Federal Court  Cour fédérale

Date: 20180314

Docket: IMM-3749-17

Citation: 2018 FC 292

Ottawa, Ontario, March 14, 2018

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

NIK GJOKA

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is the judicial review of the decision of a Senior Immigration Officer ("Officer"), dated July 6, 2017, dismissing the Applicant's application for a Pre-Removal Risk Assessment ("PRRA") which application was made pursuant to s 112(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA").

[2] As described in the reasons below, I have determined that this application must be dismissed as the lack of an oral hearing did not give rise to a breach of procedural fairness and because the Officer's assessment of the evidence was reasonable.

Background

[3] The Applicant is a citizen of Albania. By a decision dated March 12, 2015, the Refugee Protection Division ("RPD") of the Immigration and Refugee Board of Canada found that the Applicant had failed to establish his personal or national identity. Given that there was no credible or trustworthy evidence upon which the RPD could make a favourable decision, it found, pursuant to s 107(2) of the IRPA, that there was no credible basis for the Applicant's claim. The Applicant brought an application for leave and judicial review of the RPD's decision which was dismissed by this Court on July 15, 2015. The Applicant then applied for a PRRA, the decision of the Officer which refused his application is the subject of this judical review.

Decision Under Review

[4] The Officer noted that the Applicant claimed to fear for his life because of a blood feud between his family and the Reka family, as well as a conflict between the Applicant's family and the Marku family. According to the Applicant, he would be targeted by these families if he returned to Albania.

[5] The Officer acknowledged the numerous country reports and the documentation submitted by the Applicant with his PRRA application. While some of those documents pre-

dated the RPD's decision, in the interests of fairness the Officer allowed all the documents into evidence as the RPD's decision turned on identity and did not consider the merits of the Applicant's claim. The Officer stated, for the purposes of the PRRA, that all evidence submitted was considered and assessed as there were no concerns as to the Applicant's identity.

[6] Upon review of the supporting documentation submitted by the Applicant, the Officer found many of the letters and information to be vague and lacking in detail. Ultimately, however, the determinative issue was state protection.

[7] The Officer concluded that the level of state protection in Albania is adequate. The Officer acknowledged that individuals involved in blood feuds were reluctant to turn to the police for assistance and that people chose to live in isolation as a result of them. However, while the situation remains imperfect, the documentary evidence supported that Albania is a free and democratic country, that the Albanian government's legislation and efforts to address police corruption, provide harsher penalties for persons who commit murder related to blood feuds and protection of victims of blood feuds is being implemented. The Officer found, based on the evidence, that the Applicant did not rebut the presumption of state protection as there were avenues of recourse available to him which, absent evidence to the contrary, the Applicant could reasonably seek in Albania should he chose to do so.

[8] The Officer concluded that the Applicant did not provide clear and convincing evidence that state protection for him in Albania is inadequate. Nor had he demonstrated that he had made meaningful efforts to utilize available avenues of state protection and that these were, or would

not be, forthcoming. Similarly, he failed to provide sufficient documentary evidence to demonstrate that he would face additional, forward looking personalized risks or harm if returned to Albania.

[9] As to the Applicant's request for an oral hearing, the Officer referenced s 113(b) of the IRPA and s 167 of the *Immigration and Refugee Protection Rules*, SOR/2002-227 ("IRP Regulations") and found, as the Applicant's credibility was not in question, the s 167 factors were not met. Therefore, an oral hearing was not required or held.

Issues and Standard of Review

[10] The Applicant submits that the Officer breached the Applicant's procedural right to a fair hearing, failed to reasonably assess the evidence of risk, and failed to conduct an individualized assessment of state protection.

[11] I would frame the issues as follows:

1. Did the Officer breach procedural fairness by denying the Applicant's request for an oral hearing?
2. Was the Officer's state protection analysis reasonable?

