Date: 20070710

Docket: IMM-5284-06

Citation: 2007 FC 732

Ottawa, Ontario, July 10, 2007

Present: The Honourable Mr. Justice Blanchard

BETWEEN:

GURDHIAN SINGH

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

1. Introduction

[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 dated September 6, 2006, by the Immigration and Refugee Board, Refugee Protection Division (Board). On that date, the applicant's refugee claim was refused.

[2] The applicant is asking this Court to set aside the Board's decision and to remit the matter for reconsideration by a differently constituted panel.

2. Factual Background

[3] The applicant is a citizen of India who holds the position of a *granthi* (priest). He claims to be a Convention refugee and a person in need of protection on the ground that he fears persecution by the police and by terrorists if he testifies against them.

[4] On August 12, 2003, a Ragi Jatha (a group of religious singers) came to the village temple. The next day, the police raided the temple and found weapons in the singers' musical instruments. Two of the singers were arrested and a third, Dalip Singh, escaped.

[5] The applicant was also arrested during the police intervention. He was tortured by the *cheera* method before being released. The applicant associates his release with the action taken by the village and temple councils which paid a bribe to the police. He maintains that he was treated by a doctor for his injuries.

[6] Following these events, the police searched the applicant's house and told him that he would be called to testify against the terrorists who had been arrested.

[7] In the wake of these events, the applicant took steps to obtain a visa for Canada but was unsuccessful.

[8] On January 24, 2004, Dalip Singh went to the applicant's home and threatened him with death if he testified against his friends. The applicant again unsuccessfully attempted to obtain a visa for Canada.

[9] On March 30, 2004, the police arrested the applicant; he was tortured, then released. The applicant again associates his release with action taken by the village and temple councils. However, he states that his family also paid a bribe to the police. After his release, the applicant was required to report to the police beginning May 1, 2004. He maintains that he also received medical treatment for his injuries.

[10] Carrying a false passport, the applicant left India on July 23, 2004, for Canada where he sought refugee protection.

[11] The Board decided the applicant's refugee claim on May 17, 2005. This decision was set aside by Mr. Justice Luc Martineau on November 30, 2005, on the ground that the findings concerning state protection and the non-credibility of the applicant were patently unreasonable.

[12] Another hearing before the Board took place on June 2, 2006, and a negative decision was made the same day. This is an application for judicial review of that decision.

3. Impugned decision

[13] The Board determined that the applicant was not a refugee under section 96 of the IRPA or a person in need of protection under section 97 because he had not provided any credible or

trustworthy evidence. The Board therefore found no credible basis to the claim under subsection 107(2) of the IRPA.

[14] In its reasons, the Board explained why the applicant's evidence was not credible. The Board rejected the applicant's testimony regarding his allegations of torture and concluded that Dr. Dongier's report did not support these allegations. The Board essentially determined that the findings of Dr. Dongier, who examined the applicant, did not confirm that the applicant had been tortured. According to the Board, this report only confirmed what the applicant said, i.e. that he suffers from pain in his legs, back and arm. The Board noted that, according to the documentary evidence, the torture that the applicant says he was subjected to leaves physical evidence such as scars or damage to joints and muscles, which were not mentioned in the expert's report. The Board also noted that when the immigration officer asked the applicant whether he had ever had any serious medical problems, he answered in the negative. The Board did not accept the applicant's explanation that he believed the question related to problems for which he was taking medication.

[15] Next, the Board considered it unlikely that the arrest of the suspected terrorists was not reported in the newspapers, even though the applicant admitted that some journalists had come to the village after the incident. On this point, the Board rejected the applicant's explanations that the journalists abandoned the idea in order to avoid creating a bad impression of the village and preventing his release. The Board also considered it implausible that the police did not publicize the matter, since they usually trumpet their success in the media when they have arrested suspected terrorists, thus showing how effective the police force is.

[16] Moreover, the Board believed that the applicant made up the story, considering his statements that no charges had been laid against him, no proceeding compelling him to appear before a court had been recorded and he did not know whether charges had been laid against the terrorists who had been apprehended.

[17] Finally, the Board identified a contradiction in the applicant's story. At the second hearing, he filed a second affidavit of the village *sarpanch,* i.e. exhibit P-10. In this affidavit, the *sarpanch* states that bribes were paid to both the police and the terrorists, whereas the first affidavit and the applicant's story mentioned only that a bribe had been paid to the police. Confronted with this contradiction, the applicant explained that it was his son who paid a bribe to the terrorists after the applicant had left for Canada. The Board rejected this explanation because according to the second affidavit of the *sarpanch*, the bribes were paid before the applicant left for Canada. The Board found that this inconsistency only added to the implausibility of the applicant's story and gave no probative value to Exhibit P-10.

4. Issues

[18] The issues to be determined by the Federal Court in this proceeding can be summarized as follows:

- Was the Board's decision based on patently unreasonable findings of fact?
- Did the Board err in not assessing the applicant's refugee claim based on his membership in a particular social group, i.e. baptized Sikhs?

5. Standard of review

[19] At the outset, the Court must determine the appropriate standard of review for the different issues that are before the Court. The first issue concerns the credibility of the applicant and his story. The courts have consistently held that the standard of review applicable to such findings is patent unreasonableness. See: *Aguebor v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 732 (QL); *R.K.L. v. Canada (Minister of Citizenship and Immigration*), [2003] F.C.J. No. 162 (QL) and *Khaira v. Canada (Minister of Citizenship and Immigration)*, 2004 F.C. 62.

[20] The second issue to be determined by this Court consists in assessing whether the Board should have analyzed the applicant's risks given that he is Sikh and is baptized. The appropriate standard of review for this issue is correctness, since it is a question of law.

6. Analysis

[21] First, the applicant contends that the Board erred in assessing the evidence and his credibility. In support of this argument, he submits that a number of the Board's findings of fact are erroneous. I carefully reviewed the various findings that the applicant referred to but found no error that would warrant review of the decision on this basis.

[22] Second, the applicant submits that the Board could not conclude that the claim has no credible basis without analyzing the evidence that baptized Sikhs, a group that he clearly belongs to, is a group at risk of persecution in India. In support of his argument, he refers to Mr. Justice Evans' statements in *Rahaman v. Canada (M.C.I.)*, 2002 FCA 89, [2002] 3 F.C. 537 at

paragraph 51:

> Finally, while I have not been able to accept the position advanced by counsel for Mr. Rahaman in this appeal, I would agree that the Board should not routinely state that a claim has "no credible basis" whenever it concludes that the claimant is not a credible witness. As I have attempted to demonstrate, subsection 69.1(9.1) requires the Board to examine all the evidence and to conclude that the claim has no credible basis only when there is no trustworthy or credible evidence that could support a recognition of the claim. [Emphasis added.]

In other words, for the Board to refuse a refugee claim because it has no credible basis, the Board must find that there is no credible evidence.

[23] It is clear from the Board's decision and the transcript of the hearing that the issue of the applicant's membership in a particular social group, i.e. baptized Sikhs, was not addressed. The applicant did not specifically raise this issue at the second hearing but did so at the first. At the first hearing, the applicant had submitted documentary evidence indicating that, although the situation for baptized Sikhs in India has improved in recent years, members of this group are always regarded as suspect by the authorities and are at risk of being arrested. Although the second hearing, which the applicant was entitled to following the order of Martineau J., was a hearing *de novo* of his refugee claim, all the documents pertaining to the first hearing had been placed in the file for the new hearing. From this perspective, the Board could not refuse the applicant's refugee claim on the ground that it had no credible basis without considering the credible and trustworthy evidence in the file regarding the applicant's status as a baptized Sikh and the risks of persecution associated with this status.

[24] The evidence concerning the applicant's membership in the group of baptized Sikhs is limited to the documentary evidence filed at the first hearing and the applicant's testimony. It should be noted that the applicant also identified himself in his Personal Information Form (PIF) as a member of the Sikh religion and stated therein that he had performed the duties of a priest in a Sikh temple. Furthermore, the applicant's status as a priest was also corroborated by exhibits P-2 and P-3, which consisted of an affidavit of the *sarpanch*, Surjit Kaur, and a letter from the Sikh temple in Ibrahimpur.

[25] Although the applicant's story was found to be not credible and no probative value was given to exhibits P-2 and P-3 in either the first or second decisions, the applicant's status as a Sikh priest was never questioned. The transcripts confirm that the members were not concerned about the truth of this information, in the sense that they did not really question the applicant about it. My colleague, Martineau J. found as a fact that the applicant was a member of the Sikh religion when he dealt with the application for judicial review of the Board's first decision on the applicant's refugee claim. In this context, I believe it is logical to assume that if the Board had subsequently questioned this part of the applicant's story, the Board would have specifically dealt with this issue in its reasons or, at the very least, would have addressed it at the hearing, but the Board did neither in this case.

[26] Accordingly, since there was uncontradicted evidence in the file establishing that the applicant was a Sikh priest and where the documentary evidence showed that baptized Sikhs are a group at risk of persecution in India, the Board could not properly find that the applicant's refugee claim had no credible basis.

[27] The Board was required to analyze the evidence that baptized Sikhs were a group at risk of persecution in India and to assess the risks faced by the applicant as a member of this group. The Board failed to do so.

[28] For these reasons, the application for judicial review of the decision of the Immigration and Refugee Board, Refugee Protection Division, will be allowed. The matter will be remitted for reconsideration by a differently constituted panel in accordance with these reasons.

[29] The parties did not submit a serious question of general importance for certification as contemplated by subparagraph 74(*d*) of the IRPA. I am satisfied that no such question was raised in this case. Therefore, no question will be certified.

ORDER

THE COURT ORDERS:

1. The application for judicial review of the decision dated September 6, 2006, by the Immigration and Refugee Board, Refugee Protection Division, is allowed.

2. The matter is remitted for reconsideration by a differently constituted panel in accordance with these reasons.

3. No serious question of general importance is certified.

"Edmond P. Blanchard"
Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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