

Federal Court



Cour fédérale

Date: 20120523

Docket: IMM-7861-11

Citation: 2012 FC 627

Toronto, Ontario, May 23, 2012

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

LEVANI KUTALADZE

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] It is trite law that the trier of fact is best placed to assess all the evidence submitted. This assessment should take into account the context of the case. The trier of fact must be alert to the circumstances of the claim before it in order to determine the proper legal perspective and approach to be adopted to properly comprehend the crux of the claim. Therefore, the documentary evidence reflecting the country's conditions should be analyzed harmoniously with the subjective fear that emerges from the claimant's situation.

II. Judicial Procedure

[2] This is an application for judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], of a decision made by the Refugee Protection Division of the Immigration and Refugee Board [Board], rendered on October 6, 2011, wherein it was determined that the Applicant was not a Convention refugee nor a person in need of protection pursuant to sections 96 and 97 of the *IRPA*.

III. Background

[3] The Applicant, Mr. Levani Kutaladze, is a citizen of Georgia and was a resident of the district of Sachakheri.

[4] The Applicant owned a timber business in South Ossetia in the Java district. In August 2008, after the civil war, the Java district was taken by the Russian army. As a result, the Applicant could no longer return to his place of business; however, all of his business' equipment had been left in that territory.

[5] The Applicant alleges that he had tried to recover his equipment, having spoken to local forestry officials and a Russian military officer.

[6] The Applicant alleged that, in February 2009, he was accosted by two men, who identified themselves as officials from the Security Services [SOD]. These men accused him of being a spy and a traitor to the country. He was warned not to approach people from Ossetia.

[7] In April, 2009, the Applicant returned to the Java district. He alleges that upon his return four men came to his residence and beat him for not having complied with their warning.

[8] Subsequently, two men from the SOD told the Applicant that he could pay them 30,000 Lari to settle the accusation of espionage against him. The Applicant only gave them 5,000 Lari. He was, nonetheless, beaten and threatened.

[9] The Applicant went into hiding and left Georgia; he arrived in Canada on August 10, 2009 and requested refugee protection on August 17, 2009.

IV. Decision under Review

[10] The Board explicitly did not doubt the Applicant's credibility. Its negative decision was based on two findings; specifically, that there was no nexus to a Convention ground under section 96 of the *IRPA* and due to the availability of state protection under section 97 of the *IRPA*.

[11] With respect to section 96 of the *IRPA*, the Board concluded that the Applicant was simply a victim of a crime of extortion under the false accusation that he is a spy.

[12] With respect to section 97 of the *IRPA*, the Board found that the Applicant had not rebutted the presumption of state protection. Reviewing the documentary evidence, the Board found that Georgia is a democratic state where the authorities act in response to criminality.

V. Issue

[13] Is the Board's decision reasonable?

VI. Relevant Legislative Provisions

[14] The following legislative provisions of the *IRPA* are relevant:

Convention refugee

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,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(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.

Person in need of protection

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

Définition de « réfugié »

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) 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) 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.

Personne à protéger

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 Article 1 of the Convention Against Torture; or

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au 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 themselves 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.

Person in need of protection

Personne à protéger

(2) A person in Canada

(2) A également qualité

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.

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.

VII. Position of the Parties

[15] The Applicant submits that the Board did not provide reasons in support of its conclusion that his situation has no nexus to any of the Refugee Convention's ground. He argues that he was persecuted because of his political opinion having been accused of espionage. The Board ignored facts which it had accepted as credible at the outset of its decision and had also ignored the relevant documentary evidence. Also, the Applicant argues that, in its analysis of the state protection, the Board erred failing to consider the true basis upon which he was persecuted.

[16] In response, the Respondent submits that the Applicant did not provide evidence to link his fear of extortion with a Convention ground. The Respondent further argues that the espionage accusation was simply an excuse by which to extort money from the Applicant. With respect to section 97 of the *IRPA*, the Respondent submits that the Applicant had not sought protection from the authorities in Georgia before leaving the country.

VIII. Analysis

[17] The main issue is in respect of the Applicant's situation in relation to the Refugee Convention grounds; therefore, the appropriate standard of review is one of reasonableness, based on questions of mixed fact and law (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190).

