Federal Court  Cour fédérale

Date: 20130501

Docket: IMM-6263-12

Citation: 2013 FC 454

Ottawa, Ontario, May 1, 2013

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

MANGA SINGH SOHANPAL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of J. Gaumont (the "Officer"), Senior Immigration Official of Citizenship and Immigration Canada (CIC), refusing Mr. Manga Singh Sohanpal's (the "Applicant") application for a pre-removal risk assessment (PRRA) pursuant to section 112 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA* or the "Act").

[2] In addition to seeking reconsideration of his PRRA application, the Applicant requests the following declarations: that there is a favourable presumption in PRRAs for torture victims, who

should be accepted in the absence of any countervailing factors because of our abhorrence of torture as a serious crime in international law; that the situation in India and in the Punjab today is one where there is a serious risk of torture for those who have been previously targeted by the police, including political activists and human rights workers; and that removal of these categories of persons would violate the *Canadian Charter of Rights and Freedoms* (the "*Charter*").

[3] There will be no need to consider the declaratory relief sought by the Applicant. Sections 18, 18.1 and 28 of the *Federal Courts Act*, RSC 1985, c F-7, empower this Court to issue declaratory relief in relation to judicial review proceedings; however, the scope of such declaratory relief in relation to judicial review is not unlimited. Pursuant to paragraph 18(1)(a), the Court may grant declaratory relief against any federal board, commission or other tribunal, but paragraph 18.1(3)(b) limits this power to declaring invalid or unlawful a decision, order, act or proceeding of a federal board, commission or other tribunal. The above declarations sought by the Applicant clearly go beyond the declaratory powers of this Court in relation to judicial review. As a result, I shall only address the Applicant's request regarding the quashing and potential reconsideration of the Officer's decision.

[4] For the reasons set out below, I find that this application for judicial review should be dismissed.

Facts

[5] The Applicant, a citizen of India born December 29, 1970, arrived in Canada on September 15, 2002, and was refused refugee status by the Immigration and Refugee Board (IRB or the

"Board"), Refugee Protection Division (RPD) on October 7, 2004. The Applicant has a wife and three children residing in India. An application for leave to apply for judicial review from the refusal of his initial refugee claim was refused on January 27, 2005. The Applicant's PRRA request was submitted January 19, 2012, and rejected on April 26, 2012.

[6] The RPD refused the Applicant's claims, finding him to be generally lacking in credibility. The RPD also concluded that internal flight alternatives (IFAs) would be available to the Applicant throughout India as his claims that the police were pursuing him everywhere in India were not credible. Objectively, the RPD concluded that Sikh males in Punjab are not a category to be considered at risk *per se*, and it did not give any credibility to various medical reports submitted by the Applicant or to allegations of his imputed political opinion. The RPD considered the documentary evidence on the treatment of returned asylum seekers due to illegal departure from India and concluded that any fear held by the Applicant in this regard is a fear of possible prosecution and not persecution, as there was no evidence of systematic mistreatment or torture of returnees. Finally, the RPD concluded that any risk under section 97 was not personalized.

[7] The Applicant is a Sikh believer who claims to have been a victim of harassment and abuse by the Indian police because of his alleged involvement and association with Sikh militants.

[8] The Applicant's problems with the Indian police began in January 2002. At the time, his cousin and one of his employees were associated with militant activity and, as a result, the police suspected the Applicant in connection with the December 2001 attack on Parliament. The

Applicant was arbitrarily detained, despite having no knowledge of his associates' militant involvement and the police having no evidence of any wrongdoing on his part.

[9] The Applicant alleges that the police beat him and threatened his life in an attempt to gain information. He was released only once they had taken his picture and fingerprints and on the payment of a bribe, following the intervention of certain high-ranking people.

[10] The Applicant was told to report to the police station in March, April and June 2002, and was arrested again in July 2002 on the allegation that he had contact with the militants. The Applicant claims to have been beaten but was released after paying a bribe and agreeing to work for the police.

