Federal Court  Cour fédérale

Date: 20121018

Docket: IMM-955-12
IMM-957-12

Citation: 2012 FC 1216

Ottawa, Ontario, October 18, 2012

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

SOMAEL CHOWDHURY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] These reasons address two applications for judicial review arising from decisions of a senior immigration officer, dated December 2, 2011. The officer refused the applicant's request for an exemption from the in-Canada selection criteria for permanent residence on humanitarian and compassionate [H&C] grounds under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC, 2001, c 27 [IRPA], and found, in a pre-removal risk assessment [PRRA], that he would not be at risk of persecution or harm upon return to his country of origin.

[2] For the reasons that follow, both applications for judicial review are hereby dismissed. The issues raised by the applicant are not sufficient, individually or cumulatively, to justify this Court's intervention.

Background

[3] The applicant is 30 year old citizen of Bangladesh who worked as a manager-partner in an audio-video store in Dhaka. He came to Canada on a false passport on May 5, 2006, and claimed refugee protection. The applicant alleged that from January 2003 to May 2006, he was an active member of the Jatiya Party in Bangladesh and that, as a result of his political affiliations; he was harassed, extorted, and attacked by goons from the Bangladesh Nationalist Party/Jamaat-e-Eslami who wanted him to quit the Jatiya Party and join their party.

[4] The applicant said that he went to live in another town hoping things would calm down, and while he was there his business partner, who was associated with the Bangladesh Nationalist Party, took advantage of his absence and stole money from him. As he was trying to negotiate a settlement with his business partner, the latter informed him that the police were looking for him under what the applicant believed to be false charges. The applicant then left his hometown again and went to another city where he lived for four months before coming to Canada and seeking refuge.

[5] On July 15, 2010, the Refugee Protection Division [RPD] determined that due to major credibility concerns, including the credibility of the documentary evidence before it, the applicant's political affiliation and profile as an active member of the Jatiya Party was not satisfactorily established. On November 5, 2010, the applicant was denied leave to have the RPD decision judicially reviewed before this Court.

[6] On January 11, 2011, the applicant filed an application for an immigration visa exemption for H&C considerations, and on February 21, 2011, he applied for a PRRA. In support of these applications, he filed new evidence to be considered. This evidence included newspaper articles dealing with current country conditions in Bangladesh, as well as:

a. A letter from the applicant's lawyer in Bangladesh, dated March 8, 2011, indicating that a false charge was laid against the applicant on January 30, 2011, and that he risks being detained and punished upon return to Bangladesh;
b. A copy of a warrant for the applicant's arrest dated March 7, 2011, and an undated First Information Report [FIR] issued in his name;
c. An affidavit from the applicant's father, dated March 8, 2011, in which the latter states that his son owned a business in Bangladesh and that his former business partner maintained good relations with terrorists to protect his own interest and profits. He also states that his son was an active member of the Jatiya Party and was strongly involved in various development projects organized by his party relating to human rights, employment and education; he reiterates the incidents that allegedly

> made the applicant leave the country and asserts that his son is still at risk because of the charge more recently laid against him in January of 2011.

[7] The applicant alleged that although his problems occurred several years ago, the 2011 charge was most likely laid as his lawyer was trying to follow up on a previous warrant that was issued against the applicant, which brought him to the attention of the police again.

Negative PRRA Decision

[8] The officer noted that the RPD had found the applicant's principal allegations to lack credibility and stated that no further proof from a reliable and objective source was presented to allow a finding that, on a balance of probabilities, the applicant is or was an influential member of the Jatiya Party or that he is pursued by terrorists, the police or the Bangladeshi authorities. Similarly, no convincing proof was presented to establish that the applicant was involved in development activities in Bangladesh or that he was business partners with someone named Shoy(h)eb Chowdhury.

