Federal Court  Cour fédérale

Date: 20140610

Docket: IMM-7893-13

Citation: 2014 FC 556

Ottawa, Ontario, June 10, 2014

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

MORSHED ALAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] "It is in Canada's legitimate interests to avoid becoming a "haven for criminals and others whom we legitimately do not wish to have among us" and who are in violation of its domestic laws and its international obligations, this "to promote international justice and security by fostering respect for human rights…" (Reference is made to: *Zazai v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.R. 78, [2004] F.C.J. No. 1649 (F.C.) (QL); aff'd 2005

FCA 303, [2005] F.C.J. No. 1467 (C.A.) (QL)…" (*Jayasinghe v Canada (Minister of Citizenship and Immigration)*, 2007 FC 193, 309 FTR 185); however, this is not such a case.

[2] Also, as stated in *Jayasinghe* above:

> [40] In *Chiau v. Canada (Minister of Citizenship and Immigration)*, [1998] 2 F.C. 642, [1998] F.C.J. No. 131 (T.D.) (QL); affirmed [2001] 2 F.C. 297, [2001] F.C.J. No. 2043 (C.A.) (QL); leave to appeal to the Supreme Court of Canada dismissed, [2001] S.C.C.A. No. 71 (QL), Justice Jean-Eudes Dubé explained the standard of "reasonable grounds" as follows:
>
> > [27] The standard of proof required to establish "reasonable grounds" is more than a flimsy suspicion, but less than the civil test of balance of probabilities. And, of course, a much lower threshold than the criminal standard of "beyond a reasonable doubt". It is a bona fide belief in a serious possibility based on credible evidence.
>
> (Reference also is made to: *Zazai*, above; *Moreno v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 298, [1994] F.C.J. No. 912 (QL); *Qu v. Canada (Minister of Citizenship and Immigration)*, [2002] 3 F.C. 3, [2002] F.C.J. No. 1945 (C.A.) (QL), at para. 28.

[3] Based on the case-specific evidence, under the jurisprudence prior to *Ezokola v Canada (Minister of Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 SCR 678, this case, when analyzed, neither appears to meet the requirements of the conclusion reached by the Refugee Protection Division [RPD] of the Immigration and Refugee Board [Board] for jurisprudence of the past, nor for that of the present, subsequent to *Ezokola*. The statements in regard to exclusion clauses from jurisprudence cited above, in and of themselves, are not altered by *Ezokola*.

II. Introduction

[4] The Applicant seeks judicial review of a decision of the RPD, dated November 14, 2013, wherein it was determined that the Applicant was excluded from refugee protection under Article 1F(*c*) of the United Nations Convention Relating to the Status of Refugees [Refugee Convention] and pursuant to section 98 of the *Immigration and Refugee Protection Act*, SC 2001 c 27 [IRPA].

III. Background

[5] The Applicant, Mr. Morshed Alam, is a citizen of Bangladesh. Prior to his arrival to Canada he was an active member of the Bangladesh Nationalist Party [BNP], a rival political party to the country's current governing party, the Awami League [AL].

[6] The Applicant joined the BNP as a general member of the Deoti Union Branch of the Noakhali district in 2001. The Applicant became an executive member of that branch in 2003, and later Publicity Secretary, in 2006. As Publicity Secretary, he was mainly responsible for following media coverage of the BNP, printing posters for events, and recruiting voters.

[7] The Applicant claims that, since the beginning of his political involvement in the BNP, the local AL has intimidated him and physically assaulted him on several occasions. The Applicant nonetheless continued to serve his party.

[8] The Applicant claims that in 2007, the political landscape changed in Bangladesh, as an army-backed caretaker government took over control of the country. The Applicant alleges that this new government imposed bans on political activities and carried out a repressive campaign against the BNP. The Applicant claims that, despite these bans, he and two other members of the BNP secretly held meetings at his home and decided to make and post posters throughout his district.

[9] In September 2007, the Applicant claims that he was captured and held in an army camp. Fearing for his life after this incident, the Applicant states that he obtained a temporary work visa in Canada to work as a Halal meat cutter.

[10] The Applicant arrived in Canada in September 2008 and sought refugee protection on May 9, 2012.

[11] On November 14, 2013, the RPD rejected the Applicant's application for refugee status in Canada which is the underlying application before this Court.

IV. Decision under Review

[12] Without deciding the merits of the Applicant's refugee claim, the RPD rejected the claim under Article 1F(*c*) of the Refugee Convention, on the ground that he was an accomplice to the violent acts committed by the BNP between 2001 to 2008, that were "contrary to the principles and purposes of the United Nations" (at para 10).

[13] The RPD determined that it did not believe that the Applicant was unaware of the violence committed by the BNP during his involvement with the organization, particularly in light of the fact that he had been the Publicity Secretary of his local branch since 2006; and, there had been widespread media coverage of the violent incidents by the BNP. The RPD did not deem it possible for a person with the Applicant's profile not to have known of the violent acts committed by the BNP, particularly in his own district. The RPD also gave significant weight to the fact that the Applicant blamed the BNP's political rival, the AL, for the majority of the violence reported by the media in its credibility findings.

[14] The RPD concluded by stating that the Applicant was not a mere member of the BNP, but rather, someone who was complicit in the violence committed by it. The RPD noted that the Applicant had held an executive position within the BNP, that he had spent a considerable amount of time at the local party headquarters and that he had recruited over 100 members. These factors, in the RPD's view, were clear examples of a "significant contribution" to the BNP's violent activities (at par 23). Consequently, the RPD found that the Applicant, although not directly involved in the violence acts, met the threshold for exclusion under Article 1F(*c*) of the Refugee Convention.

V. Issue

[15] Is the RPD's determination that the Applicant should be excluded under Article 1F(*c*) of the Refugee Convention reasonable?

VI. Relevant Legislative Provisions

[16] The following legislative provisions of the IRPA are relevant:

96. A Convention refugee is a 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,	96. A qualité de réfugié au 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 :
(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	*a*) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(*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.
…	[…]
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	*b*) soit à une menace à sa vie ou au risque de

unusual treatment or punishment if	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 protection of that country,	(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(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.
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.
…	[…]
98. A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.	98. La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.

[17] The following provision of the Refugee Convention is also relevant:

1F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:	1F. Les dispositions de cette Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser :
…	[…]
(*c*) he has been guilty of acts contrary to the purposes and principles of the United Nations.	*c*) Qu'elles se sont rendues coupables d'agissements contraires aux buts et aux principes des Nations Unies.

VII. Standard of Review

[18] The Applicant's complicity in the violence perpetrated by the BNP and his exclusion pursuant to Article 1F(*c*) of the Convention constitutes a question of mixed fact and law and the standard of review is that of reasonableness (*Plaisir v Canada (Minister of Citizenship and Immigration)*, 2007 FC 264, 325 FTR 60; *Salgado v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1, 289 FTR 1; *Harb v Canada (Minister of Citizenship and Immigration)*, 2003 CAF 39, 238 FTR 194).

VIII. Analysis

[19] The Applicant submits that the RPD erred in its assessment of the evidence in regard to his alleged complicity, notably by ignoring the documentary evidence regarding the structure of the four-party alliance government in place at the time the violent acts were committed – consisting of the Jamat-E-Islami, the Bangladesh Jatiya Party [BJP], the Islami Oikko Jote [IJO]

and the BNP. The Applicant states that each of these individual parties had its own respective agenda.

[20] The Applicant also submits that the RPD failed to examine the documentary evidence found at Exhibit D of the Applicant's Record, which corroborated his statement that members of the AL were most often the perpetrators of violence; this is in regard to the climate that reigned therein. Thus, the matter cannot simply be dismissed summarily, as if the RPD was saying, a "plague on both their houses".

[21] Lastly, the Applicant submits that the RPD misinterpreted the evidence in his testimony. The Applicant notes, for example, that he did not indicate that there were no incidents of violence caused by his political party. Rather, he acknowledged that there were some bad elements in the BNP as in any organization with millions of members, but that he had never been involved in violent activities and would have tried to obstruct or prevent such activities if they were taking place in front of him.

[22] The Respondent submits that the RPD reasonably assessed the evidence in regard to the Applicant's activities and the documentary evidence in respect of the political violence in general in Bangladesh, and was, according to the Respondent, open to conclude that the Applicant had knowingly and voluntarily contributed to the BNP's violence. The Respondent states that the evidence before the RPD demonstrated that the use of violence by political parties in Bangladesh was widespread; therefore, it was unlikely that the Applicant would not be aware of it, as he testified he followed the media outlets as Publicity Secretary for his branch.

[23] The Court recognizes that the RPD had complete jurisdiction to weigh the evidence and draw the inferences and conclusions which it considered appropriate; and as long as these findings are not so unreasonable as to warrant the Court's intervention, they are not open to judicial review (*Aguebor v Canada (Minister of Employment and Immigration)* (1993), 160 NR 315 (FCA)); however, in this case, the Court believes that its intervention is warranted, simply on the basis of the overall record as per *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654 and *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708.

[24] After having carefully reviewed the record, the Court finds that the RPD unreasonably called into question the Applicant's credibility in regard to his knowledge of and involvement in violence committed by the BNP by misinterpreting the Applicant's testimony and dwelling on implausibilities that were unsupported, if not contradicted outright, by the evidence.

[25] The RPD found that the Applicant was not credible primarily because the Applicant testified that most of the violence reported in the media was committed by the governing political party in Bangladesh, the Awami League, and that the BNP was primarily the victim in clashes between the two parties. This testimony, according to the RPD, demonstrated the Applicant was "blinded by his loyalty to [the] party" and that he "seem[ed] to only want to believe one side of the story" (at para 30-31). The RPD found it implausible that a member of the BNP with his profile, as Publicity Secretary, would hold such a view.

[26] The Court is of the view that it was completely unreasonable for the RPD to conclude that the Applicant was not credible on this basis. In drawing its negative inference from the Applicant's testimony, the RPD appears to have used the Applicant's mere allegiance to the BNP to question his integrity (Hearing Transcript at p 53, third paragraph). There was little, if any, evidence before the RPD that indicated that the Applicant's belief was wrong or untruthful. Rather, the most recent evidence on the record clearly supported the Applicant's belief. The report submitted by the Applicant entitled, Report on the Electorate Violence - 17 October to 30 October 2006 [Report], published by the Asia Foundation confirms it. (This account of a continued heightened level of violence by the AL against the BNP was recently acknowledged in *Mohammed v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1268 at para 37.)

[27] As the RPD reached its decision without taking into account this key piece of evidence, the Court finds that its implausibility finding is flawed. While the RPD was not required to refer to and analyze every single piece of evidence when examining the merits of the case (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35 at para 17), the Court finds that it was required to at least summarily address the Report given its key relevance to the Applicant's assertion. Its failure to address it in its analysis, in the Court's view, led to an unreasonable conclusion that the Applicant lacked credibility.

[28] In reviewing the Hearing Transcript, the Court also finds that the RPD misinterpreted the Applicant's testimony regarding whether the BNP had committed violent acts.

[29] After reading the Hearing Transcript, it is clear that the Applicant did not deny that the BNP had committed violent acts, nor did he assert that the political violence was "all one-sided against the BNP" (RPD Decision at para 31, 32 and 36). Bangladesh, as the Applicant testified, is a country often immersed in a violent climate. The Applicant admitted several times during his exchange with the Board Member that he was aware that there were members of the BNP that had engaged in violent or illegal activity during his membership in the party (see Transcript at pp 21, 45, 53, 54 and 55). For example, the Court makes reference to the following exchange at pages 21-22:

> BY PRESIDING MEMBER (to claimant)
>
> - Are the attacks always one sided?
>
> …
>
> BY CLAIMANT (to presiding member)
>
> - There are some – when there are a million people involved in this kind of activity of course there will be some people that are from our faction.
>
> BY PRESIDING MEMBER (to minister's counsel)
>
> - Please proceed.

[30] The Applicant confirmed that there were some "good and bad elements" in the BNP, however, he had never been involved in violent activities and did not condone such activities (see Hearing Transcript at pp 53-54).

[31] The Court cannot accept that this evidence further demonstrates that the Applicant was wilfully blind to the violence committed by his party. The Court agrees with the Applicant that

the RPD erred in its appreciation of this testimony, which very clearly contradicts its conclusion, bearing in mind the objective country condition evidence.

[32] Overall, the Court does not consider that the evidence above, as assessed by the RPD, provides a reasonable basis for finding that the Applicant was not credible. Despite the existence of evidence on the record that demonstrates that the BNP committed violent acts while the Applicant was an active member of the party, it is not, at all "obvious", as was stated, that the Applicant was wilfully blind to these acts, and, therefore, knowingly contributed to them. Rather, it appears still quite unclear what the Applicant did or did not know, or could be considered or believed that he might even have known, and what role, if any, he played in the furtherance of any criminal act or purpose, anywhere in his periphery or purview, recognizing where specifically he was from and who he was in the overall apparatus of the party.

[33] The Court is reminded that, as stated by the Supreme Court in Canada in *Ezokola*, above, the test for determining complicity is not as simple as proving mere membership to an organization. It must include the factors of "an individual [who] has voluntarily made a significant and knowing contribution to a group's crime or criminal purpose" (*Ezokola* at para 8 [emphasis added]). In this case, the Applicant appears, credibly, to be unaware of any criminal purpose the group might have had. The Court also cautions, as it has previously, that a decision-maker should only proceed with implausibility findings in the clearest of cases borne out by contradiction or implausibility: *Valtchev v Canada (Minister of Citizenship and Immigration),* 2001 FCT 776, 208 FTR 267; reference is also made to *Diaz v Canada (Minister of Citizenship and Immigration)*, 2014 FC 389. This, on its specific evidence, was not one of those cases.

[34] Whether, prior to *Ezokola*, or subsequent to it, this case does not appear, at all, to meet the requirements of the conclusion reached by the RPD. The Court duly notes this is a case significantly revolving on its evidence, that is, that of the Applicant and of his testimony which is borne out by the objective country condition evidence which, as to the latter objective evidence, in and of itself, has not been put into question.

IX. Conclusion

[35] For all of the above reasons, the Applicants' application for judicial review is granted and the matter is returned for determination anew (*de novo*) before another member of the Board.

JUDGMENT

THIS COURT'S JUDGMENT is that the Applicant's application for judicial review be granted and the matter be returned for determination anew (*de novo*) before another member of the Board with no question of general importance for certification.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Michael Dorey	FOR THE APPLICANT
Sherry Rafai Far	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Michael Dorey Barrister and Solicitor Montréal, Quebec	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT