

Federal Court



Cour fédérale

Date: 20151029

Docket: IMM-2099-15

Citation: 2015 FC 1221

Ottawa, Ontario, October 29, 2015

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

RAM SINGH BASRAN

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a decision of the Refugee Appeal Division of the Immigration and Refugee Board [the RAD], dated April 9, 2015, wherein the RAD confirmed a decision of the Refugee Protection Division [the RPD] that the Applicant is neither a

Convention refugee nor a person in need of protection within the meaning of sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

[2] For the reasons that follow, the judicial review application is allowed.

II. Background

A. *The Applicant's Alleged Fear*

[3] The Applicant is a 39 year old citizen of Punjab, India. He came to Canada in November 2013 to attend his father's funeral. While in Canada, the Applicant became aware that the police in his neighbourhood were interested in him in relation to concerns that he may become a key witness to the forced disappearance and death of Harpreet Singh (Harpreet), a friend and neighbour of the Applicant.

[4] The Applicant claims that the events leading to Harpreet's arrest and alleged murder go back to June 2013. He stated that on June 2, 2013, the police went to Harpreet's mother looking to arrest Harpreet, accusing him of working with militants. On June 17, 2013, while the Applicant was at work, Harpreet came to see him and demanded that the Applicant give him 10,000 rupees, threatening him with a gun. When the Applicant stated he did not have the money, Harpreet indicated that he would come back the next day for the money. The Applicant informed the police of this encounter and they offered to put him under surveillance in order to arrest Harpreet. But Harpreet did not come back for the money the next day.

[5] Instead, he arrived at the Applicant's house in the evening of June 20, 2013. Police officers swiftly arrested both Harpreet and the Applicant. The Applicant alleges that the police arrested him along with Harpreet since they thought the Applicant made a secret deal with Harpreet to help him finance the militants. The police allegedly tortured the Applicant until his brother and other people in the neighbourhood secured his release by bribing a police officer. When the Applicant finally returned home, Harpreet's mother informed him that the police told her that Harpreet had escaped from custody. The Applicant was certain Harpreet remained in custody and told her that if she decided to pursue the matter in court, he would testify that he witnessed Harpreet's arrest.

[6] While in Canada attending his father's funeral, the Applicant says he learned that members of his community in India offered Harpreet's mother financial support to charge the police with Harpreet's murder and asked the Applicant to return to India to testify in the proceedings. The Applicant alleges that he is a person in need of protection since if he were to return to India, his life will be at risk at the hands of the police since the Applicant is the only witness to Harpreet's arrest. He alleges that the police have visited his home in India and have asked that he report to them upon his return.

[7] The Applicant filed for refugee protection on May 13, 2014, but his claim was dismissed by the RPD on August 26, 2014 on the basis that the Applicant's allegations as a whole were not credible.

[8] In his appeal before the RAD, the Applicant submitted new evidence in the form of two letters, one from his wife and another from a friend, and requested a hearing. Both letters indicate that the police remain interested in the Applicant and frequently visit his home to inquire as to his return.

B. *The RAD Decision*

[9] The RAD member first reviewed some of this Court's jurisprudence regarding the role and function of the RAD when reviewing an RPD decision. He concluded that although it may show some deference to the RPD with respect to its credibility assessment, the RAD's role is to provide its own independent assessment of all the evidence in order to reach its own conclusion on the appeal. Neither party has taken issue with this characterization of the RAD's role and function.

[10] The RAD then refused to grant the Applicant an oral hearing since it found that the new evidence submitted by the Applicant was repetitive of allegations before the RPD and contained a formulation of the risk that it did not find to be credible. Namely, since it was common knowledge in the community that Harpreet was arrested, it will not be necessary for the Applicant to testify if the matter were brought to trial.

[11] The RAD conducted its own credibility analysis and ultimately agreed with the RPD's credibility and plausibility findings. The RAD found that the Applicant's narrative was contradictory since although he claimed he was the only witness to Harpreet's arrest, the police essentially confessed to the arrest in informing Harpreet's mother of his escape from prison. The

RAD also found that it was implausible for the police to arrest the Applicant at all since the Applicant was under their protection at the time. In upholding the RPD's negative credibility finding, the RAD stated:

[36] In any case, the whole logic of risk to the Appellant makes little sense because, given the logic of this story, the key danger for the police is not that there is a witness to the physical arrest of Harpreet, but that there are people that would challenge the police assertion that Harpreet ran away and therefore charge the police with killing him. From this perspective, Harpreet's mother is the key danger to the police, which confirms the credibility concern of the RPD that in the Appellant's allegations Harpreet's mother is not viewed as being in danger.

