Federal Court  Cour fédérale

Date: 20130308

Docket: IMM-1748-12

Citation: 2013 FC 257

Ottawa, Ontario, March 8, 2013

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

GAUTAM CHANDIDAS,
REKHA CHANDIDAS, KARAN CHANDIDAS,
KUNAL CHANDIDAS, RHEA CHANDIDAS

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the *Act*], of the decision of a senior immigration officer (the officer), dated January 12, 2012, which refused the applicants' pre-removal risk assessment (PRRA) and found that the applicants would not be subject to a risk of persecution, danger of torture, risk to life or risk of cruel and unusual treatment or punishment if returned to their country of nationality, India.

Background

[2] The Chandidas family seeks judicial review of their negative PRRA decision. A brief description of the Chandidas' time in Canada is provided to situate this application.

[3] Gautam Chandidas, the principal applicant, is a citizen of India who arrived in Canada on a visitor's visa in August 2007. His wife, two sons and daughter arrived in November 2007.

[4] The applicants applied for refugee status in May 2008 based on the principal applicant's fear of persecution due to his experience in India. Mr Chandidas, who is Hindu, owned a garment factory in New Delhi that employed many Muslims. The Muslim employees demanded time off for daily prayers, which he refused due to production demands. Following a strike, he closed his factory. In retaliation, he was kidnapped twice and threatened. A fatwa was issued by a local mosque calling for his execution. Mr Chandidas fled and claims that he and his family cannot return to India.

[5] The Immigration and Refugee Board [the Board] denied the applicant's claim for refugee protection, finding that his claims lacked credibility, that a fatwa had not been issued and that the applicants had no subjective fear of persecution. Leave for judicial review of the negative decision was denied on September 8, 2011.

[6] In November 2011, the applicants applied for a PRRA, which reiterated the risks stated in the refugee protection claim. The principal applicant claimed that he and his family had no internal flight alternative.

[7] On January 12, 2012, the PRRA officer refused the application.

[8] In July 2010, prior to seeking the PRRA, the applicants had submitted an application for permanent residence from within Canada on humanitarian and compassionate [H&C] grounds based on the best interests of their child [BIOC] and on their establishment in Canada. The H&C application was refused by the same officer who refused the PRRA application and on the same day, January 12, 2012. The application for judicial review of the H&C decision was heard at the same time as the current application and was granted. Separate reasons for judgment were issued and can be found at *Chandidas v Canada (Minister of Citizenship and Immigration)*, 2013 FC 258.

[9] On March 13, 2012, this Court granted the applicants' motion to stay their removal from Canada.

Decision under Review

[10] The officer found that the applicants had an internal flight alternative [IFA] in Mumbai and as a result, that they would not be subject to a risk of persecution, danger of torture, risk to life or risk of cruel and unusual treatment or punishment if returned to India. The officer concluded that the applicants were not in need of protection under sections 96 or 97 of the *Act*.

[11] In reaching this conclusion, the officer considered the principle applicant's submission about the fatwa issued against him and which indicated that the family had no IFA. Due to their daughter Rhea's treatment and follow-up care for relapsed acute lymphoblastic leukemia [ALL], the applicants indicated that the only possible treatment center would be in Mumbai, where the principal applicant could be found by Muslims wanting to execute the fatwa. However, the applicants also submitted that this treatment center would not provide the treatment Rhea needed, putting the child's health and, possibly, life at risk.

[12] The officer rejected some documents submitted by the applicants on the basis that they did not constitute "new evidence" pursuant to paragraph 113 (a) of the *Act*, since they pre-dated the applicants' refugee claim. These documents included news reports on fatawa[1] and police dysfunction and impunity in India.

[13] However, the officer accepted other documents as new evidence, while noting that they should be excluded under paragraph 113 (a) of the *Act*. These documents related to the possibility of an IFA, which the Board had not examined. The officer accepted a letter from Dr Truong at Sick Kids Hospital in Toronto, describing the treatment needed, and an Executive Summary of the India Pediatric Oncology Initiative Meeting supported by the Jiv Daya Foundation, which described the barriers to treatment of childhood cancer in India. The officer also accepted a copy of a recent unsigned letter from the principal applicant's estate manager in India, which described the active status of the fatwa against him.

[1] According to the PRRA officer's reasons, 'fatwa' is pluralized as 'fatawa'.

[14] The officer indicated that he attributed significant weight to the findings of the Board, according to which the applicants did not face a risk of persecution. The officer noted that the principal applicant reiterated the same risks: that he fears Muslims in India because of the fatwa issued against him and he fears being executed, and that there is a lack of state protection due to the sheer number of Muslims in India. The officer attributed little weight to the letter provided by the principal applicant as new evidence of the active status of the fatwa.

[15] However, the officer did not make an explicit finding that a fatwa had not been issued.

[16] In assessing the forward-looking risk, the officer considered current country condition documents. These included a 2010 United States Department of State report describing India's democratic political system, as well as a 2007 Immigration and Refugee Board Response to Information Request [RIR] which examined fatawa in general.

[17] The officer concluded that the applicants had a reasonable and viable IFA in Mumbai because there was little evidence to suggest that the authority who issued the fatwa had far-reaching influence that would endanger the principal applicant there. The officer also concluded that the applicants would adapt to new environments, and that Rhea would have access to treatment for ALL in Mumbai.

The Issues

[18] Three issues arise in this application: whether the officer breached the duty of procedural fairness by relying on the RIR, which was public information but had not been disclosed to the

applicants; whether the officer failed to consider Rhea's best interests, as required by paragraph 3 (3)(f) of the *Act* (which provides that the *Act* is to be applied and construed in a manner that complies with international human rights instruments to which Canada is a signatory); and, whether the officer's IFA finding was reasonable.

[19] It is well settled that questions of mixed law and fact are assessed on a reasonableness standard, and questions of law and procedural fairness are assessed on a correctness standard: *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para 51 [*Dunsmuir*].

[20] While all three issues are canvassed below, I find that the determinative issue is the IFA finding. The IFA finding was not reasonable given the needs of the child, Rhea, for adequate treatment for ALL. It should be noted that the application for judicial review of the negative H&C decision was granted in *Chandidas v Canada (Minister of Citizenship and Immigration)*, 2013 FC 258, where the officer's assessment of the BIOC was found to be inadequate. The evidence with respect to the seriousness of ALL and the barriers to the availability of treatment in India was part of the record before the officer in both applications. The barriers to treatment make the IFA in Mumbai unreasonable.

Did the officer breach the duty of procedural fairness by relying on the RIR, which was public information but had not been disclosed to the applicants?

[21] The applicants submit that the officer breached the duty of fairness by failing to disclose extrinsic evidence, i.e. the 2007 RIR on fatawa, which the officer relied upon in determining that the fatwa would not be operative beyond the area of the principal applicant's former factory, and not in Mumbai, and in failing to provide the applicants an opportunity to respond.

[22] The applicants argue that the document was not available to them due to paragraph 113 (a) of the *Act*, which prevents PRRA applicants from relying upon evidence that pre-dates the rejection of their refugee claim (in this case, May 11, 2011). The applicants contend that this provision prevents them from making submissions to rebut the evidence relied upon by the officer because the evidence existed prior to the determination of the refugee claim – it was not "new" evidence.

[23] The respondent submits that there was no breach of procedural fairness since the officer was not required to notify the applicants that he would be relying upon public sources regarding general country conditions: *Mancia v Canada (Minister of Citizenship and Immigration)*, [1998] 3 FC 461, 147 FTR 307 (CA) at para 27.

[24] Section 113 (a) of the *Act* relates specifically to PRRA applications and provides:

113. Consideration of an application for protection shall be as follows:	**113.** Il est disposé de la demande comme il suit :
(*a*) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection 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;	*a*) le demandeur d'asile débouté ne peut présenter que des éléments de preuve survenus depuis le rejet ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'il n'était pas raisonnable, dans les circonstances, de s'attendre à ce qu'il les ait présentés au moment du rejet;
[…]	[…]
[emphasis added]	[je souligne]

[25] In *Asmelash v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1732, [2005] FCJ No 2145, the Court considered how the duty of procedural fairness applies with respect to the disclosure of public documents. Justice Blais, as he then was, noted:

> [14] In *Mancia v. Canada (Minister of Citizenship and Immigration)*, (1997) 125 F.T.R. 297, [1997] F.C.J. No. 120, Justice MacKay, at paragraph 13, confirmed that there is no obligation on the part of the officer to disclose information that is available from a public source prior to the date of any submission by the applicant:
>
> > I note that in Nadarajah, Rothstein J. considered the documentary evidence there in question to be from sources available to the public and he referred to the decision of Mr. Justice Rouleau in Quintanilla v. The Minister of Citizenship and Immigration, unreported, Court file IMM-1390-95, January 22, 1996 (F.C.T.D.), [1996] F.C.J. No. 84. In the latter case, where documentary evidence of country conditions considered in a PDRCC assessment is material that is publicly available, Rouleau J. held there was no obligation to inform the applicant, in advance of a decision, of specific documents concerning country conditions that are being considered. That same principle was applied in Nadarajah by Rothstein J., and in my view it is applicable here, at least with reference to documents published and available from public sources prior to the date of any submission by the applicant.
>
> [15] In *Chen v. Canada (Minister of Citizenship and Immigration)*, (2003) F.T.R. 297, [2002] 4 F.C. 193, Justice Hansen, at paragraphs 33-36, takes the analysis regarding extrinsic versus non-extrinsic evidence one step further by concluding that the distinction between the two is no longer determinative of whether the duty of fairness requires disclosure. She adopts the position that when dealing with matters of procedural fairness, the overriding concern with respect to the disclosure of evidence is whether the document, opinion, or report is one of which the individual is aware or deemed to be aware:

> The broad principle I take from Mancia is as follows. Extrinsic evidence must be disclosed to an applicant. Fairness, however, will not require the disclosure of non-extrinsic evidence, such as general country conditions reports, unless it was made available after the applicant filed her submissions and it satisfies the other criteria articulated in that case.
>
> In my view, both of these "rules" share a single underlying rationale. Fairness requires that documents, reports, or opinions of which the applicant is not aware, nor deemed to be aware, must be disclosed.
>
> The underlying rationale for the rule established in Mancia, in my opinion, survives Haghighi and Bhagwandass. The principle of those cases, generally stated, is that the duty of fairness requires disclosure of a document, report or opinion, if it is required to provide the individual with a meaningful opportunity to fully and fairly present her case to the decision maker.
>
> Therefore, while it is clear that the distinction between extrinsic and non-extrinsic evidence is no longer determinative of whether the duty of fairness requires disclosure, the rationale behind the rule in Mancia remains. I arrive at this conclusion because even in recent jurisprudence, applying the post-Baker framework for defining the duty of fairness, the overriding concern with respect to disclosure is whether the document, opinion, or report is one of which the individual is aware or deemed to be aware.
>
> [emphasis added]

[26] The applicants' concern relates to the fact that they could not adduce any evidence (old or new) to rebut the information included in the RIR because they were not aware that the officer was relying on this information to begin with. The applicants note that if they had been aware of the

officer's reliance on the RIR and if they had evidence to rebut this that pre-dated the IRB decision (for example, that reflected the same time period as noted in the RIR), they would have been precluded from raising this due to section 113 of the *Act*, and that this is unfair.

[27] In this case, the applicants claimed that a fatwa was issued and the onus was on them to establish that risk, which they endeavored to do in their submissions to the Board and in their submissions to the officer with the new letter from the estate manager. It should not be surprising that the officer would inform himself about fatawa in general.

[28] In my view, the failure to disclose the publicly available RIR is not a breach of procedural fairness. Section 113 of the *Act* only restricts the applicants' ability to adduce such information; it does not restrict the ability of the officer to use information that is not "new". The information was publicly available and the applicants could have accessed it. The applicants were deemed to be aware of it. Moreover, they had presented other new evidence regarding the fatwa, to which the officer attributed little weight.

[29] In some circumstances, section 113 of the *Act* may place an applicant in a 'catch 22' situation when the officer relies on new evidence (of which the applicant is not aware), but the applicant is restricted in rebutting that new evidence. In this case, the RIR was public information and provided balanced and general information about fatawa. The officer cited excerpts including the following: "Even though a fatwa may not be recognized by the government, the group that issued it takes it seriously. In such a case, a fatwa issued against an individual can be just as

dangerous as if it were government action against the individual". Moreover, the applicants did seek to introduce evidence about the risk to them of the fatwa.

[30] In these circumstances, there was no breach of procedural fairness as a result of the officer's reliance on the publicly available RIR.

Did the officer fail to consider the best interests of Rhea, as required by paragraph 3 (3)(f) of the Act, *which provides that the* Act *is to be applied and construed in a manner that complies with international human rights instruments to which Canada is a signatory?*

[31] The applicants submit that because Canada is a signatory to the *UN Convention on the Rights of the Child* [*UNCRC*], the *Act* must be interpreted in accordance with the Convention and therefore a BIOC analysis should have been conducted by the officer for the PRRA.

[32] The respondent submits that the *UNCRC* does not require that the interests of affected children be considered under every provision of the *Act*: *Mandida v Canada* (*Minister of Citizenship and Immigration*) 2010 FC 491, [2010] FCJ No 591; *de Guzman v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436, [2005] FCJ No 2119. The *Act* provides an effective opportunity to consider the BIOC pursuant to section 25, in H&C applications. Although the same officer may conduct the PRRA and the H&C assessment, these are separate decision-making processes with different considerations and tests.

[33] The two decision-making processes are indeed separate.

[34] In *Canada (Minister of Citizenship and Immigration) v Varga*, 2006 FCA 394, [2006] FCJ No 1828, the Federal Court of Appeal held that the best interests of the child need not be considered in every decision if there is another opportunity for such considerations:

> [13] Neither the Charter nor the *Convention on the Rights of the Child* requires that the interests of affected children be considered under every provision of the *Act*: *de Guzman v. Canada (Minister of Citizenship and Immigration)*, [2006] 3 F.C.R. 655, 2005 FCA 436 at para. 105. If a statutory scheme provides an effective opportunity for considering the interests of any affected children, including those born Canada, such as is provided by subsection 25(1), they do not also have to be considered before the making of every decision which may adversely affect them. Hence, it was an error for the Applications Judge to read into the statutory provisions defining the scope of the PRRA officer's task a duty also to consider the interests of the adult respondents' Canadian-born children.

[35] In *Pinter v Canada (Minister of Citizenship and Immigration)*, 2005 FC 296, [2005] FCJ No 366, Chief Justice Lutfy noted the difference between the assessment of risk factors in an application for humanitarian and compassionate consideration and one for protection from removal:

> 3 In an application for humanitarian and compassionate consideration under section 25 of the Immigration and Refugee Protection Act (IRPA), the applicant's burden is to satisfy the decision-maker that there would be unusual and undeserved or disproportionate hardship to obtain a permanent resident visa from outside Canada.
>
> 4 In a pre-removal risk assessment under sections 97, 112 and 113 of the IRPA, protection may be afforded to a person who, upon removal from Canada to their country of nationality, would be subject to a risk to their life or to a risk of cruel and unusual treatment.

[36] While recent amendments to section 25 of the *Act* have clarified that the risk factors considered in sections 96 and 97 should not be considered in H&C applications, but that other hardships may be considered, that amendment is not at issue in this case. The cases referred to above continue to describe the distinction between the two processes.

[37] Similarly in *Hamam v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1296, [2011] FCJ No 1585, Justice Mandamin noted:

> [41] The jurisprudence sets out that the risk in an H&C application is that of hardship which is different from the risk to be considered in a PRRA application. As Justice Montigny stated in *Ramirez*, "[i]t is beyond dispute that the concept of 'hardship' in an H&C application and the 'risk' contemplated in a PRRA are not equivalent and must be assessed according to a different standard."

[38] The two assessments are different, and the better opportunity to consider the BIOC is in the context of an H&C application. In this case, the applicants made an H&C application, which was refused by the same officer who refused the PRRA. The officer found that Rhea's best interests would be met by returning to India because treatment was available for her there. Judicial review was granted for the H&C decision upon finding that the officer failed to conduct an appropriate BIOC analysis and for other reasons (see file no. IMM-1750-12).

[39] Although the officer was not required to conduct a full BIOC analysis in the context of the PRRA, he did engage in a partial analysis of the BIOC in determining that an IFA existed in Mumbai.

[40] Dr Truong's letter indicated that "cancer outcomes and overall survival is well known to be higher in developed countries such as Canada where there is a network of excellent pre-hospital care (ie. EMS, ambulance), provision of supportive care (antibiotics and blood products), and excellent inpatient hospital services (diagnostic imaging and access to essential medications)".

[41] Dr Truong also indicated:

> The treatment of relapsed leukemia is **physically** and **psychologically** demanding on a young child. The chemotherapy is much more intensive and requires multiple clinic visits and long periods of hospitalization. The regime is so intense that rarely, a few children will die while on therapy. Rhea has had a *few* instances during the treatment where she has had some life threatening episodes and had to be admitted to the intensive care unit. The provision of timely and high quality care offered here has allowed her to recover from those episodes without any complications.
>
> The successful treatment of children with cancer requires high quality medical care, the availability of specialists in oncology and other medical specialties, and a multidisciplinary team of personnel that includes nurses, pharmacists, dieticians and social workers to name a few. It requires access to diagnostic imaging services such as CT and MRI scanners and access to essential chemotherapeutic drugs, such as those that Rhea is currently receiving.
>
> [emphasis in original]

[42] The Jiv Daya Report (India Pediatric Oncology Initiative Meeting) included information that described the obstacles to treatment for children with cancer in India. The report indicated that the overall cure rate in India varied between 10 and 25%, compared to 70% in the United States. The report also indicated that there were over 40,000 new cases of childhood cancer each year in India and 70% have advanced disease at diagnosis. There are only 55 practicing paediatric oncologists in all of India.

[43] The report indicated that the barriers to treatment identified included the lack of infrastructure, insufficient staff, lack of training, economic restraints and other challenges related to the delivery of care, and that the common issue expressed was the constant influx of patients, inadequate beds to see them all and insufficient staff to treat them.

[44] The evidence highlights that the treatment for relapsed ALL is specialised. The officer's conclusion that there was little evidence that medical treatment would not be available in Mumbai is not reasonable.

Was the officer's IFA finding reasonable?

[45] The test for an IFA is well established and there is a high onus on the applicant to demonstrate that a proposed IFA is unreasonable: *Ranganathan v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 164, [2000] FCJ No 2118 (CA). The two-pronged test for an IFA has been cited in many cases and was established in *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589, [1993] FCJ No 1172 (CA), which continues to apply.

[46] The test is: (1) the Board (or in this case, the officer) must be satisfied, on a balance of probabilities, that there is no serious possibility of the claimant being persecuted in the proposed IFA; and, (2) conditions in the proposed IFA must be such that it would not be unreasonable, upon consideration of all the circumstances, including consideration of a claimant's personal circumstances, for the claimant to seek refuge there.

[47] In the present case, the officer found that Mumbai offered a reasonable IFA because no one beyond the immediate area of the principal applicant's former factory would feel compelled to follow the fatwa, the applicant and his family would adapt to Mumbai, and Rhea would have access to treatment there.

[48] For the reasons noted above, the finding that the applicants had provided little evidence that medical treatment would not be available in Mumbai is unreasonable. The evidence establishes the barriers to treatment in India and highlights that Rhea has been treated for relapsed ALL which requires specialised treatment and follow-up care.

[49] Due to the personal circumstances of the applicant's family, particularly the needs of Rhea for access to prompt and high quality treatment and follow-up for ALL, the second branch of the IFA test has not been met.

Proposed Certified Question

[50] The applicants proposed the following question for certification:

> *Do the principles of fairness dictate that a PRRA officer must, before arriving at his or her final determination on a PRRA application, when relying on evidence referred to in subsection 113 (a) of IRPA, which evidence the PRRA applicant could not rely upon in his or her PRRA application by operation of subsection 113 (a) of IRPA, disclose that said evidence to the PRRA applicant and afford him or her an opportunity to rebut that evidence.*

[51] The respondent has replied that the proposed question does not meet the test for certification as it is not a serious question of general importance that will be dispositive of the appeal. The question pertains to the disclosure of a particular country condition document, and therefore would not be a question of general importance: *Gunaratnam v Canada (Minister of Citizenship and Immigration)*, 2011 FC 122, [2011] FCJ No 194. Moreover, the law is well settled that PRRA officers need not disclose public documents relied upon about country conditions and which were available and accessible at the time the submissions were made: *Mancia*, above; *Hernandez v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1301, [2011] FCJ No 1588; *Holder v Canada (Minister of Citizenship and Immigration)* 2012 FC 337, [2012] FCJ No 353.

[52] As noted above, the applicants were deemed to have been aware of the publicly accessible RIR and hence disclosure was not required. The applicants had also sought to adduce some new evidence about the fatwa, to which the officer attributed low weight. The question proposed for certification does not aptly capture the hypothetical situation faced by the applicants. In addition, its determination would not be dispositive.

[53] No question is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed and the PRRA should be remitted for consideration by a different officer;

2. No question is certified; and,

3. No costs are awarded.

"Catherine M. Kane"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1748-12
STYLE OF CAUSE:	GAUTAM CHANDIDAS ET AL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	October 2, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	KANE J.
DATED:	March 8, 2013

APPEARANCES:

Jeremiah Eastman	FOR THE APPLICANT
Kevin Doyle	FOR THE RESPONDENT

SOLICITORS OF RECORD:

EASTMAN LAW OFFICE Professional Corporation Toronto, Ontario	FOR THE APPLICANT
MYLES J. KIRVAN Deputy Attorney General of Canada	FOR THE RESPONDENT