16] The Applicant also identifies a body of jurisprudence to this effect.

[17] The Respondent submits that this matter is similar to *Cervenakova v Canada (Citizenship and Immigration)*, 2021 FC 477 [*Cervenakova*] where it was argued that the officer relied on the wrong legal test for assessing state protection by applying a "best efforts" test rather than a test based on the operational adequacy and efficacy of the state's measures to protect the Roma people from persecution. In *Cervenakova* Justice Little set out the legal principles applicable to state protection (at para 23-25) and stated:

> [26] Both parties submitted (and I agree) that this Court's decisions have established that the adequacy of state protection is assessed on the basis of the "operational" adequacy of the protection, not merely the state's efforts: *Magonza v Canada (Citizenship and Immigration)*, 2019 FC 14 (Grammond J.), at paras 71-75; *A.B. v Canada (Citizenship and Immigration)*, 2018 FC 237 (Grammond J.), at para 17; *Poczkodi v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 956 (Kane J.), at paras 36-37; *Galamb v Canada (Citizenship and Immigration)*, 2016 FC 1230 (Gascon J.), at para 32; *Beri v Canada (Citizenship and Immigration)*, 2013 FC 854 (Strickland J.). **While the state's efforts are relevant to an assessment of state protection, they are neither determinative**

> **nor sufficient; any efforts must have actually translated into adequate state protection at the operational level**: *Meza Varela v Canada (Citizenship and Immigration)*, 2011 FC 1364 (Mosley J.), at para 16; *Molnar v Canada (Citizenship and Immigration)*, 2015 FC 273 (O'Keefe J.), at para 46. In other words, "a state protection analysis must not just consider governmental aspirations"; the protection must "work at an operational level": *Galamb*, at para 32. To measure the adequacy of state protection, one must consider the state's capacity to implement measures at the practical level for the persons concerned: *Galamb*, at para 32. **A state's efforts may be relevant to the assessment but efforts are not sufficient; whether operational adequacy has actually been achieved must be considered**: *Galamb*, at para 33; *Kovacs v Canada (Citizenship and Immigration)*, 2015 FC 337 (Kane J.) at para 71.
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> [27] Adequate state protection does not mean perfect state protection, but the state must be both willing and able to protect people who seek its protection: *Poczkodi*, at para 37, citing *Bledy v Canada (Citizenship and Immigration)*, 2011 FC 210 (Scott J.), at para 47.
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> [28] The state protection analysis also inquires into the adequacy of state protection for someone in circumstances similar to those of the claimant: *Go v Canada (Citizenship and Immigration)*, 2016 FC 1021 (Gleeson J.), at para 13. It is not necessary for the claimant to have sought protection personally from the state if the claimant can show, by reference to similarly situated individuals, that such efforts would be ineffective due to state indifference: *Ward*, at p. 724-725.
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> (Emphasis in bold added)

[18] As to the test for state protection, Justice Little found that the officer did not set out the test for state protection, or the rebuttal of it, nor did the officer expressly refer to operational adequacy. Rather, that the applicants essentially asked the Court to infer that the officer had applied the wrong legal test, serious efforts, rather than operational adequacy. Justice Little concluded that reading the PRRA officer's decision in whole – including several express statements about the operational adequacy and references to concrete actions taken by the state –

that the officer had not made a reviewable error by failing to apply the correct legal test for state protection.

[19] In my view, *Cervenakova* is distinguishable from the Officer's decision in this matter. Here the Officer quoted the *Villafranca* test, underlined "serious efforts" several times in that test and in their own conclusion that the state was making serious efforts to protect its citizens and combat blood feuds. And, while the Officer briefly lists some "efforts" taken to combat blood feuds, no analysis of their operational adequacy is undertaken.

[20] As to the Respondent's submissions made when appearing before me that the test is simply "adequacy" and not "operational adequacy", I note that this is not supported by the bulk of the jurisprudence from this Court. And, to the extent that the Respondent is suggesting that *Mudrak v Canada (Citizenship and Immigration)*, 2016 FCA 178 (at paras 26-36) stands for the proposition that the effectiveness, or the operational adequacy, of state protection is not an aspect of the test, I do not agree.

[21] I conclude that in this matter, the Officer erred in applying the incorrect legal test. This error is determinative.

[22] However, I also agree with the Applicant that the Officer erred in the state protection analysis by failing to respond to the Applicant's evidence that his circumstances rendered him unable or unwilling to access state protection. The Applicant's affidavit evidence which was before the Officer states that the Applicant had killed a police officer who was a member of an

influential Socialist-supporting crime family, the Calas. Prior to sentencing, police guards beat him for killing a fellow Socialist police officer. While in prison, the Cala family arranged his mistreatment and declared a blood feud. He states that his family, on his behalf, tried to make peace through various institutions and organizations but the Cala family refused to do so. On release from prison he went into self-confinement. His friends advised him that the Calas were saying that they were going to publicly kill the Applicant and that his friends did not dare go to the police to report this. In December 2018, a police inspector and another officer came to his home, told him he was a fool for staying in Albania, and that he should leave, or be killed. They said they could and would not protect the Applicant; his murder was imminent even if he remained in his home, and the warning was all the inspector could do for him.

[23] The Officer does not question the Applicant's credibility and does not engage with the above evidence, even though the UK Home Office Report, upon which the Officer relies, states:

> 2.5.8 Effective protection for a person in blood feud is available in general. The onus is on the person to demonstrate why they believe they would be unable to access effective protection and each case must be considered on its individual facts. However, where an active blood feud means the self-confinement is the only option because the reach and influence of the opposing clan is extensive, a person is likely to qualify for refugee status.

[24] Further, the Applicant's affidavit states that his family tried to make peace with the Cala family through various institutions and organizations but that the Cala family has refused. The Applicant's wife's affidavit states that the Applicant's family sent respected elders to the Calas to try to achieve peace but the Calas refused. The affidavit of the Applicant's sister-in-law states that she and her family had tried very hard to create peace between the Applicant and the Cala family, as have others, but this has failed. A verification of the Municipality of Kamez

states that it has not been able to reconcile the conflict and that the Applicant is very much in danger in Albania. The Officer also does not engage with this evidence. When appearing before me the Respondent suggested that the supporting affidavits filed by the Applicant – which were not referred to the Officer – did not refer to Artan Cala as a police officer. However, the Applicant's affidavit filed in support of his PRRA states that "Artan Cala, a police officer and Socialist, was extorting money from me" and the Officer's reasons acknowledge that the Applicant alleges that a police officer named Artan Cala was extorting him. To the extent that the Respondent is questioning the Applicant's credibility, I note that the Officer did not do so and, had the Officer had credibility concerns, they would have been required to convene a hearing pursuant to s 113(b) of the IRPA.

[25] In my view, the Applicant's evidence that the police advised the Applicant during his self-confinement that they would and could not protect him, and the other affidavit evidence speaking to the unsuccessful efforts to resolve the blood feud, were highly relevant to the required state protection analysis – both to the question of whether protection was available in the Applicant's circumstances and whether he had rebutted the presumption of state protection. The Officer's failure to address this evidence constitutes a reviewable error.

[26] Further, the evidence does not support the Officer's statement that "I acknowledge that the applicant states that his family went to the police for assistance; however, I note that accessing police is about more that just going to see an on-duty police constable". There is no evidence in the record that the Applicant's family went to the police. The Applicant's position was that the police and other government agencies are corrupt and subject to the influence of the

Cala family. The Officer did not address whether the Applicant could reasonably be expected to seek, or whether he would obtain, state protection in these circumstances.

[27] For these reasons, the Officer's decision is "untenable in light of the factual and legal constraints that bear on it" (*Vavilov* at para 101), and it is unreasonable.

JUDGMENT IN IMM-286-21

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted;

2. The decision is set aside and the matter is remitted back to a different PRRA officer for redetermination;

3. There shall be no order as to costs; and

4. No question of general importance for certification was proposed or arises.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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