

Federal Court



Cour fédérale

Date: 20131016

Docket: IMM-10808-12

Citation: 2013 FC 1042

Ottawa, Ontario, October 16, 2013

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

SUBASH GURUNG

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, Subash Gurung, seeks judicial review of a decision by the Refugee Protection Division of the Immigration and Refugee Board that he is neither a Convention refugee nor a person in need of protection.

[2] Mr. Gurung, a 30-year-old citizen of Nepal, submitted two claims for the Board Member to consider. First, Mr. Gurung said that he fears persecution by the Maoists in Nepal because of his

political opinions. Secondly, in a *surplace* claim placed before the Board during the hearing, Mr. Gurung asserted that he fears persecution by the Maoists because of his pro-Tibetan activities and sympathies since arriving in Canada. His parents had fled Nepal for the United States due to threats from the Maoists and an uncle was allegedly kidnapped and murdered after he refused to cooperate with them. An Aunt raised Mr. Gurung. As a young adult, he says he received threats from the Maoists for raising money, participating in peace rallies and attending public meetings. In particular he raised money for Tibetan women and children displaced by the Maoists. In January 2007 he was assaulted and filed a complaint with the police. The police were unable to assist him as the Maoists also targeted them. His parents advised him to join them in the United States.

[3] Mr. Gurung was granted a US student visa. During his summer vacation in 2010, he visited friends in Canada for five days. Upon attempting to return to the US, he was denied entry on the basis that he had worked without authorization while he was studying. He was informed that he would have to apply for another student visa if he wanted to enter the United States. After speaking to friends, Mr. Gurung made a refugee claim in Canada.

[4] Since arriving in Canada, Mr. Gurung has made Tibetan friends, and has participated in a pro-Tibet demonstration in Ottawa. He sympathizes with the Tibetan cause. During the hearing before the Board, he testified that he fears persecution in Nepal because of his solidarity with the Tibetans. The Maoists in Nepal are aligned with the Government of China and seek to repress political activities in support of the Tibetan people.

[5] At issue in these proceedings is whether the Board erred by failing to consider the *sur place* claim in its decision.

[6] The standard of review applicable to factual determinations relating to persecution is reasonableness: see *Beri v Canada (Minister of Citizenship and Immigration)*, 2013 FC 854, at paras 18-19, [2013] FCJ no 908.

[7] Both parties are in agreement that while the *sur place* claim was discussed at the hearing, the Board did not explicitly address it in its decision.

[8] The applicant contends that the Board had a duty to explicitly consider the *sur place* claim, and that the failure to do so constitutes a reviewable error: *Ejtehadian v Canada (Minister of Citizenship and Immigration)*, 2007 FC 158 at para 11, [2007] FCJ no 214; *Ghasemian v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1266 at paras 22-23, [2003] FCJ no 1591.

[9] The respondent's position is that the Court should look to the record to assess whether the outcome is reasonable, applying *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 15-16, [2011] 3 SCR 708 [*Newfoundland Nurses*].

[10] I am not persuaded that the principles articulated in *Newfoundland Nurses* should apply to a case such as this. The matter before the Board was not complex. This is not a case where numerous issues were raised and the Board could not be expected to address them all in its decision. Although

Mr. Gurung's *sur place* claim was raised late, it was squarely put before the Board at the hearing and post-hearing evidence, a photograph of his participation in a pro-Tibet demonstration in Ottawa, was submitted in support. In those circumstances, the Board had a duty to make a determination with respect to the *sur place* claim, and the failure to do so renders the decision, in my view, unreasonable.

[11] No serious questions of general importance were proposed, and none are certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted and the matter is remitted for reassessment by a differently constituted panel. No question is certified.

“Richard G. Mosley”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-10808-12

STYLE OF CAUSE: SUBASH GURUNG

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: OCTOBER 7, 2013

**REASONS FOR JUDGMENT
AND JUDGMENT:** MOSLEY J.

DATED: OCTOBER 16, 2013

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