Federal Court Cour fédérale

Date: 20180712

Docket: IMM-5220-17

Citation: 2018 FC 726

Ottawa, Ontario, July 12, 2018

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

MYRTEZA BEBRI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Myrteza Bebri, is a 50-year-old citizen of Albania. He arrived in Canada in October 2014 and claimed refugee protection on November 23, 2014. In a decision dated April 18, 2017, the Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB] rejected his claim on several bases, including his credibility, the lack of a nexus to a Convention ground, and the availability of an internal flight alternative [IFA] in Tirana, the capital city of Albania. On May 8, 2017, the Applicant appealed the RPD's decision to the

Refugee Appeal Division [RAD] of the IRB. The RAD dismissed the appeal in a decision dated September 28, 2017 and, pursuant to paragraph 111(1) (a) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [*IRPA*], confirmed the RPD's decision. The Applicant has now applied under subsection 72(1) of the *IRPA* for judicial review of the RAD's decision. He asks the Court to set aside the RAD's decision and return the matter for redetermination by another member of the RAD.

I. Background

[2] The Applicant left Albania in 2014 following a dispute with his cousins over several hectares of forested land once owned by his grandfather. The conflict escalated after the Applicant's cousins began using the land illegally. When the Applicant and his brothers confronted them, the cousins threatened to kill them. Because the cousins are members of the governing Socialist Party [SP] and the Applicant and his siblings belong to the opposition Democratic Party [DP], the Applicant claims he cannot reasonably expect assistance from Albania's highly politicized police force.

[3] According to the Applicant, the conflict with his cousins began in 1992, when the governing DP instituted a law allowing citizens to apply for the return of land which had been nationalized under Albania's communist government. The Applicant and his brothers applied for the return of land which had belonged to their deceased grandfather. They were given three hectares of forest. The Applicant claims he has been attempting to obtain ownership documentation for this land since 1992, but has consistently been told by the authorities to wait.

[4] In 1997, the SP returned to power in Albania. At this time, the Applicant's cousins made a further claim on the land. The Applicant's brother, Asqeri, then left Albania for the United States on a green card lottery. The Applicant remained in Albania and became a DP Secretary in his hometown. He claims the SP began to persecute him at this time, and in September 2002 he went to the United States and made a refugee claim. That claim was rejected in 2004 and, after exhausting his appeals, he was deported to Albania in 2009, by which time the DP had returned to power.

[5] On his return to Albania, the Applicant discovered his cousins were using the property as their own. The Applicant sought assistance from the authorities, who ordered his cousins to stay away from the land and sent the police when the cousins did not obey. Many members of the cousins' family left Albania during this time, but returned in October 2011. The cousins began to build a barn and hired lumberjacks to cut trees on the property. This escalated into a physical fight between the Applicant and his brothers and the cousins' family, which led to police intervention. Subsequently, in November 2011, a member of the cousins' family threatened to kill the Applicant if he went to the authorities again. Following this threat, the Applicant left Albania on a false passport, travelling to Greece where he stayed for a few days, then passed through Italy and entered France, where authorities detained him in a camp. According to the Applicant, he did not believe he could claim refugee status in France because he was there illegally. He was then deported back to Albania.

[6] The SP returned to power in July 2013. The cousins again resumed their activities on the property, which led to further physical confrontations. The Applicant claims that because the SP

was in power, he had to receive medical treatment in his home and would receive no help from the police. He claims he could not hide in Tirana due to the small size of the country, his rural dialect and the fact that one of his cousins lives there.

II. The RAD's Decision

[7] In its decision dated September 28, 2017, the RAD considered the Applicant's contention that the RPD had ignored the role of politics in his dispute with his cousins. In support, the Applicant provided a letter allegedly from the DP of Albania, Korce region, and a certificate of his membership in the DP [collectively, the DP documents]. The RAD gave no weight to these documents, finding it would be reasonable to expect that a letter from a national political party would have letterhead and contact information. The RAD further found there was no evidence to prove the Applicant was directly persecuted by the SP or that he had actively sought protection from the police following the altercations with his cousins. Since there was no probative documentation to support the Applicant's contention that politics was the basis of his claim, the RAD determined that the alleged actions of his cousins were criminal in nature, rather than a blood feud, and thus there was no nexus to a Convention ground pursuant to section 96 of the *IRPA*.

