Date: 20080912

Docket: IMM-82-08

Citation: 2008 FC 1027

Ottawa, Ontario, September 12, 2008

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

AIM SHAZZADUL MUJIB
NAHIDA AKHTAR MUJIB
AIMAN ISHAQUE BIN MUJIB

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Aim Shazzadul Mujib and his wife, Nahida Akhtar Mujib are both citizens of Bangladesh. Their son Mujib Aiman Ishaque-Bin is a citizen of the United-States of America ("USA"). They seek judicial review of a decision by a Pre-Removal Risk Assessment Officer dated November 8, 2007. The application turns on the question of whether the officer erred in finding that documents submitted by the applicants did not constitute new evidence within the meaning of section 113 (a) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("IRPA"). For the reasons that follow, I conclude that the officer did not err and the application will be dismissed.

[2] Mrs. Mujib's father, mother, brother and sister entered Canada in July 2004 and claimed refugee status shortly thereafter based on a fear of persecution at the hands of the Bangladesh Nationalist Party ("BNP") due to the father's involvement with the Awami League. I infer from the record that the claims of the mother and siblings were dependent upon the father's claim.

[3] The applicants claimed refugee protection upon arrival in Canada from the USA on February 13, 2005. Mr. Mujib had lived in the United States since 1998 where he had married the female applicant and where their son was born. Their claim was based on his political activities in Bangladesh and affiliation with the Awami League prior to leaving Bangladesh. The claim was also based, in part, on the political activities of Mrs. Mujib's father.

[4] The claims of the applicants and those of Mrs. Mujib's family members were not joined, as provided for by the Refugee Protection Division Rules, and were heard separately. The applicants' claims were refused by a decision of the Refugee Protection Division ("RPD") dated February 22, 2007. Those of Mrs. Mujib's parents and siblings were allowed on March 7, 2007. Leave was denied for judicial review of the negative decision. An application to the Board to reopen the claims was also refused. An application for a Pre-Removal Risk Assessment ("PRRA") was then filed.

Decision under Review:

[5] At issue in these proceedings is documentary evidence filed in support of the PRRA application:

- The Personal Information Form ("PIF") submitted by Mrs. Mujib's father, A.K. Golam Faruque, dated August 14, 2004.

- A psychological report concerning the parents and siblings dated March 18, 2005.
- A partial and undated transcript of the parents' and siblings' refugee hearing.
- An undated medical certificate concerning Mr. Faruque and referring to an incident that occurred on December 25, 2001.
- A letter from the Dhaka city Awami League dated February 20, 2006.
- The Notice of Decision of the RPD regarding the parents' and siblings' protection claims.
- Letters from family members in Bangladesh.
- Information documents regarding conditions in Bangladesh.

[6] The PRRA Officer found that the allegations of risk were the same as those raised, heard and assessed by the RPD and that no new risks had been put forward by the applicants. Further, the PRRA Officer found that most of the documents provided in support of the application pre-dated the RPD hearing and that no explanation had been provided as to why they were not available for consideration at the hearing.

[7] The officer concluded that the information contained in the partial transcript of the father's RPD hearing did not support the applicants' allegation that the father held a significant position in the Awami League which would cause his daughter and her family (the applicants) to be targeted by his opponents more than five years after leaving the country. The letters from family members were given little weight.

[8] The officer acknowledged that the situation in Bangladesh has been politically unstable for many years and noted that there have been significant changes to the political situation since the applicants were before the RPD. The officer concluded that the applicants had failed to establish that they would be at risk upon their return to Bangladesh after a lengthy absence from the country.

Issue:

[9] The concerns raised by the applicants about the officer's decision can be reduced to the following issue: did the PRRA officer err in his/her risk assessment by finding that the documents submitted did not constitute new evidence within the meaning of subsection 113(a) of IRPA?

Analysis:

Standard of Review

[10] As established in *Dunsmuir* v. *New Brunswick*, 2008 SCC 9, there are now only two standards of review: correctness and reasonableness. The Supreme Court of Canada provided guidance regarding the process for determining the appropriate standard of review. The first step is to ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. If the outcome of that inquiry is fruitful, it is unnecessary to proceed to an analysis of the specific factors which would make it possible to identify the proper standard.

[11] With respect to PRRA decisions, it appears to be well established that findings of fact such as credibility should be decided on a standard of reasonableness. Regarding questions of law, such as the officer's interpretation of subsection 113 (a), the standard is correctness. The court must then determine whether the officer erred in his application of subsection 113(a) to the particular facts of the case. This is a question of mixed fact and law, to be reviewed on a standard of reasonableness: *Elezi* v. *Canada (Minister of Citizenship and Immigration)*, 2007 FC 240. The decision as a whole should be reviewed on a reasonableness standard: *Demirovic* v. *Canada (Minister of Citizenship and Immigration)*, 2005 FC 1284.

Did the officer err in his application of subsection 113(a) to the documentary evidence?

[12] As explained by Madame Justice Karen Sharlow of the Federal Court of Appeal in *Raza* v. *Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385 at paragraphs 12 and 13, a PRRA application is not an appeal or a reconsideration of the decision of the RPD to reject a claim for refugee protection. Subsection 113 (a) of IRPA mitigates the risk of relitigation of the issues that were determined by the RPD by limiting the evidence that may be presented to the PRRA officer. A negative refugee determination must be respected by the PRRA officer, (and I would add, indirectly by this Court), unless there is new evidence of facts that might have affected the outcome of the RPD hearing if the evidence had been presented to the Board.

[13] To assist the officer, subsection 113 (a) raises a number of questions about the proposed new evidence. Madame Justice Sharlow summarized them as follows:

> 1. Credibility: Is the evidence credible, considering its source and the circumstances in which it came into existence? If not, the evidence need not be considered.
>
> 2. Relevance: Is the evidence relevant to the PRRA application, in the sense that it is capable of proving or disproving a fact that is relevant to the claim for protection? If not, the evidence need not be considered.
>
> 3. Newness: Is the evidence new in the sense that it is capable of:
> (a) proving the current state of affairs in the country of removal or an event that occurred or a circumstance that arose after the hearing in the RPD, or
> (b) proving a fact that was unknown to the refugee claimant at the time of the RPD hearing, or
> (c) contradicting a finding of fact by the RPD (including a credibility finding)? If not, the evidence need not be considered.

> 4. Materiality: Is the evidence material, in the sense that the refugee claim probably would have succeeded if the evidence had been made available to the RPD? If not, the evidence need not be considered.
>
> 5. <u>Express statutory conditions</u>:
>
> (a) If the evidence is capable of proving only an event that occurred or circumstances that arose prior to the RPD hearing, then has the applicant established either that the evidence was not reasonably available to him or her for presentation at the RPD hearing, or that he or she could not reasonably have been expected in the circumstances to have presented the evidence at the RPD hearing?
> If not, the evidence need not be considered.
>
> (b) If the evidence is capable of proving an event that occurred or circumstances that arose after the RPD hearing, then the evidence must be considered (unless it is rejected because it is not credible, not relevant, not new or not material).

[14] The applicants submit that the father's PIF, as well as the transcript of evidence from his RPD hearing should have been considered as new evidence as they took on a "qualitatively different nature" when combined with the positive Notice of Decision of the parents' and siblings' refugee protection claims. These documents meet the *Raza* criteria, they submit, in that they are credible, relevant, material and new because of their source, because they prove that individuals who are closely and similarly situated to the applicants were found to be in need of protection, and they prove a fact that was unknown to the applicants at the time of their RPD hearing as it had not occurred, namely the positive outcome of the parents' and siblings' RPD hearing.

[15] The applicants further argue that the Notice of Decision in relation to Mrs. Mujib's family members contradicts a finding of fact by the RPD in the applicants' hearing, which is that they were not in need of protection based upon her father's political activities.

[16] It should be noted that the reasons underlying the Notice of Decision regarding the other family members were not provided to the PRRA officer. The applicants submit that this is immaterial as the facts outlined in the narrative of the father's PIF are essentially the same as those included in Mrs. Mujib's own PIF. Thus, the argument goes, if her father's claim succeeded, then hers should too, seeing that their claims were essentially based on the same story.

[17] The respondent submits that the female applicant's father's PIF may be credible and relevant to the applicants' submission that the parents and siblings had been found to be convention refugees; however, the PIF did not meet any of the other criteria set out in *Raza*. The PIF should not be considered new evidence because it pre-dates the applicants' hearing, there is no evidence to suggest that the applicants' claim would have succeeded if the evidence had been made available to the RPD, and thirdly, the applicants did not establish why the evidence in question was not reasonably available for presentation at the RPD hearing.

[18] In considering whether evidence is new for the purposes of a risk assessment following a negative refugee determination, the date on which the document was created will not be determinative. What will be important is whether the event or circumstance sought to be proven predated the RPD hearing: *Raza*, paragraph 16. Here, as the officer noted, the allegations of risk that were raised in the applicants' application and supporting evidence are the same as those that were previously raised, heard and assessed by the RPD. As stated in *Raza* at paragraph 17, "a PRRA officer may properly reject such evidence if it cannot prove that the relevant facts as of the date of the PRRA application are materially different from the facts as found by the RPD".

[19] The applicants have cited no authority for the proposition that evidence, which was available at the time of the RPD hearing and for which no reasonable explanation as to why it was not submitted to the Board at that time, may become "qualitatively different" and hence new and material by reason of a positive Board decision in respect of another claim.

[20] There was no explanation before the PRRA officer as to why the father's narrative, either directly or through his PIF, was not submitted to the RPD on the applicants' claim. The officer had no way of knowing what other evidence the RPD relied upon in deciding the father's claim or what portion of his evidence was accepted or rejected. As the respondent submits, the PIF informs us only of the basis of the claim and not the reasons for the positive outcome.

[21] The only document which is materially different and which was not available at the time of the RPD hearing is the Notice of Decision. That document merely confirms that the parents and siblings were granted protection. It does not confirm that the applicants are at risk and are in need of protection.

[22] I conclude that the officer did not err in excluding the evidence and that the decision, overall, was reasonable. While I have reached that conclusion, I recognize that the failure of the RPD to join the two claims, or that of the applicants to request joinder at their own initiative or to introduce the father's narrative as evidence, may well have diminished their prospects of a successful outcome for their claims. However, if an unfairness resulted the discretion to address it rests with the Minister and not the Court.

[23] The applicants have submitted a proposed question for certification which reads as follows:

> Can evidence that was available prior to a PRRA applicant's RPD hearing be considered new evidence pursuant to section 113(a) of IRPA if other evidence which came to light after the RPD hearing changes the quality of that evidence?

[24] As set out in *Zazai* v. *Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89, the threshold for certifying a question under section 74 of IRPA is whether there is a serious question of general importance which would be dispositive of an appeal. The question should be one that transcends the interests of the immediate parties to the litigation and contemplates issues of broad significance or general application: see *Dragan v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 281; [2003] F.C.J. No.404.

[25] Counsel provided post-hearing submissions with respect to certification of this question. The applicant's position is that the question transcends the interests of the parties as there may be other situations where subsequent evidence may change the quality or nature of evidence that was previously submitted or was available at the time of a refugee protection hearing.

[26] I agree with the respondent that the somewhat unique circumstances of this case are unlikely to recur. As counsel for the applicants acknowledged, he was unable to find any other reported case in which a similar situation had arisen. Thus the issue does not, in my view, transcend the interests of the parties in this particular case. Moreover, the Federal Court of Appeal has already established a framework for determining whether evidence should be considered anew by a PRRA officer. I see no reason to certify the proposed question in this case.

JUDGMENT

IT IS THE JUDGEMENT OF THIS COURT that:

1. the application is dismissed;

2. no question is certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-82-08
STYLE OF CAUSE:	AIM SHAZZADUL MUJIB NAHIDA AKHTAR MUJIB AIMAN ISHAQUE BIN MUJIB and THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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