[18] Turning to the Convention grounds, it appears from the wording of the Board's decision, that it disposed of this matter expeditiously:

Nexus

[14] The claimant's fear of the officials/agents from the SOD for not being able to pay their extortive demand of 30,000 Lari (false accusation of being a spy) does not establish a nexus to the Convention refugee definition. This is plain and simple criminality. This finding is supported by a number of Federal Court decisions, which ruled that victims of criminality, including vendettas, cannot generally establish a nexus to the Convention refugee definition. Therefore, his claim under section 96 fails. [Emphasis added]

[19] The reasoning of this Court, in *Gonsalves v Canada (Minister of Citizenship and Immigration)*, 2011 FC 648, applies to the present case:

[29] The Board's conclusion is unreasonable because it approaches the issue of motive for the attacks as a yes or no question. The criminals targeting the applicants may have been motivated by a combination of the applicants' racial and economic status. That the motive is at least not purely economic is supported by the applicants' reference to racial slurs made against them during the incidents they allege. It is further supported by other evidence, namely the testimony given by the applicants. In *Katwaru v. Canada*, [2007] FCJ No 822 (FC), this Court left open the possibility that where at least one of the motives is based on a convention ground, nexus might be established. The Court there decided there was not enough evidence to establish race as a motive, and therefore declined to find mixed motives. However, the Court left open the possibility that nexus may be found where there is evidence to support both alleged motives. In this case there was some evidence before the Board as to the possibility of mixed motives and therefore the Board erred in failing to consider whether there were mixed motives and if so, whether the motives could constitute the convention nexus required. [Emphasis added].

[20] It is important to reiterate that the Board did not doubt the Applicant's credibility. Furthermore, the documentary evidence, as well as the testimony, required the Board to conduct a more in-depth analysis of the Applicant's allegation that he was not simply targeted because of his wealth, but rather, because of his political opinions. His persecutors may have had mixed motives.

Indeed, the following excerpts of the transcript indicate that the Applicant had been approached by the SOD twice without being extorted:

CLAIMANT: They told me, “We know that you’re a spy. We know that you’ve been to Ossetia. We have been listening to your phone conversations.”

...

CLAIMANT: I told them that I’m not a spy and if they’ve listening...and I’m not betraying my country, and if they’ve been listening to my conversation they should know that I’m talking to them about my equipment which I’m trying to bring back home.

...

CLAIMANT: They were asking me to write everything, what kind of information I was taking back and forth.

...

CLAIMANT: When I did not confess and I told them I will not confess for something that I haven’t done they start to beat up.

(Tribunal Record [TR] at pp 266 and 271).

[21] The United States (US) Report, dated April 8, 2011, titled “Department of State. Georgia.”

Country Reports on Human Rights Practices for 2010, states:

...

Also unresolved at year's end were allegations made in 2009 by the then public defender and by NGOs that police planted evidence, engaged in inhuman and degrading treatment, abused official authority, and exceeded the limits of official authority. Nonparliamentary opposition activists claimed that police especially targeted them with such actions (see section 1.e.).

According to the Ministry of Internal Affairs, its General Inspection Service imposed more disciplinary actions on law enforcement officers during the year than in previous years. Forms of punishment included reprimands, demotions, and dismissals. There were 861 such actions compared with 566 in 2009. The ministry also reported that during the year more police officers were arrested for committing various crimes, 46 as compared with 29 in 2009. Crimes during the year included

corruption (18 cases), carrying or using narcotics (two), fraud or excessive use of authority (12), abuse of authority (12), and misappropriation of state property (two).

The Human Rights Protection Unit in the Office of the Prosecutor General issued regular updates on the status of cases, trials, and investigations of human rights violations. However, NGOs maintained that the incidence of abuse was higher than the number of cases investigated by the prosecutor general, and failure to conduct systematic investigations and pursue convictions of all alleged abusers contributed to a culture of impunity. Human rights NGOs also asserted that many instances of abuse went unreported by victims due to fear of reprisals or lack of confidence in the judicial system.

...

The main human rights abuses reported during the year included abuse of prisoners and detainees, poor prison conditions, and arbitrary arrest and detention. There were reports of selective application of the law--crimes allegedly involving government officials or supporters were slowly investigated and often remained pending, while crimes allegedly involving persons or organizations linked to the opposition were investigated quickly and prosecuted to the full extent of the law. This imbalance led to allegations of impunity for government officials ...

(TR at pp 65-66 and 53).

[22] Had the Board considered all of the evidence submitted by the Applicant, its assessment of whether mixed motives were sufficient to establish a nexus to a Convention ground would probably have been different.

[23] This conclusion, in itself, is sufficient to allow the present application for judicial review.

[24] With respect to the availability of state protection, this Court concludes that the Board's finding is vitiated by the fact that it did not take into account the particular circumstances of the Applicant's case and the evidence in context.

IX. Conclusion

[25] For all of the above reasons, the Applicant's application for judicial review is granted and the matter is remitted for redetermination by a differently constituted panel.

JUDGMENT

THIS COURT ORDERS that the application for judicial review be granted and the matter be remitted for redetermination by a differently constituted panel. No question for certification.

“Michel M.J. Shore”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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