IMM-75-95

BETWEEN:

GURMEET SINGH AND JASWANT NARANG

Applicants

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT

RICHARD J.:

This is an application for judicial review of a decision of the Convention Refugee Determination Division (Refugee Division) of the Immigration and Refugee Board on December 19, 1994, which found the applicants not to be Convention refugees. The applicants, husband and wife, are citizens of India and claim persecution by reason of their religion (Sikh), political opinion and membership in a particular social group. The female applicant's claim relies entirely upon her husband's claim. They arrived in Canada in 1989 and made their refugee claim in 1991. The Refugee Division's first decision with respect to the applicants' claims was quashed by this Court on October 8, 1993, and remitted to the tribunal for reconsideration.[1] The basis for the Court's decision was an agreement by both parties that the tribunal erred in its assessment of an internal flight alternative and a determination by the Court that the tribunal's assessment of the male applicant's credibility was not properly based on the evidence before it.

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[1] *Gurmeet Singh and Jaswant Narang* v. *Canada (Minister of Employment and Immigration)* (1993), 62 F.T.R. 142 (Reed J.).

The applicants lived in the city of Karnal, in the province of Haryana. The male applicant owned an oil and flour mill and operated two trucks. He was also a member of the Sikh temple Mainji Sahib Gurdwara and participated in citywide hymn singing tours (nagar kirtan). In his PIF and his testimony before the tribunal, the male applicant recounted a series of incidents which occurred between 1983 and 1987 and which included a riot surrounding a nagar kirtan, a beating and vandalism of his home allegedly by members of the Jansang party, a boycott of his mill by Hindus, harassment from the trucking union and the police culminating in an arrest and beating by the police, and an attack and beating by members of the Hindu militant group Shiv Sena. Following the murder of the Prime Minister in October 1984, the applicants fled to a remote village. Upon their return, the male applicant discovered that his mill had been vandalised and attempted to sell it. A prospective purchaser was threatened by the Shiv Sena and he was forced to return the deposit. The male applicant was arrested and beaten by the police after someone fired some shots in a village outside Karnal. He was again arrested, beaten and detained for twelve days after someone fired shots and killed a local politician. Soon after his release, the applicants fled Karnal, travelling throughout India before coming to Canada.

The Refugee Division accepted that the male applicant's testimony was generally credible. However, they concluded that the applicant did not have a well-founded fear of persecution, in part, for the following reasons:

> We accept that the claimant was exposed to difficult experiences as a member of the Sikh Temple committee during 1984, a time of turmoil, harassment and persecution of Sikhs after the assassination of Indira Gandhi. The panel finds that mainly because of the claimant's position as a member of a Sikh temple, which was under the jurisdiction of the Golden Temple, he was subjected to arrest, interrogation, destruction of his personal property, and coercion from Hindu groups such as the Shiv Sena which were located at a close distance from this Sikh Temple.
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> In the panel's opinion, the claimant suffered harassment because of his participation in the organization of Sikh religious festivals in 1984 as a member of the Sikh Temple committee. He was not prevented from practicing his religion. Other incidents of Hindu reprisals related by the claimant resulted from violent actions carried out by Sikhs.
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> Considering the circumstances of his arrests and the events surrounding the death of Mrs. Gandhi at the hands of Sikh terrorists, the police action was one of trying to cope with the violence of riots and reprisals between Sikhs and Hindus. As a result of this, the claimant was detained for 12 days without any judicial process and was released upon the payment of a 12, 000 rupee bribe. The panel does not find the actions against the claimant, even in a cumulative effect, amount to persecution.[2]

In my view, the tribunal's finding that the applicant did not have a well-founded fear of persecution because the actions against him in 1984 did not amount to past persecution is patently

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[2] Tribunal's Record at 12-14.

unreasonable.[3] It is clear from the Court of Appeal's decision in *Thirunavukkarasu* v. *Canada (Minister of Employment and Immigration)* that arbitrary arrest and detention, as well as beatings and torture, by public authorities can never be condoned no matter what the rationale.[4] The tribunal erred when it failed to deal with the male applicant's beatings by the police and by concluding that his experiences at their hands did not amount to persecution.

In addition to the tribunal's erroneous finding regarding past persecution, the applicants argue that the tribunal committed a reviewable error by failing to consider the application of subsection 2(3) of the *Immigration Act* and the medical report. At the outset of the hearing before the tribunal, counsel for the applicants indicated that he wished the tribunal to consider the applicability of subsection 2(3) of the *Immigration Act* and filed a report prepared by Dr. Pilowsky. In its reasons for decision, the tribunal neither considered the applicability of subsection 2(3) nor the psychological report. Counsel for the respondent submitted that there was no obligation upon the tribunal to consider subsection 2(3) because of its finding regarding past persecution and because there was no finding regarding changes in country circumstances.

In my view, in addition to the error regarding past persecution, the tribunal committed a number of errors which warrant the intervention of this Court. The first of these is the tribunal's failure to consider the application of subsection 2(3). Generally, subsection 2(3) applies only to situations involving a determination of changes in circumstances.[5] The definition in subsection 2(1) provides that a person is a Convention refugee if the applicant is outside the country of nationality or former habitual residence by reason of a well-founded fear of persecution for one of the enumerated grounds and is unable or unwilling to avail themself of the protection of that country. The basis for a finding of an IFA is a recognition that while an applicant may have a well-founded fear in one part of the country of origin, the applicant does not have a well-founded fear throughout that country. As such, the applicant whose claim is rejected solely on the basis of an IFA is not and never could have been a Convention refugee as defined in subsection 2(1).[6] Since the applicant could not have been a Convention refugee, the

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[3] In reviewing decisions of the Refugee Division with respect to questions of law and fact within their expertise, the standard of judicial review to be applied to the grounds of review set out in paragraphs 18.1(4)(c) and (d) of the Federal Court Act is that of patent unreasonableness: *Sivasamboo* v. *Canada (Minister of Citizenship and Immigration)* (1994), [1995] 1 F.C. 741 at 764 (F.C.T.D.) and *Stelco Inc.* v. *Canadian International Trade Tribunal et al* (23 May 1995), No. A-360-93 (F.C.A.).

[4] (1993), [1994] 1 F.C. 589 at 600-601.

[5] *Hassan* v. *Canada (Minister of Employment and Immigration)* (1992), 147 N.R. 317 at 319 (F.C.A.).

[6] *Rasaratnam* v *Canada (Minister of Employment and Immigration)*, [1991] 1 F.C. 706 at 710 (F.C.A.). See also *Thirunavukkarasu*, *supra*, note 4 at 592-593.

applicant cannot cease to be a Convention refugee within the meaning of paragraph 2(2)(e) and, therefore, subsection 2(3) would not apply. A determination based on changes in country circumstances, however, involves a recognition that the applicant might at one time have been a Convention refugee, but is no longer, or has ceased to be, a Convention refugee because the conditions in the country have changed to such an extent as to eliminate the source of the applicant's fear.[7]

In this instance, it is clear that the tribunal based its decision, in part, upon a finding of an IFA outside the Punjab or Haryana. However, their determination also involved a recognition that circumstances had changed since 1984, when ethnic tensions were at their peak after the assassination of Mrs. Gandhi, and that the applicants remained in India until 1989 without any problems. In view of these findings, it is my opinion that the tribunal erred by failing to consider the application of subsection 2(3) to the applicants' case.[8] While I would agree that the Refugee Division may not have an obligation to consider every argument raised before it by an applicant, its failure to consider whether subsection 2(3) applies in this instance is fatal to its decision because it compounds the error previously made by the tribunal. Further, counsel for the applicants explicitly raised the issue at the beginning of the hearing before the tribunal and filed a medical report in support of its claim. In its decision, the tribunal failed to make any mention of either the medical report or subsection 2(3). While subsection 2(3) might not have applied in the circumstances of this case, it is not for the Court to speculate as to why the tribunal believed that subsection 2(3) did not apply and the failure of the tribunal to consider the issue in its reasons amounts to a reviewable error.

The tribunal also committed an error by failing to have regard to the psychological report in a more general sense. This evidence appears to have been reliable and directly relevant to the applicants' claims. In some instances such a report will support a credibility determination and in others a determination pursuant to subsection 2(3). In my view, it is also a relevant factor for determining whether an IFA is reasonable in the particular circumstances of the applicants. I have arrived at this conclusion, in part because of my view above that a finding of an IFA may preclude an applicant from the protection afforded in subsection 2(3). The rationale behind subsection 2(3) is a recognition that additional protection ought to be provided to "those who have suffered such appalling persecution that

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[7] *Canada (Minister of Employment and Immigration)* v. *Obstoj*, [1992] 2 F.C. 739 (F.C.A.).

[8] In *Brown* v. *Canada (Minister of Citizenship and Immigration)* (23 June 1995), IMM-2586-94, I discussed the circumstances in which the tribunal's obligation to consider subsection 2(3) is triggered and determined that the tribunal need not consider subsection 2(3) in every case, regardless of whether there is evidence or argument to support such an inquiry.

their experience alone is a compelling reason not to return them, even though they may no longer have any reason to fear further persecution."[9] In *Thirunavukkarasu*, the Court of Appeal determined that an IFA must be sought only if it is objectively reasonable to do so in the circumstances of the individual applicant.[10] The Court went on to elaborate on the nature of the question to before the tribunal and stated as follows:

> Rather, the question is whether, given the persecution in the claimant's part of the country, it is objectively reasonable to expect him or her to seek safety in a different part of that country before seeking a haven in Canada or elsewhere. Stated another way for clarity, the question to be answered is, would it be unduly harsh to expect this person, who is being persecuted in one part of the country, to move to another less hostile part of the country before seeking refugee status abroad?[11]

Thus, a psychological or medical report may provide objective evidence that it would be "unduly harsh" to expect the applicants who have been persecuted in the past in one part of the country to move to a less hostile part of the country. One can expect that like the application of subsection 2(3) such evidence will only "apply to a tiny minority of present day claimants."[12]

For these reasons, the application for judicial review is allowed and the matter is remitted to the Refugee Division for reconsideration in accordance with these reasons on the basis of the record presently before this Court and any additional evidence the tribunal or counsel may require.

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Judge

Ottawa, Ontario
July 4, 1995

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9 *Obstoj, supra*, note 7 at 748.

10 *Supra*, note 4 at 597.

11 *Ibid*. at 598.

12 *Obstoj, supra*, note 7 at 748.

IMM-75-95

OTTAWA, ONTARIO, THE 4TH DAY OF JULY, 1995

PRESENT: THE HONOURABLE MR. JUSTICE RICHARD

BETWEEN :

GURMEET SINGH AND JASWANT NARANG

Applicants

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT

UPON an application for judicial review of a decision of the Convention Refugee Determination Division of the Immigration and Refugee Board ("Refugee Division"), dated December 19, 1994, wherein the Refugee Division determined that the applicant was not a Convention refugee.

IT IS HEREBY ORDERED THAT:

The application for judicial review be allowed and the matter be remitted to the Refugee Division for reconsideration in accordance with my reasons on the basis of the record presently before this Court and any additional evidence the tribunal or counsel may require.

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Judge