

Federal Court



Cour fédérale

Date: 20120124

Docket: IMM-813-11

Citation: 2012 FC 94

Ottawa, Ontario, January 24, 2012

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

NACHHATTAR PAL SHINMAR

Applicant

and

THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION

Respondent

**REASONS FOR JUDGMENT AND JUDGMENT**

I. Overview

[1] Ms. Nachhattar Pal Shinmar applied for refugee status in Canada on the basis of her fear of persecution in India as a single, female member of the Dalit caste. A panel of the Immigration and Refugee Board found Ms. Shinmar not to be a Convention refugee or a person in need of protection pursuant to ss 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27, [IRPA] (see Annex for statutory references). Ms. Shinmar argues that the Board made improper negative

credibility findings against her and also failed to conduct a proper analysis of s 97. In my view, the Board's credibility findings were based on the evidence, or the lack of evidence. Therefore, they were reasonable. However, the Board failed to analyze Ms. Shinmar's s 97 claim; therefore, I must allow this application for judicial review in part.

[2] There are two issues:

1. Were the Board's findings on credibility unreasonable?
2. Did the Board err by failing to conduct a separate analysis under s 97 of IRPA?

## II. Factual Background

[3] Ms. Shinmar is a citizen of India. She was born and lived in the village of Barsal until she came to Canada in 2009.

[4] Ms. Shinmar's family belongs to a lower caste called the Dalits. She and her family were discriminated against by members of higher castes. However, with the help of a sister living in Canada, they were able to buy some land and become financially secure.

[5] When her parents immigrated to Canada in 2006, they left Ms. Shinmar to care for the family's home and land. When neighbours realized Ms. Shinmar was living alone, they encroached on her land and, when she objected, they verbally abused and threatened her. Ms. Shinmar sought

help from the police but, when they found out she was Dalit, they demeaned her and demanded money.

[6] Eventually, Ms. Shinmar went into hiding. Her parents encouraged her to leave and she contacted an agent to arrange her travel to Canada.

### III. The Board's Decision

[7] The Board refused Ms. Shinmar's refugee claim based on her lack of credibility. It found a number of "serious discrepancies" and omissions in Ms. Shinmar's evidence.

[8] Ms. Shinmar stated in her written narrative that her problems with neighbours began when they learned that her parents had left India. However, before the Board, she said that her father had faced similar problems. Ms. Shinmar submitted letters from her father, the village Sarpanch (leader) and a local police officer to corroborate her narrative, but none referred to any persecution based on land ownership. The Board concluded that Ms. Shinmar's testimony was an embellishment of her claim.

[9] In her narrative, Ms. Shinmar identified two separate occasions when she was confronted by her neighbours. The first occurred after she complained to her neighbours about their encroachment on her land. The neighbours fired guns into the air to scare her. The second occurred after she complained to the police. The neighbours gathered in front of her house and fired guns. The Board found that Ms. Shinmar's oral testimony contradicted her written narrative in two ways: (1) she said

the neighbours came every day to her house and (2) she stated that guns were fired at her only once, but then changed her answer to “twice”.

[10] Ms. Shinmar also testified that she was stopped from cultivating her fields by local boys. When the Board asked why this incident was not included in her PIF narrative, she gave no answer and began to weep. The Board said that this was not a case of “domestic or sexual abuse” that would make it difficult for Ms. Shinmar to testify. The Board concluded that the incident did not happen.

[11] Ms. Shinmar wrote in her narrative that she went to the police after gunshots were fired at her house, but the police never investigated the incident. However, at the hearing, she testified that she believed the police had arrested the attackers but released them after receiving a bribe. She also stated that she went to the police station with a neighbour but they were dismissed because of their caste. The police also demanded money. When asked why these details were not mentioned in her narrative, Ms. Shinmar first said that police behaviour of this kind was common knowledge in India and then replied that she felt ashamed to tell her father. Finally, Ms. Shinmar said that she did not realize she had to explain everything. The Board concluded that Ms. Shinmar was manufacturing answers to explain her omissions.

[12] The Board found that Ms. Shinmar’s failure to provide any documents concerning ownership of her family’s land in India weighed against her credibility. When asked if she had attempted to acquire documents, Ms. Shinmar replied that she did not know she would need them. The Board found this answer unreasonable because her claim was based on acquisition of the land,

and she had ample opportunity to obtain the documents. In fact, her father's affidavit stated that he had recently travelled to India to "retrieve my daughter's documents for her refugee hearing".

[13] The Board also questioned why Ms. Shinmar's father was late submitting his affidavit to support Ms. Shinmar's claim and noted that it was not from a disinterested party. It gave the affidavit little weight.

[14] Overall, the Board found Ms. Shinmar to be a "difficult witness" because she tended to wander off on tangents, offered vague answers, had difficulty recalling specific details, and at times became very animated and began to cry. Given that she had not submitted a medical or psychological report, the Board found her emotional state weighed negatively on her credibility.

[15] The Board concluded, "I simply do not believe that...any of the significant events that the claimant alleged happened to her, actually happened and as a result, the claim pursuant to section 96 of the IRPA fails". The Board also found that Ms. Shinmar's claim under s 97 failed because there was no other evidence to indicate she would be at risk.

#### IV. Issue One - Were the Board's findings on credibility unreasonable?

[16] Ms. Shinmar maintains that the Board's findings were unreasonable. She submits that the Board gave undue attention to minor omissions and inconsistencies, unfairly discounted her oral testimony without considering the Chairperson's Gender Guidelines, and wrongly relied on an absence of documentary evidence to make adverse credibility findings.

[17] In particular, she points out that her knowledge of her father's problems was scant because men rarely shared information with women. In other areas, her oral evidence was simply more detailed than her written narrative, as one would naturally expect to be the case. Some details were omitted out of embarrassment, which also explained her emotional state at the hearing. Some of the threats and abuse she received were of a sexual nature, which was obviously upsetting and difficult to recount. This is why the Board should have considered the Gender Guidelines.

[18] Having reviewed the record, I am satisfied that many of the Board's findings were clearly merited – it was entitled to conclude that the father's affidavit should be given little weight, that the absence of corroborating documentary evidence was not well-explained, that there were discrepancies and inconsistencies in Ms. Shinmar's evidence, and that her answers to many questions were vague and unresponsive. The remaining question is whether the Board's findings were faulty for a lack of consideration of the Chairperson's Gender Guidelines. The Guidelines remind Board members that women sometimes have difficulty testifying about matters relating to sexual violence, and may have little knowledge of matters dealt with mainly by men because men may decide not to share information with women in their families.

[19] These considerations certainly applied in Ms. Shinmar's case. She had difficulty discussing the "dirty language" that was used by her neighbours. She also knew little about the problems her father had before leaving India. However, these areas of testimony did not figure largely in the Board's credibility findings. It commented adversely on her emotional state, but most of its findings were based on the other evidence before it, or the absence of evidence. In addition, while the Board

did not cite the Guidelines expressly, it did treat Ms. Shinmar sensitively at the hearing, allowing her occasional breaks to compose herself, expressing concern about her well-being, and permitting her counsel to pose questions instead of the Board member himself. In the circumstances, I find the Board generally respected the spirit of the Guidelines and would not fault its analysis based simply on a failure to refer to them explicitly.

V. Issue Two - Did the Board err by failing to conduct a separate analysis under s 97?

[20] Ms. Shinmar asserts that her return to India would risk her life or expose her to cruel and unusual treatment or punishment based on her membership in a particular social group.

[21] While the protections offered under ss 96 and 97 are separate and distinct, there are some situations where the Board's conclusions on s 96 will be determinative of the 97 claim. Where, for example, the Board finds there is no evidence supporting the s 96 claim, there would be no need to determine separately whether the s 97 claim has been made out.

[22] Here, however, even though the Board found Ms. Shinmar not to be credible and that the events she described did not occur, there remained the question of whether the objective, documentary evidence could support a claim under s 97. There is nothing in the Board's reasons to suggest that it turned its mind to that evidence. Therefore, in my view, the Board erred in not conducting a specific s 97 analysis.

VI. Conclusion and Disposition

[23] I cannot conclude that the Board's finding that Ms. Shinmar's claim under s 96 was unsupported by credible evidence was unreasonable. While the Board did not cite the Gender Guidelines specifically, it respected the spirit of the guidelines during the hearing. However, in my view, the Board erred in not considering whether Ms. Shinmar's claim under s 97 was supported by the documentary evidence. Therefore, I must allow this application in part and order a different panel of the Board to reconsider the s 97 claim. Neither party proposed a question of general importance for me to certify, and none is stated.



**JUDGMENT**

**THIS COURT’S JUDGMENT is that:**

1. The application for judicial review is allowed in part;
2. A different panel of the Board must reconsider Ms. Shinmar’s claim under s 97 of *Immigration and Refugee Protection Act*; SC 2001, c 27, and
3. No question of general importance is stated.

“James W. O’Reilly”

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Judge

## Annex

*Immigration and Refugee Protection Act, SC 2001, c 27*

*Loi sur l'immigration et la protection des réfugiés, LC 2001, ch 27*

## Convention refugee

## Définition de « réfugié »

**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,

**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) 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 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.

- 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 habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

## Person in need of protection

## Personne à protéger

**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
- (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

- 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) 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-

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

ci ou occasionnés par elles,  
(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

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-813-11

**STYLE OF CAUSE:** NACHHATTAR PAL SHINMAR  
v  
MCI

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** September 28, 2011

**REASONS FOR JUDGMENT  
AND JUDGMENT:** O'REILLY J.

**DATED:** January 24, 2012

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