Date: 20080108

Docket: IMM-5618-06

Citation: 2008 FC 18

Ottawa, Ontario, January 8, 2008

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

SWAPAN CHOWDHURY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an application for judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board) under section 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, dated September 18, 2006. The Board determined that the applicant was neither a Convention refugee nor a person in need of protection.

FACTS

[2] The applicant is a citizen of Bangladesh, where he was born in 1976. According to his Personal Information Form (PIF), he joined the Awami League (AL) when he was about 17 years old, and he became the publicity secretary of his local unit in 1995.

[3] The AL was in control of the Bangladeshi government from 1996 to 2001, when a caretaker government was appointed with the mandate to hold a fair election. The Bangladesh National Party (BNP) won the election on October 1, 2001.

[4] Before the election was held, the applicant worked for an AL candidate of his locality. On September 18, 2001, as he was canvassing with party workers for this candidate, a notorious BNP thug and his associates threatened him with death. A physical confrontation occurred where the applicant was beaten and injured. The applicant sought medical assistance and he was treated for serious blunt injury and body wounds. He then went to the police station to report the incident. Although he gave a written complaint, the applicant alleged he did not see the officer entering any complaint in the official book, nor did the police take any steps to arrest his assailants.

[5] On December 2, 2001, the applicant participated in a nationwide peaceful strike to protest the persecution of his party by the BNP. The applicant stated he was given responsibilities to organize people from his area to participate in the strike. At one point during the strike, violence broke out and a lot of AL members were injured by the police and BNP members. The applicant, however, was not seriously injured.

[6] At the next serious confrontation, he sustained injuries during and after a public meeting to protest against the detention and torture of AL members, on July 18, 2003. The applicant was in charge of publicizing the event where the speakers strongly criticized the government.

[7] The following day, the applicant was threatened by BNP thugs as a result of his participation in the public meeting. The threat was also directed at Mr. Malak, the unit president of the AL. The applicant managed to escape, and he went to Mr. Malak's home to tell him about the threat uttered against both of them. They decided to go into hiding in a friend's house.

[8] They were later warned that BNP thugs came to their houses looking for them. The applicant therefore left for his cousin's residence in Musapur on the island of Swandip, which is a five-hour drive and boat trip from his family home. He stayed with his cousin for four months, only going out at night.

[9] On April 30, 2003, the applicant's uncle sent an agent to get him and Mr. Malak out of the country. He arrived in Canada on November 4, 2003 and he asked for refugee protection.

[10] The applicant claims that the police and the BNP are still visiting his family's residences and interrogating them as to his whereabouts, even though he has fled the country. He also learned from a lawyer hired by his brother that the police want to question him under the *Special Power Act*. This law has been used by successive governments to suppress political opposition and detain opponents.

[11] A previous negative Board decision, dated March 22, 2005 was set aside by Justice Mactavish on November 4, 2005. The Court reasoned that "[w]hile the Board did not accept that Mr. Chowdhury was a high level member of the Awami League, it did appear to accept that he was indeed an active member of the party". Given the Court's view that "[t]here was significant

documentary evidence before the Board" of persecution of regular members of the AL, it was incumbent on the Board to consider whether a claim was made out on the basis of mere membership. The Board had not done this, so the decision was set aside and a re-determination was ordered.

[12] Accordingly, a *de novo* Board hearing was held on July 6, 2006. The Board rejected the applicant's application a second time on September 18, 2006, as it found that there was a viable Internal Flight Alternative (IFA). The applicant, therefore, now asks for a judicial review of this Board decision.

THE IMPUGNED DECISION

[13] The Board made an adverse credibility finding as it doubted the truthfulness of the applicant's explanations. While the applicant explained that the police did not consider his complaint, for example, the Board found that he was speculating. Similarly, the Board did not believe that people in other parts of Bangladesh would notice his different accent and find it suspect and thus, that he did not have an IFA. The Board member considered that the applicant was embellishing his responses when he explained that the BNP would still be looking for him, regardless of the time elapsed since his departure from Bangladesh.

[14] The Board then noted contradictions in the applicant's evidence. Indeed, the applicant stated that there was no warrant issued for his arrest, and then later said a lawyer found out that the police wanted to question him under the *Special Powers Act*. According to the Board, the applicant also

stated that if he returned to other parts of Bangladesh he would not participate with the AL, and then later said he would continue his political involvement.

[15] Furthermore, the Board member noted some omissions in his Port of Entry interview. The applicant made no reference to the September 2001 beating, did not talk about his key role in publicizing the July 18, 2003 meeting, and failed to mention the death threat on July 19, 2003 that caused him to hide and flee out of the country.

[16] The Board member also found that the applicant had embellished the “torture” suffered by his family members. When asked to elaborate on his definition of the word “torture”, he mentioned that the police or goons used a very firm voice when speaking to his mother, which caused her great fear. He also referred to his brother as being mentally tortured by being yelled at and spoken firmly to by the police and goons.

