Federal Court  Cour fédérale

Date: 20230119

Docket: IMM-7158-21

Citation: 2023 FC 92

Ottawa, Ontario, January 19, 2023

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

EDUARD MELAJ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Eduard Melaj, seeks judicial review of a decision of the Refugee Appeal Division ("RAD") dated September 27, 2021, confirming the determination of the Refugee Protection Division ("RPD") and finding that the Applicant is neither a Convention refugee nor a person in need of protection under sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*").

[2] The RAD disagreed with the RPD's finding that the Applicant failed to rebut the presumption of state protection, but ultimately upheld the refusal of the refugee claim on the basis that the Applicant has a viable internal flight alternative ("IFA") in Albania.

[3] The Applicant submits that the RAD's decision is unreasonable because it failed to admit the Applicant's new evidence on appeal, misconstrued evidence relating to the agent of harm, and made erroneous findings of fact relating to the IFA in Tirana.

[4] For the reasons that follow, I find that the RAD's decision is reasonable. The application for judicial review is dismissed.

II. Facts

A. *The Applicant*

[5] The Applicant is a 30-year-old citizen of Albania.

[6] The Applicant resided in the village of Hani i Hotit. The Applicant's Basis of Claim ("BOC") form states that approximately six years ago, his neighbour, Arben Gojcaj (hereby referred to as "Arben", as done so by the RPD and RAD in their decisions), began threatening the Applicant's family over their property. The Applicant's father had exchanged his original parcel of land for this one, which originally belonged to his cousin. The Applicant's father built a house and grocery store on this property, which became lucrative and stirred jealously from community members, including Arben.

[7] The Applicant claims that Arben began disputing his family's ownership of the land based on *Kanun*, a set of Albanian traditional laws. Arben claimed that as the adjacent neighbour, he should have had the opportunity to purchase the land before the Applicant's father. The Applicant claims that Arben began appearing at his father's grocery store and threatening him and his family.

[8] On December 29, 2015, the Applicant claims that the grocery store was broken into, resulting in damaged property and stolen inventory. The Applicant's father filed a police report to no avail. A few days later, the Applicant's father received a threatening phone call, advising him that something bad would happen if he went to the police. The Applicant claims the grocery store was broken into again on January 7, 2016, resulting in a greater damage. His father again reported this to the police, who informed him that nothing could be done.

[9] The Applicant opened a café in the village in 2014. He claims that Arben would appear at his café and threaten him about the land dispute. On March 26, 2017, Arben came to his café and physically assaulted him. The Applicant closed his café after this incident and, along with his brother and father, confined himself in his home. His mother ran the grocery store alone. Arben was not receptive to attempts to mediate the conflict.

[10] The Applicant left Albania and arrived in Canada in January 2019 and made a claim for refugee protection.

B. *RPD Decision*

[11] In a decision dated March 10, 2020, the RPD rejected the Applicant's claim on the basis of his failure to rebut the presumption of state protection.

[12] A state is capable of protecting its citizens and the Applicant bears the onus to rebut this presumption with sufficient evidence (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689) ("*Ward*"). Unless unreasonable to do so, the claimant must show efforts to seek state protection where that protection may be reasonably forthcoming (*Ward* at p. 691). The imperfect nature of state protection is not proof of the state's inability to protect a claimant (*Zalzali v Canada (Minister of Employment and Immigration)*, [1191] 3 FC 605 (FCA)).

[13] The RPD found that the documentary evidence indicates that Albania is a functioning democracy, with military, police and civil authorities available to protect citizens. Although corruption is an issue, the RPD found insufficient evidence to show a "total breakdown" of Albanian state authority. The RPD noted that the documentary evidence indicates redress where citizens are unfairly treated or dismissed by authorities, and that Albanian authorities have vetted judges and prosecutors, and dismissed officials tied to organized crime or unexplained wealth.

[14] The RPD recognized that challenges in state protection exist in Albania, particularly relating to crimes associated with blood feuds. Albanian authorities have been known to ignore such complaints, and people continue to go into self-imposed hiding. That being said, the RPD noted that authorities now intervene in blood feuds, and that the Prosecutor's Office have been

visiting affected families to encourage reporting of threats. The RPD stated that Albanian police claim to have made efforts to end flood feuds and in the past few years, authorities have paid an increasing amount of attention to addressing blood feuds.

