

Federal Court



Cour fédérale

Date: 20151105

Docket: IMM-2336-15

Citation: 2015 FC 1256

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, November 5, 2015

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

GILBERT CRUZE

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Preliminary

[1] On judicial review, to understand the evidence (subjective and objective) of a refugee protection claimant's story, one must understand the encyclopedia of references, the dictionary of terms, the gallery of portraits and the background music of the original claim to discover

whether there is harmony or cacophony in the inherent logic of the story's background music, based on the conditions in the applicant's country of origin.

[2] This ensures that a specialized tribunal has considered the evidence, layer by layer, in accordance with its specialized jurisdiction. This substantive examination falls within the domain of the specialized tribunal, not the Federal Court, but upon judicial review, it is the Federal Court that ensures that the specialized tribunal's decision is reasonable, in light of that tribunal's mandate.

[3] To understand whether a specialized tribunal's decision regarding an applicant's objective and subjective fear is reasonable, it is necessary to distinguish, understand and thus study the evidence in accordance with this fear, thereby uncovering the anxiety, dejection, unhappiness, sadness, depression, despair, anger, frustration, annoyance, resentment, active and passive silence (and sometimes the cry from the heart that sticks in the throat, such that it is the specialized tribunal that becomes the voice of those who no longer have one, as it may be impossible to hear over the pervasive silence) and, in contrast, the celebration or everyday routine of a non-targeted citizen of the country in question. All of this must be taken into account when analyzing whether a specialized tribunal's decision is, on the whole, reasonable in accordance with *Ye v Canada (Minister of Employment and Immigration)*, [1992] FCJ No 584, 34 ACWS (3d) 241 (FCA) [Ye], of the Federal Court of Appeal; and in accordance with *Dunsmuir v New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9 [Dunsmuir]; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, [2011] 3 SCR 654, 2011 SCC 61;

Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board), [2011] 3 SCR 708, 2011 SCC 62, of the Supreme Court.

II. Introduction

[4] 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 of the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada, dated April 2, 2015, by which the applicant's refugee protection claim was rejected.

III. Facts

[5] The applicant, Gilbert Cruze, is a Christian citizen of Bangladesh who worked as a chef.

[6] The applicant was hired by the Dhaka Sheraton Hotel in Dhaka, Bangladesh, in November 2003. He did not run into any problems until April 1, 2011, when the hotel changed owners and was renamed the Ruposhi Bangala Hotel [Hotel]. At that time, the applicant held the position of head chef and was the only Christian in a management position at the Hotel; all his other colleagues were Muslims. After the change in ownership, the applicant alleges that corruption, nepotism and political influence became common practice in the Hotel's management.

[7] Shiraz Rahma Hussain, at the time a demi-chef and leader of the employee's union at the Hotel, allegedly conspired to have the applicant fired so that he could take over his position. The

applicant alleges that on June 20, 2011, while he was at a bus station, Mr. Hussain and his gang of alleged members of Islamic extremist group Jamaat-e-Islami assaulted and threatened to kill him. Mr. Hussain and his gang allegedly told the applicant that he should forget about his job at the Hotel and that, given that he was a [TRANSLATION] “dirty Christian”, he should leave Bangladesh for good by July 6, 2011.

[8] The applicant fled Bangladesh and arrived in Canada on July 6, 2011, on a work visa he had obtained in May 2011. The applicant alleges that he did not know when he arrived in Canada that his work visa would expire on February 28, 2012, and that he expected that his employer, a restaurant named Moghel Tandoori, would take care of the visa extension applications. In June 2012, he applied for a work visa extension, which was denied in October 2012 because the application was submitted after his temporary resident visa had expired.

[9] In April 2014, the applicant filed his refugee protection claim. The Refugee Protection Division [RPD] rejected this claim in a decision dated July 8, 2014. On appeal, the RAD confirmed the RPD’s decision. It is the RAD’s decision that is under judicial review here.

IV. RAD decision

[10] In its decision dated April 2, 2015, the RAD confirmed the RPD’s decision determining that the applicant was not a Convention refugee or a person in need of protection under the IRPA. The RAD acknowledged that, as a specialized tribunal, it had to review all the evidence to determine whether the RPD’s decision was justified, having regard to the evidence and the contents of the record presented before the RPD. The RAD nonetheless had to show deference to

the RPD's findings on credibility or any other findings where the RPD had a particular advantage.

[11] The RAD concluded that the RPD was justified in concluding that the applicant's delay in claiming refugee protection and his failure to discuss or mention having been the victim of religious persecution undermined his credibility. According to the RAD, the refugee protection claim should be the first resort of a person fearing persecution, not the last, as is the case here.

[12] Moreover, the RAD rejected the applicant's other three arguments to the effect that the RPD had made negative findings regarding the applicant's credibility that were unfounded. First, the RAD rejected the applicant's argument that the RPD made a negative finding simply because the applicant answered frankly that he had left Bangladesh to come to Canada on a work visa. The RAD found that the RPD's decision could not be segmented like this, noting that the RPD had also raised the fact that the applicant had begun making preparations to work in Canada in July 2010. Second, the RAD rejected the applicant's argument that the RPD had erred in making a negative finding regarding the applicant because he had failed to record in his Basis of Claim Form [BOC Form] that he had been accused of cooking pork and criticizing the prophet Mohammed. The RPD had mentioned in its decision that a person accused of blasphemy would have noted this in his or her BOC Form, which the applicant had not done. The RAD rejected this conclusion, finding that the applicant placed too much emphasis on the word [TRANSLATION] "blasphemy" and that the RPD had simply wanted to convey that Muslim fundamentalists take a very dim view of negative comments about the prophet Mohammed and that, in his BOC Form, the applicant mentioned only that he was called a [TRANSLATION] "dirty Christian" who should

leave Bangladesh for good. Third, the RAD concluded that it agreed with the RPD's finding that if the applicant had truly been persecuted as a Bangladeshi Christian, he would have discussed his problems in Bangladesh with other Christians from Bangladesh after coming to Canada. Religious persecution is not viewed as a personal issue that cannot be discussed openly. In short, the RAD concluded that the applicant had not been persecuted because of his religious beliefs and that his problems were instead related to the fact that Shiraz Rahma Hussain wanted his position as head chef at the Hotel. Given that Mr. Hussain took over the applicant's position, and that the applicant no longer works at the Hotel, Mr. Hussain would have no reason to continue looking for the applicant. Taking all these factors into consideration, the RAD determined that the applicant is not a Convention refugee or a person in need of protection, and that the applicant would probably have no trouble finding a job at another international hotel chain in Bangladesh.

V. Issues

[13] The Court is of the view that the application raises the following issues:

- 1) Did the RAD err in finding that the delay in claiming refugee protection undermined the applicant's credibility?
- 2) Did the RAD err in finding that the applicant's problems were related to his envious co-worker and that he was not persecuted because of his religious beliefs?

VI. Statutory provisions

[14] The following provisions of the IRPA apply:

Convention refugee

96. A Convention refugee is a

Définition de « réfugié »

96. A qualité de réfugié au

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,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(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.

Person in need of protection

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

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling

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) 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) 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.

Personne à protéger

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) 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) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la

to avail themselves of the protection of that country,

(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,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(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.

protection de ce pays,

(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) 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) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

(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.

VII. Positions of the parties

A. *Applicant's position*

[15] On the one hand, the applicant submits that the RAD erred in concluding that the refugee protection claim should have been the applicant's first course of action. The applicant submits that it was a mistake for the RAD to conclude as it did because the case law of this Court has already held that what counts is the result, that is, that the person persecuted in his or her country be in Canada (*Papsouev v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ

No 769, 168 FTR 99 [*Papsouev*]). Since the applicant thought that his work permit would give him access to permanent residence under the Canadian experience class, the result was the same: allowing him to remain in Canada.

[16] Second, contrary to what the RAD concluded, the applicant submits that he did not try to divide up the RPD's decision. In his testimony before the RPD, the applicant clearly answered that he had come to Canada to work, given that he had a work permit. Moreover, his efforts to obtain the work permit came well before his problems in Bangladesh.

[17] Third, the applicant submits that Mr. Hussain's feelings towards him are based on the fact that he is a Christian. The tension created by the RAD between Mr. Hussain's professional and monetary interests and the possibility that the applicant was targeted because he is Christian is an error in law. The applicant notes that he was physically attacked and insulted in regard to his religious beliefs. The applicant submits that, contrary to what the respondent claims, the applicant's prospective fear is not a fresh issue and was argued before the tribunal.

[18] Finally, the applicant submits that the RAD relied solely on one item of documentary evidence regarding the situation of Christians in Bangladesh, namely, the 2012 *International Religious Freedom Report*, and that the RAD had a duty to consider the situation that a Bangladeshi Christian would have experienced if he had to return to Bangladesh in 2014. Neither the RPD nor the RAD conducted such an analysis. The applicant submits that although the RAD had documentary evidence on the situation of Christians in Bangladesh, it concluded that the applicant had merely suffered discrimination in his workplace, not persecution, and that he could

likely find other employment in Bangladesh. The applicant submits that there was no evidence in the record that would allow the RAD to affirm the existence of new international chains or the current practices of these chains. In short, the applicant submits that the RAD's decision is not reasonable.

B. *Respondent's position*

[19] On the other hand, the respondent submits that the RAD was reasonable in confirming the RPD's decision. Regarding the first issue, the respondent submits that the RAD could reasonably conclude that the applicant's behaviour in submitting a late claim was inconsistent with the behaviour of a person fearing for his or her life. This behaviour was a factor that could be taken into consideration when assessing the applicant's credibility (*Exantus v Canada (Minister of Citizenship and Immigration)*, 2015 FC 39 [*Exantus*]; *Nijjer v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1259). The respondent submits that a refugee protection claim should not be used as an alternative means of entering Canada.

[20] The respondent submits that the applicant's argument that the RPD and the RAD failed to analyze his prospective fear is a fresh argument that was not made before the RAD and therefore cannot be pleaded on judicial review. The respondent submits that the onus was on the applicant to prove a prospective fear of persecution (*Katwaru v Canada (Minister of Citizenship and Immigration)*, 2010 FC 196; *Pour-Shariati v Canada (Minister of Employment and Immigration)*, [1995] 1 FCR 767, [1994] FCJ No 1928). Moreover, the RAD concluded that the applicant's problems were related to Mr. Hussain's envy, not the applicant's religious beliefs, which means that Mr. Hussain would have no reason to keep looking for the applicant. The

respondent also submits that the documentary evidence is, on its own, insufficient to conclude that the applicant is at risk as a Bangladeshi Christian. The respondent submits that the RAD's findings to the effect that the applicant does not have a real prospective fear of persecution are therefore reasonable. In short, the respondent submits that the applicant has not proven that the RAD erred in its findings. Therefore, the RAD's decision is reasonable.

VIII. Standard of review

[21] The RAD's findings regarding the applicant's credibility are a question of fact, while the RAD's findings regarding the concept of persecution are a question of mixed fact and law. These findings must be reviewed in accordance with the reasonableness standard (*St Louis v Canada (Minister of Citizenship and Immigration)*, 2015 FC 996; *Perez v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1100). The RAD's decision is reasonable if it is justifiable, transparent and intelligible and falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, above at para 47).

IX. Analysis

A. *Timing of claim*

[22] The RAD paid particular attention to the applicant's delay in filing his claim for refugee protection, stating that it agreed with the RPD's conclusion that [TRANSLATION] "claiming refugee protection would be the 'first' resort of a person fearing persecution, not the 'last' resort" (RAD Decision, para 26).

[23] Although it is true that a delay in filing a claim for refugee protection is an element that may be considered in the assessment of a claimant's credibility (*Exantus*, above at para 29), it is not true that a refugee protection claim must be the first course of action (*Kaissi v Canada (Minister of Citizenship and Immigration)*, 2013 FC 234; *Papsouev*, above; *Espinosa v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1324 [*Espinosa*]). Nonetheless, if a refugee protection claimant is unable to provide any satisfactory explanation for the delay, this could be fatal to his or her claim (*Espinosa*, above at para 17).

[24] In the present case, the applicant explained in his testimony why he had waited before filing his refugee protection claim. The RPD found that the applicant's explanations were not credible and therefore rejected them:

[41] The tribunal acknowledged that the claimant does not speak English or French well. There are also some cultural factors that may prevent individuals from disclosing some personal matters.

[42] In the present case, the tribunal did not find a person who feared persecution because of his religion would be a highly private matter that would prevent that person from talking to members of his community or for that matter a catholic priest of his own community. The tribunal found the claimant not credible since there is a large discrepancy between his behaviour, by not speaking to father Thomas and other members of his church about his problems and his fear to return to Bangladesh or to seek help, and his allegation of fear of harm or persecution if he was to return to Bangladesh.

[Emphasis added.]

[25] The RPD acknowledged that certain cultural factors may have influenced the applicant's behaviour. However, simply stating this does not demonstrate that the RPD actually considered the applicant's cultural background. From the ample evidence filed by the applicant, it appears

that Christians in Bangladesh are often the victims of discrimination, even persecution, and that a culture of silence has taken hold in Christian communities:

Bangladeshi Christians are very secretive because they fear “retaliation” for their faith, she said. Persecution generally comes from community pressure, such as refusing to share a village water well with Christians, or refusing to hire them. Employment discrimination against Christians can result in poverty. While the government is not directly responsible, officials don’t do anything about the persecution, so it continues. [Emphasis added.]

(Exhibit P-2, Applicant’s Record, *Christians suffer violent persecution in Bangladesh*, WNG.org, January 15, 2014)

This culture of silence, recognized by objective evidence, causes people to lead an internalized existence whereby they do not openly reveal their fears so as not to draw attention to the differences that set them apart from the majority culture.

[26] Although certain acts may seem implausible from a North American perspective, they may be plausible in the environment where the applicant comes from (*Ye*, above). That being the case, the RAD should not have been so quick to apply North American logic and reasoning to the applicant’s behaviour without giving consideration to his age, cultural background and previous social experiences (*R.K.L. v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 at para 12; *Rahnema v Canada (Solicitor General)*, [1993] FCJ No 1431). In short, it was not reasonable for the RPD to conclude as it did, and the RAD had a duty to correct this error.

B. *Persecution of Christians in Bangladesh*

[27] The applicant filed numerous newspaper articles describing acts of violence and persecution towards Christians in Bangladesh. The objective documentary evidence clearly

shows that religious minorities in Bangladesh, including Christians, may be victims of violence and harassment, and that sometimes the state itself may have perpetrated such acts or been slow in protecting religious minorities against acts of violence:

The constitution states that Islam is the state religion, but reaffirms the nation is a secular state that “shall ensure equal status and equal rights in the practice of the Hindu, Buddhist, Christian, and other religions.” Government officials, including police, were sometimes slow to protect members of minority religious groups from violence, and there were several reports of involvement of government-affiliated actors in such violence. The government took steps to assist victims and restore religious and private property damaged in the violence.

There were reports of societal abuses and discrimination based on religious affiliation, belief, or practice. There were a large number of arson attacks and looting of minority religious sites and private homes across the country, especially against the Hindu community. Members of the Sunni Muslim majority at times harassed and physically attacked members of the Hindu, Christian, Buddhist, and Ahmadiyya Muslim minority religious groups. The government and many civil society leaders stated that violence against members of minority religious groups normally had economic or criminal dimensions, and could not be attributed solely to religious belief or affiliation.

...

[T]he U.S. embassy expressed strong concern over acts of religious intolerance and encouraged the government to protect the rights of members of minority religious groups.

[Emphasis added.]

(United States, Department of State, *Bangladesh 2013 International Religious Freedom Report*, July 28, 2014).

[28] The RAD concluded in its decision that the problems experienced by the applicant in Bangladesh were because of Mr. Hussain’s desire to take over the applicant’s job, not because of the applicant’s religious beliefs; and that, given that the applicant had left the Hotel, he would no

longer be targeted by Mr. Hussain and his gang if he were to return to Bangladesh (RAD Decision, para 30).

[29] In concluding as it did, the RAD does not appear to have taken into consideration the documentary evidence that shows that religious minorities in Bangladesh are often targeted by Islamic extremist militant groups, such as Jamatt-e-Islami. The fact that the applicant was the only Christian employee in a management position at the Hotel seems to strengthen the argument that he was targeted because of his religious beliefs and not simply because of his position.

[30] Given the applicant's situation, the RAD erred in concluding that the applicant's problems were linked solely to Mr. Hussain's desire to take over the applicant's position and not to his religious beliefs; and that, if the applicant were to return to Bangladesh, these assailants would no longer have a reason to hunt him down. This conclusion is entirely inconsistent with the ample documentary evidence filed by the applicant which shows that Christians are frequently targeted by Islamic extremist militant groups. It is important to bear in mind that, according to the evidence, as head chef, the applicant was in charge of the food and that the extremists referred to him as the [TRANSLATION] "dirty Christian", which according to tradition and custom implies a lack of cleanliness with regard to Islamic extremist ideology.

[31] In short, given the situation of religious minorities in Bangladesh, it appears that the RAD will have to conduct a thorough re-examination of the refugee protection claim, given the possibility, according to both the subjective and the objective evidence, that the applicant may face a real risk of persecution.

[32] Realizing that the applicant's situation is a paradox, according to the specified objective evidence, as a consequence of the culture of silence that prevails among Christians in Bangladesh, according to the circumstances, it appears that a new and more thorough examination of the evidence by the specialized tribunal would be necessary to ensure that a decision is made while taking into account the evidence as a whole, in the prevailing context in Bangladesh.

X. Conclusion

[33] The Court concludes that the RAD's decision does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. The application for judicial review is therefore allowed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review be allowed and that the matter be referred back to a differently constituted panel for reconsideration. No question is certified.

“Michel M.J. Shore”

Judge

Certified true translation
Michael Palles

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2336-15

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