[17] That being said, and despite his concerns with the credibility of the applicant, the Board member was prepared to accept that Mr. Chowdhury has been an active member of the AL. After having given consideration to all of the objective country documentation, the Board member also agreed that active members of the AL could face persecution by political enemies or their goons in various parts of Bangladesh.

[18] The Board member then devoted a little more than half a page to assess the IFA. He concluded that the applicant would not be politically active unless he returned to his family’s

residence in South Halishahar, Chittagong. As he stated, "[o]n a balance of probability, I would agree with the claimant that if he was to return to South Halishahar, there might be more than a mere possibility of his being again targeted by the BNP goons".

[19] Yet, the Board member was of the view that the applicant could live safely in other parts of Bangladesh. His reasoning holds in these three paragraphs:

> However, I have not accepted that if he was living in other parts of Bangladesh, such as Dhaka (where his uncle resides) or in Musapur in the island of Swandip, where other relatives reside, that he would be necessarily located by previous enemies of the BNP or their thugs in his hometown of South Halishahar in Chittagong. I believe it is reasonable for the claimant to seek an internal flight alternative in either Dhaka or Musapur.
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> As mentioned previously, I did not find the claimant's oral evidence on July 6th, 2006 in respect to his internal flight alternative options as being plausible or credible, especially when he stated that in either of these two locations, people would notice that he has a different accent and therefore "he must have done something wrong to be there".
>
> The claimant is well-educated and has a varied employment background and therefore, with that combined with having relatives in these two locations, I believe these are realistic internal flight alternatives for him if he were to return to his country of citizenship, Bangladesh. In fact, I note that he was in Musapur in the island of Swandip for over four months and he was at no risk at that time, even though he alleges he only went out during evening hours.

ISSUES

[20] The only issue to be determined in this application for judicial review is whether the Board member erred in finding that the applicant had a viable IFA in Dhaka and Musapur. According to the applicant, this finding is flawed for three reasons. First of all, the applicant contends the Board

member did not consider whether he has a well-founded fear of persecution in the IFA areas simply due to his active membership in the AL, whether his allegations about his past experiences are true. Secondly, the applicant argued that the Board member ignored or misconstrued the evidence about whether the applicant would be politically active in the IFA areas. Finally, the applicant submitted that the Board did not apply the correct standard of proof in making its IFA finding. I shall now turn to each of these three arguments.

ANALYSIS

[21] It is trite law that the appropriate standard of review when dealing with findings of fact made by the Board in the context of an IFA is patent unreasonableness: see *Ali v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 193; *Ezemba v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1023; *Chorny v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 999. As a result, the Court will only intervene if the Board based its decision on a finding of fact that it made in a perverse or capricious manner or without regard to the evidence (*Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18.1(4)(d)). As to the issue of whether the Board properly applied the test for determining the possibility of a viable IFA, this is a question of law to be assessed against a standard of correctness.

[22] The applicant tried to draw a distinction between his specific claim, based on his past experiences of threats and persecution, and his general claim resulting from mere party membership. In analyzing the objective basis of his refugee claim, the Board rejected the specific claim of the applicant but accepted that regular active members of the AL could face persecution in various parts

of Bangladesh. But in its IFA analysis, the Board lost sight of that conclusion and forgot to ask itself whether the applicant had a well-founded fear of persecution in the IFA areas simply due to his active membership, so goes the applicant's argument.

[23] Having carefully read the cases relied upon by the applicant, I have come to the conclusion that they do not stand for the proposition put forward in his oral and written submissions. When assessing a refugee claim, the issue is always personalized. Indeed, the two-pronged test to determine if an applicant has a well-founded fear of persecution throughout his country of origin focuses on his or her personal situation. This test, as set out by the Federal Court of Appeal in *Rasaratnam v. Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 706, can be summarized as follows: 1) Is there a serious possibility that a claimant be persecuted in the suggested IFA locations? 2) Would it be unreasonably harsh in all the circumstances for the claimant to move to an IFA location?

[24] In other words, the Board was required to be satisfied that there was no serious possibility of the applicant being persecuted in other parts of Bangladesh and that, in all the circumstances including those particular to the applicant, conditions in these other parts of Bangladesh were such that it would not be unreasonable for the applicant to seek refuge there. The real issue was not whether there was a serious possibility, in the abstract, for an active member of the AL to be persecuted in the cities of Dhaka or Musapur, but whether the applicant, with his personal characteristics, could find a safe haven in these locations.

[25] The Board did make this personalized assessment and found that the applicant had an IFA in Dhaka and Musapur. First, it did not accept that the applicant might be found to be suspicious and reported to the police merely because he had a different accent from people living in these two cities. Moreover, the Board noted that the applicant has relatives in both of those two cities and that he lived in Musapur with a cousin for over four months, even though he alleges he only went out during evening hours. Finally, the Board added that the applicant is well-educated and has a varied employment background. On the basis of these findings, the Board concluded that there are realistic IFA for the applicant if he were to return to Bangladesh. These findings of fact are not patently unreasonable, and I am not prepared to disturb them on an application for judicial review. It may well be that active members of the AL could be at risk in various parts of Bangladesh; it does not follow that a particular member who faces persecution in his hometown will also be threatened in other parts of the country.

[26] Turning now to the applicant's second argument, it was submitted that the Board misconstrued his testimony. The Board's conclusion that the applicant had an IFA in Dhaka and Musapur was based in part on the fact that the applicant would not resume his political activities if he were to return somewhere else than his home town. The Board "note[s] that the claimant stated in his oral evidence that if he were to return to other parts of Bangladesh, he would not be active with the Awami party unless he returned to his family residence in South Halishahar, Chittagong" (T.R., p.141).

[27] After a careful review of the applicant's testimony before the Board, I fail to see the basis for this finding. Quite to the contrary, the applicant said that he will attend all the AL meetings and processions anywhere in Bangladesh (T.R., pp. 195-196). He further stated that he would definitely contact his previous unit of the AL after his return and resume his activities (T.R., p. 222). The applicant expressed his lack of desire to return to any part of Bangladesh, but added that if forced to do so, he would return to South Halishahar since he could be located in other areas anyway. This is understandable, given that in his locality, at least, he has his family and a network of support. Be that as it may, he never stated that he would not be politically active if he were to live in Dhaka.

[28] The Board's finding is therefore completely at odds with the applicant's testimony. This may not have been of critical importance, had it not been for the fact that this finding is crucial in assessing whether the applicant has an IFA in Dhaka or Musapur. While he may be safe in these two cities if he lays low and refrain from any political activity, it could very well be otherwise if he resumes his participation in the AL and tries to get in touch with members of his local unit. The Board erred in not assessing this possibility, in light of the applicant's testimony and of its previous finding that active members of the AL could face persecution by political enemies or their thugs in various parts of Bangladesh.

[29] Finally, the applicant argued that the Board did not apply the correct test in making its IFA finding. In the extract quoted above, at paragraph 19 of these reasons, the Board came to the conclusion that the applicant would be safe in other parts of Bangladesh because it did not accept

that “he would be necessarily located by previous enemies of the BNP or their thugs…” (T.R., p. 142) (emphasis added).

[30] It is well established that for the Board to conclude that an applicant has an IFA, it must be satisfied on a balance of probabilities that there is no serious possibility of the claimant being persecuted in that part of the country to which it finds an IFA exists. The Convention refugee definition, of which the IFA concept is an inherent part, does not require the applicant to prove that he or she “would” be persecuted. There does not have to be a probability of persecution, merely a reasonable chance. In analyzing the degree of risk a refugee faces, it is an error to require that persecution “would” happen. In adding the word “necessarily”, the Board required a virtual certainty of persecution.

[31] The respondent retorted that the Board was merely addressing the facts and did not purport to set out the risk threshold. In addition, it was submitted that the Board was well aware of the correct standard, as evidenced by the following sentence in the first paragraph under the IFA heading: “On a balance of probability, I would agree with the claimant that if he was to return to South Halishahar, there might be more than a mere possibility of his being again targeted by the BNP goons” (T.R., p. 141). In any event, the respondent argued that one should not become fixated with a few words without considering the decision as a whole and the context within which those words appear.

[32] The problem with the respondent's position is that this is not a case where multiple formulations of the test have been used, some being correct and others erroneous. The questionable wording of the test is the only phrase in the IFA analysis that has to do with the standard of proof. The other sentence relied upon by the respondent to demonstrate the Board's familiarity with the correct test has more to do with the assessment of the objective risk in the applicant's home locality.

[33] In the recent decision of *Ghose v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 343 [*Ghose*], which also involved an applicant from Bangladesh, my colleague Justice Snider found that the Board had erred in its finding of an IFA because it had asked whether the applicant "would" be persecuted in the IFA area. The case at bar is even more problematic. In *Ghose*, the Board had used both a correct formulation and an incorrect one of the standard of proof. The Court was therefore left with doubt as to whether the correct formulation was used, but nevertheless chose to allow the application for judicial review. Here, there is no such doubt as the Board used only an incorrect formulation of the test.

[34] Even if I had some doubt as to whether the Board used the proper test, I would feel bound to allow the application for judicial review. This is not a case where I could say with some certainty that the same conclusion would be reached whatever test is being used. In view of the fact that the Board also misconstrued the evidence on a crucial aspect of the applicant's claim, I am left with no other choice but to quash the decision of the Board and to order a new hearing before a different panel of the Board.

[35] Neither party proposed a question of general importance for certification, and none is stated.

ORDER

THIS COURT ORDERS that the application for judicial review is allowed and a new hearing is ordered. No question of general importance is certified.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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