

MacGUIGAN, J.

This section 28 application has by agreement been dealt with together with that of the applicant's wife at all stages, and both were the subject of a single decision of the Immigration Appeal Board ("IAB" or "the Board"), which found on March 28, 1984, that they were not Convention refugees under subsection 2(1) of the Immigration Act, 1976, the relevant part of which reads as follows:

2. (1) In this Act...

"Convention refugee" means any 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,

(a) is outside the country of his nationality and is unable or, by reason of such fear, is unwilling to avail himself of the protection of that country...

The applicants' claim for Convention refugee status is based on a well-founded fear of persecution for reasons of their political opinion.

Both applicants are Guyanese by birth and citizenship and both are members of the opposition People's Progressive Party, ("PPP"). The evidence of persecution primarily concerns the husband, who was the more active party member - by his own admission, a militant member.

It does not stand to the applicants' credit that, after entering Canada as visitors, they illegally obtained Canadian social insurance cards, worked illegally for approximately a year before they were found out and arrested, and then claimed refugee status. Nevertheless, since the law allows them to apply as refugees even in such circumstances, we must conclude that it does not intend that their refugee claims should be determined on the basis of these extraneous considerations - nor was this a factor in the IAB decision.

The applicant husband rested his case on a course of police conduct towards him from 1973 to 1980, the first incident of which was his arrest and incarceration in 1973. The IAB description of this incident is as follows:

[I]t is clear that the male applicant spent one week in jail in 1973 because he had defaced election material by covering the opposition posters with his party posters. He admitted that he knew he was breaking the law but stated that this type of thing was going on in Guyana all during the election. During his incarceration he was never beaten or tortured by the police; his main complaint was about the filthy condition of the jail.

Since this was by the applicant's own admission an arrest and imprisonment according to law (although he may not have realized it at the time), it could not establish a well-founded fear of persecution.

A second incident can also be set forth in the IAB's words:

It appears from the record that the applicant was arrested a second time from his home when he was on strike and he was detained for one night. On that occasion, the police took away his radio tape, his groceries, his cash and damaged some of his furniture. At page 34 of the transcript of the hearing, the applicant made the following statement with regard to the following day after his release from detention:

□ So the following day, the vehicle came to my place. Before they stop, I was already out from the window, into the fare. So most of the times when they were coming. I know for sure they were coming, they were cooing back. So most time they came to my place, I was not there. So I figure out that - well, okay, if once they come for me - now I'm going to run all over the place, because I'm not going to go back, because I know what they were going to do with me.

No explanation was given as to why the police came to look for him at his home the day after his release from jail. It does not make sense that he would be released from detention the day following his arrest if the police had wanted to keep a close surveillance on him.

Even though the police search of his home seems to have been excessive, it was not established that the strike was legal by Guyanese law, and the whole incident is too ambiguous to support a claim of political persecution. However, the Board's final comment is in our view mistaken; such conduct on the part of the authorities might well make sense if their intention was harassment. Such an inference is strengthened by the police warning against publicity.

Taken as a whole, moreover, the evidence indicates deliberate harassment, particularly as revealed by two events. The first was a brutal beating received by the applicant husband on November 6, 1978, on the way home from a PPP Conference, a beating which caused his hospitalization for 27 days and a loss of 3 months' work. When his wife and his parents went to the police for assistance, the police failed to take any action, although the victim claimed to be able to identify some of his assailants.

The second event was the killing of his wife's grandfather in the course of an apparent search for the applicant husband in late April, 1980. The applicant's evidence was as follows:

Q. Yes. Would you continue? Tell us about the death of your wife's grandfather.

A. They came. They went to my - the police went to my parents' home, and they asked where I was. So my father told him that - I don't know, he is not living there anymore. So he said well, you have to say where are they, because you are the parents. So he just give them a name at random, and he said that we were at my father - my wife's grandfather place. They went to my wife's grandfather place. We were not there. So they were asking my wife's grandfather to look - they wanted to search the house to see if Mr. Surujpal is there. Well, according to my wife grandmother, he said that the old man was trying to protect them - prevent them from going into the house, and they hold him and tie him up, and he was calling for the old lady. So that when he was calling, he said, Granny, Granny, come. So before that, she said she didn't hear any voice after that, but the following morning, when my wife's sister went into the place, she went over there. She saw the old man was lying just in front of the door with the cloth in the mouth, and the hands were tied, and he went further in. My wife's grandmother was tied up. So the police station was just next door to the building. They just left and they went over, and they call the police. They went there around 8:30 in the morning. The police didn't arrive until 11:00. When they came over, they said, well, they cannot do anything. They cannot - they are investigating, and until now, I was made to understand nobody was being arrested....

This incident appears to have been the last straw which precipitated the applicants' flight from Guyana.

In both cases there was evidence available to the police (in the first case from the victim, in the second from the grandmother and the parents) as to the assailants, but no charges were laid. The evidence before the IAB is conflicting as to whether the attackers were private citizens supporting the Government political party or whether they included plainclothes policemen. The Board emphasized this conflict in testimony and arrived at its conclusion as follows:

The Board is sympathetic with the applicants' fear, especially after the death of the grandfather, but it has to agree with the submission of the respondent which reads, as follows: (pages 157-158, transcript)

... It is the respondent's submission that while the applicant - or both applicants in fact - may have suffered harassment at the hand of overzealous party workers in his home country, nevertheless he comes from a country where - maybe not by our standards - but nevertheless an opposition party is allowed to exist. It is not a country which has switched over to a one party state as is happening so often in the third world. That that party does speak out as an opposition, that it is an active party with a structure throughout the whole country. It is not an underground structure, it is above-board and open. And I would submit that he has not

established whereby he has suffered persecution by the state, by the government, or by the organs of that state but rather that he has suffered harassment at the hands of - as I said - overzealous party supporters....

The Board finds that Khemraj and Lilowti Surujpal are not Convention refugees.

In our view it is not material whether the police directly participated in the assaults or not. What is relevant is whether there was police complicity in a broader sense. In this respect the decision of this Court in *Rajudeen v Minister of Employment and Immigration* (1984), 55 N.R. 129, is directly in point.

In that case a number of minority race and religion in Sri Lanka was threatened and attacked by members of the racial and religious majority. Heald J. said for the majority of the Court (at p. 134):

The evidence clearly establishes that the mistreatment of the applicant was carried out by "thugs" of the Sri Lanka majority and not by Government authorities or by the police. The evidence is equally clear, however, that the police took no active steps to stop the violence, always managing to arrive on the scene after the violence had occurred. The applicant said that the police aggravated the situation by being indifferent. He also said that because the police were of the Sinhalese majority, he had no confidence that they would protect him. In his view, to ask for police protection would work against his interest since, in his experience "□ the reportee gets arrested rather than the assaulted person." On the basis of this evidence, the applicant has established ample justification for being unwilling to avail himself of the protection of Sri Lanka.

Stone J. in concurring reasons added (at p. 135)

[A] consideration of the evidence as a whole convinces me that the police were either unable or, worse still, unwilling to effectively protect the applicant against the attacks made upon him.

If you change the country, and if you change the reasons for persecution from race and religion to political opinion, you have very much the present case. If there is a difference, the facts here more strongly indicate State complicity in the persecution, since the applicants and their families did go to the police but did not obtain redress. It is not required that State participation in persecution be direct; it is sufficient that it is indirect, provided that there is proof of State complicity.

We therefore conclude that, the IAB could, on the basis of the evidence, come to only one conclusion, viz., that the applicants had satisfied the definition of Convention refugee. In holding otherwise, the Board erred in law.

We would therefore allow the section 28 application, set aside the Board's decision, and refer the matter back to the Board to be dealt with in a manner not inconsistent with these reasons.