

Federal Court



Cour fédérale

**Date: 20180205**

**Docket: IMM-3026-17**

**Citation: 2018 FC 125**

**Toronto, Ontario, February 5, 2018**

**PRESENT: The Honourable Mr. Justice Diner**

**BETWEEN:**

**ISRILBEK BORUBAEV**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

[1] This application for judicial review challenges the Refugee Appeal Division [RAD] refusal of Israilbek Borubaev's appeal [Decision], upholding an earlier refusal of the Refugee Protection Division [RPD] to grant refugee status. Mr. Borubaev is a citizen of Kyrgyzstan who is seeking refugee protection on the basis of his Uzbek ethnicity, involvement in an opposition political party, and professed fear of a police officer who threatened him with extortion. After a review of the record in light of the issues he raised, this Court will not intervene. While the RAD

made one mistake with regard to the original documents submitted by the Applicant, the error is not fatal for the reasons explained below.

I. Background

[2] Mr. Borubaev's father is Kyrgyz and his mother is Uzbek. Growing up, he claims that he was often mistreated due to his Uzbek identity. While in university, he states that he was assaulted by a group of men for organizing an event celebrating Uzbekistan's Independence Day, but when he reported the assault, the police told him he had no evidence. He asserts that police routinely discriminate against Uzbeks.

[3] Mr. Borubaev relates that on June 11, 2010, violence broke out in the city of Osh and Uzbeks were beaten, tortured, and killed, and many homes were burned. Mr. Borubaev and his wife fled Osh during the violence; when they returned, they discovered that their house had been burned down.

[4] Mr. Borubaev states that in January of 2012 he joined the Uluttar Birimdigi [UB] party and began organizing events, helping with elections, collecting information, and researching party issues. The following year he was detained and interrogated by the police due to his political activities. Mr. Borubaev states that the police warned him that if he continued to work with the UB party, he would be jailed.

[5] Mr. Borubaev claims that in 2015 he was rear-ended by a black Mercedes, which was driven by the son of a police officer, and that the officer told Mr. Borubaev that would have to

pay \$30,000 or he would have him imprisoned on the basis of his involvement with the UB party.

[6] Mr. Borubaev alleges that, as a result of these culminating threats, he obtained a Canadian visa and left Kyrgyzstan through an unofficial checkpoint with the help of a smuggler. On November 15, 2015, he flew from Kazakhstan to Toronto, and subsequently claimed refugee protection. However, On December 12, 2016, the RPD rejected Mr. Borubaev's claim, citing credibility concerns in five key areas.

- i. Mr. Borubaev testified before the RPD that he had been assaulted in 2004, but submitted a psychiatric report which stated that he had been assaulted by the police in 2013. When presented with this discrepancy, Mr. Borubaev offered a variety of inconsistent explanations.
- ii. Mr. Borubaev had previously applied for a Canadian visa, and yet the employment and education information in that application, along with that contained in his social media sites, was entirely different from that provided in his refugee claim. The RPD did not believe Mr. Borubaev's explanation that his father had hired a smuggler to apply for his visa and it was the smuggler who created these social media accounts. Furthermore, the prior visa application also included copies of various exit and entry stamps, as well as a Chinese visa, in Mr. Borubaev's old passport. This evidence of travel abroad undermined the subjective basis for his refugee claim, given that some of this travel occurred after the alleged persecution.

- iii. Mr. Borubaev claimed that, in the face of police persecution and extortion, he went into hiding in his father's home, which was adjacent to his own. The RPD found this implausible, a family home being one of the first places the authorities would have looked for him.
- iv. Mr. Borubaev's brother sent documents from Kyrgyzstan and provided both of their full names on the envelope which was then stamped by Kyrgyz customs; the RPD found that if the authorities truly sought Mr. Borubaev, his brother would have been reticent to send documents passing through Kyrgyz customs that plainly revealed both identities.
- v. Mr. Borubaev's responses to various questions about the UB party were inconsistent – both internally with his own responses, and externally with the RPD's research. For instance, he grossly misstated the number of Kyrgyz seats in parliament by more than half, all in the context of his claim to have worked full-time in politics (for the UB party) for over three years.

[7] Given these major credibility concerns, the RPD assigned little weight to the personal documentary evidence presented, including a purported: (i) UB membership card; (ii) handwritten note from a party member; and (iii) government work log. The RPD concluded that “[d]ocuments, even official ones that carry a presumption of authenticity, cannot overcome and outweigh negative inferences that result from a careful examination of a claimant's testimony and their other evidence”. Furthermore, letters submitted by Mr. Borubaev's father, brother, cousin and wife were not only unsworn or subject to cross-examination, but also lacked details. The RPD examined a medical note which stated that Mr. Borubaev was treated for a head

injury in 2004, but which did not state the cause, and neither this, nor a psychological report, assuaged credibility concerns. Finally, the RPD rejected Mr. Borubaev's contention that his Uzbek ethnicity alone was sufficient to establish his claim, due to a lack of personalized risk.

## II. Decision under Review

[8] Mr. Borubaev appealed to the RAD, arguing that the RPD erred in (i) failing to consider the documentary evidence, (ii) making unreasonable implausibility findings, and (iii) inadequately addressing protection under section 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[9] Mr. Borubaev also attempted to submit "new" evidence, namely, letters regarding: (a) UB Party membership; (b) prior employment; (c) the mail issues; as well as (d) photographs of the "real" Facebook profile and photographs of party membership cards. Mr. Borubaev requested that the RAD hold an oral hearing under IRPA section 110(6) on the basis of this evidence.

[10] The RAD, in its Decision, erroneously believed Mr. Borubaev failed to submit originals of these documents (a mistake which the Respondent concedes) and rejected the evidence, finding it was not "new".

[11] Ultimately, the RAD upheld the RPD findings in its June 14, 2017 Decision and dismissed the appeal, giving rise to this judicial review.

### III. Issues and Standard of Review

[12] The Applicant argues that the RAD erred in its assessment of the new evidence and in declining to grant an oral hearing. Further, the Applicant contends the RAD erred in drawing negative credibility inferences and in assessing the documentary evidence of Uzbek persecution.

[13] In reply, the Respondent argues that the Court should decline what amounts to an invitation to reweigh the evidence. The Respondent further asserts that the Applicant's failure to challenge material, negative credibility findings is sufficient to dismiss the application for judicial review.

[14] The RAD reviews RPD decisions on a correctness standard (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 103 [*Huruglica*]), although the RPD's factual findings may be owed deference (*Huruglica* at para 70). This Court must review the RAD's assessment of the evidence, and findings of mixed fact and law, on a standard of reasonableness (*Huruglica* at para 35; *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 47, 51, 54, and 57).

### IV. Analysis

#### A. *Credibility Findings*

[15] I agree with the Respondent that this application cannot succeed. The RPD made several central credibility findings that were open to it, and the RAD comprehensively examined and

concluded with each of them. I find all five primary findings by both tribunals to be entirely defensible.

[16] Furthermore, the Applicant did not address the first item (summarized above in paragraph 6, with respect to inconsistent accounts of the police treatment) before the RAD. Failing to contest credibility findings (even if an applicant sheds doubt on others) may be fatal on review, because it may be presumed to be true (*Quintero Cienfuegos v Canada (Citizenship and Immigration)*, 2009 FC 1262 at paras 25-26). In any event, I find that the Applicant has failed to show why any of the findings were unreasonable. The Applicant is ultimately asking this Court to reweigh the evidence.

[17] Although the credibility issues are dispositive, I will nonetheless address the Applicant's remaining arguments, namely that the RAD breached procedural fairness in failing to admit new evidence and grant an oral hearing, and also erred in its section 97 analysis.

#### B. *New Evidence*

[18] As mentioned above, the Decision mistakenly held that no originals had arrived, when clearly they had: a letter accompanying the RAD refusal advised Mr. Borubaev that the originals were with the RAD and ready to be returned, all of which was conceded by the Respondent.

[19] I find this to be a technical breach, because the RAD's finding about lack of originals did not affect its reasons for rejecting the evidence, and therefore did not prejudice the Applicant. The RAD determined, based on IRPA's section 110(4) criteria, that the evidence did not arise

after the rejection of the claim, was reasonably available, and thus could have been presented previously. These RAD's conclusions were consistent with the reasons in *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 at para 34.

[20] Therefore, the RAD's error about the originals was not fatal. As the Supreme Court held in *Canada (Citizenship and Immigration) v. Khosa* 2009 SCC 12 at para. 43, a technical breach is one which "occasions no substantial wrong or miscarriage of justice." Put simply, procedural irregularities are subject to the caveat: "no harm, no foul". This is precisely what happened in this case, because even if the RAD had relied on the original documents in analyzing whether the evidence met the newness threshold under IRPA section 110(4), the result would have been the same: the RAD rejected the evidence for reasons other than their format. The RAD committed no breach of procedural fairness.

[21] Having concluded that no new evidence should be admitted, the RAD reasonably declined Mr. Borubaev's request for an oral hearing (*Belek v. Canada (Citizenship and Immigration)*, 2017 FC 196 at para. 20).

### C. Adequacy of Section 97 IRPA Analysis

[22] Finally, the Applicant argues that the RAD erred with the respect to the section 97 IRPA analysis, relying on *Dudu v. Canada (Citizenship and Immigration)*, 2014 FC 626 for the proposition that "a refugee claimant need not even demonstrate persecution has occurred or will occur to him or her, as long as persecution is established in the treatment of similarly situated individuals" (at p. 2). What the Applicant fails to cite is Justice Strickland's conclusion to that



observation: “However, this situation is distinguished because of the RPD’s credibility finding and because it did not misstate the test”.

[23] Similarly, here, Mr. Borubaev was found not to be credible. His residual claim for protection under section 97 thus rested solely on his Uzbek identity. Both the RPD and the RAD found Mr. Borubaev faced no personalized risk akin to that described in the country documentation, a wholly reasonable conclusion based on the evidence presented, which leaves nothing to disturb in the RAD’s section 97 analysis.

V. Conclusion

[24] The RAD Decision is acceptable and defensible on the facts and the law and does not warrant this Court’s intervention. The application is dismissed. No questions for certification exist and none arise.

**JUDGMENT in IMM-3026-17**

**THIS COURT'S JUDGMENT is that** this application for judicial review is dismissed.

No questions for certification were argued, and none arose.

"Alan S. Diner"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-3026-17

**STYLE OF CAUSE:** ISRAILBEK BORUBAEV v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** JANUARY 15, 2018

**JUDGMENT AND REASONS:** DINER J.

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