

Federal Court



Cour fédérale

Date: 20120801

Docket: IMM-5863-11

Citation: 2012 FC 953

Ottawa, Ontario, August 1, 2012

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

ARNANT MAZREKAJ

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] Mr Arnant Mazrekaj unsuccessfully claimed refugee protection in Canada based on his fear of persecution in Kosovo. In 2010, a panel of the Immigration and Refugee Board rejected his claim because of a lack of credible evidence, and because authorities in Kosovo could probably protect him.

[2] Mr Mazrekaj then applied for a pre-removal risk assessment [PRRA]. In addition to the risks he set out in his refugee claim, Mr Mazrekaj presented a further source of risk – because his uncle had testified before the International Criminal Tribunal for the former Yugoslavia [ICTY], other family members were at risk of retribution. In fact, his brothers had been attacked as a result.

[3] The PRRA officer believed that the risk that Mr Mazrekaj alleged in his application was essentially the same as the one he had presented in his refugee claim. As for the risk flowing from his uncle's testimony, the officer noted that the uncle testified in 2009, well before the hearing into his refugee claim, so he could have raised that issue earlier. Further, the uncle's testimony was publicly available, so Mr Mazrekaj could not credibly claim that the reason he did not raise the issue before the Board was in order not to make it public. Similarly, the attack on his brothers took place prior to his hearing, so he could have raised that, too. Therefore, the officer concluded that Mr Mazrekaj had failed to present new evidence that he faced a substantial risk of mistreatment in Kosovo.

[4] Mr Mazrekaj argues that the officer erred by failing to accord him an oral hearing, by relying on evidence of which he was unaware, and by rendering an unreasonable decision. He asks me to quash the officer's decision and order another officer to reconsider his application.

[5] I agree with Mr Mazrekaj that the officer reached his conclusion by relying on extrinsic materials to which he should have had a chance to respond. I will grant his application for judicial review on that basis, making it unnecessary for me to consider Mr Mazrekaj's other arguments.

[6] The sole issue, therefore, is whether the officer treated Mr Mazrekaj unfairly by relying on extrinsic materials.

II. The Officer's Decision

[7] The officer took note of Mr Mazrekaj's claim that, at the time of his refugee hearing, he feared the consequences of disclosing his uncle's testimony before the ICTY. However, the officer found that the testimony had been public knowledge well before the hearing.

[8] The officer relied on his own research of the ICTY's website. It showed that the uncle's testimony was published as part of the court's records. The officer also consulted the website of an organization called the SENSE Agency. It showed that the uncle was featured in an article from 2009, eight months before the refugee hearing.

[9] Based on this evidence, the officer concluded that Mr Mazrekaj could have raised his concerns at his refugee hearing about his uncle's testimony. Therefore, he had not put forward a new risk that could support a positive PRRA.

III. Did the Officer rely on extrinsic materials?

[10] Mr Mazrekaj submits that the officer treated him unfairly by relying on the results of his own research, namely the ICTY transcript and SENSE report that were publicly available before the

refugee hearing. He claims not to have been aware of that evidence. Therefore, the officer had a duty to give him a chance to respond to it.

[11] The Minister contends that the evidence cited by the officer was not extrinsic, as it was publicly available and came from a reliable source. In addition, Mr Mazrekaj could have anticipated that the officer would check the ICTY website. In effect, Mr Mazrekaj simply “played the odds” by holding back a source of risk that he should have raised at his hearing.

[12] In my view, Mr Mazrekaj should have been given an opportunity to respond to the evidence on which the officer relied. The officer consulted materials that could not be described as the kind of standard documents that applicants can reasonably expect officers to consult (*Riaji v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1240; *Mancia v Canada (Minister of Citizenship and Immigration)*, [1998] 3 FC 461 (CA)).

[13] The evidence before the officer showed a clear risk to ICTY witnesses and their families. In effect, the officer rejected Mr Mazrekaj’s claim to have been reluctant to publicly identify his uncle as a witness at the time of his refugee hearing on the basis that he must have known that this was already public knowledge.

[14] The documents cited by the officer showed that at least some of the uncle’s testimony was accessible on-line. But those sources were not so obvious or widely accessible that they could defeat Mr Mazrekaj’s claim to have been unaware that his uncle’s testimony was publicly available at the

time of his hearing in 2010. Mr Mazrekaj should have been given a chance to respond to that evidence before the officer concluded that his claim was groundless.

IV. Conclusion and Disposition

[15] The officer's failure to give Mr Mazrekaj an opportunity to respond to documentation the officer retrieved through independent research was unfair to Mr Mazrekaj. Accordingly, I must allow this application for judicial review and order another officer to reconsider Mr Mazrekaj's PRRA application. Neither party proposed a question of general importance for me to certify, and none is stated.

JUDGMENT

THIS COURT’S JUDGMENT is that:

1. The application for judicial review is allowed. The matter is referred back to another officer for reconsideration;
2. No question of general importance is stated.

“James W. O’Reilly”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5863-11

STYLE OF CAUSE: ARNANT MAZREKAJ
v
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: June 12, 2012

**REASONS FOR JUDGMENT
AND JUDGMENT:** O'REILLY J.

DATED: August 1, 2012

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