Date: 20090212

Docket: IMM-2036-08

Citation: 2009 FC 138

Ottawa, Ontario, this 12th day of February 2009

Present: The Honourable Orville Frenette

BETWEEN:

Ataure RAHMAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision of a Pre-Removal Risk Assessment Officer (the "officer") rendered on December 17, 2007, denying an application for a waiver of the statutory requirement that the applicant apply for permanent residence from outside Canada.

The Facts

[2] The applicant is a single male from Bangladesh who arrived in Canada on July 23, 2001.

[3] His mother, his three brothers and four sisters live in Bangladesh.

[4] The applicant claimed asylum upon arrival alleging he was a member of the Bangladesh Nationalist Party (BNP) and was in danger of persecution by reason of his political opinion and activities.

[5] The Immigration and Refugee Board (the "IRB"), in a decision of November 2002, refused his claim for various reasons, *inter alia:*

(a) Since he left Bangladesh, the BNP was elected and has held power since November 13, 2001 so he had no valid reason for his fear;

(b) He was found not to be a credible claimant for the motives described in the decision;

(c) He had not discharged the burden of proof required as to his identity;

(d) His story was a complete fabrication designed to deceive the tribunal;

(e) His actions were a case of immigration in disguise (*Urbanek v. Canada (Minister of Employment and Immigration)* (1992), 17 Imm. L.R. (2d) 153 (F.C.A.)).

[6] The application for leave to obtain a judicial review of the IRB decision was denied on April 24, 2003.

[7] The applicant presented a Pre-Removal Risk Assessment (PRRA) which was the object of a negative decision on June 5, 2007.

[8] The application for leave against this decision was also denied on September 17, 2007.

[9] The applicant then applied for permanent residence in Canada based upon Humanitarian and Compassionate (H&C) considerations from within Canada on July 6, 2006, which was denied. A reconsideration of this decision was agreed upon by consent on October 15, 2007.

[10] The applicant's recourse against the refusal was dismissed by Justice Lemieux on September 17, 2007 because of "the failure of the applicant to file a second PRRA assessment record […]".

[11] The applicant was scheduled for departure on August 10, 2007, but he did not appear for removal. On October 15, 2007, his H&C application was returned to another officer for a decision.

[12] The applicant obtained a passport, valid for a period of six months, from the Bangladesh High Commission in Ottawa on February 13, 2007.

The Impugned Decision

[13] This application seeks a reversal of the officer's decision of December 17, 2007, denying the applicant's demand of a waiver of the statutory requirement that he apply for permanent residence outside Canada.

The Legislation

[14] Subsections 6(1) and 25(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, (the "IRPA") state:

6. (1) The Minister may designate any persons or class of persons as officers to carry out any purpose of any provision of this Act, and shall specify the powers and duties of the officers so designated.	**6.** (1) Le ministre désigne, individuellement ou par catégorie, les personnes qu'il charge, à titre d'agent, de l'application de tout ou partie des dispositions de la présente loi et précise les attributions attachées à leurs fonctions.
25. (1) The Minister shall, upon request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative or on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.	**25.** (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative ou sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.

[15] The process to obtain such permission is highly discretionary (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, paragraph 6; *Quiroa v. Minister of Citizenship and Immigration*, 2007 FC 495, paragraph 19; *Doumbouya v. Minister of Citizenship and Immigration*, 2007 FC 1186, paragraph 6).

The Issues

[16] The applicant submits the issues are as follows:

(a) Did the assessing immigration officer err in finding that the applicant did not face any personal risk?

(b) Did the immigration officer fetter his discretion?

(c) Is the officer's treatment of the risks that have been personally suffered against the applicant unreasonable?

[17] In my view, the only genuine issue is whether, in the circumstances, the officer's decision was unreasonable in assessing the personalized risk faced by the applicant if returned to Bangladesh.

Analysis

(1) The Standard of Review

[18] The standard of review, according to the jurisprudence, for the assessment of facts or mixed facts and law, is one of reasonableness (*Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190).

[19] In particular, the standard of review for matters involving an H&C decision was held to be reasonableness *simpliciter* in *Baker*, *supra*, at paragraphs 57 to 62.

(2) Assessment of Risk

[20] The applicant claims that the officer applied the wrong test and rendered the wrong decision concerning the personalized risk he faced if returned to Bangladesh, a country rife with violence, corruption and subject to major economic and political problems. He invokes sections 96 and 97 of the IRPA by analogy:

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	**96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son

appartenance à un groupe social ou de ses opinions politiques :

(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

(*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

[21] The applicant alleges that the officer confounded the concepts of "personalized" and "general" risks and thus failed to apply existing hardships to his situation.

[22] The respondent submits that the officer considered the "generalized risk", as a component of the personal situation of the applicant and a part of an H&C application.

[23] He adds that it is insufficient to refer only to the country conditions in general without linking such conditions to the personalized situation of the applicant.

[24] The respondent concludes that the applicant's argumentation is inconsistent with the letter and the intent of section 25 of the IRPA. To accept the applicant's interpretation would mean that almost all applications on ministerial exemption presented by foreign nationals of countries having a very bad human rights record would be automatically accepted. Such an interpretation is contrary to the law and intention of Parliament and would create an absurdity.

[25] The situation described in this case shows the difficulty of analyzing personalized risk in cases of generalized human rights violations, and war, political and economic problems where every individual faces a personalized risk that is, however, shared by most of the other citizens of that particular country.

[26] The applicant has the burden of presenting evidence establishing in his H&C process that he or she would be subject to unusual, undeserved and disproportionate personal hardships.

[27] It is insufficient to merely present evidence of generalized risk conditions of which mostly all citizens of that particular country are subject to (*Dreta v. Minister of Citizenship and Immigration*, 2005 FC 1239; *Maichibi v Minister of Citizenship and Immigration*, 2008 FC 138 at paragraphs 23 to 25; *Lalane c. ministre de la Citoyenneté et de l'Immigration*, 2009 CF 5, paragraphs 42 to 46).

[28] Madam Justice Danièle Tremblay-Lamer has recently considered how to define two concepts of risk. She notes in her decision *Prophète v. Minister of Citizenship and Immigration*, 2008 FC 331, 70 Imm. L.R. (3d) 128, the following:

> [15] Thus, the present case raises the issue of the interpretation of the meaning of the terms "personally" and "generally" as contained in s. 97(1) of the Act:
>
> […]
>
> [16] The test under s. 97 of the Act is distinct from the test under s. 96. As Rouleau J. noted in *Ahmad v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 808, [2004] F.C.J. No. 995 (QL), at para. 21, s. 97 "requires the Board to apply a different criterion pertaining to the issue of whether the applicant's removal may or may not expose him personally to the risks and dangers referred to in paragraphs 97(1)(*a*) and (*b*) of the Act" and must be assessed with reference to the personal situation of the applicant. Moreover, he indicated that the "assessment of the applicant's fear must be made *in concreto*, and not from an abstract and general perspective" (at para. 22).
>
> [17] Accordingly, documentary evidence which illustrates the systematic and generalized violation of human rights in a given country will not be sufficient to ground a s. 97 claim absent proof

> that might link this general documentary evidence to the applicant's specific circumstances (*Ould v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 83, [2007] F.C.J. No. 103 (QL), at para. 21; *Jarada v. Canada (Minster of Citizenship and Immigration)*, 2005 FC 409, [2005] F.C.J. No. 506 (QL), at para. 28; *Ahmad*, *supra*, at para. 22).
>
> [18] The difficulty in analyzing personalized risk in situations of generalized human rights violations, civil war, and failed states lies in determining the dividing line between a risk that is "personalized" and one that is "general". Under these circumstances, the Court may be faced with an applicant who has been targeted in the past and who may be targeted in the future but whose risk situation is similar to a segment of the larger population. Thus, the Court is faced with an individual who may have a personalized risk, but one that is shared by many other individuals.
>
> [19] Recently, the term "generally" was interpreted in a manner that may include segments of the larger population, as well as all residents or citizens of a given country. […]

[29] Generalized risks are one component of the "personalized risk" but it must be linked to the personal situation of an applicant to become a "personalized risk" (i.e. the other component of a "personalized risk").

[30] To obtain a positive ministerial exemption pursuant to section 25 of the IRPA, an applicant must prove the two other components before claiming "personalized risk" justifies the exemption. Simply establishing general country conditions of risk *per se* is insufficient.

[31] Justice Michel M. J. Shore in *Maichibi v. Minister of Citizenship and Immigration*, 2008 FC 138, recently reiterated this principle:

> [12] With respect to personalized risk and hardship, the officer noted that the Applicant's allegations were identical to those made

> before the IRB. Considering that the IRB concluded that the Applicant's story was devoid of credibility and that the Applicant had not provided any evidence regarding his involvement in human rights movements or that he would be sought by the authorities, the officer determined that he could not revisit the IRB's factual and credibility conclusions. As such, she concluded that the Applicant had not demonstrated that he had a political profile that would cause him a personalized risk which would equate to unusual and undeserved or disproportionate hardship should he return to Nigeria.

[32] Furthermore, as Justice Michel Beaudry in *Mooker v. Minister of Citizenship and Immigration*, 2008 FC 518, at paragraph 19 wrote:

> The line of cases relied upon by the applicants […] imposes upon H&C Officers the requirement that the generalized risk of violence, or risks flowing from discrimination, be considered according to the appropriate test. It does not go so far as to require the Officer to conclude that discrimination and a risk of generalized violence always constitute undue, undeserved or disproportionate hardship.

[33] The H&C officer in the decision summarized and considered the evidence presented by the applicant about the situation in Bangladesh showing incidents of political violence, corruption, brutal murders of businessmen and family members, explosion of bombs, crime, army and police excesses.

[34] The officer also considered "new evidence", i.e. letters showing that the police visited the family a few times and terrorists beat the applicant's brother and vandalized the family home searching for the applicant.

[35] The officer considered that notwithstanding the evidence of generalized risk, she could not find that the applicant faced a personalized risk because he had not provided sufficient persuasive and reliable evidence to prove the personalized risk.

[36] All of these risks were considered previously in the IRB, the PRRA and H&C decisions wherein it was found that the applicant was not a credible person. Also, he did not come to this Court with clean hands having neglected to appear on his removal on August 10, 2007.

[37] His story was considered by the IRB to be a "complete fabrication". This qualification must be considered when analyzing the applicant's argumentation since the officer ignored the finding of his lack of credibility.

[38] I note that the applicant himself indicates that he cannot go back to Bangladesh as he faces ". . . the same risks that everyone else faces there (as one may note from the evidence filed in this application), which makes life miserable and I face other risks that were made directly against me; […]" (Applicant's Record, page 9, paragraph 5).

[39] As noted by the respondent, "if the risks that the entire country faces" was the exclusive component of the "personalized risk" that the H&C applicants have to demonstrate, every foreign national from a country having very bad human rights or poor climatic records would automatically qualify for a positive ministerial exemption pursuant to section 25 of the IRPA. Such an interpretation of section 25 of the IRPA is inconsistent with the scheme of the Act and its regulations.

[40] With respect to the personalized risks, after analyzing the applicant's submission, including a letter from his brother that "states that the police have visited the family home a few times in the last few months in search of the applicant" and "that the cases against the applicant have been "*revived*" under the emergency rules", and despite the letter indicating that AL terrorists have beaten the applicant's brother, vandalized the family home and are searching for the applicant, the officer notes "that there is no party in power at this time. The information submitted does not denote that reports of vandalism or attacks were filed with the authorities". Moreover, he concludes that the "applicant has not demonstrated that he would incur a personal risk to his life or security as per Section 13 of the IP5 manual".

[41] I find that, despite the self-serving letters claiming that the applicant is at risk and recognizing the present country conditions, the applicant is at no greater risk than any other Bangladeshi. Moreover, I do not find that the officer erred in assessing the applicant's personalized risk.

