

Federal Court



Cour fédérale

Date: 20161216

Docket: IMM-2786-16

Citation: 2016 FC 1386

Ottawa, Ontario, December 16, 2016

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

**SYYED ALTAF HUSYN
ANU ALTAF
SYYED OMER HUSYN OMAR
AND SYYED ASRAR HUSYN ONIM**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada (“RPD”), dated June 8, 2012, finding that the Applicants are neither Convention refugees nor persons in need of protection pursuant to s 96 and ss 97(1), respectively, of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (“IRPA”).

Background

[2] The Applicants are citizens of Bangladesh, they are Mr. Syyed Altaf Husyn, the Principal Applicant, his spouse and their two sons. Their claims were heard jointly by the RPD and the Principal Applicant testified on behalf of all of the family members.

[3] The Principal Applicant alleges that he was an active local member of the Bangladesh Nationalists Party (“BNP”). On December 1, 2013, armed thugs from the Awami League (“AL”) came to his home looking for him. He was away at the time but they ransacked his home, harassed his family members, threatened to kill or abduct his sons, demanded money and shut down the water supply to their residence for three days in an effort to cause the Principal Applicant to surrender to them. The Principal Applicant alleges that on December 26, 2013, an armed gang of the AL threatened by telephone that they would kidnap his sons and kill them or demand a huge ransom. The callers told him that he would face dire consequences if he sought help from the police.

[4] As a result of these threats, on January 1, 2014, the Principal Applicant went into hiding for three days at a friend’s, without his family. He also decided to leave the country. Visas for the United States (“US”) were obtained on December 15, 2013 but the family did not leave immediately as they allege that the ruling AL government, police and immigration authorities would not have allowed BNP or other opposition party leaders or activists to leave the country. Therefore, they were looking for an influential person who could help them find safe passage. With the help of a relative who works at the airport, the family left the country, arriving in the

US on February 1, 2014 and entering Canada on February 20, 2014 at which time they claimed refugee protection. The RPD heard and rejected their claims.

Decision Under Review

[5] The RPD found that the determinative issue was credibility. In that regard, the Principal Applicant's testimony at the hearing as to when he joined the BNP was significantly inconsistent with both his Basis of Claim ("BOC") and an April 20, 2016 letter from his lawyer in Bangladesh ("Lawyer's Letter") which the Applicants had submitted as evidence supporting their claim. The RPD did not accept the Principal Applicant's explanation that he did not remember the year that he joined the BNP. It found that this was a material inconsistency, as the Principal Applicant's political profile formed the basis of his refugee claim, and drew a negative inference as to the Principal Applicant's credibility concerning his allegation that he was an active member of the BNP. The RPD also afforded little probative weight to a supporting letter from the Joint Secretary of the BNP as it was not an original document. It found, in the absence of credible supporting evidence, and given the vast numbers of BNP members participating in local meetings and events, that the Principal Applicant's profile was not such that he would be targeted by AL goons.

[6] Further, that while the Principal Applicant testified that since he arrived in Canada he has learned from his brother that the AL goons have visited his family once or twice a month looking for the Principal Applicant and leaving threatening messages, this information was not included in his BOC. The RPD did not accept his explanation that he had submitted an email from his brother which supported this assertion. It found the omission to be material, drew a negative

inference as to the Principal Applicant's credibility, and found that the AL goons are not continuing to look for the Principal Applicant in Bangladesh. The RPD concluded that the Principal Applicant's claim that he was being targeted by the AL goons because of his active support of the BNP was not credible.

[7] As to the corroborating evidence, the RPD afforded the email from the Principal Applicant's brother little weight as it was not a sworn statement or affidavit and the RPD had already found the Principal Applicant's allegations not to be credible. It also gave the Lawyer's Letter little weight. This was because, although the lawyer stated that he knew that the AL goons continued to search for the Applicants and that he was aware that the police, Rapid Action Battalion ("RAB") and other secret service personnel were looking for the Principal Applicant to arrest him, the lawyer did not state how he knew this. Nor had the Applicant in his BOC claimed that the police or RAB were seeking to arrest him. Further, the lawyer's conclusion that, upon return to Bangladesh the Principal Applicant would be detained by police and his children kidnapped was, speculative.

