

Federal Court



Cour fédérale

**Date: 20161017**

**Docket: IMM-1089-16**

**Citation: 2016 FC 1148**

**Toronto, Ontario, October 17, 2016**

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

**BETWEEN:**

**RUSTAM KHAMDAMOV**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

[1] The present Application concerns the Applicant's claim for protection that, as a citizen of Kyrgyzstan, he will suffer more than a mere possibility of persecution under s.96 of the *IRPA* and risk under s.97 should he be required to return. The Applicant's claim is based on his Uyghur ethnicity and his political activism in Kyrgyzstan.

[2] In support of this claim, the Applicant supplied an extraordinarily detailed narrative in his Basis of Claim which is quoted in the attached Appendix.

[3] The Refugee Protection Division (RPD) found that the Applicant established his identity as a Uyghur but rejected the Applicant's claim on findings that the Applicant was not credible about his allegations of abuse by authorities, and there was insufficient evidence on the record to establish that the discrimination that he faces in Kyrgyzstan rises to the level of persecution.

[4] The Applicant appealed the RPD's decision to the Refugee Appeal Division (RAD) which, by its February 23, 2016 decision presently under review, rejected the Applicant's appeal. The RAD found that the determinative issue in the Applicant's claim is the Applicant's identity as a political activist for the Uyghur cause (Decision para. 17). On this issue, the RAD rejected the Applicant's claim for protection on a finding of negative credibility. Aside from the credibility issue, the RAD also dismissed the Applicant's claim made on the basis of his Uyghur ethnicity based on in-country documentary evidence.

[5] I find that the central issue for determination in the present judicial review is whether the RAD's negative credibility finding is supportable in fact and law.

**I. The RAD's decision-making on the issue of credibility**

[6] The RAD's decision was rendered prior to the Federal Court of Appeal's decision in *Huruglica v Canada (Minister of Citizenship and Immigration)*, (2016 FC 93). Accordingly, at

paragraph 10 of the decision the RAD applied Justice Phelan's Federal Court decision (2014 FC 799) as follows:

The RAD will recognize and respect the credibility findings of the RPD and deference will be afforded to those credibility findings of the RPD where the RPD has a particular advantage in reaching its conclusions.

[7] At paragraph 17 of the decision is the first statement made by the RAD on the merits of the appeal:

The RAD finds that the determinative issue in this claim is the Appellant's alleged identity as a political activist for the Uyghur cause. The RPD has found that the Appellant's allegations of his political activism are not credible.

[8] After finding that the RPD erred in concluding on a side issue that the Applicant knew or ought to have known that his co-claimant was not Uyghur, the RAD's analysis of the RPD's credibility findings proceeds under the heading "Failure to Tender Documents". The first statements under this heading are stated at paragraphs 21 and 22 of the decision:

The RPD drew an adverse inference from the Appellant's failure to tender documents and/or records to establish his allegations, in particular, that he is politically active for the Uyghur cause and that he had been arrested by police and released with reporting conditions.

The Appellant submits that the RPD's finding is illogical. He argues that it is illogical to assume that a person who has been illegally detained and beaten or asked to pay bribes would obtain the certificates and documents easily. He also argues that the RPD failed to consider the country documentation before it which corroborates his allegations of illegal detention and bribery specifically in Kyrgyz Republic according to the Country Reports on Human Rights Practices for 2014 dated June 25, 2015.

[Footnote omitted]

[9] At paragraph 23 of the decision, the RAD engages the corroboration issue as follows:

The RAD is not persuaded by the Appellant's argument in this regard. The RAD notes that the Appellant has alleged that he was arrested and was released the last time with the condition to report to the authorities every two weeks and not to leave the country. The Appellant alleges that he reported every two weeks as required until he left the country. His explanation in testimony for why he did not have any documents to corroborate his detention and reporting conditions was that his arrests were illegal. The RAD notes, however, that the Appellant did not allege anywhere in his Basis of Claim (BoC) documents that the arrests were illegal. In fact in his schedule 'A' Background Document he states that he was arrested because he was accused of separatism. While it is true that he alleges that he was released without charges after paying a bribe, the RAD finds that this does not in itself establish that the arrests were illegal or that they would not be documented in some way.

[Emphasis added]

[Footnotes omitted]

[10] The RAD then proceeds to determine the Applicant's credibility by making a series of implausibility findings.

[11] Paragraph 24 reads as follows:

The Appellant cites country documentation which does corroborate that the police frequently used false charges to solicit bribes in exchange for release. The RAD finds that the allegations of the Appellant suggest that his arrests went beyond a scheme to solicit bribes. The RAD finds that if the purpose was simply to solicit a bribe, there would be no need to have the Appellant on a reporting condition as he has alleged. Furthermore, if he were in fact on a reporting condition, the RAD finds it is reasonable to expect that his requirement to report would be in some way documented to ensure that he did report as required. The RAD finds that the absence of any corroborating documents to this effect undermined his allegations that he was arrested and was required to report.

[Emphasis added]

[12] Paragraphs 25 and 26 read as follows:

The RAD further finds, according to the Appellant's allegations, that he obtained his genuine passport during the time he was under the scrutiny of the police and security forces and under the condition to report regularly to the police. He also alleges that he was ordered not to leave the country. The RAD finds that under the circumstances it is reasonable to expect that the Appellant would not have been issued a passport that would enable him to leave the country if he was being monitored by the police. The RAD notes that country documentation in the record indicates that persons of his profile can be denied a passport.

Article 46 in the Kyrgyz migration law (Law on External Migration 2000) regulates when Kyrgyz citizens may be denied exit. Passports may be temporarily denied or be seized if, amongst other things, a person has knowledge of state secrets, has been charged/prosecuted or sentenced in a criminal case, has civil proceedings brought against them, has unresolved legal obligations or has evaded such obligations (for example, alimony), is considered a danger by the court or has provided incorrect information. New passports are not issued to people who are called to military service, but the authorities do not confiscate passports that are already issued on the basis of military service (IRB Canada 2006). [RPD's Record, Exhibit 4, NDP for Kyrgyzstan (July 17, 2015), item, 3.2]

[Emphasis added]

[13] Paragraph 28 reads as follows:

The RAD notes that Rule 11 of the Refugee Protection Division requires that the claimant provide acceptable documents establishing identity and other elements of the claim. A claimant who does not provide acceptable documents must explain why they were not provided and what steps were taken to provide them. Since the Appellant alleges that he was detained, tortured and is being pursued by members of the police due to his political activism, acceptable documents establishing these facts would be an essential element of the claim. The RAD finds it reasonable for the Appellant to have provided documents such as letters, sworn affidavits, newspaper articles, photographs which corroborate his political activities as well as arrest records, notices of detention or release from police custody to corroborate the consequences of his political activities. Despite having been questioned about providing

documents, the Appellant has not provided any evidence that he has made any efforts to obtain such documents and has not tendered any such documents in this appeal. The RAD finds that the Appellant failed to provide persuasive documents or testimony to corroborate his allegations in this regard.

[Emphasis added]

[14] Putting the implausibility findings to work, the RAD reached the following statements of conclusion at paragraphs 29 and 33:

The RAD finds, on the basis of the foregoing, that the Appellant's allegations that he was arrested and required to report to the police are not credible.

[...]

Notwithstanding the unsustainable findings of the RPD, the RAD finds, on the basis of the findings noted above and on a balance probabilities [sic], that the Appellant's allegations that he was a political activist in Kyrgyzstan and that he was and continues to be at risk of persecution because of his political activism is not credible.

## **II. The law on the issue of credibility**

[15] On the determinative issue, in delivering an independent assessment of the RPD decision, I find that the RAD was required to assess the Applicant's sworn evidence in compliance with the decision in *Valtchev v Canada* (MCI), 2001 FCT 776 at paragraphs 6 and 7:

The tribunal adverts to the principle from *Maldonado v. M.E.I.*, [1980] 2 F.C 302 (C.A.) at 305, that when a refugee claimant swears to the truth of certain allegations, a presumption is created that those allegations are true unless there are reasons to doubt their truthfulness. But the tribunal does not apply the *Maldonado* principle to this applicant, and repeatedly disregards his testimony, holding that much of it appears to it to be implausible. Additionally, the tribunal often substitutes its own version of events without evidence to support its conclusions.

A tribunal may make adverse findings of credibility based on the implausibility of an applicant's story provided the inferences drawn can be reasonably said to exist. However, plausibility findings should be made only in the clearest of cases, i.e., if the facts as presented are outside the realm of what could reasonably be expected, or where the documentary evidence demonstrates that the events could not have happened in the manner asserted by the claimant. A tribunal must be careful when rendering a decision based on a lack of plausibility because refugee claimants come from diverse cultures, and actions which appear implausible when judged from Canadian standards might be plausible when considered from within the claimant's milieu. [see *L. Waldman, Immigration Law and Practice (Markham, ON: Butterworths, 1992) at 8.22*]

[Emphasis added]

### **III. Analysis of the RAD's findings according to the law**

#### **A. *Corroboration***

[16] By applying the decision in *Maldonado*, in order for the RAD to require corroborative evidence from the Applicant to substantiate the Applicant's claim, it was first necessary for the RAD to find reasons to doubt the truthfulness of the Applicant's sworn testimony. I find that the cardinal error in the RAD's decision is the failure to follow this straight-forward point of law. Instead of clearly identifying an evidentiary reason to rebut the presumption that the Applicant was telling the truth in the giving of his evidence, the RAD engaged corroboration in an erroneous circular analysis. That is, the fact that the Applicant did not file corroborating documentary evidence in support of his claim was found by the RAD as a reason to disbelieve his sworn evidence, and, thus, upon disbelieving his sworn evidence, the Applicant was required to provide corroborating evidence to avoid the dismissal of his claim. I find that this error alone renders the RAD's decision unreasonable.

[17] In addition, and in any event, in the course of the corroboration engagement, the RAD made implausibility findings which are unsupportable in law. The following analysis addresses each of the findings quoted above in Section I of these reasons.

**B. *Implausibility***

[18] With respect to paragraph 23, the Applicant chose the word “illegal” to describe the conduct of the police because, from his perspective, their actions were intended to suppress his activist activities outside of the law of the country. The RAD’s intense focus on the Applicant’s word choice is evidence that the RAD was unwilling to accept the Applicant’s perspective. In any event, I find that the effort expended on the word choice cannot result in a negative credibility finding against the Applicant.

[19] The statement in paragraph 24 is nothing more than unsubstantiated speculation.

[20] With respect to paragraphs 25 and 26, the RAD found that it is implausible that, as a political activist, the Applicant would be able to obtain a passport, and to use it to leave the country. According to the decision in *Valtchev*, in order to establish the implausibility finding, the RAD was required to apply documentary evidence that established that the Applicant could not have obtained the passport during the period of his political activities.

[21] In my opinion, the evidence applied by the RAD does not establish that, if he was being monitored by the police, the Applicant would not have been issued a passport that would enable him to leave the country. I find that the evidence only establishes that he might not have been



issued a passport. The fact remains that he was issued a passport. I find that the evidence relied upon by the RAD does not establish the implausibility finding advanced on a balance of probabilities.

[22] With respect to the statement in paragraph 28, the Applicant provided sworn testimony that the RAD's expectations were impossible to meet. As to letters, affidavits, news articles, and photos, the Applicant's evidence is that there were none to submit. As to not acquiring the various police records, the Applicant provides the reason that it is unreasonable and illogical to expect that he would make such a request from his persecutors. I find that there is no basis for the RAD to find that it was implausible that the Applicant could not conform to the expectations set, and that his failure to do so supports a finding of negative credibility.

#### **IV. Conclusion**

[23] For the reasons provided, I find the RAD's determination with respect to the Applicant's credibility is made in fundamental error of mixed fact and law which renders the decision under review unreasonable.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the decision under review is set aside and the matter is referred back for redetermination before a differently constituted panel.

There is no question to certify.

“Douglas R. Campbell”

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Judge

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

**DOCKET:** IMM-1089-16  
**STYLE OF CAUSE:** RUSTAM KHAMDAMOV v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION  
**PLACE OF HEARING:** TORONTO, ONTARIO  
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**APPEARANCES:**

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Appendix

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I was born in December 5, 1983 in the city of Frunze (now it is called Bishkek), Kyrgyzstan, USSR. I am ethnic Uyghur and my religion is Islam. My parents Khamdamov Shuhrat (father) and Khamdamova Zamira (mother) were born in Frunze as well. My grandparents from both sides were originally from East Turkestan (Sinzhan Province, China). My grandfather from father's side was a high ranking military officer in the army, General. During the persecution from Chinese government he as well as thousands of other Uighur families had to run from country in order to save lives of their families. This is how my family had settled in Kyrgyzstan. Kyrgyzstan used to be very friendly and safe place to live in. Everything had changed after the collapse of Soviet Union.

First wave of non Kyrgyz migration took place. Nationalists came to city. Titular nation started to suppress and discriminate us. Even in school there was enmity from teachers and classmates. Teachers would deliberately give me low marks and classmates would call me degrading names. Early 2000's changed everything dramatically. Kyrgyz government was receiving money from Chinese government in order to suppress any kind of Uyghur's activities, controlling us (Uyghur). Discrimination was taken to the next level. We couldn't find work and would not be given any governmental jobs. No matter what we did we always had to bribe officials and ordinary Kyrgyz.

We Uyghur were treated as second class citizen and I wanted to help my own people I decided to go to law school to become lawyer. That was my dream but some time later I understood that as a Uyghur that would not be possible in Kyrgyzstan. In 2002, I took exam and I was admitted to the State Law Academy; even though, results of my exam was high I still had to bribe the dean in order to make registration.

