

Date: 20010509

Docket: IMM-3427-00

Neutral citation: 2001 FCT 453

BETWEEN:

NARENDER SINGH SHAHIRAJ

Applicant

-and-

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

McKEOWN J.

Introduction:

[1] The applicant seeks judicial review of a Convention Refugee Determination Division of the Immigration and Refugee Board (the Board) decision dated June 6, 2000, wherein the Board found that the applicant had failed to establish a nexus to the Convention definition and was not a Convention refugee.

[2] The primary issue in this case is whether or not the Board erred in finding no nexus to the Convention definition. The applicant's counsel submits that the Board erred in finding no connection between the treatment suffered by the applicant and the Convention ground of (imputed) political opinion. Counsel also argued that the Board's statements on the issue of credibility were insufficient to dispose of the matter in and of themselves, therefore the matter should be sent back for redetermination based on the error the Board made with regard to the issue of nexus. Counsel for the applicant put the issue thus: Is the applicant persecuted by reason of his actual or imputed political opinion where the pretext for the treatment is political but the underlying motivation is one of extortion?

Facts:

[3] The applicant is a 32-year-old Sikh male who is a citizen of India. His brother was suspected of having relations with militants and successfully sought refugee status in Canada in 1994.

[4] The applicant claims that he was arrested and tortured on four separate occasions, once in 1995, once in 1998 and twice in 1999. He was ostensibly tortured in order to obtain confessions regarding his harbouring of militants and plots to kill certain prominent persons. On each occasion, he was eventually released on payment of a bribe.

[5] After his last arrest, and while in hiding, the applicant learned that he had been charged under the *Scheduled Castes Act*.

[6] The applicant arrived in Canada on November 21, 1999 and claimed refugee status. He told the Immigration Officer at the Port-of-Entry that he was involved in a land dispute, that he had been falsely accused of attacking the plaintiff, and that these charges had prompted him to flee from India.

[7] At the hearing, the applicant was asked why he had failed to declare at the Port-of-Entry his fear of persecution by the police in India. He stated that he was advised by his agent not to disclose this information because he might be arrested. On this issue, the Board wrote at page 3 of its decision:

The panel finds that the discrepancies between the declarations made by the claimant at the Port-of-Entry and his story of persecution in his narrative are of such magnitude to compromise the credibility of his claim. The claimant was not clear in describing the nature of the land dispute claim and the charges laid under the Scheduled Castes Act. Moreover, the panel fails to understand how the claimant could declare at the Port-of-Entry that he was accused of a serious crime in India but was "afraid" of stating that the police suspected him of being a militant. The claimant's feeble attempt to explain these discrepancies rob of credibility his story of persecution.

[8] The Board also found that the police detained and beat the applicant in order to obtain bribes and that this was not related to politics, i.e. that the applicant had failed to establish a connection between this treatment and his imputed or actual political opinion. There is no clear and unmistakable finding on what happened to the applicant during detention.

[9] Subsequently, the Board also gave consideration to the documentary evidence of several experts and held at page 4 of its decision:

Furthermore, the panel finds that the claimant's story of persecution lacks an objective basis in the light of the documentary evidence which indicates that people who are not high profile militant suspects are not at risk in Punjab today.

[10] The Board then concluded at pages 4-5:

Consequently, in the light of the documentary evidence which clearly does not depict the claimant as a militant suspect, and his own declaration whereby he explained that the police targeted him to obtain financial advantage, the panel finds that no nexus to the definition has been established.

Analysis:

[11] As a preliminary matter, I note that I agree with counsel for the applicant in terms of his argument on credibility. The Board's statements to the effect that the discrepancies between the applicant's statements at the Port-of-Entry and in his PIF narrative "compromise the credibility of his claim," and that his attempts to explain these discrepancies "rob of credibility his story of persecution" do not go far enough to dispose of the claim on credibility grounds. That is, the Board does not explicitly state that it does not believe the whole or certain parts of the applicant's story. It simply states that the applicant's story is compromised and 'robbed of credibility', but does not go that one step further to state that it disbelieves the applicant's version of events.

[12] As such, the matter before me is to be decided primarily on the issue of nexus. Section 2(1) of the *Immigration Act*, R.S.C. 1985, c.1-2 states that a Convention refugee means any person who:

(a) by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(i) is outside the country of the person's nationality and is unable or, by reason of that fear, is unwilling to avail himself of the protection of that country...

[13] It is important to keep in mind the most important facts of this case. First, the applicant alleges that he was detained, questioned and tortured by police in India. The applicant himself was not politically involved in any militant movements in India, however, he claims that the police accused him of harbouring militants and being involved in or having knowledge of assassination plots.

[14] The applicant admitted at the hearing before the Board that he believed that the real reason that the police detained and tortured him was their wish to obtain bribe money from him. He stated at the hearing that he believed that the police did not actually suspect him of having political ties to militants, but that they targeted him for the purpose of obtaining bribe money. At page 37 of the transcript, he was questioned by the Refugee Claim Officer:

Question: Now, in your opinion, would you say that the police really believed that you were involved with the militants? Or was that just a reason to ask money from you an your family?

Answer: They were doing it to take the money. They were thinking that we will beat them, we'll harass them and they will give us the money.

Question: But do you think that they really believed that you were a militant or involved with the militants in your opinion?

Answer: I have not joined the militants and I have never seen the militants. No militant ever came to me.

Question: Yes, but I understand it's in the eyes of the police, but what is your opinion about that?

Answer: We are not militants. They were asking for the money from and they were accusing us.

[15] The applicant's counsel submits that where the motivation for mistreatment is "mixed", i.e. partly political and partly criminal, the applicant should still rightfully succeed in claiming refugee status where one of the motivations establishes a nexus to a Convention ground. Counsel cites the case of *Klinko v. MCI*, [2000] F.C.J. No. 228

(C.A.) for the proposition that the Court should take a broad view of the Convention definition of political opinion. In the *Klinko, supra* case, the claimant spoke out against widespread corruption amongst customs and police officials in the Ukraine. The Board dismissed the claim because this corruption was not sanctioned by the state, so therefore the claimant had not expressed a political opinion as understood by the definition of Convention refugee pursuant to subsection 2(1) of the *Immigration Act*, R.S.C. 1985, c.I-

2. The Court of Appeal held that the machinery of state need not actually be engaged in persecuting a claimant in order to establish a nexus with respect to political opinion. Indeed, it is enough that the state "may be engaged". The Court of Appeal concluded that the Board had erred in law by failing to recognize that the persecution suffered by Mr. Klinko was on account of his political opinion.

[16] The applicant's counsel also made reference to the decision of the Federal Court of Appeal in *Zhu v. MEI*, [1994] F.C.J. No. 80 (C.A.), wherein the Court held that the Board erred in determining that the claimant had NOT established a nexus between his role assisting in smuggling two students involved in the Chinese pro-democracy movement to Hong Kong and his political opinion. In the Board's view, the claimant's acts in that case were motivated more by friendship than by political motivation and so no nexus was established. MacGuigan J. wrote at paragraph 2:

The panel was in error in setting up an opposition between friendship and political motivation. His motives were "mixed" rather than "conflicting". People frequently act out of mixed motives, and it is enough for the existence of political motivation that one of the motives was political. In this respect it should be noted that, although he was not generally politically active, he had also made a financial contribution to the pro-democracy movement, as the Board itself found.

[17] Counsel for the applicant submits that in the present case, the police were motivated to detain, question and torture the applicant based on two motivations: the criminal motivation to obtain bribe money and the political motivation to persecute the applicant due to his historical link to his brother, who had himself been linked to the militant movement in India. The applicant was initially targeted by the police based on his brother's alleged link with militants, so the continued targeting of this particular person was not purely random, but based on this historical pattern which was itself based on a political motivation. I note that the *Zhu, supra* case involves the motivations of the claimant, *not* the motivations of alleged persecutors. However, the case is similar to the present one in that it involves a Board determination of personal motivations that assist in determining whether or not the claimant has established a nexus to the Convention definition.

[18] The respondent submits that the Board correctly concluded that any mistreatment of the applicant was not as a result of any political motive and that the applicant's own evidence was that the police were motivated by money, and nothing

more. The respondent notes that the Board stated in its decision that the applicant's evidence in this regard was corroborated by the documentary evidence.

[19] It is not for the Board to base its determination as to whether or not a claimant has established a nexus to the Convention on the subjective belief of the alleged persecutors themselves, especially since these alleged persecutors are obviously not present at the hearing before the Board and cannot testify as to their own state of mind. Moreover, nothing turns on the applicant's opinion as to the subjective beliefs of the alleged persecutors. This evidence is merely opinion evidence that does not prove that the police did not believe that the applicant was connected to the militant movement in India.

[20] The Board did indeed cite documentary evidence to the effect that there is a problem with police harassment in India which is based on the motivation of obtaining bribe money. While this evidence may tend to support the Board's finding of no "nexus", it is not sufficient to dispose of the matter; there is reason to believe that the applicant was not randomly targeted for extortion by the police, but that they targeted him based at least partially on his association with his brother (who had had ties to militants) and/or his own imputed political ties to militants.

ORDER

[21] The decision of June 6, 2000 is quashed. The application for judicial review is allowed and the matter is returned to the Board for redetermination in a manner not inconsistent with these reasons.

[22] The following question is certified:

Is the applicant persecuted by reason of his actual or imputed political opinion where the pretext for the treatment is political but the underlying motivation is one of extortion?

"W. P. McKeown"

J.F.C.C.

Toronto, Ontario

May 9, 2001

FEDERAL COURT OF CANADA

Names of Counsel and Solicitors of Record

COURT NO: IMM-3427-00

STYLE OF CAUSE: NARENDER SINGH **SHAHIRAJ**

Applicant

-and-

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

DATE OF HEARING: WEDNESDAY, APRIL 25, 2001

PLACE OF HEARING: TORONTO, ONTARIO

REASONS FOR ORDER

AND ORDER BY: MCKEOWN J.

DATED: WEDNESDAY, MAY 9, 2001

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For the Respondent

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