

Federal Court



Cour fédérale

Date: 20190619

Docket: IMM-3316-18

Citation: 2019 FC 830

Ottawa, Ontario, June 19, 2019

PRESENT: Mr. Justice Gleeson

BETWEEN:

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Applicant

and

DAMIR IBRAGIMOV

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. Ibragimov, the respondent, is a citizen of Uzbekistan who entered Canada in May 2015. He initiated a refugee claim in December 2015, fearing persecution on the basis of political opinion. In May 2017, the Refugee Protection Division [RPD] denied his claim on the basis of credibility. The RPD further found there was insufficient evidence to support a *sur place* claim.

[2] Mr. Ibragimov successfully appealed the RPD decision to the Refugee Appeal Division [RAD]. The RAD concluded that on a balance of probabilities, Mr. Ibragimov would be subject to severe and disproportionate penalties if he were returned to Uzbekistan with an expired exit visa and found Mr. Ibragimov to be a Convention refugee on a *sur place* basis.

[3] The Minister of Citizenship and Immigration [Minister] brings this application for judicial review of the RAD's decision under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The Minister argues that, in granting protection to Mr. Ibragimov, the RAD engaged in impermissible speculation.

[4] For the reasons that follow, the application is dismissed.

II. The Decision under Review

[5] The RAD noted that the RPD's credibility findings had not been contested by Mr. Ibragimov and accepted those findings. The RAD held the determinative issue was the existence of a *sur place* claim.

[6] In support of the *sur place* claim, Mr. Ibragimov argued he would be persecuted if he returned to Uzbekistan as his exit visa had expired in May 2016. He further submitted that if he were returned to Uzbekistan, the government would learn of his claim for refugee protection in Canada, which would also expose him to a risk of persecution. Finally, he submitted that fundamental human rights, including prisoners' rights, are not respected in Uzbekistan.

[7] The RAD stated the RPD was correct to note that, although the objective documentation indicated that two women had been prosecuted upon returning to Uzbekistan after their exit visas had expired, these cases were limited in number and did not suggest *all* such Uzbek citizens would have problems. However, the RAD relied upon new information contained in an updated National Documentation Package [NDP] released after the RPD decision had been finalized, which addressed the issue of remaining outside Uzbekistan beyond the period of time authorized in an exit visa. The RAD stated:

[11] [...] However, new information came to light after the RPD's decision was signed. A document contained in the May 31, 2017 NDP addresses the issue of Uzbekistani exit procedures and the punishments for staying outside the country beyond the period of time authorized in an exit visa. The document indicates that Uzbek citizens require an exit visa to travel abroad and that the Uzbekistan Criminal Code provides:

Exit from or entry in the Republic of Uzbekistan, or crossing the state border, which violates the duly set procedures...shall be punished with fine from fifty to one hundred minimum monthly wages or imprisonment from three to five years.

While there is no discussion of the phrase "which violates duly set procedures", having regard to the treatment of the two women discussed above, I believe, on a balance of probabilities, that returning to the country on an expired exit visa would amount to a violation of the set procedures.

[8] The RAD found that the documentary evidence demonstrated that Uzbekistan engages in human rights violations, including torture and abuse of detainees, denial of due process and fair trial rights, and disregard of the rule of law. The RAD concluded Mr. Ibragimov would be subject to severe and disproportionate penalties and would face a serious possibility of persecution if returned to Uzbekistan.

III. Issue

[9] The application raises a single issue: did the RAD err in allowing Mr. Ibragimov's appeal and granting him Convention refugee status?

IV. Standard of Review

[10] The applicant relies on the recent decision of Justice Elizabeth Heneghan in *Wang v Canada (Minister of Citizenship and Immigration)*, 2018 FC 1172 [*Wang*], to argue that the disposition of a *sur place* claim raises a question of law to be reviewed against a standard of correctness.

[11] In *Wang*, Justice Heneghan concluded that “[t]he disposition of the *sur place* claim is a question of law and reviewable on the standard of correctness” (*Wang* at para 6). In doing so, she cited *Ejtehadian v Canada (Minister of Citizenship and Immigration)*, 2007 FC 158 [*Ejtehadian*], where a correctness standard of review was adopted when determining if the decision maker applied the correct legal test (*Ejtehadian* at para 12). The issue raised in this matter is not whether the correct legal test for a *sur place* claim was adopted but rather how the test was applied. This is a question of mixed fact and law to be reviewed against a standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 51).

[12] The applicant further argues that a reviewing court is to adopt a correctness standard when reviewing a decision maker's finding that a law of general application is persecutory (*Gonzalez Salcedo v Canada (Minister of Citizenship and Immigration)*, 2014 FC 822 at para 20).

I do not disagree; however, this is not the issue that has been raised. Instead, the Minister argues that the RAD erred in determining that the law would apply to Mr. Ibragimov in light of his particular circumstances. Again, this is a question of mixed fact and law that is reviewable on a reasonableness standard.

V. Analysis

[13] The Minister submits that a fear of criminal sanction for exiting one's country illegally or overstaying the stay authorized by an exit visa is not a basis on which to grant protection. The Minister acknowledges that there may be some exceptions to this rule—where the evidence supports a finding of clearly excessive or extra-judicial punishment for the violation of a country's law of general application—but submits there was no such evidence before the RAD in this case. Instead, the Minister argues the RAD engaged in impermissible speculation in interpreting Uzbekistan's law relating to exit procedures and concluding that Mr. Ibragimov would face the same consequences on return to Uzbekistan with an expired exit visa as would an individual travelling without an exit visa.

[14] Mr. Ibragimov submits the RAD committed no error. The RAD considered the objective facts, which established he was an Uzbek citizen whose exit visa had expired during the time it took to conclude his refugee hearing. The documentary evidence before the RAD addressed Uzbek law on exit visas, the treatment of Uzbeks who travelled abroad illegally and remained abroad without renewing their exit visas, and the human rights abuses committed by the Uzbek government.

[15] In *Valentin v Canada (Minister of Employment and Immigration)*, [1991] 3 FC 390 (CA), leave to appeal dismissed [1991] SCR No 430 [*Valentin*], the Federal Court of Appeal held that individuals who have not been the subject of persecution cannot create a fear of persecution based on the violation of a law of general application. The Court of Appeal cited two reasons for this view: first, an isolated sentence for the violation of a law of general application can only, in very exceptional circumstances, satisfy the element of repetition and relentlessness at the heart of persecution; and second, the direct relationship that is required between the sentence that may be imposed and the recognized grounds of persecution does not exist (*Valentin* at para 8).

[16] In *Donboli v Canada (Minister of Citizenship and Immigration)*, 2003 FC 883 [*Donboli*], a claimant alleged persecution on the basis of an illegal exit from Iran, a failed refugee claim, and evidence that the state subjected individuals in these circumstances to severe or extra-judicial treatment. Justice Eleanor Dawson noted that the documentary evidence showed a repressive regime with a poor human rights record as well as systematic abuses including extrajudicial killings and summary executions, torture, harsh prison conditions, and arbitrary arrest. Justice Dawson held that, in failing to consider these risks, the decision maker had committed a reviewable error (*Donboli* at paras 5–6). Justice Dawson explained *Valentin* as follows:

[4] In *Valentin v. Canada (Minister of Employment and Immigration)*, [1991] 3 F.C. 390 the Federal Court of Appeal held that punishment for an illegal exit from a country is not in itself a basis for a well-founded fear of persecution, when the punishment arises out of a law of general application. However, where a proper evidentiary basis exists it is necessary to consider whether excessive or extra-judicial punishment for an illegal exit could constitute a reasonable basis for a well-founded fear of persecution. See: *Castaneda v. Canada (Minister of Employment*

and Immigration) (1993), 69 F.T.R. 133 (T.D.); *Moslim v. Canada (Secretary of State)*, [1994] F.C.J. No. 184 (T.D.).

[Emphasis added.]

[17] *Donboli* was considered in *Alfaro v Canada (Minister of Citizenship and Immigration)*, 2011 FC 912 [*Alfaro*], where Justice Donald Rennie set out a two-part test where a *sur place* claim is advanced on the basis of an illegal exit from a country or an expired exit visa: (1) is the applicant in breach of exit procedures or the terms of an exit visa and, as a result, subject to penalties of some form; and (2) does that circumstance place the applicant at risk of severe or extrajudicial treatment in the hands of a repressive regime (*Alfaro* at paras 14–15).

[18] Based on the above-noted jurisprudence, I am of the opinion that the RAD's decision was reasonable. The RAD referred to evidence in the NDP indicating there had been two prior cases of Uzbek citizens having been prosecuted after returning with expired visas. The RAD also considered the Uzbek law and concluded that, on a balance of probabilities, citizens returning to Uzbekistan on an expired visa would violate that law. In effect, the RAD concluded the first part of the two-part *Alfaro* test had been satisfied. This conclusion was reasonably available to the RAD.

[19] In considering part two of the *Alfaro* test, the RAD noted the evidence in the NDP demonstrating that prisoners and detainees in Uzbekistan are subject to human rights violations. On this basis, the RAD concluded that Mr. Ibragimov would face a serious possibility of persecution upon return. The RAD did not engage in speculation, rather it drew inferences that were reasonably available to it based on the evidence. The Minister may well disagree with the

RAD's conclusions and question whether the evidence clearly demonstrated a serious possibility of persecution, but this is insufficient to warrant the Court's intervention where a decision is being reviewed against a standard of reasonableness. The RAD's reasoning is transparent, justified, and intelligible.

VI. Conclusion

[20] The application is dismissed. The parties have not identified a serious question of general importance for certification and none arises.

JUDGMENT IN IMM-3316-18

THIS COURT'S JUDGMENT is that:

1. The application is dismissed; and
2. No question is certified.

"Patrick Gleeson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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