

Federal Court



Cour fédérale

Date: 20100921

Docket: IMM-6669-09

Citation: 2010 FC 945

Toronto, Ontario, September 21, 2010

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

SHPETIM LUSHNJANI

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR ORDER AND ORDER

[1] Mr. Shpetim Lushnjani (the “Applicant”) seeks judicial review of the decision of the Immigration and Refugee Board of the Refugee Protection Division (the “Board”). In its decision of December 9, 2009, the Board determined that the Applicant was neither a Convention refugee nor a person in need of protection pursuant to section 96 and 97, respectively, of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the “Act”).

[2] The Applicant is a citizen of Albania. He sought protection on the basis of being a person in need of protection. He claimed that he was in danger and at risk from members of his family, primarily his brothers. The risk arises from the Applicant's personal situation. He was involved in a romantic relationship with his niece, the daughter of one of his elder sisters and had fathered a child with her.

[3] The Applicant claimed that his brothers had assaulted him at the end of March 2006, in his mother's house in the town of Elbasan. At that time his son was approximately 5 years old, and lived with this mother in Durres, about 85 km from Elbasan. The Applicant, fearing for his life, went to an orphanage in Durres seeking shelter for his son. No shelter was forthcoming and the Applicant took his niece and son to the Albania Red Cross in Tirana, the capital of Albania, located between Durres and Elbasan.

[4] The Applicant returned to his home town of Elbasan and stayed with a friend for nearly three months. He fled to Italy with the help of a smuggler and arrived in that country on July 7, 2006. However, he did not seek protection in Italy since one of his brothers lived in Italy and the Applicant feared the brother would locate him and injure him.

[5] Some three months after his arrival in Italy the Applicant obtained a false Italian passport that he used to travel to Canada. He arrived in Canada on October 12, 2006 and claimed protection as a Convention refugee or person in need of protection. The Board rejected the Applicant's claim. It found that the Applicant was not credible. It held that the Applicant had failed to establish the

existence of any siblings in Albania with the exception of one sister. It found that the failure to claim refugee status in Italy indicated that he lacked credibility, and that his behaviour undermined a subjective fear of returning to Albania. Further, the Board found that the Applicant had failed to rebut the presumption of state protection in Albania.

[6] The Board's decision is reviewable on the standard of reasonableness; see *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190. This standard applies to the Board's factual findings and conclusions which are essentially, questions of mixed fact and law. No errors of law or issues of procedural fairness are advanced by the Applicant.

[7] In my opinion, having regard to the record, the evidence of the Applicant that he gave at the hearing, and the reasons for the decision, this application for judicial review should be allowed.

[8] The Board made contradictory findings that undermine its ultimate conclusion that the Applicant is not a Convention refugee or a person in need of protection.

[9] The critical finding made by the Board was that the Applicant's brothers do not exist. The existence of the brothers is fundamental to his claim that he will be harmed, even to death, if returned to Albania.

[10] At the same time, the Board relied upon the existence of a brother in Italy as the basis for rejecting the Applicant's explanation for not having sought protection in Italy.

[11] The heart of the Board's negative decision is the negative assessment of the Applicant's credibility. The credibility finding does not meet the standard of reasonableness, having regard to the record that was before the Board.

[12] In the result, the application for judicial review is allowed and the matter is remitted to a differently constituted panel of the Board for re-determination. There is no question for certification arising.

ORDER

THIS COURT ORDERS that the application for judicial review is allowed and the matter is remitted to a differently constituted panel of the Board for re-determination. There is no question for certification arising.

"E. Heneghan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-6669-09

STYLE OF CAUSE: SHPETIM LUSHNJANI v.
THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: Toronto, ON

DATE OF HEARING: September 15, 2010

**REASONS FOR ORDER
AND ORDER:** HENEGHAN J.

DATED: September 21, 2010

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