Federal Court  Cour fédérale

**Date: 20110427**

**Docket: IMM-3793-10**

**Citation: 2011 FC 497**

**Ottawa, Ontario, April 27, 2011**

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

**BETWEEN:**

**DAVAAJAV GORDOO,**
**MUNKHZUL DAVAAJAV,**
**TSETSGEE LUVSANTSEND,**
**BADRAL DAVAAJAV,**
**ERDENE YURA**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP**
**AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] When this matter came before the Court for hearing there were five applicants, all members of the same family and citizens of Mongolia. They were the principal applicant Mr. Davaajav Gordoo, 54 years old at the time of the refugee hearings; his then 53-year old spouse, Tsetsgee Luvsantsend; Munkhzul Davaajav, the 20-year old daughter of Mr. Gordoo and the step-daughter of

Ms. Luvsantsend; Badral Davaajav, 19 and Erdene Yura, 32, sons of Ms. Luvsantsend and stepsons of Mr. Gordoo.

[2] Following the hearing, a Notice of Discontinuance was filed on behalf of Ms. Luvantsend, Mr. Davaajav and Mr. Yura. This decision will, therefore, deal only with the application of Mr. Gordoo and his daughter Ms. Davaajav. As the Board's decision with respect to their claims was based in part on findings concerning the evidence of Ms. Luvantsend and Mr. Yura, some reference must be made to those findings and that evidence in these reasons, notwithstanding that they are no longer part of this application.

[3] This is an application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 of a decision by a Member of the Refugee Protection Division of the Immigration and Refugee Board made on May 28, 2010.

**BACKGROUND:**

[4] The applicants based their refugee claim on a fear of persecution on the grounds of political opinion as a result of Mr. Gordoo's membership in the Democratic Party. Mr. Gordoo says his problems first arose in 1998 when he held the position of secretary for a committee engaged in the privatization by auction of state owned companies in the City of Erdenet. He says that at that time he refused to cooperate with demands from the provincial head of the committee to include a number of persons and organizations on a list of those awaiting transfers of the companies to private ownership. He was threatened with dismissal if he did not cooperate and received calls from people who offered bribes if he completed the arrangements.

[5] Mr. Gordoo testified that he complained to the police about the calls. He says he was summonsed to the police station and detained for 72 hours during which he was mistreated. As a result, he resigned his position as secretary to the committee and later found other employment.

[6] Mr. Gordoo says he joined the Democratic Party and in 2002 began to speak out against the wrongs committed during the privatization program. This led to threats from persons who wanted him to keep quiet about these events and harassment by the police. In April 2005, he was attacked by a group who threatened to kill him if he did not stop criticizing powerful people. He and his wife obtained visas to come to Canada in 2006 and claimed refugee protection upon arrival. Two of their children arrived via the United States in 2007. Five other children remained in Mongolia.

[7] Ms. Luvantsend testified that, after their departure, their home in Mongolia was broken into and the children who continued to live there were attacked. Mr. Yura said he was detained and mistreated by the police. Both based their claims on Mr. Gordoo's evidence and said they were targeted due to Mr. Gordoo's past political and professional activities.

[8] The hearing before the Refugee Protection Division was conducted on July 2, 2009, October 20, 2009 and January 20, 2010. At the time of the hearing on January 20, 2010, Mr. Gordoo had been undergoing chemotherapy for gastric cancer and was facing major surgery within a few days. A report from his oncologist filed as an exhibit indicated that he was suffering side effects including feeling forgetful as a result of the treatment. In addition, reports from a psychiatrist and a general

practitioner who are members of the Canadian Centre for Victims of Torture ("CCVT") medical network were filed in evidence before the Board.

**DECISION UNDER REVIEW:**

[9] The Member's decision, that the applicants are not Convention refugees and are not persons in need of protection, turned on the credibility of the evidence of Mr. Gordoo, Ms. Luvantsend and Mr. Yura. The Member drew negative inferences and made implausibility findings based on the fact that there were inconsistencies between Mr. Gordoo's Personal Information Form ("PIF") and his oral testimony. His testimony was found to be "confusing and contradictory". The evidence of Ms. Luvantsend and Mr. Yura was found to be untrustworthy and not credible.

[10] The Member noted that Mr. Gordoo was undergoing chemotherapy and was to undergo surgery two days later. Reference was made to the memory loss reported by the oncologist. The Member discounted the reports from the CCVT Doctors as opinions "…only as valid as the truth of the underlying facts on which the opinion is based".

