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Date: 5 August 1992 (19220805)

Judicial Body: Refugee Status Appeals Authority

Title: Refugee Appeal No. 47/92 Re PS

Reference: Refugee Appeal No. 47/92 Re PS

Citation: Refugee Appeal No. 47/92 Re PS (5 August 1992)

Previous Decision:

National Legislation:

International Provisions:

1907 Hague Regulations

1949 Geneva Conventions

1958 Geneva Conventions Act

1977 Additional Geneva Protocols

1987 Geneva Conventions Amendment Act

Disposition: The appellant failed to satisfy the requirements of the Refugee Convention. Appeal dismissed.

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO. 47/92

RE PS

AT AUCKLAND

Before: R.P.G. Haines (Chairman)
J.M. Priestley (Member)

Counsel for the Appellant: Mr R.P. Chambers

Appearing for the NZIS: Mr P. Poching

Date of Hearing: 24 April 1992

Date of Decision: 5 August 1992

DECISION

This is an appeal against the decision of the Refugee Status Section of the New Zealand Immigration Service declining the grant of refugee status to the appellant, an Indian national of the Sikh faith born in the Punjab and who has lived his entire life in that State.

THE APPELLANT'S CASE

The appellant is a twenty-five year old single man who has lived with his family in a village near N. His father is a farmer by occupation and the appellant's older brother also works on the family farm.

The appellant attended college until he matriculated at sixteen years of age and thereafter attended a college from which he graduated with a Bachelor of Arts degree at the age of twenty-two years.

The appellant claims to be a devout Sikh and it was his practice at home to attend the Temple daily.

On 1 June 1984 the Indian Army was sent into Amritsar in a move code-named Operation Blue Star designed to flush out Sikh militants from the Golden Temple. The result was to be a disaster: Minority Rights Group Report The Sikhs (1986) 13.

The appellant said that these events moved him very deeply and made him very angry. In September 1984 he visited the Golden Temple itself. In the same year he joined the All India Sikh Students Federation. His evidence both at the Refugee Status Section interview on 9 September 1991 and before us is accurately summarized in his counsel's memorandum in the following terms:

"He took part in rallies and strikes on a regular basis and he has likened his activities to something similar that occurred in China of recent times. There was frequent police activity during such rallies and strikes and as a result he was hurt by the police when he was beaten in baton charges.

He is unsure as to the exact time that he joined the Sikh Student Federation Movement but says he joined whilst at ... college about a month or so after his enrolment. He says that he was an ordinary member but was very actively involved, although not an office holder."

The appellant told us that at the time he joined the Federation it was a legal organization but in 1986 it was banned. The appellant nevertheless continued his active involvement in its activities.

However, in October 1986 the appellant joined a militant organization known as the Khalistan Commando Force. He described the step in his own words:

"I was pulled to it by my heart."

He outlined the objects of the Khalistan Commando Force as being first, to kill anyone in the government who did anything against the Sikhs. So, for example, if there was a police inspector who carried out unjust interrogations, he would be warned that this was not right, and if he did not listen, he would be killed. Secondly, the aim of the Khalistan Commando Force was to create a separate State of Khalistan.

The appellant said that as a member of the Khalistan Commando Force he was of the opinion that a bad person should be punished, such as police officers who committed injustices, for example, by arresting innocent persons, interrogating prisoners unfairly or taking money from them; or a political leader who made false statements to the people. All these people were bad and the Khalistan Commando Force were entitled to kill them.

The Authority told the appellant that we had heard many cases where asylum seekers claimed to be in fear of persecution by the Khalistan Commando Force. We have been told that members of this organization extort money from innocent people under pain of death and that they also kill innocent civilians, be they Sikh or Hindu. The appellant replied that these were the actions of persons in the employ of the Government who chose to blame the Khalistan Commando Force. He was adamant that his organization was not involved in the killing of innocent civilians or the extortion of money from them.

The Authority has no hesitation in concluding that the appellant's assessment of the facts is entirely out of touch with reality and fanciful.

Questioned about his activities in the Khalistan Commando Force the appellant said that following his graduation he worked on the family farm. It transpires that the farm itself is situated a little distance, perhaps one kilometre, from the village itself. The appellant's family lives in their home in the village but on the farm there is a pumphouse of substantial proportions. Attached to it are three rooms. In one of them Bihari farm labourers are accommodated. In the other the appellant slept. The remaining room is used either for the storage of tools or for cattle. The reason for the appellant sleeping on the farm was to ensure that the farm labourers did not steal the cattle or tools.

The appellant told us that from the time he joined the Khalistan Commando Force in October 1986, his role was to provide food and shelter for what he described as "more active members" who visited the farm at least once or twice each month. They would arrive at night, sleep over and then move on. The appellant hid their arms and ammunition in different places on the farm, sometimes in haystacks, sometimes among the crops and sometimes buried in the ground. The appellant acknowledged that the weapons stored on the farm would be used to kill people.

Asked why he did not take a more active part in the operations of the Khalistan Commando Force by going out and killing persons himself, the appellant replied that he was in fact becoming more and more involved in the organization, albeit slowly. He said that if the police had not arrested him he would perhaps have gone out on operations as he had specifically asked to be more involved. He had been told that he would be allowed this if an occasion arose.

These were the appellant's activities from October 1986 until January 1989. We are of the opinion that the nature and degree of his involvement in the Khalistan Commando Force was of an entirely different kind to that of an individual forced to provide food and shelter at the point of a gun or under threat of death.

One morning at 6.00 a.m. early in January 1989 the police arrived at the pumphouse and arrested the appellant. At the time no members of the Khalistan Commando Force were sleeping over in the building. The appellant was taken to Jalandhar and detained for one day only. During his detention he was interrogated. The police wanted to know whether he knew anyone in the Khalistan Commando Force and what their activities were. The appellant told the police that he knew nothing. During this interrogation he was beaten for approximately ten minutes on his back with a strap. His release was secured when his father paid the police Rupees 20,000.

Following his release the appellant continued to work and sleep on the family farm until he left for New Zealand in May 1989. The appellant arrived in this country on 18 May 1989.

At the Refugee Status Section interview the appellant said that following his release from custody there were no further visits by the police. However, in his evidence at the appeal hearing he claimed that approximately one month following his release there was in fact a second visit by the police to the farm. They were given Rupees 2,000 by the family whereupon they left. The appellant said that he forgot to mention this at the Refugee Status Section interview.

The appellant's application for refugee status was not submitted until 15 August 1990, by which time the New Zealand Immigration Service had applied for a removal warrant.

At the Refugee Status Section interview on 9 September 1991, the appellant produced a letter dated 7 December 1990 from his family in which it is reported that subsequent to his departure for New Zealand, the police had called at the family home "a few times" looking for the appellant. The family told the police that they did not know where the appellant was. In his oral evidence at the interview the appellant stated that the police had been visiting his family at least once a month asking where he was.

At the hearing of this appeal on 24 April 1992 the appellant produced a further statement recording that at 2.20 a.m. on the morning of the hearing of the appeal he had received a phone call from his father who advised that the appellant's brother had been arrested by the police and taken to Jalandhar. The appellant believed that the arrest took place "around 22 April 1992" and that the police had said that they would only release the brother after the appellant surrendered himself to them. His father had told him that his brother had been badly beaten by the police and that attempts to secure his release through the panchayat had been unsuccessful.

ASSESSMENT OF THE APPELLANT'S CASE

The Authority has considerable doubts as to the appellant's credibility, doubts which the interviewing officer of the Refugee Status Section also shared.

In particular, the phone call at 2.20 a.m. on the morning of the appeal hearing was highly improbable and too convenient, particularly bearing in mind that the alleged arrest of the appellant's brother took place almost three and a half years after the appellant's own arrest and detention.

However, notwithstanding our grave doubts about the matter, we feel constrained in the end to give the appellant the benefit of the doubt and we therefore accept the general account of events as given by him.

THE ISSUES

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

"... 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"

In the context of this case the four principal issues are:

1. Is the appellant genuinely in fear?
2. If so, is it a fear of persecution?
3. If so, is that fear well-founded?
4. If so, is the persecution he fears persecution for a Convention reason?

See further Refugee Appeal No. 1/91 Re TLY and Refugee Appeal No. 2/91 Re LAB (11 July 1991).

In view of the finding on credibility, we accept that the appellant is genuinely in fear.

We do not accept, however, that he is in fear of persecution. Rather, he is in fear of prosecution on account of his membership and activities in the Khalistan Commando Force. We will address this issue in more detail.

FEAR OF PROSECUTION, NOT PERSECUTION

THE KHALISTAN COMMANDO FORCE

As we have already mentioned, we told the appellant at the hearing that we did not accept his claim as to the nature and activities of the Khalistan Commando Force. As the appellant's counsel is aware, the violation of human rights by militants in the Punjab is well-documented. We refer in particular to the Asia Watch Report, Human Rights in India - Punjab in Crisis (1991) 170:

"Virtually all of the militant groups in Punjab have pursued their campaign for a separate state through acts of violence directed not only at members of the police and security forces but also at specifically targeted Hindi and Sikh civilians. While the civilian toll may never be known, after a decade of conflict the killings certainly number in the thousands."

And at p.175:

"Since they first emerged in the early 1980s, the militant organizations operating in Punjab have repeatedly violated international human rights and humanitarian law by engaging in acts of violence against civilians. These groups have assassinated civil servants, politicians, journalists, businessmen, other prominent individuals and ordinary Hindu and Sikh civilians. Militant groups have also engaged in indiscriminate attacks apparently designed to cause extensive civilian casualties, in some cases firing automatic weapons into residential and commercial areas, derailing trains and exploding bombs in markets, restaurants and other civilian areas. Some of these attacks have occurred outside Punjab in neighbouring states and in New Delhi.

The motives for the attacks vary. Moderate Sikh political leaders have been assassinated for opposing the militants. Other leaders have been killed as a result of militant group rivalries. A number of militant groups have attempted to impose a Sikh fundamentalist ideology, issuing directives that stipulate appropriate conduct for Sikhs and prohibiting the sale of tobacco and liquor. Failure to obey these orders has meant punishment, including death. In late 1990 and early 1991, militant groups issued 'codes of conduct' for journalists which also carried a death penalty for those who dared to disobey. Sikhs belonging to minority sects which advocate practices perceived as heretical by orthodox Sikhs have also been murdered.

In some cases, attacks on civilians have been claimed as acts of retaliation for government violence. Other killings appear to represent executions of suspected collaborators or informers. According to one observer, in some cases militants associated with certain groups have been rewarded with promotion for the number of people they kill, civilians or otherwise.

Militants have also kidnapped civilians for extortion, frequently murdering their victims when their demands were not met. Threats have been made against the minority Hindu population in an effort to drive them out of Punjab. As a result, thousands of Hindus have fled the state over the last seven years.

...

Asia Watch was not in a position to investigate many of the hundreds of such attacks which have taken place. Most of those described below occurred in 1990 or 1991 and represent only a small portion of the abuses for which militant groups are believed responsible. In each incident, militants killed, wounded or threatened civilians. Such acts directly contravene Common Article 3 which prohibits acts of violence against civilians."

The Asia Watch Report concludes (inter alia) at 205:

"India's central government, the Sikh political leadership and the militants all bear responsibility for the current catastrophe in Punjab. Committed to maintaining a climate of terror, the numerous militant groups - and the criminal gangs they have spawned - have been willing to go to any lengths to undermine efforts that would lead to a restoration of political processes in the state, killing countless civilians. At the same time, the government's policy of repression has resulted in an escalation of violence and a criminalization of the police forces. The combination has all but negated the possibility for a political settlement."

THE GENEVA CONVENTIONS

The reference to Common Article 3 is a compendious reference to the 1907 Hague Regulations, the four 1949 Geneva Conventions and the two 1977 Additional Geneva Protocols, all of which contain provisions protecting civilians and banning terrorist attacks. These apply not only to international wars, but also (so far as the Geneva Conventions and Additional Protocols are concerned) to wars of national liberation, civil wars and other "internal" wars. They provide a useful yard stick against which conduct can be measured. And we note that India has ratified all four of the Geneva Conventions: Asia Watch Report Human Rights in India: Punjab in Crisis page 32 footnote 72.

We have already had cause to refer to the Geneva Conventions in a decision to which we shall shortly refer, namely Refugee Appeal No. 29/91 Re SK (17 February 1992) 42. The text of the Conventions is to be found in the Geneva Conventions Act 1958 as amended by the Geneva Conventions Amendment Act 1987.

A useful summary of the effect of Common Article 3 is to be found in the Briefing Paper issued by the Lawyers Committee for Human Rights, The Human Rights of Refugees and Displaced Persons: Protections Afforded Refugees, Asylum Seekers and Displaced Persons Under International Human Rights, Humanitarian and Refugee Law (May 1991) 9:

"The legal predicate for protection of civilian noncombatants is the Geneva Conventions of 1949 and particularly article 3, common to the four Conventions, which has been ratified by all but two states, making it a well-accepted rule of customary international law. Article 3 applies to war and 'armed conflict not of an international character occurring in the territory of one of the High Contracting Parties'. This article is binding not simply on the States party to the Conventions but also on 'each Party to the Conflict'. The overriding right accorded all 'persons taking no active part in the hostilities' including displaced persons is to 'be treated humanely' in all circumstances. In order to protect this right, the following acts are categorically prohibited: violence to life and/or person, taking of hostages, outrages upon personal dignity, the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court. Furthermore, each party to the conflict is under a duty to provide all sick and wounded, including displaced persons, with adequate medical care.

Protocol II Additional to the Geneva Conventions relating to the Protection of Victims of Non-International Armed Conflicts creates a number of other significant rights which displaced persons may claim. It adds a number of additional acts to the prohibited list, including collective punishment, acts of terrorism, rape, enforced prostitution, slavery, pillage, and threats to commit any of the foregoing acts or any act already prohibited under article 3 of the Conventions ..."

The opinion expressed in the Asia Watch Report [Human Rights in India: Punjab in Crisis](#) in footnote 183 at page 170 is that while the killing and wounding of members of the security forces by militants are violations of domestic law:

"... these killings do not also constitute violations of the laws of war if they occur in combat or ambush and are not the result of perfidy. Insofar as members of the security forces have combat duties and are actively engaged in hostilities, they are legitimate military targets under the laws or [sic] war and are therefore subject to direct attack. Although policemen, customs agents and other government personnel authorized to bear arms are excluded from the definition of 'armed forces' and are not proper military targets, policemen with combat duties are proper military targets. See Report of Working Group B, Committee I, March 18, 1975 (CDDH/I/238/Rev.1; X, 93), in Levie, Howard S., ed., *The Law of Non-International Armed Conflict*, (Dordrecht, Netherlands: Martinus Nijhoff Publishers, 1987), p.67. The Punjab police, BSF, CRPF and other national security forces routinely engage in conflict with militants. In many situations, they are, in effect, acting in lieu of army soldiers to perform purely military functions. Under international humanitarian law applicable in internal armed conflicts, **the government may try members of guerilla forces for sedition, treason and murder in violation of state laws, but must afford them due process.**"

[emphasis added]

We will return to the highlighted passage later.

While militant attacks on security forces do not constitute violations of the laws of war, attacks by the militants on the civilian population do violate Common Article 3. The following quote is again taken from the Asia Watch Report at 177:

"Sikh militants in Punjab have flagrantly violated Common Article 3, which prohibits violence to life and person of those taking no part in the hostilities. Killings of civilians by such groups increased substantially in 1990. Throughout the year, militants engaged in targeted assassinations of politicians and political candidates, primarily from factions of the Akali Dal, the Communist Party of India (CPI) and independents. Journalists were also frequent targets; several were murdered in 1990 and early 1991. Militants also stopped vehicles along roadsides and, after identifying Hindu passengers, executed them. On a number of occasions, militants opened fire indiscriminately in Hindu neighborhoods and commercial districts, killing civilians. In June 1991, militants opened fire on two passenger trains in Punjab, killing at least 110 civilians. Militants also planted bombs and launched grenade attacks on civilian government buildings, restaurants, markets and buses. Since these are not military targets, such actions constitute gross violations of international humanitarian law.

A number of killings in predominantly Hindu villages were accompanied by threats warning the villagers to leave Punjab. Common Article 3 also prohibits 'cruel treatment and torture' and 'outrages upon personal dignity, in particular humiliating and degrading treatment'. Explicit threats to kill are barred by this provision. In some cases, villagers were beaten or tortured before being executed."

CONSEQUENCES OF INVOLVEMENT IN ACTS OF TERRORISM

We accept unhesitatingly that the appellant has denied personal involvement in violence against the civilian population of the Punjab. He has also denied that the Khalistan Commando Force is involved in such acts. We do not accept that denial.

What then is our assessment of the appellant's involvement in the Khalistan Commando Force? In our judgment, the only reasonable interpretation of his evidence is that he was actively and willingly engaged in the provision of the physical and logistical support that enables a modern terrorist group to operate. He was as much an essential part of their operation as those who actually "pulled the trigger". And had the opportunity arisen, he would have been involved in this aspect too.

It follows that the appellant was an active member in a terrorist organization engaged in acts of violence directed not only at members of the police and security forces but also at Hindu and Sikh civilians. The authorities in the Punjab therefore have a legitimate interest in investigating the appellant's activities with a view to bringing him and other members of the Khalistan Commando Force to justice. This case has very close parallels with our decision in Refugee Appeal No. 84/91 Re KS (1 May 1992) in which we said at p.11:

"In any event we do not accept that the alleged police actions described by the appellant in this case would amount to persecution for a Convention reason. It

would seem from the appellant's own evidence that he was sheltering people whom he knew were suspected of serious criminal offences and the alleged pursuit of the appellant by the police would amount to nothing more than investigation of these crimes with a view to bringing suspects to justice. We cannot find that the police could be said to have imputed any political opinion to the appellant. Any ill-treatment suffered by the appellant was not, therefore, related to a Convention reason."

To this may now be added that international humanitarian law, applicable in internal armed conflicts, allows that the government may try members of guerilla forces for sedition, treason and murder in violation of state laws, but must afford them due process.

There remains the question whether the appellant could nevertheless assert that his conduct was not criminal, but rather one that could be defined as a relative political offence. This is an issue we addressed at length in Refugee Appeal No. 29/91 Re SK (17 February 1992) at 7 to 22. There we held that the issue will turn on the extent of the linkage between the act committed and the political purpose being pursued; and perhaps most importantly, on the proportionality of the good sought to be obtained in relation to the harm inflicted through the crime. We referred, inter alia, to the following passage taken from Hathaway, The Law of Refugee Status (1991) 174:

"Where the motivation is genuine, the strategy credible, and the incidental harm tolerable in relation to the goal sincerely pursued, it is reasonable to view the action as more fundamentally political than criminal, and hence to assess the refugee claim on its merits."

Applying these tests to the facts of the present case, we can concede that the appellant's motivation is genuine but the credibility of the strategy employed by the Khalistan Commando Force in the murder and intimidation of innocent civilians is non-existent and the incidental harm to civilians quite intolerable. The appellant's participation in the Khalistan Commando Force campaign cannot be regarded therefore as fundamentally more political or religious than criminal. There is thus no acceptable link between the political or religious purpose being pursued and the terrorizing and shooting of innocent civilians, whatever justification may exist for the violence directed by the Khalistan Commando Force against members of the police and security forces. In short, there is here no proportionality between the good sought to be obtained in relation to the harm inflicted through the crime.

Our conclusion, therefore, is that to the extent that the appellant's case turns on his fear of persecution at the hands of the police, we find that his fear rather is one of prosecution, and that prima facie such prosecution would be justifiable.

We therefore need not decide the two remaining issues of well-foundedness and whether the persecution feared is on account of a Convention reason.

There remains the question whether the appellant will receive due process upon return to India.

DUE PROCESS

Addressing the question of due process, we propose to adopt what we said on this topic in Refugee Appeal No. 29/91 Re SK (17 February 1992) at 15:

"The Authority has taken into account the damning indictment of arbitrary arrest and detention without trial in the Punjab found in the Asia Watch Report, Human Rights in India - Punjab in Crisis (August 1991) 148-151 and in the Amnesty International Report, India - Human Rights Violations in Punjab: Use and Abuse of the Law May 1991 (ASA 20/11/91). On the other hand, on the appellant's own account GS was able to secure release on bail. Re-arrest only occurred after GS re-offended.

Our conclusion is that the question whether the appellant would be able to secure a fair trial is only relevant if it can be said that the process of adjudication which ignores basic standards of fairness has been set up **in such a way as to result in or support political or religious repression**. In other words, the abuses (which the Authority accepts are legion in the Punjab) must be **Convention-related**. The Convention is not an instrument to provide a remedy where the justice system of the country of origin fails to meet general standards of fairness.

Our conclusion in this respect then is not only that the appellant is sought for an alleged breach of the ordinary criminal law, but also that such unfairness as he will encounter in the Punjab criminal system is not unfairness which will be directed against him for a Convention-related reason."

Our conclusion finds some support in Aleinikoff, The Meaning of "Persecution" in United States Asylum Law (1991) Volume 3 International Journal of Refugee Law 5, 25:

"In arguing that adjudicators should not indulge in presumptions in order to deny asylum once persecution has been established, I am not suggesting that simply demonstrating serious (even unjustifiable) harm is always enough. In some cases, reasons other than those in the Convention will manifestly explain the threat to the applicant. For example, criminal defendants who face serious mistreatment by law enforcement officers probably ought not to qualify for refugee status (even though such treatment might well constitute persecution), unless the applicant can show that the prosecution is a pretext for action taken on the basis of one of the five prohibited grounds. In such circumstances, another, non-Convention, but equally reprehensible reason for the abuse is apparent."

RELOCATION

We have concluded that the appellant is excluded from the Refugee Convention as he is not in fear of persecution. Rather, his fear relates to his potential prosecution for his active involvement in a militant organization.

Even if we were wrong in this regard, and the appellant is in fact a person with a well-founded fear of persecution for a Convention reason, our decision on this appeal would be no different as it would not be unreasonable to expect the appellant to relocate and live elsewhere in India, particularly bearing in mind that he has superior educational qualifications and, in the words of counsel's memorandum, a good appreciation of Hindi. There is no suggestion that there is a warrant for his arrest and it is also to be noted that the appellant has not been subjected to torture. He has suffered only a rather minor incident of rough treatment. In such circumstances we have previously held that even if the feared agent of persecution is the police, relocation either in the Punjab or elsewhere in India is reasonable: see Refugee Appeal No. 57/91 Re AJS (December 1991) and Refugee Appeal No. 33/92 Re HD (12 June 1992). In addition there is the decision already referred to, namely Refugee Appeal No. 84/91 Re KS (1 May 1992) in which we said:

"We find that in any event it would not have been unreasonable in the circumstances of the appellant to expect him to live elsewhere in India than the Punjab in order to avoid the attention of the Punjabi police. There is no suggestion that any warrant of arrest exists for him to put him in jeopardy nation-wide and he has had the experience of having lived in foreign countries and surviving satisfactorily. We do not accept that, in general, members of the Sikh faith are unable to relocate elsewhere in India successfully. The Authority has received reports which indicate that several million Sikhs are settled in various parts of India. Counsel is acquainted with the contents of those reports."

CONCLUSION

Our conclusion therefore is that the appellant is not a refugee within the meaning of the Refugee Convention. Refugee status is declined. The appeal is dismissed.