

CANADA / JUDGMENT

MA9-11992

COURT

Refugee Protection Division

DECIDED

15 December 2011

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Immigration and Refugee Board Refugee Protection Division Commission de l'immigration et du statut de réfugié Section de la protection des réfugiés RPD File No. / No dossier SPR : MA9-11992 Private Proceeding Huis clos Claimant(s) Demandeur(e)s d'asile XXXXX XXXXX Date(s) of Hearing Date(s) de l'audience October 18, 2011 Place of Hearing Lieu de l'audience Montréal, Québec Date of decision Date de la décision December 15, 2011 Panel Tribunal Me Michel Byczak Claimant's Counsel Conseil du demandeur d'asile Me Saguy Barchichat Tribunal Officer Agent du tribunal Myra Shuster (Dépôt de documents) Designated representative Représentant désigné N/A Minister's Counsel Conseil du ministre N/A [1]

- [1] Mr. XXXXX XXXXX, a citizen of Kosovo, is requesting refugee protection in virtue of articles 96 and 97(1) of the Immigration and Refugee Protection Act (IRPA). SUMMARY OF ALLEGATIONS
- [2] The claimant is an ethnic Albanian born in 1983. He fears persecution by Serbian spies and ethnic Albanian extremists known as the AKSH (Albanian National Army), which is an ethnic Albanian terrorist organization closely associated with the Kosovo Liberation Army (KLA).
- [3] On XXXXX, 1999, Serbian security and paramilitary forces raided the claimant's home. They threatened to kill everybody. The claimant's house was burned down. In XXXXX 1999, the claimant joined the Democratic League of Kosovo (DLK) Youth Forum, a political party dedicated to the peaceful solution to the Kosovo conflict and supporting the independence of Kosovo. In XXXXX 2001, he became a full member.
- [4] In XXXXX 2004, the claimant was no longer afraid to be involved with this party, since the Serbian police and security forces had already left Kosovo.
- [5] The AKSH would finally force people to join their group. The claimant had letters slipped under the door of his home, saying "Renounce the DLK or your life". On XXXXX, 2004, when the claimant was returning home, an armed gang of three persons with AKSH insignias opened fire on his car. A bullet hit the claimant in the chest. He drove away at full speed, saving his life. He was treated two weeks at home by a doctor who was a family friend.

- [6] In testimony, the claimant said at one point that there were four persons who had shot him on the XXXXX of XXXXX 2004; subsequently, he said there could have been three or four persons.
- [7] On XXXXX, 2004, the claimant received another threatening letter from the AKSH, telling him to join them otherwise they would make him disappear.
- [8] On the XXXXX of XXXXX 2005, four masked men stopped the claimant on his way home. They questioned him and threatened to kill him.
- [9] On the XXXXX of XXXXX 2006, someone introducing himself as XXXXX XXXXX, XXXXX XXXXX XXXXX XXXXX threatened to kill the claimant's family and the claimant himself if they did not join the AKSH. The person told them they would know if the claimant or a member of his family informed the KFOR or the UNMIK (United Nations Interim Administration Mission in Kosovo), and subsequently they would kill them. Three weeks later, a bomb exploded in the claimant's backyard. The claimant suffered cuts under his eye and on his left arm from the blustering glass. His parents, siblings, and wife were also injured by the explosion. They were treated for four days at home.
- [10] After that incident, the claimant discussed with his wife and his family and decided to leave Kosovo. He left on the XXXXX of XXXXX 2006, and after two short visits in Vienna and Paris, he arrived in the United States, at JFK airport, where he applied for refugee asylum. The claimant was refused asylum by the United States authorities, and his appeal was also dismissed on the XXXXX of XXXXX 2008. The claimant was subsequently smuggled in a truck to Windsor, Ontario, on the 4th of September 2009, and he applied for refugee status in Montreal on the 21st of September 2009.
- [11] The claimant made no requests for protection from any authorities, either from the Kosovo authorities or from the United Nations authorities.

ANALYSIS

Identity

- [12] The claimant's identity has been established to the satisfaction of the tribunal based on the photocopies of the birth certificate and the photo identity card of UNMIK, the originals being with Citizenship and Immigration Canada (CIC). Determinative issues
- [13] The determinative issues are credibility and state protection. Credibility
- [14] At the beginning of the hearing, the claimant reconfirmed that everything in his Personal Information Form (PIF) was true, exact, and complete.
- [15] There were a number of credibility problems regarding omissions, contradictions, and implausibilities. The tribunal will only touch on the most important ones.

- [16] The claimant initially testified that the first death threat was made on the XXXXX of XXXXX 2004. Subsequently, he said it was on the XXXXX of XXXXX 2004. Asked which answer was correct, the claimant said it was the XXXXX of XXXXX 2004, when four persons shot at him. Confronted with the fact that in his narrative, he had said that it was an armed gang of three persons who had shot him, the claimant responded "Yes, it could be three to four". The tribunal does not accept this explanation. The claimant should clearly know whether it was three or four persons who had shot at him on the first occasion that his life was endangered. This affects the credibility of the claimant regarding this aspect of the testimony.
- [17] In testimony, the claimant referred to the ceremony celebrating the national day called Brevia, where he had gathered with a friend on the XXXXX of XXXXX 2005. In testimony, the claimant said that these men were masked and they had on their head an emblem of the AKSH, an abbreviation for the Albanian National Army. Asked whether he thought the fact that these persons were part of the AKSH was important, the claimant said yes. Asked why it was omitted, regarding the incident of the XXXXX of XXXXX 2005, where these attackers, who were members of the AKSH, threatened to kill him and kicked and punched him and opened fire in the air, the claimant explained that "Because I didn't have proof". The tribunal does not accept this explanation, as there are many allegations in the narrative for which there is no proof either; nonetheless, they are stated. This is important information. It should have been included in the narrative. It affects the claimant's credibility regarding this aspect of the testimony.
- [18] The claimant also referred to his persecutors who had made a plan to beat and kick him and who targeted him. He said that there were three or four persons around him in the cemetery. Asked which was the correct answer, the claimant said "I don't know if it was three or if there was a fourth in the car". In the narrative, it is clearly stated that there were four masked men regarding the XXXXX of XXXXX 2005. The claimant said that he apologized for this discrepancy or contradiction, and he said this was because of stress. The tribunal does not accept this explanation. It affects the credibility regarding this aspect of the testimony.
- [19] In summation, the tribunal does not find the claimant to be credible and does not believe his story. State protection
- [20] Even if the claimant was credible, there is state protection.
- [21] The claimant made no written complaint, nor did he make any oral complaints. Asked why not, the claimant's response was because of the fear of the Albanian National Army.
- [22] The adequacy of state protection cannot rest on the subjective fear of a claimant¹. A claimant cannot rebut the presumption of state protection in a functioning democracy by asserting only a subjective reluctance to engage the state².

- [23] In the absence of a compelling explanation, which the tribunal did not hear in this case, a failure to pursue state protection opportunities within the home state will usually be fatal to a refugee claim, at least where the state is a functioning democracy with a willingness and the apparatus necessary to provide a measure of protection to its citizens³.
- [24] States are presumed to be capable of protecting their citizens, except in situations where the state is in a state of complete breakdown⁴. The presumption that a state is capable of protecting its citizens underscores the principle that international protection comes into play only when a refugee claimant has no other recourse available⁵.
- [25] The evidence that state protection is inadequate must not only be reliable and probative; it must also satisfy the Board, on a balance of probabilities, that state protection is inadequate⁶. In this case, the tribunal was not satisfied, on a balance of probabilities, that the claimant has discharged himself of the burden of proof to show that state protection is inadequate in his particular case.
- [26] The claimant's evidentiary burden of proof is directly proportional to the level of democracy in the state in question. The more democratic are the state's institutions, the more the claimant must have done to exhaust all courses of action open to them. The claimant must show that he has taken all reasonable steps in the circumstances to seek protection, taking into account the context of the country of origin, the steps taken, and the claimant's interactions with the authorities⁷. In this case, the claimant took no steps whatsoever to seek protection from the authorities. The level of protection that the state must provide is not that of perfect protection, but rather adequate protection⁸.
- [27] According to section 2.3 of the binder:⁹ "Sufficiency of protection Local security forces included the Kosovo Protection Corps (KPC), a civilian emergency response organisation, and the Kosovo Police Service (KPS), a local police force that functions under the authority of the Special Representative of the Secretary General (SRSG) and supervision of UNMIK police. UNMIK maintains executive authority over the police but continued to transfer police authority and functions to the KPS. An international commissioner of police directed both UNMIK police and the KPS. Specialized units on war crimes and ethnically motivated crimes were still primarily staffed by international UN police officers and largely operated independently of the KPS due to the sensitivity of those functions. Units on criminal intelligence and organized crime were operated jointly. Both the international police and the judiciary have broad discretion to intervene in any particular criminal matter. It was reported in 2007 that the KPS generally carried out its tasks in a professional and competent manner, particularly for minor crimes. Overall, some progress was reported in the field of policing. In general there is sufficiency of protection available from UNMIK/KPS for all ethnic Albanians including those who are accused of collaborating with the Serb regime. UNMIK/KPS are able and willing to provide protection for those that fear persecution and ensure that there is a legal mechanism for the detection, prosecution and punishment of persecutory acts."

