Date: 20080402

Docket: IMM-3605-07

Citation: 2008 FC 417

Ottawa, Ontario, April 2, 2008

PRESENT: The Honourable Justice Johanne Gauthier

BETWEEN:

Harjinder Singh Bajwa

Applicant

and

Minister of Citizenship and Immigration

Respondent

REASONS FOR ORDER AND ORDER

[1] Mr. Bajwa seeks judicial review of the Refugee Protection Division's decision rejecting his claim under sections 96 and 97 of the *Immigration and Refugee Protection Act*. S.C. 2001, c. 27.

[2] The applicant is a young man from India who owned a farm of about 25 acres in the village of Mudowwal, in Punjab province. One of his hired hands, who worked several summers before being hired permanently and given lodging, was a Muslim named Tarik. One day in April 2005, Tarik received a friend who apparently left a bag containing a gun and a small bomb in his room on the farm. This bag was found by the police who came to search Tarik's room shortly after he and his friend left the farm the next day. After this discovery, the applicant was allegedly arrested, beaten

and tortured by the police, who wished to elicit information about the whereabouts of Tarik and his visitor, whom they suspected of being J&K militants.

[3] In his PIF and his testimony at the hearing before the RPD, the applicant indicated that he was released after a few days detention upon the intervention of the Sarpanch and the payment of a bribe of 25 000 rupees, and having been made to promise that he would notify the police of any new information he might learn concerning Tarik or his friend. In support of his story, the applicant produced documentary evidence from the medical clinic where he was treated upon his release (at p. 307 of the certified record), as well as other documents, such as an affidavit of the Sarpanch (at p.305) and documents related to the farm (at pages 291-299).

[4] About two and a half months later, on July 3rd, 2005, Tarik and his friend allegedly returned to the farm in the evening to claim their bag. When told by the applicant about the police raid and his arrest and detention, they threatened him and struck him over the head with a gun. They were interrupted however by the sound of an approaching car, at which point they took fright and fled into the fields, leaving the applicant shaken and afraid. On the advice of his father, the applicant decided that with his father and the Sarpanch, he would go to the police the next morning to report the incident.

[5] The police inspector was apparently furious that he had not been advised more promptly of the appearance of Tarik and his friend at the farm. He asked the Sarpanch and the applicant's father to leave the room and proceeded to arrest and detain the applicant for another three days, during which

time he was again beaten and mistreated. Again, he was allegedly released only after the intervention of the village council and the payment of a bribe of 40 000 rupees. This time, and under threat of death, the applicant was instructed to report back to the police on August 1st with definite information on the actual whereabouts of the two suspected militants.

[6] Before the expiration of the deadline, the applicant and his family went into hiding in different places. When told by his neighbour that the police actually showed up to ask about him after August 1st, he decided to flee with the help of an agent, but using his own passport. With the agent's help and advice, he obtained a visa to visit his sister in Canada and to pass through Indian immigration at the airport without facing any questions.

[7] The RPD rejected the claim about four months after the hearing in an unusually short decision, which contains an analysis of no more than four paragraphs. In the first two paragraphs the RPD explains that it rejects the applicant's story as inherently implausible because a) it was implausible that a person suspected of representing a danger to the Indian State because of his association with dangerous terrorists from Kashmir could be released at the urging of the Sarpanch after only two or three days in custody; and b) that his second arrest and release through the intervention of the village council and Sarpanch was also implausible. It is not clear on what basis this finding in respect of the second arrest was made; it is merely followed by various questions: If the Sarpanch is so influential, why did he not object to the claimant's arrest? Why did he wait three days before intervening and allow him to be subjected to torture for a second time?

[8] The next two paragraphs deal with the availability to the applicant of an internal flight alternative (IFA). In that respect, the RPD wrote:

> The panel also examined the possibility of an internal flight alternative should the claimant's story be credible. The claimant alleged that he could be found wherever he goes in India. He was unable to satisfactorily tell the panel how he, who is not a militant and who does not have an arrest warrant issued against him, could be found if he used an internal flight alternative.
>
> The panel points out the documentary evidence that clearly demonstrates that an internal flight alternative is possible for the claimant if his story is true and that he could be employed.

[9] The footnote labelled "2" refers to chapter 6.194 of the October 5, 2005 U.K report found at pages 73 and following of the certified record. The applicant argues that the implausibility finding is totally unreasonable and cannot be saved by the "pseudo analysis" of the IFA issue, which refers to neither the explanation given by the applicant at the hearing nor to the specific documentary evidence referred to during the hearing, or to other documentation directly contradicting the finding that the issue is "clear".

Analysis

[10] In respect of those two questions of fact, in light of the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9 and the pragmatic analysis undertakenseveral judgments of this Court in respect of similar findings of the RPD, there is little doubt that the standard of reasonableness must be applied here.[1]

[1] The possible impact of section 18.1 (4) of the Federal Courts Act was not raised by the parties. See *The Minister of Public Safety and Emergency Preparedness v. Lennox Philip*, 2007 FC 908.

[11] At paragraph 47 of *Dunsmuir*, it is set out that "[a] court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law." This passage appears to have been adopted in substance by the Federal Court of Appeal in *Canada (Attorney General) v. Grover*, 2008 FCA 97, at paragraph 6.

[12] The applicant adds that the Court should continue to apply the teachings of *Canada (Director of Investigation and Research)* v. *Southam Inc.*, [1997] 1 S.C.R. 748, at paragraph 55, as regards the content of the reasonableness standard. For the respondent, it is significant that the Supreme of Canada in *Dunsmuir* did not deal specifically with credibility findings, and says that it is not clear that it intended in any way to attenuate the deference previously accorded decision makers in respect of such findings, under the patent unreasonableness standard of review.

[13] In this particular case, whether the Court were to evaluate the decision against the old standard of patent unreasonableness or the new standard of reasonableness set out in *Dunsmuir*, there would be cause to intervene.

[14] Despite the fact that they were issued several months after the hearing, it cannot be disputed that the reasons supporting the RPD's implausibility findings are hastily drawn and minimally developed.

The applicant's contention that they are out of step with the teachings of the jurisprudence is well taken.

[15] As noted by Justice Edmond Blanchard in *Divsalar v. Canada (Minister of Citizenship and Immigration*), (2002) F.C.T. 653, at para. 24:

> Further, it is accepted that a tribunal rendering a decision based on a lack of plausibility must proceed with caution. I find it useful to reproduce the following passage from L. Waldman, Immigration Law and Practice, (Markham: Butterworths Canada Ltd. 1992) at page 8.10, paragraph s. 8.22 which deals with plausibility findings and the impact of documentary evidence that may be before the tribunal:
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> > s.8.22 Plausibility findings should only be made in the clearest of cases - where the facts as presented are either so far outside the realm of what could reasonably be expected that the trier of fact can reasonably find that it could not possibly have happened, or where the documentary evidence before the tribunal demonstrates that the events could not have happened in the manner asserted by the claimant. Plausibility findings should therefore be "nourished" by reference to the documentary evidence. Moreover, a tribunal rendering a decision based on lack of plausibility must proceed cautiously, especially when one considers that refugee claimants come from diverse cultures, so that actions which might appear implausible if judged by Canadian standards might be plausible when considered within the context of the claimant's background.

[16] In respect of the first and second arrest, the RPD appears to have assumed that the police thought that the applicant himself represented a danger to the Indian State, and that he personally committed a grave crime. There is simply no evidence to that effect. The evidence from the

applicant himself was that the police suspected him of aiding potential militants by offering them shelter. Moreover, considering the ample documentary evidence attesting to widespread corruption within the Indian police and the frequency of arbitrary arrest, the RPD could not have based its assumption solely on the fact that the applicant was arrested.

[17] It is also unclear how one could reasonably conclude based on common sense alone, and in light of the documented conditions in India, that it would be implausible for the police to release a person like the applicant on the payment of a bribe. In the circumstances, the RPD would have had to indicate on what particular documentory evidence or specialized knowledge it relied upon, if any, to come to its conclusion. Without this information, the Court cannot properly assess its reasoning.

[18] With respect to the second and only other reason set out for rejecting the testimony of the applicant and the corroborating evidence produced, it is unclear which part of the story was found to be implausible. Did the RPD believe that the village council or the Sarpanch would have had the necessary clout to prevent the arrest of the applicant, if as it was alleged, the Sarpanch accompanied the applicant when he went to the police? If so, there is no evidence in the certified record supporting any such conclusion. The applicant himself testified only that the Sarpanch was an elected official, a respected person, and later the Chief of his village.

[19] If instead what triggered the conclusion of implausibility was the allegation that the council only intervened to secure the applicant's release three days after the arrest, once again the only evidence on file is the testimony of the applicant, who indicated that he did not know when the Sarpanch or the village council intervened, or whether they were obliged to negotiate his release while he was in detention, because he simply was not privy to that information. In the circumstances, the RPD's assumption that the intervention only came about three days after the arrest is difficult to follow. In the absence of a specific reference to documentary evidence or specialized knowledge supporting this finding, again here the Court cannot conclude that it was reasonably drawn from the evidence on file.

[20] It remains to be considered whether these errors are material to the outcome, given the RPD's second conclusion as regards the existence of an IFA. The applicant noted that the language of the first paragraph of the portion of the decision which deals with an IFA (cited above at paragraph 8) leaves the impression that the RPD failed to appreciate that the determination as to the existence of an IFA relies on an objective test. To conclude in the sense urged by the applicant would require that one read the sentence to indicate that the RPD only considered the applicant's explanation, and had no regard to the documentary evidence dealing with persons similarily situated.

[21] The Court is not prepared to come to such a conclusion on the sole basis of the wording of the first paragraph.

[22] But what is more troubling is the fact that at the hearing, the RPD specifically refered to paragraph 6.194 of the U.K report, the only document cited to support its conclusion that there was "clearly" an IFA for the applicant. The applicant initially answered that were he to relocate, a newcomer like him would quickly attract the attention of the local police, who would then require him to identify himself. Later, his counsel made a point of noting during his statement that the particular information relayed by the UK report was dated, and was in fact contradicted by other documents on file. Counsel drew the RPD's attention to the fact that in the time since the U.K report was issued, the police in several areas have instituted mandatory tenant verification forms, through which it is ostensibly possible to track newcomers to various districts (see pages 273 and following of the certified record, as well as the copy of one such form reproduced at page 283). There is also evidence on the record that makes it clear that the Punjabi police will track down people whom they want to track; this appears to be undisputed. What is the subject of some contradictory evidence in the documentation is the profile of persons for whom the police would actually make such an effort. Some documentation indicates that it is "high profile" suspects that are at risk, while elsewhere it is suggested that any person who has been the subject of human rights abuses in the past would be at risk, particularly those of the lower economic class and with no political clout. (see for example IRBC document no. IND100771.EFX at p. 77 of the certified record)

[23] In light of the above, the Court agrees with the applicant that the use of the word "clearly," considered alongside the impugned decision's lack of any specific reference to either the applicant's detailed explanation at the hearing or the documentation referred to, leads one to

conclude that either the RPD failed to appropriately articulate the reasons for its decision, or simply failed to consider the specific explanation and documentation referred to by the applicant at the hearing, for in this particular instance, the Court is prepared to infer as much from the RPD's silence (*Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1425). Either way, these flaws vitiate the RPD's conclusion in respect of the existence of an IFA.

[24] As noted at the hearing, the Court certainly does not wish to discourage succinct and shorter reasons, but as a famous author once wrote, "I have made this letter longer than usual, only because I have not had time to make it shorter". Brevity demands clarity and precision; absent these qualities, brief reasons will risk falling short of the requirements of both the reasonableness standard of review and the duty of fairness. The essential point is that reasons must be sufficiently clear and intelligible to enable a reviewing Court to discharge its duty.

[25] Obviously, none of these comments should be taken to reflect on the underlying merits of the claim and availability or not of an IFA for the applicant in India.

[26] The parties did not present any questions for certification. The Court is satisfied that this case turns on its own facts and involves no question of general interest.

ORDER

THIS COURT ORDERS that the application is granted. The decision is set aside and the matter will have to be reconsidered (after a new hearing) by a new panel differently constituted.

"Johanne Gauthier"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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