Federal Court  Cour fédérale

Date: 20150303

Docket: IMM-4991-13

Citation: 2015 FC 265

Ottawa, Ontario, March 3, 2015

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

ROHAN SHARAD WANKHEDE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter and Background

[1] The Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada rejected the Applicant's claim for protection under sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*Act*]. Pursuant to subsection 72(1) of the *Act*, the Applicant now seeks judicial review of the RPD's decision, requesting that the Court

set aside the RPD's decision and return the matter to a different panel of the RPD for re-determination.

[2] The Applicant is a 30 year-old citizen of India who first came to Canada with a student visa on September 2, 2006. He returned to India in November, 2008, allegedly because his father had a heart attack, but came back to Canada in March, 2009. On February 7, 2012, he applied for protection, claiming that he feared persecution as a Dalit, a member of a lower caste in India known as untouchables, and that his life had been threatened by the Shiv Sena [the SS], a political party with criminal connections that had been extorting his family.

[3] The RPD held a hearing to determine the Applicant's claim on April 30, 2013. Just before the hearing began, the RPD Member presented to the Applicant's counsel a newspaper article he had discovered about the situation of Dalits in India: Sudha Ramachandran, "Dalit millionaires defy caste system", *Asia Times* (16 February 2012), online: Asia Times <http://www.atimes.com/atimes/South_Asia/NB16Df02.html>.

II. Decision under Review

[4] By reasons dated June 11, 2013, the RPD rejected the Applicant's claim.

[5] The RPD accepted the Applicant's claims that he was taunted and bullied for being Dalit, and also that one of his teachers once stripped him naked when he was a child and exposed him to harassment by the other children. However, the RPD did not accept that these incidents were a "sustained or systemic denial of core human rights," and so was not satisfied that it amounted to

persecution (citing *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, 103 DLR (4th) 1 [*Ward*]; and James C Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991) at 108). As for the plight of Dalits generally, the RPD panel member quoted from the *Asia Times* article he had discovered as follows:

> While liberalization of India's economy has facilitated the emergence of Dalit millionaires, the significant role of literacy and political empowerment – the rise of Dalit politics coincided with liberalization – cannot be ignored.

Thus, the RPD concluded as follows:

> [14] Taking into consideration the totality of the foregoing, the incidents the claimant said occurred in the past and what possibly may repeat itself in the future, and Counsel's post-hearing submissions, the panel, therefore, determines that the claimant is not a Convention refugee.

[6] The RPD also considered the Applicant's fear of the SS but found that ordinary criminality had no nexus to a Convention ground and was solely a subsection 97(1) claim. The RPD then summarized a number of cases from this Court which have upheld findings that criminal gangs posed only a generalized risk where the claimant is part of a sub-group that is more at risk than the entire population (citing, e.g. *Chavez Fraire v Canada (Citizenship and Immigration)*, 2011 FC 763 at paragraphs 9-10; *Baires Sanchez v Canada (Citizenship and Immigration)*, 2011 FC 993 at paragraph 23).

[7] The RPD determined that the Applicant was targeted because of his family's perceived wealth, and that it was "reasonably conceivable that those perceived to be wealthy, as the claimant and his family, face a general risk of being victimised for robbery and extortion." Citing

Prophète v Canada (Citizenship and Immigration), 2008 FC 331, 70 Imm LR (3d) 128, aff'd 2009 FCA 31, 387 NR 149 [*Prophète*], the RPD consequently decided that:

> [T]he risk the claimant alleges he faces from the SS goons is a generalized risk, rather than a personalized or particularized one, and that such risk is excluded from Canada's protection by paragraph 97(1)(b)(ii). That provision does not extend protection to those facing a risk that is faced generally by others in the country.

[8] The RPD therefore decided that the Applicant was neither a Convention refugee under section 96 of the *Act* nor a person in need of protection under subsection 97(1) of the *Act*.

III. The Parties' Submissions

A. *The Applicant's Arguments*

[9] The Applicant asserts that the RPD's decision should be set aside for essentially three reasons: (1) the RPD member was biased; (2) the RPD ignored pertinent evidence; and (3) subsection 97(1) was not identified as an issue and was not properly analyzed.

[10] With respect to bias, the Applicant points out that he does not need to show any actual bias, but merely needs to show that there exists a "reasonable apprehension" of bias (citing *Committee for Justice & Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369 [*Committee for Justice and Liberty*]; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraphs 45-46, 174 DLR (4th) 193 [*Baker*]; *Spence v Prince Albert (City) Police Commissioners*, [1987] SJ No 5 (QL) at 7-8, 53 Sask R 35, 25 Admin LR 90 (CA)).

[11] In this case, the Applicant believes that the RPD member was conceivably biased because he did his own research and gave to the Applicant a copy of an article from the *Asia Times* at the start of the hearing. According to the Applicant, that makes this case analogous to *Sivaguru v Canada (Minister of Citizenship and Immigration*), [1992] 2 FCR 374 at paragraph 14, 139 NR 220 (CA) [*Sivaguru*]. Although the bias was not immediately evident at the hearing itself, the Applicant says that it became apparent from the decision that the RPD member selectively relied on the *Asia Times* article to the exclusion of all the other evidence that had been submitted about the situation of Dalits.

[12] For essentially the same reason, the Applicant urges the Court to infer that the other evidence was ignored. The Applicant says that this evidence shows that Dalits are suffering a sustained and systemic denial of core human rights. As this claim was central to the application, the Applicant argues that the RPD was obliged to address the evidence supporting it specifically; a "blanket statement" that the RPD referred to the "totality of the foregoing" is not sufficient (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 (QL) at paragraphs 14 and 17, 157 FTR 35 (TD) [*Cepeda-Guterrez*]). Indeed, the Applicant says that this case is like the recent decision in *Gopalarasa v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1138 at paragraphs 37-39, since the failure to have regard to the contradictory evidence about the plight of "untouchables" in India shows only "half the picture."

[13] As for the RPD's analysis under section 97 of the *Act*, the Applicant says this was not properly identified as an issue. It was not mentioned in either the screening form or by the RPD

member at the start of the hearing. Therefore, the Applicant complains that he was not given an opportunity to address this matter.

[14] In any event, the Applicant says that any analysis under section 97 of the *Act* is not just about the SS and was not just because he was perceived to be wealthy. The Applicant says he was targeted by the SS partly because he is a Dalit. At best, the Applicant says that the RPD conducted a perfunctory analysis under section 97 of the *Act*, and ignored the treatment of Dalits in India.

B. *The Respondent's Arguments*

[15] The Respondent says the RPD had proper regard to the Supreme Court of Canada's decision in *Ward*. In particular, the Respondent states that there is clearly an analysis of the persecution allegedly faced by the Applicant. The Respondent says that not every Dalit is a refugee, and that the Court needs to look to the facts of the matter as they were before the RPD. In addition, the Respondent says there is nothing in the documentary evidence which contradicts the RPD's findings.

[16] As to bias, the Respondent says that this case does not fall within the scope of *Baker*, as there is no indication that the RPD member had closed his mind. Also, the Respondent says this is not a situation as in *Sivaguru*, where the tribunal was out to set a trap. In any event, the Respondent says that this allegation cannot be sustained because the Applicant did not raise it at the earliest opportunity. Instead, the Applicant's counsel was given five minutes to review the *Asia Times* article and then asked the Applicant questions about it. This article, according to the

Respondent, should not be overstated and it is not used to sweep away all the other documentary evidence but, rather, completes the picture such that the principle from *Cepeda-Guterrez* does not apply.

[17] The Respondent also states that the RPD reasonably assessed the section 97 claim with respect to the SS and that it was reasonable for the RPD to conclude that the Applicant faced only a generalized risk notwithstanding the extortion and criminal acts.

[18] Furthermore, the Respondent states that there is no need for a separate analysis under section 97 of the *Act* with respect to the Applicant's alleged risk as a Dalit, since that can be co-mingled with the analysis under section 96. In any event, the Respondent says that any error would be immaterial, since nothing supports a section 97 claim on this ground (citing *Athansius v Canada (Minister of Citizenship and Immigration)*, 2004 FC 745 at paragraph 13).

IV. Issues and Analysis

A. *Standard of Review*

[19] The Applicant's arguments about bias and lack of warning that there was an issue about personalized risk are questions of procedural fairness, for which the standard of review is correctness (*Mission Institution v Khela*, 2014 SCC 24, at paragraph 79, [2014] 1 SCR 502).

