

Federal Court



Cour fédérale

Date: 20091223

Docket: IMM-2548-09

Citation: 2009 FC 1311

Ottawa, Ontario, December 23, 2009

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

**MUNKHTSETSEG TUMEN ULZII
TEGSHZAYA TUMEN ULZII
UJINGOO TUMEN ULZII**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR ORDER AND ORDER

[1] Gankhugag Bumuutseren was a double agent. He is a Mongolian who spied for both Mongolia and China. When all came to light, things did not go well for him. He was jailed in China and apparently tortured before being deported to Mongolia, where he was also detained. Fearing that the secret police in Mongolia were persecuting him, he, his new wife, and their young children, one his and one hers, came to Canada in order to seek asylum. The claim as originally filed was

based on the husband's situation. However, he was deemed inadmissible in virtue of section 34 of the *Immigration and Refugee Protection Act* and so his refugee claim was not heard. Section 34(1)(a) of *IRPA* provides that a foreign national is inadmissible on security grounds for engaging in an act of espionage or an act of subversion against a democratic government, institution or process as they are understood in Canada.

[2] As a result, Mr. Bumuutseren's wife, Munkhtsetseg Tumen Ulzii, became the principal claimant at the refugee hearing, basing herself on the narrative contained in her husband's personal information form.

[3] She, and the two children, were held not to be United Nations Convention refugees or otherwise in need of Canada's protection. This is a judicial review of that decision.

[4] Although deemed inadmissible, Mr. Bumuutseren was still in Canada at the time of the hearing (and apparently still is) and testified at the hearing, as did Ms. Tumen Ulzii. The Panel of the Refugee Protection Division of the Immigration and Refugee Board which conducted the hearing accepted that Mr. Bumuutseren had serious physical and emotional health problems.

[5] The entire case turns on credibility. The Panel is entitled to deference as long as the result falls within a range of reasonable articulate, transparent outcomes (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 47). However, one must always keep in mind the difference between a proper inference drawn from facts, and outright speculation. A finding based

on speculation is in and of itself unreasonable (*Canada (Minister of Employment and Immigration) v. Satiacum* (1989), 99 N.R. 171 (F.C.A.)). The Panel dwelt on four issues, home invasions, threatening phone calls, a failure to claim asylum in Korea and Mr. Bumuuutseren's earlier trip to Canada during which he did not claim refugee status, but rather returned to Mongolia to retrieve his wife and children. The Panel's findings in this regard led it to conclude that the secret police were not after them.

[6] The husband said there were several instances during the night when their house was invaded. However in her written statement Ms. Tumen Ulzii made no reference thereto. Her testimony was that she had no personal knowledge of any invasion. It was her husband who told her so. When questioned, he said that he had left ashes on the floor in their home and noticed that they had been disturbed as had some dishes. He was not questioned extensively in light of medical reports which indicated that he is still suffering intensely from the effects of his imprisonment and torture, is extremely afraid of anyone who looks Chinese or Mongolian, and experiences frequent flashbacks. It was accepted that his mental state was fragile.

[7] While the Panel's finding that the invasions did not occur was reasonable, it had to keep in mind that Ms. Tumen Ulzii had never claimed personal knowledge of such invasions.

[8] With respect to threatening phone calls, Ms. Tumen Ulzii testified she had received a call in which an unidentified male voice said that if her husband did not return to Mongolia she and the children would be wiped out. There were other calls in which the caller simply hung up. Given that

her phone was supposed to be an untraceable mobile phone, there was fear that the secret police had targeted her and the children.

[9] The Panel found Ms. Tumen Ulzii was not threatened because she had said in an earlier written declaration that there had been many threatening phone calls, while in fact there was but one. I cannot accept this reasoning. In the context of Mr. Bumuutseren's past history and the one explicit call, what is the basis for not concluding that that hang ups were not threatening?

[10] This led Mr. Bumuutseren to return from Canada to Mongolia to help facilitate the departure of his wife and children .He was asked why he returned. He said it was to assist his wife as she did not know how to get a visa. As Ms. Tumen Ulzii is highly educated, had been well-traveled and admitted she knew how to obtain a visa, this explanation was not accepted. She did leave dangling, however, a concern as to whether she would have been able to obtain a visa for her husband's daughter, a point which should have been pursued more thoroughly.

[11] The Panel concluded that Mr. Bumuutseren did not fear persecution as otherwise he would not have returned to Mongolia to aid his wife and children. While one does not have to be a hero, there is no reason to suggest that Mr. Bumuutseren was such a coward that he would not come to the aid of his wife and children, whether objectively they needed it or not.

[12] En route to Mexico (they claimed refugee status when the plane stopped in Canada), they stayed five days in South Korea. The Panel thought they would have made a claim for protection at

the first possible opportunity, and so doubted subjective fear on their part. However the jurisprudence is well-established that failure to claim at the very first opportunity is not in and of itself determinative. In this case they were already safe, in the sense of being out of Mongolia, and were en route to Canada, where Mr. Bumuutseren had already laid the groundwork.

[13] All this led the Panel to believe that the secret police were not pursuing the applicants. The family was able to obtain a letter from the Mongolian Ministry of Health and Social Welfare to facilitate Canadian visitors' visas. The family did not need exit visas to leave Mongolia, and no reference was made to country conditions to suggest that the secret services' tentacles were as widespread and efficient as the Panel apparently thought.

[14] In conclusion, and taking into account Mr. Bumuutseren's entire history, and Ms. Tumen Ulzii's personal testimony which rather than an embellishment upon her husband's was actually more muted, I find that the decision was unreasonable.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that

1. This application for judicial review is granted.
2. The Board's decision is set aside.
3. The matter is referred back to the Immigration and Refugee Protection Board for a fresh determination by a new Panel.
4. There is no serious question of general importance to certify.

"Sean Harrington"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2548-09

STYLE OF CAUSE: *Ulzii et al v. MCI*

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: December 15, 2009

REASONS FOR ORDER: HARRINGTON J.

DATED: December 23, 2009

APPEARANCES:

D. Clifford Luyt

FOR THE APPLICANTS

Alex Kam

FOR THE RESPONDENT

SOLICITORS OF RECORD:

D. Clifford Luyt
Barrister & Solicitor
Toronto, Ontario

FOR THE APPLICANTS

John H. Sims, Q.C.
Deputy Attorney General of Canada
Toronto, Ontario

FOR THE RESPONDENT