[11] In addition, the Member found that the applicants did not provide clear and convincing evidence to rebut the presumption as to Mongolia's inability to protect its citizens. Mr. Gordoo, it was found, did not report or discuss the fraudulent privatization scheme with his superiors or the police. The Member noted that corruption in Mongolia is widespread but held that it was not endemic or pervasive and that the authorities were attempting to tackle corruption before it became a major problem.

**ISSUES:**

[12] The issues raised in this case are whether the Board made reasonable credibility findings and properly considered the totality of the evidence.

**ANALYSIS:**

*Standard of Review*

[13] Because a decision maker's credibility analysis is central to its role as trier of fact, and due to the particular expertise of the Board, the Board is owed deference from this Court: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paras. 55 and 64; *Lin v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 698 at paras. 11-12. The standard of review with respect to assessment of the evidence is one of reasonableness: *Ndam v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 513 at para. 4.

[14] In reviewing a decision against the reasonableness standard, the Court must consider the justification, transparency and intelligibility of the decision-making process, and whether the decision falls within a range of possible acceptable outcomes which are defensible in light of the facts and the law: *Dunsmuir*, above, at para. 47, and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 59.

*Were the credibility findings reasonable?*

[15] The applicants submitted that the Member performed a microscopic analysis of the evidence, failing to take into account that the events took place over 12 years ago and that Mr. Gordoo was suffering from forgetfulness and confusion due to his medical condition. This, it was submitted, amounted to focusing on inconsistencies that were insignificant and not central to the claim. The Member did not discuss the 72-hour long detention or the treatment Mr. Gordoo received in detention. Furthermore, the applicants contend, the Member erred in attributing no weight to the medical evidence presented and failed to consider the documentary evidence regarding the problem of government corruption in Mongolia. Instead, the Member found corruption not to be endemic or pervasive and that the authorities are attempting to tackle it. This was contrary to the evidence.

[16] It is well established that when an applicant swears to the truth of certain allegations, there is a presumption that those allegations are true, unless there is a reason to doubt their truthfulness: *Maldonado v. Canada (Minister of Employment and Immigration)*, [1980] 2 F.C. 302, 31 N.R. 34 at para. 5 (F.C.A.) (QL). The presumption is, of course, rebuttable: *Qasem v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1182 at para. 46; *Orelien v. Canada (Minister of Employment and Immigration)* (1992), 135 N.R. 50, 15 Imm. L.R. (2d) 1 (F.C.A.). In this case, the Member found that Mr. Gordoo's evidence was not truthful, a finding that would rebut the presumption if it can be said to be reasonable.

[17] On some elements of Mr. Gordoo's evidence, it was clearly open to the Member to draw a negative inference as to credibility. For example, at the hearing, Mr. Gordoo stated he was fired from his position because he refused to facilitate fraudulent privatization. In his PIF, he said he resigned from his position and continued as an ordinary member of the committee. That is an evident contradiction which the Member could reasonably rely on in support of a finding that the applicant lacked credibility.

[18] Other negative credibility findings were reasonably based on the implausibility of events described by Ms. Luvantsend and Mr. Yura. The Member found that Ms. Luvantsend's claim that individuals came to her house and attacked her children, demanding to know the whereabouts of their father twelve years after he had left his position and three years after they had left Mongolia to be implausible. It was reasonable, based on the time elapsed between these two events, for the Member to make such a finding. Significant omissions in Mr. Yura's evidence from what he had recounted in his narrative similarly support a negative credibility determination. It was also reasonable for the Member to make an adverse inference regarding Mr. Gordoo and Ms. Luvantsend's subjective fear in that they would not have left their children in Mongolia if they had perceived them to be in danger.

[19] However, the Member also drew an adverse inference from a perceived inconsistency between Mr. Gordoo's evidence and his narrative that is not borne out of a close examination of the transcript of the hearing. In his narrative, Mr. Gordoo said that after the meeting with the provincial head of the privatization committee he started receiving phone calls and bribes to "complete the

deal". The Member found this to be inconsistent with his oral testimony. As the Member put it, "[h]is initial response was that he could not tell his boss because, right after the meeting, he was detained by the police". Contrary to the Member's understanding, Mr. Gordoo did not give evidence that he was detained immediately after the meeting. His testimony was consistent with his narrative that there was a period following the meeting in which he was subject to pressure to approve the transfers before he was detained by the police.

