Date: 20060907

Docket: IMM-6335-05

Citation: 2006 FC 1066

Ottawa, Ontario, the 7th day of September 2006

Present: the Honourable Mr. Justice de Montigny

BETWEEN:

MANJIT KAUR
HARPREET KAUR
ARASHDEEP SINGH

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The application for judicial review at bar relates to a decision by the Refugee Protection Division (RPD) on September 28, 2005 by which the applicants were considered not to be refugees or persons in need of protection within the meaning of sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA).

[2] The principal applicant Manjit Kaur is 26 years old and originally from India. She claimed refugee status for her political opinions and membership in a particular social group, that of women

in India. She also said she feared for her life if she had to return to her country and considered she was threatened with torture. She further represented her minor children Harpreet Kaur and Arashdeep Singh, who claimed refugee status on the same ground as their mother, although they are U.S. citizens.

[3] The applicant's brother was apparently a member of the student association All India Sikh Student Federation (AISSF): he was allegedly arrested, detained and tortured at least three times for his activities in that association. When he was released on the last occasion in January 1999 he allegedly left home and was never found: the authorities suspected that he had joined other militants.

[4] On January 14, 1999 the applicant and her mother attended a meeting organized by the AISSF. A friend of the applicant's brother recognized her and asked her to address the participants and explain the fate the authorities meted out to her and her family. She did this and described the problems she had had with the police.

[5] The following day the police allegedly came to the applicant's residence. She was charged with having spoken the evening before and taken to the police station, and her mother was allegedly beaten. At the police station the police officer responsible for the investigation allegedly raped her. Thanks to a bribe provided by her family she was released the following day, after being warned never to speak of what had happened at the police station and undertaking to work with the police in finding her brother.

[6] Following these events, the applicant left her country for the U.S., where she arrived on March 27, 1999. The uncle she was living with made efforts to find her a husband, and she accordingly married shortly after arriving in the U.S. Two children were born of this union and are now claiming refugee status in Canada with their mother, although they are U.S. citizens.

[7] A year after her arrival in the U.S. the applicant and her husband made a refugee status application. The husband's application was rejected. Consequently, he had to leave U.S. territory. He then came to Canada, where he has also claimed refugee status. The applicant was called for an interview but did not go and preferred to follow her husband to Canada, where she claimed refugee status on March 21, 2005.

[8] After illegally crossing the border without reporting to the Immigration authorities, she was arrested and charged with illegal entry into Canada. The day after her arrest the Immigration officer went to the police station where she was being held to meet with her. At that time she made a number of statements which are not consistent with the evidence later submitted. An RCMP officer was present at this meeting, but she was not read her rights under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act, 1982* (U.K.), 1982, c. 11 (the Canadian Charter). When the lawyer retained by the applicant's husband went to the police station, the applicant was released on the same conditions as her husband.

[9] After discovering on her arrival in Canada that her husband was living with another woman, the applicant is now separated from him. Her two children live with her in Montréal.

[10] In its decision the RPD concluded that the applicant's testimony was not credible on account of the many contradictions and improbabilities noted in the testimony. The panel also found that the applicant's testimony contradicted what she had said at her point of entry interview. Finally, the RPD concluded that the applicant had exhibited conduct inconsistent with a real fear of returning to her country of origin: not only had she renewed her work permit in the U.S., she had failed to attend the hearing at which her refugee status claim was to be heard. For all these reasons, the panel concluded that the applicant's actions were not consistent with those of a person seeking refuge outside his or her country through fear of persecution or personal harm.

[11] In his written and oral submissions counsel for the applicant raised several arguments in this Court in support of her application for judicial review. To begin with, he maintained that in its analysis of the refugee status application the RPD had failed to take into account Guideline 4 of the Canada Immigration and Refugee Board, *Women Refugee Claimants Fearing Gender-Related Persecution* (the Chairperson's Guidelines), November 13, 1996 (the Guidelines). Secondly, he maintained that the RPD could not rely on the notes made by the Immigration officer at the point of entry because the applicant was then being detained and had made her statements without being able to consult a lawyer and without knowing her rights. He further alleged that the RPD erred in not joining the claim by the applicant and her two children to that of her husband. Finally, counsel for the applicant argued that the panel improperly assessed the facts submitted by his client and wrongfully drew negative conclusions as to her credibility. I will now consider each of these allegations.

[12] As to the Guidelines first of all, it is true that the RPD did not expressly refer to these in its reasons. However, that is not fatal as such, since the board member's silence in this regard does not support a conclusion that the Guidelines were not considered in his analysis of the case. In the same way, a mere ritual mention that the Guidelines had been considered would not suffice to establish that the panel had complied with them. What matters is that the reasons for decision demonstrate that the decision-maker was aware of the particular situation of women when the basis of their claim was related to their vulnerability. Although the Guidelines are not binding on the RPD, they must still be considered in appropriate cases (*Fouchong* v. *Canada (Secretary of State)* (1994), 88 F.T.R. 37, at paras. 10-11 (F.C.), [1994] F.C.J. No.1727 (QL); *Khon* v. *Canada (Minister of Citizenship and Immigration)*, 2004 FC 143, (2004), 36 Imm. L.R. (3d) 55, at para. 18 (F.C.), [2004] F.C.J. No.173 (QL)).

[13] In the case at bar, I am not persuaded that the member demonstrated the degree of understanding and sensitivity required in his analysis of the allegations of rape submitted by the applicant. He first considered that the medical certificate entered in evidence was not sufficiently explicit to corroborate what she said. Nonetheless, the certificate mentioned that the applicant was hospitalized on the day that she was released by the police and described her condition and the treatment received as follows:

> She was suffering from pain in her body, scratches bruises, contusions and other injury marks over her body. She was in depression. She was thoroughly examined and treated with intravenous, fluids, ointments, antibiotics, anti-inflammatory and anti[-]depression medications.
> She was discharged after satisfactory reports of blood and urine. She was further treated, at home till 26 January 1999. She was advised to come after one week for medical check up.

> She was further advised come after three weeks for Pregnancy test and after three months for H.I.V. tests. Nevertheless [s]he did not come.

[14] On reading such a report no great exercise of imagination is necessary to conclude that the applicant was raped. The fact that the physician was not more explicit can certainly be explained by cultural considerations. The fact that the Sarpanch's affidavit refers expressly to the applicant's rape, whereas the latter said she only told her mother and physician about it, in view of the loss of reputation which might result for herself and her family, is explicable. The Sarpanch was apparently very close to the applicant's family and in fact accompanied her father to the police station to obtain her release. It is thus not impossible that he was made aware of the situation, as the applicant maintained in her affidavit. Further, the applicant indicated in her testimony that the entire family ultimately learned of what had happened, although the applicant exercised great discretion in this regard. These are entirely reasonable explanations in a situation like that of India, where rape is undoubtedly regarded with greater modesty and reticence than in a country like Canada. Accordingly, it seems to the Court that the member did not demonstrate all the sensitivity and understanding required in his analysis of this aspect of the claim.

[15] Does this mean that this error is fatal? I do not think so. In view of the other reasons given by the RPD for concluding that the applicant was not credible and that her conduct was inconsistent with a genuine fear of persecution, which had nothing to do with the fact that she was a woman, the application of the Guidelines would not in any way change the outcome of the applicant's claim. This Court has often repeated that the RPD's decision will not be reversed in such circumstances if the evidence was otherwise sufficient to support its conclusion. As Judith A. Snider J. wrote in a

judgment of this Court, *Sy v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 379, (2005), 271 F.T.R. 242 (F.C.), [2005] F.C.J. No.462 (QL), at paragraphs 17 and 19:

> Nevertheless, a failure by the Board to consider the Guidelines in an appropriate case will not necessarily result in a successful judicial review application.
>
> . . . . .
>
> The Board's conclusion that the Applicant's story of a forced marriage lacked credibility was not made solely on the grounds that she was unable to provide details about her intended husband. The Board also referred to the documentary evidence that showed that the Applicant's consent would be required for a legal marriage, that most forced marriages occur at a younger age, and that forced marriages are not as common in educated families. The Board also noted that, between 1995 and 2000, the Applicant had no problems with her uncle who took over the management of her family affairs following the death of her father. Therefore, although the Board erred in not taking into account the Gender Guidelines, there was sufficient evidence to support the Board's conclusion and the error is not sufficient to set aside the Board's decision.
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> See also: *Diallo v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1301, (2004), 136 A.C.W.S. (3d) 727 (F.C.), [2004] F.C.J. No.1567 (QL); *Siket v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1666, (2005), 144 A.C.W.S. (3d) 710 (F.C.), [2005] F.C.J. No. 2068 (QL); *Begum v. Canada (Minister of Citizenship and Immigration)*, 2001 FCTD 59, (2001), 20 Imm. L.R. (3d) 258 (F.C.), [2001] F.C.J. No. 205 (QL).

[16] Additionally, it will not be necessary for me to deal at length with the alleged infringement of the applicant's constitutional rights in her examination by the Immigration officer at the police station. It may well be that she was detained within the meaning of section 10 of the *Canadian Charter* and that the situation in which she found herself could be distinguished from a routine point of entry examination, in which it was decided that a person did not have the right to be informed of the right to retain the services of counsel: see *Dehghani* v. *Canada (Minister of Employment and*

Immigration), [1993] 1 S.C.R. 1053, [1993] S.C.J. No. 38 (QL). However, I do not have to rule on this point in the application for judicial review at bar.

[17] It is in fact well settled that a point which was not raised before an administrative tribunal cannot be considered in the judicial review of that decision. The reason for this is, first and foremost, because it is of the very essence of judicial review to rule on the questions put before the administrative authority and only on the reasons given in support of the decision rendered. As Louis Marceau J. pointed out in *Poirier v. Canada (Minister of Veterans Affairs)*, [1989] 3 F.C. 233 at 247 (F.C.A.), [1989] F.C.J. No. 240 (QL):

> The powers of the Court, in the exercise of the role conferred on it by section 28 [of the *Federal Courts Act*, R.S.C. 1985, c. F-7] of overseeing and controlling the legality of administrative decisions, are solely those of setting aside a decision which appears to it not to have been made in accordance with legal requirements and of referring the matter back to the tribunal for redetermination with appropriate directions. The Court cannot pronounce itself on a decision which did not face the administrative authority, nor order the authority to answer one Way or another a question which is not of its concern.

[18] The same rules obviously apply to this Court when it is exercising the powers conferred on it by section 18.1 of the *Federal Courts Act* (*Chen v. Canada (Minister of Citizenship and Immigration)* (2000), 197 F.T.R. 307 (F.C.), [2000] F.C.J. No. 1954 (QL)). They are all the more applicable when the question raised is of a constitutional nature. In such a case, the Court must be careful not to intervene if the alleged infringement of a fundamental right was not discussed before the administrative body: such a practice is not only required by the very nature of judicial review, but is also due to the complete absence of any factual basis for determining such an important question. For example, we do not know whether the applicant was still in detention at the time of

her meeting with the Immigration officer: this point, though crucial in applying section 10 of the Canadian Charter, was not gone into by the parties before the RPD. As the Supreme Court of Canada noted in *MacKay v. Manitoba*, [1989] 2 R.C.S. 357, at 361, [1989] S.C.J. No. 88 (QL):

> *Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of *Charter* issues.
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> See also *Suchit v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 800, (2005), 139 A.C.W.S. (3d) 1055 (F.C.), [2005] F.C.J. No. 1004 (QL); *Chen v. Canada (Minister of Citizenship and Immigration), supra*.

[19] The applicant's argument that the RPD erred by not joining her refugee status claim and that of her children to her husband's claim appears to the Court to be without basis. First, I note that this request was never made by the applicant or her counsel at the hearing before the RPD. It is true that the record disclosed the existence of the husband. At the same time, the record also indicated that the applicant had been separated from her husband since her arrival in Canada and did not know where he was. What is more, we know nothing of his refugee status application, and everything indicates that facts which could justify a fear of persecution or fear for one's life or physical safety have nothing to do with the situation in which the applicant was, as she did not meet him until after leaving India. In these circumstances, joinder of the claims would not necessarily be required and it was for the applicant to make the request.

[20] As regards the children, who it will be recalled are U.S. citizens, the panel was right to conclude that they could not claim refugee status if there was no proof that they feared persecution in the U.S. Even if their application was joined to that of their father, they would not have been

granted refugee status on the basis of facts which the latter could put forward since they did not have the same nationality that he did. It is well settled that no one can acquire refugee status or the status of a person in need of protection against a country of which he or she does not have the nationality, unless the person is stateless, which of course is not the case here.

[21] In any event, the Federal Court of Appeal and this Court have several times pointed out that the joinder of proceedings does not affect the principle that each claim must be considered individually and on its own merits: see *Retnem v. Canada (Minister of Citizenship and Immigration)*, (1991), 13 Imm. L.R. (2d) 317 (F.C.A.), [1991] F.C.J. No. 428 (QL); *Zewedu v. Canada (Minister of Citizenship and Immigration)*, (2000), 193 F.T.R. 152 (F.C.), [2000] F.C.J. No. 1369 (QL); *Khorasani v. Canada (Minister of Citizenship and Immigration)*, 2002 FTC 936, (2002), 116 A.C.W.S. (3d) 724 (F.C.), [2002] F.C.J. No. 1219 (QL). This is undoubtedly one of the reasons this Court has always refused to intervene when no injustice has been created by a tribunal's decision to join or separate proceedings (*Asfaw v. Canada (Minister of Citizenship and Immigration)* (2000), 98 A.C.W.S. (3d) 880 (F.C.), [2000] F.C.J. No. 1157 (QL); *Zewedu v. Canada (Minister of Citizenship and Immigration), supra*; *Amin v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 448, [2001] F.C.J. No. 716 (QL); *Khorasani v. Canada (Minister of Citizenship and Immigration), supra*; *Lu v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1517, (2004), 134 A.C.W.S. (3d) 863 (F.C.), [2004] F.C.J. No. 1825 (QL); *Hayek v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 848, (2005), 140 A.C.W.S. (3d) 345 (F.C.), [2005] F.C.J. No. 1055 (QL)). In the case at bar, no evidence was submitted to support a conclusion that the applicant and her children had suffered any detriment from their refugee status claim not been considered jointly with that of her husband.

[22] There remains the RPD's conclusion that the applicant was not credible, a conclusion which it based on her actions and on certain contradictions between her point of entry statements and her Personal Information Form. In order to be successful the applicant had to persuade the Court that the panel made a patently unreasonable decision, that is a decision which cannot be based on any reasoning and finds no support in the evidence: *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100, [2005] S.C.J. No. 39 (QL); *Aguebor v. Canada (Minister of Employment and Immigration)* (1993), 160 N.R. 315 (F.C.A.), [1993] F.C.J. No. 732 (QL); *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, [2002] S.C.J. No. 3 (QL). This is a heavy burden which the applicant did not discharge.

[23] Although I am prepared to admit that some of the contradictions noted by the RPD between the applicant's testimony and her Personal Information Form (PIF) are perhaps more apparent than real, I do not feel that this is a sufficient basis for quashing its decision. Thus, I am not persuaded that there is any inconsistency between stating in her PIF that the leaders of the AISSF movement spoke at the meeting of January 14, 1999 and the applicant's statement at the hearing before the RPD that she was the only one who addressed the crowd. The applicant's explanation that she was the only participant who spoke of the problems she and her family had with the police may seem reasonable. Similarly, I would be inclined to think that the RPD erred in considering that the applicant was not credible when she said at the hearing she was unconscious for twenty minutes after being beaten by the police during her detention on January 15, 1999. The applicant was free to give an approximate time during which she thought she was unconscious; as to the fact that this information is not found in her PIF, I note there may simply have been a translation problem, in that

the applicant mentioned she had been beaten “until exhausted”. Finally, I do not have to repeat what I have already said regarding the medical certificate.

[24] However, it is important to note that the RPD’s decision has to be judged as a whole, and in the case at bar other reasons led it to conclude that the applicant was not credible. First, the RPD relied on the applicant’s point of entry statements in which she said at least twice that she was not afraid of returning to India and that she had come to Canada to join her husband. The applicant’s explanations that she feared being detained at the border and sent back to her country and that the events related took place several years earlier were not regarded by the member as plausible as the applicant had experience of the immigration process in the U.S., her entry to Canada was organized with the help of a smuggler and her husband had already entered Canada before her without being stopped at the border or sent back to his country. Finally, we should not lose sight of the fact that the RPD’s decision was also based on the conduct of the applicant, who said she left her country in 1999 because she feared for her life, but waited until 2001 before making a refugee status claim in the U.S., a claim which she did not then pursue.

[25] In view of all this evidence and the applicant’s general attitude at the hearing, the RPD could arrive at the conclusion that the applicant was not credible and that her actions were not consistent with those of a person seeking refuge through fear of persecution or personal harm. This does not mean that I would necessarily have come to the same conclusion, but that is not the question I have to answer. As John Sopinka J. wrote for the majority of the Supreme Court of Canada in *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, [1993] F.C.J. No. 56 (QL), at 340:

> A patently unreasonable error is more easily defined by what it is not than by what it is. This Court has said that a finding or decision of a tribunal is not patently unreasonable if there is any evidence capable of supporting the decision even though the reviewing court may not have reached the same conclusion (*Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740* [1990] 3 S.C.R. 644, at pp. 687-88), or, in the context of a collective agreement, so long as the words of that agreement have not been given an interpretation which those words cannot reasonably bear (*Bradburn, supra*, *per* Laskin C.J., at p. 849). What these statements mean, in my view, is that the court will defer even if the interpretation given by the tribunal to the collective agreement is not the "right" interpretation in the court's view nor even the "best" of two possible interpretations, so long as it is an interpretation reasonably attributable to the words of the agreement.

[26] For all these reasons, I come to the conclusion that the applicant's application for judicial review must be dismissed. Counsel for the applicant submitted two questions for certification, but I feel that in view of the facts of the case at bar these questions do not arise and the answer that might be given to them would not be conclusive for the outcome of the case.

JUDGMENT

THE COURT RENDERS THE FOLLOWING JUDGMENT:

1- The applicant's application for judicial review is dismissed.

2- No question will be certified: counsel for the applicant submitted two questions for certification, but I feel that in view of the facts of the case at bar these questions do not arise and that the answer which might be given to them would not be conclusive for the outcome of the case.

"Yves de Montigny"
Judge

Certified true translation

Brian McCordick, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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