Federal Court  Cour fédérale

Date: 20220301

Docket: IMM-5366-20

Citation: 2022 FC 261

Ottawa, Ontario, March 1, 2022

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

MOHAMMED NURUL ISLAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] Mr. Islam [Applicant] applies for judicial review of a Senior Immigration Officer's [Officer] Pre-Removal Risk Assessment [PRRA] made on September 22, 2020 [Decision]. In refusing the PRRA, the Officer concluded that if returned to Bangladesh, the Applicant would not face a personalized danger of torture, risk to life, or risk of cruel and unusual treatment or

punishment pursuant to section 97 of the *Immigration and Refugee Protection Act*, SC 2001 c 27 [*IRPA*].

[2] The application for judicial review is allowed.

II. Background

[3] The Applicant is a citizen of Bangladesh who lived in Chittagong. He is a member and a self-described leader of the Bangladesh Nationalist Party [BNP]. Inspired by the founder of BNP, he states that he and his friend, Mr. Nuru, joined the party in the late 1990s. In 2007, a party called the Awami League took power from the BNP and began kidnapping and arresting BNP members. In 2014, when the Awami League won the election without opposition, the government continued to kidnap and murder high-ranking members of the BNP.

[4] The Applicant states that on March 29, 2017, after Mr. Nuru and the Applicant attended a wedding, Mr. Nuru went back to his house while the Applicant went to his in-laws' house. Police officers in civilian clothing arrested Mr. Nuru that night. The Applicant states that the officers were members of the Awami League. The next morning, Mr. Nuru's body was found by a river. The Applicant states that the Awami League is looking for him because he was with Mr. Nuru the night he was taken and that members of the Awami League came to his house seeking him.

[5] The Applicant subsequently left Chittagong for Daka on April 5, 2017. Two days later, members of the Awami League came to his home and harassed, and physically assaulted his wife and mother. The Applicant received a Canadian visa on July 28, 2017 and arrived in Canada with

his mother on August 27, 2017. His wife and children remain in Bangladesh because their visa applications were refused.

[6] On February 26, 2018, the Applicant filed a refugee claim. An admissibility hearing was held on July 20, 2019, where the Immigration Division [ID] determined that the Applicant was inadmissible under paragraph 34(1)(f) of the *IRPA* because there were reasonable grounds to believe that the BNP engages, has engaged in, or has instigated "terrorism" or "the subversion by force of any government." As a result, the Applicant's refugee claim was terminated. The Applicant received his removal order on October 1, 2019 and, without legal representation, subsequently filed his PRRA.

[7] A Direction to Report for Removal from Canada to Bangladesh was issued on February 26, 2021. This Court granted a stay of removal on February 24, 2021.

III. The Decision

[8] The Officer recognized that the ID found that the Applicant is a member of the BNP. The Officer noted that section 96 of the *IRPA* is not applicable to the Applicant because the ID found him inadmissible on security grounds. Therefore, the Officer only assessed his risk pursuant to section 97 of the *IRPA*. The Officer also declined to assess the Applicant's evidence related to humanitarian and compassionate grounds.

[9] The Officer summarized the Applicant's PRRA submissions and canvassed articles that documented the death of Mr. Nuru. The Officer accepted that the Applicant is a member of the

BNP and that Mr. Nuru was found dead on March 30, 2017. However, the Officer ultimately held that the Applicant did not provide evidence to establish that he would be at risk if returned to Bangladesh.

[10] The Officer emphasized that the burden sits with a claimant to prove their risk and that the Applicant failed to produce evidence to corroborate his claim. The Officer pointed to two aspects of the evidence that were lacking. First, the Applicant did not provide evidence to establish that he had a relationship with Mr. Nuru or that he was with Mr. Nuru on the night of Mr. Nuru's death. The Officer stated that it is reasonable to expect evidence of their personal history given the length of their relationship.

[11] Second, the Applicant failed to provide evidence that he would be targeted if returned to Bangladesh. The Applicant did not provide affidavits from his wife or mother, nor did he provide medical documents proving they were physically assaulted. Likewise, the Applicant did not provide affidavits from friends or family, Mr. Nuru's wife, or members of the BNP. Given his longstanding involvement with the BNP, the Officer felt it was reasonable to expect letters from fellow members attesting to his risk.

[12] The Officer cited one excerpt from the UK Home Office report on political opposition in Bangladesh. Relying on this passage, the Officer concluded, "while violence does occur, it is generally low in relation to the size of political parties." The Officer concluded that a hearing was not required because the factors set out in section 167 of the *Immigration and Refugee*

Protection Regulations, SOR/2002-227 [*Regulations*] were not satisfied. Ultimately, the Officer refused the Applicant's PRRA application.

IV. Issues and Standard of Review

[13] After considering the submissions of the parties, the issues are best framed as:

1. Did the Officer err in failing to convene an oral hearing?
2. Did the Officer err in requiring corroborating evidence?
3. Did the Officer err by not assessing the Applicant's objective risk profile based on recent and publicly available documents?

[14] The Applicant submits that the standard of review for issue two and three is reasonableness. The Applicant emphasizes that reasonableness is a robust review and is not a "rubber stamping" or sheltering of administrative decision-makers (*Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 13 [*Vavilov*]) and that an apparently reasonable outcome cannot stand if it is not justified by the reasons (*Vavilov* at para 96). The Applicant submits that issue one is reviewable on the standard of correctness. The Applicant does not cite case law to support this position.

[15] The Respondent submits that none of the issues raised by the Applicant warrant a departure from the presumption of reasonableness as outlined in *Vavilov*. While issues of procedural fairness are typically reviewed on the standard of correctness, whether a PRRA Officer is required to convene an oral hearing is reviewable on the standard of reasonableness (*Ritual v Canada (Citizenship and Immigration)*, 2021 FC 717 at para 29 [*Ritual*].

[16] I agree with the Respondent that the appropriate standard of review for all issues is reasonableness. With respect to the merits of the Decision, this case does not engage one of the exceptions set out by the Supreme Court in *Vavilov*, therefore, the presumption of reasonableness is not rebutted (*Vavilov* at par 23-25, 53).

[17] A reasonableness review requires the Court to examine the decision for intelligibility, transparency, and justification. In conducting a reasonableness review, the reviewing court must look to both the outcome of the decision and the justification of the result (*Vavilov* at para 87). A reasonable decision must be "justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99). However, "a reviewing court must refrain from reweighing and reassessing the evidence considered by the decision-maker" (*Vavilov* at para 125). If the decision-maker's reasons allow a reviewing Court to understand why the decision was made, and determine whether the decision falls within the range of acceptable outcomes defensible in respect of the facts and law, the decision will be reasonable (*Vavilov* at paras 85-86).

V. Parties' Positions

A. *Did the Officer err in failing to convene an oral hearing?*

(1) Applicant's Position

[18] The Officer, while stating that the Decision was made based on insufficiency of evidence, in fact, made an adverse credibility finding (*Latifi v Canada (Citizenship and Immigration)*, 2006 FC 1388 at para 60; *Matute Andrade v Canada (Citizenship and Immigration)*, 2010 FC 1074 at

para 31 [*Andrade*]). In the absence of a determination as to credibility, an applicant's evidence is presumed to be true. If an officer's finding can only be made by disbelieving the evidence, the officer has made a credibility finding (*Cho v Canada (Citizenship and Immigration),* 2010 FC 1299 at paras 24, 26 [*Cho*]). Because credibility was in issue, the Applicant was entitled to an oral hearing.

[19] In *Liban v Canada (Citizenship and Immigration),* 2008 FC 1252, this Court found that where an officer concluded that there was "insufficient objective evidence" supporting the claimant's assertions, the officer was really saying he disbelieved the claimant. The Court held that if the Officer had believed the claimant, the Officer would have likely found the claimant to be at risk in light of the documentary evidence accepted by the Officer.

[20] In this case, the Officer questioned the Applicant's sworn evidence of future risk due to the absence of corroborating evidence. In particular, the Officer questioned whether Mr. Nuru was the Applicant's friend, whether his wife and mother were assaulted, and whether he would be targeted upon being returned to Bangladesh. The Officer could not have made this finding if the Officer believed the Applicant. A proper consideration of the recent objective evidence would have corroborated the Applicant's sworn evidence.

(2) Respondent's Position

[21] Hearings for PRRA applications are only held in exceptional cases, when all the circumstances in section 167 of the *Regulations* are made out (*Bhallu v Canada (Solicitor General),* 2004 FC 1324 at para 4). The Officer did not assess the Applicant's credibility.

[22] An Officer may consider weight or probative value without considering credibility because credibility is irrelevant if the evidence is given little to no weight (*Ferguson v Canada (Citizenship and Immigration)*, 2008 FC 1067 at paras 23-24 [*Ferguson*]). Being unconvinced by the evidence before them is not the same as making a credibility finding (*Aboud v Canada (Citizenship and Immigration)*, 2014 FC 1019 at para 35). An oral hearing is only required when the credibility finding is a serious issue – when evidence touches on credibility but it is simply theoretical, an oral hearing is not required (*Gandhi v Canada (Citizenship and Immigration)*, 2020 FC 1132 at para 41).

[23] In this case, credibility was not an issue because the Officer accepted that the Applicant was a member of the BNP. It was reasonable for the Officer not to convene an oral hearing.

B. *Did the Officer err in requiring corroborating evidence?*

(1) Applicant's Position

[24] The ID found that the Applicant is a member of the BNP, relying on the Applicant's description of himself as a leader of the BNP. Given this finding, it was unreasonable for the Officer to question the Applicant's risk and require that he provide corroborating evidence. Personal risks can be inferred by relying on circumstantial evidence where a person is a member of a group that is targeted (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 53). The objective country condition documents in this case prove that members of the BNP are persecuted by the Awami League.

[25] The Respondent submits that truth or reliability of statements cannot be equated with a presumption of sufficiency (*Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302, 1 ACWS (2d) 167). While it is true that the decision-maker determines whether sworn evidence is sufficient on the balance of probabilities, it is an error for an Officer to fail to explain why such sworn evidence is ignored or discounted. An Officer should not dwell on the evidence that is not before them (*Kim v Canada (Citizenship and Immigration)*, 2020 FC 581 at paras 56-57, 63). The Officer erred by requiring further proof in the face of the Applicant's sworn testimony and the objective documentary evidence that BNP members face a risk due to the Awami League.

[26] It is impermissible for the Respondent to buttress the Officer's reasons by now arguing that the Officer examined the Applicant's risk from the perspective that he is a member and not a leader of the BNP. The ID determined that the Applicant is a member of the BNP; it made no determination as to whether he is a leader. Furthermore, the PRRA Officer did not conclude that the Applicant provided insufficient evidence to establish that he was a leader. The PRRA Officer did not make a distinction between membership and leadership at all.

(2) Respondent's Position

[27] The ID determined that the Applicant was a member of the BNP, not a leader. The ID relied on the fact that the Applicant was given a police certificate, which would normally not be given to opposition members or leaders. The Officer then assessed the Applicant's risk against the country condition documents. While thousands of BNP members were arrested in the lead up

to the 2018 elections, the Officer appropriately noted that the number of people affected by political violence is relatively low.

[28] Even if affidavit evidence is presumed credible and reliable, it cannot be presumed to be sufficient, in and of itself, to establish the facts on the balance of probabilities. The presumption of truth cannot be equated to the presumption of sufficiency. The onus is on the Applicant to adduce sufficient evidence and submit relevant material as it becomes available (*Perampalam v Canada (Citizenship and Immigration)*, 2018 FC 909 at para 17).

[29] The requirement for corroboration of facts integral to the Applicant's case is a matter of common sense. It is reasonable to expect that failing to file supporting documentation may have an impact on an applicant's risk assessment (*Ruszo v Canada (Citizenship and Immigration)*, 2018 FC 943 at para 21; *Valdeblanquez v Canada (Citizenship and Immigration)*, 2017 FC 410 at para 41).

C. *Did the Officer err by not assessing the Applicant's objective risk profile based on recent and publicly available documents?*

(1) Applicant's Position

[30] The Officer failed to assess the objective country condition documents. Due to the principle of *non-refoulement*, an officer's analysis cannot be confined to the exact arguments or evidence presented by an applicant. An Officer has a duty to look at recent and publicly available reports on country conditions even when they have not been submitted. This duty is even higher where an applicant is self-represented, as the Applicant was at the time he submitted his PRRA

application (*Jama v Canada (Citizenship and Immigration)*, 2014 FC 668 at paras 18, 21). Even when a claimant's evidence is limited to a PRRA application form and a personal statement describing their background, risk, and fears, PRRA officers still have an obligation to consult the country condition documents. Absent an analysis of the objective documentary evidence, the Court may be left wondering why the Officer made the decision (*Pacheco v Canada (Citizenship and Immigration)*, 2018 FC 872 at paras 55-58).

[31] In this case, the Officer isolates one paragraph of the UK Home Report to conclude that political violence in Bangladesh is low in comparison to the size of political parties. It was unreasonable for the Officer to (1) ignore other parts of the UK Home Report and the entirety of the US Department of State Report; and (2) not consult other publicly available reports included in Exhibit C of the Application Record.

[32] Other portions of these reports indicate that members of the BNP and others in opposition to the Awami League are subject to arrests, harassment, extortion, torture, killings, and forced disappearance. The other reports in the record indicate that prior to the December 30, 2018 election, the level of attacks and suppression on opposition party candidates, leaders, and activists were at a level previously unseen. Two laws permit the arrest of opposition party activists for criticisms against high-ranking members of the Awami League.

[33] While an Officer does not have to mention every piece of evidence, the more important the evidence is, the more willing a court may be to conclude that the decision-maker made an erroneous finding of fact "without regard for the evidence." Thus, a decision-maker's "burden of

explanation increases with the relevance of the evidence in question to the disputed facts" (*Cepeda-Gutierrez v Canada (Citizenship and Immigration)*, [1999] 1 FC 53 at para 17, 157 FTR 35). Here, the Officer did not refer to material that was directly relevant to the core question of the Applicant's risk. This indicates that the Decision was made "without regard to the evidence."

(2) Respondent's Position

[34] The Applicant asks this Court to reweigh the evidence, which is not the function of the Court on judicial review. The Officer appropriately considered the country condition documents in relation to the Applicant and noted that BNP members can be subject to mistreatment. Applicants for a PRRA must convince an Officer on the balance of probabilities that they will face risk under section 97 by putting their best foot forward with sufficient evidence (*Nhengu v Canada (Citizenship and Immigration)*, 2018 FC 913 at para 6). In this case, the Applicant simply did not discharge this burden.

VI. Analysis

A. *Did the Officer err in failing to convene an oral hearing?*

[35] For the following reasons, I find that the Officer failed to convene an oral hearing and made a veiled credibility finding.

[36] Paragraph 113(b) of the *IRPA* states that a hearing may be held if the Minister, "on the basis of prescribed factors, is of the opinion that a hearing is required." Section 167 of the *Regulations* sets out those factors:

> **Hearing —prescribed factors**
>
> 167. For the purpose of determining whether a hearing is required under paragraph 113(b) of the [*IRPA*], the factors are the following:
>
> (a) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the [*IRPA*];
>
> (b) whether the evidence is central to the decision with respect to the application for protection; and
>
> (c) whether the evidence, if accepted, would justify allowing the application for protection.

[37] A hearing is only required where an applicant's credibility is called into question and it is a determinative factor in the issue that the PRRA officer must decide (*Andrade* at para 30).

[38] The jurisprudence recognizes that it can be difficult to distinguish insufficiency of evidence from a veiled credibility finding (*Gao v Canada (Citizenship and Immigration)*, 2014 FC 59 at para 32). In *AB v Canada (Citizenship and Immigration)*, 2020 FC 498 [*AB*], Justice Boswell explained some of the key principles relating to this distinction:

> [115] A PRRA officer does not make an adverse credibility finding every time he or she concludes that the evidence adduced by an applicant is insufficient to meet the applicant's evidentiary burden of proof (*Herman v Canada (Minister of Citizenship and Immigration*), 2010 FC 629 at para 17 [*Herman*]). There is a difference between the burden of proof, standard of proof, and the quality of the evidence necessary to meet the standard of proof (*Carillo v Canada (Minister of Citizenship and Immigration*), 2008 FCA 94 at para 16). A PRRA officer can make a negative credibility finding or simply disbelieve the evidence presented by the applicant. This approach is different from not being persuaded that an applicant has met his or her burden of proof on a balance of probabilities, without ever having considered whether the evidence is credible (*Herman*, at para 17).

[116] The jurisprudence establishes that whether an applicant has met his or her legal burden depends on the weight an officer attaches to the evidence. The officer may approach this task by first assessing credibility, and if found not to be credible, the officer may attach no weight to the evidence. But the officer may either weigh the evidence that he or she has found to be credible or may move directly to weighing the evidence without making any credibility findings (*Ferguson v Canada (Minister of Citizenship and Immigration*), 2008 FC 1067 at paras 26 and 27 [*Ferguson*]; *Gao* at paras 35 and 36). As Justice Zinn noted in *Ferguson*:

> [26] If the trier of fact finds that the evidence is credible, then an assessment must be made as to the weight that is to be given to it. It is not only evidence that has passed the test of reliability that may be assessed for weight. It is open to the trier of fact, in considering the evidence, to move immediately to an assessment of weight or probative value without considering whether it is credible. Invariably this occurs when the trier of fact is of the view that the answer to the first question is irrelevant because the evidence is to be given little or no weight, even if it is found to be reliable evidence. For example, evidence of third parties who have no means of independently verifying the facts to which they testify is likely to be ascribed little weight, whether it is credible or not.
>
> **[**27] Evidence tendered by a witness with a personal interest in the matter may also be examined for its weight before considering its credibility because typically this sort of evidence requires corroboration if it is to have probative value. If there is no corroboration, then it may be unnecessary to assess its credibility as its weight will not meet the legal burden of proving the fact on the balance of probabilities. When the trier of fact assesses the evidence in this manner he or she is not making a determination based on the credibility of the person providing the evidence; rather, the trier of fact is simply saying the evidence that has been tendered does not have sufficient probative value, either on its own or coupled with the other tendered evidence, to establish on the balance of probability, the fact for which it has been tendered. That, in my

> view, is the assessment the officer made in this case.

[39] In *Ferguson*, the applicant claimed she faced risk due to her sexuality but the only evidence before the Officer was counsel's statements. Justice Zinn noted that "had the statement been affirmed by the Applicant in a sworn affidavit submitted with her application, it would have been deserving of somewhat greater weight than it was given. Had it been supported by other corroborative evidence such as evidence from her lesbian partner(s), public statements, and the like, it would have attracted even more weight" (at para 32).

[40] The applicant in *AB* provided a sworn affidavit detailing the torture they sustained by state authorities. In Justice Boswell's view, failure to explain why the Officer disbelieved the Applicant's sworn evidence when the Officer had accepted the content of a Doctor's report amounted to a veiled credibility finding (at paras 117-118).

[41] Like *AB*, the Applicant in this case submitted sworn evidence to establish his risk. He explained that he was a member/leader of the BNP; that Mr. Nuru was his friend; that he was with Mr. Nuru the night of the murder; and that members of the Awami League assaulted his wife and mother. The Respondent submits that credibility was not an issue because the Officer accepted that the Applicant was a member of the BNP. The Officer stated that the Applicant had not sufficiently proven his relationship to Mr. Nuru, that he was with him the night of the murder, and that his wife and mother were assaulted. Of course, in assessing whether a veiled credibility finding has been made, the Court must look beyond the words of the decision-maker

(*Ferguson* at para 16). In my view, these aspects of the Applicant's sworn evidence, which the Officer rejected, are directly relevant to the Applicant's alleged risk.

[42] *Cho v Canada (Citizenship and Immigration)*, 2010 FC 1299 is instructive on this point. In *Cho*, a PRRA officer rejected the claimant's evidence that he had been assaulted because the claimant had not provided corroborating evidence (at para 20). Justice Tremblay-Lamer held that, in doing so, the PRRA officer made a veiled credibility finding:

> [24] In the absence of a determination as to credibility, an applicant's evidence is presumed to be true. Is it possible that the officer, in this case, accepted the applicant's allegations regarding having been assaulted in 2005, 2007 and 2009 as true, but nonetheless found that the burden of proof had not been satisfied in this regard? Did he merely assess the probative value of the applicant's evidence, without making a credibility finding, and determine that it was insufficient, on its own, to prove that the alleged events took place? I do not think so.
>
> [25] Of course, a determination as to probative value and weight can be made without making a determination as to credibility. Such is the case, for example, when evidence is found not to be directly relevant to the facts alleged, or when evidence is found to be unreliable for reasons other than credibility.
>
> [26] However, in this case, the applicant's statements with respect to the 2005, 2007 and 2009 assaults were directly relevant to the question of whether the alleged events took place…

[43] The key question is whether the Officer could accept the Applicant's evidence and still conclude that the Applicant did not discharge his evidentiary burden (*Cho* at para 24; *Arfaoui v Canada (Citizenship and Immigration)*, 2010 FC 549 at para 20). Had the Officer believed the Applicant in this case, it is difficult to see how the Officer could reach the same conclusion that the Applicant is not at risk. Furthermore, the Officer did not offer any reason for why the Applicant's sworn evidence was unreliable, other than for credibility reasons (*Cho* at paras 25-

26). The Officer simply stated that it would be reasonable to expect additional corroborating evidence in the circumstances.

[44] In my view, the Decision reveals that the Officer had concerns about the Applicant's sworn evidence, indicating that the Officer was making a veiled credibility finding. That sworn evidence related to risks that the Applicant feared from the Awami League because of his involvement or leadership within the BNP. The evidence of these risks was also uncontroverted and directly related to sections 96 and 97 of the *IRPA*. As such, the criteria set out in paragraph 167(a) are satisfied.

[45] The Officer also made credibility findings that were central to the Applicant's PRRA Application. There is no doubt that the rejected evidence "seriously undermined the Applicant's claim to a personalized risk" in Bangladesh (*Cho* at para 27). As such, it is central to the Decision as required by paragraph 167(b).

[46] The criteria set out in paragraph 167(c) are also made out. Had the Officer believed the Applicant, the Applicant would have established that he was a member of an opposition party, whose family and friends had been physically assaulted and murdered by the ruling Awami League. Further, he would have established that he was with Mr. Nuru the night of the murder. In these circumstances, such evidence would justify granting the PRRA application.

[47] It is unnecessary to assess the second and third issue having found that the Officer made a veiled credibility finding.

VII. Conclusion

[48] The application for judicial review is allowed. The parties did not propose a question for certification and none arises.

JUDGMENT in IMM-5366-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed. The matter is remitted to a different officer for re-determination.
2. There is no question for certification.
3. There is no order as to costs.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Sumeya Mulla	FOR THE APPLICANT
James Todd	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Waldman and Associates Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT