

Federal Court



Cour fédérale

Date: 20091223

Docket: IMM-2952-09

Citation: 2009 FC 1308

Ottawa, Ontario, December 23, 2009

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

**NATALYA CHSHERBAKOVA
ANATOLIY CHSHERBAKOV**

Applicants

and

**MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C., 2001, c. 27 (the Act) for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the panel) dated May 26, 2009, determining that the applicants are not Convention refugees or persons in need of protection.

Issues

[2] The issues are:

- whether the panel erred when it found that the applicants were not credible; and
- whether the panel violated the principles of procedural fairness.

[3] For the following reasons, the application for judicial review is dismissed.

Factual Background

[4] The female applicant, Natalya Chsherbakova, and her son, Anatoliy Chsherbakov, are citizens of Kazakhstan. The female applicant is the designated representative of her son.

[5] The applicants allege that they resided in the city of Almaty in Kazakhstan before coming to Canada. They contend that they had to flee that country because they had been pursued since April 2006 by the female applicant's former husband, Turgun Salibekov, who is a senior officer in the Almaty police. The applicants allege that they are fleeing spousal violence and persecution they suffered at the hands of the female applicant's former spouse.

[6] The female applicant arrived in Canada on November 21, 2006, and the applicants claimed refugee protection on December 1, 2006.

Impugned Decision

[7] The panel was of the opinion that the applicants are not Convention refugees or persons in need of protection, because they did not establish the credibility of their allegations.

[8] The panel found the applicants' account not to be credible. More specifically, the panel concluded that the applicants had not proved the existence of the agent of persecution. As well, the applicants did not prove that they lived in Kazakhstan during the relevant period.

Standard of Review

[9] Where the issue is credibility and assessment of the evidence, it is settled law, under paragraph 18.1(4)(d) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, that the Court will intervene only if the decision is based on an erroneous finding of fact made in a perverse or capricious manner or without regard for the evidence.

[10] As well, the panel is a specialized tribunal and its findings in respect of credibility are questions of fact. The Court will therefore intervene only in the event of patently unreasonable error (*Aguebor v. Canada (Minister of Employment and Immigration)* (1993), 160 N.R. 315, 42 A.C.W.S. (3d) 886 (F.C.A.)).

[11] Assessing credibility and assessing the evidence are matters within the authority of the administrative tribunal, which must assess a refugee claimant's allegation of subjective fear (*Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, (1998), 157 F.T.R. 35, 83

A.C.W.S. (3d) 264 at para. 14). Before the decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the standard that applied in these circumstances was patent unreasonableness. The standard is now reasonableness.

[12] Violations of procedural fairness are subject to the correctness standard of review (*Ha v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 49, [2004] 3 F.C.R. 195; *Dunsmuir*).

Analysis

[13] The female applicant alleged before the panel that she feared her former husband, a Mr. Salibekov, because she had suffered sexual violence at his hands. However, the Court is of the opinion that the female applicant did not submit probative evidence in support of her claim for refugee protection. More specifically, the absence of documentary evidence in support of their allegations seriously undermined the applicants' credibility.

[14] In particular, the female applicant stated that she lived with Salibekov for two years, from 2004 to 2006, but could not submit any photographs of her and him or of him alone, because, she said, she wanted to have nothing more to do with him.

[15] The female applicant also stated that Salibekov is a senior officer in the Almaty police, but she has no official or public document that could corroborate his existence. The female applicant has no proof of residence or proof that she lived at that address with Salibekov, and no driver's licence or copy of her income tax return in Canada.

[16] The female applicant stated that she left Kazakhstan with a forged passport on November 21, 2006. No document that might establish when she left Kazakhstan, whether an airline ticket, boarding pass, baggage receipt or bill from a business at the airport, was presented to the panel. She stated that she had given everything to her smuggler, but that explanation is insufficient. As Justice Nadon stated in *Elazi v. Canada (Minister of Citizenship and Immigration)*, (2000), 191 F.T.R. 205, 100 A.C.W.S. (3d) 649 at paragraph 17:

I take this opportunity to add that it is entirely reasonable for the Refugee Division to attach great importance to a claimant's passport and his air ticket. In my opinion, these documents are essential to establish the claimant's identity and his journey to come to Canada. Unless it can be assumed that a refugee status claimant is actually a refugee, it seems unreasonable to me to ignore the loss of these documents without a valid explanation. In my view, it is too easy for a claimant to simply state that he has lost these documents or the facilitator has taken them. If the Refugee Division insists on these documents being produced, the facilitators may have to change their methods.

