Federal Court  Cour fédérale

Date: 20120228

Docket: IMM-2225-11

Citation: 2012 FC 274

Toronto, Ontario, February 28, 2012

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

HAFEEZ OMAR PERSAUD

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant is an adult male citizen of Guyana. He came to Canada when he was twelve years old and unsuccessfully applied for refugee protection. He was ordered to be deported. He then applied for a pre-removal risk assessment (PRRA). That application was determined, without a hearing, and rejected in a decision dated the 26th day of February 2011. This is an application for a judicial review of that decision. For the reasons that follow I am dismissing that application. Neither counsel requested certification of a question and I will not do so.

[2] Briefly, the Applicant arrived in Canada from Guyana when he was twelve years old. Except to attend his grandmother's funeral, he has never returned. In his late teens the Applicant had a stormy relationship with a girlfriend. While arguing in an automobile he struck her with a rear view mirror causing injury to her. At a later time he struck her with a mobile phone. He was convicted of assault. There were subsequent convictions for criminal harassment and uttering threats against the same person.

[3] The Applicant's submissions to the PRRA Officer were essentially that, as a criminal deportee to Guyana, he would suffer harassment and cruel and unusual punishment in the community and in the hands of the Guyanese police. He also asserted that as a person of Indian ethnicity he feared discrimination. Except for a letter from a lawyer representing a relative in Guyana stating that the relative did not want the Applicant to live with her should he return to Guyana because of the possibility of excessive police surveillance, none of the evidence was personal to the Applicant and much of it was eight to ten years old.

[4] The PRRA Officer rejected the application on a number of grounds including the adequacy of state protection. The Officer found that the Applicant had not presented any clear and convincing evidence to rebut the presumption of state protection. Applicant's counsel in his written submissions, which he touched on only briefly in his oral submission before me, said very little about this except to argue that the Officer should have analyzed the Applicant's credibility and the plausibility of his assertions.

[5] Nowhere did the Officer question the Applicant's credibility. Credibility is not mentioned in the decision. Simply because an Applicant requests a hearing anticipating that credibility may be an issue does not mean that a hearing must be held. While it is true that in some cases a PRRA Officer has in reality made credibility findings in the guise of something else and should have held a hearing, that is not the case here. Credibility was not an issue. The PRRA Officer simply, and I find reasonably, found that the Applicant had not rebutted the presumption of state protection. That is the end of the matter.

[6] I will, however, go on to discuss the principal issue raised by the Applicant in his Counsel's Memorandum and by his Counsel at the hearing. The issue was stated as:

> *"Did the Officer err by ignoring probative evidence and thereby rendering an unreasonable decision?"*

[7] This is an issue, stated in one way or another, often raised in a judicial review of this nature. What follows in Counsel's written and oral argument is often a microscopic, detailed, lengthy review of every piece of evidence in the record that may possibly be considered as supportive of Counsel's client's case. The written evidence is often presented in bold type and in Counsel's oral argument presented with great forensic skill so as to emphasise and elevate its importance. The conclusion a Court is urged to reach is that such "important" evidence was overlooked by the Officer or not stated in the reasons thus the decision must be considered "unreasonable". Often reliance is placed on the decision of Evans J (as he then was) in *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425, 157 FTR 35, or quotations from that decision in later cases.

[8] What must be remembered is that the omitted piece of evidence referred to by Evans J in *Cepeda-Gutierrez* was a psychological report specific to the Applicant, it was not some general country condition report or other document non-specific to the Applicant. This is what caused Evans, J to write at paragraphs 14 to 17:

> *[14] It is well established that section 18.1(4)(d) of the Federal Court Act does not authorize the Court to substitute its view of the facts for that of the Board, which has the benefit not only of seeing and hearing the witnesses, but also of the expertise of its members in assessing evidence relating to facts that are within their area of specialized expertise. In addition, and more generally, considerations of the efficient allocation of decision-making resources between administrative agencies and the courts strongly indicate that the role to be played in fact-finding by the Court on an application for judicial review should be merely residual. Thus, in order to attract judicial intervention under section 18.1(4)(d), the applicant must satisfy the Court, not only that the Board made a palpably erroneous finding of material fact, but also that the finding was made "without regard to the evidence": see, for example, Rajapakse v. Canada (Minister of Employment and Immigration), [1993] F.C.J. No. 649 (F.C.T.D.); Sivasamboo v. Canada (Minister of Employment and Immigration), [1995] 1 F.C. 741 (F.C.T.D.).*
>
> *[15] The Court may infer that the administrative agency under review made the erroneous finding of fact "without regard to the evidence" from the agency's failure to mention in its reasons some evidence before it that was relevant to the finding, and pointed to a different conclusion from that reached by the agency. Just as a court will only defer to an agency's interpretation of its constituent statute if it provides reasons for its conclusion, so a court will be reluctant to defer to an agency's factual determinations in the absence of express findings, and an analysis of the evidence that shows how the agency reached its result.*
>
> *[16] On the other hand, the reasons given by administrative agencies are not to be read hypercritically by a court (Medina v. Canada (Minister of Employment and Immigration) (1990), 12 Imm. L.R. (2d) 33 (F.C.A.)), nor are agencies required to refer to every piece of evidence that they received that is contrary to their finding, and to explain how they dealt with it (see, for example, Hassan v. Canada (Minister of Employment and Immigration) (1992), 147 N.R. 317 (F.C.A.). That would be far too onerous a*

> *burden to impose upon administrative decision-makers who may be struggling with a heavy case-load and inadequate resources. A statement by the agency in its reasons for decision that, in making its findings, it considered all the evidence before it, will often suffice to assure the parties, and a reviewing court, that the agency directed itself to the totality of the evidence when making its findings of fact.*
>
> *[17] However, the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence": Bains v. Canada (Minister of Employment and Immigration) (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact.*

[9] This view as to adequacy of reasons is to be contrasted with the opposite approach sometimes taken that the reasons are too long and too zealous. In this regard the views of Hugessen JA (sitting as he then was in the Federal Court of Appeal) are frequently cited. In *Attakora v Canada (Minister of Employment and Immigration)*, [1984] FCJ No 444, 99 NR 168 he said in the second paragraph of his decision, concurred in by the other panellists:

> *At first blush, the Board's decision appears to turn entirely on questions of credibility and therefore to be beyond review by the Court on section 28 proceedings. In particular the Board identified three aspects of the applicant's tale of arrest, beating and escape from his native Ghana which it said "lacked credibility". Upon analysis, however, it appears that in its zeal to find the applicant unbelievable the Board itself has strayed into error.*

And later:

> *I have mentioned the Board's zeal to find instances of contradiction in the applicant's testimony. While the Board's task is a difficult one, it should not be over-vigilant in its microscopic examination of evidence of persons who, like the present applicant, testify through an interpreter and tell tales of horror in whose objective reality there is reason to believe.*

[10] Hugessen JA wrote in the same vein in *Canadian Union of Public Employees (CUPE) v Canadian Broadcasting Corp (CBC)*, [1985] FCJ No 26 in concurring reasons:

> *Before concluding, I shall add one comment. The Board's decision is lengthy, very lengthy. In its French version alone it comprises two hundred and seventy-two pages. It is full of statements and digressions whose relevance and accuracy are doubtful. It leaves itself open, unnecessarily, in my view, to challenges such as those litigated before us. Perhaps the Board feels it has a duty to perform some sort of educational and political function, in the broad sense of these terms, vis-à-vis its clientele. This is entirely to its credit. However, it must not be forgotten that the primary duty of the Board, as of this Court, is to decide precisely and concisely the cases presented to it. I shall quote without further comment the dictum of Chancellor Bacon:*
>
> > *A much talking Judge is like an ill tuned cymbal.*

[11] It is almost a damned if you do and damned if you don't situation for a tribunal writing a decision. These are, however, early cases and more recent cases help clarify the matter.

[12] The issue to the adequacy of reasons and whether detailed evidence must be mentioned in a tribunal's reasons has been more recently reviewed. Evans JA (as he now is) has written that much depends on the significance of the evidence and failure to mention a piece of evidence does not mean that it was overlooked. In *Ozdemir v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 331 he wrote at paragraphs 9 to 11:

> *[9] As for the second point, which was based on the inadequacy of the reasons, if the PCDO was required by the duty*

> *of fairness to give reasons for her decision, her reasons sufficed to discharge that duty. Decision-makers are not bound to explain why they did not accept every item of evidence before them. Much depends on the significance of that evidence when it is considered in light of the other material on which the decision was based: see Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration) (1998), 157 F.T.R. 35.*
>
> *[10] Nor will a reviewing court infer from the failure of reasons for decision specifically to address a particular item of evidence that the decision-maker must have overlooked it, if the evidence in question is of little probative value of the fact for which it was tendered, or if it relates to facts that are of minor significance to the ultimate decision, given the other material supporting the decision.*
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> *[11] In this case, the new evidence was not of sufficient importance or probative value that the duty of fairness required the PCDO to deal with it expressly in her reasons. Further, it would be inappropriate to require PCDOs, as administrative officers, to give as detailed reasons for their decisions as may be expected of an administrative tribunal that renders its decisions after an adjudicative hearing. In our opinion, the reasons given by the PCDO adequately explain the basis of her decision and do not support an inference that she failed to consider all the material before her.*

[13] Most recently the Supreme Court of Canada in *Newfoundland Labrador Nurses Union v Newfoundland Labrador (Treasury Board)*, 2011 SCC 62, in relying on another decision of Evans JA has stressed that reasons must be adequate, not perfect; they do not have to be comprehensive. Abella J for the Court wrote at paragraphs 16 to 18:

> *[16] Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn., [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to*

> *understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the Dunsmuir criteria are met.*
>
> *[17] The fact that there may be an alternative interpretation of the agreement to that provided by the arbitrator does not inevitably lead to the conclusion that the arbitrator's decision should be set aside if the decision itself is in the realm of reasonable outcomes. Reviewing judges should pay "respectful attention" to the decision-maker's reasons, and be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful.*
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> *[18] Evans J.A. in Canada Post Corp. v. Public Service Alliance of Canada, 2010 FCA 56, [2011] 2 F.C.R. 221, explained in reasons upheld by this Court (2011 SCC 57) that Dunsmuir seeks to "avoid an unduly formalistic approach to judicial review" (para. 164). He notes that "perfection is not the standard" and suggests that reviewing courts should ask whether "when read in light of the evidence before it and the nature of its statutory task, the Tribunal's reasons adequately explain the bases of its decision" (para. 163). I found the description by the Respondents in their Factum particularly helpful in explaining the nature of the exercise:*
>
> > When reviewing a decision of an administrative body on the reasonableness standard, the guiding principle is deference. Reasons are not to be reviewed in a vacuum – the result is to be looked at in the context of the evidence, the parties' submissions and the process. Reasons do not have to be perfect. They do not have to be comprehensive. [para. 44]

[14] It must be remembered that the Federal Court in cases such as the one under consideration here is conducting a judicial review, not a re-hearing, not an appeal. The Court is to determine whether natural justice and procedural fairness was observed, whether the decision was correct in law and whether the decision was reasonable within the broad boundaries established by the Supreme Court of Canada in *Dunsmuir v New Brunswick* [2008] 1 SCR 190. That decision was referred to in the *Newfoundland* case, *supra*, at paragraph 15:

> *[15] In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (Dunsmuir, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.*

[15] Thus, as a Court of judicial review, this Court may look at the record before the tribunal to determine whether important evidence having a specific bearing on the individual in question, was clearly overlooked. The Court should not engage in a detailed review of any piece of evidence, and any passage of a document in evidence, having no direct or specific reference to the individual in question. In the absence of clear evidence to the contrary, the tribunal is presumed to have considered all of the evidence and weighed it appropriately.

[16] In the present case I find no reviewable error has been committed by the PRRA Officer in respect of an assessment of the relevant evidence.

JUDGMENT

FOR THE REASONS PROVIDED:

THIS COURT'S JUDGMENT is that:

1. The application is dismissed;

2. No question is certified; and

3. No Order as to costs.

"Roger T. Hughes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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