Date: 20090901

Docket: IMM-4020-09

Citation: 2009 FC 868

Ottawa, Ontario, September 1, 2009

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

DRITAN PRIFTI
ELONA PRIFTI
FRANCESKO PRIFTI
JASON PRIFTI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The Applicants, Mr. Dritan Prifti, and his spouse, Ms. Elona Prifti, Albanian nationals, are scheduled for removal on September 5, 2009. Their two minor children, who are both United States citizens, are scheduled for removal to the United States on September 2, 2009. The Applicants bring this motion to stay their removal based on a challenge to their negative Pre-Removal Risk Assessment (PRRA) decision. The PRRA Officer rejected the Applicants' claim on the basis that their allegations were a reiteration of what was before the Refugee Protection Division (RPD) and that adequate state protection is available for the Applicants in their home country.

II. Background

[2] The adult Applicants are both citizens of Albania and have been in Canada since July 2006. The Applicants made protection claims before the RPD of the Immigration Refugee Board (IRB). The adult Applicants allege a fear of reprisals or retaliation on the basis of the female applicant's rejection of her former fiancé and, consequently, the existence of a blood feud between the two families. The RPD made a negative refugee determination decision on April 4, 2008 and rejected the Applicants' joint protection claims on the basis of credibility. Leave to seek judicial review of this negative decision was denied in August 2008 by this Court, and a negative PRRA was completed in July 2009, reiterating the decision of the RPD on credibility which was not based on actual contradictions but rather on plausibility findings; and it is not the RPD decision, which is in question; but rather, it is the PRRA decision which is under scrutiny as to whether or not the Applicants, as a family, would be in peril. In reading the relevant 2008 U.S. Country Report, released in February 2009, and other material evidence, such as that of Freedom House, of the Applicants, it is recognized that corruption, at every level, is still a major concern in respect of the authorities in question, although the state apparatus is in place for such protection; that, however, is in large measure, only in place on a theoretical basis.

III. Issue

[3] Have the requirements of the *Toth v. Canada (Minister of Employment and Immigration)* (1988), 86 N.R. 302, 11 A.C.W.S. (3d) 440 (F.C.A.) tripartite test been met?

IV. Analysis

[4] The Applicants have satisfied the *Toth* tripartite test for a stay of removal in regard to each of the components of that conjunctive test.

A. Serious Issue

[5] The determination of risk on return to a particular country is in large part a fact-driven inquiry. It requires consideration of the actual human rights record of the country, not a theoretical one, and the need to examine the possible personal risk faced by an applicant. The facts presented are particular to the applicants' situation and the applicable documentary evidence. This required analysis must be reasonable and in accordance with the *Immigration and Refuge Protection Act*, S.C. 2001, c-27 (IRPA). Reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. It is also concerned with whether the decision falls within a range of possible, acceptable outcomes in respect of the facts and law. It must take into account the peril, if any, awaiting the female applicant and her family (*Sebastiampillai v. Canada (M.C.I.)*, 2009 FC 394 at paras. 45-46; *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47).

[6] The PRRA Officer does not appear to have considered each of the Applicants' evidentiary documents. Specifically, the Officer notes that the RPD found credibility to be the determinative issue in denying the Applicants' joint claim; however, that does not alleviate the PRRA Officer from analyzing the potential peril to the family under the rubric of state protection which has been

put forward in this regard. The PRRA Officer specifically was obliged to address the tangible, not theoretical, risk, to the family itself under "state protection".

[7] The new evidentiary documents appear to refute the findings of the PRRA decision.

[8] An applicant who claims that state protection is inadequate bears the evidentiary burden of adducing clear and convincing evidence to rebut the presumption of state protection. It is the Applicants who must satisfy the trier of fact on a balance of probabilities that state protection is inadequate (*Canada (A.G.) v. Ward*, [1993] 2 S.C.R. 689, 103 D.L.R. (4th) 1, 153 N.R. 321; *Flores Carillo v. Canada (M.C.I.)*, 2008 FCA 94 at para. 30).

[9] The PRRA officer appears to have narrowly reviewed the documentation and not to have focused on the current evidence of state measures related to blood feuds in Albania. The Applicants do appear to bear the evidentiary burden as is demonstrated through several pieces of evidence; that evidence is in regard to the degree of potential peril awaiting the family due to, still existing, corruption of officials to which the Applicants could be subjected. At the beginning of the relevant 2008 U.S. Country Report, it is clearly stated that "Societal killings continued during the year, resulting from vigilante action (including… ""blood feud" killings and revenge killings") The Country Report of 2008, if read as whole, includes an excerpt, specifically, in regard to children who are not sent to school due to fear arising from blood feuds. Furthermore, the analysis that was conducted was to be with a view to any forward-looking risk to the Applicants. A PRRA Officer's reasons are not to be read microscopically but rather as a whole and as a whole they must be

reasonable, based on the evidence the PRRA Officer would have analyzed, they do not appear to be so (Applicant's PRRA enclosures, Applicant's Record, pp. 55-66; *Doukhi v. M.C.I.*, 2006 FC 1464 at para. 27; *Miranda v. Canada (M.E.I.)*, (1993), 63 F.T.R. 81, pp. 81 & 82; *Rizvi v. Canada (M.C.I. and M.P.S.E.P.*), 2009 FC 463 at para. 22).

[10] The PRRA Officer's review of the documentary evidence indicated that measures were taken by the state to handle blood feuds, but, in fact, a serious problem still exists as was specified in the Applicants' material evidence; a thousand persons remain in their homes due to fear arising from blood feuds. In particular, the PRRA Officer reviewed the U.S. Department of State (DOS) report, dated February 25, 2009, and the Freedom House 2008 report, published in August 2008, all of which need to be read as a whole in a context that is practical and, not merely theoretical; it would even be difficult to state that a tangible, durable, change of circumstances has, in fact, taken place when considering the evidence of the Applicants submitted to the PRRA Officer. Specifically, the PRRA Officer cites the enactment of criminal legislation in 2007 that targeted blood feuds themselves, making them a crime punishable by a three year sentence, and resultant harm such as murder, subjecting perpetrators to a potential penalty of 20 years' incarceration; however, although some improvement has been shown, blood feuds still continue on a significant level (Applicant's PRRA enclosures, Applicant's Record, pp. 62-63).

[11] In light of the foregoing, the PRRA Officer's conclusion, that the Applicants had failed to rebut the presumption of state protection, needs to be examined more closely as to its reasonableness (Applicant's PRRA enclosures, Applicant's Record, pp. 64-65).

B. Irreparable Harm

[12] The onus was on the Applicant to demonstrate, through clear and convincing evidence of irreparable harm, that the extraordinary remedy of a stay of removal is warranted. Irreparable harm must constitute more than a series of possibilities and cannot be simply based on assertions and speculation, which is not the case in this matter (*Atwal v. Canada (M.C.I.)*, 2004 FCA 427).

[13] Even if there is the existence of a serious issue in the context of a PRRA decision, this does not necessarily establish irreparable harm. Each case must be determined on its facts and the facts herein do establish the possibility of irreparable harm (*Selliah v. Canada (M.C.I.)*, 2004 FCA 261 at para. 19).

[14] The Applicants have duly satisfied the test for irreparable harm.

C. Balance of Convenience

[15] The Applicants are seeking extraordinary equitable relief. The public interest must be taken into consideration when evaluating this last criterion. In order to demonstrate that the balance of convenience favours the Applicants, the latter should demonstrate that there is a public interest not to remove them as scheduled, as these Applicants have duly done (*Dugonitsch v. Canada (M.E.I.)*,

[1992] F.C.J. No. 320; *RJR-MacDonald Inc. v. Canada*, *supra,* para.4; *Blum v. Canada (M.C.I.)* (1994) 90 F.T.R. 54).

[16] The balance of any inconvenience which the Applicants may suffer as a result of removal from Canada outweighs the public interest which the Respondent seeks to maintain; specifically, an interest exists in executing a deportation order as soon as reasonably practicable, if, in fact and law, such a deportation is warranted which, in this case, it is not (*Atwal v. Canada (M.C.I.)*, 2004 FCA 427 at para. 19).

V. Conclusion

[17] For all of the above reasons, the Applicants' application for a stay of execution is granted pending a final determination of their application for leave and for judicial review of the negative PRRA decision.

JUDGMENT

THIS COURT ORDERS that the Applicants' application for a stay of execution be granted pending a final determination of their application for leave and for judicial review of the negative Pre-Removal Risk Assessment decision.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Mr. Rod Catford	FOR THE APPLICANTS
Mr. Alex C. Kam	FOR THE RESPONDENT

SOLICITORS OF RECORD:

ROD CATFORD Windsor, Ontario	FOR THE APPLICANTS
JOHN H. SIMS, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT