Federal Court  Cour fédérale

Date: 20130228

Docket: IMM-7308-12

Citation: 2013 FC 201

Montreal, Quebec, February 28, 2013

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

JASWINDER SINGH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The Applicant seeks judicial review of a Pre-Removal Risk Assessment [PRRA] decision, wherein it was determined that the Applicant was not a Convention refugee or a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

II. Judicial Procedure

[2] This is an application under subsection 72(1) of the *IRPA* for judicial review of a PRRA decision, dated May 30, 2012.

III. Background

[3] The Applicant, Mr. Jaswinder Singh, a citizen of India, was born in 1958.

[4] In February 2002, Indian police allegedly detained and tortured the Applicant and his brother, who was suspected of links to militants; they were released five days later when their family paid a bribe. His brother allegedly vanished in November 2002.

[5] In January 2003, Indian police allegedly sought the Applicant upon learning that he was planning to file a complaint against them on his brother's disappearance.

[6] With the assistance of an agent, the Applicant arrived in Canada on April 24, 2003 with a fraudulent passport. He claimed refugee protection on May 7, 2003.

[7] On March 15, 2004, the Refugee Protection Division [RPD] of the Immigration and Refugee Board rejected the Applicant's refugee claim on credibility grounds. This Court refused leave for judicial review on June 24, 2004.

[8] The Applicant applied for permanent residence on humanitarian and compassionate [H&C] grounds three times. His first application on H&C grounds was made on November 25, 2004 and

rejected on October 23, 2007; his second on November 7, 2007 was rejected on September 30, 2008. The Applicant's third application on H&C grounds [H&C Application] was made on April 23, 2009.

[9] In 2009, the Applicant's brother allegedly reappeared after escaping from different police stations in different regions where he had been detained.

[10] On October 20, 2011, Indian police allegedly shot the Applicant's brother.

[11] On January 5, 2012, the Applicant received notice advising him that he could apply for a PRRA.

[12] On January 13, 2012, the Applicant filed an application for a PRRA.

[13] In his PRRA and H&C Applications, the Applicant submitted the following evidence that was not submitted in his refugee claim and earlier applications on H&C grounds: (i) the affidavit of Joginder Singh Mohalla, dated March 13, 2009 [Mohalla Affidavit]; (ii) the affidavit of Charanjit Kaur, dated March 13, 2009 [Kaur Affidavit]; (iii) the affidavit of Mohan Lal, dated January 24, 2012 [Lal Affidavit]; (iv) a copy of the Applicant's brother's death certificate [Death Certificate]; (v) a public notice published by the Applicant in a Hindi newspaper, dated 2012 [Notice]; (vi) country condition evidence on police impunity and state terrorism against Sikhs in India, dated July 29, 2010 and March 19, 2011; and, (vii) a decision of the Committee Against Torture, dated May 17, 2004 [CAT Decision].

[14] On May 30, 2012, the Officer rejected the PRRA and H&C Applications.

IV. Decision under Review

[15] The Officer stated that PRRA applications are assessed on new facts or evidence demonstrating risk of persecution or torture, risk to life, or risk of cruel and unusual treatment or punishment. Citing *Kaybaki v Canada (Minister of Citizenship and Immigration)*, 2004 FC 32, the PRRA Officer noted that a PRRA is not an appeal of an RPD decision but rather an assessment of new risks arising after a hearing.

[16] The Officer did not accept the Mohalla and Kaur Affidavits as new evidence under paragraph 113(*a*) of the *IRPA*. The affidavits post-dated the RPD decision but reiterated facts and events that were the basis of the refugee claim. It was, according to the Officer, reasonable to expect that the Mohalla and Kaur Affidavits could have been presented to the RPD and the Applicant did not explain why they were not.

[17] The Officer did not give probative value to the Lal Affidavit, which describes the alleged return and murder of the Applicant's brother. Formal defects exists in the affiant's failure to identify himself and to declare that he had first-hand knowledge which detracted from its probative value. The Officer also gave the Lal Affidavit little probative value as it was prepared nineteen days after the Applicant received notice to apply for a PRRA and was directly linked to allegations the RPD did not find credible.

[18] The Officer did not give weight to the Death Certificate as it did not identify the cause of the registrant's death and lacked the reliability of an original.

[19] No weight was given to the Notice as it did not establish that police murdered the Applicant's brother; it only gave notice to creditors of his brother's estate.

[20] The Officer did not give weight to the country condition evidence in respect of the police, state terror, and Sikh militancy because it did not relate to the Applicant's personal situation or corroborate his allegations.

[21] In the Officer's view, the CAT Decision did not have probative value because it was based on the circumstances of another individual and the Applicant did not demonstrate how it was relevant to his personal situation.

