

Date: 20080515

Docket: IMM-3611-07

Citation: 2008 FC 611

Ottawa, Ontario, May 15, 2008

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

ELVIN MENAJ

Applicant

and

**MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Elvin Menaj, the Applicant, pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, applies for judicial review of a decision by the Refugee Protection Division of the Immigration and Refugee Board (the “Board”), dated July 26, 2007, wherein it was determined that the Applicant was not a Convention refugee or a person in need of protection.

[2] The Applicant is a citizen of Albania. He told of realizing he was homosexual when he was a teenager. He did not disclose his sexual orientation to his family or friends and at the age of 26

was pressured by his family to marry. He and his wife had one child. They lived with his parents in the village of Fratar.

[3] Although married, the Applicant sought opportunities to meet with other homosexual males. He had met another male in a café in October 2006. They went to a nearby park where they kissed. Apparently this was recorded on a cell phone camera by an observer and the picture was circulated in his village. As a result, his wife left him, taking their child, and his father demanded he leave the family home because of his sexual orientation. He relocated to Tirana, the capital city of Albania. While there, he received telephone calls from his brothers-in-law who threatened him for humiliating their sister.

[4] The Applicant sought out homosexual males in Tirana and agreed to meet one individual in the city park. When he attended at the rendezvous point, the individual pushed the Applicant down and three other males appeared. The four men raped and brutalized the Applicant. He did not report the attack because of the hostility toward homosexuals in Albanian society.

[5] The Applicant made arrangements to stow away on a ship, eventually arriving in Halifax on February 8, 2007, where he immediately made an application for refugee protection.

DECISION UNDER REVIEW

[6] The Board decided the Applicant was not credible. It disbelieved his description of the events that occurred in his village of Fratar and in Tirana. It doubted his report of agreeing to meet

a strange man in a city park in Tirana when he could have met the individual in his rooming house, a location which the Board noted as more discreet than the public space of a park. The Board also concluded that his conduct in Halifax was contrary to the conduct one would expect of a homosexual male.

[7] The Board decided that the Applicant failed to produce sufficient credible evidence to prove that he was homosexual and would be persecuted because of his homosexuality should he return to Albania. The Board further concluded that the Applicant came to Canada to find a better life quoting a port-of-entry statement by the Applicant that if he returned to Albania he would have nowhere to go and no chance of employment.

STANDARD OF REVIEW

[8] The transcript of the Refugee Protection Board hearing discloses a recording gap during the Applicant's testimony about his first homosexual encounter that led to his estrangement from his wife and his alienation from his family.

[9] In *Canadian Union of Public Employees, Local 301 v. Montreal (City of)*, [1997] 1 S.C.R. 793 at para. 81, Justice L'Heureux-Dubé set out the test for whether the absence of a transcript violates the rules of natural justice:

In the absence of a statutory right to a recording, courts must determine whether the record before it allows it to properly dispose of the application for appeal or review. If so, the absence of a transcript will not violate the rules of natural justice. Where the statute does mandate a recording, however, natural justice may require a transcript. As such a recording need not be perfect to ensure the fairness of the proceedings, defects or gaps in the transcript must be shown to raise a "serious

possibility” of the denial of a ground of appeal or review before a new hearing will be ordered. These principles ensure the fairness of the administrative decision-making process while recognizing the need for flexibility in applying these concepts in the administrative context.

[10] Issues related to natural justice are reviewed on the correctness standard (*Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4 at para. 65).

[11] Where questions of fact and credibility are reviewed the standard of review is reasonableness (*Sukhu v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 427 at para. 15).

ANALYSIS

[12] The determinative issue for the Board was whether the Applicant was homosexual. Setting aside for the moment the Board’s treatment of the Applicant’s evidence about his first homosexual encounter, the Board’s decision that the Applicant is not credible because he did not tell the Immigration Officer in the port-of-entry interview that he had been raped and that his subsequent conduct in not engaging in homosexual behaviour in Halifax was at odds with his proclaimed homosexuality raises issues. The Board’s selective use of the Applicant’s port-of-entry evidence to find that he left Albania for economic reasons is also problematic.

[13] The Board considered the Applicant’s failure to tell the Immigration Officer about being raped when he reported the humiliating assault by the four men in the Tirana park to raise doubts

about his credibility. The Board's reasons do not take into account the Applicant's background and experiences when it evaluates the Applicant's failure to report his rape to the Immigration Officer.

[14] In *R.K.L. v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 at para. 16, Justice Martineau spoke to the relationship in making credibility determinations based on the port-of-entry notes:

A person's first story is usually the most genuine and, therefore the one to be most believed. That being said, although the failure to report a fact can be a cause for concern, it should not always be so. That, again depends on all the circumstances: see *Fajardo v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 915 at para. 5 (QL) (C.A.); *Owusu-Ansah, supra*; and *Sheikh v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 568 (QL) (T.D.). In evaluating the applicant's first encounters with Canadian Immigration authorities or referring to the applicant's Port of Entry Statements, the Board should also be mindful of the fact that "most refugees have lived experiences in their country of origin which give them good reason to distrust persons in authority": see Prof. James C. Hathaway, *The Law of Refugee Status*, (Toronto: Butterworth, 1991) at 84-85; *Attakora, supra*; and *Takhar, supra* (emphasis added).

[15] The Board also doubted the Applicant was homosexual because he abstained from homosexual behaviour in Halifax. The Board appears to apply a specific perspective on homosexual behaviour stating (Reasons at 6):

[The Applicant] states that he has been to the Reflection Club, which is allegedly a gay club in Halifax, on a couple of occasions. He has never had any sexual relations with any man (either in Albania or in Canada), because he is too shy. He knows what his sexual orientation is – he knows his feelings, but is too shy and scared to engage in consensual sex with a male.

[16] Again, referring to the decision in *R.K.L.* above, at para. 12, Justice Martineau stated:

Furthermore, the Board should not be quick to apply the North American logic and reasoning to the claimant's behaviour: consideration should be given to the

claimant's age, cultural background and previous social experiences: see *Rahnema v. Canada (Solicitor General)*, [1993] F.C.J. No. 1431 at para. 20 (QL) (T.D.); and *El-Naem v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 185 (QL) (T.D.).

[17] The Board appears to have applied, for lack of a better term, the North American perspective to assessing the Applicant's behaviour when the Board speaks of going to a "gay club" and engaging in "sexual relations with any man". The Board does not identify the basis for his reasoning nor does he take into consideration the difference in how homosexuality may be viewed in Albania as opposed to Canada.

[18] The Board decides that the Applicant is an economic refugee. The Board states (Reasons at 7):

[i]t is my belief, and I so find, that he came to Canada to find a better life. This is confirmed by what he told the Immigration Officer when he was asked what he expected would happen if he returned to Albania. He replied – "I have nowhere to go. No chance of employment. Can't get a job. Couldn't get hired." (Exhibit A-2) I find that the claimant has failed to produce sufficient credible or trustworthy evidence to prove that he is a homosexual and that because of his homosexuality, he will be persecuted should he return to Albania.

This quote is taken from Question 18 in the port-of-entry notes. The Board does not mention the more complete answer given in Question 17, in particular the Applicant's statement:

[b]ecause I am a homosexual male, I have no future in Albania. I cannot hold a job because eventually people discover I am a homosexual. Homosexuality is not accepted in my country.

[19] The Board's economic refugee conclusion also fails to address the Applicant's testimony that he was employed up until his homosexuality was made public in his village.

[20] In assessing the Applicant's evidence with respect to his first homosexual encounter, the Board decided that the Applicant's oral testimony was not consistent with his Personal Information Form ("PIF"). The Board stated (Reasons at 3-4):

The claimant's oral testimony did not coincide with what he alleges in his PIF narrative about that encounter. In paragraph 15 of his narrative, the claimant alleges "One time in October 2006, I found a guy, a man I met in a café. We went to a park in the afternoon." --- It seems clear from these sentences that the claimant met the guy in a café and that later on in the afternoon, they went to the park. When asked to explain this apparent discrepancy, he stated that the café was in the side or on the side of the park. The claimant was quite certain in his oral testimony that he met the guy who was sitting on a park bench (i.e. stone). He did not say – "I met him in a café and that we went to the park in the afternoon."

[21] This summary of the Applicant's oral testimony cannot be reconciled with the Board's comments about the Applicant's testimony in the hearing where the Board had the following exchange with the Applicant's counsel (Tribunal Record at 188):

A. I suspect then that I will not need to review my (inaudible) to the café/park questions.

- I think I know what he meant.

A. There is...

Q. Café in a park remember he said that?

A. Yes, that's right. There is a park in Halifax.

- Oh, you don't have to worry. It's a café in the park is a café in the park. He met at the café in the park.

[22] The Applicant's missing transcript testimony about his first homosexual encounter is relied on by the Board in its finding that the Applicant is not credible. A finding which it deemed

determinative of the Applicant's claim. The Board stated in its reasons that the Applicant met the other male on a park bench not at a café. Yet the Board's own comments at the end of the hearing would appear to contradict that description. The apparent contradiction can only be examined if the full transcript of the Applicant's testimony is available.

[23] While not all gaps in a transcript will automatically lead to a new hearing, in this case, the Applicant does not have full opportunity to launch a judicial review of the Board's decision because of the unrecorded portion of the hearing (*Goodamn v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No 342 at para. 72). In result, the Applicant's right to natural justice has been breached.

[24] The application for judicial review is granted. The decision of the Board will be set aside and the matter referred back to a different Board member for re-determination

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The decision of the Board is set aside and the matter is referred back for re-determination by a differently constituted Board.
2. No question of general importance is certified.

“Leonard S. Mandamin”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3611-07

STYLE OF CAUSE: ELVIN MENAJ
v.
MCI

PLACE OF HEARING: Halifax, Nova Scotia

DATE OF HEARING: May 7, 2008

**REASONS FOR JUDGMENT
AND JUDGMENT:** Mandamin, J.

DATED: May 15, 2008

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