Federal Court  Cour fédérale

Date: 20200205

Docket: IMM-3309-19

Citation: 2020 FC 200

Ottawa, Ontario, February 5, 2020

PRESENT: Mr. Justice Russell

BETWEEN:

SOMELA RRUSTEMAJ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], for judicial review of the decision of the Refugee Appeal Division of the Immigration and Refugee Board of Canada [RAD], dated April 30, 2019 [Decision], which dismissed the Applicant's appeal of the Refugee Protection Division of the Immigration and

Refugee Board of Canada's [RPD] decision denying the Applicant's refugee and person in need of protection claim under ss 96 and 97 of the *IRPA*.

II. BACKGROUND

[2] The Applicant is a citizen of Albania. She claims she is at risk in Albania due to her previous relationship with her ex-fiancé, who was abusive to her throughout their relationship and who has threatened both her and her family.

[3] The Applicant first came to Canada in September 2016. However, she did not make a claim for refugee protection until July 2017 following her return from Albania where, at the request of her father, she had participated in a mediation with her ex-fiancé, who at the meeting again threatened the Applicant and her family.

[4] The Applicant says that she first met her ex-fiancé when she was fifteen and was eventually pressured to marry him by her parents. She says that he frequently abused her during their relationship and she was hospitalized on multiple occasions. The Applicant suffered serious physical and psychological effects from this abuse culminating in an abortion and a suicide attempt. She also notes that her ex-fiancé continuously threatened to kill her during this time and exercised control over her day-to-day life.

[5] The Applicant states that she attempted to hide from her ex-fiancé in another city on two occasions; however, despite her efforts to evade him, he found her on both occasions.

[6] The Applicant also claims that her ex-fiancé was involved in the drug trade but, due to his friendship and association with police officers, he was never charged, despite being caught committing crimes. He bragged to her about his immunity and his friends in the police.

[7] Following her father's failed attempt at mediation in May 2017, the Applicant says she was assaulted by a man claiming to know her ex-fiancé, thus prompting her to make a refugee claim upon her return to Canada.

[8] On January 5, 2018, the RPD found that the Applicant was neither a Convention refugee nor a person in need of protection. First, the RPD drew negative inferences regarding the Applicant's credibility due to her failure to provide evidence of her Facebook conversations with her ex-fiancé to corroborate their relationship, as well as her return to Albania in 2017 to meet with him. Second, the RPD found that the Applicant had failed to rebut the presumption of state protection.

III. DECISION UNDER REVIEW

[9] On April 30, 2019, the RAD rejected the Applicant's appeal and confirmed the RPD's finding that the Applicant was neither a Convention refugee nor a person in need of protection. Despite finding that the RPD erred in its credibility analysis, the RAD agreed with the RPD that the Applicant had failed to rebut the presumption of state protection.

[10] The RAD found that the RPD's finding regarding the Applicant's credibility were the result of an improper plausibility finding and a failure to apply the *Chairperson Guidelines 4:*

Women Refugee Claimants Fearing Gender-Related Persecution, issued November 13, 1996 [*Gender Guidelines*]. The RAD emphasized that plausibility findings are to be made only in the clearest of cases and that the Applicant's failure to provide information from her previous Facebook accounts and cell phones did not call into question her credibility. The RAD also found that the RPD erred in assessing the Applicant's return to Albania on a purely objective basis. Indeed, the RAD found that the RPD had not considered the specific circumstances of the Applicant, and the effects of domestic abuse in accordance with the *Gender Guidelines* and the findings of the Supreme Court of Canada in *R v Lavallee*, [1990] 1 SCR 852, 108 NR 321.

[11] Nevertheless, the RAD found that, when taking into consideration the general country conditions and the particular circumstances of the Applicant, the RPD had not erred in finding that the Applicant had not rebutted the presumption of state protection.

[12] First, the RAD noted that the RPD did turn its mind to the level of democracy in Albania, to the shortcomings in policing, and to the evidence indicating that domestic violence continues to be a "serious problem" in Albania and that police often lack the training and capacity to effectively respond. However, the RAD also noted that the RPD correctly found that there have been tangible, operational improvements that have been implemented in Albania in recent years. As such, the RAD found that the RPD's analysis of the operational capacity of state protection with regard to the Applicant's circumstances was correct because: (1) there was no evidence of any recent communication with the agent of persecution; (2) there was no evidence of continued interest from him; (3) there was no indication that her ex-fiancé or her family were pressuring

her to continue her relationship with him; and (4) she appeared to have her family's support in severing ties with her ex-fiancé.

[13] Second, the RAD found that the RPD did not err in finding that the Applicant's failure to seek police protection was a relevant consideration in concluding that the Applicant had not established that state protection was unavailable to her in Albania. The RAD also noted that the RPD did not err in concluding that the Applicant's second-hand recounting of her ex-fiancé's connections with the local police was somewhat vague and insufficient to establish that she would be unable to obtain police protection.

[14] Third, the RAD agreed with the Applicant that the RPD improperly pointed to and relied upon state agencies that are not specifically tasked with providing protection; however, the RAD found that the RPD did not rely solely on the existence of such organizations to conclude that state protection was available.

[15] Finally, on its own assessment of the Applicant's personal circumstances, the RAD found that the RPD correctly concluded that the Applicant had failed to establish that she would be deprived of adequate state protection in Albania. The RAD noted that the Applicant is a young and relatively well-educated woman and that the domestic abuse she had suffered did not arise from her familial structure, because she was never married to her ex-fiancé and her family was supportive of her severing ties from him. The RAD noted that the absence of a familial dimension distinguishes this case from much of the commentary on the nature of domestic violence in Albania and the reluctance of Albanian police to get involved.

IV. ISSUES

[16] The issues raised in the present application are as follows:

1) Did the RAD breach the Applicant's right to procedural fairness?

2) Did the RAD err in applying the legal test for assessing the adequacy of state protection?

3) Did the RAD fail to apply the *Gender Guidelines* in assessing the adequacy of state protection?

4) Did the RAD err in its assessment of the evidence concerning state protection?

V. STANDARD OF REVIEW

[17] This application was argued prior to the Supreme Court of Canada's recent decisions in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] and *Bell Canada v Canada (Attorney General)*, 2019 SCC 66. This Court's judgment was taken under reserve. The parties' submissions on the standard of review were therefore made under the *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] framework. However, given the circumstances in this matter, and the Supreme Court of Canada's instructions in *Vavilov* at para 144, this Court found that it was necessary to ask the parties to make additional submissions on the standard of review. I have applied the *Vavilov* framework in my consideration of the application. Although it has changed the applicable standard to this Court's review of whether the RAD erred in applying the legal test for assessing the adequacy of state protection, it has not changed my conclusion.

[18] In *Vavilov*, at paras 23-32, the majority sought to simplify how a court selects the standard of review applicable to the issues before it. The majority did away with the contextual and categorical approach taken in *Dunsmuir* in favour of instating a presumption that the reasonableness standard applies. However, the majority noted that this presumption can be set aside on the basis of: (1) clear legislative intent to prescribe a different standard of review (*Vavilov*, at paras 33-52); and (2) certain scenarios where the rule of law requires the application of the standard of correctness, such as constitutional questions, general questions of law of central importance to the legal system as a whole and questions regarding the jurisdictional boundaries between two or more administrative bodies (*Vavilov*, at paras 53-64).

[19] Prior to the Supreme Court of Canada's decision in *Vavilov*, the Applicant submitted that the standard of correctness applied to the issue of procedural fairness as well as to the question of whether the RAD applied the correct legal test for assessing the adequacy of state protection in Albania. The Applicant also submitted that the standard of reasonableness applied to the RAD's assessment of the evidence and application of the *Gender Guidelines*. However, the Respondent submitted that the standard of reasonableness applied to all of the issues in this case.

[20] On January 16, 2020, the parties were asked to make written submissions on the applicable standard of review in light of the *Vavilov* decision. The Applicant does not address the issue of procedural fairness but does seem to submit that the standard of reasonableness applies to the remaining issues in this case. Meanwhile, the Respondent continues to hold that the standard of reasonableness applies to all issues in this case as "the Applicant's arguments are, in substance, challenges to the merits of the decision."

[21] I agree with the Applicant that the standard of reasonableness should be applied to this Court's review of all the issues at bar, but for the issue of procedural fairness, as there is nothing to rebut the presumption that the standard of reasonableness applies to those issues.

[22] Some courts have held that the standard of review for an allegation of procedural unfairness is "correctness" (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61 [*Khosa*]). The Supreme Court of Canada's decision in *Vavilov* does not address the standard of review applicable to issues of procedural fairness (*Vavilov*, at para 23). However, a more doctrinally sound approach is that no standard of review at all is applicable to the question of procedural fairness. The Supreme Court of Canada in *Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11 stated that the issue of procedural fairness:

> requires no assessment of the appropriate standard of judicial review. Evaluating whether procedural fairness, or the duty of fairness, has been adhered to by a tribunal requires an assessment of the procedures and safeguards required in a particular situation (*Moreau-Bérubé*, para 74).

[23] For the issue of whether the RAD erred in applying the legal test for assessing the adequacy of state protection, courts have often found in the past that the standard of correctness applies to questions concerning whether a decision-maker applied the correct legal test. See, for example, *Castro v Canada (Citizenship and Immigration)*, 2017 FC 13 at para 6, *Kotlarova v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 444 at para 19. However, following the Supreme Court of Canada's decision in *Vavilov*, a decision-maker's application of a legal test does not fall into any of the listed exceptions to the presumption of reasonableness, baring a constitutional dimension to the legal question, or a generality or "central importance to the legal

system as a whole." However, clear language in a governing statutory scheme and a significant body of jurisprudence establishing a certain applicable legal test will impose strict constraints on a decision-maker's discretion, and a departure from such would generally be considered unreasonable in the absence of explicit persuasive reasons for this departure. See *Vavilov,* at paras 105-114, 129-132, and notably para 111:

> [111] It is evident that both statutory and common law will impose constraints on how and what an administrative decision maker can lawfully decide: see *Dunsmuir*, at paras. 47 and 74. For example, an administrative decision maker interpreting the scope of its regulation-making authority in order to exercise that authority cannot adopt an interpretation that is inconsistent with applicable common law principles regarding the nature of statutory powers: see *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810, at paras. 45-48. Neither can a body instructed by legislation to determine what tax rate is applicable in accordance with an existing tax system ignore that system and base its determination on a "fictitious" system it has arbitrarily created: *Montréal (City)*, at para. 40. Where a relationship is governed by private law, it would be unreasonable for a decision maker to ignore that law in adjudicating parties' rights within that relationship: *Dunsmuir*, at para. 74. Similarly, where the governing statute specifies a standard that is well known in law and in the jurisprudence, a reasonable decision will generally be one that is consistent with the established understanding of that standard: see, e.g., the discussion of "reasonable grounds to suspect" in *Canada (Minister of Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56, [2015] 2 F.C.R. 1006, at paras. 93-98.

[24] Regarding the RAD's application of the *Gender Guidelines* and its assessment of the evidence submitted, the standard of reasonableness applies. This is consistent with the jurisprudence prior to *Vavilov*. See *Rasaiah v Canada (Citizenship and Immigration*), 2019 FC 632 at paras 14-16.

[25] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with whether it "bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para 99). Reasonableness is a single standard of review that varies and "takes its colour from the context" (*Vavilov*, at para 89 citing *Khosa*, at para 59). These contextual constraints "dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt" (*Vavilov*, at para 90). Put in another way, the Court should intervene only when "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov*, at para 100). The Supreme Court of Canada lists two types of fundamental flaws that make a decision unreasonable: (1) a failure of rationality internal to the decision-maker's reasoning process; and (2) untenability "in light of the relevant factual and legal constraints that bear on it" (*Vavilov*, at para 101).

VI. STATUTORY PROVISIONS

[26] The following statutory provisions of the *IRPA* are relevant to this application for judicial review:

Convention refugee	**Définition de réfugié**
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.

Person in need of protection

Personne à protéger

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 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 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

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes

faced generally by other individuals in or from that country,	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.

VII. ARGUMENTS

A. *Applicant*

[27] The Applicant argues that the RAD erred by: (1) breaching her right to procedural fairness; (2) applying the wrong legal test for assessing state protection; (3) failing to apply the *Gender Guidelines*; and (4) unreasonably assessing the evidence by ignoring relevant evidence, giving inappropriate weight to irrelevant facts, and dismissing her testimony regarding her ex-fiancé's relationship with the police. For these reasons, the Applicant argues that this application for judicial review should be allowed and the matter referred back to the RAD to be re-determined by a differently-constituted panel.

(1) Procedural Fairness

[28] The Applicant argues that the RAD breached her right to procedural fairness by failing to consider her submissions regarding the failure of the Albanian authorities to prosecute her ex-fiancé, and the problems women face in accessing state protection in Albania.

(2) Legal Test for Assessing State Protection

[29] The Applicant argues that the RAD erred in determining that the RPD had applied the correct test in assessing whether adequate state protection was available to the Applicant in Albania.

[30] The Applicant submits that a decision-maker must first assess the level of democracy and corruption in a country when evaluating the adequacy of state protection because a finding that a claimant should have done more to exhaust all courses of action available is directly proportional to the level of democracy and corruption in that country. The Applicant cites this Court's decision in *Sow v Canada (Citizenship and Immigration)*, 2011 FC 646 at para 10.

[31] Had the RAD turned its attention to the level of democracy and corruption in Albania, the documentary evidence would have revealed that Albania lacks judicial independence and freedom and that corruption in the police and law enforcement agencies in Albania is rampant.

(3) Application of *Gender Guidelines*

[32] The Applicant argues that the RAD failed to apply the *Gender Guidelines* with respect to its analysis of the adequacy of the state protection available to the Applicant in Albania. Though the RAD explicitly mentioned and considered the *Gender Guidelines* in its analysis of the RPD's credibility finding, the *Guidelines* are not cited in the RAD's state protection analysis. As such, the Applicant argues that the RAD ought to have considered the Applicant's ability to obtain adequate state protection in Albania according to her personal circumstances.

(4) Assessment of the Evidence

[33] The Applicant argues that the RAD unreasonably assessed the evidence submitted concerning her ability to seek adequate state protection in Albania by: (1) ignoring and dismissing critical evidence that contradicted the RAD's findings; (2) giving inappropriate weight to irrelevant facts; and (3) unreasonably dismissing her testimony concerning her ex-fiancé's relationship with the police.

[34] First, the Applicant argues that the RAD ignored an abundance of crucial evidence in this case which contradicted the RPD's findings. The Applicant notes that a failure to consider material evidence regarding an issue on which a decision is based is enough to overturn it. See *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration),* [1998] 157 FTR 35 at para 17 [*Cepeda-Gutierrez*] and *Pinto Ponce v Canada (Citizenship and Immigration),* 2012 FC 181 at para 35.

[35] Specifically, the Applicant argues that the RAD failed to consider:

1) The evidence demonstrating the involvement of Albanian police in drug trafficking, along with the fact that the Applicant's ex-fiancé was a drug trafficker;

2) The evidence that her ex-fiancé found and threatened her both times when she attempted to flee to other cities in Albania when finding that there was no evidence of a continued interest by her ex-fiancé;

3) The evidence that her father demanded she return to Albania from Canada to attend a mediation session with her agent of persecution when finding that she has the full support of her family to sever ties with her ex-fiancé;

4) The evidence detailing the physical and psychological effects suffered by the Applicant as a result of the abuse by her ex-fiancé; and

5) The evidence that the protection offered by the law in Albania for victims of domestic violence does not extend to unmarried women.

[36] Second, the RAD erred in giving inappropriate weight to irrelevant facts. In particular, the Applicant argues that the RAD considered irrelevant personal circumstances to determine the operational adequacy of state protection and relied almost entirely on governmental efforts and legislation directed at domestic violence rather than the evidence that demonstrates the practical on-the-ground deficiencies of state protection in Albania for survivors of domestic violence.

[37] Third, the RAD unreasonably dismissed her testimony concerning her ex-fiancé's relationship with the police because it was "second hand." This is not the case. The Applicant was with her ex-fiancé following his release from the police station where he directly told her that he had been released despite being guilty. Had the RAD considered this evidence, the RAD would have found that the Applicant had a subjective reluctance to engage the state as per this Court's decision in *Aurelien v Canada (Citizenship and Immigration),* 2013 FC 707.

B. *Respondent*

[38] The Respondent argues that: (1) there is no issue of procedural fairness in this case; (2) the RAD applied the correct legal test when assessing the adequacy of state protection; and (3) the RAD reasonably assessed the evidence in this case.

(1) Procedural Fairness

[39] Though the Applicant argues several issues of procedural fairness, the Respondent submits that these issues concern the RAD's assessment of the evidence. As such, no procedural fairness issue arises in this case.

(2) Legal Test for Assessing State Protection

[40] The Respondent argues that the RAD applied the correct legal test in assessing the adequacy of the state protection available to the Applicant in Albania.

[41] First, a detailed analysis of a country's democratic institutions is not required because the presumption of adequate state protection arises from a country's sovereignty and ability to protect its citizens rather than its democratic values (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689).

[42] Second, the Respondent notes that this Court found in *Kerdikoshvili v Canada (Citizenship and Immigration)*, 2018 FC 1265 at para 11 that the more democratic a state's institutions, the more the refugee claimant must have done to exhaust all courses of action open to them. As such, the Respondent notes that it is wrong in law for the Applicant to suggest that the "democratic spectrum" analysis should influence the evidentiary threshold used to rebut the presumption of state protection. Rather the jurisprudence indicates that the absence of democratic institutions is merely one factor that could assist a claimant in rebutting the presumption of state protection.

(3) Assessment of the Evidence

[43] As it is presumed that a state is able to protect its citizens, the Respondent notes that the onus rests on the Applicant to prove that the state is unable or unwilling to offer protection to her. The RAD properly assessed all the relevant evidence and reasonably concluded that the Applicant had not demonstrated that adequate state protection was unavailable to her in Albania.

[44] First, the RAD reasonably concluded that the Applicant had failed to rebut the presumption of state protection by failing to seek state protection in Albania. The RAD came to this conclusion by considering the Applicant's personal circumstances as well as the evidence

demonstrating government-funded support programs for survivors of domestic abuse and the evidence of designated domestic abuse units within the Albanian police. As such, the Respondent states that it was reasonable for the RAD to require the Applicant to exhaust all avenues of protection.

[45] Second, the Respondent submits that the Applicant failed to demonstrate the inadequacy of the state protection in Albania at the operational level with clear and convincing evidence. The RAD provided a careful and detailed analysis of the record before it and focused its analysis on the practical realities of state protection while taking into account the Applicant's personal circumstances. As such, it was open for the RAD to conclude that the Applicant had failed to rebut the presumption of state protection. The Respondent cites and relies upon this Court's findings in similar decisions such as *Gjeta v Canada (Citizenship and Immigration)*, 2019 FC 52 at paras 16 and 31; *Mernacaj v Canada (Citizenship and Immigration)*, 2018 FC 752 at para 19; *Ruszo v Canada (Citizenship and Immigration)*, 2018 FC 943 at para 29; *Hafuzi v Canada (Citizenship and Immigration)*, 2018 FC 1206 at paras 33-36; and *Zazaj v Canada (Citizenship and Immigration)*, 2018 FC 435 at paras 63-65.

VIII. ANALYSIS

[46] The RPD's analysis of state protection comes to the following conclusions:

> [20] The NDP for Albania explains challenges faced by women in Albania concerning domestic violence, including domestic violence being regarded as "a "private" issue in Albanian society and is "not openly discussed". In the Claimant's particular circumstances, she is no longer in a domestic relationship with Jurgen. She is not in a familial relationship or a relationship of financial dependency with Jurgen. She shares no legal, financial, or

> contractual connection. She is not married or in a common law relationship, she is not residing with him, she has no legal status or legal obligations with Jurgen. Further, there is no evidence of gender-based violence which the Claimant has experienced by her family members as a result of the termination of her relationship with Jurgen. In light of the Claimant having not engaged the Albanian authorities, the termination of her relationship with Jurgen, insufficient evidence of Jurgen's alleged connections to the police, no evidence of gender-based violence by members of her family, the credibility concerns outlined above, no evidence of continued interest after May 2017, and the documentary evidence regarding state protection generally in Albania, and specifically concerning domestic violence, the Panel finds the Claimant has failed to rebut the presumption of adequate state protection with "clear and convincing" evidence.
>
> [21] As indicated in the Federal Court of Appeal decision of *Kadenko*, "[t]he burden of proof that rests on the claimant is, in a way, directly proportional to the level of democracy in the state in question: the more democratic the state's institutions, the more the claimant must have done to exhaust all the courses of action open to him or her." The Panel finds the Claimant has not exhausted "all the courses of action open to … her." While the Panel finds that state protection in Albania is not perfect, the Panel finds, insufficient evidence, on a balance of probabilities, that the Albanian authorities are either unwilling or unable to provide the Claimant, in her particular circumstances, adequate state protection.
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> [Footnotes omitted.]

[47] This analysis is problematic because, although the RPD finds that the Applicant is no longer in a domestic relationship with her ex-fiancé, it nevertheless relies upon "the documentary evidence regarding state protection generally in Albania, and specifically concerning domestic violence…."

[48] A review of the RPD decision (see paras 15-19) reveals that the RPD's focus in reviewing the documentary evidence is "domestic violence." Yet the RPD concludes that the Applicant is no longer in a domestic relationship.

[49] When it comes to violence against women generally in Albania, the RPD says very little.

[50] In reviewing the RPD decision, the RAD confirms that the Applicant is not in a familial relationship with her ex-fiancé:

> [38] The Appellant and Jurgen were never married. Moreover, the Appellant's immediate family were never in favour of her relationship with Jurgen, and they appear to be supportive of her. As such, at present, the Appellant has no familial relationship with Jurgen.

[51] While criticising some aspects of the RPD's state protection analysis, the RAD endorses the RPD's general conclusions.

> [40] On the contrary, the Appellant's family appear to be supportive of her, and, as such, I concur with the RPD that this would enhance her chances of obtaining meaningful and adequate protection from the Albanian authorities should she seek it out. To this end, I note that the Appellant has pointed to no evidence suggesting that individuals in the Appellant's precise circumstances are subject to the same impediments in obtaining protection as those subject to intro-familial violence, such as spousal abuse.
>
> [41] In the end, I find that the RPD correctly assessed the documentary evidence, including the evidence on the policing shortcomings in Albania with respect to domestic violence. It considered this evidence in light of the Appellant's personal circumstances, and it correctly concluded that the Appellant had failed to establish that she would be deprived of adequate state protection in Albania.

> [42] In arriving at this conclusion, I have turned my mind to the fact that I earlier found that the RPD erred in its credibility findings, and I have considered whether these errors affected its state protection analysis. Ultimately, I have concluded that they did not do so. The RPD's state protection analysis was largely based on a consideration of conditions in Albania, situated in the context of the Appellant's circumstances. For the most part, this analysis appeared to be predicated on an acceptance of the Appellant's previous relationship with Jurgen.
>
> [43] Furthermore, on my own review of the RPD's state protection analysis, I have assumed that the Appellant's allegations are generally credible. While the RPD made brief references to its credibility findings within its state protection analysis, I have concluded that these references do not undermine its findings. In other words, even accepting the credibility of the core elements of the Appellant's claim, I conclude that the RPD did not err in finding that she had failed to establish that she would be unable to obtain adequate state protection in Albania. As this finding was determinative of the Appellant's claim for refugee protection, I further conclude that the RPD did not err in concluding that the Appellant is neither a Convention refugee nor a person in need of protection.

[52] Both decisions rely heavily upon documentary evidence related to domestic violence while, at the same time, pointing out that the Applicant is not in a domestic relationship with her ex-fiancé.

[53] The RAD's conclusions that the "RPD's state protection analysis was largely based on a consideration of conditions in Albania situation in the context of the Appellant's circumstances" is hard to square with the RPD's almost total focus on the documentary evidence related to domestic violence.

[54] However, this focus would appear to be based upon the RAD's finding that the Applicant (who has the onus) "pointed to *no evidence* suggesting that individuals in the Appellant's precise

circumstances are subject to the same impediments in obtaining protection as those subject to intra-familial violence, such as spousal abuse" [emphasis added].

[55] It isn't clear what degree of precision the RAD is relying upon here, but the evidence with regard to general violence against women and the state's inability or unwillingness to respond to this violence is quite extensive in the record.

[56] The Applicant asserts that the "law on violence against unmarried women in Albania is that there is no police protection. It is perverse of the RAD to assert state protection." The Applicant points, in particular, to the British Home Office Report of December 2017 [UK Home Office Report] as evidence of a lack of protection.

[57] The UK Home Office Report "Women Fearing Domestic Violence" in Albania, 2016, page 13, para 6.1.1 cites a national population-based survey that posits a category of former husbands and/or partners who perpetrate violence against women. Apparently, the reason for this is that the wife or partner is regarded as male property in Albania.

[58] The European Commission has highlighted the poor functioning of mechanisms to address gender-based violence in Albania. See para 7.2.7 of the UK Home Office Report.

[59] The UK Home Office Report for December 2017 for Albania has the following to say on the availability of state protection in Albania for women who face gender-based violence:

> 5.3.8 The GREVIO report further explained the significance of public or private prosecution:

‘In Albania, the rule is that a criminal offence is subject to public prosecution, unless it falls into the category of crimes subject to private prosecution. Crimes of private prosecution can only be investigated and prosecuted upon complaint of the victim and terminate if the victim withdraws the complaint or forgives the perpetrator. Article 284 of the ACPC [Albanian Criminal Procedural Code] lists the crimes of private prosecution. For the purposes of the Istanbul Convention, the relevant offences submitted to private prosecution are: non serious intentional injury (Article 89 of the CCA [Criminal Code of Albania]), rape of adult women (Article 102, first paragraph of the CCA), sexual or homosexual activity by abuse of official position (Article 105 of the CCA), sexual or homosexual activity with consanguine persons and persons in the position of trust (Article 106 of the CCA), and coercion or obstruction of cohabitating, concluding or dissolving a marriage (Article 130 of the CCA). As regards the offence of non-serious intentional injury, it should be noted that Albania did not make use of the possibility of entering a reservation to Article 55, paragraph 1, in respect of Article 35 regarding minor offences. Domestic violence is not listed under Article 284 of the ACPC and is therefore subject to public prosecution.

‘This means that any case of physical violence, including non-serious intentional injury and battery, whenever committed in the domestic sphere, is subject to ex officio prosecution. Article 130/a of the CCA [Criminal Code of Albania] defining domestic violence does not however include sexual violence, which means that such instances of violence can only be investigated and prosecuted if the victim brings forth a complaint or a report.

Given the taboo surrounding sexual violence, subjecting this form of violence to public prosecution could also serve to make this phenomenon emerge from current under-reporting. In light of the foregoing analysis, Albanian law subjecting physical violence not qualifying as domestic violence, sexual violence whether or not it qualifies as domestic violence, and forced marriage to ex parte investigation and prosecution is not in

> line with the requirement set in Article 55 of the [Istanbul] Convention. Expecting victims of these forms of violence to initiate private prosecution proceedings against perpetrators ignores their reluctance to report and increases the risk of secondary victimisation or further violence.

[Emphasis added, footnote omitted.]

[60] The UK Home Office Report for December 2017 also indicates as follows:

> 3.1.5 The same report continued, '[T]here is a tendency in Albania to promote forgiveness under the pretext of traditional family values. Women and girls themselves believe, to a large degree, that they should tolerate violence to keep the family together. This tendency transpires, for instance, in the actions of public officials in law enforcement and the judiciary who promote mediation outside any legal framework and without proper consideration for the safety of victims.'
>
> …
>
> 5.3.2 The July 2016 CEDAW report stated that it was 'concerned about the widespread problem of non-execution of court orders, including orders concerning the payment of alimony' and referred to 'The frequent failure to enforce protection orders and emergency protection orders.'
>
> 5.3.3 The USSD's report for 2016 stated that 'Police often did not have the training or capacity to deal effectively with domestic violence cases.'
>
> …
>
> 5.3.6 The GREVIO report noted further barriers to the effective implementation of EBOs and POs:
>
> > 'Other obstacles standing in the way of an effective implementation of the EBOs/Pos [Protective Orders] mechanism relate mainly to the lack of reactivity of responsible officials. These concern (a) the non-compliance with procedural deadlines, such as the 24 hour deadline to notify the victim, law enforcement, bailiffs and social services of the issuance of EBOs, or the absence of clear deadlines applying in case of appeals against the decision to

> issue an EBO/PO; (b) the scarce use by law enforcement and prosecution of their power to set in motion the procedure for the issuance of an EBO; (c) the failure of the responsible enforcement agencies, in particular bailiffs, to execute or to ensure the enforced implementation of EBOs/POs. GREVIO is further informed in this respect of cases where bailiffs have required payments from the victims in order to enforce EBOs or POs. Both perpetrators acting in violation of protection orders and officials failing to execute them can be held accountable under the relevant provisions of criminal law. Although the state report data concerning the number of violation of protection orders, no information is provided as to the sanctions which might have been applied as a consequence thereof.'
>
> [Footnotes omitted.]

[61] It is, of course, a reviewable error for the RAD not to address evidence that contradicts its own conclusions. See *Cepeda-Gutierrez*, at para 17.

[62] In my view, the RAD disregards evidence that suggests there is no real effective protection in Albania for women in the Applicant's position.

[63] In the present case, the RAD "assumed that the Appellant's allegations are generally credible" (para 43). Its analysis of her personal circumstance is as follows:

> [35] To this end, I also find that the RPD did not err in concluding that the Appellant's testimony as to Jurgen's connections with local police was somewhat vague and was insufficient to establish that she would be unable to obtain police protection in any of the various places that she has lived. In brief, the Appellant's second-hand recounting of what Jurgen had told her about his connections with the police, in a context completely separate from his mistreatment of her, was of limited value in

> establishing that Albanian police would be ineffective in protecting her.
>
> [36] Third, while I would agree with the Appellant that the RPD pointed to state agencies (such as the Ombudsperson and the Commissioner for Protection from Discrimination) that are not specifically tasked with providing protection, it did not rely solely on the existence of such organizations to conclude that state protection would be forthcoming. The existence of such agencies may be relevant to the general evaluation of a country's democratic institutions. However, I would caution the RPD from relying heavily on their existence, as it is clearly an error to suggest that the availability of recourse for protection failures is, itself, evidence of adequate protection. In this case, as noted above, I find that the RPD's reference to these agencies was accompanied by other, more relevant, evidence that justified its conclusions with respect to state protection.
>
> [37] On my own assessment of the Appellant's personal circumstances, I note that she is a young and relatively well-educated woman. She completed high school in her home town of Koplik and later pursued a university education in Shkoder, Albania, where she studied for two and a half years. She also moved to the capital city of Tirana where she indicates that she was eventually found by Jurgen. Since being in Canada, she has furthered her studies at St. Clair College, in Windsor, Ontario.
>
> [38] The Appellant and Jurgen were never married. Moreover, the Appellant's immediate family were never in favour of her relationship with Jurgen, and they appear to be supportive of her. As such, at present, the Appellant has no familial relationship with Jurgen.

[64] That the Applicant faces a threat real from her ex-fiancé, Jurgen, does not seem to be in doubt.

[65] The fact that the Applicant is a "young and relatively well-educated women" is irrelevant to the present circumstances where the Applicant has already suffered severe violence from Jurgen and he has said that he will hunt her down. The RAD is inappropriately relying upon

statistics that say that well-educated women are less likely to suffer violence. But Jurgen has found her in the past and there is nothing to suggest he will not find her again.

[66] After the Applicant left Albania to escape Jurgen, he went to her mother and younger sister and threatened to kill the sister and the Applicant. The mother and sister had to flee the country to escape him. The evidence is clear that Jurgen does not give up and his threats to harm the Applicant are not empty. After the Applicant left Jurgen, he followed wherever she went, threatened her, and told her that she belonged to him and could not hide from him. When, in order to accommodate her father, the Applicant returned to Albania to attend a meeting with Jurgen aimed at securing a truce, Jurgen said the Applicant would be with him or she would be dead. The Applicant did not return to Albania willingly, she went back to please her father, another patrimonial male.

[67] Both the RPD and the RAD also rejected Jurgen's influence on, and connections to, the police as well as his apparent immunity to prosecution as based upon "vague" and "indirect" evidence, but the evidence is clear and direct. The Applicant gave direct evidence of what Jurgen had told her. He committed crimes but the police and authorities did not prosecute him.

[68] The RAD's state protection analysis is inaccurate both as regard the Applicant's particular circumstances and the evidence on the adequacy of state protection when it comes to women in Albania.

[69] There are other problems with this Decision but the central issue was state protection and whether, if the Applicant went to the police or authorities she would be protected. There is evidence she would not be protected. The RAD failed to take this evidence into account and did not reasonably assess the Applicant's particular circumstances and the reality of the threat she faces from Jurgen. On this basis alone, this matter must be returned for reconsideration.

[70] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT IN IMM-3309-19

THIS COURT'S JUDGMENT is that

1. The application is allowed. The Decision is quashed and the matter is returned for reconsideration by a differently-constituted RAD;

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3309-19
STYLE OF CAUSE:	SOMELA RRUSTEMAJ v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	DECEMBER 12, 2019
JUDGMENT AND REASONS:	RUSSELL J.
DATED:	FEBRUARY 5, 2020

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