

Federal Court



Cour fédérale

Date: 20111223

Docket: IMM-2150-11

Citation: 2011 FC 1514

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, December 23, 2011

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

GURWINDER SINGH

Applicant

and

**MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act), for judicial review of the decision issued March 8, 2011, in which the Refugee Protection Division of the Immigration and Refugee Board (the panel) determined that the applicant was neither a Convention refugee nor a person in need of protection under sections 96 and 97 of the Act.

Facts

[2] Mr. Gurwinder Singh (the applicant) is an Indian citizen. He was born in the village of Ramgarh, in the Indian region of the Punjab, into a traditional Sikh family.

[3] He is seeking Canada's protection because he claims he was persecuted in India by reason of his political opinion and his membership in a particular social group—male citizens who practise Sikhism. The applicant says that the Indian police suspect him and his father of harbouring Sikh militants and sympathizing with their cause.

[4] The applicant states that prior to 2003, the police arrested his father, Nirmal Singh, twice and tortured him. The reason for these arrests was a visit by Sikh militants to his father's home, where the applicant also lived.

[5] The applicant also alleges that the police raided his father's home in mid-2003. The police said they wanted to question his father, but he was not there. The police harassed the rest of the Singh family and ordered them to produce Nirmal Singh to them. The police maintained that Nirmal Singh had joined the militants.

[6] The police raided the applicant's home again on February 2, 2004. He was arrested during the incident, then interrogated and tortured.

[7] He was released on February 6, 2004, and subsequently received medical treatment in a hospital.

[8] On November 22, 2007, the police raided the Sikh temple in the village and arrested the applicant and the head priest, Surjan Singh. The applicant states that they were separated from each other and that he was tortured.

[9] The applicant was released on November 25, 2007, when his family secured his release by paying a bribe. He was then treated in the same hospital where he had received treatment in 2004 and by the same doctor.

[10] Surjan Singh was not released but may have escaped.

[11] The applicant's father told him that an informer had seen Surjan Singh and that he had commenced legal proceedings against the police.

[12] The lawyer for the applicant's father asked the applicant to testify in the case. However, the police found out about this and raided his father's house again when the applicant was not there.

The police ordered the Singh family to produce the applicant.

[13] The applicant maintains that, as a result, he was advised to leave the country. The applicant arrived in Canada on June 24, 2008. He subsequently applied for refugee status on July 7, 2008.

[14] The Board's Refugee Protection Division heard the applicant's application on December 22, 2010, and issued its decision on March 8, 2011.

Decision that is the subject of this review

[15] The panel found that the applicant had not discharged his burden of establishing that there was a serious risk of persecution or that he would be personally subjected to a danger of torture, a risk to his life or a risk of cruel and unusual punishment if he had to return to his country.

[16] Other than a slight variation in the evidence regarding the applicant's date of birth (April 25 or June 28, 1984), the panel seems to have concluded that the applicant's identity had been satisfactorily established.

[17] With respect to the issue of the applicant's credibility, the panel stated that the Minister of Citizenship and Immigration, as an intervenor in the proceeding before the panel, had filed a statutory declaration (SD) dated October 14, 2008, of David Rizzo, First Secretary at the Canadian High Commission in New Delhi, India. The panel summarized the statements in the SD, which said that Mr. Rizzo, in the company of Arun Kumar, a migration integrity assistant, had visited the applicant's village, Ramgarh, in the Punjab, for the purpose of ascertaining the applicant's true identity. The SD stated that Mr. Rizzo met with a person named Saudagar Singh, the sarpanch or elected chief of the village, who positively identified the applicant's photograph and led Mr. Rizzo and Mr. Kumar to the applicant's house.

[18] Outside the applicant's house, Mr. Rizzo and Mr. Kumar met Amrik Singh, who identified himself as the applicant's uncle. During this visit, Mr. Rizzo asked the applicant's uncle whether the applicant "had ever been in trouble with the law in India" (Panel Decision, paragraph 16). The applicant's uncle replied that he had not. The same question was put to the sarpanch, who confirmed what the uncle had said and wrote a note to that effect, a note that was attached as an appendix to the SD. The panel also observed that the SD mentioned that, during Mr. Rizzo's meeting with the applicant's uncle, his wife had answered the telephone. After that call, the uncle's wife said to Mr. Rizzo that [TRANSLATION] "there were charges against Gurwinder Singh and that the police were looking for him."

[19] In light of the statements in the SD, the panel drew adverse inferences as to the credibility of the applicant's narrative. The panel stated that it had reviewed the applicant's testimony, the report on the point of entry interview, the narrative given in response to question 31 of the applicant's Personal Information Form (PIF) as well as dockets IMM-5417, IMM-5500 and IMM-5474. Based on the evidence before it, the panel commented as follows at paragraph 17 of its decision:

. . . there is a glaring discrepancy between the picture of difficulties and aggressions depicted by the claimant's narrative, the affidavit of ex-Sarpanch Jawahar Singh (P-3), and the Medical report of Dr. Puri (P-4) all of which depict a history of considerable difficulties with the police. This is in sharp contrast with the picture of peace and quiet depicted by the uncle, Amrik Singh, and Sarpanch Saudagar Singh, both orally and in his written note.

[20] In addition, the panel presented documentary evidence on India that supported both theories—the peaceful and the violent. Since there were doubts about the applicant's narrative, the panel decided to accept the peaceful theory established by the SD and chose not to apply the

decision in *Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 (CA), 31 NR 34 (FCA) [*Maldonado*]. It therefore dismissed the applicant's claim.

Issue

[21] In the Court's view, the only issue is whether the panel erred in finding that the applicant was not credible.

Statutory provisions

[22] The following provisions of the *Immigration and Refugee Protection Act* apply to this proceeding:

REFUGEE PROTECTION,
CONVENTION REFUGEES
AND PERSONS IN NEED OF
PROTECTION

Convention refugee

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail

NOTIONS D'ASILE, DE
RÉFUGIÉ ET DE PERSONNE
À PROTÉGER

Définition de « réfugié »

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques:

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de

themselves of the protection of each of those countries; or
 (b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

la protection de chacun de ces pays;
 b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Person in need of protection

Personne à protéger

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally
 (a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or
 (b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée:

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
 b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant:

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

inhérents à celles-ci ou occasionnés par elles,
(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

Person in need of protection

Personne à protéger

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

Standard of review

[23] In accordance with the established jurisprudence, the Court has consistently applied the reasonableness standard to decisions by the Refugee Protection Division of the Immigration and Refugee Board, which involve questions of fact, credibility and assessment of the evidence (*Aguebor v Canada (Minister of Employment and Immigration)* (FCA), 160 NR 315, [1993] FCJ No 732; *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*]; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339). Consequently, the Court will only intervene if the panel's decision is based on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[24] The applicant maintains that the panel's assessment of the refugee claim is unfair and that the panel erred by assigning too much weight to the SD submitted by the Minister of Citizenship and Immigration.

[25] For his part, the respondent states that the panel's findings about the applicant's credibility were reasonable. After reviewing the facts, the applicant's arguments and the statements in the SD, the respondent submits that the panel has the discretion to "base its findings on internal contradictions, inconsistencies and evasive statements" (*Antonippillai v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 382, 157 FTR 101; *Perjaku v Canada (Citizenship and Immigration)*, 2007 FC 496, [2007] FCJ No 669). The respondent argues that the information Mr. Rizzo obtained was quite different from the allegations put forward by the applicant before the panel and that these differences cast doubt on his narrative.

Analysis

[26] At the outset, this case may be summarized as follows: did the panel assign too much probative value to the SD, to the detriment of the evidence in the record? For the following reasons, the Court is of the opinion that the panel erred in its assessment of the evidence.

[27] The Court points out that in the SD, Mr. Rizzo, First Secretary at the Canadian High Commission in New Delhi, India, stated that the purpose of the visit was to ascertain the applicant's identity.

[28] The Court notes certain incongruities regarding the content of the SD that the panel relied on. Part of the testimony in the SD—which is in the appendix to the SD—is not translated (Tribunal Record, page 101). The content of the SD reflects an interpreter’s translation. A number of questions remain regarding how the interview was conducted: how long did the interview last? Does the SD contain everything that was said at the meeting between Mr. Rizzo and the villagers? Although there is no need to challenge the content of the SD, the Court is nonetheless entitled to question the probative value of this evidence and the weight the panel assigned to it.

[29] Thus, the Court notes that while the purpose of the visit was to “ascertain the true identity of the claimant” (Tribunal Record, page 54), the panel states in its decision that “the original purpose of this trip was to attempt to ascertain the true identity of the claimant” (Panel Decision, paragraph 11), which suggested to the panel that the nature of the visit changed (*Skripnikov v Canada (Minister of Citizenship and Immigration)*, 2007 FC 369, [2007] FCJ No 528).

[30] In its decision, the panel relied on the statements of the uncle, the uncle’s wife and the new sarpanch. The Court notes that the applicant’s uncle and the sarpanch were not under oath when they answered the questions.

[31] Furthermore, the panel provided no explanation regarding the fact that it disregarded the two affidavits filed by the applicant—the affidavits of the former sarpanch and of Dr. Puri. The panel instead relied on the only question Mr. Rizzo asked the applicant’s uncle and the former sarpanch: has the applicant ever had “any trouble with the law in India”? The Court can only note that the

answers were not given under oath and the panel did not put them into context with the sworn documentary evidence or explain why it disregarded that evidence.

[32] Last, the Court notes the panel's observation at paragraph 18 of its decision concerning a telephone call received by the applicant's aunt during the visit to the village: "This leaves me in a state of doubt, with the effect that it appears that at least one family member, the aunt, would say whatever is required to obtain the sought after result." With respect, there is no basis for such a finding in this case.

[33] For these reasons and after carefully reviewing the panel's decision, the transcript of the hearing and the documentary evidence, the Court finds that the panel's decision does not fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at paragraph 47). Thus, by relying on the SD and by assigning it the weight that it did as compared to the documentary evidence in the record, the panel erred. Accordingly, the application for judicial review will be allowed.

[34] Neither party submitted a question for certification.

JUDGMENT

THE COURT ORDERS AND ADJUDGES as follows:

1. The application for judicial review is allowed.
2. The matter is remitted for reconsideration by a differently constituted panel in accordance with the reasons given in this judgment.
3. No question of general importance is certified.

“Richard Boivin”

Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT
SOLICITORS OF RECORD

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APPEARANCES:

Martial Guay FOR THE APPLICANT

Catherine Brisebois FOR THE RESPONDENT

SOLICITORS OF RECORD:

Martial Guay law office FOR THE APPLICANT
Montréal, Quebec

Myles J. Kirvan FOR THE RESPONDENT
Deputy Attorney General of Canada