

Federal Court



Cour fédérale

Date: 20120620

Docket: IMM-9306-11

Citation: 2012 FC 784

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Montréal, Quebec, June 20, 2012

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

FATMIR AVDULLAHI

Applicant

and

**MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The crux of the claim concerns ethnicity. The documentary evidence on the country in question supported the applicant's allegations. In the ethnic context of the applicant's country of citizenship, it was not reasonable to question the applicant's ethnicity because it had not been officially corroborated. Nor was it any more reasonable to assess the [TRANSLATION] "the

percentage of the [applicant's] minority blood" to [TRANSLATION] "calculate" the proportion of Ashkali ethnicity. This procedure is not consistent with the jurisprudence of this Court (see para 29).

[2] Based on this reasoning, the subsequent analysis of state protection conducted by the Refugee Protection Division [RPD] is not reasonable, considering the subjective evidence and the extensive objective evidence in the entire context.

II. Legal proceeding

[3] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], for judicial review of a decision by the RPD issued November 23, 2011, which determined that the applicant is neither a Convention refugee as defined under section 96 of the IRPA nor a person in need of protection under section 97 of the IRPA.

III. Facts

[4] The applicant, Mr. Fatmir Avdullahi, is a citizen of Kosovo.

[5] The applicant is invoking his Ashkali background. He says that his grandfather, Mr. Ramadan, married two women consecutively, one an Albanian and the other, the mother of the applicant's father, an Ashkali.

[6] The applicant states that the children of his grandfather's first wife never liked his father, Musli, who was the son of an Ashkali woman. He was subjected to violence in an attempt to exclude him from his inheritance.

[7] In 1974, in a fight between Musli and his half-brothers, Musli injured one of them, Fazli, who died of his injuries. Convicted of murder, the applicant's father was sentenced to prison and released in 1985.

[8] After the 1999 war, the applicant states that the villagers felt even more hatred towards his family because of its Ashkali background. *Inter alia*, his family did not receive any post-war construction material.

[9] The applicant claims that Fazli's children persecuted him and that he was beaten unconscious in 2002.

[10] The applicant reported his assailants to the United Nations police but nothing happened.

[11] The applicant arrived in Montréal on March 25, 2009, and claimed refugee status at the airport.

IV. Decision that is the subject of this judicial review

[12] On the one hand, the RPD found that the applicant was not credible for the following reasons:

- a. the lack of evidence corroborating his Ashkali background;
- b. the lack of evidence corroborating the medical attention he received;
- c. his failure to mention in his Personal Information Form [PIF] that one of the individuals who beat him was a former police officer.

[13] On the other hand, the RPD determined that the applicant did not rebut the presumption of state protection. The RPD found that Kosovo, a functioning democracy, has the resources to protect its citizens and that the applicant did not seek protection.

V. Issues

[14] (1) Did the RPD breach procedural fairness?

(2) If not, is the RPD's decision reasonable?

VI. Relevant statutory provisions

[15] The following provisions of the IRPA apply to this case:

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.

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.

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 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

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(2) A person in Canada 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.

(2) A également qualité 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 parties

[16] The applicant submits that the RPD erred by not taking into consideration the applicant's Roma background when it dealt with state protection. It thus disregarded the relevant documentary evidence. Consequently, the applicant questions the RPD's credibility finding because the RPD did not consider the applicant's explanation as to why he was unable to provide evidence establishing his Ashkali background. Moreover, the applicant maintains that there was a breach of procedural fairness since he did not receive the report of the study on the translation problems that led to the RPD's decision after the first hearing.

[17] The respondent contends that the applicant did not raise the breach of procedural fairness issue at the earliest opportunity, i.e. at the beginning of the second hearing. He maintains that the RPD properly questioned the applicant's credibility because of the lack of evidence corroborating significant aspects of his narrative. Moreover, the respondent submits that the analysis on the availability of state protection is reasonable and does not ignore the applicant's ethnic background.

VIII. Analysis

(1) Did the RPD breach procedural fairness?

[18] This question is reviewable on a correctness standard (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190).

[19] First, the Court notes that the report of the translation study, which was ordered at the end of the first RPD hearing, is in the Tribunal Record [TR] (TR at pages 55-59). Contrary to the applicant's submissions, it was therefore absolutely not kept secret.

[20] The Court agrees with the respondent's arguments and notes that the applicant did not ask for a copy of this document when he had the opportunity to do so at the beginning of the second RPD hearing (*Kamara v Canada (Minister of Citizenship and Immigration)*, 2007 FC 448).

[21] Furthermore, the applicant does not challenge the credibility findings because of the translation.

[22] Accordingly, the applicant's procedural rights are safe.

(2) Is the RPD's decision reasonable?

[23] Because of the RPD's expertise in assessing facts related to the claim, this Court should not intervene if the decision is reasonable (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708).

Applicant's ethnicity

[24] At the outset, the Court observes that the RPD did not assign sufficient weight to the applicant's ethnic background, which is at the core of the claim, although the applicant alleged, no less, that he was the victim of a family vendetta.

[25] The RPD's requirement for a certificate supporting the applicant's Ashkali background demonstrates a misunderstanding of the ethnic context of this case. Roma ethnicity cannot necessarily be authenticated like a nationality. In this regard, tab 13.1 of the National Documentation Package dated April 27, 2011, entitled "Minority Rights Group International (MRG). N.d. 'Kosovo Overview'. *World Directory of Minorities*", states the following:

Accurate demographic data is lacking. The last census in Kosovo took place in 1991, but this was largely boycotted by ethnic Albanians. Important demographic changes took place during the 1998-1999 war and subsequent ethnic violence. Exercising the right to self-identification is difficult in Kosovo, mainly because people are afraid to openly state their ethnicity for fear of discrimination, but also because others do not necessarily respect people's identity, for example international and local actors often grouping Roma, Ashkalia and Egyptians into one. A census was planned for 2007. Most estimates put the ethnic Albanian population at 90 per cent and Serbs at five-six per cent.

Most of the estimated few thousand Ashkalia speak Albanian as their first language and practice Islam. Until the 1990s most Ashkalia identified themselves as Roma. In the 1990's, they began to identify themselves as a distinct group. They have not been accepted by the Albanian community. They are widely discriminated against and excluded from economic life. Although the Ashkalia have one reserved seat in the Kosovo Assembly, they have been excluded from real participation in political life and are excluded from discussions on the future status of Kosovo.
[Emphasis added].

[26] In this case, the applicant invoked his Ashkali identity. The documentary evidence supported the applicant's explanation that he was unable to obtain an official document confirming his ethnic background. It was not appropriate to require evidence corroborating his testimony, in

any event, without explaining why its truthfulness was doubted (*Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 (QL/Lexis)).

[27] In this case, it should also be noted that the RPD questioned the applicant in order to engage in a curious calculation. The result of this calculation is that the applicant is “one quarter” Ashkali. It appears that the RPD assigned importance to the [TRANSLATION] “percentage of [the applicant’s] minority blood”, as the transcript of the hearing shows:

[TRANSLATION]

BY THE PRESIDING MEMBER (to the person who is the subject of the proceeding)

...

- The other thing, sir, you said the first time that there were some members of your family who were Roma.

Q. Are there members of your family who are Roma?

A. Ashkalis belong to the Roma group.

- OK.

...

Q. What documents do you have, sir, or corroboration that you have Roma or Ashkali blood?

A. When, when Yugoslavia existed, we were registered as Yugoslavians, and we are not registered as Albanians or Romas.

- But there are associations of Romas that could have corroborated that your family members were Romas.

A. Ashkalis.

- Ashkalis, OK.

Q. Did you try to obtain any evidence, birth certificate or a letter from someone, one of the leaders of the Ashkali organizations in Kosovo, who could collaborate that your family, on your father's and his mother's side are Ashkalis and you are one-quarter Ashkali?

A. There's no birth certificate issued that indicates you are Ashkali, Albanian. Everyone there is described as Kosovar.

Q. So, you're not able to obtain any document from anyone that could corroborate that your father is half?

A. No, I can't have an official document because it doesn't exist.

- OK.

Q. Then, how could you be persecuted for being Ashkali if there is no official document anywhere that would identify you as one-quarter Ashkali?

(TR at pp 274-275).

[28] In addition, at the first hearing, the following was said:

[TRANSLATION]

BY THE PRESIDING MEMBER (to the person who is the subject of the proceeding)

[...]

Q. Why do you identify yourself as Roma?

A. Because my father's mother, my grandmother was Roma.

- But, OK. That's a minority of the blood in your body.

A. It's a mixed family.

- I understand that. The mix is seven-eighths non-Roma.

Q. Why do you identify with what is one-eighth, which is by far a minority?

A. Because our society there where we live considers it that way.

(TR at page 209).

[29] History teaches that people were victims of the worst atrocities because they were perceived as belonging to a certain ethnicity without the need for official evidence. According to generally known facts, the genocide of the Jews in the Second World War during the Hitler regime and, before that, the Armenian genocide by the Turks and also recently the Tutsi genocide in Rwanda by the Hutus and the massacres of Muslims in the former Yugoslavia, knowing that these genocides took place where millions of people were killed without corroborating evidence by blood. This type of reasoning calculating the degree of blood reflects a perception of aberrant echoes recognized as racist.

[30] By analogy with the analysis regarding presumed political opinions, this Court has established that the perspective to adopt is that of the agent of persecution. In other words, this is the relevant question: was the claimant perceived as belonging to an ethnic group and was the claimant persecuted because of this? (*Ali v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 610, 64 FTR 229 (QL/Lexis) at paragraph 27; *Kandiah v Canada (Minister of Citizenship and Immigration)*, [1994] FCJ No 1876, 87 FTR 72 (QL/Lexis); *Guerassimova v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 509 (QL/Lexis)).

[31] In this case, the question was not asked since the applicant, in addition to being perceived as Asashkali by his persecutors, also testified about his actual ancestry.

[32] This Court is of the opinion that this error by the RPD vitiates the entire decision because, in all likelihood, it tainted the state protection analysis that the RPD wanted to be separate from the credibility analysis.

State protection

[33] It is not this Court's role to decide whether state protection was available to the applicant.

Nonetheless, it must determine whether the decision is reasonable.

[34] In this case, the RPD did not analyze in its reasons the contradictory evidence that supported the applicant's allegations. In fact, the RPD did not direct its mind to the evidence that indicated the problems faced by Kosovo's ethnic minorities.

[35] However, it is recognized that the RPD should discuss relevant evidence that is contrary to its findings or risk committing a reviewable error (*Avila v Canada (Minister of Citizenship and Immigration)*, 2006 FC 359, 295 FTR 35; *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35).

[36] Thus, according to the document entitled "Report of the Council of Europe Commissioner for Human Rights' Special Mission to Kosovo", 23 – 27 March 2009:

6.4 Roma, Ashkali and Egyptian communities

130. It is estimated that there are approximately 35 000 to 40 000 Roma, Egyptian and Ashkali living in Kosovo and an estimated 70 000 – 100 000 outside Kosovo who left during and after the 1999 conflict. The Kosovo Roma, Ashkali and Egyptian communities face significant challenges to their everyday life. Years after the conflict, thousands remain IDPs in Kosovo (approximately 18%) or refugees in other Balkan countries and EU states, and many of them remain practically stateless. Members of the community face marginalization and discrimination in the areas of education, social protection, health care and housing. Poverty and unemployment touch them more profoundly than the rest of society. Security remains a concern and according to a number of sources, ethnically-motivated incidents continue to go unreported.

(TR at page 130).

[37] Moreover, tab 2.2 of the National Documentation Package dated April 27, 2011, entitled "Human Rights Watch. 2010. 'Kosovo'. *World Report 2010: Events of 2009*" adds the following information:

Kosovo

The lack of international agreement on Kosovo's status continues to impede efforts to protect the human rights of its inhabitants. Caught between disagreements among its member states, and between Belgrade and Pristina, EULEX struggled in 2009 to fully deploy throughout Kosovo and execute its task of building a functioning justice system. The Kosovo authorities again failed to demonstrate unequivocal commitment to minority rights and the rule of law.

Protection of Minorities

According to data from the UN Mission in Kosovo (UNMIK), 275 inter-ethnic incidents took place during the first eight months of 2009. Roma, Ashkali, and Egyptian (RAE) communities remain the most vulnerable in Kosovo. [Emphasis added].

[38] Although the RPD conducted a detailed analysis of this Court's jurisprudence on state protection and outlined the applicant's burden of proof, it did not answer the questions raised in this case, specifically, the question of ethnic persecution (RPD's decision at paragraphs 18-28).

[39] In such a unique context, a finding that protection is generally available is not sufficient because the documentary evidence must be analyzed in light of the applicant's personal situation. After reviewing the entire record, the Court is of the view that the applicant's personal situation was not properly considered.

[40] However, it is for the RPD, in a reconsideration of the circumstances of the case, to assess the alleged fear from the perspective of the subjective and objective evidence.

[41] Consequently, this Court's intervention is warranted.

IX. Conclusion

[42] For all the foregoing reasons, the RPD's decision is set aside, the application for judicial review is allowed and the case is remitted for reconsideration by a differently constituted panel.

JUDGMENT

THE COURT ORDERS that the application for judicial review is allowed, and the case is remitted for reconsideration by a differently constituted panel. There is no question of general importance to certify.

“Michel M.J. Shore”

Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT
SOLICITORS OF RECORD

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AND JUDGMENT:** SHORE J.

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