Federal Court  Cour fédérale

Date: 20090916

Docket: IMM-667-09

Citation: 2009 FC 911

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, September 16, 2009

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

NAVJOT SINGH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act), of a decision dated January 12, 2009, by the Refugee Protection Division of the Immigration and Refugee Board (panel), that the applicant is not a refugee or a person in need of protection.

[2] For the following reasons, the application for judicial review will be dismissed.

Issue

[3] The only issue is whether the panel erred in finding that the applicant was not credible.

Factual background

[4] The applicant, Navjot Singh, is a citizen of India and is of the Sikh religion. He is a farmer and a resident of the village of Agit Nagar in the province of Punjab. He alleges that he was arrested by the police on December 31, 2005, while visiting his friend Baljinder Singh in the city of Batala, also in Punjab. His friend Baljinder and Baljinder's cousin, whom the applicant knows only by the nickname "Vikki", were also arrested. The police were particularly targeting the friend's cousin, who was wanted by the police in the province of Jammu and Kashmir, where he lived. Vikki was hiding at the home of his cousin, Baljinder, in Batala to escape the police in the province of Jammu and Kashmir.

[5] The applicant was transferred to the police assigned to his community, in the city of Beas, and was tortured and questioned about his activities with militants. Photos of the applicant and his friend Baljinder Singh in weapons training while they were army cadets were found by the police during a search of the applicant's home, which reinforced their suspicion that the applicant was assisting militants.

[6] The applicant and Baljinder were released after a few days and the police handed Baljinder's cousin over to the Jammu and Kashmir authorities. This cousin was never found and his

mother asked the applicant and Baljinder to testify against the police in a complaint she wanted to file. In the end, she did not file the complaint because the applicant did not want to testify and Baljinder had run away from home.

[7] The applicant was arrested a second time on October 10, 2006, after he met a human rights organization to file a complaint against the police officers who were harassing him. The applicant claims that he was tortured and questioned about his ties with militants. He was released after being held for two days, under the conditions that he report to the police station each month, that he not file a complaint against the police officers and that he bring them information about Baljinder Singh and the militants.

[8] The applicant instead went to an aunt's house in the city of Chandigarh before leaving India on January 12, 2007, for Malaysia with the help of a smuggler, who obtained a visa for him. The applicant alleges that his smuggler held him nearly prisoner in Malaysia for approximately five months before he was sent to Canada with a false passport on June 13, 2007, where he sought protection on July 19, 2007.

[9] The applicant claims that he is still wanted by the police in India, that they are accusing him of having joined the militants and that he fears being killed by the police or being falsely accused of a crime of some sort.

Impugned decision

[10] The panel rejected the applicant's claim, stating that his account was fabricated and not credible. The panel's decision is based on its finding that the applicant's testimony lacked credibility.

Standard of review

[11] In questions of credibility and assessment of evidence, it is well established under paragraph 18.1(4)(*d*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, that the Court will intervene only if the panel based its decision on an erroneous finding of fact made in a perverse or capricious manner or if it made its decision without regard for the material before it (*Aguebor v. Canada (Minister of Employment and Immigration)*, (1993), 160 N.R. 315 (F.C.A.), 42 A.C.W.S. (3d) 886).

[12] Assessing credibility and weighing the evidence fall within the jurisdiction of the administrative tribunal called upon to assess the allegation of a subjective fear by a refugee claimant (*Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, (1998), 157 F.T.R. 35 (F.C.T.D.), 83 A.C.W.S. (3d) 264 at paragraph 14). Before *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the standard of review that was applicable in comparable circumstances was patent unreasonableness. Since that decision, the standard has been reasonableness.

Analysis

[13] It is the panel's responsibility to assess the testimonial and documentary evidence before it, and the weight to assign to this evidence is entirely within the purview of the panel, which has sole

jurisdiction over the facts (*Khangura v. Canada (Minister of Citizenship and Immigration)*, (2000), 191 F.T.R. 311, 97 A.C.W.S. (3d) 1228; *Hoang v. Canada (Minister of Employment and Immigration)*, (1990), 120 N.R. 193, 24 A.C.W.S. (3d) 1140 (F.C.A.); *Tawfik v. Canada (Minister of Employment and Immigration)*, (1993), 137 F.T.R. 43, 26 Imm. L.R. (2d) 148 (F.C.T.D.)).

[14] In so doing, the panel may use its expertise to analyze all of the evidence and choose that which applies according to the circumstances (*Ganiyu-Giwa v. Canada (Minister of Citizenship and Immigration)*, (1995), A.C.W.S. (3d) 960, [1995] F.C.J. No. 506 (QL) (F.C.T.D.)). Finally, it is accepted that the panel does not need to mention in its decision all of the pieces of evidence before it (*Canada (Minister of Employment and Immigration) v. Hundal*, (1994), 167 N.R. 75, 47 A.C.W.S. (3d) 372 (F.C.A.); *Randhawa v. Canada (Minister of Citizenship and Immigration)*, (1999), 88 A.C.W.S. (3d) 184, [1999] F.C.J. No. 606 (QL) (F.C.T.D.); *Tutu v. Canada (Minister of Employment and Immigration)*, (1993), 74 F.T.R. 44, 46 A.C.W.S. (3d) 929 (F.C.T.D.); *Ccanto v. Canada (Minister of Citizenship and Immigration)*, (1994), 73 F.T.R. 144, 46 A.C.W.S. (3d) 309).