[9] The officer declined to consider evidence which was available or could reasonably have been made available before the RPD decision, and gave little to no probative value to the applicant's new evidence. The officer stated:

> I note first of all that no photocopy of the original documents was presented together with the warrant and the FIR. Similarly, the photocopied document that is supposed to accompany the FIR was not presented and translated. As well, the spaces reserved for signature and/or identification of the signatories are not signed by the person certifying that the copy is true and that the document was verified and declared to be correct.
>
> I note that the certified copy of the FIR indicated the date on which the incident occurred; however, it does not indicate on what date the FIR document was issued. I note as well an incongruity between the legislative provisions referred to in the arrest warrant and the FIR. Indeed, in the arrest warrant the legislative article cited is the "*Emergency Rules Section-34/6(1)(2) of 2007, dated 03-03-2011*"; in the FIR, the legislative article is "*Section-3/4/6(1)(2) breaking of Government and private assets*."
>
> [...]
>
> Considering the lack of evidence from an objective and reliable source in support of the allegations contained in this affidavit; considering the finding of the RPD with respect to the allegations and fears raised previously by the applicant and analyzed by the RPD; and considering that the affidavit comes from a subjective source not independent from the applicant, very little probative value will [be] assigned to it.

[10] The officer also rejected the news articles submitted by the applicant, stating that while those reports rendered an account of the overall climate of violence, corruption and political confrontation in Bangladesh, the applicant failed to show a connection between the general documentation and the personal risks he allegedly faced. Thus, as a result of serious credibility issues in relation to the factors set out in sections 96 and 97 of IRPA and concerning the new documentary evidence, the applicant's PRRA application was rejected.

Negative H&C Decision

[11] In regard to the applicant's H&C application, the officer first reviewed the applicant's establishment in Canada, noting his involvement as the president, director, or chief executive officer of three businesses in Canada at different points in time, in one of which he held a 25% share. The applicant also submitted evidence of bank transactions from the companies he was involved in but no personal tax returns. The officer concluded that the evidence did not support a finding as to the applicant's income or financial self-sufficiency in Canada and did not lead to an inference that the departure would cause unusual and undeserved or disproportionate hardship to the applicant, to his business partners in Canada (who were not unaware of the fact that the applicant's status in this country was uncertain), or to the Canadian community. The officer stated that though favourable, the applicant's beneficial economic ties in Canada are not automatically deemed sufficient grounds for granting a favourable H&C decision (*Irimie v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ 1906 at para 26, 10 Imm L R (3d) 206 [*Irimie*]).

[12] The officer further stated that the applicant had his own company in Bangladesh, and since his arrival in Canada he has demonstrated strong adaptation skills and entrepreneurial qualities. This suggests the applicant will be able to utilize these skills and qualities in the country where he has lived the majority of his life. Accordingly, the officer concluded this would not impose unusual, undeserved or disproportionate hardship on the applicant.

[13] For the same reasons as those stated in the PRRA decision, the officer stated that little to no probative value was assigned to the applicant's new evidence. The Court notes that part of the reasons provided in the H&C decision, more specifically the paragraphs dealing with the probative value to be given to the new evidence, refers to the applicant's alleged risks and fears in returning to Bangladesh. In fact, this part of the reasons seems to have been copied from the PRRA decision, with minor adjustments.

[14] Similarly, the officer noted that he gave slight probative value to a psychological report of Dr. Pilowsky, dated December 10, 2008, stating that the applicant suffers from post-traumatic stress syndrome. The officer rejected this evidence because it is addressed to a lawyer and is based on a single meeting with the applicant in December of 2008, while no other evidence was provided that the applicant followed up the therapy recommended to him by the psychologist.

Issues

[15] The following issues are raised in these applications for judicial review:

i. Whether the officer erred in law, or reached an unreasonable decision, in rejecting the arrest warrant issued against the applicant in January 2011, the letter from his lawyer in Bangladesh, and the affidavit from his father, for the purposes of both the PRRA and the H&C decisions;

ii. Whether the H&C officer erred in law by failing to consider relevant hardship factors, and instead addressed the risk factors which are irrelevant to an H&C decision;

iii. Whether the H&C officer erred in law by using a standard of establishment which exceeds the test of unusual, undeserving or disproportionate hardship; and,

iv. Whether the H&C officer erred in law by discounting the hardship caused to the applicant.

Review of the Impugned Decisions

The officer's assessment of the new evidence

[16] The applicant submits that the officer's requirement of a photocopy of the original complaint documents referred to in the FIR was contrary to this Court's jurisprudence which establishes that evidence must be considered for what it says and not for what it does not say (*Mahmud v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ 729 at para 11; *Bagri v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ 784 at para 11).

[17] The applicant takes issue with the officer's finding of disparity between the legislative provisions referred to in the arrest warrant and the FIR, arguing that the officer has no expertise in matters of criminal proceedings in foreign jurisdictions. It is also submitted that the officer's assessment of the evidence lacks contextualization. According to the applicant, the errors noted by the officer were of no significant import as they are minor and not unusual in documents from Bangladeshi authorities.

[18] The respondent argues that this disparity between the two documents reinforces the officer's decision to deny the documents probative value considering that no photocopy of the original document that should have been attached to the FIR was translated and presented. The FIR was also undated, and neither the FIR nor the warrant was duly certified as a true copy.

[19] In the Court's view, these issues suffice to shed doubt on the probative value of those documents on a balance of probabilities. Even if the officer's expertise does not allow him to determine the authenticity of foreign documents, the irregularities that he noted were material and his analysis was reasonable. The officer was not precluded from requiring a copy of the documents referred to in the FIR. The purpose of the FIR was for the applicant to establish that he faces an ongoing risk of persecution upon return to Bangladesh. Even if the "written charge sheet" or other documents originally attached to the FIR were not necessary to establish the alleged facts, they were reasonably necessary to make sense of the FIR and, consequently, of the arrest warrant.

[20] The applicant has cited a number of cases arguing that credibility findings should be stated in clear and unmistakable terms, and that the officer failed to make such a finding with respect to the letter of the applicant's lawyer to which the FIR and the arrest warrant were attached. The letter refers to the applicant's pending case in Bangladesh and since the officer clearly stated the reasons why he did not give weight to the documentary evidence which was intended to establish the existence of the pending case, he was not required to explicitly address the lawyer's letter in a separate finding.

[21] The applicant also takes issue with the officer's characterization of his father's affidavit as self-serving evidence which falls short of being "objective and reliable", as required by the officer. The applicant argues that according to the jurisprudence, a sworn affidavit cannot be rejected on the sole basis that it comes from a family member (*Grama v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1030, [2004] FCJ 1254; *Shafi v Canada (Minister of Citizenship and*

Immigration), 2005 FC 714, [2005] FCJ 896; *Sukhu v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1662, [2005] FCJ 2036).

[22] I agree with the applicant that there is nothing prohibiting new evidence from family members from being taken into account. However, the evidence submitted by the applicant will still be assessed as a whole. The affidavit of the applicant's father points to ongoing credibility problems, particularly in regards to the 2011 warrant and the applicant's pending case. The affidavit is unsupported by any exhibits while the officer provided valid reasons to disbelieve the veracity of the many facts stated therein. In fact, contrary to the cases cited by the applicant, the Court cannot identify a lack of analysis of the content of the affidavit in this case. In the circumstances, it was reasonable for the officer to consider that an affidavit from the applicant's father was insufficient to restore the applicant's credibility and establish a number of otherwise questionable facts.

[23] I conclude that the officer's evaluation of the applicant's new evidence was neither incorrect in law nor unreasonable.

The officer's consideration of relevant hardship factors

[24] The applicant contends that the officer engaged in a detailed analysis of risk factors in relation to the grounds of protection set out in sections 96 and 97 of IRPA, and even purported to assess whether the applicant would face discrimination in Bangladesh, but failed to assess whether the conditions in Bangladesh would give rise to hardship in the broader sense of an H&C application. The applicant argues that this constitutes an error of law because the officer failed to conduct an assessment of the relevant hardship factors.

[25] The test to be met for H&C applicants is whether they would face "unusual, undeserved, or disproportionate hardship" in having to apply for a permanent resident status from outside of Canada. The CIC manual entitled "Immigrant Applications in Canada made on Humanitarian and Compassionate Grounds" (IP5), s. 5.11, lists a series of non exhaustive factors relevant to a hardship assessment. These include:

- establishment in Canada;
- ties to Canada;
- the best interests of any children affected by their application;
- factors in their country of origin (this includes but is not limited to: Medical inadequacies, discrimination that does not amount to persecution, harassment or other hardships that are not described in A96 and A97);
- health considerations;
- family violence considerations;
- consequences of the separation of relatives;
- inability to leave Canada has led to establishment; and/or
- any other relevant factor they wish to have considered not related to A96 and A97.

[26] As stated earlier, part of the reasons provided in the H&C decision, specifically the paragraphs dealing with the probative value of the applicant's new evidence, incidentally refer to the applicant's alleged risks and fears in returning to Bangladesh. However, this is not what the officer based his H&C analysis on. He considered the applicant's establishment and ties in Canada, the alleged health and discrimination issues, and country conditions. The officer did note, on more than one occasion, that he was precluded from considering the risk/persecution factors contemplated in sections 96 and 97 of IRPA and there is no indication in the reasons that such factors were taken into consideration when assessing the applicant's hardship.

[27] Furthermore, the officer did not fail to assess hardship in relation to adverse country conditions. He simply found that the objective evidence submitted on this issue reported general conditions rather than ones that concerns the applicant's personal situation. Overall, I see no error of law in the officer's H&C analysis.

The officer's assessment of the applicant's establishment in Canada

[28] The applicant submits that the officer applied the wrong legal test by elevating a consideration of "establishment" in Canada to a test of being "essential" to Canada's economy, while acknowledging the applicant's efforts and contribution to the launch of various businesses in Canada.

[29] A close reading of the impugned reasons leaves no room for doubt that the officer's statement that "the documents presented in support of [the applicant's] application do not lead to an inference that the applicant is essential to the Canada's economy" was in response to the applicant's submission that "it would be beneficial for our country to keep him in Canada" because he allegedly "contributes to the economic growth and future employment of permanent residents and Canadian citizens". Having assessed the level of the applicant's establishment in Canada, the officer made explicit that the evidence did not establish "that his departure would cause unusual and undeserved or disproportionate hardship to the applicant, his business partners or this country." In view of the reasons provided in support of this finding, I do not agree that the officer's impugned statement reflects a different test or a higher threshold of establishment.

[30] It is not for the Court to reassess the applicant's evidence of establishment. It is sufficient to say that the officer's conclusion is supported by the evidence and falls within the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190).

The officer's assessment of the applicant's hardship

[31] The applicant also contends that the officer erred in law, and unreasonably exercised his discretion, by discounting the hardship caused to the applicant or other positive factors of establishment that supported the applicant's exemption request.

[32] The Court has no reason to find that the officer did not apply the correct H&C factors or discounted any relevant considerations. The officer correctly found that, in light of this Court's jurisprudence, including Justice Pelletier's decision in *Irimie*, above, at para 26, an applicant's economic ties in Canada are not automatically deemed sufficient grounds for granting a favorouble H&C decision, as this would result in the H&C process serving as "an *ex post facto* screening device which supplants the screening process contained in the Immigration Act and Regulations". *Irimie* also makes clear that "[t]he H&C process is not designed to eliminate hardship; it is designed to provide relief from unusual, undeserved or disproportionate hardship." A similar determination was made in *Willson v Canada (Minister of Citizenship and Immigration)*, 2007 FC 488 at para 22, [2007] FCJ 657, where the Court stated:

> [T]he applicant's representative submitted to the officer that the applicant had been in Canada for a significant period of time due to circumstances beyond his control. While I agree that the civil war in Liberia would have made it difficult for him to return, one must be careful when considering this particular argument. As I noted in *Lee v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 413, [2005] F.C.J. No. 507 (QL), H&C applications should not be interpreted in such a way as to encourage applicants to gamble on the fact that if they can stay in Canada long enough to demonstrate that they are the kind of persons Canada wants, they will be allowed to stay.

[33] In my view, this rationale squarely applies in the applicant's case. The applicant acknowledges that the H&C consideration is not meant to be another selection program for purposes of immigration, but yet argues that the officer's exercise of his discretion was inequitable because the establishment achieved by the applicant is a positive, not a negative, factor in the assessment. I do not find this to be the case. The question before me is not whether it is more equitable for the applicant to stay in Canada but whether the officer's decision falls outside the acceptable range of outcomes defensible, based on the facts and the law. The applicant failed to convince me that it does, just as he failed to identify any specific equitable principle that would have been breached in the impugned H&C decision.

[34] This application for judicial review is accordingly dismissed. No questions of general importance were proposed for certification and none arise from this case.

JUDGMENT

THIS COURT'S JUDGMENT IS THAT:

1. The applications for judicial review in Court files IMM-955-12 and IMM-957-12 are dismissed.

2. No questions are certified.

"Jocelyne Gagné"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**IMM-955-12** **IMM-957-12**
STYLE OF CAUSE:	**SOMAEL CHOWDHURY v MCI**
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