- [28] As stated in paragraphs 3.7.6 and 3.7.7 of the same evidence: "Conclusion Ethnic Albanians accused of/or perceived to have collaborated with the Serb authorities may face discrimination and ill-treatment in Kosovo. However, in the majority of cases sufficiency of protection is available and internal relocation is an option, therefore applicants from these categories of claim are unlikely to qualify for asylum or Humanitarian Protection. However, it should be noted that such cases are unlikely to be clearly unfounded. Relatives of those who are accused of/or perceived to have collaborated with the Serb authorities may also face discrimination and ill-treatment in Kosovo, however, in the majority of cases sufficiency of protection is available and internal relocation is an option. Therefore applicants who apply on the basis of a relative's involvement/ or perceived collaboration with the previous Serb regime are unlikely to qualify for asylum or Humanitarian Protection."
- [29] The claimant has not done enough to seek protection in Kosovo before seeking international protection, as he did in the United States; his claim there was refused, as well as his appeal.
- [30] The claimant has not refuted the presumption of state protection in the particular circumstances of this case. The report from the clinical psychologist
- [31] The tribunal takes cognizance of the report from Dr. XXXXX XXXXX 10. The tribunal notes and acknowledges that there are psychological problems which the claimant is suffering, and that he did undergo certain psychological problems in Kosovo, as did the vast majority of citizens of Kosovo who lived there during that difficult period. This does not amount to persecution in this particular case.

CONCLUSION

- [32] Mr. XXXXX XXXXX is not a "Convention refugee" nor a "person in need of protection".
- [33] His claim is rejected. Michel Byczak Me Michel Byczak December 15, 2011 Date /jcho 1 Martinez, Dunnia Patricia Suarez v. M.C.I. (F.C., no. IMM-7329-04), Phelan, July 29, 2005, 2005 FC 1050. 2 Judge, Gurwinder Kaur v. M.C.I. (F.C., no. IMM-5897-03), Snider, August 9, 2004, 2004 FC 1089; Santiago, Graciela Ortiz v. M.C.I. (F.C., no. IMM-752-07), Frenette, February 25, 2008, 2008 FC 247. 3 Camacho, Jane Egre Sonia v. M.C.I. (F.C., no. IMM-4300-06), Barnes, August 10, 2007, 2007 FC 830. 4 Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689, 103 D.L.R. (4th) 1, 20 Imm. L.R. (2d) 85. 5 Idem. 6 Flores Carrillo, Maria Del Rosario v. M.C.I. (F.C.A., no. A-225-07), Létourneau, Nadon, Sharlow, March 12, 2008, 2008 FCA 94. 7 Peralta, Gloria Del Carmen v. M.C.I. (F.C.T.D., no. IMM-5451-01), Heneghan, September 20, 2002. 8 M.E.I. v. Villafranca, Ignacio (F.C.A., no. A-69-90), Marceau, Hugessen, Décary, December 18, 1992; Zalzal v. Canada (Minister of Employment and Immigration), [1991] 3 F.C. 605 (C.A.); (1991), 14 Imm. L.R. (2d) 81; 126 N.R. 126 (F.C.A.); Milev, Dane v. M.C.I. (F.C.T.D., no. IMM-1125-95), MacKay, June 28, 1996. 9 Exhibit A-1: Index of the National Documentation Package on Kosovo, April 27, 2011; section 2.3: United Kingdom (UK), 22 July 2008, Home Office, Operational Guidance Note: Kosovo. 10 Exhibit P-1: Psychological report by Dr. XXXXX XXXXX, Ph.D. REFUGEE PROTECTION DIVISION /

ETHNICITY / POLITICAL OPINION / VICTIM OF CRIMINALITY / FAILURE TO SEEK
PROTECTION IN OTHER COUNTRIES / MEDICAL EVIDENCE / POST-TRAUMATIC STRESS
SYNDROME / STATE PROTECTION / MALE / NEGATIVE KOSOVO

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