[15] The applicant claims that the panel lacked diligence when reviewing the medical documents and maintains that it was unable to assign any probative value to the medical documents on the sole basis of its negative assessment of the applicant's credibility because these documents, the authenticity of which has not been challenged, exist independently and corroborate the applicant's account (*Khaira v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1071, 260 F.T.R. 15 at paragraph 21).

[16] In *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, (1998), 157 F.T.R. 35 (F.C.T.D.), 83 A.C.W.S. (3d) 264, and restated in *Gill v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 656, 129 A.C.W.S. (3d) 783, this Court noted that the obligation to comment on documentary evidence in a decision depends on the importance of that evidence. In this case, the applicant alleges that the ignored documentary evidence concerned facts that are central to his claim, which renders the panel's decision unreasonable.

[17] In the case at bar, the medical document by Dr. Naveen Khaneja, Exhibit P-7, specifically mentions the following: "Patient alleged above said medical problems due to the beating in police custody". Although the medical reports note that the applicant had physical injuries, the medical evidence does not demonstrate that these injuries were actually the result of the alleged events. It is the applicant, not the doctors, who is claiming that his injuries are the result of police acts.

[18] This Court has confirmed repeatedly that the panel may make a negative finding based on the fact that a refugee claimant has produced no probative evidence to support his or her testimony if the panel has credibility concerns (*Sinnathamby v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 473, 105 A.C.W.S. (3d) 725; *Muthiyansa v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 17, 103 A.C.W.S. (3d) 809).

[19] In this case, the applicant was not able to give the complete name of his friend Baljinder's cousin Vikki, who is the source of all of his problems, even after speaking with his mother. The applicant was not able to explain why he was asked to testify for Vikki's mother when the police

admitted to detaining Vikki and handing him over to the Jammu and Kashmir authorities. Furthermore, it seems implausible that the police would have released the applicant if they suspected that he was involved with militants given that the law stipulates that he may be detained without eligibility for parole. Finally, the applicant submitted no probative evidence of his mother's harassment by the police in India.

[20] As noted during the hearing, there was a clerical error when the panel referred to Exhibit P-5, a blood donation certificate from the Indian Red Cross Society dated 06-10-97. However, it is clear from footnote 3 of its reasons that the panel was referring to the affidavit in Exhibit P-6 because the exhibit description corresponds to the content referred to by the panel. The panel therefore considered and commented on the affidavit dated November 6, 2008 (Exhibit P-6), as well as the reasons why it did not attach any probative value to this exhibit.

[21] At the hearing, the applicant also argued that there is no transcript of the hearing before the panel and that this therefore constitutes a breach of fairness. I disagree with this argument. In *Singh v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 363, 135 A.C.W.S. (3d) 903 at paragraph 3, Justice Martineau of this Court noted the following with respect to the absence of a transcript:

> On the one hand, it has been repeatedly established that the failure to record proceedings, except when it is provided by law, does not give rise to recourse for violation of the rules of natural justice (*Canadian Union of Public Employees, Local 301 v. Montréal (City)*, [1997] 1 S.C.R. 793 at paragraphs 79-87 (S.C.C.)). On the other hand, the absence of a transcript, while it is not fatal, can hinder the Court sitting in review from verifying, *inter alia*, whether the panel's general finding of lack of credibility is supported by the evidence in

> the record and whether this finding is reasonable. In this case, there is no requirement in the Act pertaining to the recording of the remarks made at the hearing. The Court must therefore determine whether the record provided allows it to properly dispose of this application for review (*Ahmed v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 739 (F.C.T.D.) (QL), (2000) 182 F.T.R. 312; and *Hatami v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 402 (F.C.T.D.) (QL)).

[22] After reviewing the panel's record as a whole, the applicant's detailed affidavit and the documentary evidence he submitted to the panel, I am of the opinion that, despite the absence of a transcript, the record before the Court allows me to properly dispose of the application for judicial review.

[23] It is settled law that the panel is in the best position to assess explanations provided by applicants on apparent contradictions and implausibilities. It is not for the Court to substitute its judgment for the findings of fact made by the panel regarding the credibility of applicants (*Singh v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 181, 146 A.C.W.S. (3d) 325 at paragraph 36; *Mavi v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 1 (F.C.T.D.) (QL)). Likewise, insofar as the panel's findings are not unreasonable, the Court should not intervene to set aside the decision (*Aguebor*, above; *Wen v. Canada (Minister of Employment and Immigration)*, (1994), 48 A.C.W.S. (3d) 1000, [1994] F.C.J. No. 907 (QL) (F.C.A.); *Kumar v. Canada (Minister of Employment and Immigration)*, (1993), 39 A.C.W.S. (3d) 1027, [1993] F.C.J. No. 219 (QL) (F.C.A.)).

[24] Overall, I am of the opinion that the applicant, in this case, did not demonstrate that the panel rendered a decision based on erroneous findings of fact made in a perverse or capricious manner or without regard for the material before it.

[25] For these reasons, the application for judicial review is dismissed. The parties did not propose any question for certification and this application does not give rise to any.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review be dismissed. No question is certified.

"Richard Boivin"
Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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