[22] After reviewing other country condition evidence, the Officer found that the Applicant would not be subject to risk of persecution, torture, risk to life, or risk of cruel and unusual treatment of punishment in India. The Officer found that there was evidence of extrajudicial killings and torture by police and that an atmosphere of impunity existed in India due to weak law enforcement, a lack of trained police, and an overburdened court system. The Officer also noted evidence that Sikh militants may be at risk of detention and physical harm; but violence has significantly subsided in the relatively recent past. Nonetheless, the Applicant failed to establish that he would be persecuted by Indian authorities; nor did his application for refugee protection in Canada place him

at risk. Country condition evidence did not demonstrate that Indian nationals returning home face adverse treatment solely because they have applied for asylum.

V. Issues

[23] (1) Was the Officer's refusal of evidence under paragraph 113(*a*) of the *IRPA* reasonable?

(2) Was the Officer's assessment of the evidence that it accepted as new evidence under paragraph 113(*a*) of the *IRPA* reasonable?

(3) Does a reasonable apprehension of bias arise from the PRRA process?

VI. Relevant Legislative Provisions

[24] The following provisions of the *IRPA* are relevant:

Convention refugee	**Définition de « réfugié »**
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	*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.

that country.

Person in need of protection

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

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

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

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

(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,

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

Personne à protéger

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

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

(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) 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.

Person in need of protection

(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.

Personne à protéger

(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.

…

[...]

113. Consideration of an application for protection shall be as follows:

113. Il est disposé de la demande comme il suit :

(*a*) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection;

a) le demandeur d'asile débouté ne peut présenter que des éléments de preuve survenus depuis le rejet ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'il n'était pas raisonnable, dans les circonstances, de s'attendre à ce qu'il les ait présentés au moment du rejet;

...

[...]

[25] The following provisions of the *Federal Courts Act*, RSC, 1985, c F-7 are relevant:

57. (1) If the constitutional validity, applicability or operability of an Act of Parliament or of the legislature of a province, or of regulations made under such an Act, is in question before the Federal Court of Appeal or the Federal Court or a federal board, commission or other tribunal, other than a service tribunal within the meaning of the National Defence Act, the Act or regulation shall not be judged to be invalid, inapplicable or inoperable unless notice has been served on the Attorney General of Canada and the attorney general of each province in accordance with subsection (2)	**57.** (1) Les lois fédérales ou provinciales ou leurs textes d'application, dont la validité, l'applicabilité ou l'effet, sur le plan constitutionnel, est en cause devant la Cour d'appel fédérale ou la Cour fédérale ou un office fédéral, sauf s'il s'agit d'un tribunal militaire au sens de la Loi sur la défense nationale, ne peuvent être déclarés invalides, inapplicables ou sans effet, à moins que le procureur général du Canada et ceux des provinces n'aient été avisés conformément au paragraphe (2).

VII. Position of the Parties

[26] While agreeing that a PRRA is not a re-hearing of an RPD decision, the Applicant submits that non-refoulement is central to the PRRA regime. Since the *IRPA* aims to prevent deportation to a substantial risk of torture, the Officer was required to consider both the specific and country condition evidence that would demonstrate the risk of torture in India.

[27] The Applicant argues that the Officer made credibility findings by having speculated, rather than having made a rational analysis of the evidence. Evidence of his detention and torture should have been analyzed in the context of country condition evidence of police impunity and state terror against suspected Sikh militants. The Applicant asserts that the Officer was required to consider the

affidavit evidence as torture rarely takes place in public and affidavits do not necessarily lack weight simply because an affiant is interested.

[28] The Applicant argues that, in the deportation context, administrative decision-making by decision-makers with little independence or expertise is inconsistent with sections 7 and 12 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*] and Canada's international obligations on human rights. The Applicant also argues that limiting the evidence that can be considered in the PRRA context to new evidence under subsection 113(*a*) of the *IRPA* is also inconsistent with the *Charter*.

[29] Finally, the Applicant claims that a reasonable apprehension of bias arises because PRRA decision-makers are systematically biased in favour of deportation.

[30] The Respondent counters that the Officer's finding that evidence submitted by the Applicant was not new evidence within the meaning of paragraph 113(*a*) of the *IRPA* was reasonable. In support, the Respondent argues that the risks alleged by the Applicant were essentially the same as those rejected by the RPD.

[31] The Respondent views the Officer's analysis of the country condition evidence as reasonable since the Applicant did not establish that he was a high-profile Sikh militant or that failed asylum seekers are at risk in India. Moreover, the Respondent adds that an applicant's claim

may not be based on country condition evidence alone without a link between personal circumstances and that evidence.

[32] The Respondent argues that the Supreme Court of Canada has held that the PRRA regime does not violate sections 7 and 12 of the *Charter* or Canada's international law obligations in *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 SCR 84, *Al Sagban v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 4, [2002] 1 SCR 133, and *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3.

[33] Finally, the Respondent argues that neither an institutional nor individual reasonable apprehension of bias arises from the PRRA process itself.

VIII. Analysis

Standard of Review

[34] The Officer's refusal to accept the Mohalla Affidavit, Kaur Affidavit, and the Lal Affidavit as new evidence under paragraph 113(*a*) of the *IRPA* is reviewable on the standard of reasonableness (*Selduz v Canada (Minister of Citizenship and Immigration)*, 2009 FC 361, 343 FTR 291). The analysis of the new evidence is also reviewable on this standard (*Terenteva v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1431).

[35] Where reasonableness applies, the Court may only intervene if the reasons are not "justified, transparent or intelligible". To meet this standard, decisions must also fall in the "range of possible,

acceptable outcomes ... defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

[36] Whether a reasonable apprehension of bias arises is reviewable on a standard of correctness (*Azziz v Canada (Minister of Citizenship and Immigration)*, 2010 FC 663, 368 FTR 281).

[37] Since section 57 of the *Federal Courts Act* precludes courts from ruling on constitutional questions where the notice requirement is not met, it is unnecessary to identify the standard of review on the *Charter* submissions. Failure to provide notice is "fatal since it is a *sine qua non* condition for entertaining the constitutional argument" (*Barlagne v Canada (Minister of Citizenship and Immigration)*, 2010 FC 547, 367 FTR 281 at para 61; reference is also made to *Eaton v Brant (County) Board of Education*, [1997] 1 SCR 241 at para 53).

(1) Was the Officer's refusal of evidence under paragraph 113(*a*) of the *IRPA* reasonable?

[38] The Officer's finding that the Mohalla Affidavit, Kaur Affidavit, and Lal Affidavit were not new evidence under paragraph 113(*a*) of the *IRPA* was reasonable.

[39] The Federal Court of Appeal set out the test for new evidence under paragraph 113(*a*) in *Raza v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385:

> [13] As I read paragraph 113(*a*), it is based on the premise that a negative refugee determination by the RPD must be respected by the PRRA officer, unless there is new evidence of facts that might have affected the outcome of the RPD hearing if the evidence had been presented to the RPD. Paragraph 113(*a*) asks a number of questions, some expressly and some by necessary implication, about the proposed new evidence. I summarize those questions as follows:

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 country 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).

[40] It would be reasonable to find that the Mohalla and Kaur Affidavits failed on the fifth criterion of *Raza*, above. These affidavits only prove events arising before the RPD hearing. The Applicant did not establish that they were not reasonably available to him, or that he could not be reasonably expected to have presented them, at the time of the hearing.

[41] While the Lal Affidavit meets the criterion of newness in discussing the return and subsequent murder by Indian police of the Applicant's brother, one could reasonably find that it was not new evidence under the materiality criterion.

[42] While stating that the Lal Affidavit was new evidence under paragraph 113(*a*) of the *IRPA*, the Officer refused to give it probative value because it "reiterates facts and events that formed the basis of the applicant's refugee claim" and that the additions on his brother's alleged return and murder "are directly linked to a story found not credible by the RPD" (Certified Tribunal Record at p 9). This suggests that the Officer expressed him or herself imperfectly and did not consider the Lal Affidavit as new evidence.

[43] *Raza*, above, held that PRRA officers "may properly reject ... evidence if it cannot prove that the relevant facts as of the date of the PRRA application are materially different from the facts as found by the RPD" (at para 17). No material difference between the Applicant's allegations at his RPD hearing that he and his brother were detained and tortured for his brother's suspected Sikh militancy and the allegations in the Lal Affidavit that his brother was murdered for his suspected Sikh militancy. Since the RPD did not believe the Applicant's narrative, his claim "probably would [not] have succeeded" if the Lal Affidavit was available to the RPD (at para 13).

(2) Was the PRRA Officer's assessment of the evidence that it accepted as new evidence under paragraph 113(*a*) of the *IRPA* reasonable?

[44] The PRRA Officer's assessment of the new evidence accepted under paragraph 113(*a*) of the *IRPA* was reasonable. The Death Certificate and Notice did not identify the cause of the Applicant's brother's death and does not necessarily lead to the inference that he was murdered by

Indian police. General country condition evidence cannot be a substitute for a direct specific linkage to an Applicant for the purpose of establishing personal risk to that of suspected Sikh militancy in India (*Brown v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1305 at para 37).

(3) Does a reasonable apprehension of bias arise from the PRRA process?

[45] The claim that a reasonable apprehension of institutional bias arises from the PRRA process itself since PRRA officers are pre-disposed to deport applicants cannot succeed. Justice Edmond Blanchard, in *Singh v Canada (Minister of Citizenship and Immigration)*, 2008 FC 669, dismissed this same argument (at para 39).

IX. Conclusion

[46] For all the above reasons, the Applicant's application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS that the Applicant's application for judicial review be dismissed.

No question of general importance for certification.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7308-12
STYLE OF CAUSE:	JASWINDER SINGH v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	February 27, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	SHORE J.
DATED:	February 28, 2013

APPEARANCES:

Stewart Istvanffy	FOR THE APPLICANT
Thomas Cormie	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Étude légale Stewart Isvanffy Montreal, Quebec	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Montreal, Quebec	FOR THE RESPONDENT