Federal Court  Cour fédérale

Date: 20111202

Docket: IMM-2353-11

Citation: 2011 FC 1406

Ottawa, Ontario, December 2, 2011

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

ROBIN CHOUDRY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of the decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board, dated 17 February 2011 (Decision), which refused the Applicant's claim for protection as a Convention refugee under section 96 or a person in need of protection under section 97 of the Act.

BACKGROUND

[2] The Applicant is a citizen of no country. He believes he is Bihari – an ethnic group from India. He has a letter which says his parents are Arshad Choudhary and Razia Begum, but he does not remember them or know where they were born. He does not know where he was born, but he believes he was born in 1982. He speaks Bengali and some Greek. The Applicant has a daughter, but he does not know where she is.

[3] When he was seven years old, the Applicant's parents died. Shortly after that, a man the Applicant called "Uncle Rahim" (Rahim) took him to Karachi, Pakistan and left him in an orphanage there. He was abused at the orphanage. In 1999, a man named Johnny Khan took the Applicant to Greece, telling him that he would bring him to Canada. The Applicant lived illegally in Greece, but found work in a garment factory. He was forced out of the garment factory when the factory managers decided to get rid of all their illegal workers. The Applicant then turned to selling goods on the street in Athens.

[4] While the Applicant was a street vendor in Greece, the Greek police harassed him and other street vendors. The police sometimes took goods from him without paying for them and solicited bribes. The Applicant grew tired of the police harassment and, because he thought he would be helped in Canada, he paid a smuggler to bring him here. The smuggler provided him with a false identity and passport, which the Applicant used to travel to Canada. He arrived in Canada on 31 December 2008.

[5] The Applicant claimed protection on 2 January 2009. The RPD held its hearing into his claim on 12 January 2011. The RPD panel member, the Applicant, and his counsel were present at

the hearing. Counsel made oral submissions at the hearing and written submissions on 14 February 2011. The RPD made its decision on 17 February 2011 and gave the Applicant notice of its decision on 16 March 2011.

DECISION UNDER REVIEW

[6] After reviewing the information before it, the RPD found that the Applicant was neither a convention refugee under section 96 of the Act nor a person in need of protection under section 97 of the Act. The RPD said that the determinative issue in Applicant's claim was identity, which he had failed to establish. The RPD also found that the Applicant did not have a well-founded fear of persecution in Greece, which was the appropriate country of reference because the Applicant was stateless and Greece was his last country of habitual residence.

Identity

[7] The RPD found that the Applicant was credible and that what he said had happened to him had actually occurred. Notwithstanding this positive finding of credibility, the RPD found that the Applicant had not established his identity on the basis of any credible evidence. The RPD noted that the Applicant did not have any government issued ID; the only documentary evidence he had to prove his identity was a letter from the orphanage in Karachi. That letter said that the Applicant had lived at the orphanage from 1989 to 1996 and also contained the names of his parents, Arshad Choudhary and Razia Begum. The RPD noted that there was no information on how the orphanage knew the names of the Applicant's parents and presumed that Rahim had told the workers at the orphanage.

[8] The RPD accepted the Applicant's assertion that he is Bihari. It found that the Applicant was born in Bangladesh because his parents' names are Bengali and he speaks Bengali. The RPD examined country documentation on Bangladesh. It said this evidence showed that only those born in Bangladesh before 1979 or to parents born in Bangladesh before 1979 are automatically citizens. The RPD found that the Applicant could not be a citizen of Bangladesh by birth, as he was born after 1979. It also found that he would be unable to establish citizenship by descent because he does not know who is parents are. The RPD noted that the Applicant had not been able to obtain identity documents from the Bangladeshi authorities in Canada, even though he had tried to do so. Since he is not a citizen of Greece, the Applicant is stateless.

[9] The RPD found that the Applicant had not established his identity, including his name, so his claim must fail. It pointed out to him at the hearing that "Robin" is a "Christian" name, which would be unusual in Bangladesh and Pakistan, which are predominantly Muslim countries. The Applicant said at the hearing that he did not know why he had that name and that Rahim had told him that it was his name.

[10] The RPD said that "it is not as if the claimant is vigorously asserting what his identity is." It noted that he was uncertain about his name himself; he had been dropped off at the orphanage when he was very young; and he "appeared to have just been given a name, for convenience." It found that the Applicant did not come even close to establishing his personal identity.

Country of Reference

[11] The RPD found that Greece was the appropriate country of reference against which to examine the Applicant's claim for protection. It found that the Applicant was neither a citizen nor a

national of Greece; however, Greece was his last country of habitual reference. As the Applicant's country of reference was Greece, the RPD examined whether he had a well-founded fear of persecution there.

