Federal Court Cour fédérale

Date: 20141008

Docket: IMM-7446-13

Citation: 2014 FC 948

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, October 8, 2014

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

ZAHIRUL ISLAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA) of a decision dated October 22, 2013, by Harry Dortelus (the member), a member of the Immigration and Refugee Board (Refugee Protection Division), rejecting the refugee protection claim of Zahirul Islam (the applicant). More specifically, the member determined that the applicant was neither a refugee nor a person

in need of protection within the meaning of sections 96 and 97 of the IRPA because of his lack of credibility and because there was an internal flight alternative.

[2] For the reasons that follow, I am of the opinion that this application for judicial review should be dismissed.

I. Facts

[3] The applicant was born in 1955 in the Demra region, Dhaka district, Bangladesh, where he resided until his arrival in Canada on August 3, 2012. He owned a business in the automobile industry. He left behind his wife and four children, who still reside in Demra.

[4] The applicant alleges that he was persecuted in his country because of his role in an opposition political party, the Jatiya Party (JP). In his Personal Information Form (PIF), and in the affidavit he filed in this Court in support of his application for judicial review, he submits that he joined this party in January 1996, later becoming the publicity secretary for his region in March 2001 and finally the vice-president for his region in January 2011.

[5] In his PIF and his affidavit, the applicant describes being a victim of violence and extortion on multiple occasions. He states, among other things, that in 1996 he was arrested at a demonstration and detained overnight. In October 2001, he was allegedly beaten in the street by members of the Bangladesh Nationalist Party (BNP). He states that he was once again the victim of extortion and a beating in 2006, again by members of the BNP.

[6] In 2008, the general election in Bangladesh was won by an alliance of multiple political parties, including the JP, the BNP and the Awami League. When the Awami League failed to live up to its commitments to the JP, it apparently left the alliance in 2011 and joined the ranks of the opposition.

[7] The applicant claims that in December 2011 and in May 2012, he was assaulted and extorted by a group of Awami League thugs. He says that he tried to file a complaint with the police, but his complaint was not processed. In July 2012, the same group allegedly came after him, giving him two weeks to leave the JP, join the Awami League and pay them 5 million takas (the equivalent of approximately CAN$70,000). Three days later, the applicant decided to leave his country and go to Canada.

[8] On August 13, 2012, the Awami League thugs allegedly came back to the applicant's home and threatened to kill him if they ever found him. The applicant's spouse allegedly called the police, but to no avail. On the contrary, it is alleged that the police came to his home the next day and raided it with the intention of arresting him. The applicant states that it was at this moment that he decided to claim refugee protection.

II. Impugned decision

[9] In its reasons, the tribunal points out several contradictions. First, the member noted that, after asking questions about the assaults by the BNP, he asked Mr. Islam if he had had any problems with other people in his country. The applicant first said that he had not but then added that he had also had problems with members of the Awami League. The member found that the applicant's initial answer was suspicious, in that the more recent and remarkable events in his story concerned the Awami League. He deduced from this that the incidents involving the Awami League were an [TRANSLATION] "embellishment" added by the applicant to strengthen his refugee protection claim.

[10] The member was also of the opinion that the applicant's vague answers regarding his duties as the JP's publicity secretary and vice-president were suspicious. He found that if the applicant had really held these positions, he would have been able to describe them in detail rather than simply state that he [TRANSLATION] "helped the poor".

[11] The member also noted a contradiction between the letter from the president of the Demra Union Branch of the JP certifying that the applicant served as publicity secretary and president of that local branch of the JP and the applicant's testimony to the effect that he was vice-president. When confronted with this discrepancy between his testimony and the president's letter, the applicant claimed that an error had been made in translating the original letter from Bengali. The member rejected this explanation and concluded that the applicant had not succeeded in showing that he was more than a mere ordinary member of this party.

[12] The member also noted that the applicant had travelled to Thailand and Malaysia in 2012 and had decided each time to return to his country despite the incidents alleged in his testimony. What is more, he did not leave his country until August 2012, whereas he had obtained a Canadian visa in May 2012. The member concluded that this showed a lack of subjective fear, since a person fearing for his or her safety would have seized the first opportunity to flee the country.

[13] Relying on the national documentation package for Bangladesh, which reports that violent incidents between political parties are often related to criminal activities rather than ideological reasons, the member stated that he was of the view that the extortion attempts alleged by the applicant were clearly due to the fact that he was a prosperous businessman, rather than political considerations. Finally, the member relied on his finding that the applicant was a mere ordinary member of the JP and unlikely to be pursued elsewhere than in his region to conclude that he could take refuge in Camilla or Noakhali, two cities located 100 km and 150 km from Demra, respectively.

III. Issues

[14] This application for judicial review raises two issues:

a) Did the tribunal breach the principle of procedural fairness in refusing to deal with the objections made by counsel for the applicant at the hearing?

b) Did the tribunal render a reasonable decision?

IV. Analysis

[15] It is trite law that the standard of review applicable to questions of fact, including the assessment of the credibility of witnesses, is reasonableness: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 51, [2008] 1 SCR 190; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 46, [2009] 1 SCR 339 [*Khosa*]. This conclusion is also supported by the wording of paragraph 18.1(4)(*d*) of the *Federal Courts Act*, RSC 1985, c F-7, which authorizes the Court to intervene only when a decision is "based . . . on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it".

[16] However, the standard of review applicable in matters of procedural fairness is correctness: *Khosa*, at para 43. In such cases, the courts are not required to show any deference: *Canadian Union of Public Employees (C.U.P.E.) v Ontario (Minister of Labour)*, 2003 SCC 29 at para 100, [2003] 1 SCR 539. It goes without saying that the requirements and the content of the duty to act fairly must be assessed contextually, taking into account several factors, such as the nature of the decision being made and the process followed in making it, the nature of the statutory scheme and the terms of the statute pursuant to which the body operates, the importance of the decision to the individual or individuals affected, the legitimate expectations of the person challenging the decision, and the choices of procedure made by the agency itself: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 23 et seq., [1999] SCJ No 39 [*Baker*]. Regarding the last factor, the Supreme Court noted the "considerable deference" owed to procedural rulings made by administrative bodies authorized by Parliament to control their own processes: *Council of Canadians with Disabilities v Via Rail Canada Inc.*,

2007 SCC 15 at para 231, [2007] 1 SCR 650. See also: *Re:Sound v Fitness Industry Council of Canada*, 2014 FCA 48 at paras 34-42, [2014] FCJ No 215.

A. *Did the tribunal breach the principles of procedural fairness in refusing to deal with the objections made by counsel for the applicant at the hearing?*

[17] The applicant argued that the tribunal breached the principles of natural justice in not dealing with the objections made by his counsel at the hearing. It appears from the transcript of the hearing held on September 19, 2013, that there was some confusion surrounding the applicant's testimony regarding the number of times he was allegedly attacked by BNP thugs, as the following excerpt illustrates:

> Q. When did they attack you?
>
> A. 2001.
>
> Q. And when was the other time?
>
> A. 2001.
>
> Q. So that's once, in 2001 that was once or twice?
>
> A. Once.
>
> Q. In your document you wrote in 2001 and in 2006.
>
> A. Yes, two times.
>
> Q. But you just said once.
>
> BY COUNSEL (to presiding member)
>
> - Once in 2001, Mr. Board Member. Sorry, not two, because your question was ---
>
> BY PRESIDING MEMBER (to counsel)
>
> - No. No, don't concern for him, Mr. Taillefer, I have enough already with ---

BY COUNSEL (to presiding member)

- No, but I'm just understanding what was your question.

BY PRESIDING MEMBER (to counsel)

- No, you don't answer for him.

BY PRESIDING MEMBER (to person concerned)

Q. How many times did the BNP folks attack you?

A. Two times.

Q. When?

A. 2001 and 2006.

Q. So now you add 2006?

BY COUNSEL (to presiding member)

- Objection, he didn't add 2006.

BY PRESIDING MEMBER (to counsel)

- There is no – there is no objection in this Tribunal unless ---

BY COUNSEL (to presiding member)

- Yes there are.

BY PRESIDING MEMBER (to counsel)

- No, there are no objections unless that they are on matters you want to clarify. You take notes and you ask your questions after.

BY COUNSEL (to presiding member)

- But, Mr. Board Member, after it will be too late.

BY PRESIDING MEMBER (to counsel)

- It will not be too late after, because if you want to proceed that way we can proceed that way. There's going to be more exchanges for your client, and for the Tribunal.

BY COUNSEL (to presiding member)

> - It's just to note for you, Mr. Board Member, that you asked the question how many times were you attacked, and he said two times. Then you asked when, and he said 2001. Then you asked was it two times in 2001, and he said, "No, once", and then you immediately went to see a credibility issue with 2006, and there is none.
>
> BY PRESIDING MEMBER (to counsel)
>
> - That's your opinion and that's fine.

[18] The RPD is clearly subject to a duty to act fairly, particularly because it renders decisions that affect "the rights, privileges or interests of an individual": *Cardinal v Kent Institution*, [1985] 2 SCR 643 at p 653, [1985] SCJ No 78, cited in *Baker*, at para 20. See also: Lorne Waldman, Immigration Law and Practice, loose-leaf (consulted on September 29, 2014), Markham, ON, LexisNexis Canada, 2009, c 11 at No 11.347. As was mentioned above, the fact that a body may be granted the authority to choose its own procedures must be taken into account when defining the requirements of the duty to act fairly.

[19] In the present case, paragraph 161(1)(*a.2*) of the IRPA grants the Chairperson of the Board the power to make rules respecting procedure and practice. The Chairperson has exercised this power by adopting, among other things, the *Refugee Protection Division Rules*, SOR 2012-256, whose section 10 sets out the standard order of questioning. Where the Minister is not a party, the standard will be for the member to start the questioning, followed by counsel for the claimant. See also Chairperson Guidelines 7 (Concerning Preparation and Conduct of a Hearing in the Refugee Protection Division), s. 5.

[20] This process has the advantage of making the claimant aware of the member's concerns and of properly identifying the issues of the claim so that the hearing proceeds as smoothly as possible. As Justice Evans wrote in *Canada (Minister of Citizenship and Immigration) v Thamotharem*, 2007 FCA 198 at para 41, [2008] 1 FCR 385, in response to an allegation that the order of questioning violates the principles of procedural fairness,

> . . . I agree at a general level that the seriousness of the rights involved in the determination of a refugee claim, as well as the generally "judicial" character of the oral hearings held by the RPD, militate in favour of affording claimants a high degree of procedural protection. However, its details must also be tailored to fit the inquisitorial and relatively informal nature of the hearing established by Parliament, as well as the RPD's high volume case load, considerations which reduce the power of the claim to aspects of the adversarial model used in courts, including the order of questioning.

[21] In the present case, the member rigorously respected Rule 10 and Guideline 7, as evidenced by his introductory remarks (Tribunal Record, p. 206). The member was certainly entitled to limit counsel's interjections during his own questioning, so as to avoid dragging out the process unnecessarily. It is true that counsel's interjection was not, technically speaking, an objection, but rather an attempted clarification after a somewhat confusing exchange of questions and answers. The fact remains that the applicant had every opportunity to give his account of the events and to present his evidence. I also note that it was open to counsel to return to this question and ask additional ones after the member's questioning, but he did not do so.

[22] In any event, the tribunal did not draw a negative inference on this basis and accepted the applicant's account to the effect that he had been attacked twice, in 2001 and in 2006 (Reasons for Decision, at para 3). The applicant was therefore not prejudiced by the confusion surrounding

this portion of the questioning, and there is even reason to believe that the observations of his counsel had the desired effect. The member rejected his claim and found it not to be credible on the basis of other contradictions and omissions that have nothing to do with this aspect of his testimony. A careful reading of the hearing transcript leads me to conclude that the lack of precision in the member's questions on this specific point did not taint his entire questioning.

[23] For all these reasons, I am therefore of the opinion that the first argument must be rejected.

B. *Did the tribunal render a reasonable decision?*

[24] The applicant also argued that the member erred in concluding that the documentary evidence contradicted his testimony regarding the position he had held with the JP since 2011. At the hearing, the applicant explained that the letter from the president of the local branch of his party entered in evidence had been mistranslated, and that the original letter in Bengali did indeed refer to the position of vice-president, not president. The hearing transcript reveals that the interpreter corroborated the applicant's testimony that the original letter mentioned the title of vice-president and not president. At the hearing before this Court, counsel for the respondent also conceded that the member had erred.

[25] However, this error is not fatal, insofar as the member relied on many other factors in finding that that the applicant was not credible. For example, the member noted the applicant's vague answers regarding his duties with the party, a contradiction regarding the number of groups that were harassing him, and the implausibility of his subjective fear in light of the fact that he returned to his country twice and waited three months after obtaining his visa before finally leaving his country.

[26] The cumulative effect of these contradictions and omissions was sufficient to allow the member to conclude that the applicant was not credible. Whether or not the applicant was vice-president or president of the local branch of his party, it was reasonable to expect him to be able to describe in more detail the role he played and to go beyond mere generalities. After all, this local branch of the JP was not a mere neighbourhood chapter but represented, according to the applicant himself, a population of one million inhabitants. In such a context, his answers leave much to be desired, as the following excerpt from his testimony illustrates:

> Q. . . . So, Mr. Islam, tell me a little bit, as publicity secretary what were your tasks in the party, and how many members you had – you were representing at that time?
>
> A. My main task were to look after the problems of the poor or the people who were suffering, for example, that is my main work, and also to publicize and to also communicate the kind of work that we are doing as – from our party, for example, to get the message out to the people in the party.
>
> Q. What were you personally doing to do that?
>
> A. Yeah, I tried – I helped, and I tried to help the poor people of my area and my locality. To keep in touch with the people, good relations to people – good relations with the people, and also to advertise or to publicize the programs of the party, for example. The people of my area, of my locality, they have – they liked me very much.

[27] In light of the numerous shortcomings in the applicant's testimony, the member could reasonably conclude that his story was not credible and that he had not proven a subjective fear of persecution. The member could also conclude that the applicant did not have the profile of a high-ranking politician likely to be pursued throughout the entire country.

[28] I am therefore of the opinion that this second argument must be rejected.

C. *Conclusion*

[29] For all of the foregoing reasons, this application for judicial review must be dismissed. The parties did not propose any question for certification, and none arises here.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review be dismissed. No question is certified.

"Yves de Montigny"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Éric Taillefer	FOR THE APPLICANT
Lyne Prince	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Éric Taillefer Advocate Montréal, Quebec	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT