

Federal Court



Cour fédérale

Date: 20140423

Docket: IMM-2277-13

Citation: 2014 FC 377

Ottawa, Ontario, April 23, 2014

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

GOVIND SINGH

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This application for judicial review concerns a decision made by the Immigration and Refugee Board [the Board] dated March 6, 2013 [the Decision] in which it excluded Govind Singh [the Principal Applicant] for espionage under sub-paragraph 34(1)(a)(f) of the *Immigration Refugee Protection Act*, S.C. 2001, c. 27. Section 34 has been amended but at the relevant time it provided as follows:

34. (1) A permanent resident or a

34. (1) Empoertent interdiction de

foreign national is inadmissible on security grounds for

(a) engaging in an act of espionage or an act of subversion against a democratic government, institution or process as they are understood in Canada;

[...]

(f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b) or (c).

territoire pour raison de sécurité les faits suivants :

a) être l'auteur d'actes d'espionnage ou se livrer à la subversion contre toute institution démocratique, au sens où cette expression s'entend au Canada;

[...]

f) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle est, a été ou sera l'auteur d'un acte visé aux alinéas a), b) ou c).

I. The Issues

[2] The application of this section gives rise to two issues:

1. Was the Board correct when it concluded that in the period from December 1998 to July 1999 [the Relevant Time], Pakistan had a democratic government as that term is understood in Canada?
2. Was it reasonable of the Board to rely on the Applicant's Personal Information Form [PIF] in which he admitted engaging in espionage?

II. The Decision

[3] The Board said the following about democracy in Pakistan during the Relevant Period:

[41] At the time in question, Pakistan was an Islamic Republic with a democratic political system. Formal democracy had returned to Pakistan in 1988 with the lifting of martial law. Prior to Mr. Singh's posting to Islamabad, the last elections held in Pakistan had occurred in February 1997. Outside observers declared the elections to be free and fair. An elected civilian government under Prime Minister Nawaz Sharif came to power with two-thirds of the Parliamentary majority. (A popularly elected Parliament selects the Prime Minister by majority.)

[42] The Various levels of government included a National Assembly, a Senate and provincial assemblies. There was also independent judiciary, Pakistan had a Constitution that provided for a number of freedoms. Pakistan faced ongoing concerns in areas such as political corruption, human rights abuses, limits on religious freedom and restrictions on one's right to exercise his political freedom.

[43] Nevertheless, the Constitution provided for an independent judiciary, and although it suffered from a lack of resources, it was able to exercise its independence. The civil judicial system provided for an open trial, the presumption of innocence, cross-examination, appeals and bail. The Constitution also provided for freedom of the press, academic freedom, freedom of assembly, freedom of movement and freedom of religion, all of which were respected in practice. [my emphasis]

[44] Internal security rested primarily with the police. Human rights abuses often took the form of police abuse, arbitrary arrest and detention and extrajudicial killings. The government, a target of corruption allegations itself, was criticized for doing little to curb abuse. Although the Constitution and the Penal Code forbade the use of torture and inhuman treatment, police accused of such conduct were rarely effectively prosecuted or punished.

[45] Nevertheless, human rights groups were free to operate without government restrictions. Human rights organizations and NGOs were active in bringing to light cases of abuse by authorities.

[46] [...] I accept that for a government to be considered truly democratic, it must allow the electorate freedom of choice and to respect that choice in order to be considered reflective of the will of the people. I also agree that respect for the rule of law is a necessary component of a democratic government. Democratic governments cannot be above the law. In keeping with this requirement, an independent judiciary is also a necessary

component. With such basic democratic standards in place, other freedoms that we have come to expect, such as freedom of religion, of the press, of association, etc. will eventually flow.

[4] The Board then concluded as follows:

[47] When a democratically-elected government does not absolutely and unequivocally attain these ideals, it does not mean necessarily that it falls short of being considered a democratic government as it is understood in Canada. Such was the case with Pakistan.

[48] Although Pakistan had its problems, and there was a great deal of room for improvement, and although President Sharif's government did not survive past October 1999, it does not negate the fact that, until then, the government in Pakistan had been democratically elected. I am satisfied that, overall and at the time in question, the government of Pakistan constituted a democratic government as it is understood in Canada.

[5] In my view the Decision shows that the Board initially undertook the correct analysis. It considered the fact that Prime Minister Sharif was elected to lead a majority government in a vote which the International Community described as "free and fair". The Board also noted that Pakistan's constitution provides for the basic freedoms Canadians associate with democracy.

[6] Further, the Board did not limit its inquiry to the election and the Constitution. It correctly noted that there were problems with the implementation of democratic principles in Pakistan. Nonetheless, it concluded that Pakistan had a democracy in the Relevant Period as that term is understood in Canada.

A. *Issue I*

[7] In my view, the Decision is not correct because the Board placed too much emphasis on the elections and the Constitution and failed to give appropriate weight to the anti-democratic events which were serious, ongoing and not being addressed or corrected by the government.

The problems included the following:

1. Minority voting rights, and minority access to important positions in government were restricted. The U.S. Department of State report for Pakistan, dated February 23, 2000 [the DOS Report] says at page 40 with reference to the year 1999:

[...]

The Government distinguishes between Muslims and non-Muslims with regard to political rights. In national and local elections, Muslims cast their votes for Muslim candidates by geographic locality, while non-Muslims can cast their votes only for at-large non-Muslim candidates. Legal provisions for minority reserved seats do not extend to the Senate and the Federal Cabinet, which currently are composed entirely of Muslims. Furthermore, according to the Constitution, the President and the Prime Minister must be Muslim. The Prime Minister, federal ministers, and ministers of state, as well as elected members of the Senate and National Assembly (including non-Muslims) must take a religious oath to “strive to preserve the Islamic ideology, which is the basis for the creation of Pakistan” (see Section 3).

And at page 45, it states:

Because of this system, local parliamentary representatives have little incentive to promote their minority constituents’ interests.

2. The rule of law was not observed by the government or the police. The DOS Report noted that:

[...]

Significant numbers of women were subjected to violence, abuse, rape, trafficking, and other forms of degradation by their spouses and members of society at large. The Government failed to take

action in a high profile “honor killing” case and such killings continued throughout the country.

[...]

In several high-profile arrests of Sharif Government critics, the police or intelligence services entered homes and arrested individuals without warrants or due process and held them for periods of days or weeks. In May, Intelligence Bureau officials arrested opposition leader and journalist Hussain Haqqani without a warrant and held him incommunicado until May 7 without filing charges (see Section 1.c.). On May 8, approximately 30 policemen broke into Friday Times editor Najam Sethi’s home, beat him, tied up his wife, destroyed property, and took Sethi away without a warrant. According to press reports, Sethi was interrogated by the intelligence services as a suspected “espionage agent.” Sethi was held incommunicado for several days and denied access to an attorney (see Section 2.a).

[...]

Police committed extrajudicial killings. The extrajudicial killing of criminal suspects, often in the form of deaths in police custody or staged encounters in which police shoot and kill the suspects, is common...The Human Rights Commission of Pakistan [HRCPP] estimates that there were 161 extrajudicial killings in the first 4 months of the year.

3. The prohibitions against slavery were not enforced by the government. The DOS Report says:

[...]

The Constitution and the law prohibits forced labor, including forced labor by children; however, the Government does not enforce these prohibitions effectively.

[...]

Illegal bonded labor is widespread. It is common in the brick, glass, and fishing industries and is found among agricultural and construction workers in rural areas. A recent study by local unions suggests that over 200,000 families work in debt slavery in the brick kiln industry. There is no evidence that bonded labor is used in the production of export items such as sporting goods and surgical equipment. However, bonded labor reportedly is used in

the production of carpets for export under the peshgi system, by which a worker is advanced money and raw materials for a carpet he promises to complete. Conservative estimates put the number of bonded workers at several million.

4. The DOS Report also indicates that the military had considerable influence over executive decision-making.
5. Finally, the Government prohibited Ahmadis from holding conferences or gatherings. They are regarded as a non-Muslim minority under the Constitution. Under Pakistan's criminal law they are banned from calling themselves Muslims and are frequently sentenced to three-year prison terms for violations.

[8] In *Qu v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 399 at paragraph 44, the Federal Court of Appeal quoted the following passage from the Supreme Court of Canada's decision in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217:

Democracy is not simply concerned with the process of government. On the contrary, as suggested in *Switzman v. Elbling*, *supra*, at p. 306, democracy is fundamentally connected to substantive goals, most importantly, the promotion of self-government. Democracy accommodates cultural and group identities: *Reference re Provincial Electoral Boundaries*, at democratic process. In considering the scope and purpose of the *Charter*, the Court in *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103, articulated some of the values inherent in the notion of democracy (at p. 136):

The Court must be guided by the values and principles essential to a free and democratic society which I believe to embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect of cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.

[9] In view of the facts and the law described above, it is my conclusion that the Board was incorrect when it concluded that Canadians would recognize as democratic a government that

tolerated honour killings, slavery, extra judicial killings by police and discrimination against religious minorities.

B. *Issue II*

[10] In view of the conclusion above, it is not necessary to decide whether the Applicant was, in fact, engaged in espionage.

Conclusion

[11] The application will be allowed.

Certification

[12] No question was posed for certification

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.
2. The Decision is set aside.
3. The matter is to be reconsidered by another member of the Board in light of this decision.

“Sandra J. Simpson”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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APPEARANCES:

Ms. Erin Roth FOR THE APPLICANT

Mr. David Tyndale FOR THE RESPONDENT

SOLICITORS OF RECORD:

Ms. Erin Roth FOR THE APPLICANT

Bellissimo Law Group

Toronto, Ontario

William F. Pentney

Deputy Attorney General of

Canada

Ottawa, Ontario

FOR THE RESPONDENT