[20] The Applicant merges his bias argument with one that the RPD overlooked evidence contrary to *Cepeda-Gutierrez*. However, deciding whether the RPD overlooked evidence is

typically considered on the reasonableness standard (*Vargas Bustos v Canada (Citizenship and Immigration)*, 2014 FC 114 at paragraphs 29 and 34-39, 24 Imm LR (4th) 81). The issue as to whether the Applicant faced only a generalized risk is a question of mixed fact and law which also attracts review on the reasonableness standard (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 53, [2008] 1 SCR 190 [*Dunsmuir*]; *Correa v Canada (Citizenship and Immigration)*, 2014 FC 252 at paragraph 19, 23 Imm LR (4th) 193).

[21] Accordingly, the Court should not intervene if the RPD's decision is intelligible, transparent, and justifiable and falls within the range of possible, acceptable outcomes that are defensible in respect of the facts and the law. It is not up to this Court to reweigh the evidence that was before the RPD, and it is not the function of this Court upon judicial review to substitute its own view of a preferable outcome: *Dunsmuir* at paragraph 47; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraphs 59, 61, [2009] 1 SCR 339.

B. *Was there a reasonable apprehension of bias on the part of the RPD panel member?*

[22] In *Committee for Justice and Liberty* at 394, Mr. Justice de Grandpré stated the general test to determine whether a reasonable apprehension of bias arises as follows:

> …the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that … [the decision-maker], whether consciously or unconsciously, would not decide fairly."

[23] Furthermore, it is well established that the grounds for the apprehension of bias must be substantial (see: *Committee for Justice and Liberty* at 394-395). As Mr. Justice Cory stated in *R v S(RD)*, [1997] 3 SCR 484 at paragraph 112, 151 DLR (4th) 193, a real likelihood or probability of bias must be demonstrated and a mere suspicion is not sufficient (also see: *Bell Canada v Canadian Telephone Employees Association*, 2003 SCC 36 at paragraphs 17-18, 50, [2003] 1 SCR 884).

[24] In *Arthur v Canada (Attorney General)*, 2001 FCA 223 at paragraph 8, 283 NR 346, the Federal Court of Appeal commented on what is required to establish bias:

> An allegation of bias, especially actual and not simply apprehended bias, against a tribunal is a serious allegation. It challenges the integrity of the tribunal and of its members who participated in the impugned decision. It cannot be done lightly. It cannot rest on mere suspicion, pure conjecture, insinuations or mere impressions of an applicant or his counsel. It must be supported by material evidence demonstrating conduct that derogates from the standard. It is often useful, and even necessary, in doing so, to resort to evidence extrinsic to the case. That is why such evidence is admissible in derogation of the principle that an application for judicial review must bear on the matter as it came before the court or tribunal.

[25] In this case, I do not think (to use the words of Mr. Justice de Grandpré) an informed person, viewing the RPD's decision and reasons realistically and practically - and having thought the matter through - would conclude that the panel member, consciously or unconsciously, did not decide the Applicant's request for protection fairly. There is no evidence on the record before the Court to suggest that the RPD prejudged the application. Moreover, the transcript of the hearing clearly shows that the Applicant was afforded an opportunity to question and respond to the contents of the *Asia Times* article.

[26] As well, the reasons for the RPD's decision neither corroborate nor substantiate the Applicant's arguments as to bias on the part of the panel member. As such, there is no excuse for failing to allege bias at the hearing, which amounts to an implied waiver of the right to raise the issue of bias at this stage of the matter: *Fletcher v Canada (Minister of Citizenship and Immigration)*, 2008 FC 909, at paragraphs 10, 17, 74 Imm LR (3d) 78; *Maritime Broadcasting System Limited v Canadian Media Guild*, 2014 FCA 59 at para 67, 373 DLR (4th) 167.

[27] Even if the Court accepts that the evidence offered by the Applicant in his affidavit filed as part of the application record is admissible, the matters deposed to by the Applicant in such affidavit do not demonstrate a real likelihood or probability of bias on the part of the panel member but, at best, suggest a mere suspicion or insinuation.

