Date: 20091208

Docket: IMM-1767-09

Citation: 2009 FC 1257

Ottawa, Ontario, December 8, 2009

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

STERBYCI SOKOL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[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 of the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated March 5, 2009, wherein the applicant was determined not to be a Convention refugee or a person in need of protection under sections 96 and 97 of the Act.

[2] The applicant requests that this Court set aside the Board's decision.

Background

[3] The applicant is a citizen of Albania who based his refugee claim on his fear of being killed in a blood feud with another family. His story was recounted in his Personal Information Form (PIF).

[4] The applicant is from a remote area in the country's north. The feud stems from his uncle's murdering of a member of the Lisi family in 1990. The applicant alleges that although there was no formal declaration of war between the families, the feud was on from that point, and eventually a different uncle of the applicant was ambushed and murdered by members of the Lisi family in 1997.

[5] According to *Kanun*, the ancient code governing such conflicts, it was now his family's turn to take revenge. The applicant alleges that that is why in 2003 his cousin (son of the first uncle) ambushed and murdered Bajram Lisi.

[6] The applicant left Albania for the United States in 2000, and other family members joined him in 2003. His claim for refugee status in the U.S. was denied and he was deported back to Albania on June 6, 2007.

[7] The applicant alleges that during the roughly four months he spent back in Albania, he lived in hiding with his aunt in Tirana and did not inform others of his return. As soon as he got the necessary documents to facilitate travel, the applicant came to Canada with the assistance of a smuggler.

Board's Decision

[8] The Board determined that the applicant was not a Convention refugee under section 96 of the Act as criminality, including vendettas and blood feuds, do not have a nexus to the Convention. Further, the Board determined that the applicant was not in need of protection pursuant to section 97 of the Act as there is adequate state protection in Albania.

[9] The Board noted the historical roots of *Kanun* and its powerful influence. The Board also noted the implementation of new laws prohibiting blood feuds and stronger sentences, but acknowledged that laws can only be as effective as the persons enforcing them and the community going to the appropriate law enforcement agencies for assistance. Evidence of the successful conviction of a murderer in a particularly brutal blood feud case was discussed.

[10] The Board gave little weight to a letter provided by the applicant, allegedly from a local police chief. The letter attested to the incidents causing the blood feud, but stated that the police "…feel unable to take actions and solve the problem as this is a nation-wide phenomenon…". The

Board found the letter's information lacked reliability and the applicant's explanation for getting the letter lacked credibility.

[11] The Board noted the applicant's evidence that his family had engaged the efforts of an organization to resolve the feud, but had been unsuccessful. While the applicant testified that the Lisi family "…will strike when they see fit", it was noted that from 1998 to 2003, his brothers were not harmed in Albania. In the end, the Board was satisfied that if the applicant was to go to the authorities, he would receive adequate protection. The Board also noted that the applicant had not gone to the authorities before seeking Canada's protection in 2007.

[12] Even if the applicant could rebut the presumption of state protection, the Board felt that Tirana provided a viable internal flight alternative (IFA). The Board noted evidence indicating that blood feuds were less common in the urban centre of Tirana. The Board also concluded that the applicant could not provide clear and convincing evidence that the Lisi family would track him down.

Issues

[13] The issues are as follows:

1. What is the standard of review?
2. Did the Board err in determining that state protection was available?
3. Did the Board err in determining that an IFA was available?

Applicant's Written Submissions

[14] With regard to the issue of state protection, the applicant submits that there were multiple errors in the Board's findings. First, the Board erred in assuming that because the government enacted laws prohibiting blood feuds that it also provided adequate protection. There was significant evidence of the ineffectiveness of police in protecting individuals from blood feuds that the Board failed to note, including the Board's own document: *Albanian Blood Feuds* which detailed the problems of blood feuds, the increased use of blood killing likely due to ineffective law enforcement and lack of faith in state punishment, ineffectiveness of convictions, as well as a statement from Albanian Ombudsman admitting blood feud targets should be given asylum in Germany, and evidence of the ineffectiveness of police in the applicant's particular region, Shkoder. The presumption that the Board considers all the evidence is rebutted when evidence that is clearly contradictory to the Board's central conclusion goes unmentioned.

[15] The applicant also submits that the Board's grounds for finding the applicant's letter from the police chief unreliable were unreasonable. The Board's reason for not believing the applicant on the credibility of the letter was based on an erroneous question the applicant had no way of answering. The Board had asked the applicant why the chief had written what he did (essentially "what was he thinking?"), and drew a negative inference when the applicant answered that he did not know.

[16] With regard to the issue of IFA, the applicant submits that the Board asked itself the wrong question. The issue was not whether a blood feud would arise in Tirana to place the applicant at risk, but whether the enforcers of a blood feud could find him in Tirana. The Board placed an inappropriate burden on the accused by requiring him to provide clear and convincing evidence that he would be found in Tirana. The Board's own evidence clearly showed that blood feuds have a long reach.

Respondent's Written Submissions

[17] With regard to the allegation that the Board ignored evidence, the respondent submits that the applicant still fails to rebut the presumption that the Board considered all the evidence, even if it did not refer to something in its reasons. The Board reviewed all of the documentary evidence on state protection and referred to many specific pieces of evidence. It was only after all these references to the evidence that the Board rendered its conclusion on state protection.

[18] Whether an IFA exists is a factual matter within the Board's expertise and should be afforded deference. The Board properly articulated and implemented the IFA test. Its conclusions were reasonable based in part on the following factors: Tirana has less blood feuds than other areas of Albania and more resources, the applicant did not provide any evidence to show how the Lisi family would track him down, and the applicant can reasonably be expected to find employment in Tirana.

Analysis and Decision

[19] **Issue 1**

What is the standard of review?

This case does not involve statutory interpretation or matters of procedural fairness. The applicant in this case directly challenges the Board's findings of fact on two key issues. In the issue of IFA, a legal issue arises regarding burden, however, this is incidental to what is primarily a challenge to the Board's ultimate factual conclusion that an IFA exists.

[20] I note here that findings of fact by administrative tribunals brought before this Court are subject to the standard of review imposed by paragraph 18.1(4)(d) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 which states:

18.1(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal	18.1(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :
. . .	. . .
(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;	d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose; . . .

[21] The Supreme Court in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] S.C.J. No. 12 (QL), recently referred to the impact of these legislative instructions:

> 46 More generally, it is clear from s. 18.1(4)(d) that Parliament intended administrative fact finding to command a high degree of deference. This is quite consistent with *Dunsmuir*. It provides legislative precision to the reasonableness standard of review of factual issues in cases falling under the *Federal Courts Act*.

[22] Mr. Justice Evans had earlier commented in *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, 157 F.T.R. 35, [1998] F.C.J. No. 1425 (F.C.T.D.) (QL) at paragraph 14 that:

> …Thus, in order to attract judicial intervention under section 18.1(4)(d), the applicant must satisfy the Court, not only that the Board made a palpably erroneous finding of material fact, but also that the finding was made 'without regard to the evidence'.

[23] With that high standard of deference in mind, I now turn to review the Board's findings.

[24] **Issue 2**

Did the Board err in determining that state protection was available?

There is a presumption in refugee law that democratic countries, even if they are developing democracies such as Albania, are capable of protecting their citizens. It flows from this presumption that in order for a refugee claimant to establish that his or her fear of persecution is objectively well-founded, the claimant must rebut the presumption that the state can provide adequate protection. This must be done with clear and convincing evidence confirming the state's inability to protect (see *Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, 282 D.L.R. (4th) 413, at paragraphs 42 to 44 citing *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 at 723 and 724, [1993] S.C.J. No. 74 (QL)).

[25] In *Hinzman* above at paragraph 45, the Federal Court of Appeal affirmed its earlier ruling in *Canada (Minister of Citizenship and Immigration) v. Kadenko*, [1996] F.C.J. No. 1376, 143 D.L.R. (4th) 532, where Mr. Justice Decary elaborated on these principles and added that the more democratic a country, the more a claimant must have done to seek protection there.

[26] The applicant argues that the Board ignored evidence showing that state protection, in practice, was ineffective and inadequate for potential blood feud victims.

[27] The respondent asserts that the Board considered all of the evidence, but in the end simply concluded that the applicant had not rebutted the presumption. The respondent also asserts that the Board need not summarize all of the evidence before it and is presumed to have considered all the evidence (see *Florea v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 598 (C.A.) (QL)).

[28] Under paragraph 18.1(4)(d) of the *Federal Courts Act*, applicants may challenge a tribunal's findings of fact on the grounds that the finding was made without regard to the evidence. Applicants who allege that evidence was ignored by the tribunal, must rebut the presumption at common law that the tribunal did in fact consider all of the evidence. When the duty of procedural fairness requires that detailed written reasons be provided, such as with Board decisions, those reasons can provide valuable clues as to whether all significant pieces of evidence were considered.

[29] Mr. Justice Evans in *Cepeda-Gutierrez* above, articulated the principle that the Board's failure to mention or analyze important evidence in its reasons may allow the presumption to be rebutted:

> 16 On the other hand, the reasons given by administrative agencies are not to be read hypercritically by a court (*Medina v. Canada (Minister of Employment and Immigration)* (1990), 12 Imm. L.R. (2d) 33 (F.C.A.)), nor are agencies required to refer to every piece of evidence that they received that is contrary to their finding, and to explain how they dealt with it (see, for example, *Has-san v. Canada (Minister of Employment and Immigration)* (1992), 147 N.R. 317 (F.C.A.). That would be far too onerous a burden to impose upon administrative decision-makers who may be struggling with a heavy case-load and inadequate resources. A statement by the agency in its reasons for decision that, in making its findings, it considered all the evidence before it, will often suffice to assure the parties, and a reviewing court, that the agency directed itself to the totality of the evidence when making its findings of fact.
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> 17 However, the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence": *Bains v. Canada (Minister of Employment and Immigration)* (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency over-looked the contradictory evidence when making its finding of fact.

[30] In the impugned decision, there is almost no mention of the significant pieces of evidence that would have gone directly to rebutting the presumption of state protection. While this deficiency alone requires that the Board's finding be set aside, I also find that the analysis contains other errors.

[31] The Board discussed the requirements for the Albanian government as follows:

> Although Blood feuds continue, the Department of State report provides information that Albania is making serious efforts to address this issue. The government need not have to eradicate blood feuds or show that it has prevented blood feuds, but rather through actions and laws is addressing the problem effectively.

[32] The Board went on to discuss new Albanian laws, but it did not appropriately discuss how the problem of blood feuds were being adequately addressed.

[33] The Board discussed the problem of blood feuds in Albania, but seemed to rely on a figure in the U.S. Department of State report which stated that of the 96 murders reported in 2007, only two were related to blood feuds. There was no discussion of the success of efforts by local police or other organizations, of ending such feuds especially in the north where the Board acknowledged that blood feuds persist. There was significant evidence calling into question the accuracy of the above statistic and the ability of local officials to combat the blood feuds, but this evidence was not discussed.

[34] The Board's own issue paper: *Albania: Blood Feuds*, part of its National Documentation Package, indicates that there is little the Albanian authorities have been able to do to combat the problem. The paper also stated that even those individuals who are arrested for murder often deny the murder was related to a blood feud in order to receive a lesser sentence, but upon release are often killed. The paper even addressed directly the inability of the police in the applicant's region to protect potential blood feud victims.

[35] While the Board did mention the paper, it was only to relate the story contained therein of a successful prosecution of a blood feud murderer. In its totality, the paper indicates that successful prosecutions in reality are few and far between.

[36] The Board similarly failed to analyze a letter from the Nationwide Reconciliation Committee (NRC), the NGO which seeks to resolve blood feuds by reconciliation and negotiation, attesting in detail to the course of the blood feud between the Sterbyci and Lisi families. The letter was signed by the NRC chair and stated that the police and Albanian government have no adequate means to protect families in revenge and blood feud situations.

[37] In my opinion, the Board was required to have some regard in its written reasons to the significant body of evidence showing a lack of adequate protection in Albania. As a result, the Board made an error in failing to assess this evidence. Consequently, the judicial review must be allowed for this reason.

[38] **Issue 3**

Did the Board err in determining that an IFA was available?

The test to be applied in determining whether there is an IFA is two-pronged: (i) there is no serious possibility of the claimant being persecuted or subjected, on a balance of probabilities, to persecution or to a danger of torture or to a risk to life or of cruel and unusual treatment or punishment in the proposed IFA area, and (ii) conditions in the IFA area must be such that it would not be unreasonable, in all the circumstances, for the claimant to seek refuge there (see

Thirunavukkarasu v. Canada (Minister of Employment and Immigration), [1994] 1 F.C. 589, [1993] F.C.J. No. 1172 (C.A.) (QL)).

[39] Once the issue of an IFA is raised, the onus is on the refugee claimant to show that the option does not exist, by establishing that either of the two *Thirunavukkarasu* above, criteria is not met.

[40] The applicant challenges the legal basis for the Board's conclusion on the first prong. With respect to the fear that members of the Lisi family might locate the applicant, the Board held that the applicant was required to provide "clear and convincing evidence that he would be found."

[41] This was an inappropriate burden to place on the applicant. The Federal Court of Appeal in *Thirunavukkarasu* above, stated that an applicant need only provide clear and convincing evidence showing that there is a serious possibility of being persecuted in the new location.

[42] However, regardless of this legal error, and without analyzing the impact it may have had on the Board's conclusion, I find that the Board's ultimate conclusion on IFA suffers from the same problem as its previous conclusion on state protection. The Board simply did not make any reference to the significant evidence indicating that those enforcing blood feuds have a long reach and great persistence. This omission was even more puzzling because earlier in its reasons, the Board had a related story involving enforcers of a blood feud traveling to London and claiming asylum there for the sole purpose of finding and killing a member of the family they despised. The

enforcers were arrested after their return to Albania and the Board had related the story ostensibly to show an example of effective enforcement. However, this story and other evidence regarding the persistence of blood feud enforcers and the inadequacy of law enforcement, provides ample grounds for an objective fear that a potential victim would not be safe simply by moving to Tirana.

[43] The applicant had in fact lived in Tirana for a short period in 2007. He testified before the Board that he spent this entire period in hiding.

[44] It was not open for the Board to reject the applicant's arguments and find that an IFA existed without specifically addressing the significant contradictory evidence (see *Cepeda-Gutierrez* above). I would therefore allow judicial review on this ground.

[45] The application for judicial review is therefore allowed and the matter is referred to a different panel of the Board for redetermination by a different panel of the Board.

[46] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

[47] **IT IS ORDERED THAT** the application for judicial review is allowed and the matter is referred to a different panel of the Board for redetermination.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

The relevant statutory provisions are set out in this section.

The *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA):

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
97.(1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	97.(1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of	a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au

Article 1 of the Convention Against Torture; or	sens de l'article premier de la Convention contre la torture;
(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,	(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,	(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

FEDERAL COURT

SOLICITORS OF RECORD

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