Date: 20060928

Docket: IMM-7777-05

Citation: 2006 FC 1155

Ottawa, Ontario, September 28, 2006

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

SAFRAN CHOWDHURY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] This judicial review application by Safran Chowdhury (the applicant) a citizen of Bangladesh challenges the rejection of his refugee claim on December 1, 2005 by the Refugee Protection Division (the tribunal) who decided he had not established through credible evidence his story.

[2] He claimed refugee status on the ground of his political involvement in the Awami League which he stated began, especially on the cultural side, in 1999 in its Student Branch, then continued

when he joined the Awami Jubo League in early 2000 becoming a member of the Executive Committee in September 2000 and, in January 2003, the Cultural Secretary of his unit.

[3] His political activities, he claimed, brought several attacks on him from goons associated with rival political parties, and, in particular, the Bangladesh Nationalist Party (BNP).

[4] He enumerated the following attacks:

- A few days after the BNP won the elections in October, 2001 he was attacked and beaten by a group of BNP goons led by Goru Swapan. He was injured and required medical attention. He made a complaint to the police. However, he said the police were not able to arrest the goons;
- On March 25, 2002, he and nine other Awami League members were arrested by the police because of a demonstration they organized to protest a police attack on central Awami League leaders in Dhaka. He was detained for one night, mistreated and released after a bribe was paid to the police;
- In November 2002, Goru Swapan and his goons came to his store asking for a donation. He refused. He was beaten and his store looted. He complained to the police. Goru Swapan and another goon were arrested. He was threatened by the other goons;
- In February 2003, he was again attacked in a street by BNP goons and beaten. His complaint to the police did not produce results;
- On December 16, 2003, he organized a theatrical performance in order to commemorate Victory Day. He made a speech. He criticized growing Muslim fundamentalism and the persecution of Awami League members by BNP goons and the police. The performance was interrupted by an attack by BNP goons, led by Goru Swapan who yelled a death threat at him and fired gunshots in his direction. He managed to escape. He went into hiding at his aunt's home. The same night the BNP goons raided his home. His father called the police who did not show up;
- On December 20, 2003 the police came to his residence to arrest him. They refused to tell his father the reasons for his arrest. His father hired a lawyer who learned from the police, while no case was registered against his son, nevertheless they wanted to arrest him under a special security law. He was afraid for his safety. He decided to leave Bangladesh;

- On January 4, 2004, while he was still in hiding, the police arrested his father. His father was interrogated and mistreated. He was told to produce the applicant;

- On January 5, 2004, helped by a smuggler he left Bangladesh. He came to Canada on January 23, 2004 and claimed protection; and

- On February 10, 2004, while he was already in Canada, the BNP goons again came to his father's house looking for the applicant. They asked his father for money. He refused. He was shot and killed by the goons. His mother filed a case with the police naming the perpetrators but no one was arrested.

The tribunal's Decision

[5] At the start of the tribunal's hearing, a designated representative was appointed for the claimant, who is twenty-four years old. That appointment was made following recommendations by Mr. Woodbury in his psychological assessment of the applicant (Exhibit P-12).

[6] The focus of the tribunal's reasons centered on the following elements: (1) the manner he testified versus Mr. Woodbury's diagnosis (2) the applicant's allegation his father was killed in February, 2004 when the goons came looking for him in light of his lawyer's letter (3) the December 16th theatrical performance during which he was threatened by BNP goons (4) his coming out of hiding to pick up his driver's licence and (5) the lack of corroborative evidence and, in particular, photographs of himself engaged in various demonstrations or events.

[7] The tribunal arrived at its credibility findings principally on the basis of the implausabilities in his story or in the explanations he gave when confronted.

- It found he testified without any difficulty despite the psychological report indicating he had serious memory and concentration problems which led to the recommendation that a designated representative be appointed. The tribunal said he remembered precisely all the dates mentioned in his PIF and all the details of the events set out there. It stated he was articulate and did not seem to have any problems in understanding the questions which were asked of him. It acknowledged he became emotional and cried

when he was asked to testify about his father's death. The tribunal found this was understandable;

- It was critical of the applicant for not taking the medications and psychotherapy he had been prescribed. The tribunal concluded he did not do anything to alleviate "his allegedly very serious symptoms of post-traumatic stress disorder (PTSD) coupled with panic attacks and major depressive episodes.

- The tribunal stated it had very serious problems as to the reliability of the psychological evaluation "particularly in that it is based on a story told by the claimant himself, a story which I found not credible";

- Exhibit P-7 is a lawyer's letter dated May 26, 2004 stating the police were still looking for the applicant. The tribunal rejected that letter because, while mentioning his father's January 2004 arrest by the police, the letter did not mention his father had been killed by BNP goons in February of that year despite the fact the applicant had testified he had asked his lawyer to provide him with documents concerning the police investigation into his father's death. The tribunal rejected his explanation the omission was because he had asked his lawyer to confirm the advice he had given on his investigation why the police wanted to arrest him on December 20, 2003.

- The tribunal, in its reasons, also mentioned the applicant's testimony that he had talked to his lawyer several times since coming to Canada and during one of those conversations he was informed by his lawyer the report by his mother to the police about her husband's killing and what was in the file did not mention the names of the goons given by his mother, but only that his father had been killed by some miscreants. The tribunal stated P-7 made no mention of these facts. The tribunal concluded his father was not shot to death by goons who were looking for the applicant. It did not believe the goons had targeted the applicant and were still looking for him. [Emphasis mine]

- The tribunal rejected as not being plausible the applicant's description of the December 16, 2003 theatre performance. It quoted his PIF where he described that "he saw Hashem (Goru Swapan) running at me with a short gun, shouting "today we are going to kill you". "I ran to the rear of the stage and heard the sound of two shots." With respect to this written passage in his PIF, the tribunal stated his oral testimony of the event during the hearing was not plausible:

> "He was not able to reasonably explain how he could hear the verbal threat directed to him in a situation of generalized panic, which followed the attack of some thirty to thirty five goons on a public composed of about two hundred to two hundred and fifty people. He was on the stage where he was reciting a poem and the goon, who threatened him, was allegedly below, at a distance of twenty to twenty-five feet. He was not able to reasonably explain how he was able to continue the recitation, when the goons, shouting slogans, were making their way from the side of the stage, through the crowd, towards him. Based on the

> claimant's testimony I do not believe that such an event ever took place". [Emphasis mine]

- The tribunal then turned to the circumstances surrounding the applicant's renewal of his driver's licence which he personally picked up, accompanied by his uncle, from the government offices on December 20, 2003 in Chittagong where he lived coming out of hiding from his aunt's house in a village 12 kilometres away for this purpose. He was asked if he was not afraid to get out of hiding and be seen by the goons. The tribunal stated the applicant replied he was afraid and that is why he went to the motor vehicle license office with his uncle. The tribunal said it responded by asking the applicant to explain why claiming his driver's licence at a time when he was in hiding and when he already had made his decision to leave Bangladesh was so important that he was ready to risk to be seen by the goons and possibly killed. The tribunal wrote:

> "The claimant answered that he "might need it" and repeated that maybe he would need it later. I do not consider these explanations satisfactory. I do not believe that the claimant would have risked going out of hiding in order to claim his driver's licence without any particular necessity, just because "he might need it" in the future. I find it even more implausible because, according to his testimony, at that time, he had already made his decision to leave Bangladesh, and therefore, would not need his driver's licence. Consequently, I do not believe that the claimant was in hiding in Bangladesh before he left his country, since I do not believe that he ever needed to do so." [Emphasis mine]

- Finally, the tribunal turned to the corroborating documents which the applicant had produced namely Exhibit P-4, a letter from the Awami Jubo League, two posters with his name on them as cultural secretary (Exhibits P-5 and P-6), a letter from a doctor who allegedly treated him in 2001 and (Exhibit P-9), a letter of appreciation from the Awami Jubo League (Exhibit P-11). The tribunal stated the applicant testified the posters were sent to him by the President of his Unit. However, it was critical the of applicant, who allegedly was often in the front of the stage, as an organizer, and as a master of ceremonies of cultural events and had participated in various political processions and demonstrations did not produce even one of the photos taken during his political activities. He was asked "why such convincing, corroborating evidence was not produced". It quoted his answer "there were many photos taken of him during the past, but he could not produce any, because the organizing secretary, who had those photos was also in hiding." The tribunal then wrote:

> "The claimant was asked if he could produce such photos, if he was given additional time by the tribunal to do so. He said that it would not be possible, because the organizing secretary was in hiding. I do not consider this explanation satisfactory. The claimant is in touch with his mother. He also allegedly has contact with the President of his Unit. I do not find it plausible that, if photos were taken as they usually are, none of his friends

> from his party unit executive or his mother at home, would have a copy of such photos. As it is indicated in the documentary evidence, and as it was mentioned during the hearing, false documents are very easy to obtain in Bangladesh. It is easy to print posters, as produced by the claimant or to obtain the letters which he submitted. Consequently, I believe that the tribunal could have expected to see photos of the claimant's past political activities. I draw from the absence of them a negative inference, as to the credibility of the claimant's allegations that he was a member of the Awami Jubo League, and as such, participated in various public activities. [Emphasis mine]

[8] The tribunal then concluded:

> "Considering all the above, I conclude that the claimant has not established that he was a member of the AJL, that he was targeted by the BNP goons and by the police, or that there is a reasonable possibility that he will be persecuted should he go back to his country.
>
> Since I rejected the claimant's testimony as not credible, I do not give any weight in this case, to the documents which he submitted in support of his allegations. Even if I believed that the claimant suffers symptoms, which he presented to Mr. Woodbury, I do not believe that they are the result of the events which he alleges. I also do not give either any probative value to Mr. Woodbury's psychological evaluation." [Emphasis mine]

Analysis and Conclusions

[9] The jurisprudence of this Court is clear to the effect credibility findings are findings of fact and a tribunal's decision based on credibility can only be set aside within the parameters set out in paragraph 18.1(4)(d) of the *Federal Courts Act*, that is, an erroneous finding of fact that it made in perverse or capricious manner or without regard to the material before it, a standard equivalent to the standard of review of patent unreasonableness.

[10] The approach to be followed by a reviewing court on the factual findings of an administrative tribunal is described by Madam Justice L'Heureux-Dubé at paragraph 85 of her reasons for judgment on behalf of members of the Supreme Court of Canada in *Canadian Union of Public Employees, Local 301* v. *Montreal (City)*[1997] 1 S.C.R. 793:

> "We must remember that the standard of review on the factual findings of an administrative tribunal is an extremely deferent one: Ross v. New Brunswick School District No. 15, [1996] 1 S.C.R. 825, per La Forest J., at pp. 849 and 852. Courts must not revisit the facts or weigh the evidence. Only where the evidence viewed reasonably is incapable of supporting the tribunal's findings will a fact finding be patently unreasonable. An example is the allegation in this case, viz. that there is no evidence at all for a significant element of the tribunal's decision: see Toronto Board of Education, supra, at para. 48, per Cory J.; Lester, supra, at p. 669, per McLachlin J. Such a determination may well be made without an in-depth examination of the record: National Corn Growers Assn. v. Canada (Import Tribunal), [1990] 2 S.C.R. 1324, per Gonthier J., at p. 1370."

[11] Justice Décary, on behalf of the Federal Court of Appeal, in *Aguebor* v. *(Canada) The Minister of Employment and Immigration,* 160 N.R. 316 wrote the following with respect to implausibility findings:

> "There is no longer any doubt that the Refugee Division, which is a specialized tribunal, <u>has complete jurisdiction to determine the plausibility of testimony: who is in a better position than the Refugee Division to gauge the credibility of an account and to draw the necessary inferences? As long as the inferences drawn by the tribunal are not so unreasonable as to warrant our intervention, its findings are not open to judicial review.</u> In Giron, the Court merely observed that in the area of plausibility, the unreasonableness of a decision may be more palpable, and so more easily identifiable, since the account appears on the face of the record. In our opinion, Giron in no way reduces the burden that rests on an appellant, of showing that the inferences drawn by the Refugee Division could not reasonably have been drawn. In this case, the appellant has not discharged this burden." [Emphasis mine]

[12] It goes without saying that, on judicial review, a reviewing court cannot set aside an administrative tribunal's decision unless the tribunal made a reviewable error in reaching its decision. In other words, a reviewing court cannot simply substitute its decision for that of the tribunal by re-weighing the facts. Moreover an administrative tribunal's decision should not be read microscopically.

[13] My reading of the transcript of the tribunal's two separate hearing days, a careful review of its decision and a consideration of the arguments leads me to the conclusion this application for judicial review should be dismissed for the following reasons:

[14] Counsel for the applicant argued the tribunal's fundamental error was in its approach to fact-finding and its method of analysing the evidence which consisted in first in making a negative credibility finding as a result of a focus on discrete features of the applicant's testimony and then, based on this negative finding, rejecting very cogent documentary evidence citing Justice Campbell's decision in *R.E.R.* v. *Canada (Minister of Citizenship and Immigration)* 2005 FC 1339 where he stated the following at paragraphs 8, 9, and 10:

> "With respect to the RPD's analysis, Counsel for the Applicants argues as follows:
>
> > [...] The Board Member's failure to mention objective evidence that directly contradicted its findings, and failure to explain why different evidence was preferred over objective evidence, sworn testimony of the principal Applicant and his wife and photographic evidence of the scars of torture, amounts to a reviewable error. The Board Member had no regard for relevant evidence that went directly to the issues of the Applicants' credibility, and the plausibility of torture which gave rise to the principal Applicants' well-founded fear of persecution.
> > (Applicant's Reply, para. 5.)
>
> I agree with this argument, but I would go further. I conclude that, from the words used in the reasons, the RPD used a linear approach in evaluating the evidence submitted by the principal Applicant. I find that the use of this linear approach denied natural justice to the principal Applicant for two reasons.
>
> First, it is only fair and reasonable for parties to litigation to expect that the decision-maker will consider the evidence in its entirety, with an open mind, before making findings about the value to be placed on critical elements of the evidence. For the general proposition that the evidence must be considered in its entirety see Owusu-Ansah v. Canada (Minister of Employment and Immigration) (1989), 98 N.R. 312 (F.C.A.). In the present case, <u>I find that the RPD was in error in not considering the whole of the evidence,</u> including the wife's rape evidence and the cogent independent evidence about the apparent effects of the torture and rape in the form of photographs and reports, <u>before making the critical finding of negative credibility against the</u>

> principal Applicant (also see Gonzalez v. Canada (Minister of Citizenship and Immigration), [2003] F.C.J. No. 422, and Herabadi v. Canada (Minister of Citizenship and Immigration), [2001] F.C.J. No. 1729).
>
> Second, I find that the RPD was in error by rejecting evidence which comes from sources other than the testimony of the principal Applicant simply on the basis that the principal Applicant is not believed. In my opinion, each independent source of evidence requires independent evaluation. This is so because the independent sources might act to substantiate an Applicant's position on a given issue, even if his or her own evidence is not accepted with respect to that issue."

[15] In my opinion, the criticism which Justice Campbell levelled at the tribunal in *R.E.R.* cannot be transposed to the manner in which the tribunal at hand reached its credibility findings.

[16] A reading of the tribunal's decision shows, and this is supported by the transcript of the hearings it reasoned by using a building block approach. The tribunal isolated four distinct elements or events central to the applicant's case, considered all of the evidence both testimonial and documentary connected with those elements or events, identified what troubled the tribunal and took into account the applicant's explanation before assessing whether or not the applicant had brought sufficient credible and trustworthy evidence to establish he was a member of the Awami League, was targeted by the BNP goons and the police and whether there was a reasonable possibility that he would be persecuted should he return to Bangladesh. In other words, the tribunal did not arrive at its conclusion the applicant failed to make out his case through credible evidence only based on the applicant's testimony without considering the whole of the evidence which is the crux of Justice Campbell's decision in *R.E.R., supra*.

[17] Counsel for the applicant then argued the tribunal erred in making adverse findings of credibility based on the implausibility of the applicant's story invoking the following principle

endorsed by Justice Muldoon in *Valtchev* v. *Canada (Minister of Citizenship and Immigration)* 2001 FCT 776 at paragraph 7:

> "A tribunal may make adverse findings of credibility based on the implausibility of an applicant's story provided the inferences drawn can be reasonably said to exist. However, plausibility findings should be made only in the clearest of cases, i.e., if the facts as presented are outside the realm of what could reasonably be expected, or where the documentary evidence demonstrates that the events could not have happened in the manner asserted by the claimant. A tribunal must be careful when rendering a decision based on a lack of plausibility because refugee claimants come from diverse cultures, and actions which appear implausible when judged from Canadian standards might be plausible when considered from within the claimant's milieu. [see L. Waldman, Immigration Law and Practice (Markham, ON: Butterworths, 1992) at 8.22]"

[18] How Justice Muldoon applied this principle is instructive because it demonstrates his approach is consistent with *Aguebor, supra*: the inferences drawn must be reasonable. What this means is such inferences must be based on the evidence in the record and not be inherently subjective or speculative.

[19] My reading of the transcript satisfies me for each of the inferences drawn there was an evidentiary basis for each of them and consequently for the implausibility finding in respect of the four elements which were the foundation of the applicant's case.

[20] There is one exception. The tribunal erred in finding when he went to pick up his driver's licence on December 20, 2003 leaving his hiding place, he had already decided to flee from Bangladesh. This finding is contrary to the evidence as the applicant's testimony is clear on the point. He made his decision to flee on December 23, 2003 after the police came to his father's house to arrest him.

[21] This error however in my view does not diminish the strength of the inference drawn: why would he risk being caught by the goons he feared and was the reason why he went into hiding in the first place.

[22] The tribunal said the applicant had testified many photos had been taken of him in the past. His counsel suggested this finding was contrary to the evidence because he testified only a few photos had been taken of him. This argument cannot be accepted; it entails a microscopic reading of the record. Taken as a whole, the evidence supports the applicant testifying that several photos of him carrying out his Awami League activities existed.

[23] Applicant's counsel suggests instances where the tribunal misread the evidence. I am not convinced. On the contrary, comparing the tribunal's reasons with the evidentiary record satisfied me that the tribunal carefully considered the applicant's testimony and documentary evidence and accepted it in several instances where initially the tribunal had thought otherwise.

[24] Finally, the record bears out the tribunal's comment on how he answered questions and his detailed recollection of events and the jurisprudence justifies the treatment it accorded to any causal link in the Woodbury report given the underlying credibility finding (see *Randhawa* v. *Canada (Minister of Citizenship and Immigration)* [1999] F.C.J. No. 606).

ORDER

THIS COURT ORDERS that this judicial review application is dismissed. No certified question was proposed.

"Francois Lemieux"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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