[15] The RPD noted that the Applicant's BOC form indicated several attempts to report the neighbour's threats to the police, but found insufficient evidence to corroborate this claim. The RPD further noted that the Applicant testified at the hearing that Arben had ties to criminal gangs, but this was not included in his BOC form and he did not elaborate on this when asked. The RPD found that this detail was added to bolster his claim and that this would have been mentioned in the BOC form if it was true, ultimately undermining the Applicant's credibility.

[16] The RPD found that the Applicant could not state with certainty that Arben was the perpetrator in his narrative, and was only able to suspect him. With no witnesses, the RPD stated that it would be difficult for the police to conduct a meaningful investigation and, even if the police failed to pursue the complaint, the Applicant and his family had other remedies available to them, such as making complaints with other oversight bodies. The RPD reiterated that the Applicant bears the onus to produce evidence that the police would not provide protection, and failed to do so (*Nadeem v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1263).

[17] The RPD ultimately found that the Applicant provided insufficient evidence to rebut the presumption of state protection and therefore refused his claim for refugee protection. The Applicant appealed the RPD's refusal on August 19, 2020.

C. *Decision Under Review*

[18] In a decision dated September 27, 2021, the RAD disagreed with the RPD's finding that the Applicant failed to rebut the presumption of state protection, but upheld the determination that the Applicant is neither a Convention refugee nor a person in need of protection, on the basis that he has a viable IFA in Tirana. The RAD also refused to admit the Applicant's new evidence proffered on appeal.

(1) New Evidence

[19] The Applicant requested that two additional documents be admitted as evidence on appeal. The Applicant requested to admit the RPD's Notice and Reasons of Decision, dated March 10, 2020. The RAD found that the RPD's decision does not have to be introduced as new evidence and it is open to the Applicant to rely on the RPD's reasons in his submissions.

[20] The Applicant also sought to introduce an affidavit outlining his concerns relating to the viability of Tirana as an IFA, in response to the RAD's request for further submissions on the IFA issue. The RAD referenced subsection 110(4) of *IRPA*, which states that an Applicant may only present evidence that arose after the rejection of his claim; evidence that was not reasonably available at the time of the rejection; or evidence that could reasonably have been expected to be presented at the time of rejection, given the circumstances.

[21] The RAD did not find that the affidavit met the requirements for new evidence under subsection 110(4) of *IRPA*. The RAD determined that the affidavit contains information that the

Applicant could have reasonably provided at the time his claim was rejected, and could reasonably have been expected in his circumstances. The RAD further found that the RPD specifically mentioned the IFA in Tirana as an issue at the hearing, and asked the Applicant numerous questions relating to the IFA, contrary to the Applicant's submission that this was not a live issue at the time. The RAD refused to admit the Applicant's affidavit as new evidence on appeal.

(2) State Protection

[22] The RAD disagreed with the RPD's decision on the presumption of state protection and found that the Applicant successfully rebutted the presumption.

[23] The RAD noted that the Applicant's burden to displace this presumption is proportional to the level of democracy in the state, and the adequacy of protection must be based on an objective assessment of the state's ability to protect the Applicant, rather than a subjective fear held by the Applicant (*Ward* at pp. 724-725; *Torales Bolanos v Canada (Citizenship and Immigration)*, 2011 FC 388). The analysis must consider the willingness of state institutions to implement protection, and requires a contextual approach to assess whether the protection is available in the Applicant's context (*Torres v Canada (Minister of Citizenship and Immigration)*, 2005 FC 660; *Gonzales Torres v Canada (Citizenship and Immigration)*, 2010 FC 234).

[24] In evaluating the National Documentation Package ("NDP"), the RAD agreed with the Applicant's central submission that the 2019 elections "set back" democratic principles in Albania, and that Albania is generally at the "weaker end of the spectrum of democracy," which

partially erodes the presumption of state protection. The RAD further found evidence to show that Albania has a mixed record in providing adequate state protection.

[25] The RAD found that the Applicant's evidence pointed to several instances where he or his family were threatened, assaulted, or had their property damaged. Contrary to the RPD's determination, the RAD found that there were three instances where Arben was suspected to be the perpetrator of these acts, and one instance where Arben directly assaulted the Applicant. The RAD found that there is no indication that the police were interested in pursuing the complaints. The RAD determined that the RPD erred in requiring further evidence to establish that the police reports were filed after each incident, and that the Applicant could have filed complaints with other bodies. The RAD therefore found that the Applicant successfully rebutted the presumption of state protection.

(3) IFA

[26] The RAD determined that the Applicant has a viable IFA in Tirana. The test for assessing an IFA requires that: (1) there is no serious possibility of persecution or risk of harm in the IFA, and (2) it is reasonable in the Applicant's circumstances to relocate to the IFA (*Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706). The second prong of the test places a high evidentiary burden on the Applicant to demonstrate that relocation to the IFA would be unreasonable (*Ranganathan v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1367) ("*Ranganathan*").

[27] At the first prong, the RAD found that the Applicant failed to establish that Arben would be interested in or motivated to locate him in the IFA, and that even if motivated, Arben would not have the means to locate him. The RAD agreed with the RPD's finding that the Applicant embellished Arben's profile in the RPD hearing, which undermined his credibility. The RAD found that the Applicant provided only vague statements regarding Arben's ties to criminal gangs, and the evidence suggests that Arben is actually a "common criminal" seeking to intimidate the Applicant over a land dispute. The RAD concluded that this profile did not indicate that Arben would be motivated or have the means to track the Applicant.

[28] The RAD further noted that the sole apparent reason for Arben's violence against the Applicant and his family is his dispute over the land, and property rights claims are not a basis for a refugee claim under sections 96 or 97 of *IRPA* (*Kenguruka v Canada (Citizenship and Immigration)*, 2014 FC 895). The RAD stated that claimants may have to make reasonable choices to free themselves of a risk of harm, and the Applicant's choice to relinquish his claim to his father's property would remove Arben's pursuit of him (*Malik v Canada (Citizenship and Immigration)*, 2019 FC 955). The RAD found no evidence showing that Arben expressed interest in or searched for the Applicant after he left Albania.

[29] The RAD found that even if Arben was motivated to search for the Applicant, the documentary evidence shows that it is unlikely that Arben would be able to access the civil registration program, where the Applicant claims that Arben could find his location. The NDP shows that while police officers may access the system for illicit purposes, they cannot do so without impunity, and there is no evidence to show that Arben has the police connections to

access the system. The RAD found the Applicant's fear that other neighbours in his village would inform Arben of his whereabouts to be speculative. The RAD therefore found that the Applicant did not establish that Arben would pose a risk of persecution or harm in Tirana.

[30] At the second prong, the RAD determined that it would not be unduly harsh or objectively unreasonable for the Applicant to relocate to Tirana. Acknowledging that it may be difficult to relocate and find new employment, the RAD found that this difficulty does not render the possibility of relocation objectively unreasonable, citing *Ranganathan* (at para 13). Despite the Applicant only having eight years of education, the RAD found that he is only 30 years old, with no evidence of medical issues, mental health issues, or other barriers. The RAD noted that he worked at his family's grocery store and ran his own café, indicating personal factors weighing in favour of finding employment elsewhere. The RAD also disagreed that the Applicant could not access social support or start a new business because the registration process would make his information accessible to Arben, reiterating that there is insufficient evidence to show that Arben has the motivation or the ability to access this system for this purpose.

[31] Finding that both requirements for an IFA are met in the Applicant's case, the RAD determined that the Applicant has a viable IFA available to him in Tirana. The RAD therefore dismissed the Applicant's appeal and upheld that the Applicant is neither a Convention refugee nor a person in need of protection under sections 96 and 97 of *IRPA*.

III. Issue and Standard of Review

[32] Whether the RAD's decision is reasonable.

[33] The standard of review is not disputed. The parties agree that the applicable standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25) ("*Vavilov*"). I agree.

[34] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker (*Vavilov* at para 85). Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

IV. Analysis

[35] The Applicant submits that the RAD unreasonably rejected his new evidence, misconstrued the evidence relating to Arben, and made erroneous findings of fact regarding the viability of an IFA. In my view, the RAD's determinations on each of these points is reasonable.

A. *New Evidence*

[36] The Applicant notes that the RAD requested additional submissions regarding the viability of an IFA. In support of these further submissions, the Applicant provided an affidavit as new evidence. The Applicant submits that Tirana was only mentioned five times during the

RPD hearing and the discussion on a possible IFA was very brief. The RPD's reasons contained no mention of an IFA. The Applicant submits that by requesting further submissions on the viability of an IFA, the RAD was clearly of the opinion that there was insufficient information in the record to make a decision on the matter. The Applicant contends that it is counterintuitive to reject this evidence after requesting further information on the issue.

[37] The Respondent submits that the Applicant has failed to point to a reviewable error committed by the RAD in refusing to admit the affidavit as new evidence, in light of the requirements for new evidence under subsection 110(4) of *IRPA* and the relevant jurisprudence. The RAD reasonably found that the issue of the IFA was raised at the RPD hearing, giving the Applicant the opportunity to respond at the time the claim was rejected, and the Applicant failed to reasonably explain how the new evidence was not reasonably available or could not have been presented to the RPD prior to its decision. The Respondent disagrees that it is counterintuitive for the RAD to seek further submissions and then reject the Applicant's new evidence, submitting that the two are distinct, and the admittance of new evidence is subject to the legislation, jurisprudence and rules.

[38] I agree with the Respondent. The RAD's reasons exhibit a clear and intelligible assessment of whether the new evidence should be admitted on appeal, in light of the three requirements stipulated under subsection 110(4) of *IRPA.* The RAD reasonably found that the IFA was an issue at the RPD hearing, even if it was not the determinative issue, and therefore not mentioned in the reasons for the decision. The Applicant himself notes in his submissions that Tirana was mentioned in the RPD hearing "five times". The Applicant's response to these

questions regarding the IFA at the RPD hearing reveal his awareness that the RPD was concerned about and alive to the issue of an IFA. In light of this awareness, the RAD reasonably found that he did not provide a sufficient explanation for his failure to provide the affidavit evidence prior to the RPD's rejection of his claim.

[39] The Applicant also incorrectly assumes that the RAD's request for further submissions on the IFA necessarily equates to an acceptance of whatever new evidence the Applicant submits in response to this request. Requesting further submissions on this issue and applying the required criteria to find that the new evidence is inadmissible are separate steps. The RAD transparently and intelligibly applied the relevant factors, and rendered a decision regarding the new evidence that is justified in light of these constraints (*Vavilov* at paras 15, 99-101). For these reasons, I do not find that the RAD erred in refusing to admit this affidavit.

B. *IFA*

[40] The Applicant submits that the RAD engaged in an unreasonable assessment of his evidence regarding Arben's motivation to pursue the Applicant, and that the RAD made erroneous findings of fact regarding the viability of the IFA in Tirana.

(1) Agent of Harm

[41] The Applicant submits that the RAD misconstrued his evidence regarding Arben's profile. The Applicant acknowledges that his BOC form contains a vague reference to Arben being "into drugs," but notes that he elaborated on this in his testimony before the RPD. The

Applicant also submits that the RAD's finding that the Applicant bolstered Arben's profile is contradictory to its finding that the Applicant rebutted the presumption of state protection. The Applicant cites *Williams v Canada (Citizenship and Immigration)*, 2016 FC 161, to submit that an adverse credibility finding cannot be drawn from elaborative details.

[42] The Applicant further submits that the RAD's finding regarding Arben's profile is incongruous with the evidence because the only logical explanation for the police's lack of response is that Arben exercises some level of police influence. The Applicant contends that his statement in the BOC form and his testimony before the RPD do not contradict one another and the latter is simply an elaboration of the same point. The Applicant submits that the RAD's conclusion on this issue disregards the Applicant's evidence and is therefore unreasonable.

[43] The Respondent maintains that the RAD reasonably concluded that the Applicant failed to show a risk of persecution or harm in the IFA. Beyond his own testimony, the Applicant provided no further information regarding Arben's motivation or ability to track him in the IFA. The Respondent cites *Franco Garcia v Canada (Citizenship and Immigration)*, 2021 FC 1006 ("*Franco Garcia*"), where this Court reviewed the RAD's determination of an IFA in light of a criminal gang threatening the applicants on the basis of a property dispute. This Court found that in the absence of credible evidence pointing to the gang's motivation to pursue the applicants in the IFA after they relinquished their claim to the property, the applicants were essentially asking this Court to "get into the minds of the agents of harm, speculating as to their next move" (*Franco Garcia* at para 24). The Respondent submits the RAD reasonably found that the

Applicant failed to provide sufficient evidence showing that Arben has the motivation or means to pursue him in the IFA.

