Federal Court  Cour fédérale

Date: 20121003

Docket: IMM-2640-12

Citation: 2012 FC 1165

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, October 3, 2012

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

SARBJEET KAUR

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision dated January 31, 2012, in which the Refugee Protection Division of the Immigration and Refugee Board [RPD] determined that the applicant (a citizen of the Republic of India) is neither a Convention refugee nor a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] Apart from the analysis of the state protection objectively available to the applicant in her country, the RPD provided an analysis of the applicant's personal situation and of the credibility of her account. The applicant is challenging the legality of the second part of the RPD's decision, *inter alia*, because of its erroneous references to evidence that was not in her record.

[3] After carefully reviewing the record and considering counsel's written and oral representations as well as the jurisprudence submitted, the Court cannot allow the decision to stand. For the reasons set out below, the application for judicial review will be allowed.

Facts

[4] The applicant alleges that, while visiting her country for a few weeks in April and May 2007, she was arrested on two occasions by the police in her country, who suspected that she had ties to members of the All India Sikh Students Federation. She was subsequently released on payment of a bribe and on condition that she not leave her village in Punjab without police permission. The applicant lived and worked in Malta at that time.

[5] The applicant's problems began on April 20, 2007. On that day, the applicant, her girlfriend and her girlfriend's brother (who was a long-standing member of the All India Sikh Students Federation) were travelling by bus to their village. Police officers stopped and searched their bus and arrested her friend's brother. They then asked the driver to leave with the other passengers.

[6] The applicant says that later her friend's father went to various police stations to find out what had happened to his son. The police denied arresting him. The applicant therefore decided to go with her friend's father to a police station where she recognized one of the officers who had forced her friend's brother to get off the bus. The officer denied everything and, as a result, they were unable to obtain any information about her friend's brother that day.

[7] The next day, April 25, 2007, the police went to the applicant's home to arrest her and took her to the police station along with her friend and her friend's father. She claims that she was questioned and beaten, then released after her father paid a bribe of 100,000 rupees. As for the friend and her father, the applicant states that, after they were released, they left their village without a word to anyone about what had happened. The applicant found out later from the sarpanch of the village (chief of the village council) that her friend had been raped by a police officer when she was held at the police station.

[8] On April 30, 2007, the police went to the applicant's home again to arrest her and brought her to the police station. This time, the police took her photograph, fingerprinted her and forced her to sign some blank documents. The applicant was also questioned by the police about her friend's family. They hit her and insulted her and accused her of helping her friend's family and of having information about them. The applicant was released that day upon payment of 75,000 rupees and on condition that she not leave the village.

[9] The applicant says that her family was very shaken by these events and advised her to leave the country as soon as possible. She returned to work in Malta on May 2, 2007.

[10] In her Personal Information Form [PIF], the applicant stated that while she was in Malta she learned that the police had gone to her parents' home and had taken her father to the police station. They questioned him about the applicant and the fact that she had breached her condition of not leaving the village. This time, the police confiscated her father's agenda book in which they found her telephone number and address.

[11] The applicant says that she was working as a maid for a family in Malta at that time. One day, her employer received a call from an unknown individual inquiring about the applicant. She received some calls from the Indian Embassy and was questioned about her address in Malta. She was told that this information was required to update the records of Indian citizens working in Malta.

[12] The applicant told her story to her employers who applied for a visa for her and advised her to come to Canada with them in order to save her life.

[13] The applicant arrived in Canada with a visa that was valid until March 27, 2008. She claimed refugee status on May 30, 2008.

RPD's reasons

[14] At the outset, the RPD stated that state protection was the determinative issue in this case, although the credibility of the applicant's allegations was also analyzed. However, the member acknowledged that, since he had not confronted the applicant about the concerns he had regarding

the credibility of her testimony, he would not limit his analysis to that issue alone.

[15] In a rather comprehensive decision, a large part of which sets out the relevant jurisprudential principles, the RPD determined that state protection was available to the applicant and that she had not tried to obtain such protection either by informing government authorities or non-governmental organizations [NGOs] or by seeking legal redress against the police.

[16] After reviewing the objective documentary evidence on country conditions (in particular, the National Documentation Package [NDP] on India, May 30, 2011, tab 2.6: IND103452.E. April 29, 2010. *Treatment of political activists and members of opposition parties in Punjab* (2008-2010) and tab 2.1: United States. April 8, 2011. Department of State. "India". *Country Reports on Human Rights Practices for 2010*), the RPD found that the governments, both in the state of Punjab and at the national level, are democratic and that despite the corruption, significant delays, potential injustices and incidents of torture by the police (NDP on India, tab 7.1: Human Rights Watch. August 2009. "Human Rights Violations by Police". *Broken System: Dysfunction, Abuse, and Impunity in the Indian Police*, Chapter III), the Indian judicial system is still functional.

[17] The RPD stated that even police forces have systems of control and codes of conduct that they are to respect (NDP on India, tab 10.3: Commonwealth Human Rights Initiative (CHRI). 2008. *Police Organisation in India* at pages 13-15 and 22-28) and that certain NGOs help people having problems obtaining state protection. The RPD noted that there is a human rights commission in Punjab, set up in 1997, which is mandated to investigate complaints of human rights violations in

the area (NDP on India, tab 2.5: United Kingdom. April 17, 2008. Home Office. *Operational Guidance Note: India,* at page 5, para 3.6.7.).

[18] In the same way, the RPD rejected the applicant's argument that she was not required to seek the protection of the authorities in her country given that her agent of persecution was the police itself. The RPD stated that, based on the current state of the jurisprudence, "[t]he real question to be asked is whether it is reasonable to require that the applicant seek protection from his state, in any way, even in cases in which the police is the persecuting agent" (*Singh v Canada (Minister of Citizenship and Immigration)*, 2006 FC 136, [2006] FCJ 153 at para 21-22).

[19] At the beginning of its analysis of state protection in India, the RPD said it was aware of the importance of assessing all the evidence presented before it, including the narrative, which constitutes the primary source for understanding the applicant's personal situation. On this point, the member correctly noted that, according to this Court's established jurisprudence, in the absence of a true analysis of a claimant's subjective fear of persecution, a finding that the claimant could avail him- or herself of state protection will be unreasonable (see, in particular, *Flores v Canada (Minister of Citizenship and Immigration)*, 2010 FC 503 at para 32, [2010] FCJ 607 [*Flores*]; *Jimenez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 727 at para 17, [2010] FCJ 879; *Pikulin v Canada (Minister of Citizenship and Immigration)*, 2010 FC 979 at para 13, [2010] FCJ 1244 and *Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 at para 14-15, [2008] FCJ 399).

[20] In its analysis of the applicant's subjective fear, the RPD noted that she had not submitted any evidence that "might have established, on one hand, that in India, all police officers work in a coordinated manner, without questioning the legality of their colleagues' actions, or, on the other hand, that simply because she approached a judicial authority—for example, to report what she was put through by certain police officers—this would have immediately placed her in a situation in which she would have been subjected to a risk to her life, a danger of torture or a risk of even greater persecution" (paragraph 31 of the reasons). Furthermore, the applicant could have obtained assistance from NGOs specializing in human rights or alerted the Indian authorities, particularly by seeking legal redress against the police (paragraph 34 of the reasons).

[21] As such, the RPD stated that it had conducted a thorough analysis of the documentary evidence submitted in the file. In doing so, the RPD made an obvious error on the face of the record when it indicated that the applicant had the support of a lawyer who took legal steps for her in India and of a sarpanch who signed an affidavit corroborating her testimony about the illegal acts committed by police officers. In a footnote, the RPD referred to two letters dated January 2012, one signed by an Indian lawyer and the other by a Delhi citizen.

[22] These exhibits were not filed by the parties in this case and are probably connected to another RPD case.

[23] It is interesting to repeat the RPD's findings on this point:

> [G]iven all of the documentary evidence, in which both the positive and negative aspects of the situation are analyzed; and given the personal situation of the claimant, who obtained a letter from a lawyer and an affidavit from her village's sarpanch that both

> corroborate her main allegations, I find that the claimant's testimony and the arguments made by her lawyer during her submissions do not constitute convincing evidence that, in her personal case, rebuts the presumption that the Indian authorities are capable of protecting its citizens.

