Federal Court  Cour fédérale

Date: 20170106

Docket: IMM-2685-16

Citation: 2017 FC 18

Ottawa, Ontario, January 6, 2017

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

BOBIR KHAKIMOV

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review by Bobir Khakimov [the Applicant] pursuant to s. 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the *IRPA*], of a decision of the Refugee Protection Division [RPD], dated May 26, 2016, finding the Applicant to be neither a Convention refugee nor a person in need of protection pursuant to sections 96 and 97(1) of the *IRPA* [the Decision].

II. Facts

[2] The Applicant is a 31-year-old Muslim and citizen of Uzbekistan. His highest level of education is secondary school. He is married with two young children. He worked for a few years as a carpenter before becoming a financially successful business man in Uzbekistan; he had a registered construction business that opened in 2008. He travels to buy car parts and used cell phones to import and resell in Uzbekistan as part of an unregistered business. He alleges fear of persecution on the grounds of fear of harm by his father-in-law and on the basis of his religion and perceived political opinion.

[3] The Applicant married in 2008. His father-in-law intensely dislikes him and wants someone more successful for his daughter. The Applicant alleges that the frequent conflict with his father-in-law led him to be very depressed; he began attending a mosque in October 2014, on the suggestion of a friend, to help him attain peace of mind. He found it psychologically helpful and would attend and pray frequently.

[4] The Applicant travelled outside of Uzbekistan regularly, allegedly for work and pleasure. He alleges that whenever he travelled outside Uzbekistan, he would search the internet for news; when he returned, he would share information he had gathered online regarding the corruption, politics and religious persecution in Uzbekistan with his trusted friends. Internet and information is severely restricted and controlled within Uzbekistan.

[5] Problems between the Applicant and his father-in-law allegedly escalated at his wife's birthday party on December 1, 2014. In January 2015, the Applicant was called to the local Mahalla's office. According to the RPD, a Freedom House *Freedom in the World 2014* report on Uzbekistan that was contained in the National Documentation Package defines Mahallas as local neighbourhood committees that wield much power in the country. It states: "Open and free private discussion is limited by the Mahalla committees, traditional neighbourhood organizations that the government has turned into an official system for public surveillance and control".

[6] The Mahalla chief is a friend of his father-in-law's. According to the Applicant, the Mahalla chief told him that his father-in-law had reported that he was behaving strangely and that he had become an Islamic radical. The Mahalla told him his father-in-law had also reported that the Applicant had travelled to too many countries, visited banned websites, told his friends that the Uzbek government is bad and was bringing forbidden information into Uzbekistan.

[7] The Applicant says he denied these allegations. He informed the Mahalla that he was a "normal Muslim" and that his father-in-law was telling lies. The Applicant alleges the Mahalla warned him that he would be jailed if he did not stop bringing suspicion onto himself; he was told to stop attending mosque, to not grow a beard and to not wear Islamic clothes. The Applicant alleges that the Mahalla told people in the neighbourhood about the Applicant and soon after he had no friends.

[8] In April 2015 the Applicant shaved off his beard and ceased attending the mosque as frequently as he had before then.

[9] In December 2015, his father-in-law took his wife and children and brought them to his house. When the Applicant went after them, his father-in-law called the police. The police refused to interfere and told the Applicant that a father has more rights than a husband and that his father-in-law was powerful and well-known in the community. They informed him he had gained a bad reputation in the neighbourhood as a religious fanatic. The Applicant then went to the Mahalla, who told him they would never oppose his father-in-law. The Applicant alleges he told the Mahalla he would move to a different city, but was informed that he would not be allowed to de-register his address "out of respect" to his father-in-law.

[10] While the issues with his father-in-law were ongoing, the Applicant went on several trips to various countries, both with and without his wife and children, including several countries in which he could have sought asylum:

- New Zealand in February 2015
- South Korea in June 2014, January 2015 and February 2015
- Finland from November to December 2014
- United Kingdom from September 2014 to May 2015
- Italy in September 2015
- United States in September 2015, January 2016

[11] The Applicant returned to Uzbekistan after each of these trips except the January 2016 trip to the U.S. When asked why he did not remain in the U.K. when he was there in May 2015, the Applicant stated that his family was having a good time and his father-in-law had calmed down; he did not think of claiming asylum in the U.K. at that time.

[12] The Applicant landed in New York City with a U.S. visa on January 14, 2016. On January 27, 2016, he made a refugee claim at the port-of-entry [POE] at Fort Erie. He falls under

an exception to the Safe Third Country Agreement due to the fact that his brother lives in Canada. His claim was referred to the RPD for a hearing.

III. Decision

[13] On May 26, 2016, the RPD determined the Applicant was neither a Convention refugee nor a person in need of protection under the *IRPA*. The RPD held that the Applicant's re-availment was "determinative of the claim"; credibility was also an issue for the RPD

[14] The RPD noted that it had been provided with little supporting documentary evidence regarding the Applicant's alleged persecution and was therefore required to rely on his word. It made note of the Applicant's success as a businessman in Uzbekistan and found him to be a sophisticated claimant. It found that the Applicant's actions were "not consistent with someone who is afraid of persecution in Uzbekistan. In particular, the claimant's frequent re-availment back to Uzbekistan and his extensive travel to first world countries without claiming asylum in any of them undermines his allegations of fear back in Uzbekistan".

[15] The RPD found the Applicant's credibility was undermined at the hearing by his denying that his father-in-law and the Mahalla had accused him of being a radical or a terrorist. I note that despite denying this at one point in his testimony, he also agreed, later in his evidence, that such accusations in fact had been made. For this same reason, the RPD also found it could only assign little weight to a letter it had before it, written by the Applicant's father, in which reference was made to "accusations" against his son.

[16] The RPD reviewed the National Documentation Package [NDP] for Uzbekistan, the 2015 annual report from the United States Commission on International Religious Freedom [USCIRF] and an Uzbek-German Forum for Human Rights and Human Rights Alliance report on Uzbekistan provided to him by counsel. It noted that the interaction with the Mahalla had allegedly occurred in January 2015 and the Applicant had since then left and returned to Uzbekistan on several occasions. It found that the Applicant appeared to not have been subjected to any monitoring or surveillance as indicated by the documentary evidence. It therefore concluded:

> … these interactions with the Mahalla did not occur as described, if at all, nor has the claimant come to the attention of the government of Uzbekistan …. I also find that the [Applicant] has lied about being identified as a possible radical in Uzbekistan by his vengeful father-in-law. This undermines the [Applicant's] credibility on a material point.

[17] The RPD found that the Applicant`s failure to claim asylum in a number of safe countries and his continuous re-availment to Uzbekistan "strongly undermine[d] his assertions of fear in his country." The RPD noted the Applicant`s explanation that he had returned to Uzbekistan because his family was there and he did not want to leave them; however, it found it difficult to reconcile his actions in light of the "incredibly harsh and oppressive actions of the Uzbek government against individuals with the profile" the Applicant advanced for himself. It determined:

> This is one of those unique cases where the actions of the claimant so strongly undermine his assertions of fear that it becomes determinative of the claim.

[18] The RPD also found the Applicant had tried to obfuscate his travel history by not fully disclosing his visa application history, further undermining his credibility. In conclusion, it stated:

> [20] As for the claimant`s assertions that he is a devout Muslim and that he cannot practice his religion in his country freely, I do not accept that the claimant is as devout as he would have me believe and I reject this element of his claim as well. He has submitted a letter from a mosque in Canada attesting to his religiosity and I find that he has attended mosque here in Canada, however, this is not convincing or persuasive evidence that the claimant`s religion led to difficulties for him back in Uzbekistan.
>
> [21] As a result of my credibility findings above, and the claimant's lack of a reasonable explanation as to why he would leave many countries of safety to return to a country of alleged danger, I find that the claimant`s allegedly self-endangering actions belie his fear and make his motivations suspect. His claim fails under both sections 96 and 97 of IRPA.

[19] It is from this decision the Applicant seeks judicial review.

IV. Standard of Review

[20] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62 [*Dunsmuir*], the Supreme Court of Canada held that a standard of review analysis is unnecessary where "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question." The issue of credibility is to be reviewed on a standard of reasonableness. Substantial deference is to be afforded to credibility findings of the RPD: *Rahal v Canada (Minister of Citizenship and Immigration)*, 2012 FC 319 at para 22, 42 [*Rahal*]; *Li v Canada (Minister of Citizenship and Immigration)*, 2011 FC 941 at para 33; *Zaree*

v Canada (Minister of Citizenship and Immigration), 2011 FC 889 at para 6; *Geng v Canada (Minister of Citizenship and Immigration)*, [2001] FCJ No 488 at para 15.

[21] In *Dunsmuir* at para 47, the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard of review:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[22] Questions of procedural fairness are reviewed on the correctness standard: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43. In *Dunsmuir* at para 50, the Supreme Court of Canada explained what is required when conducting a review on the correctness standard:

> When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

V. Analysis

[23] This case was ultimately decided against the Applicant on re-availment; the RPD said re-availment was determinative of the claim. The case also involved many credibility findings, and in that connection it is useful to recall the centrality of credibility findings to the role of the RPD.