Issues and Standard of Review

[8] In my view, there are two issues:

1. Should the Court decline to hear the application for judicial review on its merits because the Applicants do not come to Court with clean hands; if not,
2. Is the decision reasonable?

[9] The parties submit and I agree that the RPD's findings of credibility are reviewable on the reasonableness standard and are to be afforded considerable deference by this Court (*Aguebor v Canada (Employment and Immigration)*, [1993] FCJ No 732 (CA) at para 4; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 46; *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 at para 22; *Rezmuves v Canada (Citizenship and Immigration)*, 2013 FC 973 at para 33). Further, that the reasonableness standard requires this Court to consider the existence of justification, transparency and intelligibility within the decision-making process and whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

Issue 1: Should the Court decline to hear the application for judicial review on its merits because the Applicants do not come to Court with clean hands?

[10] The Respondent refers to the affidavit of Tom Heinze, paralegal at the Department of Justice, sworn on October 28, 2016, which states that the Applicants were served with a Direction to Report on August 24, 2016 but failed to appear for the scheduled departure from Canada on September 15, 2016. A warrant for their arrest was issued on September 16, 2016 which remains outstanding. In the result, the Respondent submitted that the Applicants are fugitives from the law and that the Court should exercise its discretion (*Homex Realty and Development Co. v Wyoming (Village)*, [1980] 2 SCR 1011; *Basu v R*, [1992] 2 FC 38 (FCTD) at para 9) and refuse to hear their application for judicial review on the merits as the Applicants do not come to the Court with clean hands (*Wong v Canada (Citizenship and Immigration)*, 2010 FC 569).

[11] When appearing before me counsel for the Applicants advised that the Applicants had, subsequent to the filing of the Respondent's submissions, been in touch with the Canada Border Services Agency ("CBSA") and had made an appointment to attend at CBSA's offices on the day following the hearing of the application for judicial review.

[12] Ultimately, it was agreed by counsel for both the Applicants and the Respondent that the Court need not deal with the preliminary issue of clean hands unless, prior to its decision being rendered, the Respondent were to advise the Court that the Applicants had failed to attend at the scheduled meeting with CBSA or otherwise were in breach of their reporting or other obligations. As the Court was not notified of any such default prior to the issuance of this decision, the preliminary issue has not been addressed.

Issue 2: Is the decision reasonable?

Membership in the BNP

[13] In my view, the RPD reasonably drew a negative inference from the Principal Applicant's inconsistent evidence regarding how long ago he became a member of the BNP. At the hearing the Principal Applicant testified that he had been a member of the BNP for three or four years. It was pointed out to him that the letter from the Joint Secretary of the BNP indicated that he had joined on January 15, 2007 which would suggest that he had been a member for eight years. When asked to explain the discrepancy he testified that he did not remember when he joined the BNP and disputed that he had said that he had been a member for three or four years, asserting instead that he had said he was a member for five years. However, as confirmed by the

transcript, the Principal Applicant's testimony was that he did not remember the date when he had become a member. And, when he was then asked for an approximate date, he had in fact said at least three or four years. He also stated that there could be a mistake somewhere, however, he did not offer any explanation as to what the mistake might be.

[14] I note that the Principal Applicant claimed that he was targeted by AL goons because of his involvement with the BNP. Indeed, the Principal Applicant's membership in the BNP is the heart of the Applicants' claims. I agree with the Respondent that it was reasonable to expect that the Principal Applicant would at least be able to accurately estimate when he officially joined the party. In these circumstances, it was open to the RPD to draw a negative inference from the Principal Applicant's failure to reasonably explain the four to five year discrepancy which he simply attributed to memory lapse. The existence of inconsistencies or omissions in an applicant's evidence is a well-accepted basis for a negative credibility finding (*Lawal v Canada (Citizenship and Immigration)*, 2010 FC 558 at para 20; *Abbas v Canada (Citizenship and Immigration)*, 2016 FC 911 at para 25).

