

Federal Court



Cour fédérale

Date: 20160908

Docket: IMM-5702-15

Citation: 2016 FC 1015

Toronto, Ontario, September 8, 2016

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

**MADINA MASHANLO
RAMINA CHIMIROVA
KHUSSAR CHIMIROV**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

Overview

[1] The Applicants in this matter are the principal Applicant, Khussar Chimirov, his wife, Madina Mashanlo, and their daughter, Ramina Chimirova. They are citizens of Kazakhstan and claim that, as a result of conversion from the Sunni branch of Islam to the Shia branch, they have suffered persecution by the Sunni community and the police in Kazakhstan. The Refugee

Protection Division [RPD] of the Immigration and Refugee Board of Canada determined that the Applicants are not Convention Refugees or persons in need of protection under section 96 or 97 of the *Immigration and Refugee Protection Act, SC 2001, c 27* [IRPA]. The Applicants now seek judicial review of that determination.

[2] As explained in greater detail below, this application is allowed, because I have found that the RPD erred in making findings without regard to the evidence, related to conditions in Kazakhstan and documentation corroborative of the Applicants' claim.

Background

[3] The Applicants' claim is advanced in a Basis of Claim [BOC] form and supporting narrative by Mr. Chimirov. The Applicants operated a bakery in a marketplace in Almaty, Kazakhstan. They were raised in the Sunni tradition but allege that, in March 2013, they began to experience pressure by the owner of the marketplace to make donations to build a mosque. The proponents of this initiative supported radical Islamic ideas, and Mr. Chimirov refused to participate. He claims that subsequently several of their bakery contracts were severed and, upon seeking assistance from the owner of the marketplace, he was physically thrown out of the office. Mr. Chimirov alleges that the police witnessed this and did nothing.

[4] Mr. Chimirov alleges that a man named Zaur came to his assistance and subsequently exposed him to Shiite values. He began attending group meetings with this man at a praying house. This group wanted to pray at a real mosque but could not, because they were unregistered. Mr. Chimirov claims that his extended family severed any relationship with him and his

immediate family and that his prayer group was harassed and threatened. He says that the police intervened but threatened his group with reprisals because they were not registered.

[5] Mr. Chimirov refers to subsequent incidents where his house was trashed and stoned and he was attacked and taken to a clinic for medical attention. The police were involved, following which his family received threats for complaining to the police. Mr. Chimirov and his family moved to stay with relatives, but he alleges they were followed and his then pregnant wife was attacked, resulting in a premature labour and loss of the pregnancy. They reported the incident to the police, who could not find anyone responsible.

[6] Mr. Chimirov and his family subsequently traveled to the US and then to Canada, applying for refugee protection at the Canadian border.

Impugned Decision

[7] In its analysis of the Applicants' claim, the RPD first referred to the country condition documentation and stated it was unable to find any reference to any significant problems for either the Shia in Kazakhstan or converts to that branch of Islam. The RPD referred to documentary evidence indicating that Kazakhstan is a relatively tolerant state with respect to religion.

[8] The RPD then turned to Mr. Chimirov's credibility and found him not to be credible based on inconsistencies in the evidence he presented, including the port of entry notes, his BOC,

and his testimony. The RPD noted the presumption of truthfulness that is afforded to a claimant, but found that presumption to be rebutted in this case by such inconsistencies.

[9] The RPD also found it problematic that the Applicants failed to produce any documents to corroborate Mr. Chimirov's religious conversion, the involvement of the police in the attacks, or the subsequent hospital visits. It found that Mr. Chimirov had not established that he and his family were converts to the Shia branch of Islam and rejected their claims under sections 96 and 97 of IRPA.

Issues and Standard of Review

[10] The Applicants submit the following issues for the Court's consideration:

- A. Did the RPD err in making its finding that the claim was not well-founded?
- B. Did the RPD err in making its adverse credibility findings?

[11] While the parties did not make explicit submissions on the standard of review, each has made arguments as to the reasonableness of the decision. In the context of the particular errors alleged by the Applicants, my conclusion is that the RPD's decision is to be reviewed on a standard of reasonableness.

Analysis

Did the RPD err in making its finding that the claim was not well-founded?

[12] The Applicants' arguments on this issue relate to the RPD's consideration of the objective basis for their alleged fear. The RPD concluded that their fear of persecution was not well-founded, because it was not able to find any reference to any significant problems for either the Shia in Kazakhstan or converts, as the documentary evidence indicated that Kazakhstan is a relatively tolerant state with respect to religion.

[13] The Applicants submit that this finding was made without regard to the documentary evidence, given that the evidence indicated a significant recent change in Kazakhstan's historical religious tolerance with the passage of a new law in 2011, requiring the registration of all religious communities.

[14] The RPD's conclusion, that Kazakhstan is a relatively tolerant state with respect to religion, was based on an April 2014 document, published by the United Nations Office of the High Commissioner for Human Rights, containing the preliminary findings of H. Bielefeldt, the Special Rapporteur on Freedom of Religion or Belief [the Bielefeldt Report]. However, the Applicants point out that, while the Bielefeldt Report does refer to religious pluralism as a hallmark of Kazakhstan's society traceable far back in history, it focuses on the current status of freedom of religion in that country, and one of the report's principal concluding recommendations is the need for far-reaching reforms of the 2011 Law on Religious Associations.

[15] The Bielefeldt Report states that this law, which requires all religious communities to register, was a major issue in many of Mr. Bielefeldt's discussions. The report states that a main

problem concerning the administration of religious registration is that unregistered religious groups can hardly exercise any collective religious functions in Kazakhstan. Any of their activities are deemed illegal and can incur serious sanctions. Mr. Bielefeldt refers to hearing credible stories about police raids on the premises of unregistered groups.

