

Federal Court



Cour fédérale

**Date: 20190129**

**Docket: IMM-2669-18**

**Citation: 2019 FC 106**

**Ottawa, Ontario, January 29, 2019**

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

**BETWEEN:**

**KHAYAL ASGAROV**

**Applicant**

**And**

**THE MINISTER OF IMMIGRATION,  
REFUGEES AND CITIZENSHIP**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] Khayal Asgarov seeks judicial review of a decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board [IRB]. The RAD dismissed his appeal of a decision of the Refugee Protection Division [RPD] of the IRB. The RPD found that Mr. Asgarov

was neither a Convention refugee nor a person in need of protection under s 96 and s 97(1) of the *Immigration and Refugee Protection Act, SC 2001, c 27 [IRPA]*.

[2] The RAD acknowledged that Mr. Asgarov is likely to be prosecuted for evasion of military service if he returns to Azerbaijan, and may face up to two years' imprisonment. It was therefore incumbent on the RAD to consider the evidence of prison conditions in Azerbaijan, and whether this might support Mr. Asgarov's claim for protection under s 97 of the *IRPA*. It failed to do so, and its decision was therefore unreasonable. The application for judicial review is allowed.

## II. Background

[3] Mr. Asgarov is a citizen of Azerbaijan. Military service is mandatory for Azerbaijani men between the ages of 18 and 35. Mr. Asgarov is currently 30 years old. He claims to fear persecution, and cruel and unusual punishment, due to his evasion of military service.

[4] Mr. Asgarov was able to defer his military service in 2007 by attending university in Turkey. In 2011, his mother informed him that his brother Azer, who was serving in the Azerbaijani military, had died unexpectedly. At first, the military was not forthcoming about the circumstances surrounding Azer's death. This led Mr. Asgarov's family to believe that Azer had been murdered to prevent him from revealing corruption in the military. They maintained this belief despite a subsequent military report which concluded that Azer had killed himself in a murder-suicide.

[5] Mr. Asgarov says he was profoundly affected by his brother's death. He had difficulty concentrating and dropped out of university in 2011. Because he was no longer enrolled in university, the Azerbaijan government sent him numerous military call-up notices. He stayed in Turkey, attempting to complete his university studies, until 2015.

[6] Mr. Asgarov returned to Azerbaijan to visit his ailing mother on June 12, 2015. He says that officials detained and interrogated him upon his arrival at the airport, and he was only released because his father paid a bribe. Mr. Asgarov returned to Turkey on June 21, 2015. He then applied for and received a Canadian visitor visa.

[7] Mr. Asgarov returned to Azerbaijan in April 2016. He says he was detained on arrival, interrogated and physically assaulted. His father again obtained his release with a bribe. Mr. Asgarov sustained injuries from the interrogation which required medical attention. His Turkish visa had not yet expired, so he fled to Turkey on April 23, 2016.

[8] Mr. Asgarov came to Canada on May 1, 2016. He made a refugee claim on July 14, 2016. The RPD rejected his claim on May 17, 2017, and the RAD dismissed his appeal on May 23, 2018.

### III. Decision under Review

[9] The RAD found that Mr. Asgarov lacked credibility, particularly with respect to his accounts of his brother's death, his father's employment, and the injuries he allegedly sustained

when he was detained in 2016. The RAD concluded that Mr. Asgarov would not face persecution due to his evasion of military service, because the obligation arises from a law of general application.

[10] The RAD cited Justice Yves de Montigny's decision in *Lebedev v Canada (Minister of Citizenship and Immigration)*, 2007 FC 728 as follows (at para 14):

Thus, an applicant generally cannot claim refugee status under the *United Nations Convention Relating to the Status of Refugees* (the Convention) – and accordingly, under s. 96 of the IRPA, just because he does not want to serve in his country's army. According to Hathaway, however, there are three exceptions to the general rule above. First, military evasion might have a nexus to a Convention ground if conscription for a legitimate and lawful purpose is conducted in a discriminatory way, or if the punishment for desertion is biased in relation to a Convention ground. ... The third and final exception applies to those with “principled objections” to military service, more widely known as “conscientious objectors”.

[11] The RAD found that Mr. Asgarov did not fall within any of the three exceptions. The RAD concluded that Mr. Asgarov would be prosecuted upon his return to Azerbaijan and might face up to two years' imprisonment. However, the RAD found he would not be subject to cruel and unusual punishment.

#### IV. Issue

[12] Mr. Asgarov raises several issues in this application for judicial review. Only one is determinative: whether the RAD's failure to consider prison conditions in Azerbaijan renders its decision unreasonable.

V. Analysis

[13] Decisions of the RAD are subject to review by this Court against the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35).

[14] Mr. Asgarov takes issue with the RAD's largely unsupported statement at paragraph 43 of its decision that that he "would not be subjected to cruel and unusual punishment." He says the evidence of country conditions establishes that those who evade military service are subject to cruel and unusual punishment, as well as torture, and that prison conditions in Azerbaijan are below international standards.

[15] The Minister responds that Mr. Asgarov is asking this Court to reweigh the evidence, and this is not the role of the Court in an application for judicial review. Although the RAD does not mention prison conditions, it is presumed to have considered all of the evidence before it.

[16] The RAD acknowledged that Mr. Asgarov is likely to be prosecuted and may be liable for up to two years' imprisonment for evasion of military service if he returns to Azerbaijan. It was therefore incumbent on the RAD to consider prison conditions in that country. While a tribunal is presumed to have considered all of the evidence, the centrality of prison conditions to Mr. Asgarov's s 97 claim undermines the presumption in this case. As Justice John Evans wrote in *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC) at paragraph 17:

[...] the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence" [citations omitted].

[17] There was evidence before the RAD that prison conditions in Azerbaijan are "sometimes harsh and potentially life threatening due to overcrowding, inadequate nutrition, deficient heating and ventilation, and poor medical care." Some Azerbaijani prisons are Soviet-era facilities which do not meet international standards. While awaiting trial, detainees are held in crowded basement detention facilities below the local courts. Guards may punish prisoners with beatings and isolation.

[18] The matter must therefore be remitted to the RAD to ensure it considers the evidence of prison conditions in Azerbaijan, and whether this supports Mr. Asgarov's claim to be a person in need of protection under s 97 of the *IRPA*.

## VI. Conclusion

[19] The application for judicial review is allowed, and the matter is remitted to a differently-constituted panel of the RAD for redetermination. Neither party proposed that a question be certified for appeal.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application for judicial review is allowed, and the matter is remitted to a differently-constituted panel of the Refugee Appeal Division of the Immigration and Refugee Board for redetermination.

"Simon Fothergill"

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Judge

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

**DOCKET:** IMM-2669-18

**STYLE OF CAUSE:** KHAYAL ASGAROV v THE MINISTER OF  
IMMIGRATION, REFUGEES AND CITIZENSHIP

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** JANUARY 10, 2019

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