

Federal Court



Cour fédérale

**Date: 20181214**

**Docket: IMM-1358-18**

**Citation: 2018 FC 1265**

**Ottawa, Ontario, December 14, 2018**

**PRESENT: The Honourable Mr. Justice Favel**

**BETWEEN:**

**DAVID KERDIKOSHVILI**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] This is an application for judicial review filed pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [IRPA] against a decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada [Board], dated March 2, 2018. The RAD confirmed the decision of the Refugee Protection Division [RPD], determining that the Applicant is neither a Convention Refugee nor a person in need of

protection within the meaning of sections 96 and 97(1) of the IRPA, pursuant to section 111 of the IRPA. The application for judicial review is dismissed.

## II. Background

[2] The Applicant, aged 34, is a citizen of Georgia who fears persecution in his country due to his Ossetian nationality. The Applicant left Georgia on October 14, 2015, and arrived in Canada on February 19, 2016, where he filed for asylum. In his Basis of Claim [BOC] Form, the Applicant describes several incidents that have occurred to him since 2008. On July 11, 2016, the RPD found that the Applicant was neither a Convention refugee nor a person in need of protection. The RAD dismissed the Applicant's appeal and upheld the RPD's decision in a decision dated November 8, 2016. This decision of the RAD was set aside by the Federal Court for a re-determination of the matter by a different member of the Board on June 6, 2017.

### A. *The RPD Decision*

[3] The Court endorses Justice Strickland's summary of the RPD's decision dated July 11, 2016, in *Kerdikoshvili v Canada (Citizenship and Immigration)*, 2017 FC 555, at paragraph 3

[*Kerdikoshvili*]:

The Applicant claimed that he had suffered five attacks because of his ethnicity between 2008 and 2015. The RPD conducted a review of the objective documentary evidence and found, on a balance of probabilities, that it offered insufficient proof that Ossetians are persecuted in Georgia. The RPD also found that in three of the incidents the Applicant was not attacked because of his Ossetian ethnicity. And, while the other two attacks may have been based on his ethnicity, both were dealt with appropriately by the police. Further, they were isolated incidents which, even taken together, did not rise to the level of persecution given the lack of

supporting objective evidence. The RPD also found that while the Applicant's loss of a job because of his Ossetian ethnicity was discriminatory, it was not evidence of persecution. Further, after one of the attacks the police came to the hospital to interview the Applicant. When he was released from hospital he followed up with the police and was told that the investigation was still in progress. The Applicant did not follow up again. The RPD found that it could not conclude that the police were unwilling to assist the Applicant as his evidence was that they were investigating the complaint. In the second incident the Applicant claimed that he was attacked by a customer because of his Ossetian ethnicity. The RPD noted his evidence that, within 30 seconds, the police broke up the fight and that no one was injured. It found, although charges were not laid, that this was a reasonable response. Given the police investigation and intervention, the Applicant had not provided clear and convincing evidence of the state's inability to protect him and, therefore, had not rebutted the presumption of state protection.

### III. The RAD Decision

[4] The matter was reheard by a differently constituted panel of the RAD on February 22, 2018. It is this decision of the RAD dated March 2, 2018, that is the subject of the present application for judicial review. The RAD confirmed the RPD's decision and dismissed the appeal, determining that the Applicant failed to rebut the presumption of state protection.

[5] The RAD found that the state protection was the determinative issue as the RPD had previously found in its decision that there were no credibility issues. The RAD found that Georgia is a democratic state based on the documentary evidence. The RAD then noted that the Ministry of Internal Affairs is responsible for enforcing the law and controlling the police force. After considering the country conditions on Georgia, the Board concluded that "[w]hile there are some reports of security forces committing abuses with impunity, the overall reports are that the security forces are generally considered effective and operate within the confines of the law".

The RAD determined that the Applicant did not rebut the presumption of state protection “given the level of democracy in Georgia”.

