Federal Court  Cour fédérale

Date: 20200527

Docket: IMM-5056-19

Citation: 2020 FC 645

Ottawa, Ontario, May 27, 2020

PRESENT: THE CHIEF JUSTICE

BETWEEN:

DRITON ASLLANI
MIRLINDA ASLLANI
ARMINA ASLLANI

Applicants

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS
(Delivered orally)

I. Background

[1] There are two issues in this Application.

[2] The first is whether the Refugee Appeal Division [the **"RAD"**] of the Immigration and Refugee Board erred in finding that Refugee Protection Division [the **"RPD"**] was correct in

concluding that the Applicants had not established a nexus to a ground of refugee protection set forth in s. 96 of the *Immigration and Refugee Protection Act* [the **"IRPA"**].

[3] The second is whether the RAD erred in finding that the RPD was correct in concluding that the Applicants had not demonstrated that adequate state protection at the operational level is unavailable in Italy or in Kosovo.

[4] For the reasons that follow, this Application will be dismissed.

II. **Standard of Review**

[5] The two issues raised in this Application are questions of mixed fact and law. Therefore, the applicable standard of review is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 23 and 69 ["***Vavilov***"]; *Bakos v Canada (Minister of Citizenship and Immigration)*, 2016 FC 191 at para 19.

[6] When reviewing a decision on a standard of reasonableness, the Court must approach the decision with "respectful attention" and consider the decision "as a whole": *Vavilov*, above, at paras 84-85. Its review will be "concerned with *both* outcome *and* process": *Vavilov*, above, at para 87. In this regard, the Court will assess whether the decision is appropriately justified, transparent and intelligible. In other words, it will consider whether it is able to understand the basis upon which the decision was made and then to determine whether it "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law": *Vavilov*, above, at paras 97 and 86.

[7] A decision which is appropriately justified, transparent and understandable is one that reflects "an internally coherent and rational chain of analysis" and "is justified in relation to the facts and the law that constrain the decision maker": *Vavilov*, above, at para 85. It should also reflect that the decision maker "meaningfully grapple[d] with key issues or central arguments raised by the parties": *Vavilov*, above, at para 128.

III. **Analysis**

[8] I note at the outset that Mr. Asllani has not challenged the RAD's acceptance of the RPD's finding that he is excluded from refugee protection by virtue of Article 1E of the *United Nations Convention Relating to the Status of Refugees*, because he has a status that grants him unlimited stay and basic rights in Italy. The RAD accepted that finding after noting that Mr. Asllani had not contested this aspect of the RPD's decision. The RAD nevertheless added that it had reviewed the RPD's analysis of that issue, and was in agreement with it.

A. *Nexus*

[9] I will now turn to the nexus issue. In support of his claim for refugee protection, the Principal Applicant, Mr. Asllani alleged that someone named Alban had threatened to kill him after he refused a job offer that would have required him to deliver drugs, including between Kosovo and Italy.

[10] Mr. Asllani then explained that Alban had threatened to kill him after Mr. Asllani hit Alban with a chair, injuring him severely. Later in his Basis of Claim Form, he added that Alban

"threatened to destroy my existence as a result of the damage I had caused to his life." In this regard, Mr. Asllani added that Alban had been arrested and detained for two months in Italy after the police discovered his drug operation, and that Alban believed that Mr. Asllani had reported him to the police.

[11] Mr. Asllani further explained that a friend, Mr. Bytyqi, who had introduced him to Alban back in Jaunary 2015, had informed him that Alban had contacted Mr. Bytyqi and accused Mr. Asllani of betraying Alban by reporting him to the police.

[12] In reaching its conclusion, the RAD noted that "the violence [Mr. Asllani] claims to fear from Alban and his associates arose from Alban's anger at [his] having attacked Alban in June 2015 and Alban's belief that [he] had reported him to the Italian police."

[13] The RAD added that "[e]ven assuming that [Mr. Asllani] was being forced to perform labour", it was "unable to see how 'persons who fear persecution as a result of refusing to perform a criminal act' or the family of members of such persons may be said to fall into any of the three categories of particular social group as set out in" *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, at 739 ["***Ward***"].

[14] Accordingly, the RAD concluded that there was no nexus between the circumstances alleged by the Applicants and a ground of refugee protection.

[15] Relying on *Shkabari v Canada (Citizenship and Immigration)*, 2012 FC 177 [“***Shkabari***”], Mr. Asllani maintains that he falls within the second of the above-mentioned three categories of particular social group, namely, “groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association”: *Ward*, above, at 739.

[16] However, *Shkabari* is distinguishable from the facts in the present case, because there the persecution arose from a refusal to abide by customary Albanian law that limits the internationally recognized right to marry freely. The Court found that the adult Applicants’ inability to marry freely brought them within the purview of both the first category set forth in *Ward* and, to a lesser extent, the second category described above. In my view, the link to the latter category was much stronger in *Shkabari* than it is here.

[17] Mr. Asllani nevertheless maintains that his refusal to transport drugs falls within the definition of forced labour set forth in paragraph 3(a) of Article 8 of the *International Covenant on Civil and Political Rights*, and that this refusal brings him within that second category set forth in *Ward*. He explains that by refusing to transport drugs, he was voluntarily associating with the group of people who refuse to perform a criminal act. However, Mr. Asllani was unable to identify any authority standing for the proposition that people who refuse to perform a criminal act form a group contemplated by the second category in *Ward*.

[18] While I am skeptical of the proposition that the group of people who refuse to perform a criminal act is a group of people who fall within the purview of the second category of *Ward*, I need not make a determination on this point.

