Federal Court  Cour fédérale

Date: 20180323

Docket: IMM-3717-17

Citation: 2018 FC 332

Ottawa, Ontario, March 23, 2018

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

SHYAMOL CHANDRA DEBNATH,
MALA PAUL AND
DIPANJALI DEBNATH HRIDI

Applicants

and

THE MINISTER OF IMMIGRATION,
REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

[1] This is the judicial review of the decision of a Senior Immigration Officer ("Officer") refusing the Applicants' Pre-Removal Risk Assessment ("PRRA") application which was made pursuant to s 112(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA").

[2] As described in the reasons below, I have determined that this application must be dismissed because the Applicants come to the Court with unclean hands and, alternatively, because the Officer's assessment of the evidence was reasonable.

Background

[3] The Applicants are citizens of Bangladesh, Shyamol Chandra Debnath ("Principal Applicant"), his wife Mala Paul ("Female Applicant"), and their 7 year old daughter Dipanjali Debnath Hridi ("Minor Applicant"). They arrived in Canada on May 26, 2013, and claimed protection as Convention refugees or persons in need of protection. The Refugee Protection Division ("RPD") dismissed their claim by its decision dated October 22, 2013, credibility being the determinative issue. On March 12, 2014, this Court denied the Applicants' application for leave and for judicial review of the RPD's decision. The Applicants were scheduled for removal on September 17, 2014. They brought a motion seeking to stay their removal, which was dismissed on September 16, 2014. The Applicants did not appear for their scheduled removal resulting in the issuance of a warrant for their arrest which was executed on July 18, 2016. At the time of their scheduled removal the Applicants were not eligible for a PRRA. They applied for a PRRA on July 28, 2016. The Officer denied the application by a decision dated April 11, 2017, followed by an addendum dated June 1, 2017.

Decision Under Review

[4] The Officer noted that the Applicants allege that they fear persecution and harm in Bangladesh at the hands of the Jamaat-E-Islam ("Jamaat") and the Bangladesh National Party

("BNP"). The Principal Applicant claimed he was attacked by five individuals on May 8, 2013. The assailants allegedly told him they belonged to Jamaat and the BNP, knew of his place of work, his Hindu faith, and involvement in Hindu activities. One of the assailants, who the Principal Applicant identified as Mizan Rahman, threatened to kill the Principal Applicant and harm his wife and daughter if he did not leave the country. Following the attack, the Applicants immediately left for Moulvibazar and came to Canada on May 26, 2013.

[5] The Officer noted that the negative RPD decision found credibility to be the determinative issue. In rejecting the claim, the RPD noted various inconsistencies, discrepancies and contradictions in the Principal Applicant's evidence and found him not to be credible. Further, that the Principal Applicant had failed to report the 2013 attack to police and left the country immediately, despite having stable employment, an active social life, and many friends and associates. The Applicants also arrived in the United States on May 24, 2013, using a tourist visa issued on April 10, 2013, and did not make a claim for asylum. The RPD found that this was not indicative behaviour of persons with a well-founded fear of persecution or harm in their home country.

[6] The Officer found the risks identified by the Applicants in their PRRA were essentially the same as the ones the RPD assessed. The Principal Applicant simply restated his case and did not address the credibility issue. The Officer stated that RPD decisions are considered final regarding IRPA ss 96 and 97 determinations, subject to new evidence showing that applicants would be exposed to a new, different, or additional risk that could not be contemplated at the time of the RPD decision. The Officer found that a subsequent attestation of a risk scenario

previously determined not credible, unaccompanied by objective corroborative evidence, did not overcome the prior credibility concerns of the RPD or provide sufficient evidence of a forward-looking risk to the Applicants.

[7] The documents submitted by the Applicants included a letter from a friend in Bangladesh. The Officer found that the letter reiterated events prior to the Applicants leaving Bangladesh, described general country conditions, and cautioned that it was not safe for the Applicants to return to Bangladesh because Islamic terrorists continue to be interested in them. While it post-dated the RPD decision, the letter did not overcome the RPD's credibility findings and did not provide objective evidence of a forward-looking risk to the Applicants in Bangladesh. The Officer ascribed more weight to the objective documentary evidence obtained from independent research of publically available sources, which did not support the Applicants' claim of risk.

[8] In that regard, the Officer considered the Applicants' news articles and country reports, finding that the Applicants failed to link the general country condition evidence to their personalized and forward-looking risks, as required by s 161(2) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 ("IRP Regulations"). Further, they had not provided objective documentary evidence to support that their profile in Bangladesh was similar to persons currently facing persecution, a danger of torture, or a risk to life, or cruel and unusual treatment or punishment. Rather, the submissions related to conditions faced by the general population, or describe specific events or conditions faced by persons not similarly situated as the Applicants.

[9] The Officer referenced documentary evidence stating that Bangladesh experienced a significant increase in terrorist attacks in 2015, as compared to 2014, targeting foreigners, religious minorities, police, secular bloggers and publishers and concluded that while Bangladesh had seen a rise in extremist violence over the past few years, the evidence showed that the targets of such attacks were prominent activists and minority communities.

[10] Based on the totality of the evidence, the Officer found there was less than a mere possibility of the Applicants facing persecution should they be returned to Bangladesh and that there were no substantial grounds to believe they face a risk to life or of cruel and unusual treatment or punishment.

[11] Prior to the Officer's decision being communicated to the Applicants, they retained counsel and made additional submissions in support of their PRRA. In the June 1, 2017 addendum, the Officer referred to the Applicants' additional submissions, which included an affidavit of the Principal Applicant prepared for the Federal Court in IMM-7539-13, his basis of claim ("BOC") form, letters from relatives in Bangladesh, and extensive country reports and news articles, some of which pre-dated the RPD decision. The Officer found the affidavit, BOC form, and letters from relatives were not material as they reiterated events that occurred prior to the Applicants leaving Bangladesh, described general country conditions, and asserted that Islamic terrorists continue to be interested in the Applicants. While this evidence post-dated the RPD decision, it was not capable of overcoming the RPD's credibility findings and did not provide objective documentary evidence of a forward-looking risk to the Applicants. Similarly, the news articles and country reports described general country conditions in Bangladesh and

were insufficient to establish that the Applicants' profile was similar to those persons that currently face persecution, a danger of torture, or a risk to life, or of cruel and unusual treatment or punishment in that country. The submissions related to conditions faced by the general population or described specific events or conditions faced by persons not similarly situated to the Applicants.

Issues and Standard of Review

[12] The Applicants submit the issues are that the Officer's findings are unreasonable in light of the evidence they submitted; the Officer failed to justify his or her findings rendering his or her decision unreasonable; and, the Officer erred in law by conflating the legal standards contained in ss 96 and 97 of the IRPA.

[13] The Respondent raises a preliminary issue being whether the Applicants' application should be dismissed because they did not come to the Court with clean hands.

[14] I would frame the issues as follows:

1. Should the Applicants' application for judicial review be dismissed because they failed to come to the Court with clean hands?
2. Did the Officer conflate the legal tests under ss 96 and 97 of the IRPA?
3. Was the Officer's decision reasonable?

[15] The standard of review for the issue of whether the Officer conflated the tests under ss 96 and 97 is correctness (*Somasundaram v Canada (Citizenship and Immigration)*, 2014 FC 1166 at

para 17 ("*Somasundaram*"); *Mahendran v Canada (Citizenship and Immigration)*, 2009 FC 1237 at para 10). No deference is owed on that standard.

[16] I agree with the parties that the standard of review of the Officer's findings of fact or mixed fact and law, including issues relating to the treatment of the evidence, is reasonableness (*Chinchilla v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 265 at para 13; *Nguyen v Canada (Citizenship and Immigration)*, 2015 FC 59 at para 4; *Rathnavel v Canada (Citizenship and Immigration)*, 2013 FC 564 at para 19; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 51 ("*Dunsmuir*")). Under this standard, the Officer's decision attracts deference and this Court will only intervene if the decision is not justified, transparent and intelligible, or if the decision falls outside the range of possible, acceptable outcomes (*Dunsmuir* at para 47).

Issue 1: Should the Applicants' application for judicial review be dismissed because they failed to come to the Court with clean hands?

[17] The Applicants submit that in exercising its discretion to grant leave, this Court has already rejected the Respondent's clean hands argument that was raised in the leave application. The Applicants also submit that the application for judicial review concerned all three Applicants and there is no basis upon which the Court can exercise its discretion to refuse to hear the application in order to punish the Minor Applicant for a decision she did not make. Further, that *Canada (Minister of Citizenship and Immigration) v Thanabalasingham* (2006), 263 DLR (4th) 51 (FCA) ("*Thanabalasingham*") establishes that a balance must be considered as between the integrity of the judicial and administration process and the public interest in ensuring the

protection of fundamental human rights. The Applicants submit that the balance favours them in this matter.

[18] The Respondent submits that remedies on judicial review are discretionary and the Court may decline to grant a discretionary remedy because of the conduct of an applicant. In exercising this discretion, the Court strikes a balance as described in *Thanabalasingham* (*Monteiro v Canada (Citizenship and Immigration)*, 2006 FC 1322 ("*Monteiro*")). Moreover, the clean hands doctrine has been applied in cases where the applicant evaded immigration authorities or an arrest warrant to delay or avoid removal. Here, the Applicants' misconduct was serious and demonstrated a complete disregard for Canadian immigration laws and this Court's decisions in relation to the Applicants. Further, at the time the Applicants were scheduled for removal, they were not eligible for a PRRA application under s 112(2)(b.1) of the IRPA. Therefore, there is a clear connection between the Applicants' conduct and the present application for judicial review. Moreover, permitting the Applicants to proceed would not deter others from engaging in similar conduct. Accordingly, no matter what the merits of the Applicants' application, it must be dismissed.

[19] While not pursued when the Applicants appeared before me, there is no merit to their position that this issue was disposed of by the granting of leave. The fact that the issue was raised by the Respondent in its memorandum of argument submitted in response to the application for leave and judicial review does not mean the issue was disposed of and dismissed by this Court when leave was granted. The December 1, 2017 Order granting leave does not address this or any of the issues on the merits raised by either party. Moreover, that Order was

issued pursuant to Rule 15(1) of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 ("FC Immigration Rules") which is directed to procedural matters required to be addressed to bring the application to a review hearing (*Level v Canada (Citizenship and Immigration)*, 2010 FC 251 at para 59; *Krishnapillai v Canada*, 2001 FCA 378 at para 11). And, by way of analogy, in the context of requests for extension of time under the FC Immigration Rules, where it cannot be inferred from the order granting leave that an extension of time was granted, the applications judge must determine whether the applicable test has been met (*Canada (Citizenship and Immigration) v Heidari Gezik*, 2015 FC 1268 at para 28).

[20] As to the application of the clean hands doctrine, the jurisprudence is clear that remedies available on judicial review are discretionary and, based on the conduct of an applicant, the Court has discretion to decline, to decide or to dismiss applications (*Homex Reality and Development Co v Wyoming (Village)*, [1980] 2 SCR 1011; *Canada (Attorney General) v PSAC*, [2000] 1 FC 146 (FCTD); *Mejia v Canada (Citizenship and Immigration)*, 2009 FC 658 at para 14).

[21] The leading decision on the application of the unclean hands doctrine is *Thanabalasingham*. There the Federal Court of Appeal considered a certified question being, when an applicant comes to the Court without clean hands on an application for judicial review, should the Court in determining whether to consider the merits of the application, consider the consequences that might befall the applicant if the application is not considered on its merits. The Federal Court of Appeal did not agree with the assertion by the respondent in that case that, if it was established that an applicant had not come to court with clean hands, then the Court

must refuse to hear or grant the application on its merits. Rather, the Federal Court of Appeal found that the case law suggested, if satisfied that an applicant had lied or was otherwise guilty of misconduct, then the reviewing court may dismiss the motion without proceeding to determine the merits or, even though having found reviewable error, decline to grant relief. Further:

> [10] In exercising its discretion, the Court should attempt to strike a balance between, on the one hand, maintaining the integrity of and preventing the abuse of judicial and administrative processes, and, on the other, the public interest in ensuring the lawful conduct of government and the protection of fundamental human rights. The factors to be taken into account in this exercise include: the seriousness of the applicant's misconduct and the extent to which it undermines the proceeding in question, the need to deter others from similar conduct, the nature of the alleged administrative unlawfulness and the apparent strength of the case, the importance of the individual rights affected and the likely impact upon the applicant if the administrative action impugned is allowed to stand.

[22] The factors are not exhaustive and are not all necessarily relevant in every case.

[23] This Court has also held, in the immigration context, that when an applicant seeking judicial review does not have clean hands this, in and of itself, warrants dismissal of the application. Further, that the applicant's conduct must be assessed in light of the clean hands doctrine when the application is before the Court as it would be absurd if, when exercising discretionary power and deciding whether or not to undertake judicial review, a court could not consider all of the relevant facts, including the applicant's conduct between the date of the impugned decision and the date of the judicial review (*Wong v Canada (Citizenship and Immigration)*, 2010 FC 569 at paras 10-13).

[24] In *Djosta v Canada (Citizenship and Immigration)*, 2005 FC 1475 ("*Djosta*") the applicant was denied a stay while she sought judicial review of a negative PRRA application, went into hiding to avoid removal and remained in hiding at the time of the hearing. This Court found the applicant's conduct was relevant and not beyond reproach, which was sufficient under the clean hands doctrine to dismiss the application. Nevertheless, it assessed the application on its merits (*Djosta* at paras 52, 55-57; also see *Tahiru v Canada (Citizenship and Immigration)*, 2009 FC 437 at paras 43-44; *Gazlat v Canada (Citizenship and Immigration)*, 2008 FC 532 at paras 15-18; *Monteiro* at paras 7-9; *Samaroo v Canada (Citizenship and Immigration)*, 2011 FC 1460 at paras 13-15; *Khasria v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 773 at paras 17-23).

[25] In my view, it is clear that in these circumstances the Applicants come before this Court without clean hands. Despite a valid deportation order and the dismissal of their stay motion, the Applicants failed to report for removal and went into hiding to avoid removal. This misconduct was very serious and undermined the valid removal process and shows disregard for a decision of this Court. The Applicants also benefitted from this action. This is because they were not entitled to a PRRA if less than 12 months had elapsed since their refugee claim was last rejected, which was on October 22, 2013. By failing to report for removal and going into hiding they extended their time in Canada thereby enabling them to avail of a PRRA to which they would not otherwise have been entitled. Thus, the act of eluding immigration authorities affected the PRRA application itself through avoiding the statutory 12 month bar. The need to deter others from similar conduct cannot be understated. Conversely, there is no issue of unlawful conduct by government in this matter.

[26] I do not accept the Applicants' argument that there is an insufficient connection between the subject matter of the claim and the equitable relief sought to support the application of the unclean hands doctrine (*Volkswagon Canada Inc v Access International Automotive Ltd*, [2001] 3 FC 311 (FCA)). Specifically that, because the conduct of their PRRA application and judicial review application "is irreproachable", there is no basis for an unclean hands finding. This, of course, ignores that the Applicants were only able to avail of a PRRA because they evaded a valid removal order which, in my view, is a relevant fact to be considered when making the discretionary decision of whether to dismiss the matter on the basis of the Applicants' unclean hands. Nor did the Applicants acknowledge these events in their application for judicial review or, when appearing before me, indicate that they understand the seriousness of their actions. That said, I also recognize that the Applicants, after the 12 month PRRA bar lapsed, did turn themselves in to the immigration authorities whereupon the arrest warrant was executed. They were no longer in hiding at the time of the hearing of this application.

[27] As to the other factors, the apparent strength of the Applicants' case is low, however, the impact on them if the PRRA is maintained and they are removed to Bangladesh where they claim they are at risk is potentially significant. As to the submission that, because one of the Applicants is a minor the Court cannot exercise its discretion to dismiss the application for judicial review "in order to punish the Minor Applicant for a decision she did not make", at best, this demonstrates a clear lack of understanding of the clean hands doctrine which is concerned with equity and not punishment. In any event, and as discussed below in the context of the question proposed for certification by the Applicants, the fact that one of the Applicants is a minor is not a determinative factor or one which precludes the Court from considering and

exercising its discretion with respect to the clean hands doctrine. Rather, a consideration of the Minor Applicant's interests is captured in the balancing process by way of the consideration of the likely impact on the Applicants if the negative PRRA decision is not reviewed by the Court and is allowed to stand.

[28] In my view, balancing of the *Thanabalasingham* factors in this case supports the exercise of discretion to dismiss the application for lack of clean hands. However, in the event that I am wrong, I will examine the matter on its merits.

Issue 2: Did the Officer conflate the legal tests under ss 96 and 97 of the IRPA?

[29] The Applicants submit the Officer conflated the standards under ss 96 and 97 of the IRPA by accepting the Applicants' religious and gender identities, which establish the necessary nexus to the s 96 grounds of religion and membership in a particular social group, and then comparing the profiles of the Applicants to that of the general population in Bangladesh, which is only a relevant factor when considering s 97(b)(ii). Instead of carrying out a s 96 analysis, the Officer engaged in a brief and irrelevant discussion of country conditions in Bangladesh, which pertain to the s 97 analysis rather than s 96. By conflating the two tests the Officer erred in law because risks feared by many people still qualify for s 96 protection. There is no requirement for a personalized fear of persecution under s 96.

[30] The Respondent submits the Officer did not conflate the tests under ss 96 and 97 as demonstrated by his or her findings that the documentary evidence on country conditions merely described conditions faced by the general population. The Officer also found that documentary

evidence described conditions for persons not similarly situated to the Applicants and that the Applicants did not link the evidence on country conditions to their particular circumstances. Nor was the Officer required to conduct a more in depth analysis under s 97.

[31] As stated in *Fi v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1125 at para 13, to satisfy the definition of "Convention refugee" in s 96 of the IRPA, the applicant must show that he or she meets all the components of this definition, beginning with the existence of both a subjective and objective fear of persecution. The applicant must also establish a link between him or herself and persecution on a Convention ground. The applicant must be targeted for persecution in some way, either "personally" or "collectively", and the applicant's well-founded fear must occur for reasons of race, religion, nationality, membership in a particular social group, or political opinion. Further, persecution under s 96 can be established by examining the treatment of similarly situated individuals, the applicant does not have to show that he himself has been persecuted in the past or would be persecuted in the future.

[32] In the context of an allegation of conflating the s 96 and s 97 tests, mere use of the term "personally", or other similar term, is not necessarily indicative of conflation:

> [42] I adopt the line of cases advanced by counsel for the respondent that in its context the use of such words as "personally at risk", a "personalized risk", "the risk must be individualized" does not mean section 96 is conflated into section 97. My colleague Justice Mosley put it this way in *Raza v.Canada (Minister of Citizenship and Immigration)*, 2006 FC 1385 (*Raza*), at paragraph 29:
>
> > [29] The assessment of new risk developments by a PRRA officer requires consideration of sections 96-98 of IRPA. Sections 96 and 97 require the risk to be personalized in that they require the risk to apply to the specific person making the

> claim. This is particularly apparent in the context of section 97 which utilizes the word "personally". In the context of section 96, evidence of similarly situated individuals can contribute to a finding that a claimant's fear of persecution is "well-founded". That being said, the assessment of the risk is only made in the case of a PRAA [sic] application on the basis of "new evidence" as described above, where a negative refugee determination has already been made. [Emphasis mine.]

(*Pillai v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1312 at paras 42, 44; also see *Kaur v Canada (Citizenship and Immigration)*, 2014 FC 505 at paras 37-39 ("*Kaur*"); *Somasundaram* at paras 21-25).

[33] In this matter, the Officer addressed the letter of the Principal Applicant's friend and then referred to their remaining submissions which included various news articles and country reports, noting that s 161(2) of the IRP Regulations required the Applicants to indicate how that evidence related to them. The Officer stated that the Applicants' submissions described the general country conditions in Bangladesh but that they had not linked this evidence to their personalized, forward-looking risks. The Officer stated that it is well established that it is insufficient to simply refer to country conditions in general without linking them to the personalized situation of an applicant. Further, that the assessment of an applicant's potential risk of being persecuted or harmed if sent back to his country, must be individualized. The fact that the documentary evidence shows that the human rights situation in a country is problematic does not necessarily mean that there is risk to a given individual. The Officer stated that the Applicants had not provided objective documentary evidence to support that their profile in Bangladesh is similar to those persons that currently face persecution, a danger of torture or a

risk to life, or of cruel and unusual treatment or punishment in that country. The Officer concluded by stating that he or she found that the submissions related to conditions faced by the general population, or described specific events or conditions faced by persons not similarly situated to the Applicants.

[34] The Officer then described some of the documentary evidence and concluded that while Bangladesh has seen a rise in extremist violence over the past few years, the evidence showed that the targets of such attacks have been prominent activists and minority communities. A similar conclusion was reached with respect to the additional submissions of the Applicants addressed in the June 1, 2017 Addendum.

[35] As seen from the jurisprudence set out above, under both s 96 and s 97, an applicant must establish a risk that is both personal and objectively identifiable. While the Officer could certainly have better separated his or her s 96 and s 97 analysis, reading the decision in whole I am not persuaded that the paragraph at issue, as described above, demonstrates that the Officer conflated the s 96 and s 97 tests. While persecution need not be personalized under s 96, as the claimant may demonstrate that their fear is felt by the group in which they are associated within the Convention definition, the claimant's profile must be considered when determining if there is a well-founded risk of persecution.

[36] In my view, that the Officer understood the different tests is seen in his or her findings that the documentary evidence on country conditions merely described conditions faced by the general population, described conditions for persons not similarly situated to the Applicants and

the Applicants' profile did not support the existence of a well-founded fear of persecution. Moreover, the Officer found the Applicants did not link the evidence on country conditions to their particular circumstances (see *Olah v Canada (Citizenship and Immigration)*, 2017 FC 921 ("*Olah*")). The Officer also correctly stated both the s 96 and s 97 tests at the end of his or her reasons in the initial PRRA decision and the Addendum.

Issue 3: Was the Officer's decision reasonable?

i) Did the Officer fail to consider the risk of persecution to members of the Hindu minority in Bangladesh?

[37] The Applicants submit they provided the Officer with a number of news articles post-dating the RPD decision which establish there has been a rise in violence against the Hindu minority in Bangladesh and that Hindus are being persecuted. In light of this evidence, which establishes that the Applicants are currently at risk on the basis of their profiles as Hindus, the Officer could not logically accept that the Applicants are members of the Hindu minority and then conclude they face less than a mere possibility of persecution in Bangladesh. Further, the Female and Minor Applicants will face additional and gender-specific risks in Bangladesh as violence against women has been used as a tool to force Hindus to leave the country.

[38] The Respondent submits that the RPD found that the Applicants do not have the profile of persons who would be targeted by the Applicants' alleged persecutors. Further, the attacks described in the objective documentary evidence were aimed at minority religious groups in general and did not demonstrate targeting of specific individuals or families. Nor did the Applicants show any new evidence was linked to their particular circumstances as required by

s 161(2) of the IRP Regulations. There was no change in the Applicants' profile nor was there a change in the forward-looking risk as similar attacks had already been considered by the RPD. As to the gender related risk, the RPD was aware of the allegation that the Female Applicant and Minor Applicant had been threatened with rape and kidnapping but found that the allegations of persecution were not credible. In the PRRA, the Applicants provided additional evidence on the country conditions on this issue but no evidence on their particular circumstances. The Officer found there was insufficient evidence to come to a different conclusion.

[39] In addressing this issue it must be recalled that in the Applicants' initial PRRA submissions they asserted that they were at risk of a Bangladeshi Islamic extremist group who was trying to kill the Principal Applicant and had threatened to rape his wife and kidnap his daughter and set out the same factual background as had been before the RPD. The RPD found the Principal Applicant not to be credible, did not believe his story nor that there was a well-founded basis for the Applicants' claim. The RPD also dealt with the Principal Applicant's involvement in the Hindu community and found that his testimony contradicted the information contained in his BOC concerning his activities as a religious Hindu in his country. The RPD stated that it did not believe that the Principal Applicant was targeted because of his religious beliefs and activities and found that he had tried to embellish his activities as a Hindu to make his claim of persecution more persuasive. The RPD found that the evidence provided to it was not indicative of any prominent participation in any religious or political movement by the Principal Applicant that would have made him a target of fundamentalists. The claims of the Female and Minor Applicants were based on the same BOC and testimony and therefore were also found not to be credible.

[40] The Officer noted that the risks identified by the Applicants in their initial PRRA application were essentially the same as those heard and assessed by the RPD. Further, the proposed new evidence did not overcome the RPD's prior credibility findings or provide objective documentary evidence of a forward-looking risk to the Applicants in Bangladesh or that their profile in Bangladesh was similar to those persons currently at risk of persecution. Thus, the Officer addressed risk based on the alleged attack by fundamentalists, which the Principal Applicant claimed arose from a perceived insult to Islam, and the RPD finding that the Principal Applicant did not have the profile of a prominent Hindu or activist that would put him at risk.

[41] In my view, the Officer also considered the Applicants' risk of persecution as members of the Hindu minority in Bangladesh by way of his or her determination that the Applicants did not fit the profile of persons facing persecution. Further, in reviewing the news articles and country reports, the Officer found there was no link to the Applicants' personalized forward-looking risks.

[42] For example, the Applicants submitted a New York Times article dated November 16, 2016 (The Opinion Pages, "Attacks on Hindus in Bangladesh") which states that over almost two years radical Islamists have carried out a string of brutal attacks in Bangladesh killing scores of bloggers, foreigners and members of religious minorities. Victims included a Hindu tailor and priest and an attack that left 22 people of unstated religious denomination dead. The article states that while the Prime Minister and the Awami League party accused the Islamist opposition of fomenting terrorism, news that the Awami League politicians may have been

implicated in recent attacks on Hindu homes and temples was profoundly disturbing. The attacks were set off by outrage over an image on Facebook depicting the Hindu god Siva at a Muslim holy site in the city of Mecca. On October 30, 2016, Muslims ransacked 15 temples and the homes of more than 100 families in a Hindu neighbourhood. The article also quotes a source as indicating that social media is being used to foment violence against minorities. As a result of the incident, dozens of suspects were arrested, a police officer was suspended as were three local Awami League leaders, an investigation to determine who posted the offensive image was undertaken and Bangladesh's National Human Rights Commission begun an investigation into the attacks.

[43] Another New York Times article, dated November 2, 2016, reports that crowds of Muslims attacked Hindu homes and temples the prior week raising concerns that authorities were not taking steps to curb rising religious tensions. Again reporting on the same Facebook related incident, the Gatestone Institute stated that minority communities across Bangladesh were once again facing violence and persecution by the Sunni Muslim majority and that in the last month or so dozens of Hindu temples had been vandalized and hundreds of houses burned. The Minority Rights Group International reported that since 2013 Bangladesh has experienced a series of violent attacks by extremists. The victims included - besides atheists, secular bloggers, liberals and foreigners - many Buddhists, Christians and Hindus as well as Ahmadis and Shia Muslims.

[44] I note that other articles in the record which were submitted by the Applicants report the killing of bloggers who advocated secularism; the killings of two Hindus, one Christian and the wife of an anti-terrorism officer which left members of minorities religious communities afraid

for their lives and that separate attacks on Hindus, Christians, Buddhists and atheists; an article in the Wall Street Journal dated July 7, 2016, noted that over the past 3 years Islamist militants murdered approximately 50 people, including secular and atheist bloggers, Hindu and Buddhists priests and foreign aid workers.

[45] The Officer stated that he or she had reviewed the country conditions documentation submitted by the Applicants and also referenced the US Department of State Country Reports on Terrorism 2015 as stating that Bangladesh experienced a significant increase in violent extremist terrorist attacks in 2015 as compared to 2014 and that transnational groups such as ISIL and AQ in the Indian Subcontinent (AQIS) have claimed several attacks targeting foreigners, religious minorities, police, secular bloggers, and publishers. The report stated that the Government of Bangladesh attributed those attacks to the political opposition and local terrorists. The Officer found that while Bangladesh has seen a rise in extremist violence over the last few years, the evidence showed that the targets of such attacks have been prominent activists and minority communities.