[15] As to the Applicants' submission that the RPD confused the Principal Applicant by conflating membership and support, I do not agree. Immediately prior to the above exchange the RPD had asked when the Principal Applicant had joined the BNP. He stated that he was supportive of the party during his college days. He was then asked if he officially joined during his college days. He replied no. The exchange as to his inability to remember when he joined and the inconsistency with the Joint Secretary's letter followed. The transcript does not support

the submission that the Applicant was confused as to the distinction between membership and support.

[16] The Applicants also submit that the RPD's reasons suggest that there is a misunderstanding as to this distinction. However, while the RPD stated that "the inconsistency is material as it concerns inconsistencies regarding how long he was [*sic*] been a supporter of the BNP", the RPD goes on to explain that "Whether the claimant joined the BNP in 2007 or more recently, three or four years ago, is a significant difference that should reasonably be recalled without prompting from the panel". I do not agree that this supports the existence of a misunderstanding.

[17] Nor do I agree with the Applicants' submission that this was an overzealous and microscopic examination of the discrepancy. There was a significant difference in the time, four to five years, that the Principal Applicant claimed to have been a member of the BNP and the time that the BNP Joint Secretary's letter stated that he had been a member. The inconsistency was real and substantial and, as previously stated, the Principal Applicant's membership in the BNP was the heart of the Applicants' claims.

Continued interest of agents of persecution

[18] The RPD stated that the Principal Applicant had testified that since he arrived in Canada in 2014 he had learned from his brothers that the AL goons continued to look for him, visiting his family once or twice a month and leaving threatening messages that they would harm or kill the Principal Applicant. The RPD noted that this information was not contained in the BOC or

amended BOC and asked the Applicant to explain the omission. His testimony was that he had submitted an email from his brother. The RPD rejected his explanation and found that the omission was material as it concerned the continued, frequent and persistent interest of the agents of persecution. The claim that the AL goons had continued to visit the Principal Applicant's family once or twice a month since 2014 was significant to the Applicants' story and was not a peripheral detail. The RPD also noted that the Applicants were represented by competent counsel and had confirmed at the commencement of the hearing that the BOC was complete, true and correct. The RPD drew a negative inference to the Applicants' credibility and found that the AL goons were not continuing to search for the Principal Applicant in Bangladesh.

[19] The Applicants submit that information that comes to light after the BOC is filed can be testified to at the hearing and that there is no general obligation to amend a filed BOC narrative. In this matter the Applicants provided a copy of an email from the Principal Applicant's brother dated March 27, 2014, concerning the continued interest of the agents of persecution, to the RPD on April 9, 2014. Given this timely disclosure, the RPD's rejection of the Principal Applicant's explanation for not amending his BOC and the drawing a negative inference was unreasonable.

[20] The Respondent points out that s 9 of the *Refugee Protection Division Rules*, SOR/2012-256 permits BOC amendments up to 10 days before the hearing. In this case, the email was dated March 27, 2014, and the hearing was held over two years later, leaving ample opportunity to amend the BOC. Further, the Applicants were represented by counsel and had in fact submitted an amended BOC on May 6, 2016 and were therefore aware of the process, as was

noted by the RPD. And, although Applicants may not have a “general obligation” to make amendments, they are required to satisfy the RPD of their claim.

[21] In my view it is first necessary to point out that the Principal Applicant’s BOC is dated March 6, 2014. The email from his brother is dated March 27, 2014. It states that the situation at the Principal Applicant’s house is not good because the AL goons were still searching for the Principal Applicant and had come to his house the day before using bad language, breaking furniture and threatening to kill the Principal Applicant. Thus, the email speaks to an event that occurred shortly after the BOC was prepared.

[22] At the hearing before the RPD which was held on May 12, 2016, the Principal Applicant was asked if he knew if the goons were still looking for him. He testified that he had learned from his brothers that two months after the family left, the AL goons had ransacked his home. When asked if they were still looking for him the Principal Applicant testified that they had been coming to his home once or twice a month since 2014 and threatening to kill him if he were to return. When asked why this information was not included in the amended BOC filed a week or so before the hearing, the Principal Applicant stated that he had submitted the email from his brother.