[12] The RAD also carried out its own assessment of the Applicant's corroborating evidence and agreed with the RPD not to give this evidence any weight since the letter written by the Applicant's lawyer in India, R.K. Bhatia, is based on his agenda notes of his meeting with the Applicant, implying that the lawyer did not investigate anything but **instead relayed information heard from the Applicant**. Moreover, the RAD dismissed the Applicant's medical note since it was dated June 7, 2014 and therefore procured after the Applicant made his refugee claim. The RAD also noted that fraudulent medical notes are not difficult to procure in India. In assessing the affidavit of Harpreet's mother and the joint affidavit of several members of the Applicant's community in India, the RAD concluded that these affidavits placed the Applicant's credibility into doubt since both affidavits confirm that Harpreet's arrest was well known in the community and therefore, the Applicant need not testify since he is not in fact the only witness to the arrest.

C. *The Applicant's Challenge of the RAD Decision*

[13] The Applicant submits that the RAD's reasons for not finding him to be credible were based on pure speculation. Relying on *Kaur v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1491 [*Kaur*], the Applicant argues that the RAD erred in its assessment by not reviewing the country documentation evidence regarding those who seek justice against the police since the evidence is clear that if he were to return to India, the Applicant is at risk of forced disappearance or extrajudicial execution because he witnessed police abuse.

[14] He also alleges that the RAD's reasons for not giving any weight to the corroborating evidence are not serious and do not stand up to close scrutiny. For example, the RAD's reasons for rejecting the collective affidavit are illogical given that the Applicant was detained with Harpreet and the last person to see him alive, which indicates that contrary to the RAD's assessment, the Applicant's testimony is crucial if the police officers are to be charged for killing Harpreet. As a result, the Applicant should have been granted a hearing since the new evidence demonstrated a continued danger for the Applicant if he were to return to India.

[15] The Applicant further submits that he was not given a fair hearing since the panel member who presided the RAD hearing, Mr. Gallagher, is an Anglophone who could not have understood the Applicant's submissions, which were presented in French. The Applicant contends that he has the right to have been heard by someone who could understand his written arguments.

[16] Further, the Applicant submits that Mr. Gallagher was impartial since he made statements in his decision to the effect that evidence from southern Asia and India should never be viewed as credible.

[17] Finally, the Applicant argues that the RAD's decision and Applicant's future deportation violate sections 7 and 12 of the *Canadian Charter of Rights and Freedoms, Constitution Acts, 1867 to 1982*.

III. Issues and Standard of Review

[18] The issue raised by this judicial review application is whether the RAD, in concluding as it did and in the manner in which it did, committed a reviewable error as contemplated by section 18.1(4) of the *Federal Courts Act*, RSC, 1985, c F-7.

[19] The applicable standard of review for assessing the RAD's application of the law to the facts of the case and of its own assessment of the credibility findings made by the RPD is reasonableness (*New Brunswick (Board of Management) v Dunsmuir*, 2008 SCC 9, [2008] 1 SCR 190, at para 47 [*Dunsmuir*]; *Ching v Canada (Citizenship and Immigration)*, 2015 FC 725, at para 45; *Niyas v Canada (Citizenship and Immigration)*, 2015 FC 878, at para 23).

[20] With respect to procedural fairness issues, the applicable standard of review is correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, at para 43, [2009] 1 SCR 339; *Siddiqui v Canada (Citizenship and Immigration)*, 2015 FC 1028, at para 38).

IV. Analysis

A. *Is the RAD decision reasonable?*

[21] While the Court must be careful not to reweigh the evidence before the decision-maker, as I previously stated in *Hernandez Montoya v Canada (Citizenship and Immigration)*, 2014 FC 808, at paragraph 33, this Court has held that if evidence in the record directly contradicts an essential element of finding and the decision-maker fails to address it or explain why the evidence was disregarded, then the decision may be reviewable on the basis that the decision was made “without regard for the evidence before it” (*Hinzman v Canada (Citizenship and Immigration)*, 2010 FCA 177, [2012] 1 FCR 257, at para 38; *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* 157 FTR 35, 83 ACWS (3d) 264, at para 17 [*Cepeda-Gutierrez*]).

