Federal Court  Cour fédérale

Date: 20100122

Docket: IMM-2688-09

Citation: 2010 FC 58

Ottawa, Ontario, this 22nd day of January 2010

Before: The Honourable Mr. Justice Pinard

BETWEEN:

Sukhwinder SINGH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision of Mélanie Raymond, a member of the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated April 29, 2009 wherein she determined that the applicant was neither a "Convention refugee" nor a "person in need of protection" pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

* * * * * * * *

[2] Mr. Sukhwinder Singh, the applicant, was born in Ismilepur, in the state of Punjab in India. He is a Sikh of Indian nationality. His brother and uncle were members of the Akali Dal, a political party, since 1993. On June 6, 1994 the applicant's brother gave a speech condemning the government and other political parties. He spoke openly about police dictatorship. The police responded to this criticism by searching the applicant's house, where he lived with his brother. He and his brother were arrested June 6, 1994 and held separately for two days. Their release was arranged with a payment of a bribe. Sometime after his first arrest the applicant became an active member of the Akali Dal party.

[3] The second arrest was on March 20, 1997 when he, his uncle and his brother were arrested and detained for three days. They were stopped at a police roadblock during their return from attending a religious ceremony in remembrance of a high profile member of the Sikh community. All three were released because a bribe was paid. The applicant was arrested a third time on June 6, 1999; he was detained for questioning regarding his brother's connection to militants. During that time his brother had also been detained by the police. When the applicant was released he was told that his brother had run away from custody and his whereabouts were unknown.

[4] The applicant and his uncle sought the advice of a lawyer in Jalandhar in regard to the brother's disappearance and the police conduct. The applicant's statements were taken by the lawyer and the applicant was to appear as a witness in the court proceedings. However, the complaint came to the attention of the police in his village. The police surrounded the applicant's

house on February 18, 2000 and arrested the applicant and his uncle. They were kept until March 5, 2000 and again, as in all previous arrests the applicant's release was secured through payment of a bribe.

[5] The condition imposed on the applicant's fourth release from detention was that he would leave the country. The applicant went into hiding at his uncle's house in another village but the police were able to force his wife to reveal his location. The applicant went to New Delhi in the hope of meeting with an agent who could arrange his trip to the United States.

[6] With the help of an agent, the applicant left India in September 2001; he arrived in Vancouver and quickly travelled to the United States (the U.S.) to seek asylum. He remained in the U.S. until March 2007. He was denied asylum in that country but appealed that decision. Before he received the decision on the appeal he returned to India to visit his sick mother.

[7] While visiting his mother he was again arrested by the local police. The police were allegedly now targeting the applicant's cousin, claiming he had links to terrorism. The police interrogated the applicant because his cousin had come to visit him while he was in the village. He was released after what appears to be a few months on the payment of a bribe and fled to New Delhi. He did not return to the United States but claimed refugee status in Canada on June 21, 2007.

[8] The applicant alleges that he was tortured during each period of detention.

* * * * * * * *

[9] The Board made a negative finding against the applicant's credibility and found that he did not successfully demonstrate, on a balance of probabilities, that he would be personally exposed to torture or to cruel and unusual punishment. In the alternative, the Board found that there was a possible Internal Flight Alternative ("IFA") in Mumbai.

[10] This matter raises the two following issues:

1. Is the decision unreasonable because the Board member misapprehended or ignored the evidence before it?
2. Did the Board improperly assess the evidence of an IFA for the applicant?

* * * * * * * *

[11] The standard of review for both issues is reasonableness (*Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190; *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339). More specifically, when this Court is called to review a decision by an administrative tribunal bearing on the issue of an IFA, the appropriate standard of review is reasonableness as it is a matter of applying recognized legal principles to a set of facts, which is a question of mixed fact and law.

[12] Dealing first with the issue of a viable IFA, I note that the Board sets the test for an IFA as follows:

> [14] L'analyse de la possibilité de refuge intérieur doit se faire en deux temps. Le tribunal doit déterminer s'il existe une autre partie du pays où le demandeur ne serait pas exposé à de la persécution ou à un risque à sa vie. Le demandeur a le fardeau de démontrer qu'il ne pouvait bénéficier d'aucune possibilité de refuge intérieur dans une

> autre partie de son pays. Le tribunal doit aussi se demander s'il serait objectivement déraisonnable de s'attendre à ce que le demandeur déménage dans une autre partie de son pays avant de demander l'asile à l'étranger. Lorsqu'il s'agit de déterminer ce qui est déraisonnable, la barre doit être placée très haute et il faut une preuve réelle et concrète de l'existence de conditions qui mettraient en péril la vie et la sécurité du demandeur tentant de se relocaliser en lieu sûr.

[13] The Board specifically suggested to the applicant that he would be able to seek refuge in a large urban centre like Mumbai during the testimony. The applicant was put on notice that IFA was a concern for the Board. I note that the Board may have muddled its articulation of the burden of proof which is placed on the applicant later in its reasons:

> . . . À la lumière des informations citées précédemment, le tribunal conclut que le demandeur n'a pas établi qu'il ne peut bénéficier d'une possibilité de refuge intérieur au sein de son pays, en s'établissant par exemple à Mumbai. . . .

[14] The applicant need not prove that he or she is at risk everywhere in the country but rather only refute the particular IAFs if identified by the Board. In *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 589, Justice Linden stated at pages 595 and 596:

> On the one hand, in order to prove a claim to Convention refugee status, as I have indicated above, claimants must prove on a balance of probabilities that there is a serious possibility that they will be subject to persecution in their country. If the possibility of an IFA is raised, the claimant must demonstrate on a balance of probabilities that there is a serious possibility of persecution in the area alleged to constitute an IFA. I recognize that, in some cases the claimant may not have any personal knowledge of other areas of the country, but, in all likelihood, there is documentary evidence available and, in addition, the Minister will normally offer some evidence supporting the IFA if the issue is raised at the hearing.
>
> On the other hand, there is an onus on the Minister and the Board to warn the claimant if an IFA is going to be raised. A refugee

> claimant enjoys the benefit of the principles of natural justice in hearings before the Refugee Division. A basic and well-established component of the right to be heard includes notice of the case to be met (see, for example, *Kane v. Board of Governors (University of British Columbia)*, [1980] 1 S.C.R. 1105, at page 1114). The purpose of this notice is, in turn, to allow a person to prepare an adequate response to that case. This right to notice of the case against the claimant is acutely important where the claimant may be called upon to provide evidence to show that no valid IFA exists in response to an allegation by the Minister. Therefore, neither the Minister nor the Refugee Division may spring the allegation of an IFA upon a complainant without notice that an IFA will be in issue at the hearing. As was explained by Mr. Justice Mahoney in *Rasaratnam*, *supra*, at pages 710-711:
>
> > [A] claimant is not to be expected to raise the question of an IFA nor is an allegation that none exists simply to be inferred from the claim itself. The question must be expressly raised at the hearing by the refugee hearing officer or the Board and the claimant afforded the opportunity to address it with evidence and argument.
>
> These two very different obligations, therefore, should be carefully distinguished.

[15] Of course, the Board could have made a general finding of the availability of state protection for the applicant. The effect of either is to render the fear not well-founded. It is clear that the Board only considered Mumbai, a populated centre reasonably removed from the Punjab, as the possible IFA and thus, I cannot discern a reviewable error in regard to the application of the test.

[16] The applicant submits that there was significant evidence provided to the Board demonstrating the lack of reasonable IFA for Sikhs from the Punjab in Mumbai but does not state what evidence was ignored or misapprehended. The applicant’s testimony is that he is traceable by the Punjab police anywhere in India as he will have to register himself with the local police when he

finds a place to live. This information will bring him to the attention of the Punjab police and he will be tortured as he was before. However, the evidence of the National Documentation Packages is that Sikhs who relocate from the Punjab do not have to register themselves with the police when they relocate unless there is an outstanding warrant for their arrest. The National Documentation Packages also state that the likelihood of prosecution of Sikhs outside of the Punjab is dependent on the profile of the person rather than their faith.

[17] Furthermore, it appears clearly from the testimony of the applicant himself that his alleged problems were with the local police, and that there is no warrant, formal charge or criminal record against him. There is no evidence that would indicate that the applicant is or was considered a high profile individual who would be tracked down no matter where he lives.

[18] In the circumstances, as there was undisputed evidence in support of the Board's finding of the existence of an IFA, it is not incumbent upon this Court to substitute its own appreciation of the facts to that made by the Board, and the intervention of the Court is not warranted (see, for example, *Singh v. The Minister of Citizenship and Immigration*, 2009 FC 644).

[19] The Board's conclusion of the existence of an IFA is dispositive of the claim. As I affirm this conclusion is reasonable, the existence of an IFA is similarly dispositive of the application for judicial review. Thus, it will not be necessary to deal with the other issue raised in this matter.

* * * * * * * *

[20] For all the above reasons, the application for judicial review is dismissed.

[21] The applicant proposed the following question for certification:

> Is it correct in law to find that there is an Internal Flight Alternative when a victim of persecution, in this case a victim of torture, is fleeing from the police or other state agents? Is there not a legal presumption that no Internal Flight Alternative exists when the persecution emanates from the state or from agents of the state?

[22] I agree with the respondent that the question ought not be certified as it is related to an issue which is already settled by the Federal Court of Appeal and this Court (see *Thirunavukkarasu*, *supra*; *Barrionuevo v. Minister of Citizenship and Immigration*, 2006 FC 1519; and *Ranganathan v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 164 (C.A.)). In addition, it is a purely factual issue within the expertise of the Refugee Protection Division.

[23] Consequently, the question proposed for certification does not meet the criteria enunciated by the Federal Court of Appeal in *Canada (M.C.I.) v. Liyanagamage* (1994), 176 N.R. 4 and, therefore, is not certified.

JUDGMENT

The application for judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board dated April 29, 2009 is dismissed.

"Yvon Pinard"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-2688-09
STYLE OF CAUSE:	Sukhwinder SINGH v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	January 12, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	Pinard J.
DATED:	January 22, 2010

APPEARANCES:

Me Stewart Istvanffy	FOR THE APPLICANT
Me Lisa Maziade	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Étude légale Stewart Istvanffy Montréal, Quebec	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT