Date: 20090205

Docket: IMM-2124-08

Citation: 2009 FC 123

Ottawa, Ontario, February 5, 2009

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

ESAD LECALIAJ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Immigration and Refugee Board (Board) on April 18, 2008 (Decision) refusing the Applicant's application to be deemed a Convention refugee or person in need of protection under sections 96 and 97 of the Act.

BACKGROUND

[2] The Applicant is a citizen of the Federal Republic of Yugoslavia and fears persecution, torture and a risk to his life due to his political views and because he is Albanian and Muslim. The Applicant resided in the province of Montenegro.

[3] While the Applicant was studying in Kosovo in 1983-1984, the Serbian police appeared periodically to try to send home all of the students who were ethnic Albanians. When students refused to go, they were beaten and insulted. The Applicant recalls three specific incidents of this nature involving him during his studies. The Serbian authorities did not allow the Applicant to complete his education; however, he completed his studies in photography at a different school.

[4] In January 1986, the Applicant decided to leave his country and seek refuge abroad because of the abuses he had suffered and the oppressiveness of the Serbian regime. The Applicant obtained a passport issued by Yugoslavia and traveled from Montenegro to Belgrade, Yugoslavia, and then to Amsterdam. From Amsterdam he travelled to Mexico City, arriving on January 16, 1986. About three days later, the Applicant walked from Tijuana to the U.S.A. Border near San Diego, U.S.A. He was detained at the U.S.A. border by immigration officers and held in detention at El Sendero. He stayed in the detention centre for eight days until he was released on January 26, 1986. The Applicant indicated to the officers that he wanted to go to New York and he asked for political asylum in the U.S.A. based on his fear of persecution as an ethnic Albanian living in Yugoslavia from the oppressive Serbian regime.

[5] On August 28, 1990, the Applicant's asylum claim was rejected and he was ordered to leave the U.S.A.; however, he remained in the U.S.A. without status. He was told he could not make another asylum claim for ten years. In 2002, he attempted another political asylum claim in the U.S.A., which was rejected in December 2004.

[6] In 1997, the Applicant's younger brother, Rifat Lecaj, arrived in the U.S.A. and made an asylum claim. His claim was based on the mistreatment he suffered in Yugoslavia. His claim was accepted and a green card was granted to him.

[7] On February 18, 2005, officers from the Homeland Security office came to the Applicant's house to look for him. They incarcerated him in New Jersey where he was detained for three months and five days. On May 25, 2005, he was deported from the U.S.A. to the Federal Republic of Yugoslavia. The Applicant traveled on a one-way travel document issued by the Yugoslav embassy in the U.S.A.

[8] When the Applicant arrived at the airport in Belgrade, two policemen questioned him for some time. They asked him where he had been and for how long. The officers recorded this information and released him. After the Applicant arrived in Montenegro, he stayed with family in Martinovice. He went with a friend to a café in Palv about a week after his arrival in Montenegro and two police officers asked for his name and told him to present himself at the police station the next day. The Applicant did not go because he was afraid they would beat him or force him to perform military service.

[9] On June 6, 2005, the police came to the Applicant's house to find him but he was not there at that time. When he returned home, his father informed him that the police had been to the house looking for him.

[10] On June 15, 2005, the police again came to the house and took the Applicant to the police station. The police told the Applicant that he was obligated to perform compulsory military service. The Applicant refused, as he was no longer of military age, which is between 25 and 35. He was already 41 years old. The police asked the Applicant why he had not gone to the police station as previously ordered and the Applicant did not answer. The police insulted the Applicant and beat him unconscious with batons. When the Applicant came to, he was in the hospital with a large cut above his right eye. He was given stitches and he still has a scar on his back from the beating. The Applicant was in the hospital for two days.

[11] After the Applicant's discharge from the hospital in June 2005, he decided to protect himself from the police by hiding in his uncle's village in Vuthaj, Montenegro and with a friend in Albania.

[12] On June 10, 2005, the Applicant returned to Martinovice in Montenegro and decided to change his surname so that the police would not recognize him. He changed his surname from Lecaj to Lecaliaj with the help of his brother. The Applicant obtained a passport with his altered surname.

[13] In early 2005, the Applicant bought a Danish passport for E1000 from a man in Plav and used it to buy a plane ticket.

[14] On August 17, 2005, he left Montenegro for Zagreb, Croatia, and from Zagreb he traveled to Paris and then to Cuba. The Applicant remained in Cuba for three days until August 21, 2005 and then flew to Toronto that day. At Toronto Pearson International Airport, he showed customs officers

his false Danish passport, but the officers did not believe it was genuine. The Applicant then told them the truth and produced his real Yugoslavian passport. The Applicant was informed that he would be detained and sent to an immigration holding center. The Applicant was returned to the airport the next day where he made a refugee claim.

[15] The Applicant told the officers that he had come to Canada to make a refugee claim and was afraid for his life if he returned to Yugoslavia. The Applicant explained that he had told the Yugoslav police that he refused to perform military service.

DECISION UNDER REVIEW

[16] The Board concluded that the Applicant was neither a Convention refugee nor a person in need of protection.

[17] The Board held that Montenegro declared independence from Serbia and Montenegro on June 3, 2007 after a referendum held on May 21, 2007. Montenegro was recognized as a UN member state on June 28, 2007. The Applicant's passport predates the State Union of Serbia and Montenegro and the Republic of Montenegro as an independent state.

[18] The Board noted that nationals of Montenegro can return voluntarily to any region of Montenegro by way of the Voluntary Assisted Return and Reintegration Programme run by the International Organization for Migration (IOM) and co-funded by the European Refugee Fund. The

IOM provides advice and help with obtaining travel documents and booking flights, and organizes reintegration assistance in Montenegro. The program, established in 2001, is open to others as well as failed asylum seekers. The Board was satisfied that the Applicant was a citizen of Montenegro by birth and would have a right to return to Montenegro.

[19] The Board noted that the Applicant entered Yugoslavia without difficulty after living in the U.S.A. for a period longer then nineteen years. The return of the Applicant also pre-dates the independence of the Republic of Montenegro that took place on June 3, 2007.

[20] The Board found that Montenegro is a fledgling independent parliamentary republic with a total population of less than 700,000 persons made up of several ethnic groups. After the referendum of 2007, elections were held for a president and a multi-party assembly. These elections were observed and were considered by the Organization for Security and Cooperation in Europe to be in accordance with international standards. A new constitution was adopted and written for presentation to Parliament in the spring of 2007. Montenegro uses the Euro as its official currency and maintains its own budget despite a severe unemployment rate.

[21] The Board also found that Montenegro law prohibits arbitrary arrest and detention and the government generally respects these prohibitions. The interior ministry controls both the national and border police forces. The Board found that these forces are generally effective in maintaining basic law and order. The government investigates police abuses, but criminal procedures and sentences against police are rare. During 2006, 19 police officers were dismissed for abuse of office

and exceeding authority. Police corruption has been a problem and the close-knit society discourages the reporting of corruption.

[22] The Board concluded that arrests require a judicial warrant and authorities may detain suspects for up to 48 hours before bringing them before a judge and charging them. A judge makes an initial determination on the legality of a detention and an arraignment has to take place within a specified period of time. The law also provides access to an attorney, but this does not always occur. On July 27, 2006, the Assembly Republic of Montenegro's Unicameral Assembly enacted general amnesty for prisoners unless they were convicted of trafficking in persons, war crimes or other crimes prosecuted under international law.

[23] The Board found that states are presumed to be capable of protecting their citizens, except where the state is in a complete state of breakdown. The Applicant alleged that state protection was inadequate, but the Board concluded that the evidence did not establish this on a balance of probabilities. The presumption of state protection applies equally to cases where the state is alleged to be the persecutor. International refugee protection is not intended to permit someone to seek better protection abroad than they would receive at home.

[24] The Board pointed out that the Yugoslav army ceased to exist with the collapse of Yugoslavia and an amnesty for draft evaders and deserters was granted in 2001. Prior to separation, Serbia and Montenegro drafted men between the ages of 18-25 and, in practice, men were seldom

called to serve after age 35. Reservist obligations applied to age 60 but, since 2000, reservists are seldom called upon.