[12] While the jurisprudence remains divided on the standard of review applicable to a PRRA officer's decision respecting whether to hold an oral hearing (*Zmari v Canada (Citizenship and Immigration)*, 2016 FC 132 at paras 10-12 ("*Zmari*")), I have previously found that this is reviewable on the reasonableness standard as a PRRA officer decides whether to hold an oral hearing by considering the PRRA application against the requirements of s 113(b) of the IRPA

and the factors in s 167 of the IRP Regulations which is a question of mixed fact and law (*Chekroun v Canada (Citizenship and Immigration)*, 2013 FC 738 at para 40; *Seyoboka v Canada (Citizenship and Immigration)*, 2016 FC 514 at para 29; *Ibrahim v Canada (Citizenship and Immigration)*, 2014 FC 837 at para 6). I am not persuaded differently in this matter.

[13] The Officer's conclusion on state protection falls under the reasonableness standard as it involves questions of mixed fact and law (*Howard v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 780 at para 20; *Omid v Canada (Citizenship and Immigration)*, 2016 FC 202 at para 3; *Antoine v Canada (Citizenship and Immigration)*, 2015 FC 795 at para 11; *Benko v Canada (Citizenship and Immigration)*, 2017 FC 1032 at para 15 ("*Benko*"); *Hinzman v Canada*, 2007 FCA 171 at para 38).

Issue 1: Did the Officer breach procedural fairness by denying the Applicant's request for an oral hearing?

[14] The Applicant submits an oral hearing was mandated (*Singh v Canada (Employment and Immigration)*, [1985] SCJ No 11; *Zmari*; *Matingou-Testie v Canada (Citizenship and Immigration)*, 2015 FC 651 ("*Matingou-Testie*")) and, while the Officer's reasons suggest that in accepting the Applicant's identity this attenuated the need for an oral hearing, no explanation for why this would be the case was given. The failure to convene an oral hearing denied the Applicant's right to a fair hearing and is a breach of procedural fairness that must render the decision invalid (*Cardinal v Kent Institution*, [1985] 2 SCR 643 at para 23).

[15] The Applicant also submits the Officer's stated acceptance of the Applicant's identity and credibility cannot be reconciled with the Officer's actual assessment of the evidence. The Officer's comments on vagueness and the omission of details for almost every piece of corroborating evidence demonstrate the Officer's true skepticism of the Applicant's credibility. The Applicant submits that the Officer's findings regarding the insufficiency of evidence amount to a veiled credibility finding. Accordingly, an oral hearing should have been convened to address his credibility and the failure to do so was a breach of natural justice (*Majali v Canada (Citizenship and Immigration)*, 2017 FC 275 at paras 29, 31, 41-42 ("*Majali*"); *Zmari* at paras 18, 20).

[16] An oral hearing is not required in the normal course of deciding a PRRA application. However, s 113(b) of the IRPA states that a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required.

[17] The prescribed factors are set out in s 167 of the IRP Regulations:

167. For the purpose of determining whether a hearing is required under paragraph 113(b) of the Act, the factors are the following:	167 Pour l'application de l'alinéa 113b) de la Loi, les facteurs ci-après servent à décider si la tenue d'une audience est requise :
(a) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act;	a) l'existence d'éléments de preuve relatifs aux éléments mentionnés aux articles 96 et 97 de la Loi qui soulèvent une question importante en ce qui concerne la crédibilité du demandeur;
(b) whether the evidence is central to the decision with	b) l'importance de ces éléments de preuve pour la

respect to the application for protection; and	prise de la décision relative à la demande de protection;
(c) whether the evidence, if accepted, would justify allowing the application for protection.	c) la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.

[18] As I have previously addressed in *Majali*, this Court has examined s 113(b) of the IRPA and s 167 of the IRP Regulations and held that the latter is to be interpreted as a conjunctive test. Therefore, an oral hearing is generally required if there is a credibility issue regarding evidence that is central to the decision and which, if accepted, would justify allowing the application (*Strachn v Canada (Citizenship and Immigration)*, 2012 FC 984, citing *Ullah v Canada (Citizenship and Immigration)*, 2011 FC 221).

[19] In this matter, while the RPD denied the Applicant's claim on the basis of his failure to establish his identity and, therefore, a credible basis for his claim, the Officer stated that in the PRRA there were no concerns as to the Applicant's identity. The Officer also explicitly stated that because the Applicant's credibility was not in question the s 167 factors were not engaged and, for that reason, an oral hearing was not required.

[20] That said, such statements are not necessarily determinative. Nor can it be assumed that in cases where an officer finds that the evidence does not establish the applicant's claim that the officer has not believed the applicant (*Gao v Canada (Citizenship and Immigration)*, 2014 FC 59 at para 32). Accordingly, the Court must first determine whether a credibility finding was made,

explicitly or implicitly. That is, the Court must identify the true basis for the decision (*Matute-Andrade v Canada (Citizenship and Immigration),* 2010 FC 1074 at paras 31-32).

[21] In this matter I am not persuaded that the Officer was making veiled credibility findings. This is not a circumstance as in *Majali* where the officer was calling into question the authenticity of documents and the credibility of an applicant based on inconsistencies between statements in her sworn affidavit and the evidence under review. Rather, here the Officer assessed the documents in the context of his or her assessment of risk and whether state protection was available and had been or could be sought by the Applicant and did not compare them to the Applicant's affidavit or other sworn evidence. For example, as to a letter from a priest informing of the conflict between the Applicant's family and the Marku and Reka families and reconciliation attempts, as well as a letter from the Nationwide Reconciliation Mission, the Officer noted that these were issued by non-government bodies. The Officer found that while this established that the Applicant's family went to their church and the association, it did not support that they had rebutted the presumption of state protection in Albania.

[22] Further, the Officer found that it was unclear when the Applicant's family sought assistance from the police and no details were provided about their request for assistance being denied or when the Applicant's father and brother went into hiding or whether they are being sought by members of the Marku or Reka families. Nor did the University Hospital Centre attestation provide details as to how the Applicant's father sustained a fracture. Thus, it did not confirm that the Applicant's father sustained the injuries as a result of the conflict between his family and the Marku or Reka families. As to the documents dated after the Applicant's RPD

claim, such as a certificate from the alderman of Mabe Village, a letter from the Parish and a certificate from the Ministry of Internal Affairs, Lezhe Local Police Directorate, the Officer found that they were vague and lacking in detail, reiterated the events that initiated the conflicts but did not support that since April 2016 there have been further incidents involving the Applicant or his family in Albania. As to a letter from a neurologist recommending examination of the Applicant's mother for injury to her head and face, the letter did not state how the injury was sustained, nor was it clear that the letter was provided to the police to corroborate her claim of an assault. Further, although the police directorate stated that the case concerning the assault of the Applicant's mother was closed for lack of evidence, the fact that the report was issued suggested that the police were willing to investigate, but were unable to proceed further.

[23] Viewed in whole, the Officer's treatment of the Applicant's documents speaks to the assessment of the evidence of risk, forward looking personalized risk to the Applicant and whether state protection had been sought but was not forthcoming. Significantly, however, the Officer found that the determinative issue was state protection. The Officer accepted the Applicant's evidence as to the basis of his risk, a blood feud, but found there was adequate state protection and that the Applicant had failed to take reasonable measures to avail of it. The Officer did not make veiled credibility findings concerning the Applicant's state protection evidence, the Officer was simply not convinced (*Ferguson v Canada (Citizenship and Immigration)*, 2008 FC 1067 at para 27). Further, the Officer accepted the Applicant's identity for the purposes of the PRRA. Accordingly, as credibility was not at issue, the Officer did not err in failing to conduct an oral hearing and no breach of procedural fairness arises (*Homenszki v Canada (Citizenship and Immigration)*, 2017 FC 948 at para 6).

