Federal Court  Cour fédérale

Date: 20090512

Docket: IMM-4815-08

Citation: 2009 FC 485

Ottawa, Ontario, May 12, 2009

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

BALRAJ SINGH

Applicant

and

THE 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 (Act), of a decision dated October 9, 2008, by the Refugee Protection Division of the Immigration and Refugee Board (panel) that the applicant is not a Convention refugee or a person in need of protection.

[2] For the following reasons, the application for judicial review will be allowed.

Factual background

[3] The applicant, Balraj Singh, a citizen of India, is both a pharmacist and a farmer in the state of Punjab. In August 2006, he hired a young Muslim servant. In October 2006, under the excuse that all employees from outside Punjab had to be questioned, the servant was arrested and tortured by local police authorities.

[4] On April 13, 2007, while the applicant and his servant were working in the fields, the police arrived to arrest the servant. However, the servant managed to escape. The applicant was therefore arrested, tortured and accused of being an accomplice to Muslim extremists. The police authorities told him that they had found a gun in the servant's room.

[5] The applicant alleges having been arrested and beaten two other times, in June and in August 2007.

[6] Meanwhile, the servant's father held the applicant responsible for the torture his son endured. He threatened the applicant and his family in August 2007.

[7] The applicant arrived in Canada on October 24, 2007, and claimed protection on November 5, 2007.

[8] The applicant alleges that he cannot return to India because he would be arrested and tortured by the police, who believe that he is associated with Muslim extremists.

[9] The panel denied the applicant's claim, stating that his narrative was fabricated and not credible. The panel mentioned that even if it had erred in its credibility analysis, the applicant had an internal flight alternative (IFA) in the city of Delhi.

Analysis

Standard of review

[10] In questions of credibility and assessment of evidence, it is well established under paragraph 18.1(4)(*d*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, that the Court will intervene only if the panel based its decision on an erroneous finding of fact made in a perverse or capricious manner or if it made its decision without regard to the material before it (*Aguebor v. Canada (Minister of Employment and Immigration)* (1993), 160 N.R. 315 (F.C.A.), 42 A.C.W.S. (3d) 886).

[11] Assessing credibility and weighing the evidence fall within the jurisdiction of the administrative tribunal called upon to assess the allegation of a subjective fear by a refugee claimant (*Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35 (F.C.T.D.), 83 A.C.W.S. (3d) 264 at paragraph 14). Before *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the standard of review applicable in comparable circumstances was patent unreasonableness. Since that decision, the standard is reasonableness.

[12] The appropriate standard of review for IFA issues was patent unreasonableness (*Khan v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 44, 136 A.C.W.S. (3d) 912 and *Chorny v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 999, 238 F.T.R. 289). Following *Dunsmuir*, the Court must continue to show deference when determining an IFA and this decision is reviewed according to the new standard of reasonableness. Consequently, the Court will intervene only if the decision does not fall within the range "of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at paragraph 47). The reasonableness of a decision is concerned with the existence of justification, transparency and intelligibility within the decision-making process.

[13] In the present case, the panel committed errors that warrant the intervention of the Court.

[14] With regard to credibility, the panel relied on documentary evidence to state that it did not believe the applicant, that his story was fabricated and that it was implausible that he was subjected to the alleged torture. The panel made no reference to a document entitled "National Conference on Prevention of Torture in India" dated June 2007 that was nevertheless part of the package made available to the decision-makers.

[15] The Court believes that it would have been necessary to refer to the documentation that contradicted the documentation used by the panel given that the torture suffered by the applicant was a crucial element that he raised. The panel ought to have explained why it set aside the documentation concerning torture or did not believe that the documentation was relevant (*Simpson*

v. Canada (Minister of Citizenship and Immigration), 2006 FC 970, [2006] F.C.J. No. 1224 (QL) at paragraph 44).

[16] The panel then mentioned that it did not put great weight on the affidavits filed by the applicant because it believed that these affidavits had been typewritten on the same machine. Even if there was no expert opinion in the record that could support this finding, the panel's error stems mainly from the fact that it never confronted the applicant in this regard during the hearing. Nevertheless, these affidavits corroborated the applicant's arrests. Furthermore, nothing is mentioned by the panel about a letter from a lawyer whom the applicant approached and to whom he had told his narrative.

[17] With respect to the IFA, the panel mentioned that the applicant alleged that he could not return to India because the police would arrest and torture him since they believe that he is associated with Muslim extremists. The panel conceded that the police are searching everywhere for extremist terrorists (see paragraph 20 of the panel's decision . . . "Muslim extremist terrorists have police everywhere on the alert. . . .").

[18] Nonetheless, the panel arrived at the conclusion that the applicant had an IFA.

[19] The applicant noted that he had been arrested in another state (Hariana) in India and he explained why he believed he was in danger in the two suggested cities of Delhi and Mumbai.

[20] The failure of the panel to take this important evidence into consideration, to comment on it or to explain why an IFA was nevertheless available to the applicant despite his assertions requires the intervention of this Court (*Owusu-Ansah v. Canada (Minister of Employment and Immigration)* (1989), 98 N.R. 312, 15 A.C.W.S. (3d) (F.C.A.)).

[21] The parties did not propose any question for certification and this application does not give rise to any.

JUDGMENT

THE COURT ORDERS that the application for judicial review be allowed. The matter is referred for redetermination by a differently constituted panel. No question is certified.

"Michel Beaudry"
Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**IMM-4815-08**
STYLE OF CAUSE:	**BALRAJ SINGH v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
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