Federal Court  Cour fédérale

Date: 20190429

Docket: IMM-1127-18

Citation: 2019 FC 534

Ottawa, Ontario, April 29, 2019

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

YOUNUS KHAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Younus Khan, is a 30-year-old citizen of Bangladesh. He and his mother arrived in Canada on January 12, 2014 and made a refugee claim at the Fort Erie border. After the Refugee Protection Division [RPD] of the Immigration and Refugee Board declared their claim to be abandoned and refused to re-open it, the Applicant applied for a pre-removal risk assessment [PRRA] in May 2016.

[2] A Senior Immigration Officer rejected the Applicant's PRRA application in a decision dated February 16, 2018. The Applicant has now applied under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [*IRPA*], for judicial review of the Officer's decision. He asks that the Officer's decision be quashed, and the matter returned for redetermination by a different officer with any direction the Court considers appropriate.

I. Background

[3] The Applicant's mother was politically active and joined the Bangladesh National Party [BNP] when she was 22 years old. She worked as the Women's Secretary of the Barisal Division and was the Joint Secretary of the City Committee of the BNP. The Applicant joined the BNP when he was 20 years old and within a few years after joining was promoted to a co-ordinating secretary. The major rival to the BNP is the Awami League [AL]. It defeated the BNP in 2008 and has been in power since that time.

[4] The Applicant claims he and his mother were personally targeted, beginning in the summer of 2010, by AL thugs and the police. One summer evening in 2010, two police vans parked near the Applicant's house. Six or seven men exited the vans and began banging loudly and yelling aggressively. The Applicant claims these men were linked to the government, and one of them was Rabiul Alam Sohel (who is linked to Minister Jahangir Kabir Nanak).

[5] During a demonstration by the BNP in June 2011, the police attacked the Applicant, hitting him with batons several times on his back and thighs and once on his ankle. The Applicant says he now suffers chronic back pain due to these injuries.

[6] On the second day of a two-day strike called by the BNP in April 2013, a group of AL affiliated thugs led by Mr. Sohel physically assaulted the Applicant and his mother. The Applicant says they were beaten till they bled, and the beating only stopped when a group of BNP supporters arrived. The next day, the Applicant received his first direct death threat. Individuals approached the Applicant's home and started banging on the gate. One voice from outside, claiming to be Mr. Sohel, told the Applicant and his mother that he would finish them off as they had crossed the line by challenging Minister Nanak's authority within his own constituency.

[7] After receiving the death threat, the Applicant and his mother fled to a friend's home. They remained in hiding until they could flee Bangladesh. The Applicant and his mother obtained visas to travel to the United States and departed for there on October 22, 2013. After they arrived in the United States, a relative of the Applicant living in Canada advised them to seek protection in Canada. So, on January 12, 2014 the Applicant and his mother arrived in Canada and made refugee claims at the Fort Erie border.

[8] The RPD rejected their claims in February 2014 on the basis they had been abandoned. The RPD declined to reopen their claims, and their application for judicial review of the RPD's decision was unsuccessful. As such, the Applicant has never had a refugee hearing.

[9] In April 2016 the Applicant was notified of the opportunity to apply for a PRRA. Some nine months later, the Applicant learned that his PRRA had been rejected. The Applicant applied for leave for judicial review of the PRRA decision. After the leave application was perfected, the

Applicant and Respondent agreed that the decision was unreasonable and should be redetermined by another PRRA officer. The Applicant provided further submissions to be considered on the redetermination in addition to the previous submissions. These submissions included the Applicant's repeated request that an oral hearing be convoked if credibility was an issue.

II. The Officer's Decision

[10] In rejecting the Applicant's PRRA application, the Officer first summarized the risks identified by the Applicant in his submissions as well as his immigration history. The Officer accepted the Applicant's affidavit as the basis for his claim for protection. The Officer also accepted a hospital note attesting to the Applicant's physical injuries but remarked that this evidence did not corroborate the circumstances under which the Applicant received the injuries.

[11] The Officer then considered a letter from the BNP which stated that the Applicant was "a root level leader of the BNP," that he was "compelled to leave the country at the end of the [*sic*] October 2013 in order to save his life," and that because he was one of the AL's "targeted people, he had no safety and security in Bangladesh." The Officer found this letter did not provide "sufficient objective evidence" to indicate that the author had first-hand knowledge of the Applicant or his activities while in Bangladesh. The Officer noted that: "the author of the letter from the BNP would likely have some bias against members of the Awami League because of their political differences and hence, the information contained within this letter is not objective and therefore, I give this letter little probative value in establishing a personalized risk for the applicant upon return to Bangladesh."

[12] With respect to the Applicant's allegation that he had been personally targeted by the AL beginning in 2010, the Officer noted the absence of any objective evidence to corroborate this allegation. The Officer found that the submissions and documentation presented included "little evidence to corroborate the applicant's activities as a leader with the BNP…"

[13] The Officer then embarked upon a review of country condition evidence about political parties and recent elections in Bangladesh. After this review, the Officer found that:

> … there is insufficient objective evidence before me to indicate that any particular group or individual would be interested in causing the applicant any harm upon return to Bangladesh after an absence of more than four years. I acknowledge that documentary evidence attests that Bangladesh continues to experience political unrest and violence and that the human rights situation remains poor; however, I find that the applicant has not provided sufficient objective evidence to persuade me that he will be targeted upon return to Bangladesh….I am not satisfied that the applicant would be at risk of persecution, torture, or subjected personally to risk to his life or to a risk of cruel and unusual treatment or punishment upon return to Bangladesh for any reason.

[14] After making this finding, the Officer noted the Applicant's submission that, because a hearing in respect of his claim had never taken place, an oral hearing should be held if his credibility was a determinative issue or to clarify any issues relating to the documentation submitted. The Officer referenced section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*]. Immediately after reproducing this section, the Officer noted that the burden of proof rested on the Applicant to provide evidence indicating that he would be at risk of persecution, torture, risk to life or risk of cruel and unusual treatment or punishment if returned to Bangladesh. The Officer then stated: "I have evaluated the application,

assessed the submissions and the evidence provided by the applicant, and conducted a thorough research of country conditions, and do not find that an oral hearing is necessary."

[15] The Officer concluded by stating that, based upon a thorough analysis of all the evidence, the Applicant had not provided sufficient objective evidence that he would be at risk upon return to Bangladesh.

III. Analysis

A. *Standard of Review*

[16] The appropriate standard of review applicable to whether an oral hearing is required in a PRRA determination is open to some question. The Court's recent decisions in this regard diverge and follow one of two paths (*Zmari v Canada (Citizenship and Immigration)*, 2016 FC 132 at paras 10 to 12).

[17] One path finds the applicable scope of review to be a standard of correctness with no deference accorded to the decision-maker, because the issue of whether an oral hearing is required is a question of procedural fairness. The other path applies a deferential standard of reasonableness because the application of paragraph 113(b) of the *IRPA* and section 167 of the *IRPR* is a question of mixed law and fact.

[18] In this case, the parties disagree as to what the standard of review should be in respect of the Officer's determination not to convoke an oral hearing. The Applicant frames the issue as a

matter of procedural fairness which must be reviewed on the standard of correctness; while the Respondent says the standard of review should be reasonableness since the question as to whether the Applicant is a person in need of protection is one of mixed fact and law.

[19] In my view, whether an oral hearing is required in a PRRA determination raises a question of procedural fairness. The Officer's determination not to convoke a hearing should therefore be reviewed on a standard of correctness.

[20] This requires the Court to determine if the process followed by the Officer achieved the level of fairness required by the circumstances of the matter (*Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 115). The analytical framework is not so much one of correctness or reasonableness but, rather, one of fairness and fundamental justice. An issue of procedural fairness "requires no assessment of the appropriate standard of judicial review. Evaluating whether procedural fairness, or the duty of fairness, has been adhered to by a tribunal requires an assessment of the procedures and safeguards required in a particular situation" (*Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11 at para 74).

[21] As the Federal Court of Appeal recently observed: "even though there is awkwardness in the use of the terminology, this reviewing exercise is 'best reflected in the correctness standard' even though, strictly speaking, no standard of review is being applied" (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54). A procedure which is unfair will be neither reasonable nor correct, while a fair procedure will be both reasonable and correct.

[22] It must be noted that a hearing is not automatically mandated by paragraph 113(b) of the *IRPA*, which provides that: "a hearing *may* be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required" [emphasis added]. The Minister's discretion in this regard is somewhat constrained though by the prescribed factors set forth in section 167 of the *IRPR*:

Hearing — prescribed factors	**Facteurs pour la tenue d'une audience**
167 For the purpose of determining whether a hearing is required under paragraph 113(b) of the Act, the factors are the following:	**167** Pour l'application de l'alinéa 113b) de la Loi, les facteurs ci-après servent à décider si la tenue d'une audience est requise :
(a) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act;	**a)** l'existence d'éléments de preuve relatifs aux éléments mentionnés aux articles 96 et 97 de la Loi qui soulèvent une question importante en ce qui concerne la crédibilité du demandeur;
(b) whether the evidence is central to the decision with respect to the application for protection; and	**b)** l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection;
(c) whether the evidence, if accepted, would justify allowing the application for protection.	**c)** la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.

[23] Whether each of the three prescribed factors must be present before a hearing is required is another question upon which the Court's jurisprudence diverges. For example, in *Mosavat v Canada (Citizenship and Immigration)*, 2011 FC 647 at para 11, the Court stated that: "An oral

hearing is only required if all of the factors set out in s. 167 of the Regulations are met."

However, in *Hurtado Prieto v Canada (Citizenship and Immigration)*, 2010 FC 253, the Court found that:

> [30] … section 167 describes two types of circumstances where issues of credibility will require an oral hearing. Paragraph (a) relates to the situation where evidence before the officer directly contradicts an applicant's story. Paragraphs (b) and (c), on the other hand, essentially outline a test whereby one is to consider whether a positive decision would have resulted but for the applicant's credibility. In other words, one needs to consider whether full and complete acceptance of the applicant's version of events would necessarily result in a positive decision. If either test is met, an oral hearing is required.

[24] In the present case, it is unnecessary to decide whether all or merely some of the prescribed factors must be present before a hearing is required. It is not necessary because, in view of *Tekie v Canada (Minister of Citizenship and Immigration)*, 2005 FC 27 at para 16, section 167 becomes operative where credibility is an issue which could result in a negative PRRA decision; the intent of the provision is to allow an applicant to face any credibility concern which may be put in issue (this reasoning was recently applied in *A.B. v Canada (Citizenship and Immigration)*, 2019 FC 165 at para 23).

[25] As for the Officer's overall decision, it is settled law that a PRRA decision must be reviewed against a standard of reasonableness (*Sing v Canada (Citizenship and Immigration)*, 2007 FC 361 at para 55; *Belaroui v Canada (Citizenship and Immigration)*, 2015 FC 863 at para 9).

B. *The Applicant's Submissions*

[26] The Applicant says an oral hearing was required since his credibility was an issue. In the Applicant's view, although the Officer noted his request for an oral hearing, the Officer considered this request in a superficial way. The Applicant recognizes that an oral hearing is discretionary. However, when credibility is questioned, the Applicant says the Officer fettered his or her discretion by not granting him an oral hearing.

[27] According to the Applicant, although the Officer did not explicitly state he was not credible, the Officer made veiled credibility findings about his involvement with the BNP. In the Applicant's view, the Officer unreasonably found the BNP letter did not provide sufficient objective evidence that he was personally targeted because of his association with the BNP. The Applicant says when veiled credibility findings are made by a decision-maker they trigger the same level of procedural fairness as any explicit credibility findings.

[28] The Applicant further says his affidavit clearly indicated he was at risk, and since his evidence is presumed to be credible and connected to his risk, an oral hearing should have been held. According to the Applicant, the lack of documentary evidence cannot be used to impeach an affidavit, and the evidence must be taken for what it says and not what is missing from it.

[29] In the Applicant's view, the Officer unreasonably dismissed the BNP letter because the author had no first-hand knowledge of his activities in Bangladesh. Despite the Applicant submitting numerous pieces of documentary evidence showing how BNP supporters were targets

of political violence, the Applicant claims that because none of this evidence was addressed in the Officer's reasons, the decision should be set aside.