[24] The Applicant relies on *Matingou-Testie*, however, I find it to be distinguishable on its facts. There the officer made a credibility finding and failed to address and explain why a request for an oral hearing had not been provided, this was found to be fatal as it violated procedural fairness (*Matingou-Testie* at para 7). Here, however, the Officer specifically addressed the Applicant's request for an oral hearing and denied it on the basis that credibility was not in question in the PRRA. To be afforded an oral hearing in a PRRA, the IRP Regulations s 167 factors must be met and, in the absence of a credibility finding as in this matter, they do not become operative (*Zmari* at para 17; *Tekie v Canada (Minister of Citizenship and Immigration)*, 2005 FC 27 at para 16). Moreover, as noted above, s 113(b) of the IRPA states that a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required. If the prescribed factors are not met, the basis upon which the discretion may be exercised is absent.

[25] I agree with the Applicant that this is a somewhat unusual situation in that the Applicant has not been afforded an oral hearing at any level of his claim for protection. However, this Court has held that while the fact that a claimant has not had an oral refugee hearing can impact the reasonableness of the discretionary decision of whether to hold such a hearing, the potential availability of an oral hearing arises only when there is an issue of credibility such that s 113(b) of the IRPA and s 167 of the IRP Regulations are engaged (*AB v Canada (Citizenship and Immigration)*, 2017 FC 629 at para 19).

[26] Given my conclusion that the Officer did not make veiled credibility findings, whether the standard of review is correctness or reasonableness, the outcome is the same (see *Nadarajan*

v Canada (Public safety and Emergency Preparedness), 2017 FC 403 at paras 12-21 ("*Nadarajan*")).

Issue 2: Was the Officer's state protection analysis reasonable?

[27] The Applicant submits the Officer erred by failing to cumulatively assess the corroborative evidence of the risk faced by the Applicant and members of his family (*R v Uhrig*, 2012 ONCA 470 at para 13). This resulted in the Officer not properly considering the specific circumstances of the Applicant with respect to state protection. Further, the Officer also selectively copied from the documentary evidence without analyzing state protection for this individual applicant. Selectively relying on portions of the National Documentation Package ("NDP") to support a state protection finding is insufficient, especially in the Albanian context. Moreover, the Officer used two paragraphs of supposedly individualized analysis which were repeated almost verbatim in a prior decision made by the Officer. Copying and pasting paragraphs of evidence from the NDP and then copying and pasting analysis from a prior PRRA decision cannot be considered an individualized assessment of state protection. This is a fettering of discretion and an exercise of it in bad faith (*Baker v Canada*, [1999] SCJ No 39; *Roncarelli v Duplessis*, [1959] SCR 121).

[28] The Applicant also submits that the Officer failed to consider if the Albanian government's recent efforts to address blood feuds were genuinely available to the Applicant (*Galogaza v Canada (Citizenship and Immigration)*, 2015 FC 407 at para 12). Here, the Officer unduly emphasized Albania's status as a democratic state and its efforts to improve protections for persons embroiled in blood feuds without analysis of whether the state can genuinely protect

this particular Applicant. The Officer also provided no intelligible explanation for favouring evidence that Albania is increasing its effectiveness in addressing blood feuds over evidence that people are still in danger. Even recent comments from the Albanian Ombudsman claim efforts to prevent blood feuds are insufficient, which the Officer cites but does not comment on. Nor does the Officer explain why he accepted comments from the Albanian Ministry of Foreign Affairs which claims all feud motivated crimes are detected and perpetrators punished by the courts.

[29] States are presumed to be able to protect their citizens and the burden is on an applicant to provide relevant, reliable and convincing evidence to rebut the presumption of state protection (*Eros v Canada (Citizenship and Immigration)*, 2017 FC 1094 at para 44 ("*Eros*"); *Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 at paras 17-19; *Canada (Attorney General of Canada) v Ward*, [1993] 2 SCR 689 at 724-725). However, democracies exist along a spectrum and what is required for rebutting state protection will depend on where the subject country sits on that spectrum. For that reason, risk assessors must consider the evidence offered as to whether a country is able or willing to protect its citizens before concluding whether state protection is available to individuals in their country of origin (*Bozik v Canada (Citizenship and Immigration)*, 2017 FC 961 at paras 28-30; *Rodriguez Capitaine v Canada (Citizenship and Immigration)*, 2008 FC 98 at paras 20-22).

[30] It is not sufficient for an applicant to show that the government of the applicant's state of origin has not always been effective at protecting persons in his particular situation, the standard for state protection is not perfection (*Canada (Minister of Employment and Immigration) v*

Villafranca (1992), 99 DLR (4th) 334 at para 17; *Benko* at para 29). An assessment of the adequacy of state protection requires an assessment of not only the efforts made by the state, but the actual results. That is, its adequacy at the operational level (*Eros* at para 44; *Kovacs v Canada (Citizenship and Immigration)*, 2015 FC 337 at paras 66-67).

[31] I am not persuaded that the Officer failed to cumulatively assess the documents submitted by the Applicant to corroborate the risk faced by the Applicant and his family, thereby resulting in a failure to consider the Applicant's personal circumstances when assessing whether state protection would be available to him if sought.

[32] I also do not agree that the use of two paragraphs that were similar in form to a prior decision of the Officer demonstrates that he or she failed to individually assess state protection in this matter. Those paragraphs follow four pages of the decision within which the Officer sets out documentary evidence concerning blood feuds. The paragraphs are general in nature and speak to the Officer's conclusions on state protection in Albania with respect to blood feuds based on the documentary evidence. Thus, both decisions likely considered the same or similar documentary evidence and could potentially support the same conclusion. More significantly, the finding that an applicant has an obligation to make reasonable inquiries about the possibility of state protection and to avail of state protection mechanisms before seeking international protection is a general statement of the law applicable in many such cases. In my view, borrowing language from a prior decision made by the same Officer does not, in and of itself, establish that the Officer fettered his discretion (see *Cojocaru v British Columbia Women's Hospital and Health Centre*, 2013 SCC 30 at paras 49-50). Further, focusing exclusively on

these two paragraphs ignores the Officer's analysis regarding the Applicant's individual documents, which the Officer found lacked detail about engaging the police and failed to establish that he faces a forward looking risk if returned to Albania.

[33] The issue here is whether the Officer's conclusion on state protection is reasonable in light of the decision as a whole. Referencing the United States Department of State, Bureau of Democracy, Country Reports on Human Rights Practices for 2016 the Officer concluded that, while problems exist, Albania is a functioning democratic state and its level of democracy required the Applicant to demonstrate that he had made meaningful efforts to utilize available avenues of state protection and that these were or could not be forthcoming. This finding as to the democratic status of Albania was based on the evidence and I do not agree with the Applicant that the Officer overemphasised this point.

[34] In sum, the Officer considered the documentary evidence and concluded that the level of state protection available to the Applicant in Albania is adequate and that the Applicant had not rebutted the presumption of state protection. The Officer also considered the documents submitted by the Applicant but found that they did not establish that the Applicant had made reasonable inquiries about the availability of state protection nor that he faces a forward looking risk there. While the Applicant may disagree with how the Officer weighed the documents, it is not the role of this Court to reweigh the evidence when reviewing the decision for reasonableness (*Negm v Canada (Citizenship and Immigration)*, 2015 FC 272 at para 34; *Nadarajan* at para 25; *Kahsay v Canada (Citizenship and Immigration)*, 2017 FC 116 at para 32).

[35] Reasonableness is a deferential standard. In judicial review, reasonableness is concerned with the existence of justification, transparency and intelligibility within the decision-making process and also with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 para 47). In my view, the Officers decision falls within that range.

JUDGMENT IN IMM-3749-17

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. There shall be no order as to costs.

3. No question of general importance for certification was proposed or arises.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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