Federal Court  Cour fédérale

Date: 20170918

Docket: IMM-4286-16

Citation: 2017 FC 837

St. John's, Newfoundland and Labrador, September 18, 2017

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

DILSHOD ISMAILOV

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Mr. Dilshod Ismailov (the "Applicant") seeks judicial review of the decision of the Immigration and Refugee Board, Refugee Appeal Division (the "RAD"), confirming the decision of the Refugee Protection Division (the "RPD") that he is neither a Convention refugee **nor** a person in need of protection within the meaning of section 96 and subsection 97(1), respectively, of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act").

[2] The Applicant is a citizen of Uzbekistan. He sought protection in Canada on the basis of religious persecution, that is as an adherent of the Gulen movement in Canada, and threats from the government prosecutor's office relative to an investigation into the Applicant's past employer.

[3] By a decision of the RPD, dated November 19, 2013, negative credibility findings were made against him and his claim was dismissed.

[4] Upon appeal to the RAD, the decision of the RPD was reversed.

[5] In cause number IMM-3621-14, the Minister of Citizenship and Immigration (the "Respondent") sought leave and judicial review of the positive decision of the RAD. By a consent Order made on June 3, 2014, the matter was remitted to the RAD for another determination.

[6] The RAD delivered its decision on redetermination on September 17, 2014 and confirmed the initial decision of the RPD, finding that the Applicant is neither a Convention refugee nor a person in need of protection.

[7] The Applicant sought leave and judicial review of that decision in cause number IMM-6839-14. In a decision rendered on August 13, 2015, his application for judicial review was allowed on the grounds that the RAD had erred in its assessment of certain elements of new evidence, specifically two newspaper articles.

[8] The reviewing Court also found that the RAD had unreasonably refused to assess the admissibility of a decision of the European Court of Human Rights, which was submitted for its factual findings relating to country conditions in Uzbekistan.

[9] The reviewing Court further found that the RAD'S credibility finding, that the Applicant could not have left Uzbekistan after having been questioned by the authorities, was made without regard to relevant corroborative evidence and was unreasonable.

[10] Upon a further redetermination of the Applicant's claim, the RAD again considered the eleven news articles submitted by the Applicant as new evidence. It found that six of the news articles predated the RPD decision and accordingly, were not new evidence. It found that two other news articles predated the RPD decision, but that the Applicant could not reasonably have expected to produce them before the RPD and so admitted them into evidence. The RAD accepted the remaining news articles but gave them little weight because it found that these articles were neither relevant nor credible.

[11] The RAD also considered nine other documents concerning the Applicant's ability to return to Uzbekistan, in **view** of his status as a failed refugee claimant. It found that the European Court of Justice decision was not "new evidence", since it pre-dated the RPD decision. It excluded four other documents because they were undated and the time of their availability could not be determined. The remaining documents post-dated the RPD decision and were admitted into evidence.

[12] The RAD considered more new evidence, consisting of twelve documents, relating to the Applicant's religious profile. It found that two documents were undated and it could not determine if they met the test for new evidence. The remainder of the documents originated after the RPD decision and were accepted into evidence.

[13] In its decision, the RAD found the Applicant not to be credible because his Basis of Claim ("BOC") lacked detail about certain police visits to his parents' home and because he could not remember key dates in his oral testimony.

[14] The RAD found that the Applicant is neither a Gulen nor Nursi practitioner and would not face persecution, on that basis, if returned to Uzbekistan.

[15] The RAD also found that the Applicant would not reasonably face persecution, on the basis of being a failed refugee claimant, if returned to Uzbekistan.

[16] The RAD considered the Applicant's religious profile and said it was required to determine if the Applicant was a member of the Gulen movement. It concluded he is not an "active practitioner" of the Gulen movement.

[17] In the present application for judicial review, the Applicant raises several arguments, including submissions that the RAD breached procedural fairness by not holding an oral hearing and by not accepting the new documentary evidence. He also argues that the assessments of risk were unreasonable and that the RAD lacked jurisdiction to address his *sur place* claim for

protection. He further submits that the RAD erred in failing to address the risk to him on the basis of his perceived religious affiliation, if he were returned to Uzbekistan.

[18] The Minister of Citizenship and Immigration (the "Respondent") argues that the RAD reasonably considered all the evidence and reasonably dismissed the Applicant's appeal.

[19] The first question to be addressed is the standard of review, beginning with the first standard of review, that is the standard of review to be applied by this Court to the RAD.

[20] The appropriate standard of review for this Court when reviewing a decision of the RAD is reasonableness; see *Canada (Minister of Citizenship and Immigration) v. Huruglica* (2016), 396 D.L.R. (4th) 527 (F.C.A) at paragraph 35. Accordingly, the Court should not interfere if the RAD's decision is intelligible, transparent, justifiable, and falls within a range of outcomes that are defensible in respect of the facts and the law; see the decision in *Dunsmuir v New Brunswick*, [2008] 1 S.C.R. 190 at paragraph 47.

[21] Next, I refer to the standard of review to be applied by the RAD upon an appeal from the RPD.

[22] In judicial review of a decision of the RAD, the reviewing court must look at the standard of review applied by the RAD to the RPD's decision. The Federal Court of Appeal in *Huruglica*, *supra* at paragraph 77 said:

> … I find no indication in the wording of the IRPA, read in the context of the legislative scheme and its objectives, that supports

> the application of a standard of reasonableness or of palpable and overriding error to RPD findings of fact or mixed fact and law.

[23] According to the decision of the Supreme Court of Canada in *Dunsmuir, supra*, there are generally only two standards of review, that is reasonableness and correctness. If the standard of reasonableness does not apply, only the standard of correctness remains to be applied by the RAD in its review of certain issues before the RPD.

[24] At paragraph 103, of *Huruglica*, supra, the Federal Court of Appeal concluded:

> I conclude from my statutory analysis that with respect to findings of fact (and mixed fact and law) such as the one involved here, which raised no issue of credibility of oral evidence, the RAD is to review RPD decisions applying the correctness standard. Thus, after carefully considering the RPD decision, the RAD carries out its own analysis of the record to determine whether, as submitted by the appellant, the RPD erred. Having done this, the RAD is to provide a final determination, either by confirming the RPD decision or setting it aside and substituting its own determination of the merits of the refugee claim. …

[25] In my opinion, the paragraph quoted above means that the RAD must apply a correctness standard when reviewing decisions of the RPD which do not raise issues of the credibility of oral evidence. That appears to be the situation in this case since in my opinion, the dispositive issue here is the RAD's failure to consider the risk to the Applicant if returned to Uzbekistan on the basis of being perceived as an adherent of the Gulen movement.

[26] The RAD found that religious freedom in Uzbekistan is limited to those religions recognized by the government. The RAD said that according to the documented evidence, the "Gulen movement is not a recognized religion in Uzbekistan."

[27] In its decision, the RAD said the following about the Applicant's involvement with the Gulen movement and the Said Nursi teachings, at paragraph 50:

> The RAD finds the Appellant is not an active practitioner of the Gulen movement or of the Said Nursi teachings and that he would not face a reasonable chance of persecution due to his religious profile if he were to return to Uzbekistan.

[28] According to the decision in *Chekroun v. Canada (Minister of Citizenship and Immigration)*(2013), 436 F.T.R. 1, 13 at paragraph 55, the failure to consider the risk to a person arising from a perception that he or she is practicing a religion, or form of religion, that is subject to state persecution, is a reviewable error.

[29] I refer to paragraph 55 of that decision which provides in part as follows:

> I cannot accept the Respondent's position that the Applicant first had to establish his Jewish identity before the Officer was required to consider how he would be perceived in Algeria. The question is not whether an applicant holds a belief, it is whether potential persecutors would ascribe that belief to the applicant as is illustrated by Ward v. Canada (Minister of Employment & Immigration), [1993] 2 S.C.R. 689 (S.C.C.) at para 83. The same view was stated in Kandiah v. Canada (Minister of Citizenship & Immigration), [1994] F.C.J. No. 1876 (Fed. T.D.) at para 23, which also held that, regardless of the ground of persecution, the question should be approached from the perspective of the persecutor.
>
> […]

[30] Although the application for judicial review in *Chekroun*, *supra*, was dismissed on other grounds, the statement quoted above applies to the present case.

[31] In my opinion, the RAD erred by failing to consider the risk to the Applicant if he is perceived, in Uzbekistan, to be an adherent of the Gulen movement. It did not clearly say that it was looking at that risk from the viewpoint of the persecutor, that is, the state. It was not enough for the RAD to simply say that it did not consider him to be an active participant in the movement, when it did not at least address the question of risk to him if returned to Uzbekistan where adherents of the Gulen movement do not enjoy the protection of the state. It is not necessary for me to consider the other arguments raised by the Applicant.

[32] The application for judicial review will be allowed, the decision set aside and the matter remitted to a differently constituted panel of the RAD for redetermination

[33] There is no question for certification arising.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, the decision is set aside and the matter remitted to a differently constituted panel of the Refugee Appeal Division for redetermination. There is no question for certification arising.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4286-16
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