Federal Court  Cour fédérale

Date: 20120403

Docket: IMM-5488-11

Citation: 2012 FC 381

Montréal, Quebec, April 3, 2012

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

AMIT AMIT

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for a judicial review of the Immigration and Refugee Board (Refugee Protection Division) [Board], rendered on July 20, 2011, dismissing the asylum claim of the applicant made under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act], on the basis that an Internal Flight Alternative [IFA] is available in India, such as the city of Bangalore.

[2] It must be remembered that the concept of IFA is inherent to the very definition of Convention refugee. The test for determining whether a refugee claimant has an IFA involves two steps. First, there must be no serious possibility that an individual would be persecuted or subjected to persecution, or to a danger of torture or to a risk to his life or of cruel and unusual treatment or punishment in the proposed IFA; and second, the conditions of the proposed IFA area must be such that it would not be unreasonable for the individual to seek refuge there: *Rasaratnam v Canada (Minister of Citizenship and Immigration*, [1992] 1 FC 706 (FCA).

[3] The onus is on a claimant to prove actual and concrete evidence of conditions which would jeopardize his or her life (*Morales v Canada (Minister of Citizenship and Immigration)*, 2009 FC 216). In this respect, the Board's failure to consider the specific risks feared by a claimant in an IFA analysis will constitute an error of law (*Velasquez v Canada (Minister of Citizenship and Immigration)*, [2010] FCJ 1496 at paras 15-22).

[4] In the decision under review, the conclusion that an IFA exists is not reasonable. It is not challenged that the fear of persecution of the applicant is based on a Convention ground, notably his imputed political beliefs. The whole reasoning of the Board is based on the erroneous assumption that the applicant would be a low profile Sikh militant, but the true question in this case is whether, if we believe the applicant's story, a young Hindu man who was detained, fingerprinted, photographed, interrogated and tortured by the New Delhi police, because of his alleged links with a suspected terrorist following the 2008 Mumbai bombing, has a well-founded fear of persecution throughout India.

[5] Instead of focusing on this fundamental aspect of the asylum claim, the Board relies on a documentary evidence suggesting that “while the Punjab police may be serious about pursuing Sikhs anywhere in India whom they view as hard-core militants, in practice only a handful of militants are likely to be targeted for such long-arm law enforcement” (India National Documentation Package, May 31, 2010, Tab 2.5). Be that as it may, the Mumbai bombing was a major incident that attracted national attention in India. In the absence of a true analysis of the claimant’s subjective fear of persecution, the Board’s finding that the applicant has an IFA in Bangalore is arbitrary and capricious.

[6] Another reviewable error concerns the lack of real analysis of the applicant’s credibility who alleges having been tortured for three days by the police and has produced documentary evidence to corroborate his story. However, there is no clear finding by the Board that the applicant is not credible (apart from the implausibility of what happened after the police incident). This renders highly dubious the rest of the analysis of the Board on the existence of an IFA (*Flores v Canada (Minister of Citizenship and Immigration)*, [2010] FCJ 607 at paras 22, 32-33 and 49; *Jimenez v Canada (Minister of Citizenship and Immigration)*, [2010] FCJ 879 at paras 13-18; *Pikulin v Canada (Minister of Citizenship and Immigration)*, [2010] FCJ 1244 at paras 12-13 and 22-23).

[7] If the Board had clearly and articulately set out its findings of fact, this could have perhaps prevented the truncated analysis of the objective basis of the refugee claim through the existence of an available IFA in India. This is not a case where only section 97 of the Act is at play and where it could arguably be unnecessary for the Board to proceed with an analysis of the claimant’s

subjective fear (*Prasad v Canada (Minister of Citizenship and Immigration)*, [2011] FCJ 708; *Lezama v Canada (Minister of Citizenship and Immigration)*, [2011] FCJ 1213).

[8] For all these reasons, the application must succeed. The decision is set aside and the matter will be referred for reconsideration and review by a different panel, which will need, among other things, to analyze the applicant's subjective fear including an assessment of the credibility and plausibility of his account, before proceeding with an analysis of the question of persecution, the issue of an IFA and the availability of state protection, as the case may be.

[9] The respondent has proposed no question for certification, while the applicant has proposed the following serious question of general importance:

> 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?

[10] Having considered the oral submissions of counsel at the hearing, no question shall be certified. It is not proper to certify a question of law if there is still matter to seriously debate findings of fact made by the Board. I would add that the existence of an IFA is mostly fact driven. In passing, the general proposition that it would be an error of law to affirm that an IFA is available when persecution comes from the state itself or agents of the state, such as the police force, has not been seriously challenged by the respondent in this proceeding.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted;

2. The decision is set aside and the matter will be referred for reconsideration and review by a different panel, which will need, among other things, to analyze the applicant's subjective fear including an assessment of the credibility and plausibility of his account, before proceeding with an analysis of the question of persecution, the issue of an IFA and the availability of state protection, as the case may be; and

3. No question is certified.

"Luc Martineau"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5488-11
STYLE OF CAUSE:	AMIT AMIT and MCI
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	March 22, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	MARTINEAU J.
DATED:	April 3, 2012

APPEARANCES:

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