

Federal Court



Cour fédérale

Date: 20130225

Docket: IMM-8284-12

Citation: 2013 FC 189

Vancouver, British Columbia, February 25, 2013

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Applicant

and

JASWANT KAUR

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision by the Refugee Protection Division [RPD], dated July 19, 2012, in which the Respondent was found to be a Convention refugee.

I. Facts

[2] The Respondent is a citizen of India. In 1998, her family arranged for her marriage to an Indian man residing in the United States. She moved to the United States that year and stayed there

illegally until she arrived in Canada on or about January 26, 2011. One month after her arrival in the United States, her mother-in-law and father-in-law joined the couple and they all lived in New Jersey. She had two children with her husband.

[3] The Respondent's husband left her in 2004 to return to India and died in 2009. The Respondent alleged that she has no siblings and that her parents are deceased.

[4] The Respondent entered Canada alone by walking across a treed area where no one could see her. She then took a taxi to a Sikh temple, where she met her maternal nephew, with whom she resides now. During her testimony, the Respondent stated that her nephew's family is in India.

[5] She claimed refugee protection on May 25, 2011, four months after arriving in Canada.

II. Decision under Review

[6] The RPD found the Respondent generally credible. It considered the fact that she is a widow, that she has no family or property in India and that she is particularly vulnerable as she has no work experience outside the house and a grade 10 education.

[7] The RPD considered the evidence regarding the treatment of women in India who are at risk of domestic abuse. Although measures have been put in place to protect women from domestic abuse, such measures remain inaccessible to illiterate women or those from rural areas.

[8] The RPD then considered the availability of an internal flight alternative [IFA] for the Respondent and concluded that the second part of the test is not met as it would be unreasonable for her to relocate to another place in India.

[9] The RPD determined that, according to documentary evidence, single women with limited education face discrimination that amounts to persecution. It is hard for widows to find accommodation on their own as landlords are often unwilling to rent to single women. Considering that the Respondent has no support in India and no work experience outside the family home, she would face persecution if she returned to India.

[10] The RPD made no adverse finding that the Respondent did not attempt to seek protection from the United States authorities nor did it deal with the four-month delay to seek protection in Canada.

[11] The RPD therefore concluded that the Respondent is a Convention refugee.

III. Applicant's Submissions

[12] The Applicant submits that the RPD's determination that the Respondent's fear is well-founded is unreasonable. In finding that the Respondent is at risk of persecution, the RPD did not tie the evidence considered to her personal circumstances, did not identify the agent of persecution, did not link her risk of harm to a Convention ground and did not verify whether state protection is available to her. The RPD erroneously found that the Respondent is at risk of domestic abuse as she never claimed that she fears this kind of abuse. Moreover, the RPD found that state protection is

unavailable to women who face domestic abuse in rural areas, even though the Respondent's claim was not based on this type of risk.

[13] The Applicant submits that the RPD failed to determine whether the Respondent's fear of persecution is objectively well-founded. Indeed, the RPD did not determine whether the Respondent faces a risk of persecution in her home village before conducting its IFA analysis.

[14] The RPD committed an error in its analysis of the Respondent's IFA. The RPD made a general reference to documentary evidence on India and did not explain why the Respondent would not be able to safely relocate. The RPD then analyzed the hardship that she would face upon relocation namely because she has limited literacy skills, a fact that is unsupported by the evidence.

[15] The RPD also failed to consider the support available to her in India. The evidence is to the effect that she is supported by her ex-husband's family. Indeed, her mother-in-law and father-in-law came to Canada to assist her in making her refugee claim and her children are now living with her sister-in-law in Seattle. Therefore, her in-laws would be able to assist her should she return to India.

[16] Moreover, according to the Applicant, the Respondent's assertion that she has no family in India is inconsistent with the evidence that she is living with her maternal nephew in Canada and that all of his family is in India. The RPD did not want the Respondent's counsel to explain why she is a maternal aunt although evidence of family support is relevant to her claim.

[17] The RPD failed to consider the most recent evidence contained in the national documentation package, which includes evidence on the protection offered by the government to women living alone and working in India. The Respondent is Sikh and there is evidence that Sikh do not face any discrimination outside the Punjab state, in terms of education, access to education and employment. The RPD does not consider the fact that the evidence speaks of the measures taken by the government to address this problem. The Applicant submits that the RPD erred in disregarding a report on whether women who head their own households can obtain housing and employment in main centers. This report states that single women may face difficulty in obtaining housing without family support but that the situation is improving as such women have greater employment opportunities in some industries.

[18] Finally, the Applicant argues that the RPD committed an error by not drawing a negative inference from the Respondent's failure to seek protection in the United States in the two-year period after her husband died. Indeed, the evidence demonstrates that the Respondent would be supported by her in-laws in the United States. The Respondent's explanation for her four-month delay in claiming protection in Canada should have been considered unreasonable. She explained that without help from her father-in-law, she was not able to make a claim but she was however able to cross the border independently. No mention is made of her delay in seeking protection in Canada.

IV. Respondent's Submissions

[19] The Respondent submits that the RPD's finding that she is a Convention refugee is reasonable and consistent with her testimony, the documentary evidence and the lack of state protection in India. The Respondent was found to be credible when she explained that she lacks

work experience outside the house, that she has no family or property in India and found her to be vulnerable. If returned to India, the Respondent would face persecution as a single woman, as demonstrated by the evidence. The RPD connected the Respondent's risk of harm to a Convention ground, which is a membership in a particular social group. The agents of persecution are the police and Indian society.

[20] As for the Applicant's argument that the RPD failed to consider important evidence, the Respondent submits that the RPD is presumed to have considered all of the evidence submitted and is not required to cite every document in its written reasons.

[21] Moreover, the Respondent argues that "adequacy of reasons" is not a stand-alone basis for quashing a decision.

[22] As for the analysis of whether or not the Respondent has an IFA available to her, the Respondent submits that the RPD reasonably found that it is not objectively reasonable for her to relocate in India. The RPD's finding is consistent with the evidence that relocation for single women is difficult in India.

[23] Finally, contrary to what is alleged by the Applicant, the RPD did consider the evidence that the Respondent has lived in the United States for 13 years and decided not to make an adverse finding that she did not make an attempt to seek help from the United States authorities. As for her delay in claiming refugee protection in Canada, the Respondent submits that this is not a decisive factor in determining if she is a Convention refugee.

V. Issue

[24] Did the RPD err in granting refugee protection to the Applicant?

VI. Standard of Review

[25] The applicable standard is reasonableness as the issue raises a mixed question of fact and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 51, [2008] 1 SCR 190).

VII. Analysis

[26] The RPD's decision is unreasonable for the following reasons.

[27] First, the RPD committed errors in the first step of its reasoning by determining that the Applicant would be "in a particularly vulnerable position" because of potential domestic abuse that she could face in India. Such a determination is unreasonable because the RPD needs to assess whether a person is at risk of persecution, and not whether that person is in a vulnerable position. Moreover, the Applicant never claimed she had a fear of domestic abuse in either her testimony or in her Personal Information Form. The RPD's conclusion was drawn with no regard to the Respondent's personal circumstances. Indeed, it relied on documentary evidence on domestic abuse in India but there is no connection between that evidence and the Respondent herself (*Kaba v Canada (Minister of Citizenship and Immigration)*, 2007 FC 647 at para 1, 160 ACWS (3d) 524; *Ahmad v Canada (Minister of Citizenship and Immigration)*, 2004 FC 808 at para 22, 134 ACWS (3d) 493).

[28] Second, the RPD made a mistake when it concluded that the Respondent does not have family in India and would therefore face persecution as a single woman. Indeed, the RPD deemed it unnecessary to hear the Respondent on why she is a maternal aunt. However, the Respondent, during her testimony, explained that she is a maternal aunt and that all of her nephew's family is in India. Such evidence contradicts the RPD's finding that the Applicant would be vulnerable because the evidence demonstrates that she does have relatives in India. Evidence that goes to the heart of a refugee claim should be given consideration (*Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ 598 (FCA)). In the present case, the Respondent spontaneously mentioned that her nephew's family is in India and the RPD refused to have her give more details about her statement.

[29] Third, the RPD does not make any finding as to the four-month delay to seek protection in Canada. The Federal Court decision in *Singh v Canada (Minister of Citizenship and Immigration)*, 2007 FC 62 at para 24, 159 ACWS (3d) 568 is relevant to the present circumstances. It establishes that "a delay indicates a lack of a subjective fear of persecution, since there is a presumption to the effect that a person having a well-founded fear of persecution will claim refugee protection at the first opportunity." The RPD did not consider the delay or the Respondent's explanation for the delay in seeking protection. Delay in seeking protection is a relevant factor which should have been given proper consideration by the RPD. Moreover, the Respondent lived in the United States for two years after her husband died and did not claim refugee protection although her claim is based on her fear of returning to India as a single woman. The RPD's decision not to make an adverse finding from not seeking help from the United States authorities is unreasonable as it was made without considering and analyzing the fact that she could have claimed refugee

protection in the United States. The RPD came to an unreasonable conclusion that is not based on the factual elements. The RPD appears to have selectively relied on evidence supporting its conclusion that the Respondent needs to be granted refugee protection without considering the relevant facts of the case.

[30] Finally, the RPD committed an error in failing to rely on the most recent National Documentation Package [NDP] dated May 30, 2011, and by considering an earlier NDP. The RPD should have analyzed such documentary evidence. This evidence speaks to protection and services offered by the Indian government to women living alone and working. By ignoring the most recent evidence, the RPD failed to consider and to comment on the evidence that contradicts its findings. Again, in its analysis, the RPD seems to have preferred evidence that supports its conclusion that the Respondent should be granted refugee protection although it is required to consider all of the relevant evidence (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, (1998) 157 FTR 35 at para 17, 1998 CarswellNat 1981). The May 20, 2011 documentation was relevant evidence for the purposes of the determinations made.

VIII. Conclusion

[31] For all these reasons, the RPD decision is found to be unreasonable and the matter needs to be sent back for reconsideration.

[32] The parties were invited to submit a question for certification but they declined to do so.

JUDGMENT

THIS COURT’S JUDGMENT is that the application is allowed and the matter is remitted back to a differently constituted panel for reconsideration. No question is certified.

“Simon Noël”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Jennifer Dagsvik FOR THE APPLICANT

Baldev Sandhu FOR THE RESPONDENT

SOLICITORS OF RECORD:

William F. Pentney FOR THE APPLICANT
Deputy Attorney General of Canada
Vancouver, BC

Sandhu Law Office FOR THE RESPONDENT
Surrey, BC