To begin with, the RPD has broad discretion to prefer certain evidence over other evidence and to determine the weight to be assigned to the evidence it accepts: *Medarovik v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 61 at para 16; *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 867 at para 68. The Federal Court of Appeal has stated that findings of fact and determinations of credibility fall within the heartland of the expertise of the RPD: *Giron v Canada (Minister of Employment and Immigration)* (1992), 143 NR 238 (FCA) [*Giron*]. The RPD is recognized to have expertise in assessing refugee claims and is authorized by statute to apply its specialized knowledge: *Chen v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 805 at para 10. And see *Siad v Canada (Secretary of State)*, [1997] 1 FC 608 at para 24 (FCA), where the Federal Court of Appeal said that the RPD:

> … is uniquely situated to assess the credibility of a refugee claimant; credibility determinations, which lie within "the heartland of the discretion of triers of fact", are entitled to considerable deference upon judicial review and cannot be overturned unless they are perverse, capricious or made without regard to the evidence.

[24] The RPD may make credibility findings based on implausibility, common sense and rationality, although adverse credibility findings "should not be based on a microscopic evaluation of issues peripheral or irrelevant to the case": *Haramichael v Canada (Minister of Citizenship and Immigration)*, 2016 FC 1197 at para 15, citing *Lubana v Canada (Minister of Citizenship and Immigration)*,2003 FCT 116 at paras 10-11 [*Lubana*]; *Attakora v Canada (Minister of Employment and Immigration)*, [1989] FCJ No 444. The RPD may reject uncontradicted evidence if it "is not consistent with the probabilities affecting the case as a whole, or where inconsistencies are found in the evidence": *Lubana*, above at para 10. The RPD is also entitled to conclude that an applicant is not credible "because of implausibilities in his or

her evidence as long as its inferences are not unreasonable and its reasons are set out in 'clear and unmistakable terms'": *Lubana,* above at para 9.

[25] In this case it is appropriate to examine the various findings individually, bearing in mind of course that the Decision must ultimately be assessed as an organic whole and not microscopically nor as a treasure hunt for errors. The Applicant challenges the following findings; my comments follow each.

A. The Applicant says he was in Uzbekistan on December 1, 2014; the RPD found his passport stamps indicated he was, in fact, in Finland at the time. The Applicant says he was denied a fair hearing because the RPD did not raise this with him at the hearing where he would have had an opportunity to challenge that finding. Court comment: I agree this raises a question of procedural fairness, to be assessed on the correctness standard. In my view, the RPD must be given credit for being able to determine the meaning of various stamps on a passport as lying within its field of specialized expertise. That said, the question is whether, despite or given the RPD's particular expertise, it was nevertheless unfair to find this inconsistency "undermine[d] his allegation" that he was in Uzbekistan at the time of the birthday party, given that this was when the Applicant alleges his troubles with his father-in-law began. In my respectful view, the RPD should have raised this with the Applicant and failed in not doing so. The issue then becomes whether this failure goes to a critical point in the RPD's assessment or whether it is immaterial. In my view, the RPD's failure to raise this issue with the Applicant is not material given the RPD's explicit determination that re-availment, not credibility, was "determinative". In this connection I am satisfied that the breach did not affect the

decision: *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R 202 and *Yassine v. Canada (Minister of Employment and Immigration)* (1994), 172 N.R. 308 (F.C.A.), cited in *Patel v Canada (Minister of Citizenship and Immigration)*, 2002, FCA 55 at para 5.

B. The Applicant alleges the evidence does not support a finding that he was accused of being a terrorist by the Mahalla or his father-in-law. Court comment: in my respectful view, the RPD's finding in this regard is supported on the record and therefore is reasonable. I agree that the Applicant, at certain points of his testimony, answered as if he understood the word "accused" to mean "charged," as in formal steps having been taken against him. However, the RPD was entitled to look at both the letter from the Applicant's father, which refers to "accusations", as well as the Applicant's answers during the hearing. Moreover, the Applicant himself reversed field in his testimony and answered "Yes" to the question "You were accused of terrorism by your father-in-law and the Mahalla, is that correct?" The RPD's assessment of the evidence is reasonable in the face of this admission by the Applicant.

C. The Applicant says the RPD made an unreasonable plausibility finding in determining the Mahalla believed him to be a radical Muslim and rejecting the Applicant's allegation that he was not reported to the police or arrested due to his religious activities after they were reported to the Mahalla by his father-in-law. Court comment: in my view, the RPD's finding is rationally connected to country condition evidence, which was overwhelmingly to the effect that those with extreme Muslim views were closely watched and subject to persecution. The record also supports the RPD's finding. In his Basis of Claim, the Applicant reiterates what he claims the Mahalla said to

him: “He said that while my father in law is powerful and respected I have a bad reputation as a Muslim radical.” It was open to the RPD to make an implausibility finding on this record.

D. Doubts as to the Applicant’s future religious persecution are not reasonable. Court comment: in finding that the Applicant is “not as devout as he would have [the RPD] believe”, the RPD noted he was attending a mosque in Canada. The RPD was not convinced, however, that the Applicant’s religion had led to difficulties for him back in Uzbekistan. In making this finding, the RPD acted unreasonably and confused the forward-looking risk of persecution, which should have been assessed in this case, with the Applicant’s current religious practice as it was tied to past persecution.

E. The Applicant says the RPD was overzealous in its search for inconsistencies. Court comment: this allegation is based on the RPD finding that the Applicant did not tell the truth about his visa applications. The Schedule A Background Form asked whether the Applicant had ever “been refused refugee status, an immigrant or permanent resident visa…or visitor or temporary resident visa, to Canada or any other country?” (emphasis added). He responded yes and identified that it had happened on two occasions regarding applications for Canadian visas. Later, he took steps to formally amended his answer to say he had been refused a Canadian visa on three occasions. The Minister led evidence that, in fact and in addition, the US had refused the Applicant a visa on six occasions and that the U.K. had refused him a visa once. The Applicant was asked to explain these omissions, to which he said he did not understand the form. This explanation was reasonably rejected, because the Applicant is a sophisticated traveller. More significantly, however, he failed to mention not one or two, but seven visa rejections from two

> countries. Moreover, he failed to do so not only when filling out the form for the first time, but then again when he went back and deliberately amended his history visa rejections. Left unexplained is why, when he obviously knew better, he maintained the untruthfulness of his original answer concerning the U.S. and U.K. visas The Applicant says his omissions are immaterial and irrelevant; with respect, I am far from persuaded by this argument, particularly given the egregiousness of this almost calculated omission on his part. There is no merit to the Applicant's argument that the RPD was "overzealous": to the contrary it was fairly and reasonably assessing the Applicant's repeated re-availment as it was required to do, and quite reasonably focussed on the Applicant's re-availment after the family trip to London.

[26] As noted, the determinative basis of the RPD's rejection was his re-availment, noted as follows:

- New Zealand in February 2015
- South Korea in June 2014, January 2015 and February 2015
- Finland from November to December 2014
- United Kingdom from September 2014 to May 2015
- Italy in September 2015
- United States in September 2015, January 2016

[27] While there may be doubts about the Applicant's re-availment before April 2015, at which time he shaved off his beard and ceased frequent attendances at the mosque, the challenge for the Applicant, as identified by the RPD, was his decision to re-avail with his entire family after a family trip to the U.K. in May of 2015. In my view, given the reasonableness of its lack of credibility findings (which I already reviewed) and the Applicant's record of continuous uncompelled re-availments disclosed by the record, it was open to the RPD to conclude that re-

availment was determinative. As Justice Crampton (as he then was) stated in *Kostrzewa v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1449:

> [26]… As has been repeatedly held by this Court, a refugee claimant's re-availment to the jurisdiction in which he or she fears persecution or a type of harm contemplated by section 97 of the IRPA seriously undermines allegations of subjective fear, particularly in the absence of a compelling reason for such re-availment (*Hernandez v Canada (Minister of Citizenship and Immigration)*,2012 FC 197 at para 21; *Ortiz Garcia v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1346 at para 8; *Mughal v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1557 at paras 33-35; *Natynczyk v Canada (Minister of Citizenship and Immigration)*, 2004 FC 914 at para 69).

[28] In my respectful view, the RPD's conclusion that "[t]his is one of those unique cases where the actions of the claimant so strongly undermine his assertions of fear that it becomes determinative of the claim" is reasonable per *Dunsmuir*, in that it falls within the range of decisions that are defensible on the facts and law.

[29] I have reviewed the allegations one-by-one to assess the arguments raised by the Applicant, but judicial review is not decided by then counting up the positives and subtracting the negatives. The decision must be reviewed as an organic whole; it is not a treasure hunt for error: *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 at para 54. In my respectful view, viewed in its entirety, the Decision of the RPD falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law as required by *Dunsmuir*.

VI. Certified question

[30] Neither party proposed a question of general importance, and none arises.

VII. Conclusion

[31] Therefore, the Application for judicial review must be dismissed and no question will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed, no question is certified and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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