Well-Founded Fear of Persecution

[12] The RPD noted that the Applicant had lived illegally in Greece without any status. It found that the problem he faced there was harassment from the police, either simply because he was illegally in the country or because he was illegally in the country and a street vendor. Though the RPD found the Applicant's story credible, it found that what the police did to him was simply harassment and did not amount to persecution on a Convention ground. It also found that, because he was illegally in the country, the Greek authorities had the right to act against him.

[13] Although, the Applicant's counsel at the hearing had submitted that the Greek authorities might deport the Applicant to Bangladesh if he were returned to Greece, the RPD found this would be a lawful course of action because he did not have status in Greece. Further, if he were deported from Greece to Bangladesh, the main problem that the Applicant would face there would be statelessness. Counsel's submissions at the hearing suggested that Biharis live in generally poor conditions; but the RPD found that Biharis in Bangladesh face widespread discrimination but not persecution.

[14] The RPD said that it had examined the Greece Index, a list of documents prepared by the Immigration and Refugee Board on the basis of publicly available information. The index showed that, as the Applicant testified, police in Greece abuse illegal immigrants. It also noted that Greece is a democracy, has civilian authorities which maintain control of the security forces, and has a fair

and independent judiciary. The RPD noted that Applicant could have claimed refugee status in Greece because Greece is a signatory to the 1951 *Convention Relating to the Status of Refugees* and the 1967 *Protocol Relating to the Status of Refugees*, but he did not.

Conclusion

[15] The RPD found that the Applicant's claim for refugee protection, based on his fear of persecution because of his lack of legal status in Greece, failed. His claim also failed because the RPD had insufficient credible evidence to find he had established his identity.

ISSUES

[16] The sole issue raised by the Applicant is whether the RPD's determination that Greece was the appropriate country of reference was reasonable.

STANDARD OF REVIEW

[17] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[18] In *M.R.A. v Canada (Minister of Citizenship and Immigration)* 2006 FC 207, Justice Konrad von Finkenstein found at paragraph 7 that the standard of review on the determination of a country

of reference was patent unreasonableness. In *El Rafih v Canada (Minister of Citizenship and Immigration)* 2005 FC 831, Justice Sean Harrington noted at paragraph 15 that a conclusion on country of reference is a question of mixed fact and law. As the Supreme Court of Canada held in *Dunsmuir*, above, at paragraph 51, such questions generally attract a standard of review of reasonableness. Further, Justice Michael Phelan followed a similar approach in *El Karm v Canada (Minister of Citizenship and Immigration)* 2006 FC 972, when he found at paragraph 7 that the standard of review on the determination of a country of former habitual residence was reasonableness *simpliciter*. The standard of review on the issue raised by the Applicant is reasonableness. See also *Tarakhan v Canada (Minister of Citizenship and Immigration)*, [1995] FCJ No 1525.

[19] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

STATUTORY PROVISIONS

[20] The following provisions of the Act are applicable in this proceeding:

Convention refugee	**Définition de « réfugié »**
96. A Convention refugee is a	**96.** A qualité de réfugié au

person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

…

…

(*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Person in Need of Protection

Personne à protéger

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themself of the

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

protection of that country,	
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,	(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
…	…

ARGUMENTS

The Applicant

[21] The Applicant argues that the RPD erred when it found that Bangladesh was not the appropriate country of reference to evaluate his claim against. He says that *Permaul v Canada (Minister of Employment and Immigration)*, [1983] FCJ No 1082 (FCA) establishes a presumption of truthfulness for claimants' testimony before the RPD. In his case, the RPD believed his story and found that he was born in Bangladesh. He says that the proper country of reference for his claim was Bangladesh because he was born there and is a citizen of no other country. This is so even though he is not a Bangladeshi citizen.

[22] There was documentary evidence before the RPD showing that Biharis, like the Applicant, are denied Bangladeshi citizenship. Though his counsel raised the situation of Biharis in his written submissions, the Applicant says that the RPD ignored this evidence.

[23] The Applicant also notes that he was illegally in Greece the entire time he was there and he was mistreated by the Greek police because he was an illegal immigrant. He says that if he were returned to Greece, the authorities there will send him to Bangladesh because he does not have Greek status. However, Bangladeshi authorities will deny him entry because he is not a citizen. He is not a citizen in Bangladesh because he is Bihari. Since his unfortunate situation revolves around his Bihari background, the RPD should have considered this. The RPD failed to assess the impact of the Applicant's Bihari background on his ability to obtain Bangladeshi citizenship, which amounts to a reviewable error.

The Respondent

[24] The Respondent says that the Applicant has not proven that he will face more than a mere risk of persecution in either Bangladesh or Greece. Though he may face discrimination in Bangladesh, the RPD's finding that this would not amount to persecution was reasonable, as was its finding that any harassment the Applicant might face in Greece would not amount to persecution. The Respondent says that the RPD's finding that the Applicant had not established his identity was also reasonable. Further, the RPD's findings that the Applicant was neither a convention refugee nor a person in need of protection were reasonable and should not be disturbed.

The Decision was Reasonable

[25] The RPD's findings that the Applicant was neither a convention refugee nor a person in need of protection were reasonable and were based on the evidence before it. Though there may be issues with the Decision, the RPD made reasonable findings that the Applicant will not face persecution in either Bangladesh or Greece. These findings render any other issues meaningless. The Respondent notes that the RPD may have ignored the 2009 UNHCR note on the Nationality Status of the Urdu Speaking Community in Bangladesh (2009 UNHCR Report) which suggested that, as a stateless Bihari, the Applicant may be eligible for citizenship in Bangladesh. The RPD may also have failed to consider Pakistan as a country of reference. These errors do not impugn the reasonableness of the findings that the Applicant did not adduce sufficient evidence to prove he is a Convention refugee or a person in need of protection. Since those findings are enough to dispose of the claim, the Decision should stand in spite of the technical errors.

[26] The Respondent also says that the RPD's finding that the Applicant had not established his identity, though its analysis may have been incomplete, was *obiter*. The RPD determined the Applicant's claim on the basis that he did not face persecution in either Bangladesh or Greece, so his identity does not matter. The RPD seems to have found that the Applicant did not establish his identity because he did not provide any identity documents. This could be an error under section 106 of the Act, but does not present an arguable issue here because the claim was determined on a different basis.

The RPD's Persecution Findings were Reasonable

[27] The Respondent argues that the RPD's findings that the Applicant would not face persecution were reasonable because they were based on the evidence that was before it. The Applicant did not demonstrate a serious possibility of persecution in Bangladesh or Greece, so the claim must fail.

Statelessness does not Amount to Persecution

[28] The highest claim that the Applicant could have made was as a stateless Bihari in Bangladesh and the RPD determined his claim on this basis. However, statelessness in and of itself cannot ground a refugee claim. The Respondent relies on *Thabet v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 629 (FCA) where the Federal Court of Appeal wrote at paragraphs 27 and 28 that

> [Where] a claimant has been resident in more than one country it is not necessary to prove that there was persecution at the hands of all those countries. But it is necessary to demonstrate that one country was guilty of persecution, and that the claimant is unable or unwilling to return to any of the states where he or she formerly habitually resided. While it may appear burdensome to impose this duty upon all stateless claimants, we must, in the light of Ward, properly take into account the situations where claimants have other possible safe havens.
>
> Stateless people should be treated as analogously as possible with those who have more than one nationality. There is a need to maintain symmetry between these two groups, where possible. It is not enough to show persecution in any of the countries of habitual residence--one must also show that he or she is unable or unwilling to return to any of these countries. While the obligation to receive refugees and offer safe haven is proudly and happily accepted by Canada, there is no obligation to a person if an alternate and viable haven is available elsewhere. This is in harmony with the language in the definition and is also consistent with the teachings of the

> Supreme Court in Ward. If it is likely that a person would be able to return to a country of former habitual residence where he or she would be safe from persecution, that person is not a refugee. This means that the claimant would bear the burden, here as elsewhere, of showing on the balance of probabilities that he or she is unable or unwilling to return to any country of former habitual residence. This is not an unreasonable burden. This is merely to make explicit what is implicit in Ward and in the philosophy of refugee law in general. […]

[29] To be successful in a claim for protection, a stateless person must establish both persecution and a lack of a safe alternative. The Applicant has not established persecution, so he cannot be a convention refugee or person in need of protection.

No Persecution in Greece

[30] The Respondent notes that the RPD concluded that the Applicant had not shown that he had been persecuted in Greece. The Federal Court of Appeal, in *Sagharichi v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 796 (FCA) at paragraph 3, held that "the dividing line between persecution and discrimination or harassment is difficult to establish" and that this is a decision for the RPD to make. The RPD found in this case that the Applicant might be deported to Bangladesh by the Greek authorities and that this would be legitimate enforcement of laws of general application. This was a reasonable conclusion and should not be disturbed.

[31] The Respondent also says that the lack of a legal right to enter a country of former habitual residence does not amount to persecution unless the refusal of entry arises based on a convention ground or an intention to persecute. See *Altawil v Canada (Minister of Citizenship and Immigration)*, [1996] FCJ No 986, and *Maarouf v Canada (Minister of Employment and*

Immigration), [1993] FCJ No 1329. Though the Applicant does not have a legal right to enter Greece, this does not amount to persecution and cannot ground his claim.