(3) Officer's Discretion

[42] The applicant argues that, should this Court find that indeed the officer correctly applied the notion of "personalized risk" the officer has nonetheless fettered her discretion in the case at bar by not including risks that the entire country face when she was clearly requested to do so.

[43] The applicant notes that despite having specifically requested that an assessment of the generalized country conditions be considered under the officer's broad discretion, she failed to demonstrate that she understood and/or used her discretion in the proper sense.

[44] This argument must fail. I agree with the respondent in that if an officer was to consider the generalized country conditions when assessing an H&C application, the officer would exceed the discretion conferred to him at section 25 of the IRPA.

[45] This Court has found that despite the existence of an unquestionable “generalized risk to the entire population”, it does not in and of itself prevent an application made on humanitarian and compassionate grounds from being denied.

[46] In short, the notion of “personalized risk” to an unusual or undeserved hardship pursuant to section 25 of the IRPA involves that, notwithstanding the seriousness of any given country’s conditions in general (i.e. the “generalized risks”), the H&C applicant must always connect these general conditions with his or her personalized situation in practical terms.

[47] I note that in the present case, the IRB did not believe that the applicant had been targeted in the past. Moreover, it did not pertain to the H&C officer to re-evaluate again or second-guess this final conclusion.

[48] Recognizing that the IRB has found the applicant to lack credibility coupled with his failure to comply with his deportation order and considering the country to which the applicant shall be removed, I find the officer properly exercised her discretion and this Court’s intervention is not warranted.

(4) Personalized Situation of Risk

[49] Contrary to what the applicant alleges in his submissions, the officer's written reasons clearly reveal that "the evidence submitted by the applicant was not conclusive as to establish that indeed there were any risks […] personally made against him".

[50] The purported personal risk which was one the applicant would have faced before 2003 has never been established given that this part of the applicant's story was not found credible by the IRB.

[51] Moreover, the new evidence submitted does not demonstrate that there is any pending case against the applicant or that he is charged for any offence in Bangladesh.

[52] I agree with the respondent that the applicant failed to establish that the particular circumstances of his case were such that he would face unusual, undeserved or disproportionate hardship if required to apply for a visa abroad.

Conclusion

[53] Based on the foregoing, this judicial review will be dismissed.

Certified Questions

[54] During the hearing, counsel for the applicant submitted the following questions for certification to which counsel for the respondent objected:

> 1. In the context of a H&C application where an officer finds that the applicant shows the same risk that the general population faces, is it correct to say that the applicant faces a personalized risk (a risk faced "personally" as provided for in section 13 of CIC IP Manual 5)?
>
> 2. If the answer to the above is "no", does the officer nonetheless retain discretion to consider those risks as hardship?

[55] Section 74 of the IRPA states:

74. Judicial review is subject to the following provisions:	**74.** Les règles suivantes s'appliquent à la demande de contrôle judiciaire :
[…]	[…]
(*d*) an appeal to the Federal Court of Appeal may be made only if, in rendering judgment, the judge certifies that a serious question of general importance is involved and states the question.	*d*) le jugement consécutif au contrôle judiciaire n'est susceptible d'appel en Cour d'appel fédérale que si le juge certifie que l'affaire soulève une question grave de portée générale et énonce celle-ci.

[56] The judicial interpretation of this section recognized that a certified question must be of general importance and raise questions of law worth being decided by a Court of Appeal (*Gittens v. Minister of Public Safety and Emergency Preparedness*, 2008 FC 526; *Denisov v. Minister of Citizenship and Immigration*, 2008 FC 550).

[57] The questions raised in the present case do not meet these criteria since they only involve factual determination or mixed facts and law.

[58] Therefore no questions will be certified.

JUDGMENT

THIS COURT ORDERS:

1. The application for judicial review of the Pre-Removal Risk Assessment Officer's decision of December 17, 2007 denying a waiver to apply for permanent residence from outside Canada is dismissed.

2. No general question of importance is to be certified.

"Orville Frenette"
Deputy Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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