Federal Court  Cour fédérale

Date: 20141203

Docket: IMM-6418-13

Citation: 2014 FC 1168

Ottawa, Ontario, December 3, 2014

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

SANJOY SARKER

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], seeking to set aside a decision dated September 4, 2013 rendered by Anthony da Silva [the Board Member] of the Immigration and Refugee Board of Canada [the Board], Refugee Protection Division. He found that the Applicant is not a Convention refugee nor a person in need of protection pursuant to sections 96 and 97(1) of *IRPA*.

[2] For the reasons that follow, I have come to the conclusion that the decision of the Board must be quashed, as the Applicant was not given an opportunity to address many of the concerns which eventually led to the dismissal of his claim.

I. Facts

[3] The Applicant is a Bangladeshi citizen born on November 25, 1982 in Faridpur, Bangladesh. He claims that he faces persecution on the basis of religion. In support of that claim, the Applicant alleges the following:

i) The Applicant is part of the Hindu minority in his home village of Madhukhali, in Gopalpur region.

ii) Since 2005, the Applicant became involved in organizing Hindu youths to defend the Hindu minority in his village. Among other things, in 2007, he objected to the building of homes on Hindu temple land.

iii) On several occasions, he was the victim of harassment and violence by Muslim fundamentalists. On January 10, 2010, while rebuilding vandalized religious statues, Muslim extremists confronted him and threatened serious consequences if he continued rebuilding the statues. After this incident, he fled to the house of a friend in Dhaka. He later returned to his village. On March 13, 2010, the Applicant protested after a Hindu girl was raped and forced to marry her rapist and convert to Islam. As a result of this protest, he was insulted, beaten and threatened. He then hid at his sister's house in Chandpur, but he soon faced harassment there as well. On July 6, 2010, he was attacked while returning to his village. On January 21, 2011, members of the Jamat (a Muslim political party)

attacked him and a group of Hindu youths returning home from a meeting. The Applicant and others submitted a written complaint against Jamat and other Muslim groups, but the police refused to respond.

iv) On February 23, 2011, the Applicant was arrested without warrant and beaten. He was released on bail the next day, and no charges were laid.

v) On March 26, 2011, Jamat and Horkatul Jihad "terrorists" attempted to kill him while he was returning home in a rickshaw. The attackers followed him home, but he fled to Dhaka. The attackers visited his family home in Madhukhali several times after this incident.

[4] Following these incidents, the Applicant fled Bangladesh. A broker made arrangements for him to travel to Canada on a false passport. He arrived in Canada on May 5, 2011 and made a refugee claim on May 25, 2011.

II. The impugned decision

[5] The Board rejected the Applicant's claim. First, the Board expressed concerns with the Applicant's identity. Second, the Board found that the Applicant was not credible due to inconsistencies in his evidence. Finally, the Board found that there was an internal flight alternative (IFA).

[6] The Board's concerns with respect to the Applicant's identity stem from the fact that the only document supporting his identity is his birth certificate. Several reports by UNICEF, American and Canadian officials indicate that Bangladeshi birth certificates are unreliable. Later

in the decision, the Board repeats the concern about the Applicant's lack of identity documents and the prevalence of fraud in Bangladesh. The Board also found that the Applicant cannot corroborate his date of arrival in Canada because he arrived on a false passport. Therefore, the Board was "not entirely persuaded" of the Applicant's identity, Bangladeshi citizenship, or date of arrival in Canada.

[7] The Board was also not convinced that the Applicant had a well-founded fear of persecution. The Board noted inconsistencies in three aspects of the Applicant's story: (1) incidents corroborated by newspaper articles; (2) the Applicant's whereabouts in 2010-2011; and (3) his arrest.

[8] With respect to the incidents corroborated by newspaper articles, the Board noted that the article describing the January 10, 2010 incident does not conclusively establish the identities of those involved, and is slightly inconsistent with the Applicant's story. The article says that the people involved were "injured seriously" whereas the Applicant's account is that he was merely "injured". For the March 26, 2011 incident, the newspaper's account is essentially the same as the Applicant's testimony, except that the article refers to an eyewitness, whereas the Applicant's testimony does not.

[9] As for his whereabouts, the Applicant claimed in his immigration interview on May 18, 2011 that he lived in Dhaka, Chandpur and Faridpur after January 2010. However, his Personal Information Form (PIF) and testimony describe incidents in his home village of Madhukhali,

indicating that he was present in Madhukhali during this period. The Board questioned why the Applicant did not mention his time in Madhukhali in his immigration interview.

[10] Regarding his arrest, the Applicant denied ever having been arrested or detained in any country in his immigration interview and refugee application form. However, the PIF, testimony and supporting documents recount the Applicant's arrest on February 23, 2011. The Board questioned the authenticity of the arrest documents. In any case, the documents conflicted with the Applicant's story: the Applicant claims he was arrested merely for making a complaint, but the documents say he was viewed as a catalyst for the religious unrest. The Board also remarked that the Applicant was detained for only one day, never charged, and released on bail.

[11] Finally, the Board found that there was an internal flight alternative. Its reasons on this issue are quite cryptic, and amount to no more than the following paragraph:

> [28] It would appear that whatever difficulties the claimant may have experienced or friction that may have existed between him and Muslim extremists has been localized around his home area. The panel, therefore, finds that relocation to either Dhaka or Chittagong would be a reasonable alternative for relocation and would not be unduly harsh.

III. Issues

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

A. Did the Board breach procedural fairness with respect to the identity and/or the credibility issues?

B. Are the credibility and IFA findings reasonable?

IV. Analysis

[13] The standard of review is uncontroversial and is agreed upon by the parties. On issues of procedural fairness, the standard is correctness: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43, [2009] 1 SCR 339; *Mission Institution v Khela*, 2014 SCC 24 at para 79, [2014] 1 SCR 502; *Juste v Canada (Citizenship and Immigration)*, 2008 FC 670 at para 23. On the other hand, the standard of review for the substantive issues of credibility and IFA is reasonableness: *Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 at para 4 (FCA); *Uygur v Canada (Citizenship and Immigration)*, 2013 FC 752 at paras 11-12; *Karakaya v Canada (Citizenship and Immigration)*, 2014 FC 777 at para 9; *Kayumba v Canada (Citizenship and Immigration)*, 2010 FC 138 at paras 12-13.

A. *Did the Board breach procedural fairness with respect to the identity and/or the credibility issues?*

[14] The Applicant contends that the Board breached his right to procedural fairness in raising doubts about his identity in the decision, despite having advised counsel at the hearing that identity was not an issue. I agree. Pursuant to Guideline 7, the Board sent to the Applicant a screening form in advance of the hearing, which identified the issues it considered central to the claim. The only issue that was marked under the heading "Identity" was "Affiliation: Political/Religious/Social/Family"; the other boxes under that heading (including "Civil Status" and "Country of Reference") were not checked. When some subordinate boxes are checked while others are not, the Applicant may infer that the unchecked boxes are not at issue: *Lin v*

Canada (Citizenship and Immigration), 2010 FC 108 at para 31; *Xiang v Canada (Citizenship and Immigration)*, 2013 FC 256 at paras 15-17.

[15] Even more importantly, the identity of the Applicant was never raised as an issue throughout the hearing, and no question was asked about the birth certificate and how it was obtained. Indeed, the Board Member advised Applicant's counsel prior to counsel's oral submissions that it had no concerns regarding the Applicant's personal or national identity, "so you do not have to make submissions on identity": Tribunal Record, p. 183. As a result, I have no hesitation in concluding that it was not open to the Board to draw an adverse inference from the alleged absence of documentary evidence to establish the Applicant's identity: see *Gomes v Canada (Citizenship and Immigration)*, 2006 FC 419. Natural justice requires that the Applicant be aware of the case to be met and be given the opportunity to make relevant submissions on the material issues. The Board breached the Applicant's right to procedural fairness in stating that the question of his identity was not an issue, only to raise it as a concern in casting doubt on the Applicant's credibility in its decision. Counsel for the Respondent conceded as much at the hearing before this Court.

[16] Where the parties differ, however, is with respect to the consequences of this breach. Relying on *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643, 24 DLR (4th) 44, counsel for the Applicant argues that this denial of natural justice is so egregious that it calls for the quashing of the decision. Counsel for the Respondent, on the other hand, submits that nothing turns on this mistake and that it was purely peripheral to the assessment of the Applicant's credibility.

[17] Having carefully examined the impugned decision, I do not think it can confidently be said that this breach of procedural fairness had no impact on the decision of the Board. The Respondent's argument may have been more compelling had the Board Member not dealt with the identity issue after paragraph 16 of his decision. To the contrary, the Board's identity concerns appear to have permeated its credibility analysis and may have had a material impact on the Applicant's claim. At paragraph 23 of its decision, the Board mentions the Applicant's lack of personal identity documents in questioning the authenticity of the newspaper articles and the arrest documents. Most importantly, the Board explicitly links the identity concern with the credibility analysis at paragraph 27 ("The absence of documentation confirming both his identity and arrival in Canada is problematic and further contributes to an overall concern with the credibility of the claim"). Accordingly, it cannot be said that the breach of procedural fairness was not material and that there is no point sending the Applicant's claim back to the Board. This is not such a case as *Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202, 111 DLR (4th) 1, where it could safely be said that the Board would most likely reach the same decision if it were to re-examine the Applicant's claim afresh. There is every indication that the Board's assessment of the Applicant's identity coloured its credibility analysis.

[18] This error, in and of itself, is therefore sufficient to quash the decision and to send it back to the Board for re-determination. However, there is more. The Board also had a number of concerns with respect to what were perceived as discrepancies between the newspaper articles and the Applicant's PIF and his testimony. The Board casts doubt on the January 10, 2010 assault, for example, on the basis that the newspaper article reports that the Applicant was

"injured seriously" while he testified at his hearing and noted in his PIF that he had been "injured". As for the March 26, 2011 attack, the Board acknowledged that the newspaper article and the Applicant's PIF were consistent, but questioned the credibility of the Applicant on the grounds that the newspaper article identifies the presence of an eyewitness, while there is no mention of this in the PIF. Further, the article reports that the Applicant went to the police to complain about this incident, whereas there is no mention of such complaint in either his PIF or oral evidence. Yet, none of these concerns were put to the Applicant at the hearing.

[19] I agree with the Applicant that when a hearing is conducted by way of reverse-order questioning (i.e. the Board asking the questions first and counsel questioning the applicant afterwards), the person with the onus is no longer in control of the process and there is an increased burden on the Board to ensure that issues which are determinative of the claim are raised at the hearing: *Gomes*, above, at para 15; *Veres v Canada (Citizenship and Immigration)*, [2001] 2 FCR 124 at paras 32-34; *Kerimu v Canada (Citizenship and Immigration)*, 2006 FC 264 at paras 31-33.

[20] In the case at bar, the Board did take control of the hearing by putting its questions to the Applicant first. Yet the alleged discrepancies between the newspaper articles and the Applicant's story were never put to him. If the Board thought that the difference between an "injury" and a "serious injury" was significant, it should have asked questions about it. The same is true about the alleged discrepancies between the second newspaper article and the Applicant's report of the March 26, 2011 incident. Not only is it far from clear that the differences between the newspaper articles and the Applicant's PIF and testimony are significant (especially bearing in mind that the

Applicant had no control over what the journalists wrote), but he was never provided any opportunity to explain away these differences. His lawyer could certainly not be blamed for thinking that the Board, not having questioned the Applicant on these issues, did not make much of the slightly different accounts of the two incidents between the Applicant and the media report.

[21] It may be that the onus was on the Applicant to explain some of the other apparent discrepancies; for example, the differences between his evidence and the immigration notes with respect to his places of residence and whether he had been arrested or detained by the police. Even if the Board did not see fit to raise these issues at the hearing, the discrepancies are more obvious and striking and should have been addressed, *proprio motu*, by the Applicant through questioning by his counsel. The same is not true, however, of the alleged divergences between the Applicant's version of the events on January 10, 2010 and March 26, 2011, those being of much less significance and not originating entirely from the Applicant himself.

B. *Are the credibility and IFA findings reasonable?*

[22] I am also of the view that the Board's finding on IFA is not reasonable. The reasons are very brief and superficial, and they read more like a conclusion than like true reasons. It is quite simply impossible to determine the line of reasoning upon which the Board reached its conclusion.

[23] The Board had to be satisfied, on a balance of probabilities, that there was no serious possibility of the claimant being persecuted in the proposed IFA and that, in all the

circumstances, including the circumstances particular to the Applicant, the conditions in the proposed IFA were such that it was not unreasonable for the claimant to seek refuge there. The Applicant testified that his life was in danger from the Muslim extremists who had been enquiring as to his whereabouts. It was also submitted that charges have been laid against him and are still pending. Finally, counsel stressed that as a Hindu, he would be vulnerable and subject to persecution and discrimination throughout the country. None of these arguments were mentioned, let alone addressed, by the Board Member. Accordingly, the Board's determination that the Applicant could relocate in Dhaka or Chittagong cannot stand.

V. Conclusion

[24] Having found that the Board breached its duty of procedural fairness in the assessment of the Applicant's identity and credibility, and having further come to the conclusion that its conclusion with respect to the IFA cannot stand, the application for judicial review is allowed, the decision must be quashed and the Applicant's claim must be remitted to another panel of the Board for re-determination. There is no need, having so found, to assess the reasonableness of the Board's credibility findings. No question is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, the decision must be quashed and the Applicant's claim must be remitted to another panel of the Board for re-determination. No question is certified.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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