

Federal Court



Cour fédérale

Date: 20100625

Docket: IMM-5610-09

Citation: 2010 FC 698

Ottawa, Ontario, June 25, 2010

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

**MARK NDOCI
JESIKA NDOCI**

Applicants

and

**THE MINISTER OF
CITIZENSHIP AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board) where the Board found that the Applicants were not Convention refugees nor persons in need of protection.

[2] The application for judicial review shall be allowed for the following reasons.

Factual Background

[3] The principal Applicant, Mark Ndoci, is a citizen of Albania. The minor Applicant, his daughter, is a citizen of the United States of America (US). The principal Applicant claims that he fears returning to Albania as his family is involved in a blood feud with the Leci family. He claims that the feud began in 1943 when his grandfather murdered a member of the Leci family.

[4] The principal Applicant claims that he was shot by a member of the Leci family in July 1997. He then spent ten days in the hospital recuperating but did not report the incident to police. He also claims that he was beaten unconscious by Ndoc Leci in 1999 but did not report the incident to police.

[5] In April 2001, the principal Applicant and his wife left Albania for the US where they made a claim for protection based on the blood feud and other grounds. That refugee claim was denied, as was the subsequent appeal. The minor Applicant was born in the US in 2004. After a deportation order was issued, the principal Applicant and his family were smuggled into Canada and made a claim for refugee protection.

[6] The principal Applicant and the minor Applicant's claims were heard jointly. Their claim was disjoined from that of the principal Applicant's wife. The decision rendered by the Board with regard to the principal Applicant and the minor Applicant is the subject of this judicial review.

Impugned Decision

[7] The Board first finds that there is no nexus to a Convention ground in the case of a blood feud and that the claim will only be assessed under section 97 of the Act. The Board identifies credibility and state protection as the determinative issues of the claim.

[8] The Board identifies inconsistencies in the principal Applicant's story in which it grounds the negative credibility finding. At the outset, the documentary evidence states that many people are confined to their homes for safety reasons when they are involved in a blood feud. The Applicant himself stated that he was confined in order to avoid the Leci family. However, the evidence shows that the principal Applicant was employed as a painter from 1996 to 2001. The principal Applicant testified that he would regularly leave the village at night, disguised in women's clothing, in order to buy groceries in a neighbouring town. The Board does not find this testimony credible. It also finds that, if the Leci family were in pursuit of the principal Applicant and enquiring about his whereabouts or watching his home, he would have quickly been detected. Therefore, the Board finds that the Applicant was not in self confinement.

[9] The Board makes further adverse findings based on the principal Applicant's claim in the US. It is stated that his cousin took him to the hospital after the 1997 shooting. However, in his testimony, he stated that he did not know how he got to the hospital. Also, in his US claim he testified that the attackers in 1999 were anonymous but in the current claim he identified Ndoc Leci as his attacker. Finally, he did not provide any information on the date and manner in which the

blood feud began. The Board writes that when asked to explain, the principal Applicant stated "it was there".

[10] With regard to state protection, the Board finds that the documentary evidence confirms the existence of blood feuds in Albania. The Board cites the UK Operational Guidance Note which describes the measures taken by the Albanian government to discourage blood feuds and the legal mechanisms available. The Board notes that there is an opinion stating that the government does not deal with blood feuds effectively and that there is inconsistent evidence about the sentences imposed for blood feud murders. In the end, the Board finds that the principal Applicant can seek state protection and that the state is making serious efforts with regard to blood feuds. The Board concludes that the principal Applicant failed to rebut the presumption of state protection.

[11] As for the minor Applicant, no evidence was presented with regard to the US, thus her claim is denied.

Questions At Issue

[12] The Applicants raise two issues in this case:

- a. Is the Board's finding with regard to credibility unreasonable?
- b. Is the Board's finding with regard to the availability of state protection unreasonable?

Analysis

Standard of Review

[13] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the Supreme Court of Canada established that, in determining the appropriate standard of review, the Court can look to past jurisprudence and ascertain whether it has already determined a satisfactory standard of review (para. 62). This Court has held that the Board's decisions on both credibility and state protection should be reviewed on a standard of reasonableness (*Aguirre v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 571, [2008] F.C.J. No. 732 at para. 14; *Guzman v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 490, [2008] F.C.J. No. 624 at para. 10). Accordingly, both questions at issue will be held to a standard of reasonableness and the Court will only intervene if the decision does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir* at para. 47).

Is the Board's finding with regard to credibility unreasonable?

Parties' Positions

[14] The principal Applicant argues that the Board's findings with regard to his credibility are unreasonable and there was no reason to disbelieve him. The Board found that, if the Leci family were in pursuit of the principal Applicant and enquiring about his whereabouts or watching his home, he would have quickly been detected on his trips to buy groceries. He contends that he never said that the Leci family was constantly enquiring about his whereabouts or watching his home. As for the inconsistencies with regard to his US claim, the principal Applicant claims that he testified

that he had explained the origins of the blood feud during his asylum interview. The Applicants submit that the Board erred by making these findings.

[15] The Applicants argue that the errors were exacerbated by the Board's reliance on the decision of the US immigration judge and the dismissal of the immigration appeal in finding inconsistencies between the Canadian claim and the US claim. They emphasize that these decisions are very brief and do not accurately represent the entire story. They submit that it was unreasonable to rely on these decisions instead of the written submissions for the US claim.

[16] The Applicants further submit that the Board erred by ignoring a large body of evidence that supports the claim including a video of a news report from Albania and a newspaper article covering his shooting in 1997, letters from reconciliation organisations confirming that the families are in a blood feud, the testimony of a third party in support of the claim, and a medical certificate.

[17] The Respondent advances that the credibility findings were not unreasonable and were very well motivated by the Board. The Respondent emphasizes the many inconsistencies were identified and it was fair to rely on evidence from the US claim.

[18] The Respondent submits that the evidence not mentioned by the Board simply confirms that the principal Applicant was shot in 1997, which was not questioned by the Board, but does not confirm that he is actually at risk due to a blood feud. Thus, there was no reason to mention it.

Analysis

[19] The principal Applicant has tried to explain some of the inconsistencies in his testimony and faults the Board for using the decision of the US immigration judge in making negative credibility findings, but neither one of these grounds can succeed. The transcript shows that the principal Applicant did testify that the Leci family was watching him and his home (Certified Tribunal Record at pages 365 to 367). As for the use of the decision of the US immigration judge, the decision is contained in the Tribunal Record and provides a detailed summary of the principal Applicant's testimony in those proceedings, the evidence presented by him and the reasons for the decision (pages 291 to 300). I do not find that the reliance on this piece of evidence is unfair to the principal Applicant and was in error.

[20] The Applicants argue that the decision is unreasonable as the Board ignored evidence that confirmed that the principal Applicant was shot as a result of this blood feud in 1997. There is of course a presumption that the Board directed itself to the totality of the evidence in making its findings (*Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35).

[21] However, I find that there is an error here, particularly with the Board's failure to mention two letters, one dated October 16, 2007 and the other dated September 3, 2008, from the Pan-National Reconciliation Committee which confirm that the Ndoci family is involved in a blood feud with the Leci family and that efforts at reconciliation have failed. These letters also state that the

feud has gotten worse since March 2006 when a member of the Ndoci family murdered a member of the Leci family. This evidence is specific to the principal Applicant's claim and should have been analysed by the Board and an explanation provided as to why the negative credibility finding was made despite these letters.

Is the Board's finding with regard to the availability of state protection unreasonable?

Parties' Positions

[22] The Applicant submits that the Board erred and made selective use of the documentary evidence on state protection. The Board points to the issue paper titled *Albania: Blood feuds* (May 2008) which was part of the national documentation package and was not analysed by the Board.

[23] The Respondent submits that the decision is reasonable as the facts show that the principal Applicant did not make any attempt to seek state protection and cannot rebut the presumption of state protection.

[24] The Respondent further underlines that, in the alternative, the Board found that adequate state protection exists and that finding is reasonable. The Respondent points to the Board's acknowledgement of blood feuds in Albania and other pieces documentary evidence mentioned by the Board and argues that the Board did not make selective use of the evidence and acknowledged items contrary to its own finding.

Analysis

[25] In its decision, the Board does reference to the issue paper *Albania: Blood Feuds* and notes that Mr. Marku has opined that the government is unable to deal with blood feuds or offer effective protection and that there is inconsistent evidence concerning the harshness of sentences imposed for blood feud murders.

[26] While the Board does mention the issue paper, it does not discuss the portions that detail the problems of blood feuds, the increased blood killings due to ineffective law enforcement and lack of faith in state punishment and the ineffectiveness of convictions. While it is open to the Board to prefer one piece of evidence to another, it was required to acknowledge this contradictory evidence and explain why it preferred the UK Operational Guidance Note on which it relied. The issue paper was directly relevant to the issue of state protection and the Board erred by not providing some analysis of this evidence that runs contrary to its finding.

[27] Neither party has submitted a question for certification nor does one arise.

JUDGMENT

THIS COURT ORDERS that the application for judicial review be allowed. The matter is remitted back for redetermination by a newly constituted Board. No question is certified.

“Michel Beaudry”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5610-09

STYLE OF CAUSE: **MARK NDOCI**
JESIKA NDOCI
AND
THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: June 23, 2010

REASONS FOR JUDGMENT: BEAUDRY J.

DATED: June 25, 2010

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