Date: 20071211

Docket: IMM-6214-06

Citation: 2007 FC 1296

Ottawa, Ontario, December 11, 2007

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

MOHAN SINGH

Applicant

and

MINISTER OF CITIZENSHIP & IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) for judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated October 5, 2006, which found that the applicant was neither a Convention refugee nor a person in need of protection.

[2] The applicant requested that the decision be set aside and the matter referred back for redetermination by a differently constituted panel.

Background

[3] Mohan Singh (the applicant), is a citizen of Guyana. The applicant sought refugee status on the basis of his race and ethnicity, namely Indo-Guyanese. In addition, he claims to be a person in need of protection. The circumstances which led to his claim for refugee status were set out in the background portion of the Board's decision.

[4] The applicant alleged that he and his co-workers were attacked by a group of Afro-Guyanese men in 2001 and 2002. These men used racial slurs and robbed them of money and jewellery. The applicant then fled to the U.S. and made an asylum claim. This claim was rejected and the applicant filed an appeal, but he voluntarily left the U.S. and returned to Guyana before the appeal was heard. Having returned to Guyana, the applicant alleged that he and a co-worker were attacked again by Afro-Guyanese men in 2005. The applicant also alleged that his friends and family members of the same race and ethnicity were also subject to similar persecution. His friend's car was hijacked and his uncle was robbed. The applicant attributed all the attacks by Afro-Guyanese to his race and ethnicity, namely, Indo-Guyanese. As a result of his fear, the applicant fled to Canada in March 2006 and filed his application for refugee status upon arrival.

Board's Decision

[5] In its decision, the Board found that the applicant was neither a Convention refugee, nor a person in need of protection on the basis that there was no subjective or objective bases to the applicant's claim.

[6] With regards to the Convention grounds of race and ethnicity claimed by the applicant, the Board found on a balance of probabilities that the applicant was a victim of random attacks by criminals and "bandits" for his cash and jewellery, which was unrelated to his race and ethnicity. In making this finding, the Board considered the applicant's Port of Entry declaration (POE). Specifically, the Board noted that there was no mention in the POE declaration that the agents of persecution were Afro-Guyanese. The Board also noted that the applicant was given more than one chance to identify the agents of persecution during the POE interview. The Board stated that "the first telling of a story is more persuasive than subsequent versions". The Board noted that the documentary evidence indicated tension and polarization between Afro-Guyanese and Indo-Guyanese. The Board considered the political commitment of the ruling party and the opposition party to ensure democracy, peace and development. Given the finding that the applicant's fear was only of random incidents of violence and the political commitment to change country conditions, the Board found that there was no more than a mere possibility of the applicant being persecuted on the basis of his race if he returned to Guyana.

[7] With regards to the serious risk of harm under section 97 of the Act, the Board stated that this protection is limited to those who face a specific risk that is not generally faced by others in the country; the risk must not be indiscriminate or random. The Board considered the high crime rate in Guyana and government's efforts to address the situation. The Board found that anyone in Guyana could be a victim of generalized crime, and as such, it did not constitute a serious risk of harm as defined in section 97 of the Act.

[8] With regards to the subjective basis for the applicant's claim, the Board found that the applicant's reavailment to his country's protection and time lapse of several years before again leaving and making a claim, indicated a lack of subjective fear and belied a well-founded fear of persecution or need for protection. In making this finding, the Board considered the fact that while the applicant's failed asylum application was being appealed, he voluntarily left the U.S. and returned to Guyana.

[9] The Board concluded in finding that there was insufficient credible or trustworthy evidence that the applicant had a well-founded fear of persecution by reason of any of the enumerated Convention grounds. The Board also found that the applicant was not a person in need of protection pursuant to section 97 of the Act.

Issues

[10] The applicant submitted the following issues for consideration:

1. Failure to assess credibility of the applicant's subjective fear.
2. Error of law: Failure to consider the absence of state protection.
3. Error of law: Failure to consider relevant matters

[11] I would rephrase the issues as follows:

1. What is the appropriate standard of review?
2. Did the Board err in finding that the applicant lacked a subjective fear?
3. Did the Board err in failing to consider the adequacy of state protection in Guyana?
4. Did the Board err in failing to consider all the evidence before it identifying the agents of persecution as Afro-Guyanese?

Applicant's Submissions

[12] The applicant raised three grounds for review: (1) the Board's finding of no subjective fear, (2) the Board's failure to consider the adequacy of state protection; and (3) the Board's failure to consider the evidence before it identifying the agents of persecution as Afro-Guyanese.

[13] On the first ground of review, the applicant submitted that he provided the Board with reasons as to why he returned to Guyana after his failed asylum claim in the U.S. The applicant submitted that the reasons given clearly stated that he did not reavail himself to the protection of his country and that his subjective fear has not been lost. The applicant submitted that he advised the Board during the hearing that he returned to Guyana because his U.S. counsel had advised him that

no matter what he did or how real his subjective and objective fears were, the U.S. government would say that there was state protection available for citizens of Guyana. The applicant submitted that testimony given under oath is presumed to be true unless there are valid reasons to doubt its truthfulness. As the Board did not expressly reject his testimony, the only logical conclusion is that the evidence was accepted.

[14] With regards to the second ground for review, the applicant submitted that the Board failed to consider the absence of state protection. The applicant submitted that the Board also failed to provide evidence to support its finding that the applicant would not encounter physical harassment or harm by returning to Guyana. The applicant referenced paragraph 65 of the *Handbook on Procedures and Criteria for Determining Refugees*, which provides that serious discriminatory or other offensive acts committed by the local populace can be considered persecution if they are knowingly tolerated by police. The applicant submitted that the Board must evaluate a state's real capacity to protect (*Mitchell* v. *Canada (Minister of Citizenship and Immigration)* 2006 FC 133, *Elcock* v. *Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No. 1438 (T.D.)). The applicant submitted that where the evidence, including the documentary evidence, situates the individual applicant's experience as part of a broader pattern of state inability or refusal to extend protection, then the absence of state protection is established.

[15] Finally, the applicant submitted that the Board failed to consider the evidence as to the identity of the agents of persecution, specifically, the applicant's testimony during his hearing and his PIF. The applicant submitted that while during his POE interview he used the word "bandits",

he testified during his hearing that he was referring to the "Afro-Guyanese". The applicant submitted that a Board must consider all the evidence before it and in some instances must refer to the evidence (*Cepeda-Gutierrez* v. *Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. no. 1425 (F.C.T.D.) at paragraphs 15 to 17).

Respondent's Submissions

[16] The respondent submitted that the applicant has not cited any error in the Board's decision but has simply disagreed with the Board's finding. With regards to the identity of the agents of persecution, the respondent submitted that the applicant has offered no proof that the proper word in Guyana for a major ethnic group, the Afro-Guyanese, is "bandits". The respondent submitted that the Board properly found that the applicant did not mention Afro-Guyanese as the reason for his fear in his POE declaration. The respondent submitted that the Board is entitled to take into consideration contradictions and inconsistencies in the evidence when assessing credibility, including between statements at the POE and later testimony (*Canada (Minister of Employment and Immigration)* v. *Dan-Ash* (1988), 93 N.R. 33 (F.C.A.), *He* v. *Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 1107 (C.A.), *Rajaratnam* v. *Canada (Minister of Employment and Immigration)* (1991), 135 N.R. 300 (F.C.A.), *Ramirez* v. *Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 803 (T.D.), *Zaloshnja* v. *Canada (Minister of Citizenship and Immigration)*, 2003 FCT 206).

[17] The respondent submitted that contrary to the applicant's assertions, the Board did consider his explanation for having voluntarily returned to Guyana. The respondent submitted that the Board noted that he was in detention in the U.S. and did not wish to remain in detention any longer. Reavailment is a valid consideration in assessing subjective fear (*Tejani* v. *Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 528 (T.D.), *Zergani* v. *Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 493 (T.D.), *Galdamez* v. *Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 1983 (T.D.), *Hoballah* v. *Canada (Minister of Employment and Immigration)*, [1995] F.C.J. No. 37 (T.D.)). The respondent also submitted that the applicant's presumption that sworn testimony is always true is rebuttable and should only be given when the Board is satisfied of the applicant's general credibility and the plausibility of the applicant's statements (*Chan* v. *Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593, *Gomez-Carrillo* v. *Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 1396).

[18] With regards to the failure to consider state protection, the respondent submitted firstly that the Board did consider state protection and secondly, that a finding of no subjective or objective basis for a claim is sufficient to uphold a refusal of refugee status. The respondent submitted that in any event, the applicant failed to rebut the presumption of state protection.

[19] And finally, the respondent submitted that sending this case back for redetermination would yield an inevitable result as the applicant failed to identify any nexus between the alleged events and any Convention ground. Victims of criminal activity do not constitute a particular social group and

therefore a person's fear of risk from criminals cannot be the basis of a valid refugee claim (*Canada (Attorney General)* v. *Ward*, [1993] 2 S.C.R. 689, *Suarez* v. *Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 1036 (T.D.), *Valderrama* v. *Canada (Minister of Citizenship and Immigration)* (1998), 153 F.T.R. 135).

Analysis and Decision

[20] **Issue 1**

What is the appropriate standard of review?

The appropriate standard of review for the Board's finding on subjective fear is patently unreasonable (*Abawaji* v. *Canada (Minister of Citizenship and Immigration)* 2006 FC 1065). The Board's overall finding on the adequacy of state protection is reviewable on a standard of reasonableness (*M.P.C.R.* v. *Canada (Minister of Citizenship and Immigration)*, 2005 FC 772).

[21] I propose to first deal with issue 4.

Did the Board err in failing to consider the evidence before it identifying the agents of persecution as Afro-Guyanese?

The applicant submitted that the Board failed to consider the applicant's oral testimony and his PIF which identified Afro-Guyanese as the agents of persecution. The respondent submitted that the Board is presumed to have taken all the evidence into consideration.

[22] I agree with the respondent that it is well established in law that the Board is presumed to have taken all the evidence before it into consideration in rendering its decision (*Florea* v. *Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 598 (F.C.A.)). However, in *Cepeda-Gutierrez* above, Justice Evans stated at paragraph 17:

> […] the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence": *Bains* v. *Canada (Minister of Employment and Immigration)* (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact.

[23] The portion of the Board's decision dealing with the identity of the agents of persecution reads as follows:

> ***Convention grounds***
>
> ***Race and ethnicity vs. crime*** – When the claimant came to Canada and made a claim, he was interviewed by an immigration officer (IO) (ref: Exihibit M-1, Record of Examination) and asked questions.
>
> > Q. What are you afraid of if returned to your country and why?
> >
> > A. I'm afraid of being killed.
> >
> > Q. Who are you afraid of if returned to your country and why?
> >
> > A. There is a lot of criminality in Guyana.

> The claimant was asked why there was no mention of being killed by the Afro-Guyanese for being Indo-Guyanese; he responded that he had come at night; he was confused and scared; he was given a piece of paper to write on. In a declaration, he solemnly stated in his own handwriting: fear for my life; I was beaten; to be kill(ed) by bandit; to be hijack(ed); to be rob(bed). It was pointed out to him that again, he made no reference to the agents of persecution of harm being the Afro-Guyanese. He said without responding that he did not mention this.
>
> This was the claimant's second attempt to seek international protection, the first time in the U.S., because of alleged persecution due to his ethnicity, and this was his opportunity to tell his story honestly to a Canadian official. The first telling of a story is more persuasive than subsequent versions. The panel finds on a balance of probabilities that, the claimant was a victim of random attacks by criminals and "bandits" for his cash and jewellery, which was unrelated to his race and ethnicity.

[24] The Board clearly relied on the POE declaration in making its decision that the applicant was a victim of general violence unconnected to his race and ethnicity. Moreover, it appears that the Board gave a great deal of weight to the applicant's lack of explanation at his hearing for not having identified Afro-Guyanese as the agents of persecution during his POE declaration.

[25] Based on the reasoning in *Cepeda-Gutierrez* above, the Board should have in the least addressed the evidence provided in the applicant's PIF and his oral testimony at the hearing as to the identity of the agents of persecution.

[26] The applicant's PIF clearly sets out that he fears persecution from Afro-Guyanese males. In fact, the entire first page of his PIF describes the political and social culture in Guyana that has led to the current tension between Afro- and Indo-Guyanese. Furthermore, in his PIF the applicant

identifies the agents of persecution from his November 2001, March 2002 and June 2005 attacks as Afro-Guyanese.

[27] In addition to his PIF, the applicant also identified his attackers as Afro-Guyanese at his immigration hearing:

> COUNSEL: When you wrote on you solemn declaration and you stated “by bandit”, who was the bandit?
>
> CLAIMANT: Afro-Guyanese.
>
> COUNSEL: When you said “to be hijacked”, what were you afraid of being hijacked or robbed from?
>
> CLAIMANT: From the Afro-Guyanese men.

[28] These two pieces of evidence, the applicant’s PIF and oral testimony clarifying the POE declaration, were directly relevant to a material point in the Board’s decision. Moreover, this evidence contradicts the Board’s finding that no nexus existed between the violent incidents and the Convention ground of race and ethnicity.

[29] I cannot tell what decision the Board would have arrived at if it had considered this evidence. The Board’s failure to expressly address these pieces of evidence constitutes a reviewable error.

[30] Because of my finding on these issues, I need not deal with the other issues.

[31] The application for judicial review is therefore allowed, the decision of the Board is set aside and the matter is referred to a different panel of the Board for redetermination.

[32] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

[33] **IT IS ORDERED that** the application for judicial review is allowed, the decision of the Board is set aside and the matter is referred to a different panel of the Board for redetermination.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

The relevant statutory provisions are set out in this section.

The *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA):

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,	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) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	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 la protection de chacun de ces pays;
(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.	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.
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	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) to a danger, believed on substantial grounds to exist, of torture within the meaning of	a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au

Article 1 of the Convention Against Torture; or

sens de l’article premier de la Convention contre la torture;

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

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 themself 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 inhérents à celles-ci ou occasionnés par elles,

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

(iv) la menace ou le risque ne résulte pas de l’incapacité du pays de fournir des soins médicaux ou de santé adéquats.

(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.

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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