Date: 20071004

Docket: IMM-4009-06

Citation: 2007 FC 999

BETWEEN:

ALEKO SHOLLA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT

Pinard J.

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated July 27, 2006, wherein it determined that the applicant was not a "Convention refugee" or a "person in need of protection" as defined in sections 96 and 97 respectively of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

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[2] The Board held that the central issue was state protection. The Board noted that the threshold for rebutting the presumption of state protection is higher in democracies but held that Albania was an emerging democracy and thus the threshold was low. The Board found that although the general situation with respect to the availability of state protection in Albania was less than adequate, the applicant had failed to rebut the presumption of state protection.

[3] The Board held that there was no effective state protection in 1997 when the applicant made a police complaint about his cousin's murder, but that in the spring of 2002 this changed. The police investigated, arrested, and charged an individual who was subsequently convicted and served a sentence. The Board held the police had shown by their actions that they were prepared to take action when they have sufficient evidence and that the courts are prepared to proceed when they have evidence. The applicant had not explained why he was no longer prepared to try to seek assistance from the police to deal with the continuing threats being made against his family. The Board noted that the applicant had no reason to believe that the police are not prepared to act as they did in the spring of 2002.

[4] The Board noted that it was not possible to go through all of the documentary evidence, but referred to one report which indicated that Albania had asked the European Union for support to assist in the control of corruption. The report notes that the President of Albania made a statement that the government has already taken significant reform. The Board held that the different response by the police in the spring of 2002, compared to the police response in 1997, is evidence of this reform.

[5] The Board concluded that

> . . . I am not satisfied that the fact that in 1997 the police did not respond in an appropriate way that then forever after, gives the claimant in this particular case, justification to never trust the police again. I believe that because on its face the police appeared to provide an appropriate response in 2002, then subsequent to that response there is an obligation on the claimant to again turn to the authorities before coming and asking for the protection of Canada.

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[6] This matter raises the following issues:

- Did the Board apply the correct test for state protection?
- Did the Board reasonably determine that the applicant had not rebutted the presumption of state protection?
- Did the Board fetter its discretion by referring to the Pre-Removal Risk Assessment (PRRA) process in its decision?

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Test for state protection

[7] The applicant submits that the Board applied the wrong test for state protection by finding that serious efforts to provide state protection, rather than effective state protection, are required. The applicant points to the following finding of the Board as evidence that the Board applied the wrong test:

> In conclusion, I am satisfied that the state of Albania is making serious efforts to provide adequate, although certainly not perfect protection, for individuals such as the claimant.

[8] The applicant's argument seems to be that, because the Board used the words "serious efforts" instead of "effective protection", the Board did not consider whether effective protection

was available. I do not agree. The Board did consider whether effective state protection was available when it found that

> . . . They have shown those serious efforts in their treatment of the claimant in 2002, and I am satisfied that the claimant failed to rebut that those efforts would not provide him with protection if he was to return to Albania today.

[9] In my view, the Board considered not only whether Albania had made serious efforts to provide state protection but also considered whether these serious efforts resulted in adequate state protection for the applicant.

Board's finding on the availability of state protection

[10] The applicant submits that the Board erred in finding that effective state protection was available by basing its assessment on one factor only – the State prosecuted the applicant's assailant in 2002. The applicant submits that the Board failed to consider the documentary evidence which indicates that the state protection in Albania is inadequate.

[11] The respondent submits that the applicant should have taken reasonable steps to avail himself of state protection by seeking the assistance of the police, given that they demonstrated that they were willing and able to take action against criminal activity. The respondent further submits that it was open to the Board to prefer the documentary evidence that the government of Albania was undertaking reform to the applicant's explanation as to why he did not seek protection.

[12] The Board need not summarize all the evidence or refer to every piece of evidence (*Hassan v. Canada (M.E.I.)* (1992), 147 N.R. 317 (F.C.A.) and *Florea v. Canada (M.E.I.)*, [1993] F.C.J. No. 598 (F.C.A.) (QL)); however, if the Board fails to specifically mention important evidence, a court may be willing to infer from the silence that the decision-maker made an erroneous finding of fact (*Cepeda-Gutierrez v. Canada (M.C.I.)*, [1998] F.C.J. No. 1425 (T.D.) (QL)).

[13] In the present case, I am not convinced that the Board's failure to specifically mention the documentary evidence on the availability of state protection in Albania suggests that the Board made an erroneous finding of fact. My conclusion in this regard is based on the following statement by the Board:

> Counsel took me through a generalized appraisal of the situation of state protection and I agree with counsel that the generalized picture of conditions in Albania is certainly less than adequate. However, I have to take the evidence for this particular matter and mirror it, or superimpose it over the generalized appraisal as outlined by counsel.

[14] This indicates that the Board was aware that the documentary evidence showed that, generally, state protection was less than adequate. Therefore, I am satisfied that the Board did not ignore the documentary evidence.

[15] Unless a state has collapsed there is a presumption that the state is willing and able to protect a claimant. It is up to the applicant to rebut this presumption with some clear and convincing evidence (*Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689). Providing documentary evidence of generalized country conditions will not always be enough to rebut this presumption. In

my view, it was entirely reasonable for the Board to find that generalized documentary evidence indicating that state protection was generally less than adequate was not sufficient to rebut the presumption of state protection in light of the fact that the applicant had received state protection in the past. The applicant made no attempt to seek state protection even though the state had previously provided protection. In these circumstances, I find that the Board's conclusion that the applicant was obliged to try to seek state protection in Albania was reasonable.

Fettering of discretion

[16] The applicant also submits that the Board fettered its discretion in referring to the PRRA process. The paragraph that the applicant takes exception to reads as follows:

> I would agree with counsel's submission that if very strong evidence, or even sufficient evidence to suggest that someone would be killed if they were to return to their country of origin that they should be protected in Canada. If in fact that is the case here I would only respond that there is a pre-removal risk process that looks specifically at that issue. Even though I may find that the efforts of the state would provide adequate although not necessarily perfect protection. This finding would not preclude the claimant from being protected from removal.

[17] The applicant submits that this comment shows that the Board believed that alternative protection was available from within Canada.

[18] The respondent submits that the Board referred to the PRRA process in only a hypothetical context, in response to submissions of the applicant's counsel. The respondent submits that there was no fettering as the Board fully analyzed the applicant's claim and found that he had not adequately rebutted the presumption of state protection and rejected his claim on this basis.

[19] The Board's comments are puzzling and they seem to suggest that the Board did not consider it within its scope of responsibility to consider whether the applicant would be killed if he returned to Albania. Nevertheless, I do not see how these comments are evidence that the Board has fettered its discretion, particularly in light of the Board's comments in the following paragraph:

> . . . If in fact there is evidence to satisfy another panel with a different mandate; that in fact he would be killed if he were to be returned; that recourse could be sought. I certainly have not made a finding that he would be killed if he were to be returned. (Emphasis added.)

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[20] For all the above reasons, the application for judicial review is dismissed.

"Yvon Pinard"

Judge

Ottawa, Ontario
October 4, 2007

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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