

Federal Court



Cour fédérale

Date: 20111109

Docket: IMM-427-11

Citation: 2011 FC 1284

**BETWEEN:**

**ARJAN TABAJ, ANILDA TABAJ AND  
MARIA TABAJ**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**REASONS FOR AN INTERIM ORDER DATED AUGUST 10, 2011 AND  
AN ORDER DATED AUGUST 30, 2011**

**SIMPSON J.**

**THE PROCEEDING**

[1] Arjan Tabaj, Amilda Tabaj and Maria Tabaj [collectively the Applicants], seek judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c27 [the Act] of a decision of the Minister's Delegate [the Delegate] dated January 5, 2011, wherein he vacated the Applicants' positive Pre-Removal Risk Assessment [PRRA] pursuant to subsection 114(3) of the Act [the Decision].

## THE ORDERS SOUGHT

[2] The Applicants make this application for:

1. An order setting aside the Decision, directing that the Applicants' positive PRRA decision and status as protected persons be reinstated, and directing the Minister of Citizenship and Immigration [the Minister] to issue temporary resident permits to the Applicants forthwith; or
2. In the alternative, an order setting aside the Decision and remitting the matter for reconsideration by another Minister's delegate with the following directions:
  - (a) That the redetermination be made and the Applicants notified within seven days of the date of the Court's decision;
  - (b) That the delegate render a decision that is consistent with the Court's reasons; and
  - (c) That, if the redetermination reinstates the Applicants' status as protected persons, the Minister will prioritize the issuance of either permanent or temporary resident visas to them on an urgent basis and within 30 days of this Court's decision; and
3. Costs of this application on a solicitor client basis; or
4. In the alternative, fixed costs in the amount of \$7,000.00 or
5. In the alternative, costs in accordance with the high end of column V of the Table found at Tariff B of the *Federal Court Rules*.

[3] The Respondent seeks an order dismissing the application.

## THE BACKGROUND

[4] The Applicants are a husband [the Principal Applicant], his wife [the Female Applicant] and their minor daughter [the Child Applicant]; they are all citizens of Albania.

[5] In 1988, the Principal Applicant was arrested while trying to flee Albania to escape military service. He was detained for six months, tortured and then sentenced to eighteen years in prison. However, in 1989, amnesty was declared for all political prisoners and the Principal Applicant was released. In 1995, he became a member of Albania's Democratic Party.

[6] In 1997, following an unfair election won by the Socialist Party, the Principal Applicant participated in demonstrations protesting the election. He was arrested and tortured, and was publicly beaten by the police.

[7] On November 15, 1998, the Applicants fled Albania. They arrived in Canada five days later and claimed refugee protection.

[8] In May 1999, after being told that conditions had improved, the Applicants returned to Albania. They were therefore deemed to have abandoned their refugee claim. However, four months later, in September 1999, the Principal Applicant was attacked and beaten by Socialist Party supporters.

[9] The Child Applicant was born in Albania in August 1999.

[10] On April 7, 2000, the Principal Applicant was shot and injured outside the newspaper offices of the Democratic Party [the Shooting Incident]. Two others were killed in the attack and to this day the perpetrators remain unidentified and the investigation remains open. The Principal Applicant was taken to a hospital but did not receive treatment for over ten hours. His leg was

amputated and his arm was left paralyzed. He remained in hospital for eight months following the attack.

[11] On January 1, 2001, the adult Applicants arrived back in Canada. They were not permitted to reopen their refugee claim but, since the Child Applicant had not been included in the earlier claim, a refugee claim was instituted in her name in May 2001. This claim was denied on December 18, 2002. This Court granted leave to seek judicial review but the application was ultimately dismissed on January 21, 2004.

[12] At some point in 2003, while the refugee claim was extant, the Applicants all filed an application for humanitarian and compassionate [H & C] relief. It was refused in April 2006.

[13] In March 2004, the Applicants applied for their first PRRA. It was denied in July 2004. The Applicants were also denied leave to seek judicial review of that decision.

[14] On January 6, 2006, the Female Applicant gave birth to twin sons in Canada [the Canadian Children].

[15] In June 2006, the Applicants commenced a second PRRA, which was denied in October 2007.

[16] In August 2008, the Applicants filed a second H&C application. It is unclear from the file whether that application was ever decided.

[17] In September 2008, the Applicants filed a third PRRA application supported by several new pieces of evidence to corroborate their claims. That evidence included a fax [the Fax] from the

Albanian Embassy in Ottawa [the Embassy] addressed to their consultant. It confirmed that the April 7, 2000 Shooting Incident had occurred.

[18] On June 9, 2009, while the third PRRA application was pending, the Applicants were removed from Canada and returned to Albania.

[19] On February 20, 2010, the Applicants' car was shot at as they were leaving a restaurant in Albania. The police discovered bullets in their car but the investigation remains open.

[20] On May 26, 2010, the Applicants received a positive PRRA determination and were granted protected person status [the Positive PRRA].

[21] On September 22, 2010, the Applicants were sent a Notice indicating that the Respondent was proceeding to vacate the Positive PRRA on the basis that the Applicants had, directly or indirectly, misrepresented information relating to their Positive PRRA. Specifically, a file review had flagged irregularities in the Fax and the Embassy had advised the Respondent that the Fax was "not authentic". Subsequently, at the request of the Applicants' consultant, the Embassy explained that it had described the Fax as "not authentic" because it had not been sealed or signed by the head of the mission. However, the Embassy confirmed that its contents were accurate and that the Embassy had sent the Fax. In other words, it was not a fraudulent document.

[22] In spite of this clarification the Delegate vacated the Positive PRRA, thereby revoking the Applicants' status as protected persons on the basis that the Fax constituted a misrepresentation. This Decision is the subject of the present application for judicial review.

## **THE ACT**

[23] Subsection 114(3) of the Act provides:

(3) If the Minister is of the opinion that a decision to allow an application for protection was obtained as a result of directly or indirectly misrepresenting or withholding material facts on a relevant matter, the Minister may vacate the decision.

(3) Le ministre peut annuler la décision ayant accordé la demande de protection s'il estime qu'elle découle de présentations erronées sur un fait important quant à un objet pertinent, ou de réticence sur ce fait.

## **THE DECISION**

[24] The Decision outlined the Applicants' immigration history and the basis for the Positive PRRA, before turning to the issue of misrepresentation. The Minister's Delegate noted the Applicant's emphasis on the Fax in their submissions before the PRRA officer. The Delegate rejected the Applicants' argument that they had played no part in any irregularities surrounding the Fax and found that it was significant that the Embassy was unable to explain how an inauthentic fax was transmitted from its fax machine. The Delegate concluded that the irregularities could not be dismissed as mere clerical errors. The Delegate acknowledged that the information regarding the April 7, 2000 incident had since been verified, but found that this verification was immaterial and that the PRRA officer would have given this information "far less weight" had she known that it had not been authorized for release. Because there was no adequate explanation for the irregularities regarding the Fax and because the Applicants stood to gain the most from its transmission, the Delegate concluded that the Fax constituted a misrepresentation and that the proceedings to vacate the Positive PRRA had been properly undertaken.

## **ISSUES**

[25] Although many issues were raised, the determinative issue is whether the Delegate's finding that there had been a misrepresentation was reasonable.

## **THE STANDARD OF REVIEW**

[26] The Applicants submit that the factual findings are reviewable on the reasonableness standard, citing *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190. The Respondent accepted that standard.

[27] In my view, on the determinative issue, the standard of review is reasonableness.

## **THE REASONABLENESS OF THE DECISION**

[28] There is no dispute that the Fax was sent from the Embassy's fax machine to the Applicants' consultant at the consultant's request and that it was written on Embassy letterhead. There is also no dispute that the contents were accurate but for two typographical errors [the Typos].

[29] The Fax confirmed that the Principal Applicant had been injured in the Shooting Incident in which two others had been killed. The Fax read:

Following our communication we inform you that a further notice from the Ministry of Interior of Albania on 04.04.2008, it is stated that on 07.04.2007 around 22.30 hours, at the palce named Pallatet "1 Maji" in Tirana City, unidentified persons, killed with fire weapons. 2 citizens, and from this attack two other persons remained wounded. One of them is Arjan Tabaj. This incident is under investigation from the Prosecutor Office of Tirana.

[my emphasis]

[30] The Fax was not signed and did not bear the Embassy's stamp.

[31] The Typos I have underlined were later corrected by the Embassy: "palce" was meant to be "place" and the year "2007" was corrected to read "2000".

[32] After the Positive PRRA, the file was reviewed and, because of the Typos, Citizenship and Immigration Canada [CIC] wrote on July 27, 2010 questioning the Embassy about the Fax. The Embassy replied, in part, as follows and the reply was signed and bore the Embassy's stamp:

The Embassy of the Republic of Albania presents its compliments to Citizenship and Immigration Canada, and has the honour that in reply to its paper, dated July 27, 2010, re. "Tabaj Arjan and family", to inform that the Fax message, dated 4/11/2008, ref. "Tabaj Arjan and family" is not authentic.

[33] In my view, on receipt of this information, CIC was justified in pursuing the question of misrepresentation because it was reasonable to conclude that "not authentic" meant that the Fax was a forgery which did not emanate from the Embassy.

[34] However, when the Applicants' consultant was advised that the Fax was "not authentic" he asked the Embassy to clarify the meaning of that phrase. The Embassy replied to CIC with a copy to the Applicants' consultant. The relevant portion of the reply read as follows:

The Embassy of the Republic of Albania presents its compliments to Citizenship and Immigration Canada, and has the honour that in reply to its paper, dated July 27, 2010, ref. "Tabaj Arjan and family", to inform that the Fax message, dated 4/11/2008, ref. "Tabaj Arjan and family", is not authentic, because it is not signed by the head of the mission and there is not sealed.

Concerning the matter "Tabaj Arjan and family" the Embassy of Albania is authorized to inform the Citizenship and Immigration Canada and the interested parties as follows:

"Through its official document dated 09.04.2008, No. 7899, the Ministry of Foreign Affairs of Albania clarifies that the Ministry of Interior of Albania, in its paper, dated 04.04.2008, informs that on April 7, 2000, at about 22.30, in the place named "Pallatet 1 Maji" in the city of Tirana, unidentified persons remained wounded. One of them is Arjan Tabaj. In connection with this incident, the Prosecutor Office of the Tiran District already started the penal investigation..."



[35] This correspondence corrected the Typos and confirmed the information about the Shooting Incident.

[36] After this exchange, the following facts were beyond doubt:

- The Fax had been prepared and sent by the Embassy
- The information in the Fax was accurate (but for the year) which had been corrected.
- The Fax was described by the Embassy as “not authentic” because it lacked the Embassy seal and the required signature.
- The Albanians used “authentic” as a synonym for “official” and the Embassy had not, in fact, ever suggested that the Fax was a forgery.

[37] In my view, in light of these facts, CIC should have re-evaluated its position but it failed to do so. The issue therefore is whether, given this information, it was reasonable for the Delegate to conclude that there had been a misrepresentation.

[38] As a starting point, it is noteworthy (i) that CIC does not require “official” documents from a foreign embassy in support of PRRA applications and (ii) that the Fax was not presented to the PRRA officer by the Applicants’ consultant as having “official status”. It was presented as a letter from the Albanian Embassy and that it is exactly what it was. There was no falsity or fraudulent conduct associated with the consultant’s request for the Fax or the way in which it was presented to

the PRRA Officer. Nor is there any evidence that the PRRA Officer viewed the Fax as anything other than a letter prepared and sent by the Embassy. Further, its contents were true.

[39] In my view, in these circumstances, it was unreasonable for the Delegate to conclude that the Fax amounted to a misrepresentation.

“Sandra J. Simpson”

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JUDGE

Ottawa, Ontario  
November 9, 2011

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

**DOCKET:** IMM-427-11

**STYLE OF CAUSE:** Arjan Tabaj et al v Minister of Citizenship and Immigration

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** August 10, 2011

**REASONS FOR ORDER:** SIMPSON J.

**DATED:** November 9, 2011

**APPEARANCES:**

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