Federal Court  Cour fédérale

Date: 20170216

Docket: IMM-3459-16

Citation: 2017 FC 196

Ottawa, Ontario, February 16, 2017

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

IMANOV BELEK
(a.k.a BELEK IMANOV)
(a.k.a. IMINOV BAHTIYAR YUNUSOVICE)

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [Act or IRPA] of an Immigration and Refugee Board of Canada Refugee Appeal Division's [RAD or Board] July 25, 2016 negative decision [Reasons]. For the reasons explained below, I am dismissing this judicial review.

I. Background

[2] The Applicant is a 43-year-old citizen of the Kyrgyz Republic [Kyrgyzstan]. He is seeking protection in Canada because he fears extortionists in his home country, whom he says are both state and non-state actors. The Applicant says he was beaten by extortionists on three occasions between 2013 and 2014, during which time he suffered serious injuries requiring hospitalization.

[3] The Applicant fled to Canada on September 7, 2014 and made a refugee claim, which was dismissed by the Refugee Protection Division [RPD] on February 26, 2015. The RPD's decision was upheld by the RAD on June 17, 2015 [RADI], against which the Applicant successfully argued a judicial review before Justice Zinn in *Belek v Canada (Citizenship and Immigration)*, 2016 FC 205 [*Belek*]. The reconsideration resulted in a second RAD refusal, dated July 25, 2016 [RADII].

[4] Part of RADII addressed 'new' evidence, namely (i): a short letter from a witness; and (ii) medical reports detailing injuries sustained by the Applicant's wife and son during the attack. RADII rejected the evidence, this time on the basis of credibility (whereas Justice Zinn ruled that RADI had improperly rejected it because it focussed on what the evidence did not corroborate, as opposed to what it did: *Belek* at paras 21-22). The main issue before this Court is therefore whether RADII's rejection of the evidence was reasonable.

[5] RADII agreed that while the evidence was admissible under subsection 110(4) of IRPA (under which RADI had refused its admission), the letter and medical reports lacked credibility, a factor which the recent decision in *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 [*Singh*] established may be considered pursuant to the earlier test developed in *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 at para 13 [*Raza*].

[6] In making its negative credibility findings, RADII noted that the witness' letter was not in the form of a sworn statement, affidavit or statutory declaration, provided no details about the timing of the incident, and made no mention of the specifics of the "egregious" confrontation and subsequent hospitalization. RADII concluded that the letter was not credible, and refused its admission as new evidence.

[7] As for the hospital records, the Board noted that the hospital name and contact information was not present. Rather, only the Ministry information is contained in the letter. The RADII found these alleged hospital documents to be inconsistent with similar reports provided for the RPD hearing (which did include hospital details and contact information). RADII also considered its statement that the family members "had been frightened and beaten by unknown oriental people", but gave the author no weight given it was based on self-reporting. The Board further noted that there was no mention of the authorities being contacted, given (i) that it would have been a requirement of hospital authorities under the circumstances; (ii) the author's comments about the alleged perpetrators; and (iii) statements made in the Basis of Claim [BOC] form regarding prior police involvement post-beatings. RADII also noted being "fettered" by the lack of an original.

[8] As with the witness statement, RADII found on a balance of probabilities that the medical documents lacked credibility, gave no weight to them, and did not admit them into evidence. Given the refusal to admit the new evidence, the RAD also refused to grant an oral hearing.

[9] The Applicant challenges the reasonableness of these two findings (rejection of evidence and denial of an oral hearing).

II. Analysis

[10] I concur with the parties that Issue A – the rejection of evidence – attracts deference and is reviewable on a standard of reasonableness (*Singh* at para 29), as does Issue B – a procedural ruling on an oral hearing: see *Ketchen v Canada (Citizenship and Immigration)*, 2016 FC 388 at para 20 [*Ketchen*].

A. *Rejection of New Evidence*

[11] Under subsection 110(4) of the Act and pursuant to the Federal Court's decision in *Singh* at para 34, the RAD must accept new "evidence (a) that arose after the rejection of the claim; (b) that was not reasonably available; or (c) that was reasonably available, but that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection." However, that is not the end of the inquiry: the RAD can also consider factors relating

to credibility, relevance, newness and materiality that *Raza* countenanced with respect to Pre-Removal Risk Assessments [PRRA]: see *Singh* at paras 39-49, particularly at para 44:

> Indeed, in my view it would be difficult to argue that the criteria set out by Justice Sharlow in Raza do not flow just as implicitly from subsection 110(4) as from paragraph 113(a). It is difficult to see, in particular, how the RAD could admit documentary evidence that was not credible. Indeed, paragraph 171(a.3) expressly provides that the RAD "may receive and base a decision on evidence that is adduced in the proceedings and considered credible or trustworthy in the circumstances." It is true that paragraph 110(6)(a) also introduces the notion of credibility for the purposes of determining whether a hearing should be held. In that regard, however, it is not the credibility of the evidence itself that must be weighed, but whether otherwise credible evidence "raises a serious issue" with respect to the general credibility of the person who is the subject of the appeal. In other words, the fact that new evidence is intrinsically credible will not be sufficient to warrant holding a hearing before the RAD: this evidence would still be required to justify a reassessment of the overall credibility of the applicant and his or her narrative.

[12] Mere receipt of new evidence does not mean that it will be believed, and/or admitted. The Federal Court of Appeal found that credibility was one basis upon which to exclude this evidence (see also *Issa v Canada (Citizenship and Immigration)*, 2016 FC 807 at para 20; and *Tuncdemir v Canada (Citizenship and Immigration)*, 2016 FC 993 at paras 35-37 [*Tuncdemir*]).

[13] As noted above, significant deference is owed to the Board in areas of acceptance of new evidence, which after *Singh* undoubtedly include credibility findings, which are not made in a vacuum. If the RAD can, in oral hearings it convenes, receive and base decisions "on evidence that is adduced in the proceedings and considered credible or trustworthy in the circumstances" (IRPA paragraph 171(a.3)), it may, conversely, reject evidence that lacks credibility and trustworthiness (*Tota v Canada (Citizenship and Immigration)*, 2015 FC 890 at para 44).

[14] It is notable that the Applicant did not challenge the credibility findings of the RAD in these proceedings. The credibility findings made with respect to the new documents, which are the subject of these proceedings, are made in light of the totality of the evidence, including Affidavits and other materials on the file, and the background of the case, including a fraudulent claim made abroad already noted (and admitted) by the RPD (see: *Tuncdemir* at paras 35-37). In RADII, the panel referenced the BOC, Affidavits, and other documentation that had been submitted to the RPD and RADI. In short, the RADII credibility findings were not made in a vacuum.

[15] With regard to the witness letter, the Applicant argues that RADII committed the same reviewable error as had RADI in focussing on what the letter did not say, as opposed to what the letter did say, and drew a negative inference against the credibility of the letter accordingly. The Respondent argues that this was a fair assessment of the evidence per the *Raza* factors, with which I agree: *Singh* at para 44 is explicit in its acceptance of credibility as a factor.

[16] While other decision makers may have ruled differently, I find it was open to and reasonable for RADII to conclude that where the beating was so serious as to cause the alleged injuries documented (i.e. to the skull and chest) and where hospitalization was required, something would have been mentioned in that regard by the woman who witnessed the incident.

[17] I further find it reasonable for the RAD to have doubted the credibility of the letter, when scant mention was made of the upshot of the beating, none made of hospitalization (or at minimum, the ambulance that allegedly came to pick up the victims), as opposed to the balance

of the description of the incident, which in its totality stated: “I was a witness to the beating of [the Applicant’s spouse and son]. Unknown oriental people spoke very rudely with [the spouse], yelling and insulting her.”

[18] While I do not agree with the Board that witness’ letter is “internally inconsistent” because it mentions a beating, and then recounts insults to the wife, I do not find that this finding alone renders the credibility finding unreasonable in its totality. There were certainly other bases upon which the RAD came to that conclusion regarding lack of credibility.

[19] I also find that the RAD’s assessment of the hospitalization records to be reasonable, in light of the various credibility issues it raised, including inconsistencies with the original hospital records presented, lack of any contact detail, and lack of originals. Given the lack of clarity of the new records received, I find nothing unreasonable about the panel’s feeling “fettered”, which I read to mean “hampered” by the lack of an original. Similarly, I find the other credibility findings to be reasonable in the context of the evidence presented.

B. *Denial of an Oral Hearing*

[20] If the tripartite test under subsection 110(6) of IRPA is met, the Board may grant an oral hearing. The granting of an oral hearing is not the rule; it is the exception, and may be granted or denied subject the Board’s discretion (*Biftu Adera v Canada (Citizenship and Immigration),* 2016 FC 871 at para 57). Here, given that RADII rejected the evidence on the basis of credibility, it effectively had no new evidence on which to hold a hearing. Its finding, in that light, was also reasonable.

III. Conclusion

[21] In light of the above, this application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed;

2. No questions for certification were presented, and none arises; and

3. No costs will be ordered.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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