Federal Court  Cour fédérale

Date: 20130712

Docket: IMM-12495-12

Citation: 2013 FC 784

Ottawa, Ontario, July 12, 2013

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

GZIM BELA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] of a decision of the Refugee Protection Division of the Immigration and Refugee Board [the Board] dated November 18, 2012, wherein the Board determined that the applicant is not a Convention refugee or person in need of protection.

FACTS

[2] The applicant is a 25 year-old citizen of Kosovo and an ethnic Albanian. He alleges the following facts in support of his application.

[3] During an election campaign in 2004, the applicant and his cousin supported the Democratic League of Kosovo (LDK). A fight broke out between his cousin and Mr. Hasan Zharku, a supporter of the Democratic Party of Kosovo (PDK), and the applicant tried to break up the fight.

[4] In January 2005, the applicant was severely beaten by five men. He believes he was attacked by members of the Zharku family or men hired by them, because before he lost consciousness, he heard someone say "this is a message for him". He then went to the police and gave them a statement about the attack. The police told him there was nothing they could do.

[5] In May 2005, the applicant was followed by a group of young men who he recognized as supporters of the PDK. After that, he kept changing the route he took home and would sometimes leave school later than normal. Around the same time, his cousin told him that he had been threatened, attacked and shot at by members of the Zharku family. The applicant was afraid of being attacked, so he stopped going to school for three weeks in May 2005. His cousin's family moved to Germany in May or June 2005.

[6] In September 2007, the applicant's cousin returned for a visit to Kosovo. As the applicant and his cousin returned to a friend's home (in two separate cars) in September 2007, shots were fired at the cars. Four individuals were shot and two of them died. Believing the Zharku family was

responsible for the shooting the applicant's cousin left Kosovo and returned to Germany the same day. The applicant did not approach the police after this incident.

[7] In 2009, the applicant left his hometown to attend the University of Prishtina, in a city about 60 km away from his hometown of Kacanik. He returned to Kacanik almost every weekend.

[8] In 2010, the applicant claims to have been elected to a leadership position with the youth branch of the LDK in Kacanik. During the December 12, 2010 election, the applicant took a video on his cell phone camera of three men from the PDK attempting to falsify ballots. The men saw him, took his cell phone away, deleted the video and returned the phone to him. After the election, which the PDK won, the applicant received a phone call from a man threatening to kill him if he did not bring his recordings and photos of the election to the PDK. He received another 30 to 40 calls from unknown callers over the five days following the election.

[9] On December 20, 2010, just after the applicant had arrived in Kacanik from Prishtina and was walking home from the train station, he heard gunshots behind him and a car speeding away. He did not go to the police because of the influence the Zharku family had with the local authorities and his belief that the police were corrupt and ineffective.

[10] The applicant decided to leave Kosovo. He applied for a work visa to the United States on December 30, 2010. While waiting for the visa he remained in Prishtina and did not return to his hometown. He limited the time he spent outside and changed the schedules and routes of his

comings and goings. He received many more calls from unknown callers, but when he answered his phone, no one spoke.

[11] The applicant's visa to the United States was approved on May 5, 2011. He left Kosovo on May 24, 2011 and arrived in the United States on May 27, 2011. The applicant claims he did not seek refugee protection in the United States because he was told by the agency who had issued him his visa that he did not have the right to do so. He feared that he would be returned to Kosovo if he claimed protection in the United States.

[12] The applicant's visa was to expire on September 25, 2011. He decided to travel to Canada to claim refugee protection, which he did on September 18, 2011.

THE IMPUGNED DECISION

[13] The Board found that there was a nexus between the applicant's claim and the Convention ground of political opinion, but found that the claim failed under section 96 of the Act due to lack of subjective fear. It noted that despite his testimony that his family was in a blood feud with the politically powerful Zharku family since at least 2005, the applicant was not careful to avoid the Zharku family. He said that after he stayed home for a few weeks in May 2005, he hid no more. He resumed his studies, worked in public settings as a waiter and machine operator and reasserted himself into politics, continually aligning himself with the party that was antagonistic to the politics of the Zharku family. He continued to lead a public life. Despite the threats he received beginning in December 2010, he continued to attend university classes. Moreover, even after obtaining his United States visa, he waited 19 days to flee the country and while in the United States, he took no

steps to find a way to avoid returning to Kosovo other than by filing for refugee protection in Canada in September 2011.

[14] The Board also found that the applicant's claim lacked credibility due to numerous material omissions and contradictions in the evidence. The applicant's explanations for these material omissions and contradictions were inadequate.

[15] For instance, the Board noted that a letter from the applicant's father provided post-hearing alleged attempts to reconcile the blood feud, but this was not alleged in the applicant's Personal Information Form [PIF] or testimony, or in the applicant's father's first letter to the Board. The applicant also testified that after the shooting in September 2007 he hid at his aunt's home for a few weeks, but this was omitted in his PIF.

[16] Furthermore, the Board drew a negative inference from the fact that the applicant's father stated in his letter that until 2007-2008, the year high school ended for the applicant, the applicant almost never went to school, yet this was not mentioned in the applicant's PIF. The applicant also claimed that through the Committee of Nationwide Reconciliation [CNR], the Zharku family stated that if they found him and his cousin they would guarantee the safety of his family for two years. However, this was not mentioned in the letter provided by the CNR dated March 27, 2012.

[17] When the applicant initially made his claim for refugee protection, he stated that his life was in danger due to a blood feud with his cousin, yet he failed to list the Zharku family as the people he

was afraid of or mention that he had other issues in Kosovo, such as members of an opposing political party threatening his life.

[18] Also, on September 18, 2011, the applicant told an enforcement officer of the Canada Border Services Agency that in Kosovo someone was "seeking revenge on him because of a friend's family problems". The Board found that this indicated the applicant did not understand his own claim, as there was no alleged revenge due to a friend's family problems. The applicant also told the officer that in Kosovo he was "stalked" due to political affiliation, yet provided no details of his personal circumstances, such as being shot at and threatened for his political actions.

[19] Furthermore, the Board found that the applicant did not have the profile of a person who was devoted to politics in his country, as he did not know the age at which a person is entitled to vote in Kosovo and he did not vote until the 2010 elections, when he was 23 years of age. Therefore, according to the Board, it was not plausible that the applicant would risk his life to monitor the 2010 elections and would have photographed the falsifying of ballots while he was in a blood feud with members of an opposite political party.

[20] Lastly, the Board found that the letters the applicant filed from his father and others contained statements that either contradicted the applicant's allegations or mentioned significant and material allegations that were absent from his PIF. Other documents simply did not provide sufficient information to rectify the multitude of credibility and plausibility issues contained in his case. Moreover, the Board gave no weight to the letters from the CNR that the applicant had provided, given documentary evidence that the CNR has issued attestation letters without a proper

investigation on one occasion and that the two letters submitted, one pre-hearing and one post-hearing, were significantly different.

ISSUES

[21] The present application raises the following issues:

1. Did the Board err in finding that the applicant lacked subjective fear?
2. Did the Board err in finding that the applicant was not credible?

ANALYSIS

1. Did the Board err in finding that the applicant lacked subjective fear?

[22] It is well established that the absence of subjective fear is fatal to a refugee claim under section 96 of the Act (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at para 47; *Oltime v Canada (Minister of Citizenship and Immigration)*, 2011 FC 535 at para 5).

[23] The applicant argues that the Board misconstrued evidence when it stated that the applicant alleged he was told in January 2005 that he was the target of a blood feud when his attackers said "this is a message for him". According to the applicant, "him" referred to his cousin.

[24] I disagree. The applicant's PIF does not mention his belief that until December 2010 his cousin was the only target. Rather, the applicant stated in his PIF that he believed the January 2005 attack was "in retaliation for [his] cousin's attack against Hasan Zharku" and that in May 2005, after he was followed by a group of young men, he was "afraid of being attacked again". The applicant also mentioned in his PIF that once his cousin and his family left Kosovo for Germany in May or

June 2005, the applicant was concerned that he would be "the principal target for any attacks by the Zharku family". Thus, the Board did not misconstrue the evidence.

[25] The applicant also submits that the Board further misconstrued evidence when it stated that the applicant alleged he was shot at in May 2005, as he alleged being shot at in December 2010. It was his cousin who was shot in May 2005.

[26] While I recognize that the Board mistakenly stated that the applicant was shot at in 2005, the applicant was nevertheless beaten and hospitalized in 2005. Further, the Board's detailed recitation of the applicant's allegations at the beginning of its decision demonstrates that the Board properly understood the applicant's claim that he was shot at in 2010 and not 2005. As my colleague Justice James Russell held in *Petrova v Canada (Minister of Citizenship and Immigration)*, 2004 FC 506 at para 51, the Court should not interfere with a decision if the mistake does not appear to have been a misunderstanding of the evidence.

[27] Even if the applicant's subjective fear of persecution was not triggered until the December 2010 incident, which is what he alleges, his behaviour subsequent to this incident was inconsistent with someone who had a fear for his life. The applicant states he had to stay close to his hometown while he waited for his United States visa, but his only explanation for why he continued to attend university classes in Prishtina after the December 2010 incident is that he had never been attacked there. It was reasonable for the Board to find this explanation was not sufficient.

[28] Nor did the Board err in finding that the applicant's failure to take steps to solve his alleged problem in Kosovo, other than by going to Canada, evinced a lack of subjective fear. The applicant's evidence was that he did not make an asylum claim in the United States because he was told by the company that had assisted him with his United States visa that he did not have the right to do so and he believed that if he made a claim in the United States he would be returned to Kosovo. The applicant claimed he had been told by a friend that he could claim protection in Canada. There was no evidence that the applicant ever searched for a solution for how not to return to Kosovo, such as by speaking with lawyers or by looking for information on the internet.

[29] Overall, based on the evidence before it, I find that it was open to the Board to conclude that the applicant lacked subjective fear. As noted by the Board, despite the applicant's testimony that his family was in a blood feud with the Zharku family since at least 2005 and that the Zharku family obtained positions of political power in his hometown, a few weeks after the May 2005 incident the applicant stopped hiding. He says he resumed his studies, worked in public settings as a waiter and machine operator and continued to align himself with the LDK, even though the Zharku family was associated with the PDK.

[30] In sum, the Board's decision is based on several elements and concerns, some more important than others. Taken together, they are sufficient to justify the Board's conclusion. The decision falls within the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]). As the Board's decision-making process was justified, transparent and intelligible, the Court cannot

substitute its own view of a preferable outcome (*Khosa v Canada (Minister of Citizenship & Immigration)*, [2009] 1 SCR 339 at para 59).

2. Did the Board err in finding that the applicant was not credible?

[31] This Court has recognized that the Board may make a negative credibility finding based on cumulative credibility concerns:

> [T]he accumulation of inconsistencies, contradictions, etc., taken as a whole, can rightly lead the Board to conclude that an applicant's credibility is fatally undermined.
>
> (*Asashi v Canada (Minister of Citizenship and Immigration)*, 2005 FC 102 at para 8; see also *Lawal v Canada (Citizenship and Immigration)*, 2010 FC 558 at paras 18-20)

[32] In the present case, the Board found a number of contradictions and omissions in the applicant's testimony and documentary evidence.

[33] The applicant submits that in assessing the credibility and the plausibility of his account, the Board ignored and misconstrued the evidence before it and was overzealous in its search for inconsistencies. Many of the omissions that it noted were not material and should not have had any negative inferences drawn from them.

[34] The applicant argues it was inappropriate for the Board to draw a negative inference from his father's letters. I disagree. The Board was entitled to draw negative inferences from the fact that:

1. the applicant's father's first letter omitted to mention attempts to resolve the blood feud, yet his father's second letter did; and

2. the second letter from the CNR mentioned a two year reprieve for the applicant's family members, yet this was not mentioned in the first letter by the CNR.

It was also open to the Board not to give any weight to the CNR attestation letters submitted due to many issues surrounding the legitimacy of the CNR that were identified in the documentary evidence.

[35] With respect to the Board's finding that the applicant did not have the profile of a person devoted to politics in his country, the applicant argues the Board ignored evidence such as a letter from the LDK and his LDK membership card, as well as the various corroborative letters from friends, family and acquaintances. Nor did the Board note the answers he gave to questions at the hearing that did demonstrate a level of political knowledge.

[36] Again, I disagree. The Board was entitled to question the plausibility of the applicant's claim that he was very politically engaged in Kosovo, given that he did not vote until 2010, had not voted in several elections and was unaware of the voting age. The fact that the applicant filed an LDK membership card, submitted letters to corroborate his political involvement and was able to answer certain detailed questions about Kosovo politics in his testimony, did not attest to the applicant's actual involvement and devotion to politics in his country and support his claim that he photographed the falsifying of ballots while monitoring the 2010 election. As such, the Board weighed the evidence regarding the applicant's political profile and it was reasonable to reject his explanations (*Markauskas v Canada (Minister of Citizenship and Immigration)*, 2012 FC 902 at para 25).

[37] Furthermore, as noted by the respondent, some documentary evidence the applicant provided was inconsistent with his testimony, such as letters from the applicant's friends describing significant events that the applicant did not include in his PIF. Letters from the applicant's landlords also suggested that he was paying rent for two places in Prishtina in 2009, despite the fact that he stated he had no problems with Mr. Zharku that year.

[38] To assess whether a decision is reasonable in light of the outcome and the reasons, the Court must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para 48). This means that the Court should not substitute its own reasons, but may, if it finds it necessary, look to the record for the purpose of assessing the reasonableness of the outcome (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 15).

[39] In the present case, the Board provided more than sufficient reasons to support a negative credibility finding. It noted a number of omissions and inconsistencies, and found that most of the applicant's documentary evidence failed to corroborate the applicant's testimony. The reasons are thorough and clear. Thus, the decision is reasonable.

[40] For these reasons, this application for judicial review is dismissed. There is no question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed; and

2. No question of general importance is certified.

"Danièle Tremblay-Lamer"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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