Date: 20090129

Docket: IMM-3018-08

Citation: 2009 FC 88

Ottawa, Ontario, this 29th day of January 2009

Before: The Honourable Mr. Justice Pinard

BETWEEN:

JEYARAJ Jagatheesh

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act"), of a decision of the Immigration and Refugee Board, Refugee Protection Division (the "Board"), dated May 15, 2008, which found that the applicant was neither a Convention refugee nor a person in need of protection, under section 96 or 97 of the Act.

[2] The applicant, Jagatheesh Jeyaraj, is a citizen of India who alleges that he was persecuted in his homeland because he is homosexual.

[3] The Board set out essentially two bases for its finding that the applicant did not qualify as either a Convention refugee or a person in need of protection: lack of credibility, based in part on incongruities between the narrative in his Personal Information Form ("PIF") and his oral statements; and the existence of an internal flight alternative ("IFA") within India.

Credibility

[4] The Board had several bases for finding that the applicant was not credible:

- The applicant was unable to produce documents proving his whereabouts, including at the time of the alleged persecution, and could produce no proof of his work in South Korea;
- The applicant omitted certain details from his PIF, which he raised at the hearing; and
- The applicant waited over two months after coming to Canada before seeking to obtain refugee status.

[5] In the early passages of its decision, the Board acknowledged that the claimant had valid identity documents, but noted that he was unable to provide any documents – such as a letter of employment or pay stub – to prove he worked in Korea. The Board concluded that "[t]he excuses given by the claimant to justify the lack of documents about an alleged 10-month stay in South Korea … are implausible".

[6] The respondent claims that the period of time spent in South Korea is at "the heart of the claim". The applicant, for his part, argues that the period he spent overseas is not of great

significance to his claim, playing no role in his narrative except as the place where he happened to become romantically involved with his lover.

[7] In my view, if the Board erred on this point, it was not in its conclusion regarding the absence of documents proving that the applicant worked in Korea; rather, it was in its failure to examine the identity documents to determine whether they corroborated the applicant's claims about his whereabouts at relevant points in his narrative, and particularly at the time of his persecution.

[8] There was no question in this case about the identity of the applicant; travel documents were thus not required for this purpose. The applicant explained that the agent who had assisted him in obtaining a visa to come to Canada had refused to return his passport, and provided a police report produced in response to his complaint about the theft. The documents that were presented to the Board provided evidence, albeit circumstantial, of the applicant's travel history. For instance, the applicant's driving permit, college ID card and diploma place him in India from 1997 to 1999. The issuance of an international driving permit in November 2003 is consistent with his testimony that he traveled outside of India in December 2003 to go to South Korea. His passport, issued in India in December 2004 – a copy of which was provided to the tribunal – is consistent with his testimony that he had returned to India by October 2004, following his time in Korea. Finally, the issuance of a Canadian visa on August 8, 2005, as confirmed by Citizenship and Immigration Canada, is consistent with his presence in India at that time. The Board member offers no analysis of the significance of these documents in corroborating the applicant's account.

[9] The applicant further argues that the Board erred with respect to its finding that he omitted certain details from his PIF, which he later raised at the hearing. First, the Board alleges that the applicant failed to write in his narrative that he had lost his job and could not leave his house until he fled to Canada as a result of his persecution. However, the applicant writes the following in his PIF:

> When I came home it was to more beating from my father and brothers. I lost my job. My personal sexual preference and story was leaked out. I could not find work as somehow the gossip got to the new place either before I started the work or a few days after I started. Each time I tried to get together with my partner I was blocked by either his family or mine. Everyone was humiliating me. Friends and relatives started to treat me as though I was dirty. It came to such a stage where I could not go to any temple to pray or any other public place. The priests at the temple I go to regularly since a child told me to stop coming. They said many people have complained to the management of the temple about me. They said it was against our religion and that is a bad thing that I am doing. They said that if I continued to go to the temple there were people who were going to kill me. The whole society treated me like rubbish.
>
> [My emphasis.]

[10] This excerpt plainly contradicts the Board's finding. The Board's second allegation on this point is that the applicant failed to mention in his PIF that he had taken a three-month non-certificate course in 2003, stating instead that he had completed his studies in 1999. This new information was found to amount to a contradiction. At the first hearing, the applicant attempted to explain the omission:

> By Presiding Member
>
> - You were shown the PIF at the beginning, sir. You said it was true and correct. It's only after I start asking questions that you said that you actually went to school much longer.

> Q: Could you explain the contradiction between your testimony and your Personal Information Form?
>
> A: […] I had completed my education […] according to what I had stated in the PIF. But, you know, that course which I did […] they don't issue certificates or anything like that for that. That's why I did not mention about that in that.

[11] In my view, the position taken by the Board was unreasonable. The Board cites *Basseghi v. Canada (M.E.I.)*, [1994] F.C.J. No. 1867 (T.D.) (QL), where Justice Max M. Teitelbaum observes:

> It is not incorrect to say that answers given in a PIF should be brief but it is incorrect to say that the answers should not be complete with all of the relevant facts. <u>It is not enough for an applicant to say that what he said in oral testimony was an elaboration. All relevant and important facts should be included in one's PIF</u>. The oral evidence should go on to explain the information contained in the PIF. [My emphasis.]

[12] I would add that it is not enough for a Board member to cite jurisprudence, without engaging in any analysis of why the fact allegedly omitted from the PIF is "important" or "relevant". It is not a light matter to impute disingenuous intent to an applicant; the Board has a responsibility to attempt to differentiate those omissions that are innocent from those that are not. There is not, in my view, any basis in the record for the Board to have concluded that: "the claimant adjusted his answers as the panel questioned him about this subject, which undermines his credibility".

[13] The final point that undermined the applicant's credibility, according to the Board member, was the delay in bringing his application. This Court has previously held that it is open to a Board member to make a negative inference with respect to subjective fear, when there is a delay in

applying for refugee status (*Huerta v. Canada (M.E.I.)*, [1993] F.C.J. No. 271 (C.A.) (QL), 157 N.R. 225). A delay is, however, not a decisive factor (*Osipenkov v. Canada (M.C.I.)*, [2003] F.C.J. No. 59 (T.D.) (QL), 2003 FCT 57, at paragraph 3). Given the flaws I have identified with respect to principal findings grounding the Board's conclusion about credibility, the delay does not, to my mind, constitute a sufficient basis to dismiss the application.

Internal Flight Alternative

[14] In this case, the Board turned to consider an IFA despite having identified numerous credibility issues. At pages 5 and 6 of his decision, the Board member cites a passage from the Response to Information Request IND42507.E, which, notwithstanding a number of positive assertions about the treatment of homosexuals in India, includes the following information:

> … there have also been allegations that Section 377 of the law is being used by corrupt police to extort money from gay men …
>
> With respect to available resources and support for homosexuals in India, the PUCL states that "there are organizations, helplines, publications/newsletters, health resources, social spaces and drop-in centers in most of the major cities in India …; however, despite the presence of such organizations, the PUCL adds that there is a "lack of resources, personnel, government support and extreme societal/state discrimination" and even the most established organizations reach only a small number of sexual minorities …

[15] According to the U.S. Department of State Country Report on Human Rights Practices in India for 2006, Section 377, which bans homosexual relationships, "was often used to target, harass, and punish lesbian, gay, bisexual, and transgender persons". In addition, "homosexuals were detained in clinics against their will and subjected to treatment aimed at 'curing' them of their homosexuality". The UK Home Office report on India of May 2007 cites sources reporting

"widespread police harassment, abuse and extortion against LGBT people and other sexual minorities in India" and the "impact of local media and popular psychology instilling fear and creating a hostile climate for LGBT people". Neither document is mentioned by the Board member in his decision. He concludes:

> After reviewing the documentary evidence, the panel is of the opinion that the claimant can relocate to another, more populated, area, where he would be free from mistreatment by his family and the family of his supposed lover, and where he could take advantage of agencies that assist homosexuals. The claimant is likely to face discrimination, but not persecution within the meaning of *Rajudeen*…

[16] In *Rajudeen v. Canada (M.C.I.)*, [1984] F.C.J. No. 601 (QL), 55 N.R. 129, the Federal Court of Appeal turns to the dictionary for guidance on the meaning of persecution, which was not defined in the former *Immigration Act*, S.C. 1976-77, c. 52, and is not defined in the present legislation. Accordingly, to "persecute" is: "To harass or afflict with repeated acts of cruelty or annoyance; to afflict persistently, to afflict or punish because of particular opinions or adherence to a particular creed or mode of worship". Similarly, "persecution" is: "A particular course or period of systematic infliction of punishment directed against those holding a particular (religious belief); persistent injury or annoyance from any source".

[17] As Justice Danièle Tremblay-Lamer notes in *Soto v. Canada (M.C.I.)*, [2002] F.C.J. No. 1033, 2002 FCT 768, at paragraph 10:

> The distinction between persecution and other acts of harassment not warranting international protection will not always be easy to make. It is a mixed question of law and fact to be determined on case-by-cases basis by the Board.

[18] The Board in this case, however, did not mention the above documentary evidence in its decision and made no attempt to explain why the treatment described in the reports cited, and elsewhere in the documentary evidence, does not amount to “persecution”. Had such mention been made and such an analysis been conducted, its conclusion would warrant deference from this Court. However, the failure to address relevant and important allegations contained in the above reports, and the complete absence of any analysis, constitute, in my view, errors warranting the Court’s intervention.

[19] For all the above reasons, the application for judicial review is allowed and the matter is sent back for re-determination by a newly constituted panel, in accordance with these Reasons.

JUDGMENT

The application for judicial review is allowed. The decision rendered on May 15, 2008 by the Refugee Protection Division of the Immigration and Refugee Board is dismissed and the matter is sent back for re-determination by a newly constituted panel, in accordance with the Reasons for Judgment rendered this day.

"Yvon Pinard"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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