

Federal Court



Cour fédérale

Date: 20160216

Docket: IMM-3244-15

Citation: 2016 FC 205

Ottawa, Ontario, February 16, 2016

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

**IMANOV BELEK
(AKA BELEK IMANOV)
(AKA IMINOV BAHTIYAR YUNUSOVICE)**

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The applicant is a 41-year-old citizen of Kyrgyzstan. He asks the Court to set aside a decision of the Refugee Appeal Division [RAD], affirming the Refugee Protection Division's [RPD] denial of his refugee claim. He claims that he has been the victim of violent extortion attempts in Kyrgyzstan and thus is a person in need of protection under section 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

Background

[2] The applicant has a son, Ak-Tilek Belekovich Imanov, and a wife, Rakhia Orunaliyevna Imanova. In Kyrgyzstan he ran a business buying and selling cars but, in 2003, the business went bankrupt.

[3] In September 2004, the applicant moved to Sweden to find a “better life.” While in Sweden, he submitted a claim for refugee protection. For the purposes of the claim, he used a false name, a false birthdate, and fabricated his ethnicity. In mid-2007, his claim was refused by Swedish authorities. He appealed the decision but, before the appeal could be determined, his mother fell ill and he returned to Kyrgyzstan in October 2007.

[4] In November 2008, the applicant returned to Sweden. By this time, the Swedish authorities had found out the applicant’s true identity because he had used his genuine passport to leave Sweden in 2007. The Swedish authorities terminated his refugee appeal and he returned to Kyrgyzstan in January 2009.

[5] Following his return to Kyrgyzstan, the applicant resumed his business of buying and selling cars, and also started a cleaning supply business with his wife. After they opened the cleaning business, the applicant claims that he and his wife were subject to extortion demands by government officials and members of organized crime. The applicant claims that he was attacked on three occasions after refusing to accede to these demands. The first attack took place on August 20, 2013, the second on February 4, 2014, and the third on May 3, 2014.

[6] On September 7, 2014, the applicant left Kyrgyzstan, after selling the cleaning business. His wife and son remained behind. He made a refugee claim in Canada on or about October 16, 2014.

[7] On February 20, 2015, the RPD rejected the applicant's refugee claim, largely on the basis that his story was not credible. The RPD identified several inconsistencies or omissions involving, variously, the applicant's Basis of Claim form [BOC], his testimony at the hearing, and documents that he provided. In most cases, the RPD put its concern to the applicant and invited him to provide an explanation. In other cases it did not. The areas of concern not put to the applicant for explanation were the following:

- The medical report for the August 20, 2013 assault states that the applicant was picked up by an ambulance and taken to the hospital; however, the applicant stated in his BOC that some neighbours found him and put him in a taxi.
- The medical report for the May 3, 2014 assault states that the applicant was delivered to the hospital by a passing car; however, the applicant stated in his BOC that his wife found him and called an ambulance to take him to the hospital.
- The medical reports for all three assaults state that the applicant was attacked by an unidentified group of people; however, the applicant testified that, during all three assaults, his assailants stated that they were acting on behalf of the Municipality of Bishkek. Further, he testified that, during the August 20, 2013 and February 4, 2014 assaults, his assailants told him that they were part of the Kamchi Kolbaev criminal group.

- The applicant testified that he was taken to the Republican Hospital following each assault; however, the medical reports he submitted in evidence are from Sokuluksk Territorial Hospital.

[8] The RAD considered three issues on appeal. It examined whether the RPD acted unfairly when it failed to provide the applicant with an opportunity to make submissions on all of its concerns about his evidence and, more generally, whether it had erred in finding that the applicant was not credible. In the context of the appeal the RAD considered whether it should admit three pieces of new evidence submitted by the applicant and if so the weight to be given to them. Lastly, it considered whether it should convene an oral hearing, in light of the new evidence.

[9] The RAD held that the RPD had not acted unfairly. First, it held that, because the applicant had failed to raise his concerns about procedural fairness before the RPD, he had waived his right to raise those same concerns before the RAD. Second, the RAD held that the applicant had not identified where on the record the RPD had failed to provide him with an opportunity to address its concerns. Finally, the RAD held that, based on its own review of the audio recording of the RPD hearing, the applicant had been allowed to address the RPD's concerns. It concluded that the RPD's credibility findings were reasonable.

[10] The RAD found all three pieces of evidence were admissible as new evidence; however it gave them little weight.

[11] The first document was a letter from Raisa Yakovlevna Firsova, a neighbour of the applicant's wife and son, which states that unknown Oriental people demanded that the applicant's wife disclose his whereabouts and threatened to kill him if they found him. Ms. Firsova also writes that she witnessed the beating of the applicant's wife and son. The RAD placed little weight on the letter because it was not a sworn statement and provided no details as to when the beating took place, how many people were involved, and whether anyone reported it to the police.

[12] The second document is a hospital record for the applicant's son, which states that he was hospitalized from February 10, 2015, to February 14, 2015, with chest and skull injuries sustained as the result of an assault by "unknown Oriental people." The RAD gave this document little weight because it is not an original and does not include the name of the hospital or its address or telephone number. The RAD also states that "[m]oreover, there is no evidence that the medical staff witnessed the alleged beating." Finally the RAD notes that this document does not look the same as the hospital records submitted by the applicant to the RPD.

[13] The third document is a hospital record for the applicant's wife, which states that she was hospitalized from February 10, 2015, to February 18, 2015, with a concussion and a facial soft tissue injury as the result of an assault by "unknown Oriental people." The RAD placed little weight on it for the same reasons it gave regarding the son's hospital record.

[14] In an affidavit from March 30, 2015, the applicant provides the following context for these documents:

On or about February 20, 2015, I spoke to my wife Rakhia Imanova on the phone who advised me that she and our son Ak-Tilek Belekovich Imanov were physically attacked just outside our home in Bishkek on February 10, 2015 by a group of men who looked to be of Asian origin. My wife further advised me and I do verily believe that the men were specifically looking for me and that they said that they needed to see me as I owed them money. The men also warned her that they would kill me. My wife further advised me and I do verily believe that she and our son had both been hospitalized as a result of injuries sustained in the incident.

[15] The RAD held that the new evidence did not raise a serious issue as to credibility and therefore the test for an oral hearing set out in subsection 110(6) of the Act was not met.

Issues

[16] The issues raised in oral submissions are threefold: (1) it was unreasonable for the RAD to find that the RPD had provided the applicant with an opportunity to make submissions on all of its concerns about his evidence; (2) whether the RAD erred in its assessment of the new evidence, and in particular, in its decision to give that evidence little weight; and (3) whether the RAD erred in failing to convene an oral hearing.

Analysis

[17] I agree with the applicant that the RAD's reasoning on procedural fairness is unsatisfactory. The RAD's finding that the applicant had waived his right to raise procedural fairness on appeal does not make sense, since there was no way that the applicant could have known, before he received the RPD's decision, that the RPD would base its decision on concerns that he had not had an opportunity to address. Further, the RAD's observation that the applicant

failed to pinpoint where in the record the RPD denied him an opportunity to address its concerns is nonsensical as one cannot pinpoint an omission. Finally, the RAD is just wrong when it finds that the RPD gave the applicant an opportunity to respond to all of its concerns, when in fact he was given an opportunity to respond to only some of its concerns.

[18] Nonetheless, on the core issue of whether the RAD was reasonable to find that the RPD had acted fairly, I conclude that it was. The duty of the RPD in this respect was discussed by this Court in *Tekin v Canada (Minister of Citizenship & Immigration)*, 2003 FCT 357 [*Tekin*] at para 14:

In addition, the Board did not err by failing to specifically mention to the Applicant its credibility concerns related to this omission from his PIF. The Board is not obligated by the duty of fairness to put all of its concerns regarding credibility before the Applicant (*Appau v. Canada (Minister of Employment & Immigration)*, [1995] F.C.J. No. 300 (Fed. T.D.); *Akinremi v. Canada (Minister of Citizenship & Immigration)*, [1995] F.C.J. No. 808 (Fed. T.D.); *Khorasani v. Canada (Minister of Citizenship & Immigration)*, 2002 FCT 936, [2002] F.C.J. No. 1219 (Fed. T.D.)). In this case, the Applicant was represented by counsel, the parties were on notice that credibility was an issue and the inconsistency between the Applicant's PIF narrative and his oral testimony was readily apparent. As a result, the Board was not required to put this inconsistency to the Applicant and its failure to do so was not a reviewable error (*Ayodele v. Canada (Minister of Citizenship & Immigration)*, [1997] F.C.J. No. 1833 (Fed. T.D.); *Matarage v. Canada (Minister of Citizenship & Immigration)*, [1998] F.C.J. No. 460 (Fed. T.D.); *Ngongo c. Canada (Ministre de la Citoyenneté & de l'Immigration)*, [1999] F.C.J. No. 1627 (Fed. T.D.)). [emphasis added]

[19] The underlined sentences in the above passage apply entirely to the case at hand.

Following *Tekin*, there is no reviewable error as submitted by the applicant.

[20] The applicant submits next that the RAD erred in its assessment of the new evidence. The RAD assigned little weight to the letter from Raisa Yakovlevna Firsova because it is not a sworn statement and does not specify when the events described took place, how many Oriental people threatened the applicant's wife, or whether anybody reported the matter to the police.

[21] I agree with the applicant that documents that corroborate some aspects of an applicant's story cannot be discounted merely because they do not corroborate other aspects of his story: *Mahmud v Canada (Minister of Citizenship & Immigration)*, 167 FTR 309 at paras 8-12 [Mahmud]. Here the RAD assigns little weight to a letter that corroborates some of the applicant's story simply because it fails to provide details that would further corroborate his story. The RAD fails to explain why it would be reasonable to expect these further details to have been provided, such that a negative inference can be drawn from their absence: See *Taha v Canada (Minister of Citizenship & Immigration)*, 2004 FC 1675 at para 9. Absent such justification, the RAD's treatment of this document is unreasonable.

[22] The same proposition applies to the RAD's assessment of the medical reports pertaining to the applicant's wife and son. The RAD assigns little weight to these reports, in part, because there is no evidence that the medical staff who wrote them also witnessed the assault of the wife and son. The fact that the medical reports do not directly corroborate every aspect of the applicant's claim that his wife and son were beaten by extortionists does not mean that it should be given "little weight." I suspect that the RAD was really observing that it would be giving little weight to the statement in the report that the harm had been caused by Oriental men because the authors of the report had no first-hand knowledge of that fact. That may be a fair

and reasonable view; however, the remainder of the report, when considered in terms of what it does establish (the beating, the date thereof, and the seriousness of the injuries), is relevant to the applicant's story and ought to have been considered in that context. More critically, the RAD also gives these reports little weight because they are "very dissimilar to the medical reports provided by the Appellant for his claim [and the] RAD's disclosure shows that there is only one hospital in Bishkek." The RAD, as submitted by the applicant, is wrong. These reports are in exactly the same format as that provided by the applicant. Accordingly, the weight given these reports by the RAD was unreasonable, and may have had an adverse impact on the decision it reached.

[23] The RAD's decision not to grant an oral hearing was based on its assessment of the new evidence. Having found that its assessment was unreasonable, the decision cannot stand and the appeal must be re-determined by another panel. Accordingly, the issue of whether to grant an oral hearing should also be left to be determined by that panel.

[24] No question was proposed for certification. There is none.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is allowed, the decision of the RAD is set aside, the applicant's appeal is to be heard by a different panel of the RAD, and no question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3244-15

STYLE OF CAUSE: IMANOV BELEK (AKA BELEK IMANOV) (AKA IMINOV BAHTIYAR YUNUSOVIC) v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

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