

Federal Court



Cour fédérale

**Date: 20090728**

**Docket: IMM-233-09**

**Citation: 2009 FC 764**

**Ottawa, Ontario, July 28, 2009**

**PRESENT: The Honourable Mr. Justice Beaudry**

**BETWEEN:**

**KASHMIR SINGH GHOTRA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act), of a decision by the Refugee Protection Division of the Immigration and Refugee Board (panel) dated December 11, 2008, determining that the applicant is neither a Convention refugee nor a person in need of protection.

**Issue**

[2] The issue is whether the panel erred in finding that the applicant had failed to rebut the presumption that India was capable of protecting him.

**Factual background**

[3] The applicant, a citizen of India from the state of Punjab, fears being persecuted on the basis of his membership in a particular social group and his political opinion.

[4] His father, a longstanding and active member of the Akali Dal Badal Party, was arrested and imprisoned in 1984. At the time, police raided the applicant's family home and accused them of being anti-national.

[5] In February 2002, the applicant worked for the same party. He claims to have been harassed by Congress Party workers. After the Congress Party came to power, he was harassed by the police and the leaders of the Akali Dal Badal Party were thrown in jail and charged with corruption.

[6] After having worked for his political party in 2003, the applicant was questioned and beaten by Inspector Garcha, who then began to raid his home. He was shown photos and asked to identify people in them.

[7] In April 2004, the inspector left to work in another region, but returned in March 2005. At the end of April 2005, he once again raided the applicant's home and beat his father, who died a year later.

[8] Throughout that same year, the applicant claimed to have been arrested, beaten and tortured. He alleged that he was forced to sign blank papers, have his picture taken and promise to report to the police station every month in order to be released.

[9] In September 2006, the applicant fled to Delhi, where he stayed with an agent. He then claimed to have found out that the police had again raided his home and that Inspector Garcha was looking for him.

[10] He flew to Canada using a false passport on January 16, 2007, and immediately claimed refugee protection.

### **Impugned decision**

[11] After considering the applicant's arguments, his personal situation, the documentary evidence and the case law, the panel found that state protection was available to him in India and that he should have alerted the Indian authorities and availed himself of this protection prior to claiming refugee protection in Canada.

**Preliminary issue**

[12] The respondent argues that in paragraphs 28 to 38 of his supplementary memorandum, the applicant alleges that the panel failed to proceed with an assessment, under section 97 of the Act, of his personal situation if he were to return to India, considering the fact that he has no passport.

[13] The respondent contends that this is a new argument by the applicant which was never raised before the panel. It is recognized that an issue that has not been raised before an administrative tribunal cannot be raised in an application for judicial review (*Toussaint v. Canada (Labour Relations Board)* (F.C.A.), (1993), 160 N.R. 396, 42 A.C.W.S. (3d) 288 at paragraph 5; *Tozzi v. Canada (Attorney General)*, 2007 FC 825, [2007] F.C.J. No. 1085 at paragraph 22). Consequently, the respondent argues that this allegation and the documentary evidence submitted must be dismissed.

[14] It is trite law that judicial review of a decision should proceed only on the basis of the evidence before the administrative tribunal (*Gallardo v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 45, 230 F.T.R. 110). The applicant is entitled to rely only on material that was before the decision-maker when presenting his arguments. Consequently, the Court will not address this argument by the applicant.

### **Standard of review**

[15] The question of state protection is one of mixed fact and law, and the applicable standard of review is reasonableness (*Chagoya v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 721, [2008] F.C.J. No. 908 (QL) at paragraph 3; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Chaves v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 193, 137 A.C.W.S. (3d) 392; *Mendoza v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 634, 139 A.C.W.S. (3d) 151 at paragraph 16).

[16] According to the Supreme Court of Canada, the elements to be considered are the justification for the decision, its transparency and its intelligibility. The outcomes must be defensible in respect of the facts and law (*Dunsmuir* at paragraph 47).

### **Analysis**

[17] For the application for judicial review to be allowed, the applicant must show that it was unreasonable for the panel to find that the applicant had not rebutted the presumption that his country could protect him.

[18] In spite of the fact that, in its decision, the panel did not mention that the applicant was in hiding when he was living in Delhi, the Court is of the view that it was not unreasonable for the panel to find the applicant's explanations as to why he failed to seek the protection of his country or other authorities to be insufficient.

[19] In *Martinez v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 343, 146 A.C.W.S. (3d) 1052 at paragraph 10, it was established that a tribunal should not automatically conclude that the actions of a small number of people constitute persecution by the state. When the alleged persecutors are found in a specific location, as in this case, the tribunal must determine if it is objectively reasonable for the applicant to seek protection in his or her country.

[20] In the case at bar, the decision-maker, relying on both the positive and negative documentary evidence, found that there was other recourse available to the applicant with regard to his persecutors in India.

[21] Given the particular circumstances in this case, the Court's intervention is not warranted.

[22] The decision is justified and intelligible and the outcome is defensible in respect of the facts and law.

[23] No question was proposed for certification and none arises from this case.

**JUDGMENT**

**THE COURT ORDERS** that the application for judicial review be dismissed. No question is certified.

“Michel Beaudry”

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Judge

Certified true translation

Sebastian Desbarats, Translator

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-233-09

**STYLE OF CAUSE:** KASHMIR SINGH GHOTRA  
v.  
THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION

**PLACE OF HEARING:** Montréal, Quebec

**DATE OF HEARING:** July 23, 2009

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

**DATED:** July 28, 2009

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