Federal Court  Cour fédérale

Date: 20121113

Docket: IMM-9533-11

Citation: 2012 FC 1318

Ottawa, Ontario, November 13, 2012

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

JIAUDDIN JAINUL SHAIKH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant seeks judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*) of the decision of Pre-Removal Risk Assessment (PRRA) officer (Officer), dated November 5, 2011, rejecting the applicant's PRRA application. For the reasons that follow the application is dismissed.

Background

[2] The Officer's decision was based on the finding that the applicant would not be subject to risk of persecution, danger of torture, risk to life or risk of cruel and unusual treatment or punishment if returned to India.

[3] The applicant, Jiauddin Jainul Shaikh, is a Muslim and a citizen of India. He is unmarried and his parents and siblings live in India.

[4] The applicant testified before the Immigration and Refugee Board that in 2002, as a student activist, he joined with other Muslims to protest against politically affiliated Hindu fundamentalist groups such as Shiv Sena and Navriman Sena. Due to the applicant's involvement in Muslim activism, members of these fundamentalists groups began targeting him in 2005. The applicant unsuccessfully sought police protection from these incidents.

[5] The applicant further said that on September 21, 2005, he was kidnapped and beaten. The leader of one of the Hindu fundamentalist groups contacted his father and demanded 100,000 rupees for his son's release. The applicant's father negotiated his son's release for 35,000 rupees on the condition that the balance would be paid within a week. The applicant was released with the warning that if the balance was not paid, he would have nowhere to hide in India. His father was unable to pay the balance. Thus, on November 16, 2005, he fled to the United Arab Emirates (UAE). The applicant worked in the UAE, but overstayed his tourist visa. He was subsequently caught by the authorities and deported back to India on May 11, 2007.

[6] On his return to India the applicant initially lived with relatives and visited his home at night. However, on July 7, 2007, the extremists visited his home while he was there. The applicant said that he escaped through the back of the house. After consulting with his family he decided that India was not safe for him. He secured a six-month contract on a ship and a United States (US) visa and sailed to the US in October 2007. On May 14, 2008, when the ship docked in Vancouver, the applicant disembarked and entered Canada.

[7] On arrival in Canada the applicant filed a claim for refugee protection. His refugee hearing was held in March 2010. In a decision dated July 27, 2010, the Refugee Protection Division (RPD) denied the applicant's refugee claim. The determinative issues were credibility and Internal Flight Alternative (IFA). The RPD identified various concerns that pointed to a lack of subjective fear of persecution and found that, on a balance of probabilities, the applicant had been country shopping. In addition, the RPD found that an IFA existed for the applicant in Kolkata, Delhi or Bangalore, where there were large Muslim populations. The RPD concluded that the applicant did not have a well founded fear of persecution and was not a person in need of protection. Leave to challenge the RPD's decision was denied.

[8] On June 4, 2011 the applicant filed a PRRA application. In his PRRA the applicant explained that he feared persecution in India and irreparable harm should he return. He highlighted the continuing risk to his life in India, the lack of an IFA, the collusion between the police and religious extremist groups and referred to documentary sources on religious extremism and increasing violence against religious minorities. He also provided a letter from his father indicating

that extremist groups had recently been searching for him and that his family was victim of a break-in by religious extremists on April 15, 2011.

Decision Under Review

[9] The Officer noted the statutory requirement for new evidence mandated under subsection 113(a) of the *IRPA*, and the explanation of this assessment provided in *Raza v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1385, [2006] FCJ No 1779. Turning to the applicant's PRRA submissions the Officer found that the applicant had merely restated the information provided to the RPD. Specifically, the Officer stated that:

> This information is not significantly different than the information previously provided and I do not find the submission provides new evidence regarding the material elements of the applicant's personal circumstances.

[10] The Officer noted the applicant's father's letter and its contents. After considering this letter the Officer found that the information contained therein was unverifiable and that its probative value was minimal. The Officer explained that:

> The information does not come from a disinterested party to the outcome of the applicant's case and the information is not corroborated by independent evidence. I do not find this letter provides significantly different information from that considered by the RPD but rather is an update on the risk identified by the applicant. I do not find this letter rebuts the findings of the RPD including the IFA finding.

[11] The Officer then turned to the articles submitted by the applicant, noting that he had read and considered them all. The Officer found that they reported on a number of topics, including "country conditions in India, reducing police torture against Muslims, the promotion of impunity in India and the façade of human rights in India". The Officer found that the articles were general in

nature and did not address the material elements of the applicant's personal circumstances. He concluded that they did not rebut the RPD's findings and did not provide evidence of new risk developments that were personal to the applicant and that had arisen since the RPD's decision.

[12] The Officer also addressed the applicant's submission that there was no IFA. With regards to these submissions the Officer stated that:

> He [the applicant] quoted from various sources; however, he did not provide the documentation that he was quoting from and I can assign no weight to the sections quoted.

[13] After reviewing the RPD's finding on IFA, the Officer found that none of the applicant's PRRA submissions rebutted this finding. Nevertheless, the Officer reviewed country conditions to determine if there had been a significant change in country conditions. Based on the human rights situation stated in the 2010 US Department of State Human Rights Report for India the Officer found that there had not been a significant change in country conditions since the RPD's decision.

[14] The Officer concluded that the applicant did not face more than a mere possibility of persecution nor that it was more likely than not that he would be subjected to torture or was at risk to life or of cruel and unusual treatment of punishment upon return to India. The applicant's PRRA application was therefore rejected.

Issues and Standard of Review

[15] The applicant raises three issues; first, whether the Officer erred in discounting the letter from the applicant's father on the basis that it was "unverifiable" and came from an interested party; whether the Officer erred in the assessment of country condition reports on the basis that the risks

they described were not personalized to the applicant, and finally; whether the Officer erred in not according a hearing to the applicant.

[16] It is well established that, barring an error in procedural fairness, the standard of review of a PRRA officer's decision is reasonableness. In consequence, it is not up to the reviewing court to substitute its own view of a preferable outcome or to re-weigh the evidence.

Discussion

[17] The respondent correctly notes that giving evidence little weight due to its provenance is an option which is open to the decision maker. The jurisprudence is clear that evidence should not be disbelieved simply because it comes from an interested party: *R v Laboucan*, 2010 SCC 12, [2010] 1 SCR 397, para 11. The Court has expressed this principle on several occasions; all neatly summarized by Justice de Montigny in *Cruz Ugalde v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 458, paras 24-25. Underlying these cases is the reality that certain types of evidence, by its very nature, will usually be known or testified to by persons with close personal connections to the applicant. This applies with particular force in cases of refugee protection, where the risk must be personal to the claimant. The Officer would thus have erred if this evidence had been wholly discounted on this basis alone.

[18] The Officer also noted that the letter was not corroborated by independent evidence. In some respects, the Officer is right. There is no evidence that corroborates the precise events of April 5 when the applicant's parents' home was invaded by Hindu extremists. That is correct, but that aspect of the letter describes increasing aggressive conduct by Hindu extremists.

[19] These errors in the treatment of the letter from the father must be situated in the context of the RPD decision and the PRRA process. The RPD found that the applicant had a viable IFA in other areas of India. The letter does not displace or address this finding.

[20] At the outset, I note that a positive IFA finding is usually determinative of the claim: *Rosas Maldonado v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1183, para 6. As explained by Justice Snider in *Sarker v Canada (Minister of Citizenship and Immigration)*, 2005 FC 353, para 7:

> Whether the Applicant is correct in this assertion is not, in my view, important or necessary for this application. The question of the existence of an IFA is a separate component of the Board's analysis that can stand alone (*Tharmaratnam v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 92 (F.C.T.D.)). Put simply, where an IFA is found, a claimant is not a refugee or a person in need of protection (*Zalzali v. Canada (Minister of Employment and Immigration)*, [1991] 3 F.C. 605 (F.C.A.), *Rasaratnam v. Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 706 (F.C.A.)). […]
>
> [Emphasis added]

[21] In sum, notwithstanding the errors, they do not affect the outcome of the decision or call into question the reasonableness of the IFA finding. The letter, even if accepted and given great weight, has no bearing on the IFA finding. In sum, although the Officer erred in his treatment of the evidence, the error was immaterial to the outcome of the case.

[22] The applicant also contends that the Officer did not have regard to all of the evidence before him, rendering the decision unreasonable. To be specific, it is said that the Officer did consider the

country condition reports. The applicant submitted a report: "The Promotion of Impunity in India: How Oppressive National Political Agendas Interact with the Global War on Terror" by Satchit Balsari, research associate at the Harvard School of Public Health (the "Balsari report").

[23] The Officer dismissed this report stating:

> [The Applicant] quoted from various sources; however, he did not provide the documentation that he was quoting from and I can assign to weight to the sections quoted.

[24] The Officer continued, noting:

> … the applicant submitted articles from various sources… the articles report on various topics including country conditions in India, reducing police torture against Muslims, the promotion of impunity in India, and the façade of human rights in India.

[25] The applicant has established that the Officer confused those aspects of the reports that were in fact "quoted" by the applicant as opposed to those that were relied on. This error is, in my view, equally immaterial. What is critical is whether the Officer fairly considered and directed his mind to their content.

[26] The crux of the applicant's argument is that the Officer failed to examine the reports, because if he had, he would not have concluded that the assertion in the father's letter about a rise in Hindu extremism was uncorroborated.

[27] The issue of Hindu extremism was not new; indeed, it was the very basis of the claim and was the very risk considered by the RPD. Nor did anything in that report address the viability of an IFA. To be specific, the report in question addresses violence in the state of Gujarat in 2002. The

report itself was written in 2004. It is not new evidence that requires a hearing under section 113 of the *IRPA*. It is worth noting that the report, at page 20, sustains the reasonableness of the finding of the IFA:

> Meanwhile, Indian minorities, like those persecuted in Germany, have started emigrating. The vastness of Indian territory allows them to seek refuge within India's borders. Ghettoization of Muslims has been observed across the country, with escalations in trend following communal violence. There are several regions in Gujarat that the VHP has declared "cleansed" – free of Muslims. Unprecedented migrations were seen in the city and suburbs of Bombay following the riots of 1993. These cloistered societies, however, foster insecurity, and the perceived lack of justice drives them to violent action. The area of Mumbra near Bombay, is not 80% Muslim, where "talk of nationalism, democracy, secularism…has come to be seen as anti-Islam."
>
> [Emphasis added]

[28] This leaves the question whether the Officer, given his treatment of the father's letter as "unverifiable", erred in not providing the applicant a hearing. Had the letter been directed to the viability of an IFA this argument might have succeeded. As it was directed to a known risk, already assessed, and for which refuge was available, it added nothing to the analysis of the risk before the Officer. The finding of the IFA was not called into question by this evidence.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be and is hereby dismissed. There is no question for certification.

"Donald J. Rennie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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