

Federal Court



Cour fédérale

Date: 20101105

Docket: IMM-1084-10

Citation: 2010 FC 1097

Ottawa, Ontario, November 5, 2010

PRESENT: The Honourable Justice Zinn

BETWEEN:

SHANTA GURUNG

Applicant

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(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, of a decision of the Refugee Protection Division of the Immigration and Refugee Board. The Board determined that the applicant was neither a Convention refugee nor a person in need of protection.

[2] For the reasons that follow, although the Member made errors in the decision, this application must be dismissed.

Background

[3] The applicant is a 30 year-old Nepali woman. She alleges that she faces persecution under s. 96 and risk under s. 97 of the Act at the hands of Maoists if she returns to Nepal.

[4] She says that during secondary school she was a member of the National Student Union (NSU), the student wing of the Nepali Congress. During this time she was threatened by members of the All Nepal Free Students Union, the student wing of the Communist Party of Nepal (Maoist). After leaving school she went to work in Oman as a housekeeper from 2001 to 2004, eventually returning to Nepal in February 2004 with the intention of opening a convenience store in her village, Morang. Instead she moved to Kathmandu because her brother had told her that Maoists were forcibly recruiting people in her village and had raided their house.

[5] In September 2004 there was a truce in the fighting, and the applicant returned to her village with her family. In October 2004, armed Maoists came to their house and tried to recruit the applicant. When her brother, who is disabled, argued with them, they pushed him to the ground. The Maoists eventually left, but threatened that if she did not agree to join the militia they would take her by force. The applicant left for Kathmandu but later discovered that the Maoists had returned, assaulted her brother, and threatened to search for the applicant everywhere. At this point the applicant obtained a visa to work in Israel and left Nepal in November 2004.

[6] In February 2005, King Gyanendra seized power in a coup. Around this time the Maoists became more active and took control of the applicant's village. The Maoists extorted the

applicant's family, forcing the family to give them the money the applicant had been sending home from Israel. In July 2007, the Maoists asked the applicant's family for a large sum of money, which the applicant knew she would be unable to provide. Accordingly, she advised her family to flee to Kathmandu, where they remain in hiding from the Maoists.

[7] In August 2007, the applicant obtained a Canadian visa under the Live-In Caregiver Program and came to Canada from Israel. Unfortunately, she was abandoned by her arranged employer who did not show up at the airport to meet her or return her calls. As a result, the applicant lost her eligibility to obtain permanent residence in Canada, normally available to live-in-caregivers after working for two years.

[8] In September 2007, the Maoist coalition with the Nepalese government broke down and the Maoists resumed their extortion activities. The applicant's brother informed her that Maoists took over their house in their village and threatened the applicant and her family. After hearing this news, and anticipating that she would not qualify for residence under the Live-In Caregiver Program, the applicant claimed refugee status on October 3, 2007, even though she had valid status in Canada until December 31, 2010.

[9] The Board determined that the applicant was not a Convention refugee or a person in need of protection. The Board found that the applicant's story lacked credibility and that her alleged fear was not well-founded.

[10] The applicant presented to the Board a letter from the Belbari Office of the Village Development Committee, which explained that the Maoists had “captured” the applicant’s family’s property. The letter is dated July 2008 and the translation indicates that the applicant has “fled with her family” from Morang. The Board noted that the applicant had been in Canada in July 2008, when the letter was written, and was in Israel in July 2007, when her family fled to Kathmandu. The Board reasoned that the letter’s statement that she fled “with” her family was thus inaccurate and therefore determined that the letter was not genuine, the Maoists had not seized the property as alleged, and the applicant was not credible. The Board’s decision makes it clear that this negative credibility finding also cast doubt on the claimant’s explanation for delaying making her refugee claim in Canada.

[11] The Board also noted that the applicant did not have receipts for the extortion money that her family had paid to the Maoists, and stated that it had “specialized knowledge” indicating that the Maoists did in fact issue receipts indicating that such contributions were voluntary. However, the Board specifically stated that it was not making a negative credibility finding based on this failure to corroborate.

[12] The Board reviewed the applicant’s testimony that she would not have made a refugee claim if she could have stayed in Canada on a valid work permit, and also noted that the applicant did not attempt to seek refugee protection during the time she spent in Israel. The Board determined that the applicant’s intention was to be a worker in Canada, not to seek Canada’s protection, and that accordingly the applicant exhibited a lack of subjective fear of returning to Nepal. The Board made a further negative credibility finding on this basis.

[13] Finally, the Board found that the applicant had not established a well-founded fear of persecution because it was unlikely the Maoists would still be interested in pursuing her. The Board Member noted that the applicant had been outside of Nepal for five years and that neither she nor her family had received any threat since July 2007, despite being in contact with people from their village. The Board considered that there was no evidence that the Maoists had even inquired about the applicant over the last two and a half years.

Issues

[14] The applicant raises two issues:

1. Whether the Board misconstrued the evidence by finding that the letter from the Officer of the Village Development Committee in Morang was not genuine; and

2. Whether the Board erred by finding that Ms. Gurung lacked subjective fear because of her delay in claiming refugee protection in Canada.

1. Misconstruction of the Evidence

[15] I agree with the applicant that the Board interpreted the statement in the letter that she fled “with” her family literally as meaning that she fled Morang at the same time as her family, and on this basis alone determined that the letter was not genuine.

[16] Counsel for the applicant at the RPD hearing informed the Member that the interpretation the Member proposed was not one which had crossed his mind. That in itself, coupled with the wording of the translation, leads me to the view that the phrase, as translated, is ambiguous. I agree with the applicant that the Board's statement that it conducted a "close analysis" of the translation is unconvincing given that it did not ask the interpreter who was present to review the original version of the letter or take any other steps to clarify its meaning. In fact, the Board did not indicate that the applicant's credibility or the proper interpretation of the letter was an issue for it when it outlined its areas of concern before final submissions were made.

[17] The respondent's submission that the Board did not base its credibility findings solely on the letter is not convincing. I do not accept the alternative reasons for a negative credibility finding the respondent proposes. The delay in claiming refugee protection, absence of pursuit of refugee protection in Israel, and clear intent to come to Canada to work are factors that may indicate a lack of subjective fear, not lack of credibility. Furthermore, the absence of corroborative evidence with respect to extortion money and alleged inconsistent evidence with respect to the provision of a receipt are both unreasonable. With all due respect to the Member's claimed "specialized knowledge," the fact that the Maoists may have issued receipts in the past is not a valid basis for doubting the applicant's testimony that there was no record of the extortion. Although the respondent notes that after being confronted with the Board's specialized knowledge the applicant said that her brother did not provide her with copies of the receipts, and submits that this amounted

to inconsistent evidence, in fact there was no inconsistency in the applicant's testimony. The transcript of the hearing provides as follows:

MEMBER: Yeah, I understand that. I'm just saying – you just said that they don't give receipts and I'm telling you they do give receipts. So why did you just say they don't give receipts?

CLAIMANT: If they had given to my brother then my brother would have sent it to me.

[18] The applicant's position throughout has been that there were no receipts. Despite very pointed questioning from the Board Member, the applicant remained unshaken and her testimony was consistent. Accordingly, this was not, as the respondent suggests, a reasonable alternative basis for making a negative credibility finding.

2. Lack of Subjective Fear

[19] The Board found that the applicant's delay in making a claim after leaving Nepal showed a lack of subjective fear.

[20] The respondent submits that the genuineness of an applicant's fear can be undermined by his or her conduct with regards to the persecution, and that any delay in claiming refugee protection is a valid basis upon which the Board may conclude that the applicant does not possess the requisite subjective fear. The respondent notes that the applicant delayed bringing her refugee claim in Canada and never turned her mind to bringing a claim in Israel. Accordingly, the respondent says, the Board did not err in finding that the applicant's behaviour undermined the credibility of her testimony and highlighted her lack of subjective fear.

[21] The respondent's submission that "any" delay in claiming refugee protection is a valid basis for concluding an applicant does not possess the requisite subjective fear misinterprets *Singh v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 62 upon which the respondent relies. While *Singh* makes it clear that delay in claiming may be a valid factor to consider, such a delay does not automatically result in a finding of lack of subjective fear. The circumstances and potential explanations for the delay must be considered. In *Singh* and the other relevant cases cited therein there was no evidence that the applicants had any alternative route to permanent residence in Canada, and thus protection from harm, other than a claim for refugee protection.

[22] Here the applicant reasonably assumed that she would be receiving permanent residence through the Live-In Caregiver Program and I agree with the applicant that this was a more reliable avenue for obtaining status in Canada. This is a valid explanation for not claiming refugee status sooner and in my view the applicant's delay in claiming was, in the circumstances, not inconsistent with a subjective fear of returning to Nepal. Similarly, while the applicant was in Israel she appears to have been eligible to remain there as a housekeeper. Further, her family did not flee as a result of the actions of the Maoists until July 2007. It is critical to observe that because of the Member's interpretation of the letter discussed in issue #1, it had found that the "key event," the seizure of the family home, did not happen and thus did not consider that this event prompted, in part, the refugee claim.

[23] In *Correia v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1060 and *Niyonkuru v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 174, the Court found that having temporary status in Canada and thus not being subject to immediate removal was not a

sufficient explanation for a delay in failing to make a refugee claim. Here, the applicant not only had temporary status, but was also on a direct and relatively assured path to permanent status through the Live-In Caregiver Program. Once that path to permanent status disappeared, through no fault of her own, she made a claim for refugee protection. Her behaviour cannot reasonably be interpreted as demonstrating a lack of subjective fear.

Conclusion

[24] The Board made two errors in its decision. However, as the respondent has noted, the applicant's evidence, accepted by the Board, was that there have been no threats by Maoists against her family or herself since 2007. Since the applicant no longer appears to be a target of the Maoists, her fear cannot be said to be well-founded and accordingly the Board did not err in refusing her claim.

[25] The Board found that:

However, the claimant indicated that in two and a half years, from July 2007 to the date of the hearing, there has not been one report of the Maoists seeking or even inquiring about the claimant or her family, even though they have been getting news from their village. There has been no report that they have been sought in Kathmandu. The panel finds that the Maoists have in fact lost interest in the claimant, if indeed they ever had interest.

[26] The application must be dismissed. Although the Board erred with respect to the applicant's credibility and her lack of subjective fear, it is clear that these determinations were distinct from the

Board's finding that objectively, the Maoists would no longer be interested in the applicant. In its reasons, the Board stated that:

As well, the panel has found that even if the claimant did return to Nepal, the claimant's alleged fear is not well-founded, and that the evidence indicates that she would not be targeted in Nepal.
(Emphasis added)

[27] The Board's reasonable finding on this issue was not tainted by its other, unreasonable, determinations. A finding that a claimant's subjective fear is not objectively well-founded is fatal to a refugee claim: *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689. The law is clear that this is a separate element required to establish persecution under s. 96 of the Act; accordingly, errors with respect to discrete elements of a refugee claim will not invalidate a decision as a whole where the Board reaches an independent determination of lack of objective fear. Where other findings, such as negative credibility determinations, influence the Board's findings on objective fear, an unreasonable finding might upset the decision as a whole. This is not the case here, where there was no dispute that the threats had ceased. The Board's erroneous credibility determination had no impact on its reasonable finding that a two and a half year absence of threats indicated that the applicant's fear was not objectively well-founded. This finding was sufficient to dispose of the claim in and of itself, and accordingly the application must be dismissed.

[28] Neither party proposed a question for certification. No question will be certified.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application is dismissed; and
2. No question is certified.

“Russel W. Zinn”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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STYLE OF CAUSE: GURUNG V. MCI

PLACE OF HEARING: TORONTO

DATE OF HEARING: NOVEMBER 2, 2010

**REASONS FOR JUDGMENT
AND JUDGMENT BY:** ZINN J.

DATED: NOVEMBER 5, 2010

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