[24] With respect to the credibility issue, the RPD's analysis was very simple. It simply noted that the applicant was nervous and anxious during the hearing; that at the beginning of her testimony she was mistaken about the dates of the events; and that she recited what she appeared to have learned by heart instead of giving a direct answer to the member's questions. The RPD stated that its finding that the applicant was not credible did not result from a few errors in her testimony but rather from the fact that the testimony as a whole was not spontaneous and seemed to have been previously memorized.

[25] The RPD also faulted the applicant for not including certain facts in her PIF, i.e. the fact that the police are still looking for her and the fact that they have gone to her parents' home and harassed and beaten her father two or three times since she left, and the fact that the police now accuse her of being involved with extremists outside the country.

[26] Since these facts were not in her PIF, the RPD determined that the applicant's credibility was undermined on the question of whether her father had been beaten by police officers since she left the country. However, in the same paragraph, the RPD said that these allegations were corroborated by an affidavit signed by the sarpanch of the applicant's village. The pertinent excerpt of this affidavit reads as follows:

> 9. . . . I leanrt that in Malta, [the applicant] was followed by phone. Callers claiming themselves calling from India and Indian Embassy Malta. [The applicant]'s employer helped to send her to Canada. She

> left Malta and reached Canada and over there, she had filed her asylum case to save her life.
>
> 10. That time to time, police come to harass her family at the village and alleging that [the applicant] working with militants from foreign land. Police also told her family that now police are trying to made a contact with Indian Embassy in Canada to get her back to India.
>
> 11. That I being the sarpanch and other panchayat members helped to release [the applicant] and her father whenever they were arrested by the police.

[27] For all these reasons, the applicant's refugee claim was rejected.

Issues

[28] The applicant's arguments focus on the following three issues:

(1) Did the RPD err in finding that the applicant could have availed herself of state protection in India?
   a. by considering evidence that clearly came from another file; and
   b. by ignoring evidence in the record that corroborated the applicant's allegations

(2) Did the RPD make unreasonable findings about the applicant's credibility?

(3) Did the RPD breach its duty of procedural fairness by failing to analyze, under subsection 97(1) of the IRPA, the risks that the applicant would personally face if she were to return to India?

Analysis

The RPD erred in its analysis of the availability of state protection in the applicant's personal case

[29] The applicant submits that the fact that the RPD believed that she had the assistance of a lawyer who had acted for her in India and who had written a letter to her corroborating her allegations was determinative in its analysis of whether state protection was available to the applicant. I agree with the applicant on this point.

[30] This Court's jurisprudence on the requirement that an analysis of subjective fear must precede an analysis of objective fear is unequivocal. In *Flores*, above, at para 32, Justice Mainville wrote:

> The analysis of the objective fear should ordinarily be carried out after the analysis of the subjective fear, since the particular context that is unique to each case is often conclusive for the objective analysis. A refugee claimant who has no subjective fear of persecution cannot ordinarily allege absence of state protection. As well, the analysis of the availability of state protection will vary considerably depending on the subjective fear in issue. A subjective fear of a low-level marijuana dealer might lead to a radically different conclusion in the analysis of objective fear as compared to a subjective fear of being pursued by a large and powerful drug cartel with virtually unlimited resources. In one case, state protection might be available, but it might not be in the other case, and it is therefore important for the panel to make reasoned findings concerning the subjective fear of persecution before proceeding with the analysis of the objective fear of persecution, which includes the availability of state protection.
>
> [Emphasis added]

[31] Accordingly, it is clear that the analysis is not limited to the *availability* of state protection but must reflect the *possibility* of obtaining such protection in the circumstances of each case. The RPD's finding that the applicant had not rebutted by convincing evidence the presumption that the Indian authorities are capable of protecting their citizens in her personal case was, at least in part, based on evidence that was not in the record.

[32] The respondent submits that this is not a fatal error in the determination of state protection. He referred me to extensive jurisprudence that teaches us that insignificant errors such as an improper reference to an affidavit, non-determinative to the outcome of the decision *(Gill v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1498 at para 22-24, [2004] FCJ 1828), a

"typographical error" (*Gonzalez v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1504 at para 20, [2011] FCJ 1827) or "clumsiness of language or expression" (*Osaru v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1656 at para 6, [2005] FCJ 2109) should not, in and of themselves, taint a decision that is otherwise well-founded. However, we are not talking about those types of errors in this case. The RPD, in part, based a determinative finding of fact (state protection) on documentary evidence that did not belong to this case.

[33] The respondent correctly submits that the applicant was required to demonstrate that she had offered her country the real possibility of intervening before being able to legitimately infer that it was not capable of providing her with the necessary protection or that it was reasonable to not avail herself of this protection. However, the RPD's errors do not stem from its analysis of the fact that the applicant took no real action to attempt to obtain the protection of her country; rather, they stem from its improper assessment of the evidence (or its assessment of improper evidence), both documentary and testimonial, which vitiated its decision overall.

[34] This finding is even more determinative since the RPD did not confront the applicant with the concerns it had about her credibility. As Justice Martineau wrote in *Kabongo v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1106 at para 36-39, [2011] FCJ 1369:

> The decision to allow or reject a claim for refugee protection is not an accidental or trivial action; it requires disinterestedness, objectivity, reflection and analysis of all the relevant factors, including the refugee claimant's testimony, on the part of the panel. It is on the quality of the written reasons that are provided, if any, and thus on the analysis of the facts of the case, that a court sitting on judicial review will be able to determine whether the panel's conclusion constitutes a possible and acceptable outcome in the circumstances (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190).

> Given that the fear of persecution contains a subjective component and an objective component, the panel is required to critically assess the credibility and conduct of refugee claimants (*Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689). It goes without saying that the panel cannot assess the credibility of claimants or reject the evidence they have adduced without giving them the opportunity to be heard and to have their counsel argue their case.
>
> First, the panel must ensure that it confronts refugee claimants at the hearing on every inconsistency, real or apparent, in their account of persecution, without criticizing, blaming, making disparaging comments or showing unjustified aggression and impatience, particularly because this is often a refugee claimant's only opportunity to be heard in person. See *Jaouadi v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1347, [2003] F.C.J. 1714; *Guermache v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 870, [2004] F.C.J. 1058; *Hernandez v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 179 at paragraphs 44-45, [2010] F.C.J. 199.
>
> Second, once it has made its decision (whether it is communicated orally or in writing), the panel must be able to explain why it did not accept the refugee claimant's explanations, if applicable. . . .
>
> [Emphasis added]

[35] While the RPD was obliged to confront the applicant on every deficiency and contradiction in her testimony, it was also obliged to base its findings on the evidence in the record and to justify them. In that sense, I cannot find, as the respondent does, that this was not a fatal error because the RPD's decision might have been different in the absence of this error. Since the RPD relied on certain documents that were not part of the applicant's record for a central element of its decision, it is impossible to speculate what its decision would have been without this error.

The RPD made unreasonable findings in evaluating the applicant's credibility

[36] The respondent contends that the RPD's determination of the applicant's credibility was reasonable and determinative of the outcome of her refugee application in this case. However, this

finding is not supported by the evidence or by the transcript of the applicant's testimony at the hearing.

[37] If the RPD wanted to hold against the applicant the fact that her PIF did not set out events subsequent to her arrival in Canada, which are corroborated by the affidavit of the sarpanch, it should have, like any other question regarding the applicant's credibility, confronted her with its doubts and allowed her to explain.

[38] In light of my finding about the RPD's errors in its analysis of the applicant's subjective fear and of her credibility, it is not necessary for me to examine the last issue raised by this application, i.e. whether the RPD conducted a separate analysis based on subsection 97(1) of the IRPA and gave adequate reasons for its refusal. This application for judicial review is therefore allowed.

[39] I am of the view that the analysis of the applicant's subjective fear as well as the analysis of state protection that was available to her are tainted by two significant errors that make the decision under review unreasonable.

[40] At the hearing, counsel for the applicant suggested the following as a question of general importance: Is it fatal that the RPD based a finding of fact in part on evidence that was not in the record? In the Court's opinion, this is a question that should be determined on a case-by-case basis.

JUDGMENT

THE COURT ORDERS AND ADJUDGES as follows:

1. The application for judicial review is allowed, and the decision made by the RPD on January 31, 2012, is set aside.

2. The matter is remitted to the Immigration and Refugee Commission for a reconsideration of this refugee application and for a new hearing before another member of the Refugee Protection Division.

3. No question is certified.

"Jocelyne Gagné"
Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2640-12
STYLE OF CAUSE:	**SARBJEET KAUR and MCI**
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DATED:	October 3, 2012

APPEARANCES:

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