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The University I went to was one of the biggest universities in Kyrgyzstan. In the whole university there were only about 10 Uyghur students. In my class, there were about 30 students I was the only Uyghur student. Because I was the only Uyghur student in the class, I was isolated from other students. I would be singled out and discriminated in the school. During my school years I was following world politics and human right conditions of Uyghur in China and Kyrgyzstan. On my fourth year, on March 21, 2006, I have decided to make a presentation about Uyghur human rights problems in China and Kyrgyzstan in the class. March 21 is the day we celebrate Newroz. My intention was draw to attention of students in the Newroz. Because of China's influence, there was a lot of misleading anti-propaganda about Uyghur people in general. They were showing Uyghur people of China like terrorist as bombing and killing the Chinese civilians. I wanted to show that was a lie in the media and in reality Uyghur people are peaceful and live under great oppression in China. I have invited as many students as I could from the University.

After the presentation, the dean asked me to go to his office. The dean cursed and shouted at me as saying I could not make political statement about Uyghur and he accused me of being separatist and sympathizing with the terrorists. I told him I had no connection with any Uyghur in China I just wanted to reflect Uyghur problems there. The dean told me I could not go unpunished and he could not let me continue my studies there anymore because I acted against school policy. He told me I should not bother coming back to school because he would expel me from the school.

Later in the evening 5 heavily armed policemen raided the home and I was staying with my family and whole my family terrified with the police treatment and actions in the home. They thoroughly searched the home while they were breaking many household items. Indeed, they could not find anything they would incriminate me. They took me to the police station where they interrogated me while they were severely beating me. I thought they would kill me. The police wanted to know

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Why I've made that presentation, who were else behind it and if I had any connection with the Uyghur in China. When my honest answers didn't satisfy them they beat me. I was held in the police station for 3 days. I was set free only after my father had bribed the police. They have warned me that if I ever involved in these kinds of activities they would take me again and they would either kill me or I would be staying in jail for a long time. When they released me they also told me they would be closely monitoring me after my release. After that incident I was expelled from the Academy. The Academy did not give me a solid reason why they were expelling me, they only verbally told me I involved in separatist activities and my activity would have had serious consequences in the Academy or even in the city.

All my dreams were crashed as being a lawyer. Then I started to search jobs and for a long time I could not find a proper job. Being a Uyghur made very difficult to find a job.

In April 2007, I found a job as a driver in the company providing limousine services. Political situation was already tense due to ethnic problems in the country. In July 2010, the ethnic clashes took place in the south of country. The Kyrgyz nationalists attacked ethnic Uzbeks and Uyghur in the south (the city of Osh) and killed about 2000 (even though official number were about 893) and injured thousands of them. They destroyed many of Uzbek and Uyghur's homes and stores. The hostility and hatred had spread to other cities as well including the capital, Bishkek. Majority of Uyghur and Uzbeks owned private businesses. The Kyrgyz nationalist gangs looted and destroyed Uzbek and Uyghur's stores. They marked some of the houses and stores of Uyghur and Uzbek in Bishkek and then the nationalist gangs looted and burned the stores. Kyrgyz nationalists were openly threatening minorities to go back to their homeland. Many Russians moved to Russia at that time. Uzbeks could not go to Uzbekistan because Uzbek closed its border and we Uyghur had nowhere to go.

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Russians moved to Russia from Bishkek and many Kyrgyz from south moved to Bishkek took over the governmental positions and businesses (forcefully). The limousine businesses suffered also. In Bishkek, most of the limousine businesses were owned by Russians and Uyghur and drivers were also mostly Russians and Uyghur. Southern Kyrgyz people forcefully started to steal our customers, threatening us and extorting money. The newcomers Kyrgyz took key points at the airports and city (wedding) hall and they openly demanded money from Russians and Uyghur in order to let them to run the limousine businesses. We had to pay them; otherwise, we could not operate the business. We would complain the police but the police would not do anything. Especially for me was more difficult to get any response from the police because my name was already in the police as being troublemaker or separatist; as whenever I complained they remind my past detention.

In order to push Uyghur away from the limousine business the Kyrgyz would openly attack us for no obvious reason. In one occasion, on May 2011, two Kyrgyz drivers without provocation attacked me in front of city hall. Then the police intervened and right away understood I was a Uyghur and without listening me they took me to the police station. At the station, they told me I was detained before for involving separatist activities in the Academy and I was the one who attacked the Kyrgyz drivers. They beat me and questioned me if I continued with my political activities. I was kept in detention for two days. My father again had to bribe the police to release me. Police told me I should be respectful to Kyrgyz people and drivers and I should be thankful I was given opportunity to work despite of being Uyghur.

The Kyrgyz authorities and police mistreatment increased by time; we Uyghur drivers would be discriminated and fined constantly. We would be attacked by the Kyrgyz drivers. For us Uyghur drivers, it became impossible to work and make money. I started to organize Uyghur drivers to protest this situation. In June 2012, in order to draw attention of the authorities about I collected about 20 signatures

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from Uyghur drivers and submitted to the Mayor of Bishkek. Just two days later I submitted the petition to the Mayor's office, the police took me to the police station while I was waiting customer in the front of city hall. They accused me with inciting separatism and creating hatred and animosity among Kyrgyz and Uyghur people. I told the police I had no such intention I just want to complain the discrimination we face. But the police did want to listen me they kept beating me. They told me I had been detained earlier while I was in the Academy for my political activities. I was kept 2 days then released. They told me I should not involve any political activities otherwise, I would be imprisoned for life. My petition did not have any useful affect we Uyghur drivers continued to suffer at the hands of Kyrgyz authorities and drivers.

In around February 2014, the Chinese police arrested Uighur (professor) activist Ilham Tohti and later on he was given a life sentence with inciting separatism. In fact, he was just outspoken person for Uyghur rights. Ilham Tohti would speak out against Chinese authorities' treatment of Uyghur people and demanded Uyghur should be equal with Han Chinese people. He was falsely accused with inciting separatism and given life sentence and all of his assets were seized by the Chinese government. That news saddened all Uyghur around the world as well as in Kyrgyzstan. His home and workplace was in Beijing but he was taken to Urumqi the capital city of East Turkistan (Xinjiang) about 4000 km away.

I knew Ilham Tohti before he was arrested as I heard his talking about Uyghur rights issues in China. His arrest and whereabouts him was known by the public much later than February 2014. In conversation, with my colleague (Uyghur driver) I told him about the news and told him it would be good idea if we organize some kind of gathering in front of Chines Embassy or gather signatures. He did not like my idea but he did not object also.

On June 25, 2014, the next morning, 4 police officers came home and took me to the station. At the station I was questioned by the police while I was beaten. They

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asked some questions about Ilham Tohti and what connections I had with him and other Uyghur activists or terrorists. They brought back my presentation at the university and my petition to the Mayor's office about Uyghur drivers' complain. The police told me I am separatist like Ilham Tohti and they wanted to know who I was in contact in China or abroad and who else with me in Kyrgyzstan. I told them I had no connection with any one I am Uyghur and wanted to help Uyghur who have been suffering everywhere. They kept me 5 days at the station. They would question and beat me almost every day. In the detention I met Alymzhan, whom I knew as he was also working as a limousine driver. Alymzhan have told me about his case and problems. 38

After 5 days later they let me with some conditions. I had to report to the police every two weeks. They also told me not to leave country without informing them. After I was released I found out that my parents had to sell their vehicle in order to pay the police to get me release. After I was released my boss fired me also; even though my boss was also a Uyghur but he was afraid for himself. He told me I am trouble maker I would create problem for him also. After that I could not find any other jobs. Even my Uyghur friends were afraid to socialize with me. I became isolated and depressed. From my release and until I left country I continued to report the police every two weeks and whenever I was reporting I would be harassed, humiliated and sometimes beaten.

After some time I contacted Alymzhan to check how things were going with him. During conversation he told me that he was in the same situation as me. We together decided to leave Kyrgyzstan. We did not know where to go and did some research in the internet. We found a person whose name Sergei who was organizing visas to Canada, Australia and USA. After some more thought we decided to try to go to Canada. So we agreed on everything and gave him first payment and our passports. We waited for a long time to get updates from Sergei. We were calling him and he kept on telling us to wait. The Sergei also obtained for

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us Chinese visa and advised us to travel to Kazakhstan so our passports would look better when we apply for Canadian visa.

We arrived in Toronto on May 4, 2015 and the next day we went to Edmonton to meet Aymzhan father's Uyghur friend (Dilshat) there. Dilshat was going to help us to apply for refugee status and he was a truck driver and indeed he did not have much time to help us. He had some problems in his company and he just left us there. He was just saying he would find a lawyer who would help us to make claim to the authorities. But he just left us there alone and we could not speak English and did not know what to do and we waited for him. In the end, we decided to come back to Toronto on June 22, 2014. We learned that Toronto is bigger city there would be more Uyghur, interpreters and lawyers. As soon as we came to Toronto we found a Turkish lawyer and made our claim.

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