

Federal Court



Cour fédérale

Date: 20100401

Docket: IMM-3955-09

Citation: 2010 FC 356

Ottawa, Ontario, April 1, 2010

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

MOHINDER SINGH JASSI

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application by Mohinder Singh Jassi (the applicant) pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), for judicial review of a decision by the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated June 23, 2009, wherein the Board found that the applicant is neither a refugee nor a person in need of protection.

Factual Background

[2] The applicant is a citizen of India, where he used to be a taxi driver.

[3] On December 24, 2001, the applicant was allegedly arrested by the police, along with Mr. Shashi Kant, a customer whom he had never met before he entered the applicant's taxi. Mr. Kant was accused of carrying illicit liquor which was found in the applicant's taxi. It is not clear whether the applicant was also accused.

[4] The applicant claims that he was threatened by people connected to Mr. Kant, who wanted to bully him, saying that the liquor found at the time of their arrest was his, and thus inducing him to pleading guilty in Mr. Kant's place. Several incidents occurred starting in 2002, culminating on December 20, 2006, when the applicant was kidnapped and threatened with death by two passengers who repeated the same demands.

[5] The applicant received further death threats on March 28, 2007. Three individuals allegedly again warned him that he would be killed if he did not declare in court that it was he who was guilty of carrying illicit liquor.

[6] On April 4, 2007, the applicant left India for Canada and he made an asylum claim on April 23, 2007.

Decision Under Review

[7] The Board found the applicant's allegations do not fall under section 96 of the Act. The Board only considered the applicant's claim under section 97 of the Act and rejected it.

[8] The Board noted a number of inconsistencies in the applicant's evidence. For example, the applicant submitted a document indicating that he was charged, along with Mr. Kant, with carrying illicit liquor, yet he testified that he was only a witness in proceedings against Mr. Kant and that there were no charges against him. The Board also noted that the applicant testified that Mr. Kant's associates visited his relatives to inquire as to his whereabouts, but he never amended his Personal Information Form (PIF) to include this information and he did not mention it at the beginning of the hearing when asked about any new developments in his case. While the applicant explained that he was stressed and simply forgot to mention this fact, and there was an expert report attesting that he suffers from post-traumatic shock, the Board still found that the applicant could have disclosed this information.

[9] Furthermore, the Board did not believe the applicant's claim that he did not inform himself of what became of Mr. Kant since he left India. While he said that he was afraid that he would be killed if he inquired, the Board found that it was not plausible that the applicant would make no attempt to find out anything about the circumstances that forced him into exile.

[10] The Board also found implausible that Mr. Kant or his associates would persecute the applicant if he returned to India, because Mr. Kant's sentence would not be more than two years of imprisonment, and so may already have been served.

[11] Finally, the Board noted that the applicant had not been afraid of the police before leaving India. The applicant now fears that the police will not be pleased with his failure to appear as a witness against Mr. Kant. The Board concluded that this is no basis for a refugee protection claim.

[12] Thus the applicant failed to show, on a balance of probabilities, that he would personally risk being tortured or suffering a cruel and unusual treatment or punishment, or that his life would be in danger, if he were returned to India.

Issues

[13] The only issue is whether the Board erred in dismissing the applicant's refugee claim.

Standard of Review

[14] The assessment and weight given to the evidence by the Board is a question of fact which should be reviewed on a standard of reasonableness with great deference toward the Board's conclusions (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339).

[15] Questions of credibility and the weighing of the evidence fall within the jurisdiction of the administrative tribunal called upon to assess a refugee claimant's allegation of subjective fear (*Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, (1998), 157 F.T.R. 35, 83 A.C.W.S. (3d) 264 at par. 14). The Court will only intervene if the Board based its decision on an erroneous finding of fact made in a perverse or capricious manner or if it made its decision without

regard to the material before it (*Aguebor v. Canada (Minister of Employment and Immigration)*, (1993), 160 N.R. 315, 42 A.C.W.S. (3d) 886 (F.C.A.)). Since *Dunsmuir*, the applicable standard of review is reasonableness.

Analysis

[16] According to the applicant, the Board does not understand that Mr. Kant and the people connected with him could seek revenge against him for a prison sentence that may have already been served and to blame him for the sentence imposed and served. According to the jurisprudence, in order for a statement or action to be implausible, it must be inherently improbable or suspect (*Armson v. Canada (Minister of Employment and Immigration)*, (1989), 101 N.R. 372, 17 A.C.W.S. (3d) 322 (C.A.F.)). In the case at bar, the applicant submits there was nothing inherently improbable or suspect with respect to which findings of implausibility were made.

[17] The applicant submits that the Board disregarded that charges were filed against him, and that, as a result, the applicant would be sought by the police in India. The Board cannot be silent on relevant documentary evidence which substantiates the applicant's claim (*Cepeda-Gutierrez; Khan v. Canada (Minister of Citizenship and Immigration)*, (1999), 163 F.T.R. 127, 87 A.C.W.S. (3d) 132) and the applicant alleges that the Board failed to consider all the documentary evidence in his case (*Ahmed v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 226, 129 A.C.W.S. (3d) 390; *Castiillo v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 56, 128 A.C.W.S. (3d) 782; *Guerrero v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 104, 129 A.C.W.S. (3d) 170). Even if the Board found the applicant not to be credible, the Board should have

considered the totality of the documentary evidence in its analysis (*Kamalanathan v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 553, 105 A.C.W.S. (3d) 1125).

[18] The Court notes that the Board is in the best position to assess the explanations provided by the applicant with respect to the perceived inconsistencies. It is not up to the Court to substitute its judgment for the findings of fact drawn by the Board concerning the applicant's credibility (*Singh v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 181, 146 A.C.W.S. (3d) 325 at par. 36; *Mavi v. Canada (Minister of Citizenship and Immigration)*, (2001), 104 A.C.W.S. (3d) 925, [2001] F.C.J. No. 1 (QL)).

[19] A heavy burden lies on the applicant to rebut the Board's finding that he lacks credibility (*Aguebor*). The Board is entitled to make reasonable findings based on implausibility or common sense and rationality.

[20] In the case at bar, the applicant did not provide convincing evidence of his subjective fear as he did not inform himself of the fate of Mr. Kant and the state of his trial after he left India. The applicant failed to mention that Mr. Kant and his associates visited his family, and he was also unable to clearly explain whether he was charged or if he was simply a witness to Mr. Kant's trial. The applicant thus failed to meet the burden to establish a subjective fear of persecution. The possibility of revenge identified by the applicant is not sufficient to establish a well-founded fear of persecution, especially given the important omission to state in his PIF that Mr. Kant and the mafia

had visited his family. The applicant justified this omission by explaining that he was forgetful and tense.

[21] In support of this argument, the applicant also submitted a psychological report prepared by David Woodbury (Exhibit P-16) to establish that he is suffering from post-traumatic stress disorder. However, the respondent argues that Mr. Woodbury's report should not be considered as a psychological report since he is an orientation counsellor (*Singh v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1376, 110 A.C.W.S. (3d) 1113 at par. 6; *Rai v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1338, [2008] F.C.J. No. 1674 (QL) at par. 37-38). The Court agrees with the respondent that being forgetful or tense or alleging post-traumatic stress disorder as diagnosed by an orientation counsellor, cannot justify such an important omission by the applicant which is at the heart of his claim.

[22] Furthermore, the applicant submitted in evidence a "charge-sheet" (Exhibit P-6), directed against him and Mr. Kant. However, given the applicant's repeated statements that no charges were laid against him, the Court is of the view that the Board ensured the questions were appropriately understood by the applicant (transcript at pp. 218-219). Therefore, in light of this contradictory evidence, the Court does not accept the applicant's contentions that he did not properly understand the question about the charge-sheet and that he was in fact charged.

[23] Finally, counsel for the applicant submits that the applicant fears the police since he left India because he did not respect his duties as a witness in Mr. Kant's trial. The fact that the

applicant is fearful because he did not respect his legal obligations in his country of origin cannot support his refugee claim (*Valentin v. Canada (Minister of Employment and Immigration)*, [1991] 3 F.C. 390, 167 N.R. 1 at par. 8; *Zandi v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 411, 129 A.C.W.S. (3d) 1187 at par. 10). Indeed, in *Zandi* at par. 10, this Court mentioned the following:

“The applicant submits that the Board did not consider whether he was a Convention refugee based on his membership in a particular social group, namely being a defector under section 96 of IRPA or whether he was a person in need of protection under subsection 97(1)(b) of IRPA. The Court disagrees. The Board did decide that the documentary evidence is that the Government of Iran would not persecute the applicant for simply failing to return to Iran, i.e. defecting. However, that does not mean that the applicant may not be sanctioned in accordance with the law of Iran for violating the terms of his exit visa. This type of sanction does not equate to the risk of punishment or sanction contemplated by section 96 and 97 of IRPA...”

[Emphasis added]

[24] After reviewing the evidence and hearing counsel for the parties, I am not satisfied that the intervention of this Court is warranted. The applicant has failed to show that the Board based its decision on an erroneous finding of fact, made in a perverse or capricious manner or without regard to the material before it (*Khosa*).

[25] For these reasons, the application for judicial review is dismissed. The parties did not propose any question for certification and, in my view, there is no question that warrants certification.

JUDGMENT

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

“Richard Boivin”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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