Federal Court  Cour fédérale

Date: 20140703

Docket: IMM-1567-13

Citation: 2014 FC 648

Ottawa, Ontario, July 3, 2014

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

RUDINA CAPA
CLIRIM CAPA
KELSI CAPA
JULIEN ABDYL CAPA
(A.K.A. JULIEN CAPA)

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review, pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the "*IRPA*" or the "*Act*"], of a February 4, 2013,

decision by the Immigration and Refugee Board [the "IRB" or the "Board"] that the applicants were not Convention refugees or persons in need of protection.

[2] For the reasons which follow, the application is denied.

II. Factual background

[3] The applicants are Clirim and Rudina Capa and their minor children Kelsi (born in 2000) and Julien (born in 2003). The parents and Kelsi were born in Albania, while Julien was born in the United States and holds American citizenship. Clirim Capa is the principal applicant.

[4] Mr. Capa explains that his wife Rudina Capa (born Baraku) first met a man called Clirim Aleti in 1993 when she was still in high school. They began seeing each and in August 1995 became engaged to be married, with a date set in October 1996. However, Mr. Aleti proved to be abusive and violent. Ms. Capa had applied to go to dental school after she finished high school in 1996 but Mr. Aleti did not want her to take post-secondary education; he wanted her to move to his home village. Ms. Capa ended the engagement in August 1996, after which Mr. Aleti stalked her and attempted to control her behaviour.

[5] Ms. Capa had met Clirim Capa in 1995 and the two began to see each other more frequently after she had broken off her engagement, dating secretly to keep the relationship secret from Mr. Aleti. Mr. Aleti, meanwhile, continued to demand that she change her mind and go through with the marriage. At the start of 2000, Ms. Capa became pregnant with Kelsi. She travelled to Patos, two hours' drive away in southern Albania, between April and September

2000 to hide the pregnancy, then returned to Tirana and gave birth on September 6, 2000. On October 10, 2000, she married Mr. Capa.

[6] At the end of September or the beginning of October 2000, Mr. Aleti sent a neighbour to Clirim Capa's business to advise him that the Aleti family had declared a blood feud against his family. The Capas and their child lived with an uncle from September 2000 to June 2001 to hide from the blood feud; the uncle has provided a notarized declaration to that effect. Mr. Capa paid a man to run his coffee bar; this employee has provided a notarized declaration stating that from September 2000 to April 2001 his employer lived in hiding due to a blood feud and managed the business by telephone.

[7] In his PIF narrative, Mr. Capa noted that a good friend of Ms. Capa's family was sent to the Aleti family in 2007 and 2010 to try to resolve the dispute, but was not successful. The friend has provided a sworn statement to that effect, dated April 27, 2012. It states in part that: "I declare that the son-in-law of the Baraku family, Clirim Capa, has had troubles and disagreements with the family of Clirim Aleti. I declare that I have intervened twice to reconcile these families, once in 2007 and once in 2010, and have not been successful in both attempts".

[8] In his April 26, 2013 affidavit for this judicial review, Mr. Capa added that the family had also commissioned Peace Reconciliation Missionaries to mediate, and that too was unsuccessful. A certificate dated September 19, 2012 from the Peace Reconciliation Missionaries notes that:

> … The reason for the conflict is that Mrs. Rudina Capa has requested a separation, as they didn't match as a couple and as a

> result of her marriage to CLIRIM ABDYL CAPA intensified this conflict, which risks the life of Mr. CLIRIM CAPA and his family. After many attempts, including even the latest of Spring 2011 which include the elders village council, the peace reconciliation missionaries of blood-feuds of Albania, these two families have failed to compromise a peace treaty.

[9] In the affidavit Mr. Capa also noted that he had reported the feud to the police in Tirana but they were not willing to provide protection.

[10] The Capas decided that there was no other option than to flee. They entered the U.S. in June 2001 and made an asylum claim, but based on advice given to them at the time, they did not mention the blood feud, believing that it could not form the basis of a refugee claim in the U.S. They argued instead that Mr. Capa had experienced problems from the Socialist Party and its supporters because he was a Democratic Party supporter. He provided a three-page single-spaced statement describing harassment and eventually expulsion by high school officials, detention and abuse by the police in 1988 when teenaged friends of his tried to escape from Albania, further detention following participation in protests in 1990 and 1991, going into hiding with his family until a Democratic Party victory in 1992 and then moving to Tirana to start a restaurant with them, vandalism at the restaurant in 1997 which the police refused to investigate, government surveillance in 1998, a drive-by shooting by a government supporter in 1999, the destruction of the restaurant by arson in 1999, participation in protests in 2000 and a head injury at the hands of the police, political campaigning in 2001 which led to a telephoned death threat, and finally the decision to flee.

[11] In the U.S., Ms. Capa was able to work as a dental assistant and the couple had their second child, Julien. Their asylum claim was rejected in 2005 and an appeal was also rejected in 2008. The U.S. Second Circuit appeal decision dated April 18, 2008 is in the record. It indicates that all of the evidence submitted by Mr. Capa was considered to have been taken into account. While substantial evidence supported a finding of past persecution, the presumption of future persecution if he was returned to Albania was rebutted by the Democratic Party's return to power through general elections in July 2005. An objective likelihood of persecution was not shown and therefore the denial of the asylum claim was upheld, any stay of removal was vacated, and any pending motion for a stay of removal was dismissed as moot.

[12] The Capas lived in the U.S. without status for three and a half years then drove north to Canada to try again. They arrived in Fort Erie, Ontario, on September 30, 2011. Ms. Capa indicated at the Board hearing that her brother had moved to Canada in July 2000, before the blood feud was declared. He is now a Canadian citizen. She also indicated that her father has come to visit her four times in Canada; his life in Albania is restricted due to the blood feud but he has chosen to keep returning there and not seek asylum in Canada.

III. Contested decision

[13] In his reasons, the Board member hearing the claim first summarized Mr. and Ms. Capa's narratives: they were residents of Tirana and citizens of Albania; Ms. Capa was engaged to Mr. Aleti but broke this off in August 1996; she then took up with Mr. Capa; she became pregnant in January 2000 and gave birth to their daughter in September 2000; in September or October 2000, Mr. Aleti sent a neighbour to announce that he had declared a blood feud; the claimants left for

the U.S. in June 2001; being denied refugee status there, they moved to Canada on September 30, 2011 and filed claims the same day.

[14] The Board member found that the claimed fear arising from a blood feud did not establish a nexus to a Convention refugee category and therefore that the claim under section 96 of the *Act* failed. He then examined the section 97 claim.

[15] He found that the claimants had not provided credible evidence to support the well-foundedness of their fear. Mr. Capa's testimony was evasive and his story was not believable based on common sense. Since the member did not believe the account, the claim of a blood feud had no basis. The member noted that Mr. Capa had submitted a certificate from the Peace Reconciliation Missionaries attesting to the existence of a blood feud but that he had not provided a reasonable explanation for not mentioning the reconciliation attempt and his report to the police in his PIF narrative; these omissions going to an essential element of the claim led the member to doubt the testimony.

[16] The Board member noted that even without disbelieving every part of a claimant's testimony, a panel may find a claimant so lacking in credibility that it concludes that there is no credible evidence relevant to his claim. He denied the claim.

IV. Issues

[17] The applicants state that the issues are:

1. Did the Board member make unreasonable credibility findings?
2. Did the Board member err in failing to consider objective evidence of risk?
3. Did the Board member fail to discharge his duty to assess the applicability of section 96?

V. Standard of review

[18] The applicants argue that the first two issues are reviewable on the standard of reasonableness, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, and that the third is reviewable on the standard of correctness, as per *Canada (MCI) v Khosa*, 2009 SCC 12 at para 43.

[19] The respondent agrees that the standard for the credibility issue is reasonableness, but argues that a finding of a lack of nexus to a Convention ground under section 96 is a question of mixed fact and law and is also reviewable on a standard of reasonableness *(Ariyathurai v Canada (MCI)*, 2009 FC 716 at para 6; *VLN v Canada (MCI)*, 2011 FC 768 at para 15). The respondent does not comment on the standard for the second issue, the Board member's consideration of evidence.

[20] I find that the standard of review is reasonableness for all three issues.

VI. Analysis

1. *Did the Board member make unreasonable credibility findings?*

[21] The applicants argue that it was unreasonable for the member to base his credibility determinations on an omission; that being, failing to declare the Peace Missionaries involvement. While the applicants ought to have mentioned this at the outset, they were not embellishing their claim by adding it, because it was not a significant or material point. A letter from the Peace Missionaries was submitted as evidence and the member did not suggest that it was not genuine. The principal applicant's explanation that he forgot to mention this point was not a good explanation but was not unreasonable.

[22] I find that it was reasonable for the Board to draw negative inferences from two key omissions in the PIF narrative. As the respondent notes, the applicants did not mention having recourse to the Peace Missionaries and the police until the hearing. When the Board member confronted the principal applicant with these omissions, his answers were vague and did not provide a reasonable explanation. The PIF clearly instructs claimants to provide details of all steps they took to obtain protection from any authorities.

[23] I agree with the respondent that the applicants should have been fully conversant with the need to present relevant facts to immigration officials, having previously made asylum claims in the United States. Moreover, the applicants were represented by counsel at the time of filing their PIF (other than counsel appearing before me). It is not reasonable to think that counsel would not have questioned the applicants carefully to determine whether such critical evidence existed

regarding intervention from Peace Missionaries or having gone to the police for assistance. I note as well that the certificate from the Peace Reconciliation Missionaries of Albania indicates that the latest attempts at reconciliation were made in the spring of 2011, close to the time of entering Canada that fall. It is difficult to imagine that had such a reconciliation process taken place that it could have been omitted from the PIF.

[24] Applicants' counsel argued that the Board member did not question the genuineness of the certificate. I would think that this conclusion was implied. If the applicants could omit to refer to such a memorable and critical circumstance such as having an independent reconciliation organizations involved in their problems over a number of years, it strongly suggests that the certificate was bogus. Refugee adjudication tribunals and courts must be on guard to be sure that official looking documents actually carry the weight for which they are being introduced. Given the obvious omission of not mentioning the reconciliation certificate, it was incumbent on the applicants to lead further evidence demonstrating that the document was genuine and the organization authorized for the purpose of providing the reference.

[25] It should be understood that documents like the reconciliation certificate entered into evidence in this matter, which originate from a nongovernment organization operating in a country which is experiencing all of the difficulties from criminal organizations and violence that the applicants rely upon as the basis for their case, must be extensively substantiated and accredited in order to be relied upon by the RPD or other immigration decision-makers. The issuer of this reconciliation certificate was not present before the RPD to prove its authenticity, including by being questioned by the Board. In addition, there was no corroborating evidence to

show that the issuing organization had the authority or a duty pursuant to an appropriate legal mandate to provide attestations to the genuineness and reliability of the declarations being proffered as reliable evidence. In my view, this document should not have been admitted into evidence in the first place. Given the fact that the applicants failed even to mention such a significant current document in their PIF, even if it had been substantiated to some extent, the tribunal would be justified in disregarding it.

[26] I also conclude that the RPD was not required to specifically refer to the attestation from Nuh Berdica that Clirim Capa "has had troubles and disagreements with the family Aleti" and that he had intervened once or twice in attempting to reconcile them. There is no presumption of truthfulness attaching to an out-of-court declaration from a third party. These documents lack any indicia of reliability or necessity. Unless somehow a degree of genuineness and reliability could be attached to them, they should not be admitted, or if admitted for the purpose of the record, should not be taken to contain sufficient probative value as to require any comment by the Board.

[27] The applicants also argue that the member drew two improper inferences: he inferred that Mr. Capa would recall the date on which he learned that Ms. Capa was engaged, and he inferred that Mr. Aleti would have discovered the relationship between Mr. and Ms. Capa. He made plausibility findings based on these inferences, but did not comment on why common sense suggested that Mr. Capa would have this knowledge. The Court has said that "concrete reasons supported by cogent evidence must exist before the person is disbelieved" (*Vodics v Canada (MCI)*, 2005 FC 783 at para 11; see also *Maldonado v Canada (MEI)*, [1980] 2 FC 302 at para

5). The events were eighteen years in the past and it was reasonable that Mr. Capa would not remember a date. As well, the member did not address the applicants' testimony that they were intentionally secretive about their relationship, which would have prevented Mr. Aleti from learning about it. This was a reasonable explanation.

[28] The respondent submits that these credibility findings were based in part on aspects of the applicants' demeanour while testifying. The court was taken to passages where relatively simple questions were put to the principal applicant, who not only appeared to have memory problems but was defensive in the answers provided. The Board member is entitled to a significant degree of deference from the Court on its credibility findings, and when demeanor is described as a factor and the transcript demonstrates reluctance to answer questions, such as even to provide a range of dates when asked about the timing of a significant event, there is no basis for the Court's intervention.

[29] I am also of the view that there is reasonable ground to support the Board's conclusion rejecting the applicant's evidence that Clirim Aleti did not learn of the applicants' relationship until the fall of 2000, although they had been living together since 1996. Given the apparently conflicting narrative that Aleti was obsessively stalking Ms Capa and continually demanding that she agree to be re-engaged with him, it was fair to impose a requirement on the applicants to provide detailed evidence explaining how in a small geographic region the applicants were able to live together without it becoming generally known and being learned by Mr. Aleti.

[30] In my view, the Board was best placed to assess Mr. Capa's testimony and it came to a reasonable conclusion when it drew further negative inferences from his failure to respond to certain questions and his evasive demeanour throughout the hearing.

2. *Did the Board member err in failing to consider objective evidence of risk?*

[31] The Board member must in all cases assess whether there is independent and credible evidence before him capable of supporting a positive disposition of a claim, and where such evidence exists, he must assess risk under section 97. *Canada (MCI), v Sellan*, 2008 FCA 381 at para 3:

> 2. The Judge also certified a question, namely: where there is relevant objective evidence that may support a claim for protection, but where the Refugee Protection Division does not find the claimant's subjective evidence credible except as to identity, is the Refugee Protection Division required to assess that objective evidence under s. 97 of the *Immigration and Refugee Protection Act*?
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> 3. In our view, that question should be answered in the following way: where the Board makes a general finding that the claimant lacks credibility, that determination is sufficient to dispose of the claim unless there is independent and credible documentary evidence in the record capable of supporting a positive disposition of the claim. The claimant bears the onus of demonstrating there was such evidence.

[32] I have already dealt with and rejected the submissions that the Board ought to have given weight to the certificate from the Peace Missionaries and the sworn statement from the family friend who attempted to resolve the blood feud.

[33] The applicants further submit that the country conditions documentation amply demonstrated that blood feuds are a continuing reality in Albania and that state protection from them is inadequate. In *Prekaj v Canada (MCI)*, 2009 FC 1047 at paras 30-31, a case concerning a blood feud in Albania, Justice Russell held that a Board's failure to refer to portions of the national documentation package demonstrating ineffective state protection warranted the Court's intervention. In the present case, both personal and country documentation corroborated the applicants' story and yet the member did not deal with this documentary evidence.

[34] The respondent submits, however, and I agree, that it was reasonable for the Board to find that the credibility determination was dispositive of the claim. The two documents cited – the certificate from the Peace Missionaries and the sworn statement from the family friend – did not constitute independent and credible documentary evidence capable of supporting a positive disposition of the claim and the applicant has not demonstrated how they could. The applicants are merely disagreeing with the Board's assessment of credibility. Having found that the applicants had not demonstrated that they were victims of a blood feud, the Board was not required to provide reasons with respect to the general documentary evidence on blood feuds in Albania.

3. *Did the Board member fail to discharge his duty to assess the applicability of section 96?*

[35] The applicants argue that the member did not present an individualized assessment of why the existence of a blood feud did not establish a nexus to a Convention ground. It did not suffice for him to find that blood feud victims are "generally" unable to establish a nexus. Before the Board, the principal applicant presented very limited submissions on the issue, claiming only

that the applicants had a well-founded fear of persecution as members of a particular social group by being targets in a blood feud or belonging to a targeted family.

[36] The applicants acknowledge that the Federal Court has determined on several occasions that blood feuds do not have a nexus to a Convention ground because recognizing participation in a feud as demonstrating membership in a social group would amount to according status to criminal activity. See most recently *Sanaj v Canada (MCI)*, 2012 FC 744 at paras 8-10:

> 8. The Board rejected the Applicants' claims under s. 96 of *IRPA* on the basis that their claim had no nexus to a Convention ground, relying on the decisions in *Zefi v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 636, [2003] F.C.J. No. 812 (QL) [*Zefi*] and *Bojaj v Canada (Minister of Citizenship and Immigration)* (2000), 194 FTR 315 (TD), 9 Imm LR (3d) 299 [*Bojaj*] for the proposition that "victims of blood feuds cannot generally establish a nexus to the Convention refugee definition".
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> 9. The Applicants submit that the Board's use of the word "generally" intimates that there are circumstances where the existence of a blood feud can fall within a Convention ground. Accordingly, the Applicants argue that the Board failed to discharge its duty to assess the applicability of s. 96 on the particular facts of their claims to determine whether their situation was one of the exceptions.
>
> 10. Had the Applicants put forward any evidence that went beyond the existence of a blood feud between two families, I might agree with the Applicants. However, a review of the record, including the Applicants' Personal Information Forms (PIFs) demonstrates that the alleged fears arose exclusively due to the operation of a blood feud. While the Board did not engage in a detailed analysis of the facts or the law, on these facts, its analysis was sufficient; it is also supported by the decisions it cited - *Zefi* and *Bojaj*, above.

[37] I also reject the applicants' argument and agree with the respondent's submission that the Board reasonably found that the applicants' alleged fear of the Aleti family was tantamount to a

fear of criminality or vendetta and that based on this Court's jurisprudence, such victims are not protected by the Convention. The finding was specific to the facts of this case and was reasonably made. The applicants' argument is similar to that put forward - and rejected - in *Sanaj v Canada (MCI)*, 2012 FC 744 at paras 8-10 and previous cases. The Board's reasons are adequate to allow the parties and the reviewing court to understand why it made this decision on nexus *(Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16).

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is denied, and

2. No questions for certification were raised.

"Peter Annis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	RUDINA CAPA, CLIRIM CAPA, KELSI CAPA, JULIEN ABDYL CAPA (A.K.A. JULIEN CAPA) v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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