[25] In August 2006, compulsory military service in the Republic of Montenegro was abolished. The Board noted that the Applicant's alleged incident of police brutality occurred prior to the independence of Montenegro and within the State Union of Serbia and Montenegro.

[26] The Board concluded that, based on the documentary evidence and the facts of the case, the Applicant had not rebutted the presumption of state protection with clear and convincing evidence of the state's inability to protect him.

ISSUES

[27] The Applicant raises the following issues:

1) Is there any evidence which supports the Applicant's submissions with respect to the issues set out below, and are any of these issues, either individually or in combination, serious ones?

2) Did the Board err in law, breach fairness, err in fact and exceed its jurisdiction in purporting to reject the Applicant's claim in that the reasons are inadequate or otherwise erroneous in relation to the evidence of Dr. Fisher and the presumption of state protection?

STATUTORY PROVISIONS

[28] The following provisions of the Act are applicable in these proceedings:

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	**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

subject them personally

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 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

Personne à protéger

(2) A person in Canada who is a member of a class of persons prescribed by the regulations

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait

as being in need of protection is also a person in need of protection.	partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

STANDARD OF REVIEW

[29] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada recognized that, although the reasonableness *simpliciter* and patent unreasonableness standards are theoretically different, "the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review": *Dunsmuir* at paragraph 44. Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of "reasonableness" review.

[30] The Supreme Court of Canada in *Dunsmuir* also held that the standard of review analysis need not be conducted in every instance. In determining a standard of review, the Court should consider whether prior jurisprudence has determined the appropriate standard of review for a particular question.

[31] One aspect of the Applicant's complaint is that the Board simply ignored the highly relevant evidence provided by Dr. Fischer in his report. Thus, in light of the Supreme Court of Canada's decision in *Dunsmuir* and the previous jurisprudence of this Court, I find the standard of review applicable in this issue to be reasonableness. When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and

intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir* at paragraph 47. Put another way, the Court should only intervene if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[32] For a procedural fairness issue, like the adequacy of a board's reasons, the standard of review is correctness: *Thomas v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 1114 at paragraph 14; *Adu v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 565, at paragraph 9. According to *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539 at paragraph 100, "it is for the courts, not the Minister, to provide the legal answer to procedural fairness questions."

ARGUMENTS

The Applicant

[33] The Applicant points out that the Board did not reject his credibility. He says, however, that the Board erred in failing to consider the expert report that contradicted the Board's own thesis. Dr. Fisher concluded that there was a well-founded fear of persecution to the Applicant based on his particular circumstances; however, the Board rejected his claim anyway.

[34] The Applicant argues that in *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1425 (F.C.T.D.), the Board committed the same errors as in the present case, which include ignoring evidence, failing to analyze the documentary evidence, failing to provide adequate reasons and failing to give weight to the evidence of an expert and/or failing to indicate whether the expert was accepted as an expert.

[35] The Applicant submits that the affidavit of Dr. Fischer included a detailed discussion of problems that ethnic Albanians face in Montenegro, as well as Anti-Americanism, the current Montenegrin government's human rights record (including "a corrupt and politicized police force"), the promotion of the Montenegrin identity (which does not include minorities) as well as the status of draft evaders that is unclear even though the draft has been abolished. The Applicant says that the evidence of Dr. Fischer is credible, clear and convincing.

[36] The Applicant argues that *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 makes it clear that a higher burden of proof than is normally required on a balance of probabilities standard is not required to meet the legal standard for state protection. The Federal Court of Appeal in *Carillo v. Canada (Minister of Citizenship and Immigration)* 2008 FCA 94 (*Carillo*) states at paragraph 38:

> …A refugee who claims that the state protection is inadequate or non-existent bears the evidentiary burden of adducing evidence to that effect and the legal burden of persuading the trier of fact that his or her claim in this respect is founded. The standard of proof applicable is the balance of probabilities and there is no requirement of a higher degree of probability than what that standard usually requires. As for the quality of the evidence required to rebut the presumption of state protection, the presumption is rebutted by clear and convincing evidence that the state protection is inadequate or non-existent.

[37] The Applicant submits that he presented clear and convincing evidence to rebut the presumption of state protection and that the Board committed an error by finding that evidence insufficient.

[38] The Applicant also submits that the Board did not address the expert's affidavit and focused on state protection only. The Applicant contends that Dr. Fischer's affidavit proves that state protection would not be sufficiently forthcoming. Had the Board considered that aspect of the affidavit, its reasons may have been different. The Applicant says the Respondent's argument amounts to speculation as to what the Board would have made of the affidavit of Dr. Fischer. However, the Court does not have the jurisdiction to accept speculation.

The Respondent

[39] The Respondent submits that the Applicant's claim was rightfully dismissed because of the availability of state protection. Further, the Respondent argues that the Applicant does not challenge the findings of the Board but, instead, argues that the Board failed to consider an affidavit confirming the validity of his objective fear of persecution. However, the Board made no adverse findings regarding the objective basis of his fear and, since the Applicant's affidavit provided no concrete evidence or examples of the treatment of deserters in the Republic of Montenegro, the report was speculative and immaterial to the Board's findings. Therefore, the Respondent submits that the Applicant has failed to establish any error on the part of the Board.

[40] The Respondent points out that the Republic of Montenegro abolished compulsory military service in August 2006, prior to the Applicant's hearing. The Board examined the Applicant's stated fear and found that, even if the Applicant feared persecution, state protection from the newly formed State of Montenegro would be forthcoming. The Applicant has not demonstrated any error with the Board's finding and this application ought to be dismissed on that basis.

[41] The Respondent submits that Dr. Fischer's affidavit focuses primarily on the legitimacy of the Applicant's fear of persecution. Since the Board's Decision turns on state protection, the Respondent argues that the Board did not need to address the report. The affidavit stated that the Montenegrin police force is corrupt and politicized. However, the Board acknowledged these problems and concluded that state protection would be available to the Applicant. The Affidavit did not support the conclusion that all avenues of protection would be unavailable to the Applicant if he were to return to Montenegro. The affidavit also does not provide examples or statistics regarding the treatment of draft evaders since the abolishment of compulsory service. Therefore, the opinion offered by Dr. Fisher is speculative in the Respondent's view and insufficient to rebut the presumption of state protection.

[42] The Respondent reminds the Court that an applicant must adduce evidence that is relevant, reliable and convincing and must satisfy a trier of fact on a balance of probabilities that state protection is inadequate: *Carrillo* at paragraph 30; *Ward* and *Hinzman v. Canada (Minister of Citizenship and Immigration)* 2007 FCA 171. The Respondent also points out that the Applicant left

his country before the formation of his new country of citizenship, Montenegro. The Applicant has never approached Montenegrin authorities for protection.

[43] In sum, the Respondent concludes that because the Applicant took no measures to seek protection in the newly formed Republic of Montenegro, and because he produced no evidence to show that former deserters have been officially mistreated or refused protection, he has not provided relevant, reliable and convincing evidence to suggest protection would not be forthcoming. The Board therefore properly concluded that he had not rebutted the presumption of state protection.

ANALYSIS

[44] The Board's Decision reveals that the Board considered this as a one-issue case (draft evasion) and never clearly identified the range of risks the Applicant faced, or how those risks related to the Board's determinative findings on state protection. In my view, this is important because the evidence presented by Dr. Fischer goes well beyond the issue of draft evasion and the Board's failure to deal with that evidence is directly related to the persecutory risks put forward by the Applicant.

[45] As counsel for the Applicant made clear to the Board, and as Dr. Fischer emphasizes in his report, the risks alleged by the Applicant are not only related to his evasion of the draft. The Applicant also alleged that he was at risk from both the state of Montenegro and the general population for a variety of reasons.

[46] In my view, then, the Board committed an initial reviewable error in failing to identify and address the risks that were claimed by the Applicant. It is not sufficient to say that the Board somehow dealt with those risks as part of its treatment of state protection. I do not think that the Board can adequately address state protection issues unless it also articulates an awareness of which risks the Applicant says the state cannot, or will not, protect him against.

[47] Further, there was no issue concerning the Applicant's credibility regarding his account of being arrested and beaten. By characterizing his claim as being solely about his fear as a draft dodger, the Board committed an unreasonable error.

[48] The Board's error concerning the risks alleged also infects its analysis of state protection and, in particular, its failure to mention Dr. Fischer's report. It may well be that the Board neglected to refer to the evidence in that report because it regarded Dr. Fischer's evidence about general risks in the country as having no relevance to the draft evasion issue, or because it felt that what Dr. Fischer had to say about draft evasion was too speculative for mention and consideration. In any event, the Decision is unreasonably flawed for this reason and the matter needs reconsideration.

[49] Dr. Fischer is a professor of Balkan History and chair of the Department of History at Indiana University, Fort Wayne. He is frequently consulted on Balkan affairs and has provided advice to many governments and organizations on Balkan issues. Notably, he has even assisted the Immigration and Refugee Board of Canada in updating their materials on Albanian issues. The Applicant made it clear that Dr. Fischer was brought forward as an expert witness both for his

knowledge of the situation in Montenegro and because of his expert opinion on the risks faced by the Applicant; therefore, it was extremely important from the Applicant's perspective that the Board address Dr. Fischer's evidence. And yet, the Board fails to mention that evidence at all and provides no explanation for its omission. While there is a presumption that the Board has considered all of the evidence before it, in the circumstances of this case and the Applicant's strong reliance upon that evidence, that presumption has been rebutted.

[50] Dr. Fischer provided extensive evidence to the Board in this case regarding the risks that the Applicant faced if he was returned to Montenegro, including the unwillingness of the state to provide effective protection to someone like the Applicant against those risks.

[51] Dr. Fischer said that the Applicant was particularly at risk in Montenegro for the following reasons:

1. His status as an ethnic Albanian;
2. His status as a Muslim in a predominantly orthodox Christian society;
3. His American connections;
4. His status as a draft evader;
5. The threats and physical harm he has suffered at the hands of local authorities in Montenegro.

[52] Dr. Fischer says that the state of Montenegro would be unwilling or unable to protect the Applicant against the risk of persecution and physical harm for the following reasons:

1. Ethnic Albanians and religious minorities have suffered persecution historically in Montenegro, which persecution is unlikely to come to an end under the new regime;
2. Albanians and religious minorities face popular and official mistreatment in Montenegro, which is intent upon building an oppressive national identity around Montenegrin nationality;
3. The government of Montenegro only pays lip-service to outward forms of democracy for opportunistic reasons while, in reality, it is a corrupt dictatorship that allows no opposition from the press and has a corrupt and politicised police force;
4. Detainees are at risk of physical abuse and mock executions;
5. Even though the draft was abolished with the creation of an independent Montenegro, "it is still unclear how the new state will deal with those who avoided the draft during the Serbia-Montenegro period of 2003-2006" and "[e]ven if [the Applicant] avoids state prosecution, he could face difficulty from society at large" because "Montenegrins are a martial people" and draft evaders "have never been treated kindly and can expect little official protection."

[53] The Respondent argues that "[g]iven [that] the Board's Decision turned on state protection, the Board did not need to address the content of the report." The Respondent also takes issue with the contents of Dr. Fischer's report and points out that it provides no examples or statistics regarding draft evaders and that it is speculative. In fact, the Respondent says that the Board did not need to address Dr. Fischer's report because it does not contradict anything the Board says and it does not provide evidence of a lack of state protection.

[54] While Dr. Fischer's report can be criticized in many ways, his message is clear and uncontradicted: Albanians and religious minorities are at risk of physical harm in Montenegro from both the general population and the state and they can expect little in the way of protection from a corrupt and repressive state.

[55] In my view, the report contains clear and convincing evidence that flatly contradicts the Board's determinative conclusion that the state is both willing and able to protect the Applicant; therefore, the Board had the duty to address that conflicting evidence.

[56] Therefore, I find that reviewable errors have occurred in this case. The Board's failure to address the risks identified by the Applicant and to address the evidence of Dr. Fisher that contradicts the Board's conclusions was unreasonable. The matter requires reconsideration.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. This Application is allowed and the matter is returned for reconsideration by a differently constituted Board;
2. There is no question for certification.

"James Russell"
Judge

SOLICITORS OF RECORD

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