[23] In my view, the filing of the email was not responsive to this question because it did not speak to the ongoing continuing interest by the AL goons that the Principal Applicant claimed he had learned of after the email was submitted, more than two years before. The significant

omission as identified by the RPD was the continuing monthly or bimonthly visits to the Principal Applicant's home since 2014.

[24] I would also note that at the commencement of the hearing the RPD indicated that it had before it the BOCs on file as well as a BOC amendment that had been recently received. It noted the Applicants' signatures on the BOCs and the amendment and asked for confirmation that those documents were complete, true and correct. The Applicants agreed that they were and did not raise actions of the AL goons that postdated the incident described in the March 27, 2014 email.

[25] This Court has found that it is reasonable for the RPD to make adverse credibility findings based on omissions in a BOC of important aspects of a claim (*Hamidi v Canada (Citizenship and Immigration)*, 2015 FC 243 at para 28; *Esteban Zeferino v Canada (Citizenship and Immigration)*, 2011 FC 456 at paras 31-32; *Aragon v Canada (Citizenship and Immigration)* 2008 FC 144 at para 21). In these circumstances it was open to the RPD to draw a negative inference based on the omission, particularly in the absence of any explanation for the omission other than the fact of the submission of the email, and in light of the fact that an amended BOC had been filed shortly before the hearing.

[26] While I agree with the Applicants that they were not compelled to file an amended BOC to address the ongoing threat, in these circumstances the failure to do so supported the RPD's negative inference.

Use of the BNP Joint Secretary's letter

[27] The Applicants also submit that the decision was unreasonable because the RPD, having used the BNP Joint Secretary's letter to challenge the Principal Applicant's credibility, then assigned it little probative weight because it was a copy and not the original. The Applicants submit that if the letter is not credible then it cannot be used to challenge the Principal Applicant's credibility. It was also unreasonable to disregard it merely because it was a copy.

[28] At the hearing before the RPD the Principal Applicant was asked if he had the original document, he responded that he could not find it. The failure to provide the original, and a less than compelling explanation for this, permitted the RPD, as it did, to afford the document little weight. Contrary to the Applicants' submission, the RPD did not find that the letter was not credible, disregard the document or find it not to be genuine. Nor was it required to state how it would have determined the veracity of the original document, as that document was not submitted. And, regardless of the weight ascribed to the BNP Joint Secretary's letter, it was submitted by the Applicants in support of their claim. On that basis it was open to the RPD to refer to its content as being inconsistent with the Principal Applicant's testimony.

Email from brother

[29] The RPD gave the email from the Principal Applicant's brother little weight explaining that this was because it was not a sworn statement or affidavit and the RPD had previously found that the Principal Applicant was not credible regarding his allegations. It was open to the RPD to place less weight on documentary evidence when it has drawn an overall negative assessment of

an applicant's credibility (*Huang v Canada (Citizenship and Immigration)*, 2011 FC 288 at para 21; *Xu v Canada (Citizenship and Immigration)*, 2014 FC 1062 at para 4; *Jai v Canada (Citizenship and Immigration)*, 2014 FC 422 at para 19). In addition, the weight to be given to the evidence is a matter that is within the jurisdiction and discretion of the RPD (*Exantus v Canada (Citizenship and Immigration)*, 2015 FC 1118 at para 23; *Lin v Canada (Citizenship and Immigration)*, 2011 FC 1235 at para 70).

Lawyer's Letter

[30] In considering the Lawyer's Letter the RPD noted that the Principal Applicant had not indicated in his BOC that the police or RAB were seeking to arrest him, which the lawyer had asserted but without providing the basis for his claimed knowledge of this. The Applicants submit that, in drawing a negative inference from the fact that the Principal Applicant did not specify that the police and RAB are seeking to arrest him, the RPD ignored his testimony explaining that they are all a part of the AL and he therefore did not differentiate one from the other. The Applicant's submit that the decision is unreasonable because the RPD failed to consider this reasonable explanation.