*Did the Board fail to take into account the totality of the evidence?*

[20] Mr. Gordoo's evidence at the hearing suffered from what the Member described as "confusing and contradictory responses". This may have been linked to the medical conditions from which he was suffering. The Member acknowledged that Mr. Gordoo had medical problems and faced a major operation within two days of the last hearing date. It was noted that efforts had been made at the hearing to "respect the claimant's particular circumstances and the stress of the hearing room."

[21] It is reasonable to assume that in addition to the stress which claimants normally experience in testifying before the Board, Mr. Gordoo was suffering from the effects of chemotherapy and contemplating the forthcoming operation. His oncologist had reported a complaint of memory loss. This may have served as at least a partial explanation for the confusing and contradictory nature of Mr. Gordoo's testimony. The Member does not appear to have taken that into account in assessing his evidence.

[22] It was open to the Member to discount the reports of the psychiatrist and general practitioner to the extent that they were based on information provided to them by Mr. Gordoo about his experiences in Mongolia. Such reports cannot be relied upon to bolster an account of persecution that is otherwise found to be not credible. They have no greater evidentiary value than that of the source and cannot be characterized as corroborative. That the authors belong to a network of physicians dedicated to treating the victims of torture is laudable but does not add probative force to their repetition of the claim as it was told to them. It was perhaps that type of opinion evidence that the Member had in mind when she discounted these reports.

[23] In this case, however, the report of the general practitioner, Dr. Block, also included the results of a physical examination of the applicant which disclosed evidence of injuries and scars. The doctor stated his opinion that these were consistent with the applicant's history of torture and assault in Mongolia. While that opinion was not determinative of the question whether the applicant's history of physical abuse was credible or not, which remained within the Board's fact-finding mandate, it should have been taken into consideration. The evidence appears to have been overlooked by the Member, perhaps because of the four months which had passed between the last hearing and the writing of the decision.

[24] The Member noted that Mr. Gordoo had joined the Democratic Party and had begun exposing the wrong-doing during privatization. It was also noted that the applicant had testified to having been attacked by a group of people who threatened to kill him if he did not stop criticizing powerful people. However, in her analysis, the Member did not include a consideration of the attack, the death threat or how those incidents may have been a factor in the applicant's objective or

subjective fear of persecution. Instead, the analysis focused on the implausibility that Mr. Gordoo would be approached in 2005 when he had not been involved in the privatization scheme since 1998. This was a cursory analysis that failed to consider a question that dealt with the heart of the matter in a meaningful way.

[25] Finally, the Member concluded that "[a]lthough corruption is a problem in Mongolia, it is not endemic or pervasive, and the authorities are attempting to tackle corruption before it becomes a major problem". The Board had before it a number of objective country reports indicating that corruption permeates all levels of government in Mongolia. As the Member makes no reference to these reports in her reasons, it is difficult to understand how she could have concluded that corruption in that country was not endemic or pervasive. The failure to discuss the contrary evidence supports an inference that the Member failed to take the reports into account.

[26] In the result, I am not satisfied that the Board's decision in this case was based on the evidence before it. With all due deference to the Board's fact-finding mandate, I am unable to conclude that the decision meets the standard of reasonableness. This matter must be remitted for reconsideration by a differently constituted panel.

[27] No serious questions of general importance were proposed and none will be certified.

**JUDGMENT**

**IT IS THE JUDGMENT OF THIS COURT that**:

1. the application for judicial review of the decision made by the Refugee Protection Division on May 28, 2010 with respect to the claims of Davaajav Gordoo, and Munkhzul Davaajav is granted and the matter is remitted for reconsideration by a differently constituted panel;
2. the applications for judicial review with respect to the decision of the Refugee Protection Division regarding the claims of Tsetsgee Luvsantsend, Badral Davaajav and Erdene Yura are discontinued; and
3. no questions are certified.

"Richard G. Mosley"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-3793-10 |
| **STYLE OF CAUSE:** | DAVAAJAV GORDOO,<br>MUNKHZUL DAVAAJAV,<br>TSETSGEE LUVSANTSEND,<br>BADRAL DAVAAJAV,<br>ERDENE YURA<br><br>and<br><br>THE MINISTER OF CITIZENSHIP<br>AND IMMIGRATION |
| **PLACE OF HEARING:** | Toronto, Ontario |
| **DATE OF HEARING:** | February 28, 2011 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | MOSLEY J. |
| **DATED:** | April 27, 2011 |

**APPEARANCES:**

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| Kirk Cooper | FOR THE APPLICANT |
| Veronica Cham | FOR THE RESPONDENT |

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