

Federal Court



Cour fédérale

Date: 20100909

Docket: IMM-6591-09

Citation: 2010 FC 887

Ottawa, Ontario, September 9, 2010

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

LAXMI CHAPAGAIN

Applicant

and

**THE MINISTER OF
CITIZENSHIP AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the RPD) dated December 8, 2009 concluding that the applicant is not a Convention refugee or person in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act* (IRPA), S.C. 2001, c. 27 because her claim lacks credibility and state protection is available. The applicant submits that while these findings

are in error, the RPD did not conduct a fair hearing considering that the applicant was designated as a “vulnerable person”.

FACTS

Background

[2] The twenty-eight (28) year old applicant is a citizen of Nepal. She arrived in Canada on July 2, 2007 and claimed refugee status on July 5, 2007.

[3] The applicant is an educated woman who holds a Bachelors Degree and a Masters Certificate from Tribhuvan University in Nepal. In 2002 the applicant accepted a position as a Program Officer with the United Nations Development Fund for Women (UNIFEM). The applicant’s duties initially consisted of administrative office tasks. She was later promoted to planning and implementing peace building activities for Nepalese women. On August 17, 2006, the applicant was invited to join the Maoist affiliated All Nepal National Independent Students Union (ANNISU) by a group of students at her university where she completing her Masters Certificate. The pressure, albeit gentle, persisted although the applicant consistently refused to join. In September 2006 the applicant’s duties in UNIFEM were upgraded and now included planning and implementing peace building activities. On September 27, 2006 the applicant received a phone call from an ANNISU member who voiced his disapproval with the applicant’s position and duties in UNIFEM and her failure to join ANNISU. In November 2006 a power sharing peace treaty was signed between the Maoist rebels and the government. The peace treaty ended the violence from the Maoist rebels, but affiliated groups such as the Young Communist League (YCL) continued to harass the population. On December 28, 2006 the applicant was confronted by five YCL members

who requested a donation of 1 million Rupees within a week since the applicant earned high wages. They robbed the applicant of the 5000 Rupees which she had in her purse before releasing her. The applicant was too afraid to report the incident. The applicant received a total of 10 threatening telephone calls before she fled to Canada on July 1, 2007.

Vulnerable person designation

[4] The applicant was designated by the RPD as a “vulnerable person” under the *RPD Guidelines on Procedures with Respect to Vulnerable Persons Appearing before the IRB*. This was based on a request from the applicant’s counsel who demonstrated that the applicant has been seriously ill and hospitalized with depression and suicidal tendencies. This was recognized by the RPD at the hearing, and the applicant’s counsel was invited to reverse the order of questioning so that the applicant’s counsel could lead the applicant before the Refugee Protection Officer began questioning. The applicant’s counsel declined the offer.

Decision under review

[5] On December 8, 2009 the RPD dismissed the refugee claim because it lacked credibility and state protection is available in Nepal.

[6] The RPD determined that the applicant’s allegation of being a person of interest to the Maoists was not credible for the following reasons:

1. the allegation of being on a Maoist “hit list” was made *de novo* at the hearing and omitted from the Personal Information Form or the immigration interview without explanation;
2. it was reasonable to expect that the Maoists would have harmed the applicant in the two years she was on a hit list but she was never harmed or injured;
3. the December 27, 2007 letter from the Maoists which threatened the applicant with “physical harm” if she did not donate and join the Nepal Communist party was self-serving and lacked credibility;
4. the applicant’s fear that the police would disclose the letter and her name to the media if she made a complaint was not substantiated; and
5. the applicant could not adequately discuss the nature of her employment at UNIFEM.

[7] The RPD determined that the state protection was available in Nepal. The RPD determined that the country condition documentation did not indicate that police disclose complaints to the media so that the Maoists could proceed with retaliatory action. The RPD determined at paragraph 20 that the present country condition documentation indicates that Nepal is safer then it was when the applicant would have been harassed by the Maoists:

¶20 There is varying documentary material concerning the situation in Nepal. As noted in the claimant’s PIF there was a ceasefire in Nepal in April 2006 and a Comprehensive Peace Agreement was signed on November 21 that year. In July 2007, which was the time the claimant left Nepal, the UN High Commission for Refugees found that significant improvement was made in the overall situation in Nepal although there was some concern about tension in the Tarai region and some continuing

extortion by Maoists. Some reports from the end of 2007 showing a worsening of human rights situation and suggest that Nepal was at risk of slipping back into renewed conflict. At the constituent assembly election on 10 April 2008 the CPN-M won 220 out of 575 elected seats, twice as many as the NCP. The UML won 103 seats. The CPN-M leads a coalition government in Nepal. Some newspaper articles were disclosed regarding the killing of a wealthy businessman and beating of school teachers at the hands of Maoist perpetrators. The documentary evidence persuades me on a balance of probabilities that extortion and forced recruitment have decreased dramatically since the claimant left Nepal in July 2007. I do not find the claimant to be similarly situated to the persons in the news articles.

[8] The RPD found in the alternative the risk feared by the applicant, of falling prey to Maoist forced recruitment or harassment, is a risk faced generally by the Nepalese population. The refugee claim was therefore dismissed.

LEGISLATION

[9] Section 96 of IRPA grants protection to Convention refugees:

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 themselves of the protection of each of those countries; or

(b) not having a country of

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;

nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

[10] Section 97 of IRPA grants protection to certain categories of persons:

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

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(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,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(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) 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) la menace ou le risque ne

medical care.

résulte pas de l'incapacité du
pays de fournir des soins
médicaux ou de santé
adéquats.

ISSUES

[11] The applicant raises the following issues :

- a. Did the Board Member err in law by making credibility findings that were vague and primarily on the basis of unreasonable and irrelevant considerations?;
- b. Did the Board member violate the principles of natural justice by failing to consider the psychological report detailing a condition of Post Traumatic Stress Disorder and how this disorder would affect the applicant's testimony?;
- c. Did the Board member err by overlooking other corroborating documentary evidence of her story based on a general adverse finding of credibility?;
- d. Did the Board member violate the principles of natural justice by ignoring applicant's counsel's repeated request that the applicant was facing difficulty in understanding the questions due to the poor quality of the interpretation and did not permit the counsel's request to allow the applicant to respond to the member's question in English without the help of an interpreter?;
- e. Did the Board member err in law by failing to consider the totality of evidence detailing the situation of "similarly situated individuals" filed in support of the applicant's claim and particularly by ignoring parts of evidence directly contradicting the Officer's conclusion that state protection was available?; and
- f. Did the Board member err in law by failing to conduct an analysis of the "country of reference" evidence?

[12] The Court has reformulated the issues as follows:

- a. Did the RPD breach its duty of procedural fairness it owed to the applicant?;
- b. Was it reasonably open to the RPD to find that the applicant was not credible?; and
- c. Was it reasonably open to the RPD to find that state protection was available to the applicant?

STANDARD OF REVIEW

[13] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, 372 N.R. 1, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to “ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of (deference) to be accorded with regard to a particular category of question”: see also *Khosa v. Canada (MCI)*, 2009 SCC 12, per Justice Binnie at para. 53.

[14] Questions of credibility, state protection and IFA concern determinations of fact and mixed fact and law. It is clear that as a result of *Dunsmuir* and *Khosa* that such issues are to be reviewed on a standard of reasonableness. Recent case law has reaffirmed that the standard of review for determining whether the applicant has a valid IFA is reasonableness: *Mejia v. Canada (MCI)*, 2009 FC 354, per Justice Russell at para. 29; *Syvryyn v. Canada (MCI)*, 2009 FC 1027, 84 Imm. L.R. (3d) 316, per Justice Snider at para. 3; and my decision in *Perea v. Canada (MCI)*, 2009 FC 1173 at para. 23. Whether the applicant’s right to a fair hearing and natural justice has been compromised by inadequate translation is a question of procedural fairness which is reviewable on a standard of correctness: *Sherpa v. Canada (MCI)*, 2009 FC 267, 344 FTR 30, per Justice Russell at paras. 20-22.

[15] In reviewing the RPD's decision using a standard of reasonableness, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir, supra*, at paragraph 47; *Khosa, supra*, at para. 59.

Issue No. 1: Did the RPD breach its duty of procedural fairness owed to the applicant?

[16] The only submission from the applicant at the oral hearing was that the applicant's right to a fair hearing was breached because the RPD panel member was not adequately sensitive to the applicant as a vulnerable person under the Chairperson's Guidelines on Procedures with respect to Vulnerable Persons Appearing before the IRB. The applicant was designated before the hearing as a "vulnerable person" because she had been hospitalized with a psychiatric illness and had demonstrated strong suicidal tendencies. She had been hospitalized at the request of the police.

[17] At the RPD hearing, the applicant clearly appeared vulnerable and sensitive. During the hearing she complained of "dizziness", and advised the RPD panel member that she had forgotten to take her medicine for stress that day.

[18] There was a Nepalese interpreter at the hearing. During the hearing the applicant answered some questions in English. Counsel for the applicant explained that she can better answer questions about her job description in English because it was the English language which described her job while working in Nepal for the United Nations. For example, at page 24 of the transcript:

COUNSEL FOR CLAIMANT: Excuse me. Can you reply that in English in your own language if it's possible what you were working so that we better understand? (*sic*)

The RPD member interjects:

MEMBER: You want the claimant to not use the interpreter?"...

The counsel for the applicant said that the applicant can better explain in English what she was doing in her job:

COUNSEL FOR CLAIMANT: The translation is probably not conveying the total meaning what I was thinking. So if possible like, you know, she can reply in English. We'll see if she can do it. Otherwise we can ask the interpreter to translate again.

The panel member says "But she chose to go forward in Nepali not in English". At this point, the claimant became dizzy and needed a rest.

[19] At the hearing, the applicant explained that she worked with an action plan for HIV/AIDS and she provided this information in English. The panel member said "I'm hearing this in English ... is there a reason why we switched over to English in order to answer these questions?" The claimant says: "Sometimes I have problems". Then the panel member states: "Counsel, as I have indicated, we aren't doing reverse order of questioning." "And you will get your opportunity to ask questions that you think need to be clarified or questions that haven't been put to her".

[20] Counsel for the claimant states that there are gaps in the understanding by the interpreter and that is why it's better if she answers in English.

[21] During the hearing this bothers the panel member. The panel member says at page 35 of the transcript:

MEMBER: ... Do you wish to continue using the Nepali interpreter or do you wish to give your answers in English? I had already indicated my preference was to continue with the interpreter.

CLAIMANT: I will follow the Member's advice.

This problem kept arising and the member was completely inflexible.

[22] The Court must conclude, upon reading the full transcript, that the panel member was not accommodating or sensitive enough to the applicant's vulnerability. The applicant's counsel reported hostility and inflexibility from the panel member. The Court can see that the RPD member should have been flexible and provided a more gentle and accommodating hearing. It was not necessary for the panel member to be so rigid in not allowing the applicant to answer the questions partly in Nepali and partly in English, particularly if the question involved her job description which was better communicated in the English language. While the applicant originally wished to give her evidence in Nepali, and to use an interpreter at the hearing, that should not foreclose the member from allowing the applicant to answer certain questions partly in English to allow the applicant to better communicate her true meaning. As counsel for the applicant submitted, some words are not available in Nepali which can be better answered in English.

[23] I must conclude that the panel member was not sufficiently sensitive and accommodating in tailoring its procedures to meet the particular needs of the applicant as a vulnerable person. The panel member ought to have allowed the applicant to provide part of her answer in English when it

was appropriate in her mind. The panel member ought to have allowed the applicant to reverse the order of questioning when it was clear that the applicant's counsel felt it would be appropriate to ask the questions first, notwithstanding that he originally declined the offer. The panel member ought to have been gentler and made a greater effort to make the applicant more comfortable. For these reasons, the applicant is entitled to a new hearing before a different member of the RPD, and it will not be necessary for the Court to consider the remaining issues with respect to credibility and state protection.

[24] At the conclusion of the hearing, I advised the parties that I had heard another appeal that same morning involving the same panel member. The complaint in that case was the panel member was harsh and insensitive toward the applicant. In that case, IMM-117-10, the applicant was not a vulnerable person, but I did notice the same manner of speaking by the panel member in both cases.

[25] In the case at bar, the hearing of the applicant was expedited because the applicant was a vulnerable person. It is important for the RPD to schedule its new hearing for the applicant also on an expedited basis, and bring this matter to a conclusion. The applicant may not have any reasonable grounds for her refugee claim. That can be decided properly if the new RPD panel is sensitive to the vulnerability of the applicant as it conducts its hearing.

CERTIFIED QUESTION

[26] Both parties advised the Court that this case does not raise a serious question of general importance which ought to be certified for an appeal. The Court agrees.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

The application for judicial review is allowed, the decision of the RPD dated December 8, 2009 is set aside, and this refugee claim is referred to another panel of the RPD for redetermination on an expedited basis.

“Michael A. Kelen”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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