

Federal Court



Cour fédérale

Date: 20110920

Docket: IMM-494-11

Citation: 2011 FC 1079

Ottawa, Ontario, September 20, 2011

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

**ZOJA ZOJA (a.k.a. ZOJA PERKOVIQ)
ROBERT PERKOVIQ,
ELIZABETH DUSEVIC,
CHRISTIAN MARK DUSHAJ JR,
SHPRESA PERKOVIQ,
GJERGJ PERKOVIQ**

Applicants

and

**THE MINISTER OF CITIZENSHIP &
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] The applicants are a family of refugee claimants who left Kosovo for the United States in 1986. They lived in the US illegally after their claim for asylum was rejected in 1989. In 2008, they were smuggled into Canada.

[2] The family consists of Ms. Zoja Zoja (aka Zoja Perković), her husband, Gjergj Perković, their son, Robert, their daughters, Shpresa and Elizabeth, and Elizabeth's son, Christian. (Zoja and Gjergj have two other sons, Alfred and Kastriot Perković, but they are not part of this application.) The applicants are citizens of Kosovo, except Shpresa and Christian, who are US citizens.

[3] The applicants' claim was based on their mixed ethnicity and religion. They are Albanian nationals with a Serbian surname who adhere to the Catholic faith. They maintain that the Albanian majority sees them as Serbs, while the Serbian minority sees them as Albanian. In addition, Zoja claimed persecution on the basis of gender, arguing that women in Kosovo have a lower social status, are poorly treated, and receive a lesser degree of state protection. Gjergj also alleged that his family was the object of a feud waged by a family called Leshaj.

[4] A panel of the Immigration and Refugee Board dismissed the applicants' claim mainly on the basis that their evidence was not credible. The applicants argue that the Board made erroneous credibility findings, conducted an incomplete analysis of their claim, rendered an unreasonable decision, and failed to provide adequate reasons. They ask me to set aside the Board's decision and order a new hearing before a different panel of the Board.

[5] I agree with the applicants that the Board's analysis was incomplete and will grant their application for judicial review on that basis. It is unnecessary for me to consider the other grounds raised by the applicants.

II. The Board's Decision

[6] Since Shpresa and Christian are both US citizens, the Board concluded that they did not merit refugee protection in Canada. The applicants do not dispute that finding.

[7] The Board also rejected the claims of the other applicants, mainly because their testimony was implausible or not credible. The Board's concerns arose mainly from the testimony of Gjergj. Gjergj stated in his written narrative that the family could not return to Kosovo because of the Leshaj family's feud against them. However, he had not mentioned this feud when he first arrived at the port of entry (POE). The Board found this omission was inconsistent with Gjergj's claim that the conduct of the Leshaj family was the main reason the family left Kosovo in 1986.

[8] Gjergj testified that his sons Alfred and Kastriot were deported from the US in 2007 and, when they returned to Kosovo, unknown persons attacked them in the street and burned down their apartment. According to Gjergj, his sons were told that the arson was a message from the Leshaj family. However, the Board found that Gjergj was "vague and evasive in his responses". It found his evidence to be untrustworthy and not credible.

[9] The Board also found Elizabeth's testimony to be unpersuasive. She did not know much about the feud and did not tell her mother anything about it. The Board found this evidence "totally untrustworthy". The Board was also concerned that Zoja's evidence did not mention the feud. Her main fear was based on the family's Albanian ethnicity, Catholic religion and Serbian surname. Furthermore, none of the applicants mentioned the feud at the POE.

[10] The Board was also concerned about Robert's evidence. When Robert was interviewed at the POE, he said he was unable to return to Kosovo because he would be too far from his wife (a US citizen), they were expecting a baby, he did not speak the language fluently, and his brother, who was deported in 2007, had told him about the poor conditions in Kosovo. Robert did not mention persecution as a reason for not wanting to return to Kosovo.

[11] Ms. Megan Perković, an American citizen married to Alfred, testified that she was in Kosovo in 2007 when Alfred and Kastriot were attacked and their apartment was set alight. But she had no knowledge of any threats from the Leshaj family. The panel drew a negative inference from her testimony and determined that the family had fabricated evidence about the feud to establish their refugee claim.

