

Federal Court



Cour fédérale

Date: 20100106

Docket: IMM-493-09

Citation: 2010 FC 10

Ottawa, Ontario, January 6, 2010

PRESENT: The Honourable Mr. Justice O'Keefe

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

O'KEEFE J.

[1] This is an application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, as amended, and subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) of a December 18, 2008 decision made by a pre-removal risk

assessment officer (the officer). In that decision, the officer rejected the application of the applicants for permanent residence based on humanitarian and compassionate (H&C) grounds.

[2] The applicants request that the decision be set aside and the matter referred back to a new officer for redetermination.

Background

[3] Mr. Aim Shazzadul Mujib and his wife, Nahida Mujib are citizens of Bangladesh. Their son, Aiman Ishaque bin Mujib is five years old and was born in the United States of America. Their second son, Ahnaf Ishaque bin Mujib, was born in Toronto and is three years old. Both children hold Bangladeshi citizenship, having been born abroad to Bangladeshi parents. Ahnaf is also a Canadian citizen.

[4] Mr. Mujib fled Bangladesh as a result of his involvement with the Bin Protik Ishaque Foundation, an NGO that spoke out against Islamic Fundamentalists, and due to Mrs. Mujib's father's activism with the Bangladesh Awami League (AL). Mr. Mujib stated that he was repeatedly attacked by members of the Bangladesh National Party (BNP) and was at one point hospitalized as a result. At one point, the BNP announced its intention to kill him, and so he fled to the United States in September 1998.

[5] Mrs. Mujib stated that her father was targeted by individuals within the government for his role in helping to organize political events leading to the October 2001 elections. These individuals threatened Mrs. Mujib's family if her father did not surrender. Her father was taken by these individuals and while her uncle went to the police, he was told they could not assist. After her father was returned, the family was continually threatened. Mrs. Mujib and her family fled to the United States in February 2002.

[6] Mr. and Mrs. Mujib were married in the United States in October 2003.

[7] The applicants entered Canada on February 13, 2005. Their claim for refugee protection was denied on February 22, 2007. Leave for judicial review in respect of this decision was denied by this Court in June 2007. The applicants then submitted a pre-removal risk assessment (PRRA) application, which was denied on November 8, 2007. While this Court granted leave to judicially review that decision, ultimately their application was dismissed on September 12, 2008. On March 12, 2008, the applicants submitted an application for permanent residence on humanitarian and compassionate (H&C) grounds, which was refused on December 18, 2008 by the officer. It is this refusal which is the subject of this judicial review.

[8] Mrs. Mujib's parents, her two sisters and brother were previously found to be Convention refugees and are now permanent residents of Canada, residing in Toronto. Mr. Mujib's parents and four of his six brothers remain in Bangladesh, while his two other brothers are permanent residents of Australia.

Impugned Decision

[9] The officer considered the risk to the family if returned to Bangladesh, their establishment in Canada, the best interests of the children and Mr. and Mrs. Mujib's reestablishment in Bangladesh.

[10] With regards to the risk of return, the officer found that significant changes had taken place in Bangladesh and that while political violence continued and high profile politicians and activists were targeted, the applicants had not provided objective evidence establishing that they would be targeted by the BNP or others.

[11] On the issue of establishment, the officer found that the applicants have a good civil record in Canada and that their community had expressed significant support for them. In addition, the officer found that Mrs. Mujib's parents provided substantial support to the family. Regardless, the officer concluded that the evidence failed to demonstrate that their establishment was so great that their removal would cause unusual and undeserved or disproportionate hardship.

[12] The officer also found that the applicants had not established that relocating the two children would have a negative impact such as to amount to unusual and undeserved or disproportionate hardship. There was a lack of evidence indicating that the two boys' needs would not be met in Bangladesh and a lack of evidence that the children, both Bangladeshi citizens, could not reside there. Mr. Mujib's family is also present in Bangladesh, which the officer found would facilitate their adjustment.

[13] Finally, the officer concluded that there was a lack of evidence supporting the contention that Mr. and Mrs. Mujib would be unable to reestablish themselves in Bangladesh or that doing so would amount to unusual and undeserved or disproportionate hardship.

Issues

[14] The issues are as follows:

1. What is the standard of review?
2. Did the officer err in failing to consider evidence of similarly situated individuals that were granted protection?
3. Did the officer err in failing to consider that the applicants' separation from Mrs. Mujib's family would be permanent?

Applicants' Written Submissions

Ignoring Evidence

[15] The applicants submit that the officer concluded the risk analysis by stating that the documentary evidence did not support the applicants' submissions of risk. However, there was evidence before the officer that Mrs. Mujib's parents, brother and sister, who had faced the same problems advanced by the applicants, had been found to be Convention refugees. Therefore, contrary to the officer's finding, there was indeed evidence that the applicants would be of interest

to the BNP and Jamat-e-Islami. It is a reviewable error for an H&C officer to ignore relevant evidence (see *Bagwandeem v. Canada (Minister of Citizenship and Immigration)*, 2001 FC 661).

Establishment

[16] The applicants argue that the officer failed to consider that their separation from Mrs. Mujib's family would be more or less permanent since the applicants are under a deportation order and Mrs. Mujib's family are Convention refugees and cannot return to Bangladesh.

[17] The applicants submit that IRPA and the *Immigration and Refugee Protection Regulations* are designed to avoid this result. Rule 49(1) of the *Refugee Protection Division Rules* states that claims of family members must be joined. This would presumably prevent inconsistent results such as that which occurred in this case. Further, paragraph 3(1)(d) of IRPA states that one objective of the Act is to see that families are reunited in Canada. Therefore, the applicants' desire to be reunited is a hardship that IRPA seeks to address.

Respondent's Written Submissions

Ignoring Evidence

[18] The respondent submits that despite the applicants' contention, the officer considered all of the evidence concerning Mrs. Mujib's family. The presumption is that the officer has taken into

account all evidence before her. Provided she considers all relevant facts in reaching a decision, there is no need to refer to every piece of evidence (see *Sidhu v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 741 at paragraph 15). Further, the officer specifically stated that she had considered all evidence related to the application. This would include documents related to Mrs. Mujib's family.

[19] While the applicants state that the arguments advanced by Mrs. Mujib's father were sufficient to grant the family refugee protection, in the present case, the officer had no way of knowing what other evidence the IRB relied upon in reaching a positive decision in Mrs. Mujib's father's claim or what portion of the evidence was accepted. Mrs. Mujib's father's PIF simply provided the basis for his claim, not the reasons for a positive outcome. This does not necessarily establish that the applicants are at risk or in need of protection. This is similarly the case for the other extrinsic evidence submitted.

[20] The applicants' argument amounts to a disagreement with the weight given to the evidence by the officer. It is well established that the weighing of relevant factors is a matter within the officer's authority (see *Legault v. Canada (Minister of Citizenship and Immigration)* (2002), 212 D.L.R. (4th) 139 (F.C.A.) at paragraph 11 and *Hamzai v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1108 at paragraph 24).

Establishment

[21] The respondent submits that the hardship triggering the exercise of discretion on H&C grounds must be something more than that which is inherent in being removed after establishing a life in Canada (see *Irimie v. Canada (Minister of Citizenship and Immigration)* (2000), 10 Imm. L.R. (3d) 206 at paragraph 12). The fact that the applicants may leave behind family and that it might be difficult to visit them is not necessarily sufficient to justify the exercise of discretion.

[22] The respondent argues that in addition, regard must be given to the submissions placed before the officer (see *Ahmad v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 646 at paragraph 37). The applicants' submissions did not refer to any potential difficulties they may experience visiting Mrs. Mujib's family. The officer's reasons properly identified the factors referred to by the applicants.

Applicants' Reply

Ignoring Evidence

[23] In addition to the documentary evidence previously mentioned that was submitted in support of their contention that their profile was similar to those at risk in Bangladesh, the applicants also referenced documentary evidence that family members of individuals wanted by the government are at risk.

[24] The applicants also argue that most of the country condition evidence referred to by the officer relates to events in January 2007, which pre-dates the granting of protection to Mrs. Mujib's family and therefore cannot be characterized as changes in country conditions. Further, one event referred to by the officer occurred on December 17, 2008, one day before the decision was made. Fairness would dictate that the applicants be given the opportunity to respond to this evidence.

Establishment

[25] The applicants argue that an officer should understand that the separation of the applicants from Mrs. Mujib's family is not an everyday separation, but one which would cause unique problems given Mrs. Mujib's family's refugee status.

Respondent's Further Submissions

Ignoring Evidence

[26] The applicants' argument that the officer failed to consider similarly situated persons is rooted in the erroneous proposition that when one member of a family is granted protection, all others should be considered at risk also. This does not accord with the jurisprudence, as it is established that persecution against one family member does not automatically entitle all others to Convention refugee status (see *Rahmatizadeh v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No, 578 at paragraph 8).

[27] The respondent states that regardless of the arguments concerning extrinsic evidence, the officer reasonably concluded that the applicants were not at risk given the passage of time and the fact that they did not demonstrate that they fit the profile of those at risk.

Establishment

[28] The respondent states that the IP5 policy manual and the jurisprudence of this Court each recognize that family separation in and of itself does not necessarily amount to undue and underserved or disproportionate hardship (see *Irimie* above, at paragraph 2 and *Inland Processing Manual*, Chapter 5, section 11.2). Further, while one of the stated objectives of IRPA is family reunification, this is but one of many objectives and neither trumps all others nor is determinative.

Analysis and Decision

[29] Issue 1

What is the standard of review?

Issue two is a question of fact, reviewable on the standard of reasonableness (see *Ebonka v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 80 at paragraph 17). Whether an officer has erred in her assessment of establishment is also a question of fact, reviewable upon the standard of reasonableness (see *Buio v. Canada (Minister of Citizenship and Immigration)* (2007), 60 Imm. L.R. (3d) 212 at paragraph 17).

[30] **Issue 2**

Did the officer err in failing to consider evidence of similarly situated individuals that were granted protection?

The officer mentioned the applicants' submissions concerning the threats to Mrs. Mujib's family but a review of the documentary evidence cited by the officer in relation to changed conditions shows that most of the evidence pre-dated the decision that found her family members to be Convention refugees.

[31] In coming to a decision on the applicants' PRRA application, the PRRA officer did not accept the documents relating to Mrs. Mujib's father's refugee claim (his PIF and other documents relating to his political activities) as they were not new evidence for the purpose of the PRRA claim.

[32] These documents, however, can be considered in an H&C application.

[33] In my view, the officer in the present case failed to properly analyze the evidence about Mrs. Mujib's family who appear to be similarly situated individuals and who were granted protection. This evidence was put forward by the applicants.

[34] As a result, the application for judicial review must be allowed because of this reviewable error and the matter is to be referred to a different officer for redetermination.

[35] Because of my finding on Issue 2, I need not consider the remaining issue.

[36] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

[37] **IT IS ORDERED that** the application for judicial review is allowed and the matter is referred to a different officer for redetermination.

“John A. O’Keefe”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-493-09

STYLE OF CAUSE: AIM SHAZZADUL MUJIB
NAHIDA AKHTAR MUJIB
AIMAN ISHAQUE BIN MUJIB

- and -

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: July 9, 2009

**REASONS FOR JUDGMENT
AND JUDGMENT OF:** O'KEEFE J.

DATED: January 6, 2010

APPEARANCES:

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| Hart A. Kaminker | FOR THE APPLICANTS |
| Tessa Kroeker | FOR THE RESPONDENT |

SOLICITORS OF RECORD:

| | |
|---|--------------------|
| Hart A. Kaminker Toronto, Ontario | FOR THE APPLICANTS |
| John H. Sims, Q.C. Deputy Attorney General of Canada | FOR THE RESPONDENT |