[22] This principle is also true for evidence which may have an impact on the plausibility of an Applicant’s narrative (*Kaur*, above at para 20). As stated by Justice Danièle Tremblay-Lamer in *Malik v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 453, 122 ACWS (3d) 1105 at paragraph 7 of the decision:

While it is true that the Board is entitled to rely on the evidence it prefers, in doing so, it cannot ignore substantial documentary evidence which is consistent with the applicant's claim and can have a direct impact on the plausibility or implausibility of the story told.

[23] In the case at bar, the RAD came to the conclusion that the entire logic of the Applicant’s risk did not make any sense. It did not believe that the Applicant was a key witness to Harpreet’s

arrest, nor that the Applicant was arrested at all for that matter, and also found that it was illogical for the Applicant's testimony to be of any importance in the event that charges were laid against the police for killing Harpreet. In short, the RAD simply did not believe that the Applicant was of any interest to the police. These findings of fact are problematic since the RAD came to these conclusions without regard to substantial documentary evidence having an impact on the plausibility of the Applicant's narrative.

[24] Firstly, the RAD found that the Applicant's eye witness testimony of Harpreet's arrest was simply not necessary because "he was not the only witness" since police assisted in the arrest and the Applicant "appears to be arguing that the police essentially will not now tell the truth that they had arrested Harpreet." In this regard, the documentary evidence cited by Applicant's counsel before the RPD clearly demonstrates that police officers in India systematically deny involvement in forced disappearances, even in cases where the subject was last seen alive in police custody.

[25] Moreover, the RAD overlooked important documentary evidence when it decided that it was implausible for the police to have arrested the Applicant along with Harpreet since the documentary evidence indicates that police officers in India frequently arrest individuals on false charges and sometimes make arrests with the sole purpose of obtaining a bribe. Police corruption in India is a well-documented fact. In my view, the RAD committed a reviewable error in its assessment of the plausibility of the Applicant's narrative because it failed to consider material evidence having an impact on the Applicant's credibility. As indicated by Justice John Evans in *Cepeda-Gutierrez*, above 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": [...] In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. [...]

[26] In my view, the evidence was clearly important in the assessment of the credibility of the Applicant's narrative as to whether he was the only witness of the arrest, the plausibility of his arrest, and potential risk of retaliation from the police if he were to return to India. Indeed, the documentary evidence indicates that police officers in India are known to arrest people in retaliation for complaints of police abuse. The RAD makes no mention of these facts in its decision. Since the documentary evidence clearly has a strong potential to affect the plausibility of the Applicant's narrative in this case, the RAD had a duty to assess the evidence before dismissing it or assigning any probative value to it (*Kuar*, above at para 23).

[27] In light of the foregoing, since the RAD did not properly assess the Applicant's credibility, it did not adequately assess the various affidavits from his wife, his friend in India, Harpreet's mother, and the collective affidavit from members of the community, all of which corroborate the Applicant's narrative. The corroborating evidence supports the Applicant's claim that the police now perceive him to be a threat. I agree with the RAD that the key danger to the police is that people are willing to challenge the claim that Harpreet escaped from police custody. I am of the opinion that in giving the Applicant's corroborating evidence no probative value, the RAD erroneously set aside evidence that the Applicant's community and the police officers searching for him for that matter perceive the Applicant to be an important witness to

challenge police assertions. In this respect, the formulation of the risk, as formulated by the Applicant, cannot be said to be devoid of logic.

[28] For all these reasons, I believe the RAD erred in its assessment of the Applicant's credibility. In failing to assess relevant and material evidence, the RAD, in my view, came to a negative credibility finding based on erroneous facts and this is a reviewable error (*Mundi v Canada (Minister of Citizenship & Immigration)*, 2004 FC 1260, at para 6).

[29] Given my finding that the RAD decision is unreasonable, there is no need to determine the other grounds of review argued by the Applicant.

[30] No question of general importance has been proposed by the parties. None will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The judicial review application is allowed;
2. The decision of the Refugee Appeal Division, dated April 9, 2015, is set aside and the matter is remitted back to a different member for re-determination;
3. No question is certified.

"René LeBlanc"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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