[12] Regarding the applicants' fear of persecution based on their ethnicity, Zoja, Elizabeth and Robert all testified that the brothers were attacked by young Albanians because of their accent, Serbian last name and the fact that they did not live in Kosovo. But the Board found no evidence to support that allegation. It found that the attack was random.

[13] With respect to the issue of state protection, the Board determined that the police did take some action. It found that state protection in Kosovo "is not without its flaws". However, it also noted that state protection does not have to be perfect, and that the applicants had the burden of rebutting the presumption of state protection. The Board found that the claimants had not presented clear and convincing proof of Kosovo's inability to protect its own citizens.

[14] The Board drew a negative inference from the applicants' varying and often contradictory evidence as to why they were seeking protection. It found that the applicants' desire to live in Canada was motivated not by fear, but by their inability to gain status in the US and their wish to seek a better life. Further, the Board found that their evidence did not establish that they would be at risk of persecution if they returned to Kosovo. Accordingly, it dismissed their claims.

III. Did the Board fail to analyze fully the applicants' claim?

[15] The Minister submits that the Board fully considered the merits of the applicants' claim. Further, the Minister argues that the Board did not commit a reviewable error in failing to analyze the gender issue, as it was clearly not the main focus of Zoja's claim.

[16] The Board clearly disbelieved the applicants' evidence about a family feud. However, in my view, it failed to go on to consider other parts of the applicants' claim with respect to mixed ethnicity and religion. In fact, the Board's reasons did not contain any assessment of the risks faced by the applicants on those grounds, even though there was evidence before the Board that the attack on the brothers was, in fact, ethnically motivated. The door of their apartment was painted with an ethnic slur.

[17] Further, documentary evidence, not cited by the Board, supported this aspect of the applicants' claim. The 2009 US Department of State report on Kosovo notes that particular risks are faced by Catholics, Albanian Serbs and persons from mixed marriages perceived to be Serbian. A Response to Information Request identifies Kosovo Albanians in ethnically mixed marriages as

being vulnerable and in need of international protection. Further, the UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Individuals from Kosovo identifies persons in mixed marriages or children of mixed parentage as being one of four groups most at risk in Kosovo.

[18] With regard to gender, the Board simply failed to address this aspect of the claim, notwithstanding the evidence before it. A 2009 US Department of State report suggested that women in Kosovo face persecution, domestic abuse, sexual harassment and discrimination.

[19] In my view, the Board focused entirely on the part of the applicants' claim relating to a long-standing family feud. It was entitled to conclude that the applicants' evidence relating to that situation was not credible. However, it also had a duty to consider the other grounds put forward by the applicants and consider their merits. The fact that their evidence relating to the feud was not credible did not excuse the Board from considering those other grounds. As I stated in *Joseph v Canada (Minister of Citizenship and Immigration)*, 2011 FC 548, at para 11:

The Board must be careful not to dismiss a refugee claim on the basis that it disbelieves parts of the claimant's testimony, or evidence that does not go to the core of the claim. Sometimes claimants embellish their stories, or they forget minor details. It is unreasonable for the Board to dismiss claims simply because they find evidence at the fringes not to be reliable or trustworthy. Even if the Board finds some evidence not to be credible, it must go on to consider whether there remains a residuum of reliable evidence to support a well-founded fear of persecution.

[20] Here, the Board failed to consider whether there was a residuum of reliable evidence to support the applicants' claim of persecution based on mixed ethnicity, religion and gender.

Accordingly, I find its decision was not a defensible outcome based on the facts and the law and, therefore, was unreasonable.

IV. Conclusion and Disposition

[21] The Board omitted analysis of important aspects of the applicants' refugee claim.

Accordingly, I find that its decision was unreasonable and must, therefore, allow this application for judicial review. Neither party proposed a question of general importance for me to certify, and none is stated.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed. The matter is referred back to the Board for a new hearing before a different panel;
2. No question of general importance is stated.

“James W. O’Reilly”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-494-11

STYLE OF CAUSE: ZOJA ZOJA, ET AL
v
MCI

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: September 13, 2011

**REASONS FOR JUDGMENT
AND JUDGMENT:** O'REILLY J.

DATED: September 20, 2011

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