[46] In my view, the documentary evidence clearly demonstrates that it is not the Hindu minority that is being targeted by fundamentalists and others, but activists and many minority communities in general. The violence described in the documentary evidence is sporadic, often event-based or reflective of random or undirected attacks by fundamentalists or others. It is directed at prominent activists and is occasionally, but not always, aimed at those with a profile as Hindu. Thus, it is not indicative of a risk of violence against the Hindu minority in particular as argued by the Applicants. In other words, as found by the Officer, that evidence established

that there are human rights problems but they are not specific to the Hindu minority and do not give rise to risk to specific individuals. And, contrary to the Applicants' submissions, the mere fact of being a Hindu in Bangladesh is not, in and of itself, sufficient to establish that an applicant faces more than a mere possibility of persecution upon return (*Olah* at paras 14-15).

[47] Further, the RPD noted in its decision that the documentary evidence indicated that religious groups, from time to time, incited violence or harassment against members of other minority religious groups, most commonly, arson and looting of religious sites and homes including one that occurred after high school students performed a play which allegedly insulted the Prophet Mohamed. Those incidents were aimed at the religious groups in general. They were not related to a single family asserting that it was the target of fundamentalists as was the situation before the RPD. For that reason, the RPD found that those incidents were irrelevant for its analysis. This also illustrates, however, that incidents such as those arising from the Facebook posting contained in the documentary evidence submitted by the Applicants in support of their PRRA was not a new or heightened risk of persecution. The Applicants' new documentary evidence was "simply more of the same, even though it related to new events" (*Kulanayagam v Canada (Citizenship and Immigration)*, 2015 FC 101 at para 33 ("*Kulanayagam*")).

[48] As to the gender related risk, the RPD was aware of the allegation that the Female Applicant and Minor Applicant had been threatened with rape and kidnapping. However, the RPD found that the underlying allegations of persecution, based on the Principal Applicant being a target for fundamentalists, either as a result of an alleged insult to

Islam his profile as a prominent Hindu or activist, were not credible and, therefore, nor was that alleged risk. The Officer found that the new evidence did not overcome the RPD's credibility concerns.

[49] However, in support of their PRRA, the Applicants submitted various documents to support their claim of risk based solely on gender. As noted by the Officer, some of these documents pre-dated the RPD decision, such as "*Women and Girls in Bangladesh, UNICEF"* (dated June 2010) and "*Hindus in South Asia & the Diaspora A Survey of Human Rights 2011*", prepared by the Hindu American Foundation. The Officer stated that to the extent that the new documents constituted new evidence as defined by s 113(a) of the IRPA, they had been read and considered.

[50] I note that the record indicates that the Applicants also submitted the Hindu American Foundation, *Hindus in South Asia & the Diaspora A Survey of Human Rights 2014-2015*. Amongst other things, this addresses sexual violence against ethnic and religious minorities stating that sexual violence plagues women of all backgrounds in Bangladesh and that minority women, in particular, have suffered disproportionally and often bear the brunt of sectarian violence. Further, that women from minority communities are often especially vulnerable during mass bouts of violence. In the run up to and during the election in January 2014, Hindu women were reportedly raped and sexually assaulted by BNP and Jamaat activists in an attempt to intimidate the community and prevent them from voting.

[51] While the Applicants submit that this established that the Female and Minor Applicants are currently at risk on the basis of their profiles as female Hindus, the evidence is far more general in nature and speaks to sexual violence against ethnic and religious minorities generally, including Hindus. And while I agree that the Officer did not specifically reference this documentary evidence, he or she was not required to explicitly refer to each piece of evidence and is assumed to have reviewed all of the evidence in the absence of evidence to the contrary (*Flores v Canada (Minister of Employment and Immigration)*, [1993] FCJ 598 (FCA); *Matute Andrade v Canada (Citizenship and Immigration)*, 2010 FC 1074 at para 64; *Kaur* at para 42). I would also note that the Officer did not conclude that Hindus or Hindu women are, or are not, a particular religious or social group for the purposes of s 96. The Officer simply was not satisfied that the Applicants had a well-founded fear of being persecuted either as a result of belonging to such a group (*Kaur* at para 40) or because of an absence of a link to their personal circumstances. And, significantly, the Officer concluded that the evidence did not establish more than a mere possibility of persecution. Given the content of the subject documentary evidence, this finding was open to the Officer.

ii) Did the Officer fail to assess the RPD's credibility findings using new evidence?

[52] The Applicants submit that while a PRRA is not an appeal of the RPD decision, the Officer must assess new evidence relevant to the facts that were before the RPD to see if it might have affected the outcome of that hearing (*Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 at para 13 ("*Raza*")). Moreover, as credibility findings are cumulative, evidence that could have changed even one of the main findings of the decision requires that credibility be revisited in light of the new evidence (*Chen v Canada (Citizenship and Immigration)*, 2015 FC

565; *Yousif v Canada (Citizenship and Immigration)*, 2013 FC 753 at para 51; *Nkeshimana v Canada (Citizenship and Immigration)*, 2015 FC 1199). Here, in addition to the country condition evidence, the Applicants submitted two written statements concerning their personal circumstances and the incidents that affected them directly. The new evidence relates to facts subsequent to the RPD decision and corroborates the Applicants' allegations made before the RPD, it therefore called for a re-assessment of the Applicants' allegations as to the incidents suffered prior to their departure from Bangladesh. At the very least, the Officer had to explain why this new evidence did not overcome the RPD's credibility findings.

[53] The Respondent submits, given the findings of the RPD, that the Officer properly began with the premise that the Applicants were not credible and examined the new evidence to determine whether it was sufficient to overcome the credibility and other findings of the RPD (*Raza*; *Kulanayagam*; *Ibrahim v Canada (Citizenship and Immigration)*, 2014 FC 837). Ultimately, the Officer found the new evidence was not sufficient to overcome the RPD's findings on credibility and alleged fear or to establish the Applicants are at risk (*Bicuku v Canada (Citizenship and Immigration)*, 2014 FC 339; *Canada (Citizenship and Immigration) v Flores Carillo*, 2008 FCA 94; *Ferguson v Canada (Citizenship and Immigration)*, 2008 FC 1067 at paras 25-26; *Parchment v Canada (Citizenship and Immigration)*, 2008 FC 1140 at para 23). Further, if the RPD found the Applicants were not persecuted as alleged, statements showing continuation of alleged persecution, such as threats, would be insufficient. The Applicants submitted no evidence on their PRRA to come to a different finding on the initial allegations of persecution. Therefore, the Officer reasonably found insufficient evidence to establish the Applicants are now at risk (*Kulanayagam*).

[54] The Officer acknowledged the new evidence which included the August 7, 2016 letter from Amal Krishna Sala ("Sala Letter"), a friend of the Applicants, the May 3, 2017 letter from the Principal Applicant's brother ("Brother's Letter") and the May 2, 2017 letter from the mother of the Female Applicant ("Mother's Letter"), an affidavit of the Principal Applicant, the BOC and other documentary evidence. The Officer properly noted that the admissibility of new evidence in a PRRA is governed by s 113(a) of the IRPA. That is, applicants can only submit new evidence that arose after the rejection of their claim by the RPD or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented at the time of the rejection. The Officer found that the letters did not overcome the RPD's credibility concerns or provide objective evidence of forward-looking risk to the Applicants in Bangladesh and, for that reason, they were not material. The Officer stated that he or she gave more weight to the Applicants' documentary evidence, which did not support the risks the Applicants cited. In that regard I note that favouring objective evidence over the letters does not constitute failing to assess credibility (*Tapambwa v Canada (Citizenship and Immigration)*, 2017 FC 522 at para 85).

[55] In *Raza*, the Federal Court of Appeal stated that new evidence need not be considered if it is not material, in the sense that the refugee claim probably would have succeeded if the evidence had been made available to the RPD. As the Officer found the letters and other evidence not to be material, as it could not overcome the RPD's credibility findings, he or she was not compelled to consider it.

[56] Reviewing the letters, I also note their content is vague and in some ways contradicts, rather than corroborates the Applicants' claim. For example, the Mother's Letter indicates that due to the Applicants' "well establishment in the society, honour, [and] reputation at a young age" they became the subject of societal jealousy and "without any knowledge", the Applicants became the target of an unspecified terrorist group, which gradually became serious. This group continuously threatened that they would kill the Principal Applicant, rape the Female Applicant and kidnap the Minor Applicant. In the face of these threats the Applicants fled. However, this directly contradicts the evidence of the Principal Applicant before the RPD, which was that he fled to Moulvibazar, leaving everything behind, immediately after the May 8, 2013 attack, which attack occurred because of offense that was taken to an alleged religious insult. The letter also states that the conspirators continued to regularly inquire of the Female Applicant's students and her mother as to the whereabouts of the Applicants and vandalized and set fire to the Principal Applicant's parents' house, but provided no details of these events.

[57] Similarly, the Brother's Letter states that during university the Principal Applicant participated in meetings in protest of torture against Bangladeshi minority groups and "this is how even in his ignorance he became the target of Islamic terrorists". The letter makes no reference to the Hindu faith. It further describes that after the Applicants' departure, the Principal Applicant's family was placed under continuous surveillance in an attempt to determine the Applicants' whereabouts, that his parents were threatened by terrorists and that a portion of their home had been set ablaze. His parents moved and "here also in the face of severe surveillance and torture by terrorists both my beloved mother and father died". The

brother states that terrorists come to him regularly to inquire about the location of the Applicants and to threaten him, but the letter provides no detail of any of these matters.

[58] The Sala Letter states that the Principal Applicant always tried to protest against barbarian and brutal minority persecution and that is why an Islamic terrorist group targeted him to be killed and cites the U.S. State Department and Amnesty International reports concerning members of the Hindu minority being killed, raped, tortured or intimidated by Muslim extremist groups which asserts are gaining strength. The letter states that even three years after the Applicants left Bangladesh "they keep asking me and some other local friends" where the Applicants are. No details of who makes these inquiries are provided nor is an explanation given as to how the author of the letter knows that the extremist group also keeps asking the Principal Applicant's parents about the whereabouts of the Applicants and that on September 2, 2014, the Islamic extremist group burned a large portion of the Principal Applicant's parents' home.

[59] The letters are unattested, lack detail and contradict key aspects of the Principal Applicant's story of why he was targeted by fundamentalists. They also do not support that the Applicants are being targeted because of their Hindu faith or gender. In my view, the Officer reasonably found that they could not overcome the RPD's negative credibility findings. The RPD based its negative credibility findings on the Principal Applicant's varied testimony as to whether the alleged attack took place in the dark; his lack of a valid reason explaining why he did not contact the police after the attack; his explanation for leaving Dhaka immediately and permanently because he feared for his life not to be credible; his failure to seek asylum at the first opportunity upon arrival in the United States demonstrated an absence of a subjective fear of

persecution; and, his assertion that the reason for the attack was mere speculation and was not credible. The letters do not address these credibility findings. Accordingly, the Officer reasonably found that the subsequent attestation of the risk scenario that the RPD found not to be credible, absent supporting objective evidence, did not overcome the credibility concerns (*Kulanayagam* at para 33) or provide sufficient evidence of forward-looking risk. And while the letters also speak to threats alleged to have been made after the Applicants had fled, given the unresolved credibility concerns, the Officer found that objective evidence was needed to support the new subjective evidence of threats arising from the incident which was rejected by the RPD as not believed. And, while I agree that the Officer's reasons were not perfect, and further reasons would certainly have been preferable, perfection is not required and reviewing the record together with the decision permits the Court to connect the dots (*Patel v Canada (Citizenship and Immigration)*, 2017 FC 570 at para 13; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 14) so as to understand the Officer's conclusion.

Certified Question

[60] The Applicants proposed the following question for certification pursuant to s 74(d) of the IRPA:

> Can the doctrine of "clean hands" be invoked to deny a child's application for judicial review on the basis of his or her parent's unclean hands?

[61] The Respondent opposes the proposed question on the basis that it does not transcend the interests of the immediate parties to the litigation (*Zhang v Canada (Minister of Citizenship and*

Immigration), 2013 FCA 168 at para 9). Further, in *Thanabalasingham* (at paras 8-11) the Federal Court of Appeal provided a complete response to the doctrine of unclean hands and is dispositive of the question proposed by the Applicants. Public policy dictates that individuals are not entitled to benefit from a lack of clean hands and, the fact that one of them is a minor child does not negate this.

[62] The Federal Court of Appeal in *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 recently revisited the criteria that must be met for certification of a proposed question:

> [46] This Court recently reiterated in *Lewis v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para. 36, the criteria for certification. The question must be a serious question that is dispositive of the appeal, transcends the interests of the parties and raises an issue of broad significance or general importance. This means that the question must have been dealt with by the Federal Court and must arise from the case itself rather than merely from the way in which the Federal Court disposed of the application. An issue that need not be decided cannot ground a properly certified question (*Lai v. Canada (Public Safety and Emergency Preparedness)*, 2015 FCA 21, 29 Imm. L.R. (4th) 211 at para. 10). Nor will a question that is in the nature of a reference or whose answer turns on the unique facts of the case be properly certified (*Mudrak v. Canada (Citizenship and Immigration)*, 2016 FCA 178, 485 N.R. 186 at paras. 15, 35).
>
> [47] Despite these requirements, this Court has considered that it is not constrained by the precise language of the certified question, and may reformulate the question to capture the real legal issue presented (*Tretsetsang v. Canada (Citizenship and Immigration)*, 2016 FCA 175, 398 D.L.R. (4th) 685 at para. 5 per Rennie J.A. (dissenting, but not on this point); *Canada (Citizenship and Immigration) v. Ekanza Ezokola*, 2011 FCA 224, [2011] 3 F.C.R. 417 at paras. 40-44, affirmed without comment on the point, *Ezokola v. Canada (Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 S.C.R. 678). Any reformulated question must, of course, also meet the criteria for a properly certified question.

[63] In my view, the proposed question is not suitable for certification. First, given my alternate finding that the Officer's decision was reasonable, the question is not dispositive. Second, I agree with the Respondent that the Federal Court of Appeal in *Thanabalasingham* has already set out the balance a Court should attempt to strike when making the discretionary decision as to whether the merits of the application should be considered if applicants come before the Court with unclean hands. This balance is as between the maintaining of the integrity of and preventing abuse of judicial and administrative processes and the public interest in ensuring the lawful conduct of government and the protection of fundamental human rights. The latter factor incorporates the importance of the individual rights affected and the likely impact upon the applicant if the administrative action is allowed to stand. In my view, this captures a consideration of the fact that one of the applicants may be a minor who is blameless with respect to the unclean hands of his or her parents. In other words, the balancing of the individual rights affected and the likely impact upon the applicant captures the impact of removal on the minor, but the discretion of the Court to consider the unclean hands of the parents is not precluded because one of the applicants is a blameless minor.

[64] By way of analogy, the Respondent refers to *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at paras 26-27 where the Federal Court of Appeal stated, in the context of an application for permanent residence based on humanitarian and compassionate grounds:

> [26] With respect to the first argument, I am satisfied that it was not incumbent on the officer to highlight the fact that the twins were innocent of any wrongdoing. The first case cited by the appellants for this proposition, *Momcilovic v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 79 at paragraph 53, does not suggest this in any way. The second, *Mulholland v. Canada*

> *(Minister of Citizenship and Immigration)*, [2001] 4 F.C. 99, (2001) F.C.T. 597, at paragraphs 29-30, only stands for the proposition that it is unreasonable for an immigration officer to effectively ignore the interests of a child on the basis that it was the parents' "choice" to have the child in the first place.
>
> [27] In this type of case, where children are "left behind" due to a parent's misrepresentation on an immigration application, it will usually be self-evident that the child was not complicit in the misrepresentation. Yet, it is well established that such misrepresentation is a relevant public policy consideration in an H&C assessment (see, for example: *Li v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1292 at paragraph 33). Inevitably, the factors favouring reunification of the family in Canada will not always outweigh the public policy concerns arising from a misrepresentation. This is not tantamount to "visiting the sins of the mother upon the children" as in *Mulholland*, *supra*, where the officer failed to consider the children's interests at all. Similarly, in my view, an officer is not bound to mention the fact that the parents' removal from Canada had not been sought as a result of their misrepresentations. If the parents were being removed, they would obviously not be in a position to sponsor a child in the first place. The fact that the parents are entitled to remain in Canada is a fact that will be self-evident in cases of children "left behind".

[65] In *Aslan v Canada (Citizenship and Immigration)*, 2015 FC 946 at para 16, Justice Diner stated that it is clear from the above paragraph that an officer can weigh the public policy considerations of a misrepresentation by a parent against the best interests of the child remaining in Canada in an humanitarian and compassionate application (at para 16). In my view, the application of the unclean hands doctrine is also one of public policy and a reviewing Court is not precluded from considering the doctrine simply because one of the applicants is a blameless minor. Rather, as stated above, the circumstances of the minor are captured in the balancing of the *Thanabalasingham* factors, which factors are not exhaustive.

[66] Thus, the question does not arise from the facts of the case nor is it dispositive.

JUDGMENT IN IMM-3717-17

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. There shall be no order as to costs.

3. No question is certified.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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