[16] While the Bielefeldt Report states an appreciation of the Kazakhstan government's motivation to counter religious hatred, intolerance and extremism, it recommends that registration not be a mandatory requirement for religious community practice, so that unregistered communities can operate free from discrimination and fear of intimidation.

[17] The Applicants also referred to a number of other documents in the National Documentation Package [NDP] for Kazakhstan which speak to the consequences of the 2011 law. The Applicants note that these documents refer to the Kazakhstan government requiring all Muslim groups to join the Sunni Hanafi Spiritual Administration of Muslims in Kazakhstan in order to obtain registration; to Shia and Ahmadi Muslims being denied legal status; and to the Kazakhstan government increasingly seeking to constrain religious organizations whose views are not in line with the state approved version of Islam.

[18] The Applicants also note that, in their written submissions to the RPD, they expressly cited some of this documentary evidence including reference to the denial of legal status to Shia Muslims (in the Annual Report 2014 of the United States Commission on International Religious Freedom) and an article referring to the Bielefeldt Report urging that Kazakhstan end mandatory registration of religious communities.

[19] The Respondent argues that the issue of religious registration is peripheral to the fact pattern of the Applicants' claim. While I agree that the claim is not premised principally on persecution pursuant to the 2011 Law on Religious Associations, I note that Mr. Chimirov's BOC narrative refers to his inability to go to a mosque because it was virtually impossible to get official registration. This resulted in negotiation with a mosque to use their premises before the regular congregation, and it was while leaving this mosque after one of their Friday prayer sessions that Mr. Chimirov alleges his prayer group was harassed and threatened, resulting in involvement of the police which he says exacerbated the problem.

[20] I also note the issue of religious registration to have been the subject of testimony by Mr. Chimirov before the RPD. The transcript indicates that he testified the police threatened to imprison him because the Shiite group was not registered. The RPD member stated that he had looked for and could not find any evidence about that and noted the Bielefeldt Report's reference to religious pluralism being a hallmark of Kazakhstan Society. In response to that statement by the member during the hearing, the Applicants included in their post hearing submissions the references to the documentary evidence noted above, including the statement that Shia and Ahmadi Muslims have been denied legal status.

[21] I am conscious of the Respondent's argument that the role of the Court on judicial review is not to re-weigh the evidence that was before the RPD, particularly in the context of country conditions documentation. However, given that the inability of Mr. Chimirov's Shiite prayer group to register formed part of the fact pattern surrounding his alleged persecution, and given the substantial quantity of evidence identified by the Applicants in the NDP which speaks to the

negative impact upon religious freedom of the 2011 Law on Religious Associations, I find this case to fall within the principle set out in *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35. That is, the more important the evidence that is not mentioned specifically and analyzed in an agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact without regard to the evidence. I find the Applicants' argument to this effect particularly compelling, given that the RPD relied upon the Bielefeldt Report for its conclusion as to religious tolerance in Kazakhstan, while one of the principal recommendations of this report concerned the effect of the 2011 Law on Religious Associations upon religious freedom.

[22] For these reasons, I find the RPD's conclusion, that the Applicants' fear of persecution is not well-founded, to be unreasonable.

Did the RPD err in making its adverse credibility findings?

[23] I also find the RPD to have made a reviewable error in its analysis of corroborating documentation while considering Mr. Chimirov's credibility. Among the reasons for the RPD's adverse credibility findings was the lack of documentation corroborating his claim. The RPD's decision refers to the member having asked Mr. Chimirov if he had any documentation regarding the court, the police or the alleged hospital visits. The decision then refers to Mr. Chimirov stating that he thought they were at his mother's residence and admitting that he had not made any attempts to acquire them from his mother. The RPD notes that, where it makes a general finding that a claimant lacks credibility, that determination is sufficient to dispose of the claim unless there is independent and credible documentary evidence in the record capable of

supporting a positive disposition. It concludes that Mr. Chimirov has not met his onus to demonstrate that there was such evidence.

[24] However, this analysis appears to overlook the fact that the evidence before the RPD included two discharge letters, related to the hospitalization of Mr. Chimirov and Ms. Mashanlo, which described their injuries and, in Ms. Mashanlo's case, refers to the resulting loss of her pregnancy. Indeed, contrary to the RPD's statement in the decision, the transcript of the hearing indicates that, when the member asked if he had a report from the hospital, Mr. Chimirov responded that he did, and the Applicants' counsel noted that there was a report for both him and his wife which had been tendered in evidence as exhibits.

[25] The Respondent argues that the RPD's adverse credibility finding related not to the lack of corroborating documents but to the Applicants' lack of effort to obtain such documents. While I agree that the RPD was taking into account such lack of effort, it is apparent from the decision that it was also influenced by the absence of the documents themselves. Therefore, the RPD's failure to consider the corroborative effect of the documentation from the hospital, and the fact that it appears to have entirely overlooked this documentation in reaching its decision, makes this portion of the decision unreasonable.

Conclusion

[26] Having found reviewable errors in the RPD's findings both as to the well-foundedness of the Applicants' claim and as to Mr. Chimirov's credibility, this application for judicial review must be allowed and the matter returned to the RPD for redetermination by a different member.

[27] Neither of the parties proposed any question of general importance for certification for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is allowed and the matter is returned to the Refugee Protection Division for redetermination by a different member.

“Richard F. Southcott”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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