[6] The RAD also noted that the documentary evidence presented on file did not indicate any aggression or oppression against Ossetians in Georgia. The RAD made reference to the European Commission against Racism and Intolerance Report, Council on Europe, published on March 1, 2016, and cited legal provisions that intended to prohibit discrimination and allow the Public Defender, “an independent institution elected by Parliament” and “authorized to examine complaints from natural and legal persons” and to “investigate cases on his/her own initiative”.

[7] Further, the RAD noted that the police did in fact investigate the incidents alleged by the Applicant, however, it is the Applicant who failed to follow up with the results of the investigations and failed to reach out to other authorities for recourse. According to the RAD, the Applicant is a well-educated man who was easily able to find employment and housing in Georgia, despite the allegations of persecution due to his ethnicity. The RAD therefore concluded that “[t]he incidents during his employment are not indicative of persecution, rather discrimination”, as the documentary evidence only seemed to point out some language discrimination.

#### IV. Issue

[8] The parties agree, and the Court concurs, that the sole issue to be determined in the present matter is whether the RAD’s decision is reasonable in its analysis on state protection. The RAD’s assessment of state protection raises a question of mixed fact and law that is to be

reviewed under the reasonableness standard of review (*Kerdikoshvili*, Federal Court decision dated 2017 at para 6). In reviewing the RAD's decision, the Court must not intervene in the matter if the decision falls in the "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 [*Dunsmuir*]).

V. Analysis

[9] For the following reasons, the application for judicial review is dismissed.

A. *Is the RAD's decision reasonable in its analysis on state protection?*

[10] The Applicant argued that the RAD ignored relevant evidence in making its finding on the "democracy spectrum" of Georgia. The Applicant submitted that the country conditions evidence shows that Georgia does not rank high on the democracy spectrum, particularly because there are "significant shortcomings in the administration of justice". According to the Applicant, the RAD erred in finding that he faced a high burden in rebutting the presumption of state protection simply because it found that "Georgia is a democratic country". The Court notes that the Applicant presented similar submissions before this Court in *Kerdikoshvili*, as well as in his Memorandum of Argument before the RAD.

[11] The Court cannot accept this argument. The RAD did not err in determining that a "refugee claimant's burden of proof is directly proportional to the level of democracy in the state in question: the more democratic the state's institutions, the more the refugee claimant must have

done to exhaust all courses of action open to them” (*Kadenko v Canada (Minister of Citizenship and Immigration)*, [1996] FCJ No 1376, 68 ACWS (3d) 334 at para 5).

[12] Based on the country conditions evidence, the RAD reasonably found that Georgia is a democratic state. The Applicant argued that Georgia does not rate high on the democracy spectrum and that the RAD conducted a simplistic analysis of the country conditions. The objective evidence on Georgia does not contradict the RAD’s finding. According to the Country Reports on Human Rights Practices for 2015, the government is accountable to parliament and the constitution of Georgia has an executive branch, a unicameral parliament and a separate judiciary. The following passages found in the Certified Tribunal Record demonstrate that Georgia is in fact a democratic country:

**a. Arbitrary or Unlawful Deprivation of Life**

The government continued to conduct investigations into several killings allegedly committed by former government officials. [...] On October 13, the prosecutor of the International Criminal Court (ICC) requested authorization from the ICC’s judges to initiate an investigation into alleged war crimes and crimes against humanity committed related to the 2008 war in South Ossetia.

**d. Arbitrary Arrest or Detention**

Prosecutors are required to investigate police use of force when a detainee sustains injuries during an arrest when information about a possible violation is received, even if from an anonymous source. If prosecutors conclude after investigation that charges are not warranted, their decision may be appealed to a higher level with the office.

**Section 3. Freedom to Participate in the Political Process**

The constitution and law provide citizens the ability to choose their government through free and fair periodic elections based on universal and equal suffrage. Citizens exercised that right, although some problems persisted.