[8] The RAD next considered the Applicant's submissions and documentary evidence to the effect that the code of blood feuds in Albania forbids killing a person in their home or apartment, and therefore the Applicant was not endangering himself by returning to his home town following his removal from France. The RAD gave no probative value to this evidence since the Applicant's claim was based on criminal activity rather than a blood feud. Because the Applicant

chose to return to his home town rather than claiming refugee protection in France, the RAD drew a negative credibility inference and found that such action on his part undermined his subjective fear of persecution.

[9] In reviewing the documentation presented for the claim, the RAD found no supporting documentation that the Applicant was a part owner of the property in Albania, and that he should reasonably have made an effort to acquire the documentation or give an indication as to why he could not. The RAD drew a negative inference from the lack of documentation to support his claim that he was a part owner of land in Albania. The RAD further found that, if the Applicant relinquished his claim to the property, there would be no reason for his cousins to continue to pursue him. In response to the Applicant's submission that the RPD had failed to consider his inability to obtain documentation about his property rights was the result of him not functioning at the level of another person due to his long history of depression and PTSD, the RAD found the document with respect to his poor functioning was not probative, and there was no indication that he or his counsel at the RPD hearing had asked for consideration because of this alleged condition.

[10] After summarizing the RPD's findings with respect to the proposed IFA in Tirana, the RAD considered the Applicant's contention that his cousins can act with impunity due to their political influence, and that if he registered in Tirana as required, the police could pass on that information to his cousins. To support this contention, the Applicant provided a document from the Swiss Refugee Council, stating that victims of blood feuds cannot safely relocate within Albania. The RAD assigned no probative value to this document since the Applicant was not

involved in a blood feud, and further noted that there was no evidence to support the cousins' SP membership or political influence or connections. The RAD observed that Albania is a functioning democracy, and while there were issues of police corruption, these were being addressed in a proactive way. The RAD noted that the Applicant had worked in construction and had provided no evidence to suggest he would be unable to find employment, housing, or treatment for his medical issues. Since the Applicant had a viable IFA in Tirana, the RAD concluded that he was neither a Convention refugee nor a person in need of protection, and dismissed the appeal.

III. Issues

[11] The Applicant's submissions raise a number of issues which can be summarized as follows:

1. What is the appropriate standard of review?
2. Did the RAD breach procedural fairness by raising new issues and failing to put them to the Applicant?
3. Was the RAD's decision unreasonable?

IV. Analysis

A. *Standard of Review*

[12] The standard for review of the RAD's decision is reasonableness (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35, [2016] 4 FCR 157). The reasonableness standard tasks the Court with reviewing an administrative decision for "the existence of

justification, transparency and intelligibility within the decision-making process" and determining "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 at para 47, [2008] 1 SCR 190). Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708). So long as "the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome"; nor is it "the function of the reviewing court to reweigh the evidence" (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61, [2009] 1 SCR 339 [*Khosa*]).

[13] The standard of review for an allegation of procedural unfairness is correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79, [2014] 1 SCR 502; *Khosa* at para 43). The Court must determine whether the process followed in arriving at the decision under review achieved the level of fairness required by the circumstances of the matter (*Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 115, [2002] 1 SCR 3). The analytical framework is not so much one of correctness or reasonableness but, rather, one of fairness and fundamental justice. As the Federal Court of Appeal recently observed: "even though there is awkwardness in the use of the terminology, this reviewing exercise is 'best reflected in the correctness standard' even though, strictly speaking, no standard of review is being applied" (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54,

[2018] FCJ No 382). This is particularly true in cases where the alleged breach is an unintentional omission rather than a deliberate procedural choice. In other words, a procedure which is unfair will be neither reasonable nor correct, while a fair procedure will be both reasonable and correct. Furthermore, a reviewing court will pay respectful attention to the procedures followed by a decision-maker and will not intervene except where they fall outside the bounds of natural justice (*Bataa v Canada (Citizenship and Immigration)*, 2018 FC 401 at para 3, [2018] FCJ No 403).