[19] This is because it was not unreasonable for the RAD to conclude that Mr. Asllani had not established a nexus to a ground of refugee protection due to the fact that "the violence he claims to fear from Alban and his associates arose from Alban's anger at [his] having attacked Alban in June 2015 and Alban's belief that [Mr. Asllani] had reported him to the Italian police."

[20] In my view, that conclusion was reasonably, and indeed soundly, based in Mr. Asllani's own claims, as described at paragraphs 10 and 11 above. By his own words, Mr. Asllani fears Alban not because he refused to transport drugs for Alban, but because he injured Alban severely, and because Alban believes Mr. Asllani reported him to the police.

[21] Having regard to the foregoing, I consider that the RAD's conclusion on this issue was appropriately justified, transparent, intelligible and fell well "within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law": *Vavilov*, above, at para 86.

[22] I will simply add in passing that Mr. Asllani's position on this issue is not assisted by his assertion that "but for" his refusal to transport drugs for Alban, he would not have found himself in a position where he fears Mr. Alban. The fact remains that his stated fear of Alban, which is

what counts for the purposes of his refugee claim, does not have a nexus to any recognized ground of refugee protection.

[23] My finding on this issue alone provides a sufficient basis upon which to dismiss the present Application. However, for completeness I will briefly address the state protection issue below.

B. *State Protection*

[24] With respect to both Italy and Kosovo, Mr. Asllani submits that the RAD erred by failing to state the correct test. In this regard, he states that the correct test is whether state protection is adequate at the "operational level" (*Durdevic v Canada (Citizenship and Immigration)*, 2018 FC 427 at para 33) and that it was incumbent upon the RAD to explicitly articulate that test at the outset of its assessment of the state protection issue.

[25] I disagree. I am not aware of any such onus on the RAD or the RPD. What counts is whether the adequacy of state protection is actually assessed at the operational level. This assessment is made in the course of assessing evidence led by the refugee claimant to overcome the presumption of state protection that exists in the absence of a demonstration of a complete breakdown in the state's apparatus: *Ward*, above, at 692.

[26] It bears underscoring that the burden of overcoming this presumption and demonstrating that adequate state protection does not exist at the operational level lies upon the refugee claimant. However, in his submissions to the RAD, Mr. Asllani did not endeavour to discharge

this burden with respect to Italy by referring to evidence in support of his bald assertion that the RPD had failed to examine the availability of state protection at the operational level.

[27] With respect to Kosovo, Mr. Asllani simply made the very general statement that it was "clear from the documentary evidence that the state's efforts, its capacity, and, most importantly, its will to implement the procedural framework is lacking."

[28] Having regard to the foregoing, it was not unreasonable for the RAD to have concluded, without further assessing the issue, that Mr. Asllani had not rebutted the presumption of adequate state protection at the operational level.

[29] In my view, the RAD's conclusion on this point was appropriately justified, transparent, intelligible, and fell well "within range of possible, acceptable outcomes which are defensible in respect of the facts and the law": *Vavilov*, above, at para 86.

[30] I will simply add in passing that, in the RPD's decision with respect to the Applicants' claims, it noted that Mr. Asllani had not sought state protection or assistance in Italy because he was afraid of the criminal network of which Alban was a part. The RPD found that there was nothing compelling in this explanation for not seeking state protection from the police, and that in these circumstances, it was incumbent upon Mr. Asllani to approach the police in Italy for state protection.

[31] I agree. In attempting to rebut the presumption of state protection, an applicant for refugee protection has an onus to demonstrate that he or she took all objectively reasonable efforts, without success, to exhaust all courses of action within the country in question, before seeking refugee protection abroad: *Ruszo v Canada (Citizenship and Immigration)*, 2013 FC 1004 at paras 33-34, 42-43 and 45.

[32] As it turns out, the Italian police actually did arrest and detain Alban for two months in connection with his personal drug use. This further undermined Mr. Asllani's bald assertion regarding the inadequacy of state protection in Italy at the operational level.

[33] Regarding Kosovo, Mr. Asllani adds that the RPD noted, at paragraphs 38-42 of its decision, that there are various problems with state protection in that country. However, in the course of its assessment, the RPD also discussed other evidence regarding the effectiveness of state protection in Kosovo. In light of all of the evidence, the panel concluded that the Applicants had not rebutted the presumption of state protection in that country.

[34] In the absence of any arguments as to why the RPD erred in reaching that conclusion, I am unable to find that the RAD's conclusion regarding the issue of state protection in Kosovo was unreasonable. This is particularly so given that none of the Applicants sought to avail themselves of state protection in that country, or offered a compelling explanation of why they had failed to do so.

IV. **Conclusion**

[35] Given the reasons set forth above, this Application is dismissed.

[36] At the end of the hearing in this matter, counsel to the Applicants and the Respondent each stated that there was no serious question of general importance to be certified under paragraph 74(d) of the IRPA. I agree.

JUDGMENT IN IMM-5056-19

THIS COURT'S JUDGMENT is that:

1. This application is dismissed.

2. There is no question for certification pursuant to paragraph 74(a) of the IRPA.

"Paul S. Crampton"
Chief Justice

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5056-19
STYLE OF CAUSE:	DRITON ASLLANI ET AL v MIRC
PLACE OF HEARING:	HELD BY TELECONFERENCE BETWEEN OTTAWA AND TORONTO, ONTARIO
DATE OF HEARING:	MAY 26, 2020
JUDGMENT AND REASONS:	CRAMPTON C.J.
DATED:	MAY 27, 2020

APPEARANCES:

John O. Grant	FOR THE APPLICANTS
Alison Engel-Yan	FOR THE RESPONDENT

SOLICITORS OF RECORD:

John O. Grant Barrister & Solicitor Mississauga, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT