

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO. 71077/98

AT AUCKLAND

Before: J M Priestley QC (Member)

Representative for the Appellant: Mr D Ryken

Date of Hearing: 16 November 1998

Date of Decision: 17 December 1998

DECISION

INTRODUCTION

The appellant is a national of India. He was born and raised in the Hoshiarpur district in the Punjab. He is a single man aged 26.

The appellant claimed refugee status on his arrival at Auckland international airport on 13 February 1996. He was detected in the customs hall with three other refugee claimants, having arrived on a flight from Singapore via Honiara. Airline records suggest that he had presented in Singapore an Indian passport in the name of one G Singh. He had no travel documents, however, in his possession on arrival.

A detailed statement in support of his refugee claim, prepared by his counsel, was lodged on 2 March 1996. Over two years later, on 24 March 1998, the appellant was interviewed by the Refugee Status Branch of the New Zealand Immigration Service. By letter dated 20 August 1998, refugee status was declined. From that decision lies this appeal to the Authority.

THE APPELLANT'S CASE

The appellant seeks the protection of the Convention. He claims that there is a well-founded fear that, if he were to return to India, he would be persecuted on the ground of his political opinion. The appellant claims that he was a committed member of the All India Sikh Students Federation (AISSF) which he joined in 1993. On four occasions between April 1994 and October 1994 he claims that he was detained by the Punjab police in Hoshiarpur, interrogated, and was severely tortured. Since his departure from India in early February 1996, his family's home has been visited by the police on a number of occasions and inquiries have been made. He states that his father was arrested by the police in late 1997 and interrogated as to his son's whereabouts.

The appellant's narrative, which is set out in greater detail in the next section of this decision, paints a picture of a young man who was active in a banned organisation with political aims. It is a picture of a man illegally detained and persistently tortured by state authorities, who fears repetition or worse if he were to return to the country of his origin. His narrative, if true, entitles him to refugee status. A central issue will be whether he is credible.

THE APPELLANT'S NARRATIVE

The appellant is the fourth of five children. He has three older sisters and one younger brother. His parents are in their 50s. The family lives in a village approximately 20 kilometres from Hoshiarpur. His father was described as "comfortable", having inherited a modest portion of land from his father, but whose main source of income is a well-established motor-electrical business.

The appellant described his family as apolitical. Having matriculated from high school, the appellant went to college at Hoshiarpur. There he joined, in June 1993, the AISSF. He knew that this was a banned organisation but he believed that a degree of activism was necessary to improve the political and economic position of Sikhs in India. The appellant was elected to the committee of his college's branch. He had general organisational responsibilities which included giving two or three speeches per month at various meetings. These meetings were of moderate size and were usually held in local gurdwara or in surrounding villages. The appellant commented that the village people were "very illiterate" and that it was part of the AISSF's task to enlighten them on various matters.

At the hearing before the Authority, the appellant proffered information (in

response to questions) which had not been covered either in his initial written statement (page 26) or at his RSB interview. On two occasions prior to April 1994, the appellant had (so he said) been detained for periods of approximately four or five hours by the police and beaten on his thighs and on the soles of his feet with sticks. He was warned by the police that what he was doing was illegal. He was released by the police because, so he said, "they had no proof". No medical treatment was required on these occasions.

Further new information provided by the appellant was that, during this phase of his AISSF membership, his family home was visited on occasions by armed terrorists who demanded food and shelter. The appellant stated that this was provided by him and his father who, although aware of what was going on, offered no opposition or protest.

It would appear in 1994 the appellant was detained four times by the police. These detentions occurred in mid-April 1994, in mid-June 1994, mid-July 1994 and September/October 1994. On all occasions he was taken to police stations in Hoshiarpur. On all occasions he was interrogated, asked to reveal details of AISSF members; was beaten with sticks and lathis on his thighs, legs, back and shoulders and also had rollers pushed across his thighs. The length of these detentions ranged from a week to 10 days. On all occasions he was eventually released as a result of bribes paid to the police station. The beatings took place on a daily basis. The pain was excruciating. The fine detail of this persistent treatment coincides with numerous other accounts given by refugee claimants fleeing from the Punjab and is totally consistent with the country information detailing maltreatment of this type.

The first detention was undoubtedly the most serious and dramatic. The appellant and approximately 15 other AISSF organisers were arrested whilst they were on the stage of a gurdwara on Bisakhi Day. They had been participating in a meeting involving some 1,000 people. When the police entered the gurdwara, chaos broke out. Approximately 10 people, including the appellant, were arrested.

After having been kept in isolation and beaten for three days, the appellant on the evening of the third day was blindfolded by the police and driven out into the jungle. His blindfold was then removed. He saw there three of his colleagues, two of whom had been arrested with him and one of whom he knew. The other three were asked to identify the appellant, which they did correctly. The blindfold was

then replaced on the appellant's head. He heard screams and shots and although he never saw the corpses of his three colleagues, he knew that they had been killed. The police party returned the appellant to the Hoshiarpur police station where he was detained for a further week. He was told that his life had been spared so that he could help the police with the capture of other Federation members.

The three further detentions referred to above followed. On all occasions the appellant was beaten. The pain and his suffering were great. On no occasion, however, did he reveal any information to the police. The appellant had no idea why he too was not killed although it is fair to comment that the number of slayings due to "false encounters" in the Punjab in 1994 was fast diminishing.

After the fourth detention, the appellant and his family decided that he had to go into hiding. He therefore left the Punjab and travelled to D, a town in the foothills of the Himalayas in Uttar Pradesh. He stayed there with members of his maternal family for just over a year. He obtained employment in a factory.

In December 1995, the Uttar Pradesh police raided the home of the appellant's maternal relatives in D. The appellant was not there at the time. The police demanded information on the whereabouts of the appellant and accused him of having fled from some criminal incident in the Punjab. The appellant's relatives dissembled and told the police that they were unaware of his whereabouts. The appellant's relatives, when he returned home that evening, were not prepared to harbour him any longer. The appellant therefore went to stay with a friend he had met at the factory, one JS. He lived with JS for the next few weeks whilst arrangements were made (at a cost of Rs350,000) to leave India. This he did on a false passport having been advised by his agent that it would be impractical for him to travel on his own passport.

Thus it was that the appellant left New Delhi and travelled to New Zealand via Singapore and Honiara.

As it happened, the appellant has a married sister who arrived in New Zealand some two years previously, in January 1994, and who subsequently obtained permanent residence status as a result of her marriage to an Indian national who had apparently successfully obtained refugee status. The appellant professed to the Authority that when he left both India and Singapore, he had no idea what his

ultimate destination would be. He stated that, even when he arrived in New Zealand, he was unaware where he was (although this seems to be at odds with various questions and forms with which he was confronted at Auckland airport). He stated that it was only when he cleared the airport and was taken to a gurdwara in Auckland that he became aware that he was in New Zealand and that he subsequently, as a result of a chance encounter in the gurdwara, became aware of his sister's address.

The appellant now lives in the Bay of Plenty as a member of the household of his sister and brother-in-law. He is employed as a labourer and owns a second-hand motor vehicle. He describes his health as being neither good nor bad. He is frequently afflicted with aches in his shoulders and upper arms and frequently recalls his screams and his beatings and also has dreams which revolve around gunshots and sudden death.

The appellant has been in contact with his family over the past two years and nine months. His father is apparently illiterate but he has received various letters from his father which, amongst other things, suggest that the police continue to make routine inquiries. Although there is a new police superintendent at Hoshiarpur police station, the appellant believes from these letters that a file exists for the appellant which includes photographs of him.

PSYCHOLOGICAL REPORT

In support of his client's claim, the appellant's counsel arranged for the appellant to be examined by a consultant psychiatrist, Pramila Fernandez. Ms Fernandez produced a report dated 6 November 1997, which the Authority has considered. The purpose of the assessment was to "consider psychological sequelae of the trauma he suffered in the Punjab". Although the report is dated 6 November 1997, the actual assessment was carried out some eight months previously. The appellant was unable to speak in English as a result of which the psychiatrist was assisted by an interpreter.

For reasons which are not apparent to the Authority, the first portion of the report deals with alleged trauma and humiliation which the appellant experienced as a result of his not being able to undergo Amrit, a Sikh religious ceremony designed to instil a sense of moral worth. According to the psychiatric report, a combination of missing this ceremony coupled with having to cut his hair and shave off his

beard (to avoid police scrutiny) was traumatic and resulted in a loss of identity accordant to death.

The appellant appeared at the Authority's hearing with neatly cut hair, no turban and a short, trimmed beard. He has not, in New Zealand, undergone the Amrit ceremony and was unable to explain the significance of this portion of the psychiatric assessment (page 68).

The appellant was elsewhere in the report described as quiet and withdrawn, preoccupied and making little eye contact. His mood is twice described as dysthymic. His dysthymic mood included nightmares and reliving his past experiences with similar dreams as those he described to the Authority. The report concludes:

“[The appellant] presents a traumatised man and experiences symptoms suggestive of a chronic post-traumatic stress disorder ... these may be directly related to the experience of torture and persecution he suffered with the Punjab police.”

Such reports are, with respect, next to useless. There is extensive literature and published clinical information relating to post traumatic stress disorder. The condition is particularly relevant to genuine refugee claimants, many of whom will have undergone horrendous torture and other forms of persecution. By and large, psychological and psychiatric conditions are difficult to feign and an experienced person, particularly where the report will have forensic significance, will always be alert to the possibility that the patient is attempting to mislead. Probing questions and attempts to produce relevant symptoms are frequently justified.

In fairness to Ms Fernandez, she was not called in evidence to amplify her diagnosis or to describe (from her contemporaneous notes) the nature and extent of her examination. It may possibly be, in this particular case, that the examination was extensive and that her diagnosis is beyond dispute.

On the other hand, this Authority is frequently presented with reports by psychologists and psychiatrists which are little more than a lengthy recital of an appellant's narrative with little discernible attempt to explore the alleged sequelae. To report, as in this case, that the symptoms are “suggestive” of post traumatic stress disorder and that his (self-reported) “constant fear and insecurity ... *may* (emphasis added) be directly related to ... torture and persecution” is of little help. A helpful report would be a robust one which sets out the length of the interviews,

the nature of the diagnostic process and a fairly firm conclusion on whether or not a relevant condition is present, with reasons. Reports which do not meet these standards are not likely to be of much assistance to the Authority or the cause of those appellants who present them.

In this case, the Authority is satisfied from the appellant's demeanour and in particular the genuine and appropriate grief which he exhibited, that he had indeed been systematically tortured by the Punjabi police on a number of occasions and that he had probably been subjected to the horror of his colleagues being executed. His grief and distress were manifest. If similar observations were made by Ms Fernandez (and they may well have been), then they are not specified in her report.

THE ISSUES

The Inclusion Clause in Article 1A(2) of the Refugee Convention relevantly provides that a refugee is a person who:-

"... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it."

In terms of Refugee Appeal No. 70074/96 (17 September 1996), the principal issues are:

1. Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?
2. If the answer is yes, is there a Convention reason for that persecution?

Because the issue of relocation arises in this case, the decision of this Authority in Refugee Appeal No 523/92 (17 March 1995) requires two additional issues to be addressed:

- (a) Can the appellant genuinely access domestic protection which is meaningful?

- (b) Is it reasonable, in all the circumstances, to expect the appellant to relocate elsewhere in the country of nationality?

DECISION

There are a number of highly unsatisfactory aspects about the appellant's narrative which raise serious concerns about his credibility. These include:

1. the improbability that his family would not have informed him that arrangements were being made to send him to New Zealand where a sister had already established herself;
2. the improbability of the appellant being unaware, even at the time of his departure from India, of his final destination;
3. the improbability of the appellant meeting by chance in a gurdwara in Auckland a person who was aware of his sister's address and contact details;
4. the extraneous and irrelevant information given to Ms Fernandez about alleged cultural trauma as a result of the appellant having to shave his hair and beard. (Given that he left India on a false passport which nonetheless carried a Sikh name, the reasons for such an attempt to disguise his ethnic identity are unfathomable).
5. his unsatisfactory responses and demeanour when it became apparent that the qualified doctor in his village, HS, who would conceivably have been able to give some written corroboration of medical treatment given in the wake of his four detentions, had moved out of private practice into public service and had left the area;
6. problems inherent in the statement made at RSB level that the deaths of two of his three colleagues in the April 1994 jungle encounter have been reported in two Punjabi newspapers. When asked how the appellant could have known of the newspaper reports when he himself was still detained, the appellant's demeanour again became evasive and he mumbled something to the effect that the two deaths were reported as "Mr Singh".

With regard to the first three of the above concerns, counsel for the appellant conceded that his client might well be lying in that regard and that a possible reason (highly speculative) was that the appellant wanted to avoid implicating his agent and possibly members of his family in whatever procedure was used to bring him to New Zealand.

Despite these credibility concerns, however, there are other features of the appellant's narrative and its presentation which weigh in his favour. His physical symptoms (even today he requires occasional forms of pain relief) are consistent with the torture he has described. There are some light scars on his legs which are similarly consistent with cuts and abrasions which could have flowed from beatings. His grief and his dreams and the conclusions (albeit tentative) in the psychiatric report are all consistent with his narrative. Particularly telling are his nightmares involving gunshots and screams.

It is also important for the Authority to remind itself that the RSB determination did not take place until two and a half years after the appellant's arrival in New Zealand. By 1994 and 1995, much of the turmoil which had plagued the Punjab in the earlier years of this decade had passed away. By 1995, there were signs that many of the excesses of the Punjab police and security forces were being reined in. Over the last two years, whilst the appellant has patiently been awaiting his RSB interview, this Authority has had to process a significant number of totally unmeritorious appeals by Punjabi claimants who have been filing their second and third applications. In support of such appeals (which would never have eventuated had the appellants been located and removed speedily after the determination of their first appeals) the Authority has been presented with many specious and fraudulent documents and narratives. This claim, however, falls into a different class. It is precisely the type of claim which the Authority encountered from genuine claimants during the 1993-1995 period. Members of the AISSF and their families frequently did harbour terrorists at night under duress. AISSF members were indeed detained by the police and interrogated and tortured for information. The AISSF did indeed carry out a political programme of the type described by the appellant. And although, by 1994/1995, the number of civilian casualties in the Punjab had declined significantly, young men who had the profile of activists were still at risk and were certainly the subject of police excesses.

A feature of this case which must not be overlooked is that this particular appellant was himself a witness to one such excess, namely the summary execution of three

AISSF activists in a jungle clearing in April 1994. The appellant might thus be of interest to the police in more ways than one. Not only would he have a local profile as an AISSF activist, but he would also be a potential witness against certain police officers who may themselves be the subject of investigation and prosecution. This additional factor may well account for the fact that his family has been frequently visited over the intervening three years. There is also the evidence of the appellant (confirmed in one of his father's letters) that the police have a file and photographs of the appellant.

It is, of course, possible that the appellant's story and even his expressed grief are total fabrications and that the Authority has been hoodwinked. The aspects of his narrative catalogued above which raise credibility concerns cannot be explained away. About the central core of the appellant's story, however, the Authority has fewer doubts. There are, of course, some doubts which, given the legitimate credibility concerns referred to above, will not evaporate. However, in terms of our jurisprudence, the appellant must be given the benefit of such doubts. The central core of his story remains and there are not proper grounds for rejecting it *in toto*. That central core includes the fact that the appellant was an AISSF activist on a college committee who addressed public meetings; that he was an occasional reluctant harbourer of terrorists; that on a number of occasions he was detained and disgracefully treated by the Punjab police; that he underwent the trauma of having three of his friends executed in his presence; and that he had his family remain of on-going interest to the Punjab police.

This is clearly not a case where the risk of persecution can be reduced to below the threshold of a real chance by the appellant relocating. The persistent nature of the torture to which the appellant has been subjected and its long-term effect on him, both physically and emotionally, in the Authority's view, make relocation an unreasonable option. Furthermore, given the persistence of the police interest and their apparent ability to track him down to Uttar Pradesh, and given further the continuing police visits to his family, there is a significant risk that the appellant might be found by the police if he were to relocate elsewhere in India outside Hoshiarpur district.

Thus, for the reasons that are stated, the Authority concludes that the appellant is entitled to refugee status. There is a real chance that, if this appellant were to return to India, he would be persecuted on the ground of his political opinion. That risk is on-going today, there being ample evidence from current country

information that practices of the type to which the appellant was subjected are still employed by the Indian police and security forces.

The appellant, for the reasons stated, thus falls within the ambit of Article 1A(2) of the Refugee Convention. His appeal is allowed.

.....
J M Priestley QC
Member