Federal Court  Cour fédérale

Date: 20170728

Docket: IMM-91-17

Citation: 2017 FC 737

Vancouver, British Columbia, July 28, 2017

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

EDUARD KULLA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [Act or IRPA] of a negative Pre-Removal Risk Assessment [PRRA] decision dated November 1, 2016 [Decision] by a PRRA Officer [Officer].

[2] The Applicant, Eduard Kulla, is a citizen of Albania. He became a permanent resident of Canada in 2009. In 2011, the Applicant was convicted of growing marijuana and was given a one year conditional sentence. The Applicant was subsequently found inadmissible to Canada and was ordered to be deported in November, 2011. An appeal of the deportation order to the Immigration Appeal Division was dismissed in January, 2015 and leave for judicial review was denied.

[3] The Applicant's PRRA application, his first risk assessment in Canada, is based on his fear of his first cousin, Agron Vuksani [Vuksani], who currently lives in Canada. The Applicant says Vuksani believes, to this day, that the Applicant and/or his brother, Gjon Kulla [Gjon] committed adultery with his wife.

[4] Vuksani was charged and convicted in 2013 of aggravated assault and unlawful imprisonment of the Applicant's brother Gjon, after a one-sided attack in which Gjon suffered serious injuries including extensive bruising, a very deep cut to the ankle, and extensive bleeding from several other wounds (*R v Vuksani* (14 March 2013), Vancouver 86633-C2 (BC Prov Ct) [*Vuksani*] at para 19; Certified Tribunal Record [CTR] at p 91).

[5] The Provincial Court of British Columbia, in the criminal trial, accepted Gjon's version of events: Vuksani unexpectedly pepper-sprayed the victim Gjon, bound him and attempted to extract his teeth with pliers, including causing the injuries listed above. At para 49 of *Vuksani* the Court held:

> The extent of his injuries when contrasted with the lack of any injury to the accused also supports Kulla's version that the attack

> was completely one sided. I am also supported in my findings by the evidence of Eduard Kulla. While it was clear from the way he testified that there was a good deal of animus towards the accused, his evidence that he received a phone call from Albania that the accused had killed Gjon is consistent with the accused's testimony that during the attack he did phone family in Albania…. Eduard's evidence of the contents of the call is supported by his actions in calling the RCMP after he received the phone call relaying to him what the accused had apparently told his family.

[6] The judge further accepted "[Gjon's] evidence that after he left the accused's home he drove to his brother's apartment to warn him about threats made by the accused against Eduard". Thus, the BC Court found that threats were also made against the Applicant (Eduard) during the attack on Gjon.

[7] The Applicant testified on behalf of his brother Gjon in the criminal trial, and says he has since been threatened for having testified against Vuksani. Some of the threats have been made in person, while he maintains others have come from unknown persons in Albania by text message who the Applicant believes are friends or contacts of Vuksani.

[8] In his testimony before the Provincial Court of British Columbia, Vuksani testified that adultery is the most serious crime under Albanian traditional law and that if someone is an adulterer he should be put to death. Vuksani also testified that he believes that one or the other of the Applicant or his brother Gjon committed adultery with his wife. Vuksani's sentence included a no-contact order with the Applicant.

[9] In 2012, Vuksani submitted a solemn declaration to the Canada Border Services Agency [CBSA], alleging various misrepresentations made by the Applicant to immigration officials. In

the declaration he repeated that he believes the Applicant committed adultery with his wife, and stated the Applicant "broke my family and changed my life and I want the truth known" (CTR at p 44).

[10] The Applicant believes that Vuksani made this statement to provide support for his removal from Canada, so that once removed from the relative safety he feels in Canada, he would be subject to severe harm or death at the hands of Vuksani and/or his contacts (including his brothers) who live in Albania; unlike the police protection the Applicant has enjoyed in Canada, he asserts there is no such state protection in Albania.

II. Decision under Review

[11] The PRRA Officer began by noting that the Applicant's fear of return was related to the blood feud initiated against him by Vuksani, and the fear that he would be killed in accordance with the Kanun (traditional Albanian law) if he returns to Albania. The PRRA Officer found there to be less than a mere possibility the Applicant would face risk if he returned to Albania, because:

(i) Vuksani does not follow the Kanun, based on comments he made in the criminal proceedings (for instance testifying that he does not follow this traditional Albanian law), and because Gjon testified that Vuksani planned to extort $100,000 from another man he believed was having an affair with his wife, which is not considered customary behaviour under the Kanun;

(ii) Vuksani had already avenged the alleged wrong because he was boasting in his community about the beating he inflicted on Gjon; and

(iii) the PRRA Officer was not persuaded that any community in Albania would have an interest in the matter, as the assault took place in Canada.

[12] The PRRA Office also noted that blood feuds are becoming rarer in Albania, and in any event found that the conflict between the Applicant and Vuksani did not amount to a traditional blood feud.

[13] Ultimately, the PRRA Officer found that the presumption of state protection was not discharged, as the documentary evidence indicates improvements under the current government. Although there were recognized "shortcomings" in the government, the Officer found that the protection mechanisms are at a standard to deliver adequate protection to its citizenry.

III. Analysis

[14] The standard of review of a PRRA officer's decision, including its assessment of risk and whether the presumption of state protection has been rebutted, is reasonableness (*Hoo v Canada (MCI)*, 2016 FC 283 at para 8). In applying the standard of reasonableness, the Court is concerned with the justification, transparency and intelligibility of the decision-making process and whether the decision falls within a range of possible, acceptable outcomes defensible in fact and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). The only issue to be decided in this application is whether the Officer's Decision was reasonable, and what follows are the reasons explaining why it was not.

[15] The Applicant submits that while the Officer is presumed to have considered all of the evidence and need not mention every piece of evidence, here the Officer failed to make reference to relevant contradictory evidence. I agree with the Applicant, based on several of the Officer's findings.

[16] With respect to the finding that Vuksani has already avenged the alleged wrong by beating Gjon, the Applicant argues the Officer's finding is both speculative and contradictory to the evidence of Vuksani's desire to harm the Applicant, even after his brother was attacked. This evidence includes Vuksani's 2012 CBSA declaration in which he accused the Applicant of misrepresentation and declared that he believed the Applicant had an affair with his wife, "broke my family and changed my life."

[17] Similar themes were noted in the Applicant's statements to the RCMP regarding threats he received, which the Applicant continued to report throughout 2012 and 2013. Indeed, in August 2012, the RCMP remarked in a police report that:

> Eduard KULLA contacted the RCMP to advise that he was approached by an unknown male while walking on the street that if he testified in court that "the graves are open for them". Police believe that these are intimidation tactics to prevent KULLA from testifying. Please mark any file to this address as priority one response to ensure occupants safety.
>
> (CTR at p 116)

[18] Of course, it is not the role of this Court to decide whether the Applicant would be at risk based on the evidence presented to the Officer. That is purely the Officer's role. Rather, one of the limited roles of this Court in reviewing the reasonableness of decisions, is to ensure that key

contradictory evidence was addressed; it is incumbent on the Officer to address the evidence that runs counter to its findings, even if briefly. In other words, if the Officer wished to dismiss the direct evidence from the agent of risk (such as the CBSA evidence above) and the Applicant (such as reports he made by to the police), as well as comments made by the RCMP themselves about the risk to the Applicant from Vuksani, then it was incumbent on the Officer to address that evidence. The Officer failed to do so.

[19] As a related point, the Officer also failed to address the fact that part of the alleged risk emanated from the Applicant's testimony at Vuksani's criminal trial. It must be recalled that the Applicant alleged that the risk stemmed not only from the alleged affair and the resulting feud, but also from his decision to testify in the criminal proceedings which landed Vuksani in jail, and from which – as cited above – both (i) the RCMP documented in pre-trial risk of reprisals, and (ii) the trial judge noted in his decision.

[20] Indeed, the assault of Gjon and associated threats to the Applicant were not the only evidence of a propensity to violence raised by the Applicant. In legal submissions to the Officer, counsel pointed to the family law decision involving Vuksani and his ex-spouse, where Justice Zisman held, vis-à-vis Vuksani, "[i]t is clear that the mother has a reasonable fear for her safety and the safety of the child" (*Shoshi v Vuksani*, 2013 ONCJ 459 at para 50; CTR at p 75).

[21] Another area in which the Officer failed to address evidence was with respect to the finding that no community in Albania would have an interest in this matter (Decision at p 5). Once again, the Officer failed to address contrary evidence, including from a Canadian court: the

BC Provincial Court accepted the evidence that Vuksani had called family members in Albania during the attack of Gjon, who in turn called the Applicant. While of course it is always open to a decision-maker to discount evidence, here the Officer did not address this evidence or explain why it was discounted. Likewise, the Officer did not address the evidence of text messages received by the Applicant from unknown persons in Albania, which were reported to the RCMP.

[22] As to the finding that Vuksani does not adhere to traditional Albanian law and therefore the risk to the Applicant is minimal (Decision at p 5), the Officer relied on portions of the evidence provided by the accused in his criminal trial, when attempting to exonerate himself. According to the Court, this was an attempt at a defense that lacked credibility and was ultimately discounted as having "absolutely no air of reality".

[23] Again, the Officer's conclusion fails to address the fact that the risk alleged was only partially in relation to the alleged adultery and consequences. It was equally due to threatened reprisals arising from the Applicant's testimony in the criminal proceedings. The Officer's conclusions about this not being a traditional blood feud, on its face, fails to address what clearly flowed from Vuksani's attempt to settle the score in Canada – whether one calls it a traditional Albanian blood feud or, as the judge did, a "one-sided savage beating of [Gjon]".

[24] I also agree with the Applicant that the Officer engaged in speculation in finding that just because Vuksani inflicted injures on Gjon, this demonstrated that "he avenged the wrong" against the Applicant (Decision at p 5). That finding might have been reasonably made had the Officer provided a basis on which to do so, but that was not the case here.

[25] Finally, I agree with the Applicant that both the Officer's focus on the concept of a traditional blood feud and her state protection analysis, were unreasonable. This Court has previously warned against an overly formalistic definition of a blood feud (*Gjeta v Canada (Citizenship and Immigration)*, 2014 FC 905 at para 41).

[26] The Officer also focused her state protection analysis on efforts versus the effectiveness of those efforts. For example, the Officer notes that violence against a person is a crime under the *Albanian Criminal Code* with significant penalties and that the government "has mechanisms to investigate and punish abuse and corruption". This does not, however, address the adequacy of state protection in the context of honour killings. The state's own Ombudsman report commented on the inability of the state to protect victims of blood feuds, but this evidence was not referred to (see also *Plenishti v Canada (Citizenship and Immigration)*, 2017 FC 36 at para 14).

[27] Furthermore, in other evidence put before the Officer in these PRRA submissions but which went unaddressed in the Decision, blood feuds were raised as a concern in certain areas, particularly in the north of Albania and specifically in Shkodra, the city where the family in question - including the Applicant - came from (see, for instance, the Home Office's July 2016 report entitled *Country Information and Guidance, Albania: Blood Feuds*: CTR at pp 21, 23, 27).

[28] Indeed, the state protection analysis provided an imbalanced view of the one item of country condition evidence the Officer did rely on, namely a single U.S. Department of State [US DOS] report. Notably, the Officer quoted just a portion of that US DOS report, but omitted to address portions of that same report that address continued impunity and corruption in

Albanian law enforcement, as well as blood feuds (CTR at pp 54, 68). Where the Officer fails to consider and analyze relevant and contradictory evidence regarding the adequacy of state protection, specifically in the context of honour killings and blood feuds, the decision is unreasonable (see *Taho v Canada (Citizenship and Immigration)*, 2015 FC 718 at para 42; *Kapllaj v Canada (Citizenship and Immigration)*, 2015 FC 23 para 21).

[29] In sum, given the totality of the incidences of flawed analysis above, including findings made without reference to directly contradictory and relevant evidence, and based in part on speculation, the matter should be reconsidered afresh: *Rahimi v Canada (Citizenship and Immigration)*, 2017 FC 56 at para 14.

IV. Conclusion

[30] The determinative factual findings regarding risk in this matter are not defensible based on the record before the Officer, who failed to address key evidence that was contrary to the findings – including key comments from Canadian courts. These flaws merit redetermination, as they are central to the Officer's conclusion that there is no more than a mere possibility of risk to the Applicant's return to Albania.

[31] The application for judicial review is accordingly allowed. No questions were raised for certification, and none are merited.

JUDGMENT in IMM-91-17

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed. The decision is set aside and the matter sent back for redetermination by a different officer.

2. No question will be certified.

3. There is no award as to costs.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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