No Persecution in Bangladesh

[32] The Respondent notes that the RPD, though it was not required to, considered the Applicant's claim against Bangladesh. The only discrimination the Applicant has alleged against Bangladesh is a denial of citizenship. The Applicant has not provided any evidence of persecution or any risk to him if he returns to Bangladesh. The Applicant left Bangladesh with Rahim for reasons other than persecution or risk. Also, if he is actually entitled to Bangladeshi citizenship, as the 2009 UNHCR report suggests he is, there is no basis for his fear based on statelessness.

[33] Though the Applicant could point to similarly situated individuals in Bangladesh to establish his claim, he has not done so. The conditions faced by Biharis, which the Applicant referred to in his submissions to the RPD, are faced by people who have spent their entire lives in Bihari refugee camps in Bangladesh. These people are not similarly situated to the Applicant, who has not been to Bangladesh in more than twenty years. Though he may experience discrimination as a Bihari if he returns to Bangladesh, the Respondent says that the RPD's conclusion that this would not amount to persecution was reasonable, so the Decision should stand.

ANALYSIS

[34] The Applicant raises a single issue. He says that the country of reference for the RPD's Decision should have been Bangladesh, rather than Greece, based on the fact that he was born in Bangladesh and had not acquired citizenship or permanent residence in any other country. He also

says that the RPD committed a reviewable error because it failed to assess the impact of the Applicant's Bihari background on his ability to obtain Bangladeshi citizenship and the general situation of Biharis in Bangladesh. The Applicant appears to be suggesting that he qualifies for section 96 protection because he was "subjected to official discrimination in his own country [i.e. Bangladesh] including being denied citizenship because he is Bihari."

[35] The RPD specifically found that the Applicant would not be able to establish Bangladeshi citizenship because of when he was born, and his inability to identify his parents at paragraph 11 of the Decision:

> As to whether he is a citizen of Bangladesh, the Panel has reviewed Exhibit R/A-1. Item 3.1 thereof deals with this issue, and the Panel cannot find, on a balance of probabilities, that the claimant is a citizen of Bangladesh. It indicates generally that only persons born in 1971 or earlier in the country are deemed citizens, and their descendents. The claimant indicated that he believed he was born in 1982, thus he would not be a citizen by birth. The claimant does not know who his parents are, and thus, the Panel finds that the claimant would not be able to establish Bangladeshi citizenship. This finding is corroborated by the claimant's evidence that he has been unable to get citizenship documents from Bangladesh [*sic*] authorities in Canada, as well as counsel's submission that the Biharis are not citizens of Bangladesh.

[36] Evidence on the record, and before the RPD (i.e. the 2009 UNHCR report) suggests that the RPD made a fundamental mistake of fact on this point. That report notes a 2003 decision of the Supreme Court of Bangladesh which seems to say that Urdu speakers (i.e. Biharis) always qualified as Bangladeshi nationals under domestic legislation.

[37] The Respondent concedes this mistake by the RPD which means that the Applicant's claim should have been assessed against Bangladesh. The Respondent's position, however, is that the mistake does not matter because the RPD does address the situation in Bangladesh in paragraph 13

of the Decision. In any event, the Respondent says there was no evidence of persecution in Bangladesh before the RPD upon which a refugee claim against that country could have been based.

[38] The correct approach to these matters was set out by the Federal Court of Appeal in *Thabet*, above, at pages 9-10. Because the Respondent concedes that a mistake was made in the present case, I will not quote at length from *Thabet*.

[39] My review of the evidence placed before the RPD concerning the treatment of Biharis in Bangladesh, including the 2009 UNHCR report which suggests that their situation may have improved, required the RPD to assess and weigh the relevant evidence and reach a reasoned conclusion on point. Because the RPD made the mistake of focusing upon Greece, a proper assessment of the situation facing the Applicant in Bangladesh was never done. It is not clear from its reasons that the RPD considered all the evidence before it on Bangladesh. Even if it did so, the reasons at paragraph 13 are not adequate to support the conclusion the Applicant does not face persecution in Bangladesh because he is Bihari. In my view, the Decision is both unreasonable and procedurally unfair.

[40] Because the RPD makes it clear in the Decision that its focus was on Greece, I think it would be unsafe not to allow the Applicant a full consideration of a refugee claim against Bangladesh. Hence, for reasons given, I think this matter has to be returned for reconsideration.

[41] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is allowed. The decision is quashed and the matter is returned for reconsideration by a differently constituted RPD.
2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-2353-11
STYLE OF CAUSE:	**ROBIN CHOUDRY**
	- and -
	THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	Nobember 22, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	HON. MR. JUSTICE RUSSELL
DATED:	December 2, 2011

APPEARANCES:

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