Federal Court  Cour fédérale

Date: 20220224

Docket: IMM-4468-20

Citation: 2022 FC 255

Ottawa, Ontario, February 24, 2022

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

BLERIM MARKU, FATBARDHA MARKU AND VIKTORIA MARKU

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a decision of the Refugee Appeal Division of the Immigration and Refugee Board [the "RAD"], dated August 28, 2020 [the "Decision"], which dismissed the Applicants' appeal and upheld the decision of the Refugee Protection Division of the Immigration and Refugee Board [the "RPD"], dated November 4, 2016.

[2] The RPD found that the Applicants were neither Convention Refugees nor persons in need of protection within the meaning of sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the "*Act*"].

II. Background

[3] The Applicants, Blerim Marku [the "Principal Applicant"], his wife Fatbardha Marku [the "Associate Applicant"], and their daughter Viktoria Marku [the "Minor Applicant"], are all citizens of Albania.

[4] The Applicants fled to Canada on June 16, 2016 and claimed refugee protection pursuant to sections 96 and 97 of the *Act*, due to their fear that the Principal Applicant's uncle, Lutfi, was seeking to harm them.

[5] In a decision dated November 4, 2016, the RPD refused the Applicants' refugee claim. The RPD determined that there was no nexus to a Convention ground under section 96 of the *Act*, and that there was insufficient credible evidence to establish a threat to the Applicants and that the Applicants had failed to rebut the presumption of state protection.

[6] The Applicants appealed the RPD decision to the RAD. The RAD dismissed the appeal and upheld the decision of the RPD, finding that the Applicants were credible but did not establish that they face a prospective risk in Albania.

[7] On July 24, 2019, I allowed the Applicants' application for judicial review of the RAD's decision and ordered that the matter be referred to a differently constituted panel for a redetermination [*Marku v. Canada (Citizenship and Immigration)*, 2019 FC 991[*Marku*]]. I found that the RAD had unreasonably failed to admit new evidence submitted by the Applicants under subsection 110(4) of the *Act*, and therefore failed to meaningfully consider the Applicants' risk and the availability of state protection in Albania.

[8] In the Decision before the Court in the present matter, a differently constituted RAD dismissed the Applicants' appeal and upheld the RPD's decision for a second time. Briefly, the RAD found that the RPD did not err when it concluded that the Applicants had not rebutted the presumption that adequate state protection was available to them in Albania.

[9] On September 23, 2020, the Applicants filed the current application for leave and judicial review of the second RAD's Decision. The Applicants are seeking an Order remitting the matter to the RAD for a hearing *de novo*.

III. Decision Under Review

A. *New Evidence*

[10] The Applicants sought to admit three new pieces of evidence before the first hearing of the RAD. In line with my reasons in *Marku*, the RAD in this Decision allowed (i) a letter from the Principal Applicant's father, dated November 17, 2016, and (ii) a report from the police, dated

November 1, 2016, but declined to admit (iii) a letter from the Minor Applicant's school, dated December 9, 2016.

[11] In addition, when the appeal was first before the RAD, the Applicants sought to admit new evidence to support their submissions on the prospective risk faced by the Applicants in Albania. The RAD in the Decision accepted this evidence, which consists of four articles/reports regarding blood feuds and revenge killings.

[12] The Applicants sought to submit further evidence before the RAD in this Decision in the form of four new articles also on the subjects of blood feuds and revenge killings. The RAD declined to admit these four articles because they were not accompanied by a memorandum detailing how the proposed new evidence meets the requirements of subsection 110(4) of the *Act* according to *Rule* 3(3)(g)(iii) of the *Refugee Appeal Division Rules*, SOR/2012-257 [the "*RAD Rules*"]. The RAD also found that, upon review, it was not clear how this proposed new evidence was relevant to the determinative issues.

B. *Oral Hearing*

[13] The new evidence presented to (and accepted by) the RAD did not raise any credibility concerns; therefore, the RAD denied the request for an oral hearing.

C. *Decision on the Merits*

[14] While the RAD found that the RPD erred in its assessment of the Applicants' credibility, it upheld the RPD decision finding that the Applicants do have, on a balance of probabilities, access to adequate state protection.

[15] The RAD accepted the following claims:

A. The Principal Applicant's uncle, Lutfi, murdered his brother, Hasan, in 1992, threatened the Principal Applicant's father, Esat, at that time, and received a sentence of twenty years in prison;
B. That Lutfi may seek revenge upon the Applicants to resolve the family/property dispute that began between the elder brothers in 1992, including the Principal Applicant's father;
C. That Lutfi is alive, has been released from prison, and has demonstrated an interest in contacting the Applicants by visiting the Minor Applicant's school and by asking his daughter about the Applicants; and
D. That the history of personalized revenge killings and blood feuds in Albania has caused the Applicants to believe that Lutfi could take revenge upon them.

[16] Since no crime has been committed and no issues have occurred in the last 25 years, beyond the incident at the Minor Applicant's school, the RAD found that, if the Applicants fear that they could become victims of a crime, they must seek out the protection of the state.

[17] While the RAD disagreed with some of the RPD's findings, the RAD found that the RPD did not err in its conclusion that Albania could provide adequate state protection to the

Applicants. The RAD found that the objective documentary evidence shows that, though the Albanian state protection mechanism has struggled with issues of corruption and resources, it has demonstrated an ability to respond to concerns and can provide adequate, if not perfect, protection to its citizens.

[18] The RAD further noted that the Applicants are willing and able to access adequate state protection and that the Albanian police have made efforts to intervene in the dispute that has affected the Applicants' family.

IV. Issues

[19] There are two issues in the present matter:

(1) Did the RAD err in not accepting the new evidence? and

(2) Did the RAD err in determining that there was adequate state protection available to the Applicants?

V. Standard of Review

[20] The standard of review is reasonableness [*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paragraph 25].

VI. Analysis

A. *Whether the RAD erred in not accepting the new evidence.*

[21] On appeal before the RAD, the appellant may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection [subsection 110(4) of the *Act*].

[22] According to *Rule* 3(3)(g)(iii) of the *RAD Rules,* appellants must submit a memorandum that includes full and detailed submissions regarding how any documentary evidence they wish to rely on meets the requirements set out in subsection 110(4) of the *Act*.

[23] The Applicants argue the RAD's reasons for not admitting the four articles as new evidence under subsection 110(4) of *Act* and per *Rule* 3(3)(g)(iii) of the *RAD Rules* are incomprehensible. In support, the Applicants note two articles came from a source previously accepted in the first RAD appeal, and the other two articles are alleged to be manifestly relevant to state protection, on which the appeal was denied.

[24] The Applicants further argue that, though they failed to submit a memorandum as required under the *RAD Rules*, *Rule* 53 provides the RAD with the discretion to waive or vary the rules.

[25] The onus is on the Applicants to prove the relevance, materiality, newness, and credibility of the proposed new evidence in a memorandum, which they failed to submit as required under the *RAD Rules*.

[26] The RAD's Decision to not accept the new evidence was reasonable. Not only did the Applicants not submit the required memorandum, the proposed new evidence failed to explain why the Applicants considered the four articles to be relevant to the determinative issues.

[27] The cases relied upon by the Applicants with respect to the alleged new evidence are distinguishable from the present case. In addition, the Applicants were represented by counsel who were familiar with the required processes, having submitted new evidence at two prior occasions and having undergone a previous judicial review concerning evidentiary issues.

B. *Whether the RAD erred in determining that there was adequate state protection available to the Applicants.*

[28] Persons claiming to be personally subjected to a risk to life or risk of cruel and unusual treatment pursuant to section 97 of the *Act* must also prove that they are unable or unwilling to avail themselves of the protection of their country of origin.

[29] The test for whether state protection is adequate is well established [see *Ward v. Canada (Minister of Employment and Immigration)* (1993), [1993] 2 SCR 689 (SCC)]. While tribunals must presume the state is capable of protecting its own citizens if it is in control of its land, security, and judiciary, this presumption can be displaced with clear and convincing evidence that is both reliable and probative of the state's inability to do so [*Flores Carrillo v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 at paragraphs 28 and 30].

[30] A tribunal cannot premise the operational adequacy of state protection on "serious efforts" or "good intention," but must rather on the results of those efforts. The emphasis must be on whether the state actually produces adequate safety, rather than whether the state tries hard enough. Simply taking action is insufficient [*Mudrak v. Canada (Minister of Citizenship and Immigration)*, 2016 FCA 178 at paragraphs 31 to 33].

[31] The Applicants submit that the RAD's assessment of state protection is "riddled with uncertainty" and that the RAD's conclusion is based on the false premise that mere efforts made by the Albanian police equate to state protection that is operationally available to the Applicants.

[32] I find that the RAD conducted a thorough analysis of not only the evidence related to state protection in Albania generally, but also the state protection that has been afforded to the Applicants specifically in the context of their family dispute.

[33] The RAD noted that Albanian's police and judicial system are functional. It acknowledged that corruption (and sexism in instances of female complainants of sexual abuse and domestic violence) have been issues faced by the Albanian police; however, efforts are being made to improve in these areas. The RAD reasonably found that the evidence before it does not imply that the Albanian police do not have the capacity to protect its citizens.

[34] In addition, the RAD noted that the Applicants have been willing and able to avail themselves of the state protection afforded to them in Albania. The police responded to the Applicants' complaint, conducted a six-month investigation, and involved the Prosecutor's

Office. The RAD reasonably found that there is no clear and convincing evidence that Albania state protection is not operationally functional and available to the Applicants.

[35] While I am sympathetic to the Principal Applicant's concern for his family and appreciate that Albania has problems with state protection, the evidence before the Court does not show that the state protection is such that the RAD's Decision was unreasonable.

[36] For the reasons above, the application is dismissed.

JUDGMENT in IMM-4468-20

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. There is no question for certification.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4468-20
STYLE OF CAUSE:	BLERIM MARKU, FATBARDHA MARKU, AND VIKTORIA MARKU v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	FEBRUARY 22, 2022
JUDGMENT AND REASONS:	MANSON J.
DATED:	FEBRUARY 24, 2022

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