Federal Court  Cour fédérale

Date: 20140820

Docket: IMM-6180-13

Citation: 2014 FC 811

Montréal, Quebec, August 20, 2014

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

ROZA LI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] When a state participates in that which amounts to persecution, an Internal Flight Alternative (IFA) is not an option (*Canada (Minister of Employment and Immigration) and Sharbdeen* (1994), 81 FTR 90, 23 Imm LR (2d) 300 (FCA).

[2] Reference is made to the International Crisis Group Report – National Documentation Package on Kyrgyzstan, 31 August 2012, as well as in Kyrgyzstan Widening Ethnic Divisions in the South Asia Report No. 222, 12 March 2012, wherein it is clearly stated that "it appears that the southern authorities gave tacit approval to the continuing persecution of the Uzbek minorities".

[3] It is recognized in the file that the impunity of government security forces was a major problem for the Applicant; the government did not protect its citizens, as per the evidence, government forces were complicit in significant acts leading to the peril of Uzbek minorities.

II. Introduction

[4] The Applicant seeks a judicial review of a decision by the Refugee Protection Division of the Immigration and Refugee Board [RPD], dated August 30, 2013, wherein, it was determined that she was not a Convention refugee under section 96 nor a person in need of protection under section 97 of *the Immigration and Refugee Protection Act*, SC 2001 c 27 [IRPA].

III. Background

[5] The Applicant, Ms. Roza Li, is a 67-year-old citizen of Kyrgyzstan. She is an ethnic Korean, recommended for the highest award in medicine by the authorities of the city of Osh; and, yet, she demonstrated to the RPD without any contradiction that she was in peril.

[6] The Applicant claims that her problems began after the April Revolution of 2005 in Kyrgyzstan. This revolution caused widespread violence across the country, fuelled by ethnic nationalism against minorities; the majority of the conflict centering on the Kyrgyz and Uzbek communities. By 2006, she claims she started receiving anonymous phone calls threatening her to leave her position as head of the Endocrinology Center in the city of Osh. The telephone calls were soon followed by nationalists writing "Korean" on the gate of her house, stoning her house, and eventually burning it; and, in April 2006, her dog was poisoned.

[7] The Applicant reported these incidents to the local police but they did not take action. The threatening calls continued over the years.

[8] In May 2010, the Applicant applied for a visitor's visa to Canada to be with her daughter as she was expecting a baby. She received this visa on September 2, 2010.

[9] In June 2010, the country of Kyrgyzstan experienced increased ethnic tension involving the Kyrgyz and Uzbek people. On June 11, 2010, in the midst of major inter-ethnic violence, the Applicant's house was attacked by a mob of armed nationalists. All her valuables were stolen and her house was burned to the ground. She managed to escape the home and went to stay with a friend.

[10] The Applicant left the city of Osh shortly after this incident and sought refuge in the capital of Kyrgyzstan, Bishkek. She stayed in Bishkek for several months before coming to

Canada. On September 28, 2010, she left Kyrgyzstan and joined her daughter in Canada for 6 months as a visitor. On April 8, 2011, she made a claim refugee protection.

IV. Decision under Review

[11] In its decision dated August 30, 2013, the RPD determined that the Applicant had not established a serious possibility of persecution on one of the Convention grounds or that she would face a risk to her life or a risk of cruel and unusual punishment if she returned to her country.

[12] The RPD acknowledged that the Applicant had been a victim of widespread inter-ethnic violence in Kyrgyzstan in 2010; however, based on the country condition documentation, the RPD concluded that this violence had since been largely abated, and that she could return home with little possibility of a reoccurrence of such violence. The RPD noted that the violence was still present in some of the southern parts of the country; however, the Applicant's son and sister had reported no incidents in the city of Osh since 2010. The RPD concluded that, even if the Applicant were unable to return to Osh, she could seek an IFA in the north of the country, namely in Bishkek, where she had resided for several months prior to her departure to Canada.

V. Issue

[13] Is the RPD’s decision reasonable?

VI. Relevant Legislative Provisions

[14] The following legislative provision of the IRPA is relevant:

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.
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 subject them personally	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 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.
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

VII. Position of the Parties

[15] The Applicant declares that the RPD erred in law in finding that an IFA exists for the following reasons:

a) The RPD acted without regard for the evidence of the complicity, involvement and impunity of the government's security forces in support of Kyrgyz nationalists;
b) The RPD misconstrued the evidence that the Applicant was in hiding in Kyrgyzstan and only emerged to get medical attention;
c) The RPD failed to conduct a proper analysis of the claimant's fear of persecution by not evaluating persecution on cumulative grounds.

[16] In regard to the first point, the Applicant argues that there was clear and uncontradicted evidence on the record that demonstrates complicity by Kyrgyzstan's security forces in the June 2010 attacks; therefore, it was capricious for the RPD to find that protection was available anywhere in the country, including in Bishkek.

[17] In regard to the second point, the Applicant asserts that the RPD misconstrued her explanation as to why she was turned away by a doctor while hiding in Bishkek. The Applicant alleges she was not turned away because she lacked documentation to be treated, but rather, because she was Korean. She argues that the objective evidence on the record clearly supports her subjective fear that there was no State protection available to her.

[18] In regard to the last point, the Applicant argues that, while the RPD noted incidents in her past, it did not take these into account in its assessment of her persecution or her IFA.

[19] The Respondent maintains that the RPD was right to conclude that the Applicant was no more than a victim of generalized violence in the riots of 2010. The RPD continues that the Applicant did not demonstrate that she had a particularized risk, as thousands of other homes were also destroyed during this time period. The Respondent also submits that, since 2010, the city of Osh has helped to rebuild her home, and her family had not reported violence immediately after.

[20] The Respondent affirms that the RPD was open to conclude that the Applicant would not be at risk if she returned to Kyrgyzstan as she had an IFA in Bishkek.

VIII. Standard of review

[21] Under the circumstances, was the decision of the RPD reasonable and/or, also, did the RPD err in law as to the available IFA in Bishkek?

IX. Analysis

[22] The evidence, in numerous examples, does demonstrate most significant complicity of the government's security forces in support of Kyrgyz nationalists. This is clearly evident in the comprehensive objective integral evidence on record (see National Documentation Package on Kyrgyzstan, 31 August 2012, United States, 24 May 2012, Department of State, "Kyrgyz Republic", Country Report on Human Rights Practices for 2011).

[23] Also, the evidence in respect of the Applicant's overall well-being was misconstrued in respect of her physical well-being, and, also, in respect of her having to hide – recognizing, she had only received care with great difficulty for attendance to her heart condition (in a German run medical facility) and her physical safety appears to have been in serious peril due to her having been targeted as a visible minority (noting that her prominent position also made her a viable target).

[24] Reference is made to the International Crisis Group Report – National Documentation Package on Kyrgyzstan, 31 August 2012, as well as in Kyrgyzstan Widening Ethnic Divisions in the South Asia Report No. 222, 12 March 2012, wherein it is clearly stated that "it appears that the southern authorities gave tacit approval to the continuing persecution of the Uzbek minorities".

[25] It is recognized in the file that the impunity of government security forces was a major problem for the Applicant; the government did not protect its citizens, as per the evidence, government forces were complicit in significant acts leading to direct peril to Uzbek minorities.

[26] The intentions and actions of a government can and are in this case very different, even if intention did exist, action was not evident in the case of the Applicant. Intention and action are two very different notions; peril to the Applicant was clearly demonstrated due to uncontradicted complicity that was recognized as such by the RPD.

[27] When a state participates in that which amounts to persecution, an IFA is not an option (*Canada (Minister of Employment and Immigration) and Sharbdeen* (1994), 81 FTR 90, 23 Imm LR (2d) 300 (FCA).

[28] The RPD's findings appear to be taken out of context; if the evidentiary record is read as a whole, a very different comprehensive picture emerges (see *Kyrgzstan - State of the World's Minorities and Indigenous Peoples*, 2012 – Events of 2011, Minority Rights Group Information at pp 121-122).

[29] The Applicant was considered to be credible throughout her testimony; thus, her having been in hiding was never contradicted; when the Applicant was in Bizkek, she could not walk out and had had a heart attack with assistance at that time (from a German run facility), only made possible in a most unusual manner, not due to any state authority assistance, whatsoever.

[30] The analysis of the IFA has no bearing in the case of the Applicant as the situation of the Applicant from a cumulative perspective demonstrates her perilous state due to her physical and psychological state.

[31] No need exists for the RPD to analyze the IFA as the cumulative nature of the Applicant having been in physical and psychological jeopardy to her person was in evidence, both being of a subjective and objective nature, considered of significance, requiring analysis of the comprehensive evidence as a whole.

[32] Thus, the treatment of the Applicant in respect of acts committed against her warranted, due to complicity of the central government's forces, a wholesome analysis as to the persecution to her particular person of a cumulative nature, not necessarily one envisioned in treatment of a generalized nature within the country. It demonstrates a case which turns on its own facts, as a case onto itself, as per the objective and subjective evidence.

[33] Details of the Applicant's narrative clearly demonstrate the precarious state of the Applicant due to cumulative acts against her (*Canada(Minister of Citizenship and Immigration) v Munderere*, 2008 FCA 84, 165 ACWS (3d) 726 at para 40-42, as penned by the late Justice Mark MacGuigan of the Federal Court of Appeal).

X. Conclusion

[34] For all of the above reasons, the Applicant's application for judicial review is granted and the matter is returned for determination anew before another member of the RPD.

JUDGMENT

THIS COURT'S JUDGMENT is that the Applicant's application for judicial review be granted and the matter be returned for determination anew before another member of the RPD with no question of general importance for certification.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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