### **Section 5. Governmental Attitude Regarding International and Nongovernmental Investigation of Alleged Violations of Human Rights**

The law charges the prosecutor general with protection of human rights and fundamental freedoms. The human rights unit of the Office of the Chief Prosecutor monitored overall prosecution and supervision of compliance with national and international human rights standards. The unit reviewed statistical and analytical activities within the prosecution system and was responsible for considering and responding to recommendations of national and international institutions involving human rights.

[13] As for the assessment of the adequacy of state protection, the Court finds that the RAD carefully reviewed the entire evidence before it and made an appropriate assessment of the objective evidence, given that “[t]he weighing of evidence is at the heart of the RAD’s expertise” (*Csoka v Canada (Citizenship and Immigration)*, 2016 FC 1220 at para 12). After reviewing the documentary evidence, the Court is also of the view that the RAD did not err in its analysis on state protection. For instance, evidence clearly shows that in a democratic country such as Georgia, although there was progress on judicial reforms, problems still occurred with regard to judicial independence. The Court notes that the RAD did consider the evidence on file as it acknowledged that “[n]o government is expected to guarantee perfect protection to all of its citizens at all times”.

[14] As determined by the RAD, the onus is on the Applicant to rebut the presumption of adequate state protection with clear and convincing evidence of the state’s inability to protect its citizens (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689). The Respondent argued that the Applicant simply did not provide enough evidence to rebut the presumption.

[15] The RAD further stated that the documentary evidence is silent on any “aggression or violence against Ossetians”. The Court agrees. In both of the incidents alleged by the Applicant, the police intervened and commenced investigations. According to the RAD, the police did provide support in a time of need and, even then, the Applicant had recourse to other authorities if he felt that his incident was not fairly treated by the authorities due to his Ossetian ethnicity. The documentary evidence shows that the Public Defender has the power to hear cases of alleged discrimination and decide whether the Applicant is a victim of discrimination. The Public Defender can also make a recommendation on ways to reinstate the violated equality. “The constitution provides for fundamental equality before the law, and a variety of laws or regulations contain antidiscrimination provisions”. The RAD did not err in finding that progress has been made in Georgia in a number of fields. The Court therefore agrees with the RAD that the Applicant failed to rebut the presumption of state protection with clear and convincing evidence as he did not seek help from other agencies after alleging that the police did not assist him.

[16] The Court finds that “the RAD made an independent assessment of the evidence, as shown in the reasons, and that the finding on the availability of state protection was reasonable given the documentary evidence in the record” (*Kroj v Canada (Minister of Citizenship and Immigration)*, 2016 FC 1071 at para 43). The Court reiterates the conclusion found in *Sandoval v Canada (Minister of Citizenship and Immigration)*, 2008 FC 868, at paragraph 16:

The Federal Court of Appeal in *Carrillo [The Minister of Citizenship and Immigration v Flores Carrillo, 2008 FCA 94]* held that one seeking to rebut the presumption of the adequacy of state protection must adduce "relevant, reliable and convincing evidence" which, on the balance of probabilities, satisfies the trier of fact that the state protection is inadequate. Where, as in this



case, protection was sought and provided, an applicant will have a challenge to show that it was an aberration unless there has been some material change in personal or state circumstances. Here there was no such evidence.

[17] For these reasons, the Court is persuaded by the arguments of the Respondent and concludes that the RAD's assessment on state protection is reasonable. The RAD's decision, therefore, falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir* at para 47).

#### VI. Conclusion

[18] The application for judicial review is dismissed. No question of general importance will be certified.

**JUDGMENT in IMM-1358-18**

**THIS COURT'S JUDGMENT is that** the application for judicial review is dismissed.

There is no question of general importance for certification and none arises.

“Paul Favel”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-1358-18

**STYLE OF CAUSE:** DAVID KERDIKOSHVILI v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** OCTOBER 4, 2018

**JUDGMENT AND REASONS:** FAVEL J.

**DATED:** DECEMBER 14, 2018

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