Minimizing the importance of the passport and air ticket as documents to be produced or ignoring their non-submission for all sorts of reasons in my opinion only serves to encourage all those whose only purpose is to take advantage of a system which is intended solely to enable genuine refugees to come to Canada.

[17] In short, given that there were no documents, the female applicant could not corroborate her account.

[18] As a final point, when the female applicant's son was asked what country's border was the closest to Almaty, he replied China and Uzbekistan, although Almaty is less than 30 kilometres

from Kyrgyzstan. He was unable to name the major streets of Almaty or the name of the street where the school he attended for seven years was located.

[19] This Court has often noted that the panel may draw an unfavourable conclusion from the fact that a refugee protection claimant has not produced corroborating evidence to support his or her testimony when the panel has concerns about the claimant's credibility (*Sinnathamby v. Canada (Minister of Citizenship and Immigration)*, 2001 FCTD 473, 105 A.C.W.S. (3d) 725; *Muthiyansa v. Canada (Minister of Citizenship and Immigration)* 2001 FCTD 17, 103 A.C.W.S. (3d) 809; *Quichindo v. Canada (Minister of Citizenship and Immigration)*, 2002 FCTD 350, 115 A.C.W.S. (3d) 680).

[20] The applicants allege that the panel had no reason to reject certain documents in the records without valid reason, in particular by relying on the fact that trafficking in forged documents occurs. On reading the panel's decision, the Court is of the opinion, rather, that the panel rejected the documents based on the applicants' testimony, to which the panel assigned no credibility, and it was only as an alternative and supplementary reason that the panel referred to trafficking in forged documents. Accordingly, and this is settled law, when a person is found not to be credible, that finding extends to all evidence presented by that person (*Herman v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1077, 75 Imm. L.R. (3d) 82 at para. 27; *Sheikh v. Canada (Minister of Employment and Immigration)*, [1990] 3 F.C. 238, 112 N.R. 61 (F.C.A.)).

[21] The applicants also submitted that the panel violated the principles of procedural fairness by failing to honour its undertaking at the hearing on March 26, 2009, not to make a final decision without first obtaining the contents of the male applicant's visa application file at the Embassy of Canada in Moscow to give the applicants a chance to prove legal residence in Kazakhstan during the period from 2004 to 2006. On that point as well the Court disagrees with the applicants. The transcript indicates that there was discussion between counsel for the applicants and the panel. The relevant discussion in the tribunal's record is as follows:

[TRANSLATION]

Q.: That is exactly why ... So generally they send it. When Immigration, when there is a refugee claim, that is why I was surprised, they did not include the visa application form for the son Anatole.

A.: Mm hmm. Well, if that is what you want. Because if we do that we are going to do other searches too, eh? We are going to have the authenticity of the documents verified and we are going to do a lot of things. But if that is what you want. I will request it. It should not be too complicated to get. (p.251)

- So I will take it all under advisement and I reserve the right to – to request ... I am going to request the visa document. I am going to see whether it is worth going into it further perhaps, authenticating certain documents. I will keep you informed if necessary. (p. 259)
(Emphasis added)

[22] On reading the discussion, however, the Court is of the opinion that the panel did not give any undertaking to counsel for the applicants. On the contrary, by concluding at the end of the hearing as it did, the panel indicated that it was taking the matter under advisement and further stated that it would follow up [TRANSLATION] "if necessary". Based on that discussion, the Court

cannot conclude that the panel undertook to obtain the contents of the applicant son's visa application first, before making a decision. Consequently, the Court rejects the argument that the panel violated the principles of procedural fairness by not adhering to its own procedure.

[23] Accordingly, given the absence of probative evidence to corroborate the applicants' account and testimony, the panel reasonably concluded that the applicants were not credible and did not violate the principles of procedural fairness.

[24] The parties did not submit a question for certification and there is no question in this case.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review be dismissed. No question will be certified.

“Richard Boivin”

Judge

Certified true translation
Brian McCordick, Translator

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2952-09

STYLE OF CAUSE: Natalya CHSHERBAKOVA and Anatoliy
CHSHERBAKOV v. MCI

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: December 16, 2009

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