

**Date: 20080307**

**Docket: IMM-3291-07**

**Citation: 2008 FC 318**

**Ottawa, Ontario, March 7, 2008**

**PRESENT: The Honourable Maurice E. Lagacé**

**BETWEEN:**

**PRITHIPAL SINGH GORAYA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] The applicant, Mr. Prithipal Singh Goraya, seeks review, under s. 72(1) of the *Immigration and Refugee Protection Act*, of a decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Protection Board (IRPB) dated July 18, 2007, determining that he is neither a Convention refugee nor a person in need of protection. Leave to seek judicial review in this matter was granted by Order dated November 22, 2007.

## **Facts**

[2] The applicant, an unmarried 22 year-old Indian national, lived successively in Delhi, Mumbai, and the Punjab prior to coming to Canada. He entered the country at Vancouver on August 8, 2005, on a work visa issued in New Delhi which expired on November 30, 2005, and filed a claim for refugee protection in Montreal on September 1, 2005.

[3] In his Personal Information Form (PIF), the applicant claims that his father is a politically active member of the Punjab-based Sikh party Akali in India, and the founder of a religious organization called Rohani Dewan Management. Among other things this organization provides spiritual and material support to Sikh youth. His father is also a businessman who used to run a transportation company with offices in Mumbai and Punjab. His father's political activities would have made him apparently a target of the Indian police and of certain political parties, who accuse him of conspiring with Sikh militants.

[4] Additionally, the applicant claims that his first cousin Narinder Singh was also the subject of police harassment and even torture, such that the applicant's father felt compelled to assist him to flee the country in August of 2003.

[5] The applicant alleges that a month later, his family home in Mumbai was raided and that he was arrested together with his father and a cousin named Kulprit Singh to be taken into custody and tortured. The applicant's teeth were broken. The police wanted information on Narinder Singh's whereabouts, and the activities of Sikh militants. Released after 5 days in custody, they subsequently sustained continual harassment.

[6] In April of 2005, the applicant was traveling from Punjab to Mumbai in a company truck, with his cousin Kulprit Singh and a Muslim driver, when they were stopped at a police checkpoint, isolated and placed in custody, and their truck searched. The police alleged that they had recovered weapons and a bag of explosives from the truck. The applicant was interrogated and accused of ferrying weapons to Mumbai militants and plotting the assassination of a nationalist Hindu politician. After three days in custody during which time he was tortured, the applicant's release was secured on payment of a bribe. However, Kulprit Singh was released to Punjabi authorities and has not been seen since his arrest.

[7] After his release, the applicant and his father complained to a local human rights group about the disappearance of Kulprit Singh. This was in early May of 2005. They were instructed to collect evidence and documents. However, in the interim their house was once again raided. The applicant was not at home, but the police would have told his mother that they knew his intentions to file a complaint with respect to Kulprit Singh's disappearance, and that he would "*not be spared.*"

[8] The applicant and his father subsequently decided to flee India; but the father obtained a visa only for his son and was unable to obtain one for him. Finally, the applicant left India on August 8, 2005 and arrived in Canada the same day. His father continued to be harassed. At the hearing of January 25, 2007, the applicant testified that the police had come to his family home several times inquiring as to his whereabouts as they suspected that he had joined a militant group.

[9] The applicant submitted *inter alia* the following corroborative evidence of his story:

- A letter dated 11.8.2006 and signed Tanajirao Kadam – Social Worker, under the letterhead “International Human Rights and Rehabilitation Organization”, confirming that the applicant approached the Mumbai office of the above-mentioned organization on May 2, 2005 stating that he had been accused of collaborating with militants and illegally detained;
- A letter dated August 8, 2006, from Dr. Dalbir Singh confirming that the applicant was treated for dental pain and swelling between September 27 and October 2, 2003;
- A letter from Dr. Girish K. Kulkarni dated August 5, 2006, confirming that the applicant was treated for bruises and contusions from September 23 to October 2, 2003, and from April 24 to May 4, 2005.

[10] The Board’s record contains CAIPS notes from the Canada Border Services Agency which disclose that the applicant was intercepted by the RCMP shortly after his arrival in Canada, in a truck presumably en route from Vancouver to Montreal, in the company of one Amarjit Chahal. According to these notes, the applicant and Chahal were both on that occasion suspected by the RCMP of being deserters from a commercial vessel and Chahal had a terrorism alert in the U.S.

[11] This incident is not material to the refugee claim in any obvious way, and was not even discussed nor considered in the RPD’s decision. Nevertheless, the applicant raises now this information as one of his arguments for review, as discussed below.

## **DECISION OF THE RPD**

[12] The RPD rejected the applicant's claim on the basis that the claimant's testimony was not credible. The RPD noted the following in this respect:

- The claimant initially indicated that the police came to arrest him on May 4, 2005, whereas in his oral testimony he refers to the date of May 2, 2005;
- His testimony as to how the police came to know his intention to file a human rights complaint was speculative;
- It is implausible that the police would take the trouble to seek him out at home, and then leave after having only managed to speak with his mother, without making more efforts to locate him;
- If he saw his doctor on May 3, 2005, as he claims he did, then there is no reason he would not have sought documentary records of this visit at that time in contemplation of his human rights complaint;
- The applicant neglected to amend his PIF in consequence, after learning in Canada, that the police were still questioning his mother and brother as to his whereabouts;
- The RPD questions why the police has not inquired at his home since February of 2006; if they are still interested in his whereabouts;

- The information related by the claimant with respect to his father, i.e. his unawareness of his father's current whereabouts and the fact that his father sometimes goes by the name of his native village of "Thikriwal" rather than the name of "Goraya" is not plausible. Also the applicant did not provide convincing documentation of his father's political involvement in the Akali party;
- The omission of details in the applicants' PIF with regard to how he was tortured during his 2003 detention diminishes his credibility.

[13] The RPD also states in its decision that its conclusions on credibility obviate the need to conduct a separate analysis of the claim under s. 97 of *IRPA*.

### **Legislation**

[14] Section 95 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("*IRPA*") confers refugee status on individuals who are Convention refugees, while section 96 of *IRPA* defines what constitutes a Convention refugee and section 97 defines what person is in need of protection. The text of these sections reads as follows:

95. (1) Refugee protection is conferred on a person when

(a) the person has been determined to be a Convention refugee or a person in similar circumstances under a visa application and becomes a permanent resident under the visa or a temporary resident under a temporary resident permit for protection reasons;

95. (1) L'asile est la protection conférée à toute personne dès lors que, selon le cas :

a) sur constat qu'elle est, à la suite d'une demande de visa, un réfugié ou une personne en situation semblable, elle devient soit un résident permanent au titre du visa, soit un résident temporaire au titre d'un permis de séjour délivré en vue de sa protection;

(b) the Board determines the person to be a Convention refugee or a person in need of protection; or

(c) except in the case of a person described in subsection 112(3), the Minister allows an application for protection.

(2) A protected person is a person on whom refugee protection is conferred under subsection (1), and whose claim or application has not subsequently been deemed to be rejected under subsection 108(3), 109(3) or 114(4).

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) la Commission lui reconnaît la qualité de réfugié ou celle de personne à protéger;

c) le ministre accorde la demande de protection, sauf si la personne est visée au paragraphe 112(3).

(2) Est appelée personne protégée la personne à qui l'asile est conféré et dont la demande n'est pas ensuite réputée rejetée au titre des paragraphes 108(3), 109(3) ou 114(4).

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans

le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

## ISSUES

[15] The main issue raised in this application is whether the RPD's negative credibility conclusion constitutes a reviewable error. The applicant contends that the RPD actually misstates in its decision, his oral testimony so as to conclude it is not credible. He also points out that the RPD omitted to explain why it granted no probative value to the letter entered in evidence from the Human Rights group to which the applicant complained, and which would appear to corroborate his story.

[16] The applicant also contends that it appears from the information contained in the CAIPS notes filed in the tribunal record, that the applicant is a deserter. Therefore and with this information on record it was incumbent upon the RPD to proceed to a separate analysis under s. 97 of *IRPA*.



[17] Finally, the applicant states that his right to procedural fairness was compromised at his hearing insofar as he was repeatedly interrupted by the Refugee Protection Officer (RPO), and in such manner that his testimony was affected. In addition, notes taken by an immigration officer on September 30, 2005, and upon which the RPO was relying, were not translated for his benefit despite his counsel's request to that effect.

[18] The respondent contests the applicant's submission that his testimony was misstated, and insists that the RPD's conclusions are well-founded and based on the evidence submitted. The respondent also submits that on factual questions, the Court must show deference to the RPD to the point of patent unreasonableness.

[19] In its supplementary memorandum, the respondent also contends that the applicant's arguments on procedural fairness are without merit since the alleged "interruptions" should have been objected to at the time of the hearing by the applicant or his counsel, and not after. And with respect to the oral translation of the officer's notes, the hearing transcript does not disclose whether such translation was in fact made, and moreover, it was in no way incumbent upon the RPD to provide a Punjabi translation.

## **STANDARD OF REVIEW**

[20] It is well established that the RPD's conclusions on the credibility of claimants' testimony are factual in nature and should attract the Court's deference to the point of patent unreasonableness. (*Aguebor v. Canada (Minister of Employment and Immigration)*, (F.C.A.), [1993] F.C.J. No. 732, at

para. 4; *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100, at para. 38).

[21] This being said, nevertheless a failure by the RPD to consider important evidence properly can constitute a violation of procedural fairness. And a defect in procedural fairness is reviewable as a question of law independently of the pragmatic and functional approach (*Sketchley v. Canada (Attorney General)*, [2005] F.C.J. No. 2056).

[22] A failure to provide reasons allowing the Court to follow and appreciate the RPD's logic can also be grounds for review as a question of procedural fairness (*Via Rail Canada Inc. v. National Transportation Agency*, [2000] F.C.J. No. 1685).

## **ANALYSIS**

[23] The Court has some reserve on the undue weight placed by the RPD in its findings with respect to ostensible and questionable inconsistencies in the applicant's testimony.

[24] The Court questions particularly the RPD's focus on apparent implausibility in the sequence of events narrated by the applicant, and concerning the timing of his complaint to the "*International Human Rights and Rehabilitation Organization*", the subsequent raid on his family home, and his efforts to assemble evidence in support of his complaint.

[25] Nevertheless and this being said, considering the applicable standard of review, so long as the RPD's factual conclusions are not clearly irrational, it is not for the Court to reweigh the

evidence. And as stated by the Supreme Court of Canada in *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, at para. 52, the patently unreasonable decision is one that is “*evidently not in accordance with reason*”. This is certainly not the case here.

[26] More problematic however, remains the RPD’s apparent disregard in its reasons for any of the corroborative evidence adduced by the applicant, namely a letter from Dr. Dalbir Singh confirming that the applicant sought medical treatment for facial injuries consistent with torture, and a letter from the “*International Human Rights and Rehabilitation Organization*” confirming that the applicant sought their assistance and intervention.

[27] It may very well be that the RPD had its doubts as to the authenticity of these documents or the veracity of the information therein contained; but if this is so, it is nowhere stated in clear terms. It is thus impossible for the Court to know what probative value was assigned to this corroborative evidence, or to follow the RPD’s reasoning process with respect to these documents. The claimant’s credibility is an important issue here. Why ignore or not comment on important elements of the corroborative evidence adduced by the claimant? Has it been considered, accepted, rejected? No way for this Court to know.

[28] The presumption that the RPD has considered all of the evidence before it is not so strong as to overcome an omission to comment on evidence which on its face strongly supports a conclusion different than the one actually reached (*Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35 (T.D.)). The Court finds that this is the case here. The RPD’s

reasons are insufficient to meet the procedural fairness requirements enunciated in *Via Rail* cited above.

[29] Similarly, because the RPD does not in its reasons make it clear which, if any, elements of the applicant's testimony it considers to be credible, it is impossible to assess the propriety of its decision not to analyze the claim under s. 97 of *IRPA*. It is well established by the case law that a negative credibility determination under s. 96 of *IRPA* is not necessarily dispositive of considerations arising under s. 97: *Ozdemir v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 1242; *Kandiah v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 275; *Bouaouni v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1540. In other words, a claimant may not be entirely credible in his or her testimony, yet still face a risk to his or her life or a risk of torture, having regard to country conditions and other objective criteria.

[30] In the present case, the RPD appears to have accepted that the claimant is who he says he is, i.e., an observant Indian Sikh having a connection to both Mumbai and the Punjab. This being the case, it was incumbent on the RPD to consider whether he might be subject to any of the risks enumerated under s. 97 of *IRPA*, having regard to documentation submitted by the applicant on police repression of Sikhs in the Punjab, as well as the RPD's own country of origin documentation.

[31] The applicant has also submitted that the information contained in the CAIPS notes on file, and related to his arrest by the RCMP, should have been taken into account by the RPD under a section 97 analysis. But the applicant's position in this regard seems to be premised on the mistaken

impression that these CAIPS notes suggest that the applicant is a military deserter. However, on a close reading they do not. These notes only explain the circumstances of the applicant's arrest. They certainly do not form part of his original request for refugee protection. The applicant was well aware of the circumstances of his arrest and chose not to refer to those circumstances in his request for protection. As a result, the RPD did not have to consider these notes in its analysis.

[32] On the overall and for these reasons the Court concludes that the omissions of the RPD are sufficiently important to justify an intervention and for the judicial review to be granted.

[33] No question was submitted for certification.

**JUDGMENT**

**THIS COURT ORDERS** that the present application is granted. The decision of the Board is set aside and the matter referred back for redetermination by a different member of the Board.

“Maurice E. Lagacé”

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Deputy Judge

**FEDERAL COURT**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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**STYLE OF CAUSE:** PRITHIPAL SINGH GORAYA v. THE MINISTER  
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