

Date: 20071001

Docket: IMM-1157-07

Citation: 2007 FC 978

Ottawa, Ontario, October 1, 2007

Present: The Honourable Mr. Justice Beaudry

BETWEEN:

SARBIT SINGH

Applicant

and

**MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), of a negative decision by the Immigration and Refugee Board (the panel) dated February 13, 2007. The panel refused the refugee claim and found that the applicant was not a “person in need of protection” as defined in section 97 of the Act. The panel decided it need not consider the application under section 96.

ISSUES

1. Did the panel err in failing to consider the applicability of section 96?
2. Did the panel err in failing to consider all the oral evidence?
3. Did the panel err in basing its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it?
4. Did the panel err in finding that the applicant did not discharge his burden of establishing that his country is unable to protect him?
5. Did the panel err in determining that the applicant had an internal flight alternative?

[2] For the reasons below, the response to the first question is in the affirmative, and it is not necessary for me to respond to the other questions. This application for judicial review will therefore be allowed.

BACKGROUND

[3] The refugee claimant, Sarbjit Singh, is a citizen of India who arrived in Canada on May 4, 2004, and claimed refugee status. His claim for protection is based on problems with his neighbour, an active member of the Babar Khalsa organization.

[4] On July 6, 1999, the applicant and his brother saw their neighbour, Mangal Singh, running from the police. They told the police where he was hiding. Mangal Singh was killed in the ensuing gun battle.

[5] The applicant's father warned his sons that this neighbour was a member of the Babar Khalsa, a terrorist organization. A few days later, Mangal Singh's son, Ajmer Singh, called the

applicant's father to tell him that he was going to avenge his father's death. The applicant's family received a number of similar calls and informed the police.

[6] On September 25, 1999, on his way to work, the applicant's brother was murdered by Ajmer Singh and his men. The applicant's family reported the murder to the police, which led to a trial and a conviction. However, Ajmer Singh was released in December 2003.

[7] The family continued to receive threatening telephone calls during the trial. The applicant fled to Cyprus to continue his studies. While he was away, Ajmer Singh's thugs destroyed the crops belonging to the applicant's family, thus causing financial problems for them. The applicant then returned to India.

[8] Once released, Ajmer Singh began threatening the family again, and on January 4, he and his men shot at the applicant. On January 24, 2004, the family's home was ransacked. The applicant hid in another Indian province, but he was still pursued. He left India for Canada on April 18, 2004.

IMPUGNED DECISION

[9] The panel determined that there were no grounds for refugee protection under section 96 and pointed out that the applicant had not applied under this section. The panel analyzed the protection claim solely under section 97 and denied the claim. The applicant challenges that decision in this judicial review.

[10] First, the panel referred to the fact that the applicant returned to India after his stay in Cyprus and concluded that there was no subjective fear of persecution.

[11] Second, the panel found that the applicant did not discharge his burden of establishing that his country is unable to protect him. In support of this finding, the panel refers to the fact that there was a trial and a conviction following his brother's murder. The panel also cites the fact that, according to his Personal Information Form, the applicant did not report the acts committed after the trial by the members of the Babar Khalsa. The applicant testified that his family did inform the police, but the panel did not find this statement credible.

[12] Last, the panel concluded that there was an internal flight alternative. The panel did not believe that the applicant was being sought throughout India and determined that, despite his instability, the applicant could settle in New Delhi.

ANALYSIS

1. *Did the panel err in failing to consider the applicability of section 96?*

[13] The applicant submits that the panel erred in law in failing to consider that he was a "Convention refugee" under section 96. He states that he fears persecution based on his political opinion.

[14] The appropriate standard of review in this case is correctness: *Kaburundi v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 361, [2006] F.C.J. No. 427 (QL) at

paragraphs 41 and 42:

According to the applicant, the panel erred in law in failing to deal with the merits of his claim for refugee protection, i.e., his potential inclusion in the “Convention refugee” categories.

The standard of review for such an error of law would be the correctness standard (*Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982).

[15] Before determining whether the panel decided the question correctly, I will consider one of the respondent’s arguments. He refers to the fact that the applicant did not check the box dealing with grounds for persecution and, therefore, did not apply under section 96. This statement is incorrect. In *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, the Court stated the following on this issue:

I note that the UNHCR Handbook, at p. 17, paragraph 66, states that it is not the duty of a claimant to identify the reasons for the persecution. It is for the examiner to decide whether the Convention definition is met . . .

[16] In the Court’s view, the following passage from the panel’s decision constitutes a reviewable error (tribunal record, page 4, second paragraph):

The panel determines that there are no grounds for the claim for refugee protection under section 96, particularly since the claimant did not originally make his claim under section 96 but only under paragraphs 97(1)(a) and (b), and after discussions with the claimant’s counsel, the panel concludes that this claim for refugee protection is based solely on section 97 because it is simply a matter of revenge.

[17] It is true that there was a discussion about sections 96 and 97 at the hearing. However, it cannot be inferred from the discussion that counsel for the applicant waived an analysis under section 96. It was the decision-maker himself who determined that the claim was based solely on section 97 because, in his view, it was simply a matter of revenge.

[18] On the one hand, the documentary evidence about the terrorist organization Babar Khalsa is probative. On the other hand, in both his written documents and his testimony, the applicant alleges a well-founded fear of persecution with regard to this organization. Furthermore, the panel wrote the following (tribunal record, page 4):

The claimant's father apparently told them that they were wrong to tell the police where the neighbour was hiding because the organization that the neighbour belonged to was very dangerous.

[19] In light of such a statement and the evidence in the record, the Court does not understand why the panel decided to base its analysis solely on section 97.

[20] It is true that revenge is an important factor in the applicant's statement about persecution. However, the aspect of the applicant's story regarding the terrorist organization Babar Khalsa should have been analyzed under section 96. This error warrants the intervention of the Court (*Jawaid v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 220, [2003] F.C.J. No. 305 (QL)).

[21] The parties did not submit a question for certification.

JUDGMENT

THE COURT ORDERS that this application for judicial review is allowed. The matter is remitted to be analyzed and decided by a different panel. There is no question to be certified.

“Michel Beaudry”

Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1157-07

STYLE OF CAUSE: **SARBIT SINGH AND
MINISTER OF CITIZENSHIP AND IMMIGRATION**

PLACE OF HEARING: Montréal, Quebec

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**REASONS FOR JUDGMENT
AND JUDGMENT BY:** The Honourable Mr. Justice Beaudry

DATED: October 1, 2007

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