

Federal Court



Cour fédérale

Date: 20200525

Docket: IMM-6364-18

Citation: 2019 FC 1032

Ottawa, Ontario, May 25, 2020

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

NIKOLL PECAJ

Applicant

and

THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

Respondent

AMENDED JUDGMENT AND REASONS

[1] The Applicant, Mr. Pecaj seeks judicial review of the Refugee Appeal Division's decision that found him not to be a Convention refugee or a person in need of protection. For the reasons that follow, his application for judicial review will be dismissed.

I. Background

[2] Mr. Pecaj is a Catholic man from Shkoder, Albania. He began dating a Muslim woman. His partner's family disapproved of her being with someone of a different religion. Mr. Pecaj received death threats from her parents, and was assaulted by her brother, resulting in Mr. Pecaj going into hiding in Tirana, Albania.

[3] In Tirana, Mr. Pecaj approached the police. The Officer he spoke with informed him that the police were unable to help since the incident occurred outside their jurisdiction (i.e. in the city of Shkoder). Mr. Pecaj then requested to speak to a superior in the Tirana police force, but his request was denied. Instead, he was encouraged to seek help from the police in Shkoder. Mr. Pecaj states that he refused to do so because he feared his partner's relatives, who at the time worked for the Shkoder police, and a prison in the area.

[4] Mr. Pecaj later learned of other threatening actions taken by his partner's relatives against his family in Shkoder. As a result, Mr. Pecaj came to Canada in August 2017 seeking refugee protection, fearing persecution by his partner's family in Albania. The Refugee Protection Division [RPD] found Mr. Pecaj credible, but rejected his claim on the basis of state protection. Mr. Pecaj appealed that decision to the Refugee Appeal Division [RAD].

II. Decision Under Review

[5] In its December 4, 2018 decision [Decision], the RAD denied Mr. Pecaj's appeal, also on the basis of state protection. The RAD found that he only sought assistance from the police in

Tirana, without advising of what he stated were his partner's family connections to the police in Shkoder. Furthermore, the RAD did not accept Mr. Pecaj's explanation of why he did not approach other authorities in the six months that he remained in Albania, including the prosecutor or ombudsman. Even though there is evidence that Albania's efforts have not always resulted in effective protection, the RAD found that Mr. Pecaj did not provide clear and convincing evidence that any weaknesses in state protection would apply to him if he were to fully apprise the authorities of his situation.

III. Issues and Standard of Review

[6] The Applicant raises two issues. First, he asks the Court to find that the RAD breached its duty of procedural fairness by failing to afford him an opportunity to properly respond to its concerns. Second, he argues that the Decision was unreasonable.

[7] The parties appropriately agree that the procedural fairness issue is to be reviewed on a standard of correctness (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 34). As concerns the state protection findings, the RAD's assessment of the evidence and findings involving a consideration of questions of mixed fact and law are reviewed against a standard of reasonableness and thus owed deference by this Court (*Zhang v Canada (Citizenship and Immigration)*, 2019 FC 870 at para 9).

IV. Analysis

Issue 1: Procedural Fairness

[8] Mr. Pecaj argues that the RAD breached its duty of procedural fairness by not affording him the opportunity to respond to its concerns that he did not inform the Tirana police of the family connection to the Shkoder police, which the RAD ultimately found was “fatal” to his case.

[9] Mr. Pecaj further argues that the RAD recognized why he would not seek police protection in Tirana due to his concerns regarding the risks in reporting to the police in Shkoder, but concluded that there is no evidence that the family has the same connections in Tirana, thereby completely ignoring the evidence on this point. Mr. Pecaj argues that this was an error; an applicant’s testimony is presumed to be true, and if the Board preferred other evidence over it, it should have given a clear explanation for doing so: *Csoke v Canada (Citizenship and Immigration)*, 2015 FC 1169 [*Csoke*] at para 17.

[10] In short, Mr. Pecaj contends that the RAD unfairly based its decision on negative credibility findings, and in addition, based its refusal on newly raised issues.

[11] I cannot agree with Mr. Pecaj that there was any unfairness in the RAD’s Decision on either of these points. Mr. Pecaj raised the same concerns regarding state protection before the RPD, which addressed his arguments. He raised them once again before the RAD, adducing no new evidence. The RAD was therefore neither examining new issues, nor making negative

credibility findings. Rather, the RAD fairly - and in my view reasonably - found Mr. Pecaj's evidence to be insufficient to overcome the presumption of state protection. That segues into the second issue raised by Mr. Pecaj, namely the reasonableness of the RAD's state protection determination.

Issue 2: Reasonableness of the State Protection Determination

[12] Mr. Pecaj argues that the RAD recognized that he would not seek further police protection in Tirana, given his concerns regarding the risk in reporting to the police in Shkoder. I disagree. Rather, the RAD only found that it was "understandable why [he] would chose [sic] to approach authorities in Tirana rather than in Shkoder because of his concerns that those whom he fears have employment links to police in Shkoder." However, the RAD never accepted Mr. Pecaj's stated fear as conclusive or sufficient evidence that the family had ties to the Tirana police.

[13] The RAD's finding was consequently not one of credibility, but rather of sufficiency of evidence. Indeed, the RAD did not ignore Mr. Pecaj's testimony of his fear that his partner's family would have connections with the Tirana police, finding "no evidence that [her] family have the same connections in Tirana that they have in Shkoder."

[14] The RAD is not required to accept every conclusion put forward by a claimant simply because he or she is considered generally credible, or if credibility is not at issue: *Jimenez v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 1225 at paras 19–20.

[15] Mr. Pecaj further submits that the RAD unreasonably adopted the RPD's finding on state protection including that he ought to have disclosed to the Tirana police the family connection, and should have taken further action after his only request to speak to a superior was denied. This, he contends, caused the RAD to find a lack of personalized evidence to corroborate his concerns, which the RAD found was "fatal" to his state protection argument. He argues that the RAD failed to explain why, given his credible testimony that he was afraid disclosing the family connections would put him at risk; his failure to do so was fatal to his claim.

[16] In addition, Mr. Pecaj submits the RAD unreasonably expected him to rely on non-police agencies, namely the ombudsman or prosecutors, for state protection; institutions other than the police force, such as other governmental or private institutions, are presumed not to have the means or the mandate to protect citizens: *Csoka v Canada (Citizenship and Immigration)*, 2016 FC 1220 [*Csoka*] at para 20.

[17] Mr. Pecaj further argues that the RAD erred in requiring him to risk his life seeking ineffective state protection by disclosing his partner's family ties: *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 [*Ward*]. This, he claims, was done, in spite of supporting evidence, including Albania's corruption concerns discussed by both the RPD and RAD. He also points to evidence that Albanian police are ineffective in addressing blood feuds, and personal connections can influence law enforcement. All of the above, according to Mr. Pecaj, clearly demonstrates that state protection is not available to him in Albania on a balance of probabilities.

[18] I cannot accept Mr. Pecaj's position. The RAD's determinative state protection analysis was justifiable and rational in light of the law and legal test, and therefore reasonable.

[19] First, there is no merit to Mr. Pecaj's assertion that the RAD merely adopted the RPD's analysis. It is clear from the decision that the RAD applied a standard of correctness in its review of the RPD decision, and did not defer to the RPD, not finding it to be in a position of meaningful advantage. The RAD undertook a complete review of the evidence, including the actions taken by Mr. Pecaj in Albania, and independently concluded that he did not rebut the presumption of state protection. Reaching the same outcome as the RPD does not mean that the RAD uncritically adopted its analysis, particularly when the RAD appropriately proceeded under a correctness review and assessed the evidence on its own terms.

[20] There is also no merit to the argument that the RAD misapplied the law: rather, it correctly applied the "operational effectiveness" test for state protection. It cited *Ward* and numerous other leading cases in setting out and applying the state protection doctrine.

[21] With respect to the situation in Albania, the RAD acknowledged that efforts have not always resulted in effective protection, but found that Mr. Pecaj did not provide clear and convincing evidence that any weakness in state protection applied to him, or would apply to him if he were to fully apprise the authorities of his situation.

[22] While it is true that a state which has the ability - but not the willingness - to protect an individual cannot be found to provide sufficient state protection, Mr. Pecaj did not establish that

this situation applied to him. For instance, it cannot be said that the police were unwilling to act when he failed to share key information with them. Similarly, contrary to Mr. Pecaj's submission, the RAD did not require him to put himself at risk in order to avail himself of state protection. The RAD acknowledged that it was understandable not to seek assistance from the Shkoder police, but reasonably observed that there was no persuasive evidence on the record of ties to the Tirana police beyond Mr. Pecaj's speculative testimony on the point. For instance, when asked by his counsel at the RPD hearing whether Tirana police cooperate with other Albanian police forces, Mr. Pecaj responded "I am not sure, but I believe yes".

[23] Finally, regarding external organizations and protection, Mr. Pecaj relies on cases such as *Csoke*, where Justice Fothergill held at para 20, that "the police force is presumed to be the main institution mandated to protect citizens, and that other governmental or private institutions are presumed not to have the means nor the mandate to assume that responsibility" (see also *Csoka* at para 20). Here, reference to other agencies in the Decision was simply one observation in the RAD's overall determination that Mr. Pecaj had not taken all reasonable steps to seek state protection with those he needed to – i.e. the police. The RAD wrote:

[24] ... I find the failure of the Appellant to transparently advise authorities in Tirana about his concerns about the connections between [his Partner's] family and police in Shkoder and to press for the intervention of higher authorities to be fatal to the Appellant's argument in regard to the availability of state protection.

[25] The Appellant argues that the RPD finding that the Appellant made no further attempts to report incidents to authorities following his initial attempt at making a report is "erroneous." However the Appellant has not established that the additional incidents reported in his evidence to the RPD were ever subsequently reported to police in Albania. I find no error on the part of the RPD panel and no merit in the Appellant's argument in this regard.

[24] In other words, the RAD (and the RPD before it) found that Mr. Pecaj's failure to be transparent, and to follow up with the police over the ensuing months while he remained in the country and continued to encounter incidents, were fatal to his claim. It was open to the RAD to find that one attempt to seek out state protection, under all the circumstances, was insufficient.

[25] Finally, Mr. Pecaj's submission that the RAD ignored evidence as to why he was unwilling to seek police protection in Shkoder is not accurate. In fact, the RAD specifically found it understandable for him not to do so. The RAD amply addressed both the personal testimony of Mr. Pecaj relating to his subjective fear, and considered that evidence in light of the available objective evidence.

V. Conclusion

[26] The RAD's decision is reasonable. There is no basis for this Court to intervene. I further agree with the parties that no question arises for certification. The application for judicial review is accordingly dismissed.

JUDGMENT in IMM-6364-18

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.
2. No questions for certification were argued, and I agree none arise.
3. There is no award as to costs.

"Alan S. Diner"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6364-18

STYLE OF CAUSE: NIKOLL PECAJ v THE MINISTER OF CITIZENSHIP
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DATE OF HEARING: JULY 18, 2019

JUDGMENT AND REASONS: DINER J.

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