C. *Was the RPD's decision reasonable?*

[28] The Applicant argues that the RPD's analysis of his risk as contemplated by subparagraph 97(1)(b)(ii) of the *Act* was overly simplistic, if not perfunctory, and unreasonable because there was no individualized inquiry or assessment of such risk.

[29] The RPD took at face value the fact that the Applicant feared the SS since they had targeted him and his father for extortion and had harassed and threatened him. Although the Applicant had testified that he had been subjected to death threats from the SS, the RPD's reasons make no mention of these specific types of threats. In this regard, the Applicant testified as follows:

> The reason I left there [India] was like the Shiv Sena was trying to extract more money from my family…when these gangsters, they knew that I had come back from Canada, they started calling me and they were issuing me death threats. They were telling me I have to pay for the protection money. And the protection money is, means that if I don't give them the money they would, they would kill me…

[30] The RPD also found that, as the Applicant and his family were "perceived to be wealthy or at least of good financial means, the claimant and his family would be part of a subgroup of the general population that could be victimised by criminals, criminal groups or would be criminals." As such, the RPD concluded that the Applicant's risk was not personalized or particularized but, rather, generalized.

[31] In arriving at this conclusion, the RPD relied upon several cases in this Court where wealthy persons in Latin America who had been targeted and faced risk because of their perceived wealth had been found to face only a generalized and not a personalized risk. The RPD also relied upon *Prophète*, a case involving a man from Haiti, in further support of its conclusion that the Applicant's risk was merely a generalized one since his perceived wealth made him part of a larger subgroup.

[32] However, in this case the RPD failed to follow the guidance offered by *Prophète* since it did not conduct a proper, individualized inquiry as to the Applicant's risk. In *Prophète*, the Court of Appeal stated as follows:

> [6] Unlike section 96 of the Act, section 97 is meant to afford protection to an individual whose claim "is not predicated on the individual demonstrating that he or she is [at risk] … for any of the enumerated grounds of section 96" (*Li v. Canada (Minister of*

> *Citizenship and Immigration)*, 2005 FCA 1, [2005] 3 F.C.R. 239 at paragraph 33).
>
> [7] The examination of a claim under subsection 97(1) of the Act necessitates an individualized inquiry, which is to be conducted on the basis of the evidence adduced by a claimant "in the context of a *present or prospective* risk" for him (*Sanchez v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 99 at paragraph 15) (emphasis in the original)…

[33] The RPD here did not reasonably assess or appreciate the Applicant's individualized risk. On the one hand, it finds that the Applicant has a personal fear or risk at the hands of the SS, but, on the other, it concludes that this personal risk is negated simply because he is part of a larger subgroup of wealthy individuals who, as such, are assumedly more vulnerable to extortion and other crimes. In this regard, Madam Justice Gleason's determination in *Portillo v Canada (Citizenship and Immigration)*, 2012 FC 678 at paragraph 36, [2014] 1 FCR 295 [*Portillo*], is apt: "if an individual is subject to a *personal* risk to his life or risks cruel and unusual treatment or punishment, then that risk is no longer general. If the Board's reasoning is correct, it is unlikely that there would ever be a situation in which this section would provide protection for crime-related risks" (emphasis in original).

[34] Furthermore, nowhere does the RPD make any findings about the nature or the degree of risk from criminality that persons of perceived wealth face in India. It instead based its conclusion that the Applicant's risk was generalized on the fact that wealthy victims of crime in other countries faced only a generalized risk. As the RPD never assessed the nature or degree of the risk faced by the Applicant or compared it to any evidence of the risks faced by other individuals or groups in India, the decision must be set aside (*Portillo* at para 41).

V. Conclusion

[35] In the result, the RPD's decision in this case is not intelligible and cannot be justified and, accordingly, is not within the range of possible, acceptable outcomes that are defensible in respect of the facts and the law.

[36] The application for judicial review is therefore allowed and the matter is returned to the RPD for re-determination by a different panel member. Neither party suggested a question for certification; so, no such question is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed and the matter returned to the Refugee Protection Division for re-determination by a different panel member. No serious question of general importance is certified.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4991-13
STYLE OF CAUSE:	ROHAN SHARAD WANKHEDE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	DECEMBER 8, 2014
JUDGMENT AND REASONS:	BOSWELL J.
DATED:	MARCH 3, 2015

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