Federal Court  Cour fédérale

Date: 20090728

Docket: IMM-201-09

Citation: 2009 FC 763

Ottawa, Ontario, July 28, 2009

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

HARDEEP KUMAR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated January 7, 2009, where the Board found that the applicant was not a Convention refugee nor a person in need of protection.

Issues

[2] The only issue in the case at bar is whether the Board erred in concluding that the applicant did not rebut the presumption that India was able to protect him?

Factual Background

[3] The applicant, Hardeep Kumar, is a citizen of India from the village of Lohgarh in the district of Jalandhar in Punjab.

[4] His brother, Pawan Kumar, was a taxi driver who had problems with the police. Specifically, he was arrested, tortured and charged in February 2004 for collaborating with extremists and transporting their weapons. The applicant alleges that his brother was forced to take extremists in his taxi but that they fled when he approached a checkpoint.

[5] In April 2005, the applicant's brother was again arrested, tortured and interrogated by the police about extremists, but was released after the intervention of influential people. After receiving medical care, he left home without telling anyone. The applicant and his family went to the police station to file a report on the matter but they refused to take their report and alleged that the applicant's brother had joined the extremists.

[6] On June 12, 2005, following the explosion of a bomb in a cinema in Delhi, the police raided the applicant's home and asked where his brother was. When the police did not find him, they arrested the applicant and took him to the police station, where they interrogated him, beat him and severely tortured him. With the help of the village council and his family's payment of a bribe, the applicant was released on June 17, 2005, and he then received medical attention.

[7] On March 23, 2006, two individuals came to the applicant's home during the night, forcing him and his family to give them food and shelter. They said that the applicant’s brother was working for them. The next morning, the police raided the home and arrested the applicant. They took him to the police station where they questioned him about the extremists and his brother, and they beat him and tortured him.

[8] On March 27, 2006, the applicant was released after a bribe was paid, but, before his release, he was fingerprinted and photographed, told to sign blank papers and ordered to report to the police station monthly. The applicant also received medical attention.

[9] After receiving treatment, he left his village and went to Chandigarh with an agent, or human smuggler. The agent told him that the police were looking for him because he had not reported to them as ordered. The applicant alleges that the agent took care of his papers and obtained a visa for him so he could come to Canada.

[10] The applicant left his country and arrived in Canada on December 18, 2006. He claimed refugee protection in Canada on January 29, 2007.

[11] The applicant’s claim for asylum is based on his alleged fear of persecution at the hands of corrupt police officers in Punjab. Specifically, the applicant alleges that the Punjabi police suspected his brother of supporting the terrorists and the police detained and tortured him in order to find out his brother’s whereabouts and to get a confession.

Impugned Decision

[12] The Board dismissed the applicant's claim as it concluded that the applicant could have availed himself of state protection before fleeing India.

[13] During the hearing, the Board asked the applicant if, while living in Chandigarh for the eight months before he left for Canada, he informed the Indian authorities of the problems he had with the police in his district. The applicant replied that he had not done so because he would have probably been captured by the Punjabi police. When asked whether he had tried to obtain help from either a human rights commission or a non-governmental organization working in that field, the applicant answered that he had not done so and that his agent kept him indoors at all times.

[14] The Board asked the applicant to specify whether he had gone to the Canadian Embassy to obtain his visa. The applicant initially answered that his agent brought him all the documents, but he then said that he had gone to Delhi with the agent to visit an office associated with the Canadian Embassy. When asked whether he informed the Indian authorities of the problems he had with the police in Punjab when he was in Delhi, the applicant replied that the agent had not given him enough time to do so. He also answered that he had not tried to obtain assistance from a human rights commission or a non-governmental organization working in that field while he was in Delhi.

[15] The Board noted that the test for whether state protection might reasonably be forthcoming is an objective one (*Judge v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1089, 133 A.C.W.S. (3d) 157 at paragraph 10) and there is a presumption that the state is capable of protecting

its citizens (*Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689. The Board noted that India is a democratic country and that the documentary evidence indicates that, despite the serious problems that do exist in India, the government generally respects the rights of its citizens. The documentary evidence further indicates that the judiciary is independent and that citizens can avail themselves of judicial recourse and obtain concrete results. Control mechanisms exist with the police forces and the police are expected to abide by a specific code of conduct and there are government funded and non-governmental organizations to assist those who have difficulty obtaining state protection.

[16] When a lack of state protection is claimed, relevant and probative evidence must be adduced of the state's inability to protect (*Carillo v. Canada (Minister of Citizenship and Immigration)* 2008 FCA 94, 377 N.R. 393 at paragraph 38). Where a state is in effective control of its territory, has military, police and civil authorities in place, and makes serious efforts to protect its citizens, the mere fact that it is not always successful at doing so will not be enough to rebut the presumption of the existence of state protection (*Canada (Minister of Employment and Immigration) v. Villafranca (F.C.A.)*, (1992), 150 N.R. 232, 37 A.C.W.S. (3d) 1259). The protection offered by the state must not be perfect but it must be practical, real and effective (*Judge* at paragraph 9; *Kaur v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1491, 143 A.C.W.S. (3d) 1094 at paragraph 28; *Razo v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1265, 162 A.C.W.S. (3d) 659 at paragraph 10). A citizen is required to seek the protection of the authorities in their country, unless it is objectively reasonable not to do so; in other words, unless such protection would not be forthcoming (*Soto v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1654, 145 A.C.W.S. (3d) 136 at paragraph 7; *Castro v. Canada (Minister of Citizenship and Immigration)*,

2007 FC 40, 154 A.C.W.S. (3d) 937 at paragraph 14). The Board noted that it is not reasonable to require a refugee protection claimant to place his own or his family's life in danger, or expose himself to the risk of further persecution merely to demonstrate the ineffectiveness of the state protection sought (*Chagoya v. Canada (Minister of Immigration and Immigration)*, 2008 FC 721 at paragraph 5, [2008] F.C.J. No. 908 (QL)).

[17] During the hearing, the applicant indicated that when state protection becomes ineffective, there is no further requirement for an applicant to seek the protection of the authorities. The applicant also cited this Court's decision in *Kaur* and argued that state protection in India was ineffective. The applicant referred to the documentary evidence, citing in particular an Amnesty International report indicating that torture and violence against persons in detention persists in Punjab and that the authorities seem to believe that they can violate citizens' fundamental rights with impunity. He further indicated that the Punjab State Human Rights Commission was inundated with complaints mostly concerning abuses committed by the police. He also cited the remarks of an Indian judge who complained that, in response to complaints of illegal acts by police officers, no action was taken to make the officers aware of the need to respect human rights.

[18] The applicant also filed documentary evidence such as decisions by the Supreme Court of India noting the existence of illegal practices by Indian police officers, including cases of torture and death of detainees. In *Smt. Shakila Abdul Gafar Khan v. Vasant Raghunath Dhoble and ANR*, [2003] INSC 435, September 8, 2003 at p. 8 (*Khan v. Dhoble and ANR*), the judges clearly

indicated that such practices are intolerable and pointed out that recourse is available to those beaten or assaulted while in detention.

[19] In the recent Periodic Review of India by the Human Rights Council, India's representatives were criticized and were questioned about acts of torture and mistreatment committed with impunity by the police and security forces during operations under the *Armed Forces Special Powers Act*. Overall, however, India was congratulated on its commitment to democracy and its determination to promote human rights, not only through the courts and human rights commissions, but also through active participation by civil society and the press. The Indian delegation indicated that India had signed the Convention against Torture and embraced its objectives.

[20] The Board recognized that the situation in India is problematic and significant violations of human rights do occur. The Board is aware of the possible consequences of being a victim of torture and concerns with the remarks of the judges of the Supreme Court of India, who wrote that the adoption of the *Universal Declaration of Human Rights* marked the emergence of a worldwide trend in the protection and safeguarding of specific fundamental rights, including the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (*Khan v. Dhoble and ANR*). Although the Board noted that these crimes are still alarmingly widespread in India and that some politicians, feigning ignorance, allow police officers to act in this way when it suits their own purposes, the Board did not believe that this shows that state protection is ineffective in India, because the judges of India's Supreme Court and other courts perform their duties in an independent manner, changing the rules of evidence to make justice more accessible to citizens who are the

victims of such acts and calling upon all concerned, magistrates included, to make all citizens more aware of their rights.

[21] Despite criticisms of the Indian judicial system, including the fact that delays are sometimes excessive, there is a general effectiveness of the system. Moreover, illegal acts by police officers in a specific region of the country do not allow to conclude that the state, taken as a whole, is itself an agent of persecution or does not offer protection against such acts (*Luthra v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1053, 170 A.C.W.S. (3d) 401 at paragraph 13.

[22] Taking all of the documentary evidence into account and considering the personal situation of the applicant, who lived in Chandigarh for approximately eight months before leaving India, the Board found that the applicant's testimony and the documentary evidence to which he referred did not constitute convincing evidence to support a conclusion that the presumption of the ability of the Indian authorities to protect their citizens had been rebutted in his case.

[23] Moreover, the Board did not believe that it was unreasonable to expect the applicant to attempt to alert the Indian authorities and to seek their protection while living in Chandigarh or Delhi. He could have obtained assistance from governmental or non-governmental human rights organizations and he could have informed them that he was threatened by police officers in his district (*Lopez v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 198, 165 A.C.W.S. (3d) 514 at paragraph 22; *Hernandez v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1211, 164 A.C.W.S. (3d) 842 at paragraph 21).

[24] The Board found that the applicant's explanation for not taking action while he was living in Chandigarh or during his stay in Delhi because state protection in India was ineffective was unconvincing given that, despite the persistence of significant problems, the documentary evidence showed that democracy still operated in India. The Board noted that the Indian state had the resources – particularly its judicial system – and the willingness to provide adequate protection to its citizens (*Navarro v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 358, 169 A.C.W.S. (3d) 626 at paragraph 17; *Sanchez v. Canada (Minister of Citizenship and Immigration)* 2008 FC 66, 167 A.C.W.S. (3d) 155 at paragraph 12).

Analysis

Standard of review

[25] The question of state protection is one of mixed fact and law which is reviewable on the standard of reasonableness (*Chagoya* at paragraph 3; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraphs 55, 57, 62 and 64; *Chaves v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 193, 137 A.C.W.S. (3d) 392; *Mendoza v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 634, 139 A.C.W.S. (3d) 151 at paragraph 16; *B.R. v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 269, 146 A.C.W.S. (3d) 530 at paragraph 17).

[26] According to the Supreme Court of Canada, the elements to consider are the justification of the decision, its transparency and its intelligibility and the outcome must be defensible in respect of the facts and the law (*Dunsmuir* at paragraph 47).

[27] In the case at bar, it was entirely open to the Board under the circumstances to conclude that the applicant had failed to exhaust all avenues to seek alternative avenues of redress sanctioned by the state. Moreover, it was reasonably open to the Board to find unsatisfactory the applicant's explanations for not seeking state protection when he lived in Delhi and Chandigarh.

[28] As noted by this Court in *Martinez v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 343, 146 A.C.W.S. (3d) 1052 at paragraph 10, the Board should not automatically conclude that the actions of a few constitute persecution by the state. Where the alleged persecutors are confined to a specific location or are rogue elements acting outside their jurisdiction, the Board must still assess whether it was objectively reasonable for the applicant to have sought the protection of the state.

[29] The Board member analyzed not only the positive documentary evidence concerning India but the negative one and considered that there were remedies available to the applicant against his alleged persecutors in his country, especially since he had been living in two different cities where various authorities and agencies such as human rights commissions were available to help him. The Board therefore found that since he had failed to seek the protection of his own country, the applicant had not rebutted the presumption of state protection. This is not an error justifying the intervention of this Court.

[30] The conclusions of the Board are defensible in respect of the facts and the law.

[31] Both parties advised the Court that they do not consider that this case raises a serious question which ought to be certified for an appeal. The Court agrees.

JUDGMENT

THIS COURT ORDERS that the application for judicial review be dismissed. No question is certified.

"Michel Beaudry"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

Andrea C. Snizynski (514) 271-1127	FOR APPLICANT
Marilyne Trudeau (514) 496-4070 Alexandre Tavadian (514) 496-2447	FOR RESPONDENT

SOLICITORS OF RECORD:

Andrea C. Snizynski Montreal, Quebec	FOR APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR RESPONDENT