[44] On the basis of the evidence available to the RAD, I find that the RAD reasonably assessed Arben's profile as the agent of harm, and his motivation or interest in pursuing the Applicant in the IFA. The Applicant submits that the RAD's finding that he embellished Arben's profile is unreasonable because his testimony at the RPD hearing was merely an elaboration of his BOC form. However, I find that the RAD reasonably assessed the Applicant's testimony to be an embellishment. The Applicant only vaguely claimed that Arben was "into drugs" in his BOC form and, at the hearing, only stated unsupported assertions that Arben had connections to criminal gangs, with no specific evidence about how the Applicant knew this information, what gangs Arben was a part of, or what kind of connections he had. This lack of clear evidence in the testimony, leaving little more than vague assertions, undermines the Applicant's contention that his assertions were simply elaborative, rather than embellishments. The RAD therefore did not err in drawing a negative credibility finding on this basis.

[45] I do not find that the only logical explanation for the police's failure to pursue the complaints made by the Applicant and his family is that Arben has connections to and influence in police and, in turn, has the motivation or ability to pursue the Applicant. The evidence proffered by the Applicant does not reveal any such information about Arben's connections with police, or his ability to access the Applicant's location. It simply shows that Arben has sought to threaten and intimidate the Applicant and his family over a land dispute, and that the complaints made by the Applicant and his family to the police were not pursued. There is a substantial

evidentiary gap between these two findings. It would be a jump in reasoning for the RAD to draw a connection between these findings, establishing Arben's means and motivation to pursue the Applicant, without any evidence to support this connection (*Vavilov* at para 102).

[46] This Court has established that speculative assertions about the motivation or interest of an agent of harm in pursuing an applicant is insufficient to establish that the claimant faces a risk of persecution or harm in the IFA (*Franco Garcia* at paras 32-33). This Court's role is not to enter the mind of Arben and anticipate his next move, absent clear evidence to show that he would reasonably pose a risk to the Applicant in the IFA (*Franco Garcia* at para 24).

(2) Viability of the IFA

[47] The Applicant submits that the RAD failed to meaningfully consider or engage with the objective country evidence in concluding that Tirana is a viable IFA. The Applicant submits that the RAD erroneously relied on a report in the NDP that does not provide a fulsome analysis of how the civil registration system can be used by corrupt police officers to track citizens. The Applicant further contends that the RAD erred by characterizing the Applicant's fear that one of the other neighbours in his village may inform Arben of his location as speculative, since the Applicant's BOC form details other neighbours' jealousy of the Applicant's family.

[48] The Respondent maintains that the RAD reasonably found that the Applicant failed to discharge the high evidentiary burden at the second stage of the IFA analysis. The Respondent submits that the Applicant did not provide actual and concrete evidence showing that Tirana is not a viable IFA and that Arben would reasonably pursue him there.

[49] I once again agree with the Respondent. The RAD's reasons exhibit a thorough and intelligible analysis of the country condition evidence, and reveal a clear line of reasoning between this evidence and the conclusion that Tirana is a viable IFA for the Applicant. The Applicant's submissions amount to a request for this Court to reweigh the evidence before the RAD. This is not this Court's role on reasonableness review (*Vavilov* at para 126). The RAD is also not obligated to mention every piece of documentary evidence in its reasons, and a failure to mention certain evidence does not mean it was ignored (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16; *Arora v Canada (Citizenship and Immigration)*, 2021 FC 1270 at para 25). This Court must review the decision as a whole to assess whether it accords with the evidence. The RAD's conclusion that the Applicant has a viable IFA, where he can reasonably relocate and Arben does not pose a risk of persecution or harm, is reasonable in light of the record (*Vavilov* at para 99).

V. Conclusion

[50] The RAD's decision is reasonable. The Applicant failed to point to a reviewable error made by the RAD in refusing to admit the Applicant's new evidence on appeal, or in assessing the viability of the IFA in the Applicant's circumstances. This application for judicial review is therefore dismissed. No questions for certification were raised, and I agree that none arise.

JUDGMENT in IMM-7158-21

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. There is no question to certify.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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