

Federal Court



Cour fédérale

**Date: 201004220**

**Docket: IMM-4586-09**

**Citation: 2010 FC 426**

**Ottawa, Ontario, April 20, 2010**

**PRESENT: The Honourable Mr. Justice Shore**

**BETWEEN:**

**LEKSI GJOKA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

I. Overview

[1] The test for state protection has been determined in the following terms by Justice Luc Martineau in the case of *Avila v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 359, 295 F.T.R. 35:

[26] On the question of government protection, the *Ward* test expressly requires careful review of the fear of persecution from the standpoint of the refugee protection claimant and the objective conditions of the country in question. A subjective fear of persecution, coupled with the inability of state to protect the claimant, gives rise to the presumption that the fear is justified. The risk that this presumption will be too broad in its application is limited by the requirement of clear and convincing evidence that the state is unable to provide protection. In order to

rebut the presumption that a state can protect its nationals, a claimant may put before the Board testimony of similarly situated individuals. He can also rely on the documentary evidence of record. He can, of course, relate his own experience (*Ward, supra*, at paragraphs 49, 50 and 52).

## II. Judicial Procedure

[2] This is an application for judicial review pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) of a decision of the Refugee Protection Division of the Immigration and Refugee Board (RPD) finding the Applicant, Mr. Leksi Gjoka, not to be a person in need of protection under section 97.

## III. Background

[3] The Applicant is a citizen of Albania and was born in Velipoje, Albania on November 2, 1981.

[4] The Applicant is the victim of a blood feud between his family and the Ramaj family which began over a dispute involving fishing rights which the Applicant's family was given. It is that which led to the death of his cousin, Mark Gjoka. Mark's father refused to assist the police in their investigation of Mark's death in order to take revenge on the Ramaj family. This led to an escalation of the blood feud and the Applicant went into hiding before coming to Canada.

## IV. Decision under Review

[5] The RPD found that the Applicant is not a person in need of protection under section 97 of the IRPA on the grounds that he did not provide clear and convincing evidence of the inability of Albania to protect its citizens (Applicant's Record (AR) at p. 9).

[6] The RPD noted that the Applicant's uncle did not inform the police about the identity of his son's murderer in order to seek revenge. The RPD concluded that it was reasonable to assume that the adequacy of state protection was not tested, as the police did not have sufficient information to investigate the act which resulted in the origin of the blood feud (AR at p. 9).

[7] The RPD also noted that the Applicant did not go to the police to seek protection after the declaration of a blood feud against his family, as he was of the belief that the police could not protect him. The RPD concluded that the Applicant is not in a position to say whether state protection in Albania is adequate or inadequate because he failed to test that protection by going to the police. The RPD cited the case of *Ramirez v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1214, [2008] F.C.J. No. 1533 (QL) for the proposition that doubting the effectiveness of state protection without testing it does not rebut the presumption that the state can protect its citizens.

[8] The RPD further discussed whether state protection might reasonably have been forthcoming had the Applicant gone to the authorities. The RPD noted documentary sources showing that Albania is a parliamentary democracy with a functioning judiciary. The evidence cited also showed that Albania has legislation in respect of blood feuds and seeks to enforce it, although this enforcement has been deemed insufficient at times (AR at p. 10).

[9] The RPD recognized that the Albanian police “may have limited capacity in dealing with blood feuds” and that state protection may be imperfect. Nonetheless, the RPD cited the case of *Canada (Minister of Employment and Immigration) v. Villafranca* (1992), 18 Imm. L.R. (2d) 130, 150 N.R. 232 (F.C.A.) for the proposition that where a state is in effective control of its territory and has the apparatus and will to protect its citizens, the mere fact that it is not always successful does not mean that it is not providing protection (AR at p. 11).

[10] The RPD rejected (Exhibit C-5) the claims of the National Reconciliation Committee (NRC) October 16, 2007 Report made specifically in regard to the Applicant’s family. This Report stated that the Albanian government is “not able to offer assistance or protection, because this would lead to further deterioration of the blood feud” and “does not have the legal framework and the necessary tools to place the Gjoka clan under protection” (AR at p. 40). This evidence was rejected with reference to the legislation dealing in respect to blood feuds (AR at p. 12).

[11] The RPD rejected the argument that the Applicant is not required to place himself at risk in order to prove the inadequacy of state protection on the basis that seeking police protection when the Applicant is already the target of a blood feud would not create additional risks towards the Applicant’s life (AR at p. 12).

## V. Issue

[12] It has been determined by the Court that only one issue is pertinent to the RPD decision under review: Did the RPD fail to analyze the risks faced by the Applicant?

## VI. Relevant Legislative Provisions

[13] Sections 96 and 97 of the IRPA state:

### Convention refugee

**96.** A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

*(a)* is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

*(b)* not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

### Person in need of protection

**97.** (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if

### Définition de « réfugié »

**96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

*a)* soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

*b)* soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

### Personne à protéger

**97.** (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi

they do not have a country of nationality, their country of former habitual residence, would subject them personally

vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de

fournir des soins  
médicaux ou de santé  
adéquats.

Person in need of protection

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

Personne à protéger

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

VII. Positions of the Parties

The Applicant's Position

[14] The Applicant submits the RPD erred by failing to analyze the risk Mr. Gjoka faces in Albania. The Applicant cites the case of *Rivera v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 814, 351 F.T.R. 267 for the proposition that a failure to properly characterize and analyze an aspect of a claim is fatal to the determination of state protection. The Applicant contends the RPD erred by citing legislation criminalizing blood feuds as well as country condition evidence showing improvements in police professionalism and then not linking those documents to Mr. Gjoka's claim.

[15] The Applicant submits the RPD misstated the test for state protection by concluding that Mr. Gjoka was not in a position to say whether state protection was adequate. The Applicant states the RPD found Mr. Gjoka to be credible and erred by dismissing his family's efforts to get protection from the NRC. The Applicant submits it was an error of law to find that Mr. Gjoka is

unable to rebut the presumption of state protection due to his failure of seeking the help of the police. The Applicant notes that claimants can rebut the presumption of state protection by showing that protection would not have reasonably been forthcoming.

[16] The Applicant submits the RPD erred by ignoring evidence of the risk that going to the police would have posed to Mr. Gjoka. The Applicant cites the case of *Lopez v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1341, 168 A.C.W.S. (3d) 370 for the proposition that the effectiveness of state protection must be examined in light of the practical impact of the legal remedies that are available. The Applicant also notes that the RPD must address contradictory evidence regarding state protection. The Applicant submits there was relevant evidence regarding the role of the NRC in blood feuds and the inadequacy of the Albanian police. The Applicant concludes that the RPD erred in finding Mr. Gjoka was not in a position to say whether state protection was available to him in light of his assertion that the police could not protect him, in addition to the information the RPD had before it from the documentary evidence regarding blood feuds.

#### The Position of the Respondent

[17] The Respondent cites the case of *Kadenko v. Canada (Solicitor General)* (1996), 143 D.L.R. (4th) 532, 206 N.R. 272 for the proposition that a refugee claimant bears the burden of demonstrating that he exhausted all the courses of action available to him before seeking refugee protection in Canada and that this burden increases with the level of democracy in the state in question. The Respondent submits that if a state has effective control of its territory and makes



serious efforts to protect its citizens, then the fact that it is not always successful will not be enough to establish that persons are unable to avail themselves of state protection. The Respondent contends that the RPD considered the Applicant's evidence and found that he had not provided clear and convincing proof of the state's unwillingness or inability to protect him whatever the NRC said.

[18] The Respondent submits the evidence before the RPD demonstrates that the Applicant never requested police protection and that sufficient state protection exists both in theory and in practice in Albania.

[19] The Respondent argues the NRC letter was explicitly considered by the RPD. The Respondent contends that seeking the help of the NRC does not equate to seeking state protection, as the NRC has no power to act without the consent of both sides of a blood feud.

[20] The Respondent also submits that the Applicant should have sought police protection, as there is no compelling evidence that requesting help from the police would have put him in any additional danger. The Respondent notes that the police were investigating the murder of the Applicant's cousin, but were thwarted by the non-cooperation of the Applicant's uncle. The Respondent submits this evidence shows that the police were capable and willing to help the Applicant.

[21] The Respondent concludes that the test for state protection is an objective one that is based on clear and convincing evidence, not based on the Applicant's personal opinion that the police could not protect him.

### VIII. Standard of Review

[22] The Court finds that the question of whether the RPD failed to properly analyze the Applicant's claim is to be reviewed on a standard of reasonableness, although the Applicant's contention that the RPD applied the wrong legal test when assessing the availability of state protection is a question of law which should be reviewed on a standard of correctness (*Barajas v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 21, [2008] F.C.J. No. 8 (QL) at para. 23).

### IX. Analysis

[23] The focus of inquiries under section 97 is on risk and, as Justice Tremblay-Lamer held in *Lopez*, above: "an analysis of state protection does not occur in the abstract."

[24] The RPD emphasized evidence explaining Albanian efforts aimed at improving the effectiveness of police and the judiciary in dealing with blood feuds. The RPD also noted legislation criminalizing blood feud murders. While these efforts are laudable, they are not determinative of the effectiveness of state protection at the operational level.

[25] It is the Court's conclusion that the RPD's decision is unreasonable because it failed to link general evidence to the point-specific problems faced by persons in exceptional circumstances, such as those of the Applicant. It clearly specified in an uncontradicted report by the National Reconciliation Committee, of October 16, 2007, which is addressed to the Applicant's family, that

the Albanian Government is “not able to offer assistance or protection, because this would lead to further deterioration of the blood feud” and “does not have the legal framework and the necessary tools to place the Gjoka clan under protection” (AR at p. 40). This evidence was rejected with reference to the legislation dealing in respect to blood feuds (AR at p. 12).

X. Conclusion

[26] If this Court is to follow the tradition of *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, although it must recognize that certain questions which come before the RPD do not possess a single answer; however, the Court must step in when the decision is not justifiable with regard to the facts and the law.

[27] For all the above reasons, the application for judicial review is allowed and the matter is remitted for redetermination by a differently constituted panel.

**JUDGMENT**

**THIS COURT ORDERS that** the application for judicial review be allowed and the matter be remitted for redetermination by a differently constituted panel.

“Michel M.J. Shore”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-4586-09

**STYLE OF CAUSE:** LEKSI GJOKA  
v. THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION

**PLACE OF HEARING:** Calgary, Alberta

**DATE OF HEARING:** April 14, 2010

**REASONS FOR JUDGMENT  
AND JUDGMENT:** SHORE J.

**DATED:** April 20, 2010

**APPEARANCES:**

Mr. Bjorn Harsanyi FOR THE APPLICANT

Mr. Rick Garvin FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

SHARMA HARSANYI FOR THE APPLICANT  
Barristers and Solicitors  
Calgary, Alberta

MYLES J. KIRVAN FOR THE RESPONDENT  
Deputy Attorney General of Canada