

Federal Court



Cour fédérale

Date: 20120720

Docket: IMM-149-12

Citation: 2012 FC 920

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, July 20, 2012

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

LULZIM GORQAJ

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR ORDER AND ORDER

[1] Mr. Gorqaj is an ethnic Albanian. With the break-up of Yugoslavia, he became a citizen of Kosovo, where he claims to have been persecuted by Serbian spies and Albanian extremists. The present application for judicial review involves allegations of persecution on the part of the Albanian National Army (AKSh), which is considered to be a terrorist organization. Mr. Gorqaj, as well as his father and other members of his family, have been working to bring about a peaceful

resolution of the conflicts in Kosovo. Specifically, Mr. Gorqaj is a member of the Democratic League of Kosovo. In his Personal Information Form (PIF), he alleges various incidents which, if true, strongly suggest that he was the subject of persecution in that country.

[2] He left Kosovo in 2006 and claimed asylum in the United States, without success. He later entered Canada illegally and claimed refugee protection on political grounds. The Refugee Protection Division (RPD), of the Immigration and Refugee Board of Canada, questioned him, among other things, about the decision of the U.S. immigration authorities to reject his claim for asylum. He replied that this was a result of a lack of competence on the part of his lawyer. In any case, given the current state of Canadian law, the fact that his claim in the United States was unsuccessful is inconsequential here.

[3] The RPD rejected his refugee protection claim on two grounds. The member determined that Mr. Gorqaj lacked credibility. Yet he was also of the view that even if the applicant's story was credible, the presumption of state protection had not been rebutted.

[4] In the present case, Mr. Gorqaj maintains that the RPD's findings with regard to his credibility and state protection were unreasonable. Furthermore, he contends that the member was biased against him.

DECISION

[5] I will allow this application for judicial review. In my opinion, the findings regarding Mr. Gorqaj's credibility were unreasonable. With respect to state protection, he was not given a

reasonable opportunity to establish his case, thus resulting in a breach of procedural fairness. As for the allegation of bias, the member was somewhat aggressive in his cross-examination of Mr. Gorqaj, interrupting him and cutting him off several times when he was trying to answer questions. Given that this Court has determined that Mr. Gorqaj was denied procedural fairness, there is no need for me to examine the other aspect relating to natural justice, namely, the right to be heard before an unbiased and impartial decision-maker. At any rate, Mr. Gorqaj was represented by counsel at the hearing, and no objections were raised regarding the approach taken by the member. It is well-established that such concerns must be raised at the earliest opportunity (*Abedalaziz v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1066, [2011] FCJ No 1271 (QL) and *Acuna v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1222, [2006] FCJ No 1557 (QL)).

DISCUSSION

I. Credibility

[6] In this case, we have a classic example of a microscopic analysis. The RPD must not concentrate its analysis on a few minor or secondary inconsistencies to the point where it is “splitting hairs” (*Joseph v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1515, [2011] FCJ 1804 (QL) and *Shaheen v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 670, [2001] FCJ No 993 (QL)).

[7] The member appeared to be particularly obsessed about three attacks:

[8] During his testimony, Mr. Gorqaj provided an incorrect date with respect to one of the attacks, but immediately corrected it. The member ought not to have drawn a negative inference from this, especially if one considers the fact that his aggressive questioning made Mr. Gorqaj nervous and disturbed his concentration, and that he acted in a way as to suggest that the applicant was afraid of his own shadow.

[9] In his PIF, he indicated that in March 2004, an armed group wearing AKSh insignia opened fire on his car.

[10] He testified about another incident in October 2004, and stated that on November 28, 2005, he was held by four masked men and threatened with death. He subsequently testified that he had received a call a few months later from someone claiming to be the head of the AKSh. The member criticized Mr. Gorqaj for failing to mention the fact that these men had been wearing AKSh insignia in his PIF, as he had in his testimony. However, upon reading his account, it is perfectly clear that these individuals were AKSh members.

[11] The member also criticized him for stating that these men had threatened him with death, although these threats had not necessarily been verbalized. When attackers open fire on someone's car and shoot them in the chest, one would certainly and rightfully infer that they have every intention of killing that person.

[12] In fact, the member made an astoundingly illogical comment in this regard:

Did they say anything with regards to killing you if you do -- because that threat is if they say if you do 'x' or you don't do ['y'], here is the consequences, we will kill you. And that's a death threat. It has to

depend on something you do or you don't do and the consequences are death. From what you testified, nothing implies there is a death threat there. So why is there not a consistency between your written version which speaks of death threat and what you testified?

[13] To put this point to rest, there is no need for me to address the issue of Mr. Gorgaj's credibility. I need only determine whether the member's findings fall outside a range of possible, acceptable outcomes (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190). I am of the opinion that they do.

II. State Protection

[14] Mr. Gorqaj's attorney presented two arguments in this regard. First, she contended that, although Mr. Gorqaj had not personally tried to obtain protection from Kosovo, he did in fact attempt to explain his reasons for not doing so by referring to his father's situation. However, the member cut him off and would not let him continue speaking. The transcript of the hearing is revealing:

BY PRESIDING MEMBER (to claimant): Did you ever ask for any state protection from any authorities whatsoever; yes or no?

BY CLAIMANT (to presiding member): Personally, no, my father.

BY PRESIDING MEMBER (to claimant): So you never made any written nor oral complaints?

BY CLAIMANT (to presiding member): My father was personally.

BY PRESIDING MEMBER (to claimant): I am not asking about your father. I'm asking about you.

BY CLAIMANT (to presiding member): I couldn't ever go to declare to the police about what was happening.

BY PRESIDING MEMBER (to claimant): That's part of the explanation. I'm asking you for an answer. I'll ask the same question for the third time. It's a yes or no answer. Did you make --

BY CLAIMANT (to presiding member): Personally, no.

[15] Mr. Gorqaj was denied the opportunity to explain his actions in this respect, particularly in light of his father's experience, and this, in spite of the fact that the member seemed to accept that his father's circumstances were in fact part of his explanation.

[16] Second, she submitted that the member proceeded with a highly selective analysis of the reports on the situation in Kosovo. Given the circumstances, there is no need for me to examine this issue.

ORDER

FOR THE AFOREMENTIONED REASONS;

THE COURT ORDERS that:

1. The application for judicial review is allowed.
2. The matter is remitted for redetermination before a differently-constituted panel of the Immigration and Refugee Board of Canada's Refugee Protection Division.
3. There is no serious question of general importance to certify.

“Sean Harrington”

Judge

Certified true translation
Sebastian Desbarats, Translator

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-149-12

STYLE OF CAUSE: GORQAJ v MCI

PLACE OF HEARING: MONTRÉAL, QUEBEC

DATE OF HEARING: JULY 12, 2012

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

DATED: JULY 20, 2012

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