

Federal Court



Cour fédérale

Date: 20150826

Docket: IMM-7263-14

Citation: 2015 FC 1013

Ottawa, Ontario, August 26, 2015

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

**ANAR CAMAL ISMAYILOV
a.k.a. ANAR ISMAYILOV,
PARVIN AHMADOVA AND
HACER ISMAYILOVA**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The applicants are a family who sought refugee protection in Canada claiming to fear persecution in Azerbaijan because of their religious faith. The family's claim was rejected by the Refugee Protection Division of the Immigration and Refugee Board on credibility grounds. The Board also found that, in the alternative, the applicants had an internal flight alternative (IFA) in Baku, the capital of Azerbaijan.

[2] Notwithstanding the deference that is owed to the Board's credibility findings, I am satisfied that many of the findings in this case were made without regard to the evidence. The errors in the Board's credibility findings also tainted its IFA analysis, which was, in any event, unreasonable. Consequently, the application for judicial review will be granted.

I. Background

[3] The applicants are devout Salafi Muslims who lived in a predominantly Shia country. They claim persecution at the hands of government agents who fear Salafi extremists and who view ordinary Salafis as potential threats to the state.

[4] Mr. Ismayilov says that in the years leading up to his departure from Azerbaijan, he was detained by the police on four occasions for "looking too Muslim". During these detentions, he was questioned, beaten and forcibly shaved, as well as insulted, denied food and water, and the ability to pray.

[5] While the Board accepted that the applicants were citizens of Azerbaijan, and appears to have also accepted that they were Salafi Muslims, it was not persuaded that the applicants faced more than a mere possibility of persecution in Azerbaijan.

II. The Lack of Supporting Documentation

[6] One of the main reasons cited by the Board for disbelieving Mr. Ismayilov's claim that he had been arrested and tortured by the Azerbaijani police on four occasions was his failure to produce any documentary proof of his arrests. The Board was of the view that it was reasonable to expect there to be documents substantiating such a central component of Mr. Ismayilov's story. According to the Board, Mr. Ismayilov asked his father to try to obtain documents

pertaining to the arrests, but that he himself had not made any effort to do so since his arrival in Canada.

[7] What the Board does not mention is Mr. Ismayilov's explanation that he had already personally attempted to obtain documents corroborating his arrests from the police while he was still in Azerbaijan. According to Mr. Ismayilov, the police refused to provide him with any such documents.

[8] As the Board made no mention of Mr. Ismayilov's evidence on this point, it is impossible to know whether it was overlooked or disbelieved. Mr. Ismayilov's testimony regarding his attempts to obtain police documents was material evidence that directly contradicted a central finding by the Board, and should thus have been discussed: *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35, at paras. 14-17, [1998] F.C.J. No. 1425 (F.C.T.D.).

[9] If the evidence was overlooked, then the Board's finding that Mr. Ismayilov had not personally attempted to obtain documentary proof of his arrests was made without regard to the evidence. If the Board did not believe Mr. Ismayilov's testimony, it did not explain why it was rejected, and this aspect of the Board's decision thus lacks the justification, transparency and intelligibility required of a reasonable decision: *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47, [2008] 1 S.C.R. 190 and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at para. 59, [2009] 1 S.C.R. 339.

III. The Medical Documents

[10] The Board also takes issue with the medical documents provided by Mr. Ismayilov documenting the injuries that he claims to have suffered during his detentions, discounting the evidence because it did not indicate the cause of Mr. Ismayilov's injuries. However, the medical reports do in fact state that the injuries that he had suffered had been caused by beatings, although they do not indicate who was responsible for the beatings. Given that it is unlikely that the treating physicians were first-hand witnesses to his mistreatment by the police, I question whether this was a valid reason for rejecting the evidence, as any reference in the medical reports to the individuals responsible for the injuries would likely have been based on hearsay reports by Mr. Ismayilov himself.

[11] If, however, the Board was of the view that this was a significant omission, this creates a further problem. That is, the medical reports documenting Mr. Ismayilov's father's injuries specifically state that the injuries were sustained as a result of beatings by the police, and the Board does not explain why it discounted the medical evidence regarding the father's injuries.

IV. Failure to Claim

[12] Mr. Ismayilov initially came to Canada in December of 2009 on a study permit, with his wife and young child remaining behind in Azerbaijan. He decided to seek refugee protection and consulted a lawyer for advice. Mr. Ismayilov did not, however, end up claiming refugee protection during his initial stay in Canada. He explained to the Board that this was because his lawyer advised him to wait until his wife and child arrived in Canada so that they could make their claims as a family. According to Mr. Ismayilov, the lawyer was concerned that the other

members of his family might be denied visas to come to Canada if he had a pending refugee claim.

[13] Mr. Ismayilov further explained that he became concerned that his family was in danger, and that he returned to Azerbaijan in May of 2010 because of his concerns for their safety. I will deal with the issue of reavailment in the next section of these reasons, but suffice it to say that in finding that Mr. Ismayilov's failure to claim indicated of a lack of subjective fear on his part, the Board made no reference to Mr. Ismayilov's explanation that he was acting in accordance with legal advice that he had received.

[14] Once again, this was evidence that was material to one of the Board's central findings and should thus have been discussed: *Cepeda-Gutierrez*, above. The failure of the Board to consider the explanation provided by Mr. Ismayilov renders this finding unreasonable.

V. Reavailment

[15] As noted, the Board found that Mr. Ismayilov's return to Azerbaijan in May of 2010 showed a lack of subjective fear of persecution his part.

[16] However, Mr. Ismayilov had testified that after his wife and child obtained visas to come to Canada, they were denied the right to leave Azerbaijan. The police allegedly came to the family's home in January of 2010 looking for Mr. Ismayilov, and in April of that year, his wife and child were detained by the police and Mr. Ismayilov's home was searched. Fearing for their safety, Mr. Ismayilov returned home in May of 2010.

[17] Once again, the Board made no mention of the explanation given by Mr. Ismayilov as to why he was willing to put his life at risk by returning to Azerbaijan. It was open to the Board to

reject Mr. Ismayilov's explanation, but its failure to even mention such a key piece of evidence, let alone deal with it, is a clear error.

VI. The Internal Flight Alternative

[18] The Board also found that the applicants could live safely in Baku – the capital of Azerbaijan. There are a number of problems with this finding.

[19] The first is that the Board's IFA finding is tainted by the numerous errors in the Board's credibility assessment. By rejecting the applicants' story, the Board did not fully appreciate the applicants' profile, and thus could not determine whether these applicants could live safely in Baku.

[20] That is, the Board based its assessment that Baku was a valid IFA for these applicants on its finding that Mr. Ismayilov was not a high-profile individual, and that he was not a person of interest to the Azerbaijani authorities. I have already identified some of the problems with this determination, and would further note the Board's failure to address the evidence indicating that Mr. Ismayilov was one of a number of Salafi Muslims who had filed a written complaint with the Government in which they complained of the systematic mistreatment of the Salafi minority by Azerbaijani authorities. On top of the errors regarding Mr. Ismayilov's past arrests, the Board's failure to deal with this evidence renders its finding that Mr. Ismayilov was not a high-profile individual who would be of interest to the Azerbaijani authorities unreasonable.

[21] In support of its finding that Baku was a valid IFA for these applicants, the Board relied primarily on a statement in one article where one Salafi individual indicated that Baku was the

only place where he felt free to practice his version of the Muslim faith. However, finding that Baku would be a valid IFA for these applicants required a highly selective reading of the article.

[22] The individual referred to above is also quoted in the same article describing how he was insulted by the police and by others who viewed him as dangerous because of his bearded appearance. This individual also stated that he had been taken to a police station and forcibly shaved on three occasions in the previous two years. Thus the evidence that the Board relied on to support its IFA finding demonstrates that Salafi Muslims are arbitrarily detained and mistreated by the police in Baku because of their religious affiliation.

[23] The article also indicated that the only Salafi mosque in Baku had been closed by the government following an explosion in 2008, and that the mosque remains closed. The Board dismissed Mr. Ismayilov's concern that he would be unable to worship at a Salafi mosque in Baku on the basis that he would be able to pray at another mosque, presumably one practicing a different form of Islam. I agree with the applicants that this comment demonstrates a remarkable insensitivity to the sincerity of the applicants' religious beliefs, and the nature of a religion-based refugee claim in general.

VII. The Alternative Finding

[24] The Board's alternate finding at paragraph 41 of its reasons is also very troubling. There the Board dismisses Mr. Ismayilov's claim, stating that even if the allegations contained in his Personal Information Form were accepted as true, Mr. Ismayilov had simply been subjected to "routine questioning" by the police, and was not personally targeted by the Azerbaijani authorities.

[25] The Board describes this “routine questioning” as involving the aggressive detention and harassment of Salafi Muslims, as part of an overall policy by the Azerbaijani police who were concerned about extremists within the country’s Salafi population.

[26] Mr. Ismayilov stated in his PIF that he was arrested and detained because of his religious faith. During his various detentions, he was questioned, insulted, beaten, denied food, water and the ability to pray, and forcibly shaved. To find that his claim was not well-founded because this was just “routine questioning” of a member of the minority Salafi population of Azerbaijan is simply perverse.

VIII. Conclusion

[27] For these reasons, the application for judicial review is granted. I agree with the parties that the case is fact-specific, and does not raise a question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed,
and the matter is remitted to a differently constituted panel for re-determination.

"Anne L. Mactavish"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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STYLE OF CAUSE: ANAR CAMAL ISMAYILOV A.K.A. ANAR
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