Federal Court  Cour fédérale

Date: 20110117

Docket: IMM-2749-10

Citation: 2011 FC 45

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, January 17, 2011

PRESENT: The Honourable Madam Justice Bédard

BETWEEN:

NARESH KUMAR

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), of a decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada (the Board) dated April 22, 2010, in which it

refused to recognize Naresh Kumar (the applicant) as a refugee or a person in need of protection under sections 96 and 97 of the IRPA.

Background

[2] The applicant is an Indian citizen of Hindu origin. He arrived in Canada on August 23, 2007, and claimed refugee protection 12 days later.

[3] The applicant's claim is based on the following allegations. The applicant lived in the village of Shatabgarh in the district of Ludhiana in Punjab state. He claims that he fled persecution by the local police. The applicant contends that the police suspected him of protecting and being the accomplice of two of his friends who are Sikh militants. The allegations against him included hiding his friends at his home and also hiding their weapons. The applicant was arrested twice when he was with his two friends. He was beaten and tortured by the police. The police then went to his home to question him about his friends, who were wanted. The police also threatened to kill him if he did not disclose the place where his friends were hiding. The applicant fled to Canada from that persecution. The applicant contends that even after he left the police went to his home and harassed his father.

Decision of the Board

[4] The Board rejected the applicant's refugee protection claim on the ground that he had an internal flight alternative (IFA) in Bombay. The Board stated that it had not assessed the applicant's credibility because it believed that he could reasonably have availed himself of an IFA, even if his account were accepted as fact.

Issues

[5] This application for judicial review essentially raises the question of the reasonableness of the Board's decision having regard to the facts and the law.

Standard of review

[6] The Board's decision as to whether there was an IFA is subject to the reasonableness standard (*Martinez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1200 (available on CanLII), *Velez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1114 (available on Quicklaw), *Yanez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1059 (available on CanLII), *Singh v Canada (Minister of Citizenship and Immigration)*, 2009 FC 158 (available on Quicklaw).

Analysis

[7] The applicant is challenging the Board's decision on several points. He submits in particular that the Board failed to exercise its jurisdiction by refusing to assess his credibility. Essentially, he submits that the Board could not reasonably have determined whether there was an IFA without taking into account his allegations and the particular circumstances of his situation, and accordingly the Board had to either assess his credibility or accept his allegations as fact. The applicant submits that the Board clearly stated that it had not assessed his credibility, but the reasons for decision show that it did not consider his account in its analysis.

[8] The applicant also submits that the Board conducted a selective analysis of the evidence and failed to consider and address documentary evidence that was relevant and that contradicted its findings.

[9] The respondent submits that the Board's analysis of the evidence was reasonable and that it analyzed each of the explanations given by the applicant to show there was no IFA. The Board's findings are reasonably supported by the evidence and the Board did not have to cite all the evidence it is presumed to have analyzed.

[10] For the reasons that follow, I find that the Board committed errors that render its decision unreasonable and warrant the intervention of this Court.

[11] Counsel for the respondent acknowledged that when the Board stated that it had not assessed the applicant's credibility because an IFA was available to him, even if his story was true, it had to accept as true the facts in support of his account of persecution. She also submitted that the presumption of truth did not apply to the explanations the applicant gave to rebut the existence of an IFA. Counsel stressed that the truth of the account on which the claim is based must not be confused with the explanations and answers given to the Board member at the hearing when the issue is whether there is an IFA. That statement is correct in some circumstances, but in my opinion it is not correct when the explanations given to rebut the existence of an IRA are closely connected with the account on which the refugee protection claim is based.

[12] I find that in this case the issue of whether there was an IFA could not be analyzed without regard to certain of the applicant's allegations in support of his refugee protection claim. In his Personal Information Form (PIF), the applicant referred to a number of factual elements that were relevant both to his account of persecution and to the determination of the issue of whether there was an IFA; they included the following:

a. When he was charged the first time he was accused by the police of collaborating with his friends who worked with Sikh militants, and the police accused him of being a traitor because he was a Hindu who supported the Sikh militants;
b. When he was first arrested he was tortured by the police, and he was released after his father paid a bribe;
c. He had learned from the sarpanch of the village (the head of the village council) that his friends had been released after 10 days in detention on a promise to report to the police once a month, and in April 2007 they left their village without informing the police. They were suspected of joining the militants;
d. He had cut off contact with his friends, but on the night of June 7, 2007, his friends came to his home. Shortly after they arrived, the police came to his home; they searched his house and arrested all three of them;
e. On that occasion the police accused him of collaborating with the militants by hiding their weapons in his home. The police detained and tortured him and he was released after five days after his father paid a bribe;
f. On July 15, 2007, the police burst into his home and questioned him about his friends after informing him that his friends had escaped from prison. The police accused him of knowing where his friends were hiding. They ordered him to tell

them where they were hiding before the end of the month, failing which he would be liquidated. The applicant described that incident as follows in his PIF: “I was conditioned to produce [XX] and [XX] by the end of August, 2007 else I would be killed in fake story by the police”;

g. His father took him to seek advice from the sarpanch of the village who advised him not to file a complaint against the police on the ground that a complaint would aggravate his situation, and advised him instead to leave India;

h. His father informed him that on September 1, 2007, after he arrived in Canada, the police went to his home because the applicant had not “produced his friends” as required. The police then alleged that the applicant had joined the militants and they harassed his father.

[13] The applicant also filed the affidavit of the sarpanch of the village, which contains various statements, including the following: “That the Punjab Police frequently visiting at our village in the search of Mr. Naresh Kumar.”

[14] This evidence was all relevant to support the applicant’s allegation that he had been persecuted by the Punjab police and his allegation that he was wanted by the police because they suspected him of collaborating with the Sikh militants. Those “facts” were relevant for the purpose of determining whether the applicant fell within the parameters of sections 96 and 97 of the IRPA, but also to determine whether, in the circumstances, an IFA was available to him.

[15] The applicant submitted, in particular, that because he was wanted by the police and suspected of collaborating with Sikh militants and hiding weapons, he would likely be wanted by the police in the other regions of India, and it was possible that his name had been entered in POLNET.

[16] To find that there was an IFA in this case, the Board had to either accept the applicant's allegations as fact and explain why, notwithstanding those allegations, it found that there was an IFA, or find that the applicant was not credible and disregard his allegations. The Board could not have accepted only part of the applicant's account as fact. In my opinion, that is what it did.

[17] The Board clearly indicated that it had not assessed the applicant's credibility because it was of the opinion that there was a reasonable internal flight alternative, "[e]ven if the claimant's story had been true". However, it appears from the decision that the Board failed to consider several of the applicant's allegations that were relevant in its analysis of the existence of an IFA. Some of the Board's findings are even the opposite of the applicant's allegations.

[18] The Board rejected the applicant's allegation that the police might arrest him. It found that the applicant did not have the profile of an active militant wanted by the police, he had never given his fingerprints, there was no arrest warrant issued against him, and he had never appeared before a court or been convicted. The Board therefore concluded that it rejected "the argument that the claimant could be arrested as an obstacle to an internal flight alternative". The Board's conclusion seems reasonable on its face. The problem with that conclusion is that it totally disregards and evades the applicant's allegation that he was in fact wanted not because he was a militant, but

because he was suspected of collaborating with his militant friends and hiding their weapons. The Board made no finding regarding that allegation, which was central to the applicant's account.

[19] The Board also rejected the applicant's argument that even though he had not been convicted, his name might be in POLNET because he was suspected of collaborating with Sikh militants. In that regard, the Board noted that the documentary evidence concerning the operational level of POLNET was divided. The Board also noted that the documentary evidence indicated that the names of persons who are arrested and then released without any charge were entered if the person was designated as a suspect. It then concluded:

> [15] … However, with respect to the claimant, it is not stated that the police officers, who are instead looking for bribes or family revenge, are entering information about him in the network. In addition, even if it were the case, it does not mean that once he is settled in his new home, the claimant would have to deal with police officers who would use this information ill advisedly or would treat him poorly.

[20] With respect, the Board's findings completely fail to take the applicant's allegations into consideration.

[21] The Board had no obligation to accept the version of the facts presented by the applicant, but it could not state that it had not assessed his credibility and in the same breath reject his version of the facts or simply ignore it in its reasons. If the Board believed that the applicant had not discharged his burden of proof, it had to say so and explain. If it considered the applicant's allegations to be insufficient, it also had to say so. It could also have found the applicant's allegations not to be credible, but again, it had to give the reasons.

[22] The following passages from the decision are also perplexing. Although the Board clearly stated that it had not assessed the claimant's credibility, the following passage from the decision shows that it in fact drew negative inferences regarding the claimant's credibility:

> [16] … The panel confronted the claimant with the fact that he took a while to file his refugee protection claim. He explained that the human smuggler told him not to claim refugee protection at the airport.
>
> [17] Here is what the Federal Court states in similar situations: "The delay in making a claim to refugee status [or in leaving the country of persecution] is not a decisive factor in itself. It is, however, a relevant element which the tribunal may take into account in assessing both the statements and the actions and deeds of a claimant."
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> [18] On that subject, Justice Hugessen's statement in *Urbanek* should be noted, where he states the following about the refugee determination process: "[...] the purpose of that system is to provide safe haven to those who genuinely need it, not to give a quick and convenient route to landed status for immigrants who cannot or will not obtain it in the usual way". The panel is of the opinion that this is the case of the claimant.

[23] I acknowledge that the Board's conclusion regarding the applicant's delay in claiming refugee protection was not decisive in this case, but it does speak to the Board's perception. Although the Board stated that it had accepted the applicant's story as fact, it actually did not believe it. If that was the case, it had to say so clearly and it had to give reasons for its finding.

[24] In view of the conclusion I have reached, I need not address the other grounds for review advanced by the applicant.

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

[TRANSLATION]

Is it open to the panel not to assess an applicant's credibility for the purposes of determining whether there is an internal flight alternative, when it has refuted some of the statements made to rebut the internal flight alternative?

[26] The respondent objected to certification of that question on the ground that the issue of whether the panel absolutely had to assess an applicant's credibility for the purpose of assessing the internal flight alternative had already been settled and the second part of the question proposed could not be analyzed without considering the unique fact situation in each case.

[27] First, because the applicant is successful here, certification of the question proposed would serve no purpose (*Rana v Canada (Minister of Citizenship and Immigration)*, 2010 FC 696 (available on CanLII)). I further find that the question as proposed could not be certified because it could not be answered without being considered in relation to a particular fact situation. Accordingly, it is not a "serious question of general importance" (*Canada (Minister of Citizenship and Immigration) v Liyanagamage*, 51 ACWS (3d) 910, 176 NR 4, at para 4).

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is allowed and the matter is referred back to the Board for the applicant's refugee protection claim to be determined by a different panel. No question is certified.

"Marie-Josée Bédard"
Judge

Certified true translation
Susan Deichert, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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