Date: 20080403

Docket: IMM-3971-07

Citation: 2008 FC 422

Montréal, Quebec, April 3, 2008

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

Rodon ELEZI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) for judicial review of a decision by a Pre-Removal Risk Assessment Officer (the officer), dated July 27, 2007, whereby the applicant's application for protection was refused.

BACKGROUND

[2] The applicant is a citizen of Albania who fears persecution by the mafia because of his employment with a commission dealing with land claims, and because his father, former chairman of the local electoral commission, refused to favour the socialist party candidate in a past election.

[3] In 1996, the applicant alleges to have begun work as a jurist at the Commission for the Return of Land and Compensation to Legitimate Owners. In the context of this work, he was exposed to threats and intimidation. In 1997, the Commission office was burned down, and three unknown individuals made death threats against him. The death threats continued at work and at home.

[4] The applicant fled the country, spending one month in Greece before returning to Albania. After returning to Albania, he stopped working on the more sensitive files at the Commission. Many of his colleagues had also fled the country during this time because of the same threats.

[5] Three months later, after the electoral victory of the socialist party, the applicant was fired and began working at his father's law office. However, he continued to receive threats.

[6] In 2001, the applicant attempted to flee the country but was stopped by Italian authorities and returned to Albania. In 2002, the applicant again attempted to flee, this time to Canada via Ecuador, but was forced to return from Ecuador as well.

[7] The applicant alleges that his situation deteriorated in 2003 after the municipal elections. His father was named chairman of the local electoral commission and the threats to his family intensified. The applicant began to be used as a bargaining tool by leftist extremists in order to compel his father to rig the election in their favour. However, the applicant's father did not comply with this demand.

[8] On September 10, 2003, the applicant was beaten by unknown individuals in the street while walking with two friends as a warning to his father. A few days later the applicant's father received a death threat aimed at the applicant. The applicant went into hiding until April 2004, and then fled the country.

[9] The applicant arrived in Canada on June 21, 2004, and claimed refugee status upon his arrival.

[10] In a decision dated October 28, 2004, the Refugee Protection Division (the Board) rejected the claim for lack of credibility, behaviour incompatible with that of a person who has a genuine fear of persecution, lack of nexus with one of the Convention grounds, and a failure to demonstrate an absence of state protection.

[11] On March 3, 2005, this Court dismissed the application for leave and for judicial review of the Board's decision.

[12] Subsequently, the applicant submitted a PRRA application which was denied on June 20, 2006.

[13] The application for judicial review of the negative PRRA decision was granted on March 1, 2007 by this Court.

[14] On July 27, 2007, a second PRRA decision was rendered, denying the application.

[15] With respect to the risks associated with the Commission's work, the officer indicated that while it was possible that the applicant worked at the Commission from 1997 to 2001, and that as a member of the Commission it was also possible that he was the victim of threats and intimidation as he alleges, it has been 6 years since he was implicated in that work. Moreover, after his firing in 2001, he spent three years living in the same city without demonstrating in a probative manner that the threats and intimidation related to his work at the Commission continued.

[16] Further, the officer highlighted the fact that Mr. Gega, the author of one of the declarations submitted by the applicant, did not mention that he received threats during his time working at the Commission with the applicant. Mr. Gega went on to become the mayor of the city. The officer was of the view that it was reasonable to ask how he managed to become mayor while the applicant was forced to go into hiding because of his work at the same institution.

[17] With respect to the risks related to the functions of the applicant's father, the officer considered and assessed all the evidence submitted by the applicant. More particularly, he commented on six declarations provided in support of the claim, but gave little probative value to these documents.

[18] The officer also noted that the applicant's father does not currently occupy the position of chairman of the electoral commission and that it was never alleged that the applicant's parents were forced to move because of threats. It was noted that no incident occurred after the extremists visited the applicant's father's office in July 2004 and that no complaint was filed in spite of the fact that the applicant's father was an influential person.

[19] In addition, it seemed implausible that the mafia and criminal groups that the applicant alleges have continued to threaten him and his family for four years would not have followed through on their threats. The evidence indicated that these are very violent groups who eliminate people who are perceived as harmful.

[20] The officer also stated that while vendettas do exist in Albania, the nature of the applicant's allegations is not consistent with the definition of a vendetta. On the one hand, the applicant has had no links with the process of land restitution for 6 years and has not demonstrated that the threats continued after he was fired, and on the other hand, the evidence submitted by the applicant does not prove that he is the target of a vendetta because of the activities of his father.

[21] On the issue of the objective situation in Albania, the officer stated that the existing situation in Albania is the same, if not better, than it was when the tribunal made its decision, and thus there have not been any significant adverse changes that demonstrate that the applicant is personally at risk.

THE STANDARD OF REVIEW

[22] Canadian administrative law has recently undergone a change in the standards of judicial review. In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada indicated that in lieu of the previous three standards: patent unreasonableness, reasonableness *simpliciter*, and correctness, there will now be two applicable standards, correctness and reasonableness.

[23] In providing guidance as to what the appropriate standard of review will be in a given case, the Court indicated that

> […] questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness while many legal issues attract a standard of correctness. Some legal issues, however, attract the more deferential standard of reasonableness. (at para. 51)

Further, the Court emphasized the two-step nature of the judicial review process:

> First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of defence to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review. (at para. 62).

[24] The standard of review applicable to PRRA decisions has been addressed extensively by this Court. For example, in *Kim v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 437,

[2005] F.C.J. No. 540 (QL), at para. 19, Mosley J. affirmed that "in the judicial review of PRRA decisions the appropriate standard of review for questions of fact should generally be patent unreasonableness, for questions of mixed law and fact, reasonableness *simpliciter*, and for questions of law, correctness." Given the recent change in Canadian administrative law, and the factual nature of the issues involved in the present case, I find the appropriate standard of review to be that of reasonableness.

[25] In *Dunsmuir*, *supra*, at para. 47, the Court expounded upon the meaning of this standard and stated that an analysis conducted according to this standard will be 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*, *supra*, at para. 47).

ANALYSIS

[26] In *Lopez v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1341, [2007] F.C.J. No. 1733 (QL), at para. 21, I alluded to the importance of properly characterizing the alleged risks before conducting a state protection analysis in order to avoid short circuiting a full assessment of the claim. I am satisfied that the officer generally understood the risks as alleged by the applicant and properly characterized those risks as emanating from mafia elements in retribution for the applicant's previous work at the Commission for the Return of Land and Compensation to Legitimate Owners and because of his father's work as chairman of the local election committee.

[27] Accordingly, the remainder of the decision will focus on the issue of state protection, which is a crucial element in the present case.

[28] On the issue of state protection, the applicant mainly submits that the officer erred by according little weight to six declarations provided in support of his claim for protection. Of more relevance to the issue of state protection, the applicant submitted letters from state officials, the Mayor of Lushnje, Mr. Gega, and an Albanian Member of Parliament, Mr. Bano, which indicated that Albania could not protect him. While these letters explicitly state that Albanian authorities cannot protect the applicant, they were accorded little probative value and not mentioned by the officer in the state protection analysis.

[29] This contrasts with a previous judicial review pertaining to the admissibility of "new" evidence under s.103 of the Act, where these same letters were considered significant as they lend credibility to the applicant's claim (*Elezi v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 240, [2007] F.C.J. No. 357 (QL)). In that case Justice de Montigny stated:

> All of this evidence is obviously extremely probative, and to a large extent, refutes all of the Board's conclusions against Mr. Elezi […] That evidence goes to the very heart of the Board's conclusion, and certainly tends to confirm not only Mr. Elezi's story but also the risk he would be facing were he to be returned to Albania." (*Elezi*, *supra*, at paras. 38 and 44).

While these comments were made in *obiter* and thus not binding upon the PRRA officer, in my view, at minimum, they offer some guidance in how to approach the new evidence.

[30] In his reasons, the officer indicated that he gave little weight to the declarations of Mr. Bano, and Mr. Gega for the following reasons: they were based on hearsay; Mr. Bano admitted to being a friend of the applicant's father and thus his evidence was not disinterested; the declarations discussed facts that the Board had already rejected for lacking credibility and for which the Board found that the applicant waited six months before leaving Albania, thus undermining the subjective nature of his fear; and finally, because no "good reason" had been provided as to why the declarations were not submitted before the Board.

[31] The respondent submits that while the applicant may disagree with the PRRA officer's treatment of the evidence, it was open to him to accord the evidence the weight that he saw fit.

[32] In *Augusto v. Canada (Solicitor General)*, 2005 FC 673, [2005] F.C.J. No. 850 (QL), at para. 9 my colleague Justice Layden-Stevenson held that "[i]n the absence of having failed to consider relevant factors or having relied upon irrelevant ones, the weighing of the evidence lies within the purview of the [PRRA] officer conducting the assessment and does not normally give rise to judicial review."

[33] On the issue of hearsay, I emphasize that the declarations were made by government actors, a local mayor and a Member of Parliament, and thus the ability of the state to protect the applicant was within their personal knowledge, and cannot properly be characterized as hearsay evidence. These individuals are part of the state apparatus at the local and national levels, and, as such, are presumed to have knowledge of its protection capabilities.

[34] The second reason for according little probative value to the declarations was because they discussed facts that the Board had already rejected for lacking credibility**.** In the recent Federal Court of Appeal case of *Raza v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385, [2007] F.C.J. No. 1632 (QL), dealing with the admission of new evidence in a PRRA application, Justice Sharlow asserted, at para. 13:

> As I read paragraph 113(a), it is based on the premise that a negative refugee determination by the RPD must be respected by the PRRA officer, unless there is new evidence of facts that might have affected the outcome of the RPD hearing if the evidence had been presented to the RPD. […]

She further stated that in the context of qualifying evidence as new, it is pertinent to ask: "Is the evidence new in the sense that it is capable of […] contradicting a finding of fact by the RPD […]".

[35] In my opinion, the foregoing passage is instructive. While the PRRA process is not an appeal from a Board decision, there would be no point in admitting new evidence capable of contradicting a finding of fact by the Board, if it then could be given little probative value for the very reason that it was admitted. Thus, where new evidence is admitted that contradicts the Board's previous findings of fact, the evidence cannot be discounted solely because it contradicts prior conclusions, rather the capacity of the new evidence to temper those findings for the purposes of the present PRRA analysis must be evaluated.

[36] The officer also discounted the evidence because no "good reason" had been provided as to why the declarations were not submitted before the Board. In my view, this is not a relevant consideration. By accepting the declarations as new evidence pursuant to s.113(a) of the Act, the

officer also implicitly accepts that the applicant had a valid reason for not submitting these declarations to the Board. Indeed, as noted in the previous *Elezi* decision:

> […] the Board's hearing took place only three months after he arrived in Canada, and it does not require a stretch of the imagination to consider that this is not much time to gather that kind of evidence. The same applies, obviously, to the letters coming from the Mayor and the Deputy, if they were to be considered as evidence that arose before the Board's decision. (*Elezi*, *supra*, at para. 43)

[37] Given the importance of these declarations in proving the inability of the state to offer protection to Mr. Elezi, it was incumbent upon the PRRA officer to take into account relevant factors in conducting his assessment. I am of the view that in taking into consideration irrelevant factors in assessing the declarations provided, the PRRA officer committed a reviewable error.

[38] Finally, it is well established that where there is evidence before a decision maker which contradicts its conclusions, it must provide reasons why it did not consider this evidence credible or trustworthy (*Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1425 (QL), at para. 15). A failure to do so will result in a reviewable error.

[39] I note that the applicant submitted a second declaration from Mr. Bano (page 323 of the Tribunal Record). This declaration explains why the previous declarations of both Mr. Bano and Mr. Gega were not dated and reiterates that the applicant’s life would be in danger should he return to Albania. Despite forming part of the Tribunal Record, this declaration, which contradicts the PRRA officer’s state protection findings, was not addressed in the reasons.

[40] Also of importance was an article entitled “Dobjani meets with the German MPs to help the immigrants in Germany” (25 July 2005) which was not mentioned by the PRRA officer. Of particular relevance is the following excerpt:

> […] The argument presented by the Albanian party and Mr. Dobjani about the repatriation of the Albanian citizens was that the human rights in Albania are heavily violated […] The Albanian party has requested that some special categories of emigrants be especially helped. […] One category of emigrants that should be especially helped is those people whose life is threatened by vengeance. […] (page 480 of the Tribunal Record)

This extract directly contradicts the PRRA officer’s finding that state protection exists and should have been addressed in the decision.

[41] In light of the fact that irrelevant factors were taken into consideration and contradictory evidence was not addressed, I am unable to conclude that the PRRA officer’s decision is reasonable.

JUDGMENT

THIS COURT ORDERS that the application for judicial review is granted and the matter is referred back for re-determination by a different officer.

"Danièle Tremblay-Lamer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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