[31] I note that the RPD made this comment in the context of considering the Lawyer's Letter as corroborating evidence, and merely pointed out that what the lawyer states, that the police, RAB and other secret service personnel are looking for the Principal Applicant to arrest him, is not information that is found in the BOC. I am not convinced that the RPD was drawing an adverse credibility finding against the Principal Applicant on this basis, it made no statement to that effect as it did with all of its other negative credibility findings and it had already

summarized those findings before considering the corroborating evidence. In any event, the BOC speaks exclusively of persecution by an armed AL gang, there is no reference to any party seeking to arrest the Principal Applicant. Nor does the general statement in the Principal Applicant's BOC that "Mostly the members of BNP led 18 party alliance are the victims of torture and other ill-treatment by the police, RAB, the army and intelligence agencies" assist the Applicants in this regard. Moreover, the RPD had other concerns with the letter such as the fact that the lawyer did not state how he knew the police and RAB are seeking to arrest the Principal Applicant and that the lawyer's conclusions that the Principal Applicant would be detained and his children kidnapped were speculative.

Profile

[32] Finally, the Applicant submits that the RPD made unreasonable plausibility findings in relation to the Principal Applicant's profile as a target of the AL and cites much jurisprudence describing the making of plausibility findings. The Applicant submits that the RPD's findings concerning the Principal Applicant's credibility were not supported by the evidence but were based on speculation. Specifically, its finding that given the number of BNP members and attendees at events, it was not plausible that the Principal Applicant's profile is such that he would be singled out by the AL. The Applicant submits that the RPD points to no documentary evidence supporting its plausibility findings that only senior BNP leaders have a profile which would put them at risk.

[33] I am not convinced that the RPD made a plausibility finding in this regard. The Principal Applicant's testimony was that he was a local member of the BNP in Shamoli. He was not an

elected member but would attend local meetings. He estimated there would be four or five thousand BNP supporters in his locality and one or two thousand would attend meetings and events. When asked why the AL would be interested in him because of his participation in BNP meetings and events, he stated that he was astonished as to why he was targeted and that many other members had been targeted as well. Later, when asked if he thought of himself as having the profile of a political activist who might be precluded from leaving Bangladesh by the authorities, he testified that "...they had always...they feared that one day I would be a big member, big leader. So they might have targeted me that, you know, they will harm me, they will harm my family, they will demand or...some money from me."

[34] The Principle Applicant testified that he did not have a job with the BNP, he was just a member. When asked if he thought that because of his profile with BNP that the police would not let him leave the airport he stated "... But in Awami League, people had many goons working for them as they were possibly fearful or they had suspicion that, you know, when we work in BNP that one day we could be activist and we will take away their power. So they would target us." When asked by counsel on why he, rather than others would be targeted, he testified "They possibly had a fear that, you know, that they would think that I.... one day I would be a big leader. I...I...I'm educated man, I have a good job. They will...they will demand some money and this is...and this is what they intend to accomplish. This is the... the government people and the...together with the goons, they do these things against the opposition parties."

[35] The RPD found that given the vast number of BNP members and of the BNP members participating in local meetings and events, the Principal Applicant's profile was not such that he

would be targeted by AL goons. The Principal Applicant had provided no credible or trustworthy evidence as to why his profile as a supporter of the BNP is such that he would be singled out of a crowd of 1000-2000 and targeted for his active support.

[36] Based on the evidence that was before the RPD, I see no error in this conclusion. The Principal Applicant testified that he is only a member of the BNP, one of thousands, he does not work for nor hold office with the BNP, and he merely speculated that he was targeted because of the possibility of a fear that someday he would be a big leader.

[37] In conclusion, in my view the RPD's credibility findings were reasonable as was its treatment of the corroborating evidence. Accordingly, there is no basis for this Court's intervention in its decision.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.
2. There shall be no order as to costs.
3. No question of general importance for certification was proposed or arises.

“Cecily Y. Strickland”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2786-16

STYLE OF CAUSE: SYYED ALTAF HUSYN, MRS ANU ALTAF, SYYED OMER HUSYN OMAM, AND SYYED ASRAR HUSYN ONIM v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: DECEMBER 7, 2016

JUDGMENT AND REASONS: STRICKLAND J.

DATED: DECEMBER 16, 2016

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