B. *Did the RAD breach procedural fairness by raising new issues and failing to put them to the Applicant?*

[14] The Applicant contends that when the RAD makes new findings based on the record which were not made by the RPD, it should give notice to the parties and provide an opportunity to respond. In the Applicant's view, the RAD raised numerous new issues in its reasons, and by denying him an opportunity or oral hearing to address these new issues it breached procedural fairness. In particular, the Applicant says the RAD raised a new credibility issue concerning his mental health, even though the RPD had accepted that he suffered from depression, PTSD and migraines, and that the RAD's finding on this issue entitled him to an oral hearing. The Applicant further says the RAD's rejection of the DP documents was based on its specialized knowledge, giving rise to an obligation to provide him with notice that this specialized knowledge was being relied upon. According to the Applicant, his sworn testimony is presumed to be true, and the RAD's refusal to provide him with an oral hearing to address the credibility of his testimony, notably that his cousins were members of the SP, was a denial of procedural fairness.

[15] The Respondent argues that each of the purported new issues raised by the Applicant were either addressed by the RPD or included in his own submissions to the RAD. According to the Respondent, new issues in the context of refugee claims include elements of sections 96 and 97 of the *IRPA* such as an IFA or a *sur place* claim, rather than individual findings of fact or weighing of evidence, and a matter raised by an applicant on appeal or by the RPD is not a new issue. The Respondent says the RAD may independently assess the evidence and make independent credibility findings, and may independently assess the materials in the RPD record even where they were not explicitly mentioned by the RPD. With respect to the Applicant's request for an oral hearing, the Respondent notes the RAD Rules provide that an oral hearing is exceptional in RAD proceedings, and in order to be granted an oral hearing an applicant must make detailed submissions and file new evidence to meet the requirements of subsection 110(6) of the *IRPA*. The Respondent also notes the Applicant explicitly stated he would not be providing additional evidence and made no submissions as to why an oral hearing was warranted beyond making a bald statement that he was requesting an oral hearing.

[16] In my view, the Applicant's argument that the RAD breached procedural fairness by raising new issues and failing to put them to him or to grant an oral hearing is without merit. None of the issues raised in this regard by the Applicant is a new issue in respect of which the RAD ought to have afforded the Applicant an opportunity to be heard. The issues raised by the Applicant as being new issues were either addressed by the RPD or raised by his own submissions to the RAD. The RAD may independently assess the documentary evidence or make credibility findings (see: *Bakare v Canada (Citizenship and Immigration)*, 2017 FC 267 at para 19, [2017] FCJ No 247; *Tan v Canada (Citizenship and Immigration)*, 2016 FC 876 at

paras 36 to 41 and 46 to 49, [2016] FCJ No 840; *Oluwaseyi Adeoye v Canada (Citizenship and Immigration)*, 2018 FC 246 at paras 11 to 15, [2018] FCJ No 295; *Marin v Canada (Citizenship and Immigration)*, 2018 FC 243 at paras 35 to 38, [2018] FCJ No 266).

[17] This is not a case where the RAD raised a new question or issue and identified additional arguments and reasoning, going beyond the RPD decision under appeal, without affording the appellant an opportunity to respond to them (*Kwakwa v Canada (Citizenship and Immigration)*, 2016 FC 600 at paras 25 and 26, 267 ACWS (3d) 676). Nor is this case like *Jianzhu v. Canada (Citizenship and Immigration)*, 2015 FC 551 at paras 7 and 12, [2015] FCJ No 527, where the Court found the RAD's decision unreasonable because it had raised and decided the issue of an applicant's *sur place* refugee claim when that issue had not been determined by the RPD or raised by the appellant on the appeal to the RAD. To similar effect is the Court's decision in *Ojarikre v. Canada (Citizenship and Immigration)*, 2015 FC 896 at paras 20 to 23, 37 Imm LR (4th) 56, where the RAD's decision was set aside because it had raised and decided the issue of an IFA which had not been raised by either party before the RAD and the RPD had made no determination on the issue.

[18] In this case, none of the issues raised by the RAD diverge in any substantial or material way from the RPD's findings or from the Applicant's submissions to the RAD. There was no violation of procedural fairness in raising issues with the Applicant's own documentary evidence. Furthermore, since the Applicant here did not submit any new evidence or provide submissions to the RAD as to why he should be granted the exceptional measure of an oral hearing, there was no breach of procedural fairness not to grant him one.

C. *Was the RAD's decision unreasonable?*

[19] The Applicant claims the RAD made a number of findings which are unsupported by the evidence, noting that an applicant's testimony is presumed to be truthful in the absence of any reason to doubt its veracity. According to the Applicant, the RAD ignored his testimony and the DP documents which attested that SP-aligned police officers would help his cousins kill him. In the Applicant's view, the RAD unreasonably focused on an overly formalistic definition of a blood feud, and the multiple physical altercations with his cousins bring the dispute within a broad definition of a blood feud (under which he could not be harmed in his home).

[20] The Applicant says a refugee's temporary return to a country where persecution is feared should not result in loss of refugee status. The Applicant submits the RAD failed to consider his submissions that he did not claim refugee protection in France because he did not believe he could legally do so and that he was returned to Albania against his will. The Applicant argues that the RAD also failed to consider his explanations as to why he had no supporting property documentation, including that he had been told to wait every time he sought the documents and that his mental health issues increased his inability to obtain these documents. As for the RAD's finding that he could forsake his claim to the property, the Applicant states that his cousins hate him and are vindictive and that, in any event, he has no ability to renounce his claim to the property which is jointly owned with his brothers.

[21] With respect to the IFA, the Applicant maintains that the RAD refused to consider his evidence about blood feuds based on an error of fact that the conflict with his cousins was not a

blood feud and that, in any event, the documentation indicates there is no possibility of an IFA in Albania under any circumstance. In the Applicant's view, the RAD ignored his testimony that because of his identifiable accent, appearance, and the presence of one of his cousins in Tirana, the proposed IFA was not reasonable. The Applicant says the RAD's finding that Albania is a functioning democracy was unreasonable since it ignored evidence of corruption within its institutions.

[22] The Respondent says the Applicant's arguments amount to a request for the Court to re-weigh the evidence. With respect to the RAD's finding that there was no blood feud, the Respondent submits that this conclusion was reasonable in the absence of documentation to corroborate the Applicant's testimony. The Respondent argues that the RAD considered the relevant jurisprudence to the effect that victims of criminality, including vendettas, cannot generally establish a nexus to a Convention ground, and that it reasonably concluded in the absence of persuasive evidence to the contrary that the basis of the Applicant's claim was a property dispute rather than a blood feud.

[23] With respect to the RAD's alleged failure to consider the Applicant's explanations as to why he had no property documentation, the Respondent notes that the RAD specifically referred to those explanations and found the Applicant's mental health evidence in this regard was not persuasive. The Respondent further notes that the Applicant provided contradictory testimony to the RPD that an official determination on ownership of the property had been reached in the 1990s, but also testified that he could not provide documentation because his claim was still being processed. The Respondent contests the Applicant's argument that the RAD did not

consider his submissions that he was deported from France against his will, noting that it did in fact state he was arrested in France and returned to Albania.

[24] The Respondent says the RAD reasonably considered the lack of documentation to support the Applicant's contention that his cousins were SP members or had political connections, and reasonably concluded that this had not been established. In the Respondent's view, the RAD reasonably considered the Applicant's arguments in this regard and found he had not established that his persecutors would continue to pursue him in Tirana or that they had sufficient influence with the political party that they could act with impunity.

[25] I agree with the Respondent that the Applicant's arguments amount to a request for the Court to re-weigh the evidence before the RAD. This is not a basis upon which to allow the Applicant's application for judicial review. The RAD's finding that the Applicant's claim was a property dispute, rather than a blood feud, was reasonable in the absence of documentation to corroborate his testimony. Moreover, the RAD's determination that the Applicant had a viable IFA in Tirana was not unreasonable. Ultimately, the Applicant failed to discharge the onus upon him to persuade the RAD that he was the victim of a blood feud and that state protection would not be forthcoming in Tirana. His application for judicial review is therefore denied.

V. Conclusion

[26] In conclusion, I find that the RAD reasonably reviewed the RPD's decision and conducted its own independent analysis of the record before it. The RAD's reasons provide an

intelligible and transparent explanation for its decision to dismiss the Applicant's appeal, and the outcome is defensible in respect of the facts and the law.

[27] Neither party proposed a question of general importance for certification; so, no such question is certified.

JUDGMENT in IMM-5220-17

THIS COURT'S JUDGMENT is that: the application for judicial review is dismissed; and no question of general importance is certified.

"Keith M. Boswell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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