[11] The Applicant argues in his submissions before this Court that the police raided his house in August of 2002, beating his wife and detaining his father. Elsewhere the Applicant claims that he and his family moved cities to escape attention, but the police apparently tracked him down and he was forced to flee to Canada. He alleges that the police continue to question his family regarding his whereabouts and that his parents have both passed away due to depression and stress suffered as a result of the police's constant harassment and assaults.

[12] The Applicant claims to have left India under an alias with false travel documents and fears that he will be sentenced to prison upon return as this is against the law in India. In addition, the Applicant's representative asserts that, in order to obtain a travel document, the Applicant was forced to complete a form addressed to the Indian High Commission in Ottawa, in which he was

asked to indicate whether he had filed a refugee protection claim in Canada and, if so, on what grounds.

Decision under review

[13] The Officer rejected the Applicant's PRRA application, determining that he would not be at risk of persecution, torture, risk to life or risk of cruel and unusual treatment or punishment if returned to India.

[14] The Officer acknowledged the Applicant's version of the facts and summarized the exhibits filed in support of his PRRA application. The Applicant had submitted four affidavits from his wife and acquaintances in India, but the Officer found that the affidavits relayed substantially the same allegations that were made to the RPD and noted that the Applicant could not explain why he was unable to present this evidence at the time of his RPD hearing in 2004. Finding that the affidavits did not shed light on facts already deemed not to be credible by the RPD, the Officer did not assign any evidentiary value to them. The Officer noted that the wife merely reasserted facts found not to be credible by the RPD and that the remaining affiants said that they were "aware" of the facts alleged, but did not state that they were direct witnesses of any of the reported incidents.

[15] The Officer concluded that the Applicant had failed to discharge his burden of proving that he was at risk under sections 96 or 97 of the Act. His claims that he was still pursued by the Indian authorities were previously rejected by the RPD and the PRRA is not an appeal process or opportunity for review of a decision of the RPD but is focused instead on "new information".

[16] With respect to the form requested for the Indian High Commission in Ottawa, the Officer noted that a copy of the form was provided in evidence, but found that it could not constitute probative evidence that the Indian authorities are aware that the Applicant claimed refugee protection as it was not filled out. The Officer concluded that even if the Indian government was aware of the Applicant's status, the documentary evidence showed that failed and deported refugee claimants are generally not at risk upon return to India. The Officer found that while the Applicant might be questioned upon return, there was no evidence that failed and deported claimants returned with valid travel documentation would be persecuted upon return.

[17] The Officer next considered the Applicant's allegations that he would be arrested and imprisoned for two years for having left India using a false passport. The Officer confirmed that the alleged sanction exists and that it may be accompanied or replaced by a fine. The Applicant, however, had provided no evidence regarding the enforcement of such sanctions and the Officer was unable to find anything to that effect in the documentary evidence; therefore, the Officer concluded that the Applicant failed to discharge the burden of showing he was at risk under sections 96 and 97 of the Act.

[18] Finally, the Officer considered the Applicant's submissions regarding the treatment of Sikhs in India, particularly with respect to the corruption and impunity of the authorities. Noting that the Applicant has not demonstrated that he is an active militant who might be of interest to the authorities, and that there are protections in place for religious minorities including Sikhs, the Officer cited evidence from 2007 and 2010 suggesting that the situation in the Punjab has been relatively calm for several years and the political situation has regularized. The Officer recognized

that the situation is not perfect in India, but found that the Applicant was not at risk within the meaning of sections 96 and 97 of the Act given his profile and the country conditions on the whole.

[19] The Officer concluded that there is no more than a mere possibility that the Applicant will be persecuted by reason of an enumerated Convention ground and that there are no serious reasons to believe that he would be subject to torture or otherwise at risk pursuant to section 97 of the Act.

Issues

[20] The only issue to be decided on this application for judicial review is whether the PRRA Officer's decision is reasonable.