C. *The Respondent's Submissions*

[30] The Respondent says the Officer noted the factors set out in section 167 of the *IRPR* and, therefore, was alive to the consideration of an oral hearing. The Respondent characterizes the Officer's findings as there being no future risk of harm to the Applicant, not a lack of credibility finding.

[31] In the Respondent's view, the Officer's decision to give little probative value to the BNP letter was appropriate considering that the author did not specify what activities the Applicant participated in, how the author knew the Applicant, or who if anyone was interested in harming the Applicant after four years of being out of the country. The Respondent notes that it is not the role of the Court to re-weigh the evidence.

[32] According to the Respondent, the documentary evidence provided by the Applicant refers to current opposition leaders and activists, not past members and, as such, does not assist in addressing his future risk. The Respondent says that, since this evidence was not relevant, it did not need to be addressed.

D. *An Oral Hearing should have been held*

[33] The Applicant's credibility was clearly at issue when the Officer stated that "the submissions and documents presented included little evidence to corroborate the Applicant's activities as a leader with the BNP while in Bangladesh." This statement shows that the Officer had unexplained and unstated concerns about the Applicant's credibility. In my view, this statement constitutes a veiled credibility finding because the Officer looked for evidence to corroborate the Applicant's claim that he faces political persecution and a personalized risk because of his active role in the BNP. The only way the Officer could make this finding was if he or she found the Applicant not to be credible or had doubts about statements in the Applicant's affidavit.

[34] The Officer explicitly stated that the Applicant's affidavit was accepted as the basis for his claim for protection. The Officer did not explicitly find the Applicant to be not credible; nor did the Officer reference any contradictions, inconsistencies, or implausibilities arising from the Applicant's sworn testimony in his affidavit. This runs afoul of *Maldonado v Canada (Minister of Employment & Immigration)*, [1979] FCJ No 248 at para 5: "When an applicant swears to the truth of certain allegations, this creates a presumption that those allegations are true unless there be reason to doubt their truthfulness." The Officer expressed no such doubt in this case.

[35] Unlike most refugee claimants, the Applicant never had an oral hearing before the RPD. His refugee claim was declared to be abandoned and the RPD refused to reopen it. This Court denied his application for leave for judicial review of the RPD's decision in May 2015.

[36] In this case, the Applicant has never had an opportunity to address any credibility concerns about his claim for refugee protection. The Officer accepted the Applicant's affidavit without question. If the Officer had concerns about the basis for or credibility of the Applicant's claim, an oral hearing should have been held before the Officer made a negative decision (and, perhaps, all the more so because the Applicant's claim and his credibility have not been assessed by way of an oral hearing before the RPD).

E. *The BNP Letter and Medical Report*

[37] I agree with the Applicant's submission that it was inappropriate and unreasonable for the Officer to dismiss the probative value of the BNP letter. Although this letter does not establish that the Applicant faces a continuing risk, if the Officer had not doubted the Applicant's connection with the BNP, the documentary evidence is such that there is an ongoing risk for him in Bangladesh. Various news stories in the country condition evidence show that individuals who are considered to be leaders and activists in the BNP have been specifically targeted since the AL came to power. There also is a 2017 Freedom House report which states that official harassment of the political opposition is on the rise and that the AL government harasses leading BNP members through house arrests, imprisonment, or being forced into hiding or exiled.

[38] The Officer's assessment of the medical evidence submitted by the Applicant to corroborate that he was attacked was unreasonable. In the Officer's view, this evidence did not corroborate the circumstances in which the Applicant sustained injuries in the assault. In my view, no medical report could be used to establish that the attackers were politically motivated. In this regard, the Officer mischaracterized the point of submitting corroborating medical

evidence: the point was to show that the Applicant suffered injuries on the date he swore to and his affidavit explained the circumstances in which the injuries arose.

IV. Conclusion

[39] The Applicant's application for judicial review is granted, the Officer's decision is set aside, and the matter returned for a new determination by a different immigration officer. The officer conducting the redetermination should conduct an oral hearing.

[40] No question of general importance is certified.

JUDGMENT in IMM-1127-18

THIS COURT'S JUDGMENT is that: the application for judicial review is allowed; the matter is returned for redetermination by a different immigration officer after an oral hearing; and no question of general importance is certified.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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