



RPD File No. / N° de dossier de la SPR : TB2-12957

TB2-12964 / TB2-12973 / TB2-12974

Private Proceeding / Huis clos

Reasons and Decision – Motifs et Décision

Claimant(s)	XXXX XXXX XXXXXXXXXX XXXX XXXXXXXX XXXX XXXXXXXXXX XXXX	Demandeur(e)(s) d'asile
Date(s) of Hearing	February 28, 2018	Date(s) de l'audience
Place of Hearing	Toronto, Ontario	Lieu de l'audience
Date of Decision and reasons	March 28, 2018	Date de la décision et des motifs
Panel	Marie-Andree Lalonde	Tribunal
Counsel for the Claimant(s)	Douglas A Macisaac Barrister and Solicitor	Conseil(s) du (de la/des) demandeur(e)(s) d'asile
Designated Representative(s)	XXXX XXXX	Représentant(e)(s) désigné(e)(s)
Counsel for the Minister	N/A	Conseil du (de la) ministre

2018 CanLII 132440 (CA IRB)

REASONS FOR DECISION

[1] The principal claimant, XXXX XXXX, his spouse, XXXX XXXX and their two children XXXX and XXXX XXXX, are claiming refugee protection pursuant to ss. 96 and 97(1) of the Immigration and Refugee Protection Act.¹

[2] XXXX XXXX, the mother, was the designated representative for her two minor children XXXX and XXXX XXXX.

ALLEGATIONS

[3] The principal claimant (from now on the claimant) alleged that his father was murdered in 2000 by Serbians. He indicated that he cannot return to Kosovo because he is known to those people. The XXXX family wanted the culprits to be arrested and brought to trial. Charges were brought against a number of Serbians. During the investigation the claimant and his family members, especially his mother, received numerous threats to dissuade his brother and his mother from testifying at the trial. They all decided to move to Prishtina.

[4] The culprits were three Serbians. The trial opened in July 2002. The claimant's brother and mother did their best to testify at the trial but noticed that not all the evidence was there. In the end, the culprits were acquitted in September 2002 for insufficient evidence. The claimant's mother and other members of the family protested against this acquittal.

[5] The claimant's family contacted a XXXX agency asking for another investigation into the case. Pressure was put on the Kosovo government and the police to reopen the case because the first trial had shortcomings. The case was reopened at the behest of the Kosovo Prosecutor's office in 2011.

[6] The family learned from officers of XXXX that a significant amount of evidence had mysteriously disappeared in 2008. The authorities were asking if the family was in possession of certain documents or photos which were entered into the evidence at the trial. The family did find material: photos of the crime scene, newspaper articles and the autopsy report. These documents

¹ Immigration and Refugee Protection Act, S.C. 2001, c. 27 as amended, sections 96 and 97 (1).

were handed over to the police. The police also asked if the claimant's brother and mother would testify again at the upcoming trial. They agreed.

[7] Evidence revealed that that the claimant's father was murdered by a group called the XXXX XXXX in 2000.

[8] In May 2012, the claimant and his family were contacted by Serbian extremists who were aware of their father's murder. They vowed that the claimant's mother and brother would never be able to testify at the upcoming trial. The claimant's brother and mother went to the police station to report the threats. The family were denied witness protection. Instead, the police officer told them to move to another place. They went to the Prosecutor's office and were told that, if the police refused their request, there was nothing they could do. Then the claimant's brother and mother moved to Raushic.

[9] The claimant and his spouse discussed the matter and preferred to leave Kosovo to save their lives. The claimant arrived in Canada and claimed refugee status on the July 24, 2012.

Identity

[10] The identity of the claimants is established to the satisfaction of the panel on the basis of genuine passports from Kosovo, adduced in evidence² of which the panel has true certified copies.

ANALYSIS

Credibility

[11] The claimants were credible and provided details spontaneously in a coherent and candid manner. There were no contradictions or embellishments.

[12] The claimant added during his testimony that he also has documents that are pertinent for the trial. He added that the head of the Brigade was arrested and that he had a trial in 2016. He is negotiating a plea bargain to get his sentence reduced in exchange for information. Some of those revelations may shed light on the claimant's father's murder. The prosecutor who was heading the

² Exhibit 1, Package of information from the referring CBSA/ CIC, copies of passports.

inquiries died in January 2018. The claimant is doubly fearful for his and his family security. He insisted that the police force has among its midst, Albanians and Serbs, who are corrupt.

[13] The panel found the claimants credible and their subjective fear is established.

Objective fear

[14] In order to meet the burden of proof that the claimants need international protection, they have to establish that their fear is well founded objectively. Therefore, an assessment of the state protection apparatus and country condition at the time of the hearing needs to be assessed.

STATE PROTECTION

[15] States are presumed to be capable of protecting their citizens, except in situations where the state is in a state of complete breakdown. This is not the situation presently. There is no longer a state of civil war, invasion, or breakdown of order. The government has complete control of its territory. Kosovo is a parliamentary democracy with a population of 2.2 million people. The country declared its independence in 2008 which provided for internationality sponsored mechanism, including XXXX XXXX XXXX XXXX XXXX (XXXX) to support the new government.³ Of course no state can pretend to provide perfect protection but that in itself is not a basis for determining that the state is unwilling or unable to offer reasonable protection in the circumstances.⁴

[16] According to documentary evidence, in general, indicates that the police are one of Kosovo's genuinely multiethnic institutions, with Serbs and others integrated in all regions and at all levels. Moreover, 70% of the population are satisfied and believe that they are one of the least corrupt services. They have a willing manpower pool but are poorly managed and lack vital skills as their leadership increasingly neglect training.⁵ The force can deal effectively with routine, low-level crime but has a limited ability to fight organized crime, financial crime and fraud, drugs and human trafficking and other specialized challenges. It has a hostile relationship with the public

³ Exhibit 7, NDP for Kosovo, item 2.2 Us DOS November 2017.

⁴ Milev, Dane v. M C I. (F.C.T. D.). No IMM-1125-95.

⁵ Exhibit 7, NDP for Kosovo item 10.5.

prosecutors, who are charged with leading all police investigations of serious crime. Despite the weaknesses outlined above, the police are the strongest of Kosovo's rule of law institutions.

[17] The Kosovo Police managed the transition to independence successfully and largely prevented interethnic incidents. Allegations of police misconduct are handled by the Kosovo Police's own internal investigations unit (IIU) which deals with minor offences and the PIK, an independent body, is charged with investigating more serious complaints. Rule of law has clearly improved since the period of UN interim administration. The government has taken important steps, replacing key officials and passing long delayed reforms. While weaknesses remain, most notably in the courts, the international community has driven much of the progress on police and judicial reform.

[18] XXXX operates units in criminal intelligence and organized crime and specialized police units investigate war crimes, financial crimes and organized crimes. The most sensitive cases have been transferred to XXXX. The case of the murder of the claimant's father was reviewed by XXXX. Although there are reports of still large-scale corruption and impunity, there is a climate of rule of law which should curtail this situation over the years. It is the organisation which reopened the investigation in the claimant's father's murder.

[19] The Constitution guarantees that the judicial power is independent, fair, apolitical and impartial and that courts adjudicate based solely on the Constitution and the law.⁶ It appears from the documentary evidence that Kosovo has a solid ground and functioning protective systems that are under control. It is providing adequate protection to its citizens and is attempting to deal with its problems as well as serving the citizens adequately.

[20] According to the DOS report Exhibit 7, NDP for Kosovo, November 30, 2017, item 2.1:

“(...) Endemic government and private-sector corruption coupled with the lack of punishment for corrupt acts remained an important human rights problem.”⁷

“XXXX s mandate is to monitor, mentor, and advise local judicial and law enforcement institutions. It also has some operational responsibilities, serving, with the police force as second responders, including during raids and actions requiring crowd and riot control, although it did not carry out this function during the year. XXXXs mandate for policing

⁶ Exhibit 7, National Documentation Package (NDP) for Kosovo, Item 9.4, p. 10.

⁷ Exhibit 7, NDP, Item 2.1, p. 1.

operations is limited to cases of organized crime, high-level corruption, war crimes, money laundering, terrorist financing, and international police cooperation. It also engaged in witness protection operations and training for police in witness protection. XXXXs executive role gradually decreased as envisaged in the exchange of letters between the government and the EU in 2014 and as extended during the year.”⁸

“The law provides for a fair and impartial trial, and the judiciary generally upheld the law. Trials are public and the law entitles defendants to the presumption of innocence, the right to be informed promptly and in detail of charges against them, to be present at their trials, to remain silent and not to be compelled to testify or confess guilt, to confront adverse witnesses, to see evidence, and to have legal representation. Defendants have the right to appeal. These rights extend to all citizens without exception. The country does not use jury trials.

According to the Organization for Security and Cooperation in Europe, the Agency for Free Legal Aid, an independent agency mandated to provide free legal assistance to low-income individuals, has not functioned as envisioned the agency offers legal advice but does not represent cases before the court. A section of the Office of the Chief State Prosecutor helped to provide access to justice for victims of all crimes, with a special focus on victims of domestic violence, trafficking in persons, child abuse, and rape.”⁹

[21] By contrast, Counsel submitted that: “the judiciary, customs, public utilities and procurement sectors are the most affected by corruption. While anti-corruption laws are strong, the judicial system is weak and inefficient, leading to poor enforcement.”¹⁰ The judicial seems to be, indeed the weakest. Therefore, there are mix views. NDP Item 10.5, indicates, however, that the general public are satisfied with their police force.

[22] How does this apply to the claimants?

[23] The claimant’s family was able to obtain a new investigation in the claimant’s father’s assassination. A key leader of those murderous groups has been arrested in 2014. The agent of alleged persecution in this case is not the state, but criminals who can be arrested, as others have been in the last years dealing with war crime issues.

[24] While the three Serbians who killed the claimant’s father was acquitted of the murder charges, XXXX did intervene to investigate the case of the father’s murder and found links with the XXXX XXXX group. The family did obtain a retrial as requested.

⁸ Exhibit 7, NDP, Item 2.1, p. 10.

⁹ Exhibit 7, NDP, Item 2.1, p. 13.

¹⁰ Exhibit, 10.5.

[25] No government can guarantee the protection of all its citizens at all times,¹¹ what is necessary is that the state be reasonably forthcoming with adequate serious efforts to protect its citizens. Asked where his brother and mother are, the claimant replied that they are still in Kosovo, in hiding. The claimant's brother is single and takes care of his mother. In his circumstances with a family, he felt that it was too dangerous for all members of the family.

[26] However, since his departure, the claimant indicated that there is no progress for the retrial. In the meantime, his mother and brother are determined to go and testify to obtain justice.

[27] The panel acknowledge that the claimant and his family members did receive threats between 2000 and 2004 and then in 2011, when the retrial was decided. However, they also received a response to their request to have the case reopened. On a balance of probabilities, the panel comes to the conclusion that the government of Kosovo cannot guarantee the protection of all its citizens at all times, as protection can never be perfect. However, it is necessary that the state be reasonably forthcoming with serious efforts to afford protection when needed. XXXX has a witness program since the claimant's departure. The fact that the witness protection was not granted in 2011 is not indicative that the state is not protecting the numerous victims of war crimes. Considering that the long delays before cases are heard by a judge, the state must have rules and criteria for each case. This information is not before the panel. The panel cannot draw a negative inference based on the overall material before it.

[28] The panel finds that state protection would be on balance of probabilities, available to the claimants in Kosovo should they needed it. The claimants did not establish, on a balance of probabilities, that it is more likely than not that the state is unable, or unwilling to afford them protection.

[29] The claimants did not establish that their subjective fear is objectively well-founded or that their fear of risk to life, or a risk of cruel and unusual treatments or punishments should he go back to Kosovo.

¹¹ M.E.I v. Villafranca, Ignacia (F.C.A., no A-69-90), Hugessen, Marceau, Décary, December 18, 1992.

CONCLUSION

[30] Therefore, the panel finds that the claimants, are not “Convention refugees” and are not “persons in need of protection” according to sections 96 and 97(1) of the IRPA.

[31] The claims are rejected.

(signed) “Marie-Andree Lalonde”
Marie-Andree Lalonde
March 28, 2018
Date