Analysis

[21] The Applicant objects to the Officer's assessment of the affidavits, medical reports, human rights reports and "other strong corroborating evidence" he claims to have submitted. He argues that the evidence was rejected solely on the basis that the Board found his allegations not to be credible. He argues that the PRRA Officer cannot reject evidence simply because it is self-serving or hearsay evidence, as this would go against the instructions regarding admissibility before the Board and a PRRA Officer's jurisdiction cannot be more restrictive than that of the Board.

[22] The Applicant also argues that the Officer's rejection of the additional evidence submitted with respect to the persecution inflicted by the police was arbitrary and capricious, and that the evidence corroborates his story and demonstrates that he is still under an imminent threat of torture if deported to India. The Applicant takes issue with the Officer's statement that none of the three

officials from the Applicant's village who submitted affidavits claimed to be witnesses to the acts of violence and torture attested to. He argues that requiring him to produce evidence from eye witnesses imposes an impossible standard as only the perpetrators were present during the alleged events. He submits that the affiants witnessed him fleeing to a different region of India because of the violence he experienced, as well as many other events, and that the Officer's failure to give any weight to the affidavits signalled a lack of good faith.

[23] The Applicant's submissions demonstrate a certain level of confusion regarding the requirements of paragraph 113(a) of the Act and the contents of the record before the PRRA Officer. In addition, both the relief sought by counsel for the Applicant and his submissions suggest that he has failed to appreciate the link that must be created between the Applicant's personal situation and the general country conditions in India. Despite the Applicant's adamant submissions regarding the quality and sufficiency of the evidence provided, he has failed to establish that the Officer committed a reviewable error as required under subsection 18.1(4) of the *Federal Courts Act* and relies primarily on additional submissions regarding the country conditions in the Punjab and in India generally.

[24] It is well established that a PRRA application is not an appeal or reconsideration of the IRB's decision: *Raza v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385 at para 12. Writing for the Court, Justice Sharlow then expounded (at para 13) on the questions that must be asked to determine whether "new evidence" ought to be considered by a PRRA officer:

> 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 county 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. Express statutory conditions:
    (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).

[25] In deciding that he could not assign any evidentiary value to the four affidavits in the case at hand, the Officer noted that the affidavits "do not shed new light on facts already deemed not to be credible by the RPD" (Decision, page 6). He noted at page 5 of his decision that the Applicant could not explain why he was unable to present this evidence at the time of his RPD hearing in 2004

and that the RPD rejected the Applicant's refugee protection claim on the very basis of the facts presented in the affidavits, being of the opinion that the Applicant was not credible.

[26] While one might contest the Officer's finding under part 3(c) of paragraph 13 of the Court of Appeal's decision in *Raza*, above, by arguing that the affidavits could be considered new to the extent that they "[contradict] a finding of fact by the RPD (including a credibility finding)", each of the other factors arguably go against consideration of the affidavits and suggest that they should not be admissible under paragraph 113(a) of the Act. Although the Officer has not directly commented on the credibility of the affidavits, he notes that none of the three officials were witnesses to the reported incidents. I do not agree that this should be interpreted as imposing a burden on the Applicant to provide eye witness accounts of the alleged incidents of torture, but merely as commenting indirectly on their relevance. The Officer found that the affidavits merely comment on facts already considered by the RPD and, as such, are not material. Finally, the Applicant has not established that the express statutory conditions, as set out by the Court of Appeal in *Raza*, have been met.

[27] The Officer considered the content of each affidavit, but could also reasonably have noted that three of the four affidavits are essentially sworn copies of the same affidavit and the wife's contains only minor changes to reflect her alleged personal experiences of persecution. The findings above do not mean that it was not open to the Officer to consider additional evidence if it was consistent with the requirements of paragraph 113(a) of the Act, but the Applicant has not established that this is the case here.

[28] While the Applicant mentions at several points in his submissions the importance to the PRRA decision of certain medical reports, copies of which are included at pages 26 to 28 of the Applicant's Record, a careful review of the Certified Tribunal Record suggests that this information was not before the PRRA Officer. Nor is it included in the section entitled "PRRA submissions" starting at page 30 of the Applicant's Record. As asserted by the Respondent, it is clear that an applicant cannot rely on evidence that was not presented to the administrative tribunal in the course of judicial review, and it cannot be an error for the Officer to fail to mention evidence that was not before him. In addition, the medical certificate and prescriptions in question date from 2002 and 2003, and the Applicant has not explained why this evidence was not available to him for presentation at the RPD or why he could not reasonably have been expected to have presented it at the RPD hearing. The same is true of the pictures of the abuse against his family, to which he refers at paragraph 26 of his reply.

[29] For all of the above reasons, I find that the Applicant has failed to establish that the Officer's consideration of any additional evidence submitted was unreasonable. The Applicant was deemed not to be credible by the RPD; indeed, the RPD noted that it was not even clear he was in Punjab at the time of the alleged events. The "new evidence" submitted by the Applicant, in the form of affidavits and documentary evidence, does not materially undermine the credibility findings of the RPD and should have been filed before the assessment of his refugee claim. In those circumstances, it was clearly insufficient for the Applicant to refer to general country documentation showing that the situation in his home country is not perfect. An applicant must establish that a link exists between his or her own personal predicament and the general situation in his or her country of origin. In the present case, no such link was established.

[30] In his written submissions, the Applicant argued that the Officer erred in deciding that there was no risk of return for a failed refugee claimant. Yet, counsel did not reiterate that argument orally. In any event, the Applicant has failed to convince me that the Officer's consideration of his risk as a failed refugee claimant, even having left India using false travel documents, was unreasonable.

[31] The Applicant alleges that he had to fill out a form addressed to the Indian High Commission in Ottawa wherein he was to indicate whether he had submitted a refugee claim in Canada. The Officer refused to consider that form, which the Applicant filed with his submissions as part of his PRRA application, because it had not been completed and could not therefore establish that Indian authorities were aware of his refugee claim.

[32] If the facts alleged were true, the practice of requiring a failed refugee claimant to declare his status to a potentially abusive government in order to gain travel documents could raise serious issues. In such a case, I would not necessarily agree with the Officer that a blank form could not constitute probative evidence of risk if credibly supported by affidavit evidence of an applicant and objective evidence of risk. This issue, however, is not determinative of the reasonableness of the Officer's decision in the case at hand since, despite finding that the Applicant had not provided probative evidence that the Indian authorities are aware that he claimed refugee protection, the Officer then went on to consider the claims as if they were.

[33] The Officer accepted that leaving the country with a false passport is an offence punishable by prison and/or a fine, but could find no evidence before the Court that the Applicant will be

returned to India without travel documents. While the Officer might also have considered the conditions of imprisonment were the Applicant to be imprisoned, his failure to do so cannot be considered a determinative error in the case at hand, as the Officer was not satisfied that there was a serious risk of imprisonment. In addition, the Applicant has not pointed to any specific pieces of evidence that would render the Officer's findings unreasonable.

[34] Finally, the Applicant relied heavily in his written submissions on certain provisions of the Convention Against Torture and the *Charter*. In the Applicant's PRRA submissions, however, counsel for the Applicant does not focus on the same sections of the instruments relied on in his arguments before this Court. The PRRA submissions instead include references to various articles of the Universal Declaration of Human Rights, with a brief mention of the international norms encompassed by the United Nations Convention Against Torture and to articles 2, 7, 9 and 12 of the *Charter*.

[35] The Applicant has not convinced me that the Officer's decision violates any of the cited national or international principles or provisions, as the Applicant failed to convince the PRRA Officer that he was at risk of torture or at risk under sections 96 or 97 of the Act. I accept the Respondent's submissions that the PRRA inquiry and decision-making process is focused on personalized risk and that the Applicant has failed to provide objective evidence that he faces a personalized risk in India. While the evidence relied upon by the Applicant speaks of generalized risks in India or risks faced by certain groups of people, the Applicant has failed to establish that he personally faces any such risk under sections 96 or 97 of the Act, or that the Officer's conclusion in this regard was unreasonable.

[36] For all of the foregoing reasons, this application for judicial review is dismissed. No question for certification was proposed, and none will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed. No question is certified.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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