

Federal Court



Cour fédérale

Date: 20120116

Docket: IMM-3534-11

Citation: 2012 FC 28

Ottawa, Ontario, January 16, 2012

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

**BETWEEN:**

**VALBONE KASTRATI and  
PERPARIM KASTRATI**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This decision pertains to an application for judicial review of a decision by the Refugee Protection Division of the Immigration and Refugee Board of Canada (the Board) that found the applicants were neither Convention (United Nations' *Convention Relating to the Status of Refugees*, [1969] Can TS No 6 (the *Convention*)) refugees nor persons in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, 2001, c. 27 (*IRPA*). For the reasons that follow, the application is dismissed.

***Facts***

[2] The applicant Mrs. Kastrati, is originally from Kosovo. She was a member of the Democratic Party and a councilor in Kosovo. In December 2001 her niece was raped by Shani Rexhepi, a former Kosovo Liberation Army (KLA) soldier who apparently had influence with the government in Kosovo. The rape was reported to the police but it is not entirely clear from the record evidence by whom. Nonetheless, the applicant claimed that Rexhepi began to threaten her, saying she would be “worse off” if she continued to pursue the rape charges against him. Rexhepi was eventually charged and convicted of rape. The conviction was set aside on appeal by reason of errors made by the trial court with respect to the forensic evidence.

[3] In 2006, a man named Hajdar Hajdari (Haji) began construction of a mosque in the applicant’s neighbourhood to which she and her husband were opposed. Haji began to harass and threaten the applicant and her husband and spat upon them, calling them “infidels.” Even though the construction of the mosque was suspended due to the absence of municipal approval, construction continued. Apparently Haji used his influence to prevent the applicant’s re-election to the city council in 2007. The applicants thus left Kosovo for Canada on March 13, 2009 and made claims for refugee protection on March 24, 2009.

[4] The applicant’s and her son’s refugee claims were rejected. The determinative issues were credibility and state protection. The applicants contend that the Board’s credibility findings were “microscopic”, unreasonable and failed to take both the applicant’s gender and her psychological condition evidence into account.

***Issues***

[5] The issues in this case are whether the decision of the Board that found that the applicant is neither a *Convention* refugee nor a person in need of protection because she lacked credibility and had not sought state protection is reasonable per *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190.

***Analysis***

[6] The Board found that based on "...cumulative credibility problems ... on a balance of probabilities, the claimant's family does not face harm at the hands of Rexhepi [or Haji], as she alleges." A number of findings were supplied by the Board in support of this conclusion which I will discuss before proceeding to the state protection issue.

***A. Credibility***

[7] The Board drew a negative credibility inference from the inconsistent testimony the applicant provided at the hearing with respect to whether she reported her niece's rape to the police. Negative credibility inferences were also drawn from the inconsistent testimony she provided at the hearing with respect to how many times she was summoned to court to give evidence in respect of the rape. The applicant was given an opportunity to explain the inconsistency and suggested that she had only helped her niece with a declaration rather than actually being summoned to testify in court. The applicant also provided inconsistent testimony as to where she testified. When prompted by the Board, the applicant corrected her testimony.

[8] The Board also determined that the applicant detracted from her own credibility in respect of the testimony she provided regarding Rexhepi and her interactions with him. For example, when asked if Rexhepi had threatened anyone other than the applicant herself, she answered in the negative but later claimed that her husband had also been threatened. The Board drew a negative inference from the inconsistent testimony. Moreover, the Board observed that in her Personal Information Form (PIF) the applicant did not recount an assault committed against her by Rexhepi.

[9] The Board also gave little weight to the claim that Rexhepi exerted influence over the Kosovo government, as few details were advanced as to the nature of his influence and its affect on the applicant.

[10] The applicant made a strong argument that the Board did not consider the Chairperson's Guidelines on Gender-related Claims into account, or consider the medical evidence as to the applicant's mental state and the effect it would have on her testimony. The Board did indicate that it was aware of both, and, with respect to the Guidelines said they were used to help understand the applicant's testimony.

[11] In sum, these findings fall squarely within the decision of the Supreme Court of Canada in *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339. The findings fall within a range of possible, acceptable outcomes having regard to the record and the applicable legal principles. Counsel for the applicant points out that other conclusions could have been drawn, and I agree. The role of this Court is not, however, to substitute its views on the evidence.

***B. State Protection***

[12] Even if the applicant had been found credible, her claim would fail on the basis of her failure to both claim and rebut the presumption of state protection.

[13] While it is true that a refugee claimant need not always seek state protection to demonstrate that it is inadequate, here the principal applicant failed to persuade the Board by clear and convincing evidence that had she sought it and that it would not be forthcoming.

[14] Kosovo is a functioning democracy with a significant United Nations presence and a functioning Ombudsman's Office. As such, the requirement of clear and convincing evidence applies with considerable force. The applicant had no evidence apart from her subjective perception that the state would not assist. Indeed, the only evidence in the record, namely the prosecution and conviction of Rexhepi, points to the opposite conclusion. Rexhepi was charged and initially convicted of rape. Notwithstanding the demonstrated willingness of the state to prosecute Rexhepi, she did not tell the police of subsequent threats she received from Rexhepi.

[15] The application for judicial review is dismissed.

[16] There is no question for certification.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application for judicial review be and is hereby dismissed. No question for certification has been proposed and none arises.

"Donald J. Rennie"

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Judge

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

**DOCKET:** IMM-3534-11

**STYLE OF CAUSE:** VALBONE KASTRATI and PERPARIM KASTRATI  
v. THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION

**PLACE OF HEARING:** Toronto

**DATE OF HEARING:** December 7, 2011

**REASONS FOR JUDGMENT  
AND JUDGMENT:** RENNIE J.

**DATED:** January 16, 2012

**APPEARANCES:**

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Ms. Balqees Mihirig FOR THE RESPONDENT

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