Date: 20090212

Docket: IMM-2883-08

Citation: 2009 FC 140

Ottawa, Ontario, this 12th day of February 2009

Present: The Honourable Orville Frenette

BETWEEN:

Jasvir Kaur SOKHI
Maninder Singh SOKHI
Ravinder Kaur SOKHI
Ramandeep Singh SOKHI

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "IRPA") of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the "Board") rendered on May 30, 2008, determining that the applicants were not Convention refugees nor persons in need of protection

pursuant to sections 96 and 97 of the IRPA because they were not credible and failed to prove a reasonable fear of persecution should they be forced to return to India.

The Facts

[2] The applicants are citizen of India from Punjab State and were baptised in the Sikh Faith. Ms. Jasvir Kaur Sokhi is the mother of Maninder Singh Sokhi, Ravinder Kaur Sokhi and Ramandeep Singh Sokhi. The applicants' claim is based on that of Ms. Sokhi (the "principal applicant") and Mr. Maninder Singh Sokhi (the "male claimant").

[3] The principal applicant's husband, also a citizen of India, is a civil engineer who worked in Dubai for 20 years. He visited his family in India, irregularly, but sent money to provide for their needs.

[4] The principal applicant alleges fear of persecution by the police. She claims that she was arrested by the police in September 2003, mistreated and beaten by them because they believed that militants had stayed at her house. The police were led to the principal applicant's home by a "*hawala*" arrested in Delhi. The principal applicant's husband had sent some money through this person two weeks before and this person had her address in his diary.

[5] The principal applicant contends that the police accused her of knowing about her husband's illegal activities, including that he was involved with Muslim militants. She adds that her husband was detained in 2002 while visiting in India and was released after paying a bribe.

[6] The principal applicant claims she sought medical treatment for stress following her arrest in India in 2003. She claims she was hospitalized from two to four days. She did not remember in what year. She produced a medical certificate from a Dr. K. K. Sidhu, emanating from his clinic. She did not remember his name or what treatment she received. The certificate does not detail the injuries or indicate the treatment given.

[7] In 2003, she followed her husband to Dubai but, in 2004, problems occurred there and the police questioned her about them. After this incident she went to England for seven days with her husband.

[8] In February 2005, she came to Canada with her husband and children but four days later he returned to India where he still resides.

[9] The applicant is a 44-year-old woman who consulted medical specialists in Canada about her depression. They diagnosed her ailment as "severe post-traumatic stress syndrome" caused by the refugee process and prescribed her medication. The hearing by the Board was postponed numerous times at her counsel's request based on this reason.

[10] In one report by Dr. Jaswant Guzder, a child psychiatrist at the Montreal Jewish General Hospital, dated January 15, 2008, he wrote: "… in consultation with Dr. Beauregard, we are urging the Refugee Board to end her uncertain status and grant her asylum in Canada". A psychological report was prepared in 2006 by David L. B. Woodbury (who is an orientation specialist not

authorized to prepare psychological reports) and another report was made by Dr. Sylvie Laurion, a registered psychologist, dated February 8, 2007.

[11] The male claimant contends that he fell in love with a Muslim girl in January 2004. He met her parents on February 24, 2005 who disapproved their relationship and made threats against him. He fears for his safety. He was 17 years old at that time.

[12] The Board's hearing lasted from November 2, 2006 to February 5, 2008, in four distinct sittings, postponed mostly at the applicant's requests, culminating in the impugned decision of May 30, 2008.

The Board's Decision

[13] In its 12-page decision, the Board summarized the evidence and over nine pages elaborated the reasons supporting its finding that the applicants are not "Convention refugees" and "persons in need of protection".

[14] The Board found the principal applicant not to be credible nor a trustworthy witness, going into great details from the evidence and her Personal Information Form (PIF) to substantiate this finding.

[15] The Board found the psychologists' reports to be of little probative value and rejected them because they were based upon the principal applicant's version of the facts, a person found to be not credible.

[16] The Board also found that, because of her lack of credibility, *Guideline 8: Guideline on procedures with respect to vulnerable persons appearing before the IRB* and *Guideline 4: Guideline for women refugee claimants fearing gender-related persecution* (the "Guidelines"), issued by the Immigration and Refuge Board of Canada, were not applicable to her.

[17] The male claimant was also considered "not a straight forward witness".

The Standard of Review

[18] According to the jurisprudence for the assessment of facts or mixed facts and law, in such a case, the standard of review is reasonableness (*Dunsmuir v. New Brunswick,* [2008] 1 S.C.R. 190). The criterion to decide is: Does the decision fall within the acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir*, at paragraph 47)? The reasonableness standard requires courts to give due deference to decision-makers (*Dunsmuir*, at paragraph 49).

The Legislation

[19] Articles 96 and 97 of the IRPA read as follows:

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or

(*b*) not having a country of nationality, is outside the country of their former habitual

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence

residence and is unable or, by reason of that fear, unwilling to return to that country.	habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	**97.** (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	*a*) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	*b*) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,	(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,	(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

The Issues

[20] The applicants submitted four issues which I believe should be presented as follows:

i) Did the Board err on the determination of the non-credibility of the applicants?

ii) Did the Board err in refusing to give weight to the medical, psychological, and psychiatric reports about the principal applicant?

iii) Can an affidavit be set aside as self-serving?

iv) Did the Board err in ignoring the documentary evidence that members of the Sikh community are still in danger in India from police terror?

v) Did the Board err in not considering the Guidelines for vulnerable persons and women refugee claimants fearing gender-related persecution?

Preliminary Issue – Tardiness

[21] The respondent alleges that the application should have been filed within 15 days of the notification of the decision of the Board under subsection 72(2) of the IRPA. If requested, a Judge may, for special reasons, allow an extension of time to file the application.

[22] In the present case, the application was filed 12 days late alleging "other emergencies" which were not detailed in the application for leave.

[23] This matter has become *moot* since Justice Mosley granted leave on October 24, 2008.

Analysis

Did the Board err on the determination of the non-credibility of the principal applicant?

[24] The principal applicant submits that the Board erred in its general assessment of her non-credibility without giving any weight to the medical, psychological and psychiatric reports detailing her psychological problems.

[25] The respondent points out that the Board spent numerous pages of its decision analyzing the alleged facts, contradictions and inconsistencies presented by the principal applicant in her PIF and in her testimony which could not be explained only by the medical reports.

[26] This is evident from a reading of the decision.

[27] The applicants argue that the Board did not consider the facts that were established and particularly did not take into account, in assessing the principal applicant's credibility, her fragile medical state caused by the traumatic events which occurred in India. They claim that the Board ignored or refused to give weight to the medical, psychological and psychiatric reports which explained the effects of traumatic events and post-traumatic stress disorder (PTSD) on a person's capacity to testify and to recall events.

[28] The respondent replies that the Board considered the medical evidence but found many omissions and contradictions that could not be explained by the PTSD.

[29] The Board highlighted the numerous, important contradictions in her testimony and PIF. An analysis of these arguments reveals that the contradictions and inconsistencies in the testimony are numerous and evident.

[30] For example, she said her husband was arrested by the police in India in 2002 and gave bribes to be released but in his visa application to come to Canada he wrote he had never been arrested in India.

[31] In another part of her testimony she says she went to various countries with her husband, i.e. the United Kingdom in 2002 and 2004, the United States of America in 1999 and 2003, Canada in 2004, Germany and Holland in 2004, yet she or they did not claim refugee status.

[32] Before coming to Canada in 2005, they stayed in the United Kingdom with a visa obtained for this purpose.

[33] If the general facts that were presented by the principal applicant were the sole issue, I could not recognize any reviewable error since the courts cannot interfere in the factual determination unless it does not fall within the range of possible outcomes arising from the law and the facts (*Dunsmuir*, *supra*; *Mugesera v. Canada (M.C.I.)*, [2005] 2 S.C.R. 100, at paragraph 38; *Singh v. Minister of Citizenship and Immigration*, 2007 FC 62, at paragraph 28).

[34] The Board did point out to the medical, psychological and psychiatric evidence concerning the principal applicant but decided it could not explain the frailty of the evidence.

[35] The Board also pointed out that the quality of the “expert” evidence was debatable particularly regarding Mr. Woodbury, who is not a registered psychologist and therefore should not be producing “psychological reports”. On this point, the Board is correct (*Kakonyi v. Minister of*

Public Safety and Emergency Preparedness, 2008 FC 1410, at paragraphs 49 and 50). However, Dr. Sylvie Laurion is a registered and qualified psychologist and Dr. Jaswant Guzder is a psychiatrist practising at the Montreal Jewish General Hospital.

[36] The Board was also concerned with the undue emphasis this medical evidence put on the opinion that this patient should be granted asylum in Canada. A matter which has been assigned to immigration authorities and the courts. It is also accepted in law that medical evidence based upon facts related by a person who is found not to be credible, can be rejected by the Board (*Wahid v. Minister of Citizenship and Immigration*, 2002 FCT 517, at paragraphs 9, 10 and 11; *Dzey v. Minister of Citizenship and Immigration*, 2004 FC 167, at paragraph 42). However, the Board failed to consider sufficiently the psychological reports which show that a person's ability to recall events and testify in a coherent and logical manner can be severely impaired by PTSD.

[37] The Board in the present case did assess the principal applicant's credibility considering her medical condition, sufficiently taking into account its effect on her testimony.

[38] In reviewing the evidence provided and reading the transcripts of the hearings, I am not convinced that the Board properly considered the psychological and medical reports that warned about cognitive dysfunctions that would impede the principal applicant from giving a good and coherent testimony in front of the Board. I believe this impacted on the decision, filled with negative conclusions on credibility that are based, in contrast to the respondent's argument, on slight inaccuracies, that were, in my view, not properly founded.

[39] This constitutes a reviewable error according to the jurisprudence of our court (*Lubana v. Minister of Citizenship and Immigration*, 2003 FCT 116 (paragraphs 16 and 17); *Fidan v. Minister of Citizenship and Immigration*, 2003 FC 1190; *Atay v. Minister of Citizenship and Immigration*, 2008 FC 201).

[40] In a recent case concerning a couple, citizens from India, Deputy Judge Maurice Lagacé dismissed an application for judicial review in which the psychological state of the applicant was referred to explain inconsistencies and contradictions in the evidence (*Sharma et al. c. ministre de la Citoyenneté et de l'Immigration*, 2008 CF 908). The applicants had invoked sections 96 and 97 of the IRPA to attempt to have the negative Board's decision overturned. Judge Lagacé recognized the fact that the Board had determined the applicants were vulnerable persons because of their psychological state. However, at paragraph 29 of his decision, he dismissed the application because "[à] la lumière de ce qui précède, la Cour conclut que la Commission a considéré l'état psychologique des demandeurs et a mis en oeuvre les dispositions nécessaires envisagées par les Directives n° 8 ».

Women Refugee Claimants Fearing Gender-related Persecution – Guideline 4

[41] The principal applicant claims the Board did not follow the gender guidelines which exist to help the Board to assess credibility (*Muradova v. Minister of Citizenship and Immigration*, 2003 FCT 274).

[42] The respondent submits the Board applied the gender-related guidelines and took her fragile mental health into account in assessing her credibility. To accommodate this, the hearing was

divided in four sittings and the Board was attentive to her condition. It also considered her a "vulnerable person".

[43] The fact that the Board refused to grant the principal applicant's motion to have the hearing before a female member is not acceptable as a motive to overturn a decision. Moreover, granting such a motion could raise an issue of gender discrimination.

[44] Concerning the third issue: "the setting aside of an affidavit because self-serving", the short answer is that a Board, for valid reasons, could reach such a conclusion. However, here, the Board did not set the affidavit aside it only gave it limited value for the reasons given by the Board.

[45] Concerning the fourth issue, the applicants claim the Board ignored the danger faced by Sikhs in India. The respondent submits that the Board is presumed to have considered the documentary evidence and in fact concluded that the applicants did not face personalized risk in India.

[46] Recent decisions of our court have decided that Sikhs do not face greater risks than other Indian citizens. Every complainant must prove personalized risk (see *Singh v. Minister of Citizenship and Immigration*, 2008 FC 408; *Kaur et al. v. Minister of Citizenship and Immigration*, 2008 FC 1320; *Luthra v. Minister of Citizenship and Immigration*, 2008 FC 1053; *Singh v. Minister of Citizenship and Immigration*, 2008 FC 453). Therefore, the applicants' argument on this point cannot be accepted.

[47] The principal applicant claims that the Board failed to consider the impact of the *Canadian Charter of Rights and Freedoms* because of the inhuman treatment prohibited by sections 7 and 12 of the *Charter* and article 3 of the 1984 United Nations *Convention against Torture and Other Forms of Inhuman or Degrading Treatment or Punishment*. The respondent argues this issue is premature before the Board, a position supported by case-law (*Tsakala v. Minister of Citizenship and Immigration*, 2003 FCT 411). This argument is therefore unfounded.

The male claimant

[48] The Board did not accept Marinder Singh Sokhi's claim based on the fact that his school certificate indicates he would have been in school on January 1, 2004 while the alleged incident concerning his relation with a Muslim girl, their meeting with her disapproving parents, occurred on February 24, 2005. He explained that after January 1, 2005, he attended school to prepare for exams. The second reason the Board did not believe his version of the facts was that he could not remember the name of a temple he had visited. This conclusion of fact is erroneous since in his testimony, he gave the name of the "Temple Nanadavy" (at page 665 of the Tribunal Record); it was the district's name he could not remember.

[49] Finally, the Board did not consider his young age (17) at the time.

[50] I find the Board's finding of non credibility of the male claimant is not supported by the facts; therefore, it is unreasonable.

Conclusion

[51] The application for judicial review will be allowed.

JUDGMENT

THIS COURT ORDERS THAT:

1. The application for leave and for judicial review of the Refugee Protection Division of the Immigration and Refugee Board (the Board) rendered on May 30, 2008, determining that the applicants were not Convention refugees nor persons in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, is granted;
2. This matter is referred back to the Board for re-determination before a differently constituted panel;
3. No question of general importance is certified.

"Orville Frenette"

Deputy Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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