

Federal Court



Cour fédérale

Date: 20100217

Docket: IMM-1311-09

Citation: 2010 FC 161

Toronto, Ontario, February 17, 2010

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

DHARMINDER KUMAR

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by the Refugee Protection Division of the Immigration and Refugee Board that the applicant was neither a Convention refugee nor a person in need of protection within the meaning of the *Immigration and Refugee Protection Act*, R.S.C. 2001, c. 27.

[2] The case is unusual in that the Board Member who presided over the hearing did not make the decision. The decision under review was made, on consent, by another Board Member on the basis of the transcript and documentary evidence. The determinative issues were credibility, plausibility, and the availability of an internal flight alternative (IFA).

[3] For the reasons that follow, this application for judicial review is granted.

BACKGROUND

[4] Mr. Kumar is a citizen of India and a member of the Sikh faith. He was a farmer in Punjab state. He alleges that on the night of January 15, 2005, five members of the separatist party, Akali Dali, entered his house and forcibly demanded a meal. Mr. Kumar complied.

[5] He says that the next day, a number of Punjab police officers came to his house, assaulted him, detained him, and took him to the police station. He was interrogated about his involvement with the separatists and he says that he was tortured. His father was able to obtain his release three days later after paying a bribe.

[6] On April 13, 2005, after exiting a Sikh temple in a nearby village, Mr. Kumar was again detained by the police and questioned about his involvement with separatists. He says that he was again assaulted and tortured, this time over a period of seven days. After his father again obtained his release, Mr. Kumar fled to New Delhi, approximately an 8-9 hour drive from his village. He states that his father joined him there after 2-3 days.

[7] Mr. Kumar alleges that the Punjab police followed him to New Delhi and that they came looking for him with New Delhi police at his sister's house where he was staying. Mr. Kumar states that he was out at the market with his sister when they arrived, and that his father, who was at the house, lied about his whereabouts. Mr. Kumar states that his father was beaten and that the police threatened to kill Mr. Kumar if they found him.

[8] Through the assistance of an agent, Mr. Kumar obtained a false Canadian passport and departed India on June 7, 2005. On June 15, 2005 he claimed refugee status. His expressed fear was that the Punjab police would continue to assume he supported the separatists and that he would be persecuted on the basis of this imputed political opinion.

[9] On February 12, 2009, almost two years after his hearing, the Board, differently constituted, rendered a negative decision. The Board drew a negative credibility inference based on an apparent inconsistency between the applicant's PIF and his testimony. The applicant in his Personal Information Form (PIF) stated: "While I was in my sister's place, Punjabi police came at my place. My father lied and said 'Dharminder Kumar is not living here'" [emphasis added]. The Board reasoned that the use of the word "my" suggested that the police came to the applicant's house in Punjab state, and not to his sister's house in New Delhi. The Board disbelieved the applicant's explanation that his father had joined them in New Delhi. The Board also found it suspect that the applicant would be out at the market with his sister when he was apparently in hiding. The Board determined "that the claimant was not telling the truth about the police visit, and that the claimant's

father did not join him in New Delhi, and that the police did not come to the claimant's sister's house."

[10] The Board also found it implausible that a group of Punjab police would drive some eight hours to follow an individual that "was merely suspected of supporting the separatist faction." The Board noted that "there is no established integrated communication system within the police system in India" that would facilitate the joint efforts of the Punjab and New Delhi police.

[11] The Board determined that the applicant had "virtually no political profile in India" and that this lack of profile, combined with the non-existence of any warrant for his arrest, supported the conclusion that he would not attract the attention of authorities if returned to India.

[12] Finally, the Board determined that an IFA was available to the applicant. The Board reasoned that the lack of "a central registry system that would enable the police to find a person" throughout India, the applicant's "low political profile," the legal freedom of movement for Sikhs, and the applicant's ability to work, all made relocation reasonable. The Board concluded "that there is not more than a mere possibility that the police would search for him throughout the country, if he were to return." The Board cited the example of the applicant's stay in New Delhi, stating: "I have found that they did not seek him out there, even if they went to his home in Kular."

ISSUES

[13] The applicant raised a number of issues:

1. Whether the Board's credibility and plausibility findings were unreasonable and reached in violation of procedural fairness;
2. Whether the Board erred by failing to consider the objective basis of the applicant's claim despite its credibility findings;
3. Whether the Board erred by failing to provide a separate section 97 analysis;
4. Whether the Board's conclusion regarding the applicant's political profile was unreasonable; and
5. Whether the Board's IFA determination was reasonable.

ANALYSIS

[14] In my view, it is unnecessary to consider each of the five issues identified by the applicant because it is clear to me that the applicant succeeds on the first issue.

[15] I find that the Board's decision that it was implausible that Mr. Kumar would be followed and persecuted in New Delhi was unreasonable. This is not to suggest that the Board may not be correct. He may have lied about the police following him to New Delhi; however, based on the facts as found by the Board, that finding was unreasonable for the following reasons.

[16] The Board made no findings with respect to the applicant's allegations that he had twice been arrested, detained, beaten, and tortured in his home state because of his apparent association with separatists. It is trite law that "when an applicant swears to the truth of certain allegations, this creates a presumption that those allegations are true unless there be reason to doubt their

truthfulness:” *Maldonado v. Canada (Minister of Employment and Immigration)*, [1980] 2 F.C. 302 at 305 (C.A.). The silence of the Board on the first two allegations of abuse by the police must be seen as acceptance of this aspect of the applicant’s testimony.

[17] Having accepted this outrageous conduct in Punjab state by the police, one must ask on what basis the Board reached the conclusion that it was implausible that they would have followed the applicant to New Delhi. The Board states that it rested its finding on the fact that the applicant “was merely suspected of supporting the separatist faction.” In fact there was much more evidence that the Board appeared not to consider. Specifically, there were the two previous instances of what the applicant asserts was “torture” at the hands of the police over many days.

[18] The respondent correctly submits that plausibility findings must be made taking into consideration what would be viewed by an objective third-party “as reasonable in that place and in those conditions”: *Gonzalez v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 805 (T.D.) (QL) at para. 27. Given the Board’s acceptance of the applicant’s testimony regarding police persecution in his home state, it is unfathomable to me how the Board could reach its plausibility finding with respect to the allegation of police persecution in New Delhi without referring to the previous instances of persecution.

[19] That the applicant was detained and tortured on two occasions because of his imputed association with separatists are serious allegations and gross human rights violations. Such

treatment suggests that regardless of the applicant's profile and police suspicions, he was of significant interest to the local authorities.

[20] It is not this Court's role to pronounce on what a reasonable person armed with knowledge of the applicant's treatment by police in Punjab state would or would not think plausible in terms of the police following him to New Delhi. However, the Board's plausibility conclusion must be reasonable; the Board's failure to situate the allegations of persecution in New Delhi within the context of accepted prior instances of arrest and torture makes its decision insufficiently justified and therefore unreasonable. The Board has failed to explain why the applicant's low political profile would subject him to arrest and torture in his home state, but not to similar treatment in a neighbouring state only eight hours away.

[21] In addition to the Board's finding of implausibility with respect to the police following the applicant to New Delhi, it also doubted the applicant's story to that effect; however, that finding is also, in my view, not without question.

[22] The Board's focus on the word "my" in the applicant's PIF does appear to be a microscopic analysis. An assessment of credibility on the basis of a single word by a Member who did not hear the evidence or question the applicant must be viewed with some suspicion. Further, the Board's focus on the applicant's submission that he was "in hiding" but yet out with his sister when the police arrived might be characterized as either an inconsistency finding or an implausibility finding. If it is an implausibility finding then the Board was not obligated to put it to the applicant: *Appau v.*

Canada (Minister of Employment and Immigration) (1995), 91 F.T.R. 225 at 228-229. However, if it is a finding of inconsistency then the Board was obligated to put it to the applicant for a response: *Danquah v. Canada (Secretary of State)*, [1994] F.C.J. No. 1704 at para. 6 (T.D.) (QL). The Board viewed it as an inconsistency rather than implausibility as is evident from its statement in the decision: “This is another inconsistency”. The Board was therefore obligated to put its concern to the applicant and it was a breach of procedural fairness in not doing so.

[23] Accordingly, the basis for the Board’s decision with respect to the events in New Delhi cannot stand. For this reason the decision must be set aside and the applicant’s claim must be reconsidered by a different Board Member.

[24] Neither party proposed a question for certification and in my view there is none.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is allowed and the applicant's application is remitted back to a hearing by a Board Member who has not previously heard the application; and
2. No question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1311-09

STYLE OF CAUSE: DHARMINDER KUMAR v. THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATES OF HEARING: February 15, 2010

**REASONS FOR JUDGMENT
AND JUDGMENT:** ZINN J.

DATED: February 17, 2010

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