Federal Court  Cour fédérale

Date: 20091022

Docket: IMM-135-09

Citation: 2009 FC 1070

Ottawa, Ontario, October 22, 2009

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

SURINDER SINGH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an application for judicial review of a decision by the Refugee Protection Division of the Immigration and Refugee Board (panel), dated December 17, 2008, which found that the applicant was not a Convention refugee or a person in need of protection within the meaning of sections 96 and 97 of the *Immigration and Refugee Protection Act* (IRPA).

[2] After examining the record as well as the written and oral submissions made by the parties, I find that this application must be dismissed. The following paragraphs explain the reasons for this decision.

FACTS

[3] The applicant is a 31-year-old Sikh from Punjab and an Indian citizen. Several members of his family are very involved in the religious practices of his community.

[4] The applicant claims to have been arrested on four occasions, namely, on July 10, 2005, December 5, 2005, February 2, 2006 and November 6, 2006, for allegedly having links with militant Sikh extremists and for hiding these links. He alleges having been tortured each time and having needed medical treatment thereafter.

[5] On July 13, 2006, the applicant applied for a temporary resident visa, stating that he was seeking to come to Canada for a maximum period of six months in order to act as a religious preacher. He was issued a visa on September 7, 2006, but since his wife was unable to accompany him, he decided to forego the visa and not come to Canada.

[6] Following a new interrogation at the hands of police in November 2006, the applicant finally decided to come to Canada. With the help of an officer, he obtained a six-month visa allowing him to come and pursue religious activities. He arrived here on November 17, 2006, and claimed refugee protection on March 16, 2007.

IMPUGNED DECISION

[7] The panel rejected the claim for refugee protection on the grounds that the applicant lacked credibility. The reasons given in support of this finding are as follows:

a. In his visa application, the applicant signed an affidavit declaring that he had never been charged with any criminal offence nor been arrested in his country, yet his claim for refugee protection is essentially based on his run-ins with the Indian police.

b. The applicant claimed to have been severely beaten in November 2006, after which he was unable to walk for several days. He also claimed to have consulted a doctor in India about his injuries in the days that followed, yet contended that he was unable to provide a copy of his medical record and had not consulted a doctor in Canada in this regard since his arrival. The applicant claimed the Indian doctor refused to provide him with such a certificate due to having experienced problems in the past as a result of providing such reports. He also claimed that he had not consulted a Canadian doctor because he no longer suffered the kind of mistreatment he had endured in his country since his arrival in Canada. The panel dismissed these explanations, being of the opinion that, based on its experience, the kind of torture allegedly suffered by the applicant normally leaves physical and psychological after-effects. In short, the panel concluded that the applicant had failed to discharge his burden of proof and had submitted no documents corroborating his allegations of torture.

c. The panel also used the four-month lapse between the applicant's arrival in Canada and his claim for refugee protection to cast doubt on his credibility. The applicant's explanations for this lapse were judged to be insufficient, given the absence of corroborating documents or testimony.

ISSUES

[8] The applicant raised a number of arguments against the panel's decision. These may be summarized as follows:

i. Did the panel breach the principles of procedural fairness? More specifically, did the panel err in using its own experience without giving the applicant an opportunity to make his submissions? Were the reasons for the panel's decision sufficient?

ii. Did the panel err in its assessment of the applicant's credibility? More specifically, did the panel assign too much importance to the contradictions between the affidavit submitted in support of his visa application and his testimony at the hearing? Did the panel make an unreasonable finding regarding the delay in claiming refugee protection?

iii. Finally, did the panel err by failing to consider the applicant's membership in the social group of baptized Sikhs?

ANALYSIS

[9] It is well established that the panel's findings as to the applicant's credibility must be deemed to be questions of fact, and should therefore be accorded great deference in the context of an application for judicial review. Therefore, this Court will not intervene unless the applicant can establish that the panel's findings were unreasonable or capricious, made in bad faith or not supported by the evidence. This is a heavy burden, to the extent that the applicant must satisfy the Court that the panel's decision does not fall within the range of possible, acceptable outcomes which are defensible in respect of the facts and law: *Dunsmuir v. New Brunswick*, 2008 SCC 9.

[10] In matters of procedural fairness, however, no deference is owed. The panel has no room for error in this regard, and the Court will not hesitate to intervene if it feels an administrative decision-maker has not complied with the requirements of this standard, within the particular context in which a decision is made: *Ha v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 49; *Chrétien v. Canada (Commission of Inquiry into the Sponsorship Program and Advertising Activities- Gomery Commission)*, 2008 FC 802; *Sketchley v. Canada (Attorney General)*, 2005 FCA 404.

[11] Finally, the issue of whether the panel erred in not assessing the risk to the applicant given that he is a baptized Sikh has already been deemed to be a question of law to be reviewed in accordance with the standard of correctness: see *Singh v. Minister of Citizenship and Immigration*, 2007 FC 732, at para. 20. I will therefore apply the same standard in the case at bar.

a) The principles of procedural fairness

[12] As was previously mentioned, the applicant criticized the panel for having relied on its specialized knowledge to conclude that the torture he claims to have suffered would have left after-effects, without giving him the opportunity to respond to this opinion. It is true that under Rule 18 of the *Refugee Protection Division Rules* (SOR/2002-228), the panel must notify the applicant of its intention to use an opinion that is within its specialized knowledge and give him the chance to make representations. In this case, no formal advance notice was given to the applicant.

[13] That said, I do not feel this is a fatal error under the circumstances. It is well established that the panel could have drawn a negative inference from the fact that the applicant did not submit any medical evidence to corroborate his allegations of torture: see, for example, *Singh v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 62, at para. 28; *Encinas v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 61, at para. 21. The transcript of the hearing also reveals that the panel questioned the applicant to this effect and on several occasions expressed concern about the lack of any medical assessment. Mr. Singh did attempt to explain why he had not submitted any evidence of medical consultation, but the panel clearly regarded these explanations as insufficient. This conclusion does not strike me as being unreasonable, given the fact that the applicant claimed to have been unable to walk when he was released from police custody following his final interrogation, one week before arriving in Canada.

[14] I therefore feel that the applicant was not taken by surprise and had every opportunity to address the panel's concerns. The panel could, in its assessment of the applicant's credibility,

dismiss his explanations and disregard the affidavit of a person who had supposedly participated in his liberation and who corroborated the applicant's statements. Even if the panel had given more precise advance notice of its intention to use its specialized knowledge, the end result would have been the same. Even if we were to leave aside the panel's ''opinion'' on the long-term after-effects of torture, one fact would still remain: there is no medical evidence to support the applicant's allegations of torture, and the panel was entitled to draw a negative inference from that.

[15] As for the applicant's claim that the grounds are incomplete and inadequate, it seems to me that this too should be dismissed. A simple reading of the decision shows that the panel expressed itself in clear and understandable terms, in accordance with the standards established by the case law. As my colleague, Justice Carolyn Layden-Stevenson (then a member of this Court) wrote in *Liang v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1501, at para. 42:

> [i]t is important not to lose sight of the purpose of the reasons. In *Li v. Canada (Minister of Employment and Immigration)*, [1995] F.C.J. No. 413 (T.D.), Mr. Justice Teitelbaum, citing *Syed v. Canada (Minister of Employment and Immigration)* (1994), 83 F.T.R. 283 (T.D.), stated:
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> > The function of written reasons is to allow an individual adversely affected by an administrative tribunal's decision to know the underlying rationale for the decision. To that end, the reasons must be proper, adequate and intelligible and must give consideration to the substantial points of argument raised by the parties … The Refugee Division is obligated, at the very least, to comment on the evidence adduced by the applicant at the hearing. If that evidence is accepted or rejected, the applicant should be advised of the reasons why.
>
> At the same time, the reasons are not to be read microscopically and held to a standard of perfection. They must be read as a whole:

> *Medina v. Canada (Minister of Employment and Immigration)* (1990), 120 N.R. 385 (F.C.A.); *Ahmed v. Canada (Minister of Employment and Immigration)* (1993), 156 N.R. 221 (F.C.A.).

[16] It is clear that the panel's reasons adequately set out the underlying rationale for the decision, and give consideration to the substantial points raised by the parties.

b) The applicant's credibility

[17] The applicant argued that the panel had erred in its assessment of his credibility. According to the applicant, it was unreasonable to disregard the affidavit of the person who participated in his liberation based on contradictions between the visa application and his later statements, on the length of time it took him to claim refugee protection, and on the lack of medical evidence.

[18] It should be noted that the reasonableness standard calls for significant deference with regard to decisions made by an administrative tribunal. The question is not whether I would have come to the same conclusion but rather if the decision falls within a range of ''possible, acceptable outcomes defensible in respect of the facts and law'': *Dunsmuir v. New Brunswick*, 2008 SCC 9, at para. 47. To this question I unhesitatingly respond in the affirmative. In fact, there is no doubt in my mind that the panel's decision was not based on an erroneous finding of fact, made in a perverse or capricious manner, or without regard for the material before the panel (*Federal Courts Act*, R.S.C. (1985), c. F-7, subsection. 18.1(4)).

[19] The panel's negative credibility finding regarding the applicant is based on a number of factors. The panel noted a flagrant contradiction between the applicant's statements about his

criminal record contained in the affidavit submitted in support of his visa application and his later statements. It is true that in *R.K.L. v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116, Justice Martineau ruled that the fact of declaring to have travelled using an authentic passport when it was in fact a false passport could not justify a general negative credibility finding. That is not what is at issue here; rather, it is two sworn statements. The applicant claimed that his visa application had been filled out in his name by a human smuggler, who advised him not to mention the criminal charges he faced, or else his application would be rejected. The panel, which had the benefit of questioning the applicant and assessing not only his answers but also his body language and reactions, took this explanation into consideration but did not find it satisfactory.

[20] I have already addressed the issue of the lack of medical evidence supporting the applicant's allegations of torture, which was used as a basis for the panel's negative credibility finding. The third factor held against the applicant is the four-month period between his arrival in Canada and his claim for refugee protection. In this regard, the applicant argued that he could not submit his claim earlier because he had given his passport to the person who had organized his travel to Canada. The panel once again rejected this explanation, noting that it could not possibly be corroborated and that the person who was supposedly in possession of his passport had failed to appear before the panel, in spite of a summons issued to that effect.

[21] The applicant argued that the delay in making his claim cannot be a determining factor and that the panel could not hold him responsible for the fact that the smuggler did not comply with the summons issued to him by the panel. In this regard, I would make the following comments. It seems

to me, first of all, that we cannot infer from the panel's statements any blame being assigned to the applicant for the smuggler's failure to obey the summons he had been sent. As for the delay in filing a claim, this is certainly a factor the panel could take into consideration in assessing the applicant's credibility, even if it could not be a determinative factor in itself: see *Huerta v. Canada (Minister of Employment and Immigration)*, (1993) 157 N.R. 225 (F.C.A.); *Niyonkuru v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 174; *Conte v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 963. It is true that the applicant's subjective fear, on which some doubt may be cast, given the delay in filing his claim, is not relevant under section 97 of the Act. Nonetheless, the objective risk allegedly faced by the applicant must be based on a credible story.

[22] In short, I am satisfied that the panel could reasonably conclude that the applicant lacked credibility based on the different factors mentioned in the preceding paragraphs. Even if each of these factors, considered in isolation, may be insufficient in themselves to draw such a conclusion, the same cannot be said when they are taken as a whole. In such circumstances, the panel's decision certainly falls within the range of possible outcomes with regard to the facts submitted.

c) Membership in a religious group

[23] Lastly, the applicant argued that the panel had failed to address the ground of persecution, namely, his membership in the group of baptized Sikhs. Yet it is clear upon reading the applicant's narrative in his Personal Information Form (PIF) that his fear was based, not on his membership in a social group, but rather derived from the fact that he had been arrested and tortured by the police on suspicion of having ties to militants.

[24] The fact that the applicant had mentioned being a baptized Sikh in his PIF and that his counsel had briefly referred to it in his submissions is insufficient to make it a ground of persecution. A careful reading of the panel's record reveals that the basis for his claim was his alleged connection to militants and that, in fact, no incidents relating to his being a baptized Sikh were even alleged. Under these circumstances, the panel cannot be faulted for failing to address an issue which did not emerge from the evidence submitted. As the Federal Court of Appeal wrote in *Guajardi-Espinoza v. Canada (Minister of Employment and Immigration)* (1993), 161 N.R. 132 (F.C.A.), at para. 5:

> [w]ith respect, the Court does not feel that the appellants can *ex post facto*, that is once the Refugee Division decision has been rendered, change the nature of the argument they made to the tribunal based on one single sentence they took out of the file after fine tooth-combing it. As this Court recently said in *Louis v. M.E.I.*, [F.C.A., No A-1264-91, April 29, 1993.] the Refugee Division cannot be faulted for not deciding an issue that had not been argued and that did not emerge perceptibly from the evidence presented as a whole. [Ibid., at 3.] Saying the contrary would lead to a real hide-and-seek or guessing game and oblige the Refugee Division to undertake interminable investigations to eliminate reasons that did not apply in any case, that no one had raised and that the evidence did not support in any way, to say nothing of frivolous and pointless appeals that would certainly follow.
> See also: *Singh v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 732.

[25] As for the general documentary evidence on the situation of baptized Sikhs submitted by the applicant, it has been well established that, in general, nothing can be deduced from such evidence when considering an application by a refugee claimant. The risk referred to in sections 96 and 97 must be personalized and specific to the applicant himself; consequently, the situation generally

existing in a given country is not sufficient to establish the basis for the protection sought, in the absence of any tangible connection to the applicant’s personal situation.

[26] For all these reasons, I am of the view that this application for judicial review must be dismissed. The parties submitted no question for certification and none will be certified.

ORDER

THE COURT ORDERS that the application for judicial review be dismissed. No questions are certified.

‘‘Yves de Montigny’’
Judge

Certified true translation

Sebastian Desbarats

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-135-09
STYLE OF CAUSE:	SURINDER SINGH and THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	September 2, 2009
REASONS FOR ORDER AND ORDER:	de MONTIGNY J.
DATED:	October 22, 2009

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