Federal Court  Cour fédérale

Date: 20110210

Dockets: IMM-3453-10
IMM-3455-10

Citation: 2011 FC 161

BETWEEN:

MENSUR DEMIRAJ & VELE DEMIRAJ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

HENEGHAN J.

[1] Mr. Mensur Demiraj and his wife Mrs. Vele Demiraj (the "Applicants") are citizens of Albania who came to Canada in November, 2007. They sought protection in Canada, pursuant to the provisions of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act") on the basis of persecution in Albania arising from a blood feud between their extended family, that is the Demiraj family and the Bushati family. They claimed protection in Canada, either as Convention refugees or as persons in need of protection as defined in sections 96 and 97 of the Act, respectively.

[2] The specific impetus for this blood feud was a romantic relationship between Taulant Demiraj, a nephew of the male Applicant and a young female member of the Bushati family. The young woman was “intended” to be the wife of another man and the romantic relationship with Taulant, when discovered by the Bushati family in February 2007 led to an attack upon Taulant. The attack was reported to the police. Subsequently, Taulant and his friends attacked a member of the Bushati family. Ultimately, a member of the Bushati family was injured by a firearm that was shot by Taulant in July 2007. The Bushati’s then declared a blood feud against the immediate family of Taulant.

[3] After the shooting, Taulant, together with his brother and sister-in-law, moved into the Applicants’ house in Tirana, the capital city of Albania. After the declaration of the blood feud, the Applicants left Tirana and went to Korce, living with the male Applicant’s sister until they left Albania on September 4, 2007.

[4] The Applicants travelled to Canada on false passports, obtained from a smuggler. They landed in Canada on November 22, 2007, arriving in Montreal. The Refugee Protection Division of the Immigration and Refugee Board (the “Board”) rejected their claim for status as refugees or persons in need of protection in a decision dated February 23, 2009, on the grounds that the Applicants had failed to rebut the presumption of state protection in Albania. The Applicants successfully obtained leave for judicial review of the Board’s decision but their application for judicial review was dismissed on September 25, 2009.

[5] On January 18, 2010, the Applicants submitted a Pre-Removal Risk Assessment ("PRRA") application, pursuant to the Act. In this application, they alleged that they continue to be at risk in Albania from the blood feud between the Applicants' family and the Bushati family.

[6] On May 6, 2009, the Applicants also submitted an application for permanent residence from within Canada, on humanitarian and compassionate grounds (the "H & C application"), pursuant to subsection 25(1) of the Act. The basis of this application was the extreme hardship that they would suffer if separated from their daughter who lives in Michigan, United States of America, with her husband and two American-born young children. The Applicants also claimed that they would face considerable hardship, for example by living in social isolation and unable to look after their basic needs, if returned to Albania.

[7] A PRRA Officer (the "Officer") assessed both the PRRA and H & C application. In a decision dated April 27, 2010, the Officer refused the PRRA application, noting that the Applicants had failed to submit new evidence of risk to them in Albania.

[8] By a decision dated April 28, 2010, the Officer denied the Applicants' H & C application. The rationale for this decision was the Applicants' failure to show that they would face a risk if returned to Albania, as well as their failure to establish that they would suffer unusual and undeserved or disproportionate hardship if returned to Albania. In the negative H & C decision the Officer considered the Applicants' establishment in Canada, in comparison with their establishment in Albania, as well as the best interests of children who might be affected by their return to Albania,

in this case, their grandchildren who lived in Michigan but who have visited, and continue to visit the Applicants in Windsor, Ontario.

[9] In the written and oral submissions made on their behalf, the Applicants argue that the Officer committed reviewable errors in making both decisions, including errors of law and failure to address relevant evidence.

[10] The first issue to be addressed is the relevant standard of review. According to the decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, decisions of statutory decision-makers, like the Officer, are reviewable on one of two standards, either reasonableness for fact-driven conclusions and questions of mixed fact and law, or correctness for questions of law and issues of procedural fairness.

[11] In *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339, the Supreme Court of Canada confirmed this approach to the identification of the relevant standard of review. The issue whether the Officer applied the appropriate legal test is reviewable on the standard of correctness. Otherwise, the issues decided by the Officer in this case were ones of mixed fact and law, reviewable on the standard of reasonableness. According to *Dunsmuir* and *Khosa*, that standard is met when a decision is justifiable, transparent and intelligible.

[12] I will first discuss the PRRA decision which is the subject of cause number IMM-3453-10. I am not persuaded that any of the arguments raised by the Applicants supports a finding that the

Officer committed any error of law in dealing with their PRRA application. The Officer did not apply the wrong test nor fail to conduct a proper analysis.

[13] Subsection 113(a) of the Act allows a person to submit new evidence upon a PRRA application when a prior request for refugee protection has been rejected by the Board. The meaning of "new evidence" was definitively reviewed by the Federal Court of Appeal in *Raza v. Canada (Minister of Citizenship and Immigration) et al.* (2007), 289 D.L.R. (4th), at para. 13. "New evidence" is evidence that meets the following criteria:

> …
> 3. *Newness*: Is the evidence new in the sense that it is capable of:
>
> (a) proving the current state of affairs in the country of removal or an event that occurred or a circumstance that arose after the hearing in the RPD, or
>
> (b) proving a fact that was unknown to the refugee claimant at the time of the RPD hearing, or
>
> (c) contradicting a finding of fact by the RPD (including a credibility finding)?
>
> If not, the evidence need not be considered.

In the result, I see no basis for judicial interference in this negative PRRA decision. The Officer made a reasonable decision, having regard to the material submitted. This application for judicial review is dismissed. No question for certification was proposed.

[14] I turn now to the decision whereby the Officer refused the Applicants' H & C application. The Applicants here argue that the Officer erred by applying the wrong test for assessing risk, using

the elevated standard for assessing risk in the context of a PRRA application rather than the less stringent test that applies in an H & C application.

[15] As well, the Applicants submit that the Officer erred in her assessment of "hardship" should they be returned to Albania.

[16] I am not satisfied that the Officer erred in assessing risk in the context of an H & C application. She properly noted that there was no evidence of a change in risk between the negative determination of their refugee claim, and that state protection was still available to the Applicants.

[17] However, at the same time, I am not satisfied that the Officer took the correct approach to assessing the potential hardship the Applicants will face if returned to Albania. The Officer reasons that because there is state protection available in Albania, the Applicants face no risk to life, and therefore, that there will be no undue, undeserved or disproportionate hardship.

[18] In *Pacia v. Canada (Minister of Citizenship and Immigration)* (2008), 73 Imm. L.R. (3d) 274, Justice Mosley held that equating state protection to a lack of undue, undeserved or disproportionate hardship is an error of law, as it indicates that the officer applied the wrong legal test. At para. 13, Justice Mosley said:

> …The Officer accepted the applicant's account of a long-standing dispute in her community and threats of harm. The finding that protection was available to the applicant does not address the question whether she would encounter undue hardship should she be required to avail herself of the state's shelter.

[19] In my opinion, the Officer in this case committed the same error. She considered the availability of state protection to be determinative of whether the Applicants faced unusual, undeserved or disproportionate hardship if returned to Albania, without addressing whether the Applicants will face hardship should they need the protection of the state. In doing so, the Officer applied the wrong legal test.

[20] The application for judicial review in respect of the negative determination of the H & C application is allowed. No question for certification was proposed.

"E. Heneghan"
Judge

Toronto, Ontario
February 10, 2011

FEDERAL COURT

SOLICITORS OF RECORD

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