

Date: 20080730

Docket: IMM-179-08

Citation: 2008 FC 908

Montréal, Quebec, July 30, 2008

PRESENT: The Honourable Mr. Justice Maurice E. Lagacé

BETWEEN:

**KIRPAL SHARMA
SANTI SHARMA**

Applicants

and

**MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), the applicants are seeking judicial review of a decision by the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated December 13, 2007, which refused to recognize them as Convention refugees or persons in need of protection under sections 96 and 97 of the Act.

I. Facts

[2] The principal applicant, Mr. Kirpal Sharma, and his wife, Santi Sharma, were born in Delhi, and both are Indian citizens.

[3] After one of the principal applicant's cars exploded at the car rental business owned by him and his son, on October 29, 2005, the police arrested his son, and the applicants lost all contact with him, despite their efforts to find him.

[4] After receiving a call from the hospital on November 13, 2005, the applicants went to identify the body of their son. Although cerebral hemorrhage was given as the official cause of death, the applicants maintain that their son was tortured.

[5] On November 21, 2005, the police arrested the principal applicant at his business, accused him of being involved in the October 29, 2005, explosion, threatened to kill him like his son and subsequently questioned and tortured him.

[6] The principal applicant was released on November 26, 2005, for medical reasons, subsequent to an intervention by a local political representative, payment of a bribe to police and a promise to not leave the city.

[7] After his release, the principal applicant and his wife sought refuge at a friend's home, and while there, he took steps to leave the country, fearing that the police would find him.

[8] The applicants left Delhi on June 4, 2006, and travelled by way of Paris before arriving in Montréal the same day. They subsequently claimed refugee status.

[9] Because of doubts about their identities, the truthfulness of their stories and the authenticity of their documents, Canada Border Services Agency decided on June 12, 2006, to detain the applicants.

[10] On July 4, 2007, counsel filed an application on behalf of the applicants asking that a representative be designated for the hearing of their application, pursuant to subsection 167(2) of the Act. Since there was no evidence that the applicants were *unable to appreciate the nature of the proceedings*, as the Act requires, the application was denied. However, considering the applicants' vulnerability as shown by the medical evidence, the panel ordered that they could be accompanied at the hearing by a person of their choice for moral support.

[11] The Board heard the applicants' application for refugee protection and dismissed it. That negative decision is the basis for this application for judicial review.

II. Impugned decision

[12] After noting a number of contradictions and inconsistencies in the applicants' story, the Board concluded as follows:

Based on all the foregoing, PC [Principal Claimant] was found not to be credible. FC's claim fell as her claims was based on her

husband's, PC, claim. They failed to establish the well-foundedness of their fear with credible evidence.

The panel therefore has determined the claimants, **Kirpal SHARMA** and **Santi SHARMA**, not to be "Convention refugees" and that they are not "persons in need of protection". Hence, it rejects their claims for refugee protection.

III. Issue

[13] The only issue is whether the Board breached procedural fairness. Specifically, did the Board's procedure and decision take into account the vulnerability of the applicants and the Chairperson's Guideline with respect to vulnerable persons?

IV. Standard of review

[14] There are now only two standards of review, correctness and reasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9). Correctness is the appropriate standard for jurisdictional and some other questions of law (see *Dunsmuir*, above, at paragraph 50). When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker.

[15] With respect to the duty of procedural fairness, the appropriate standard of review continues to be correctness, and a breach of procedural fairness will result in the decision being set aside.

[16] Considering the nature of the only issue here, the appropriate standard of review is correctness.

V. Analysis

[17] The applicants are advancing essentially two types of arguments. First, they state that the Board did not take into account their psychological vulnerability, despite the report of certain intervenors and their counsel's application to the Board to have a representative designated because they were not able to represent themselves adequately at the hearing. The applicants also maintain that, despite the Board's refusal to designate a representative for them, the Board did not provide any specific measure to take into account their vulnerable state.

[18] Second, the applicants rely on the Chairperson of the Board's Guideline 8 (Guideline 8) and submit that the Board was required to take their vulnerability into account, which it did not do. They contend that the Board completely disregarded their psychological vulnerability when assessing their story. Accordingly, the Board automatically attributed some inconsistencies in their story to a lack of credibility, whereas those inconsistencies could very well have been attributed to the applicants' psychological fragility.

[19] However, the applicants' psychological vulnerability should not be confused with that of a person who is unable to appreciate the nature of the proceedings or the questions at a hearing before the Board. It is for the Board to determine whether an applicant requires a designated representative,

based on the individual's apparent understanding (or lack thereof) of the proceedings and the questions.

[20] Although the Board decided it was unnecessary to designate a representative to represent the applicants at the hearing of their application, an acting coordinating member of the Board nonetheless considered the applicants to be vulnerable persons; that is why an order was made pursuant to paragraph 4.2 of Guideline 8 that the applicants could be accompanied at the hearing by a person of their choice to provide moral support to them.

[21] At the hearing, the applicants benefited from this moral support. Moreover, their counsel did not ask the Board for any other type of procedural accommodation or any other measure that could minimize the psychological vulnerability of his clients. It is difficult for the applicants to now argue that the Board failed to consider their vulnerability when all the intervenors at the hearing, including the applicants, seemed satisfied with the procedure that was adopted.

[22] Section 167 of the Act provides as follows:

167. (1) Both a person who is the subject of Board proceedings and the Minister may, at their own expense, be represented by a barrister or solicitor or other counsel.

(2) If a person who is the subject of proceedings is under 18 years of age or unable, in the opinion of the applicable

167. (1) L'intéressé peut en tout cas se faire représenter devant the Board, à ses frais, par un avocat ou un autre conseil.

(2) Est commis d'office un représentant à l'intéressé qui n'a pas dix-huit ans ou n'est pas, selon la section, en

Division, to appreciate the nature of the proceedings, the Division shall designate a person to represent the person. mesure de comprendre la nature de la procédure.

[Emphasis added.]

Thus, the Board designates a representative where the claimant is under 18 years of age or is unable to appreciate the nature of the proceedings. This does not seem to be the case here.

[23] Since both applicants in this case are over the age of 18, the issue is whether they were able to appreciate the nature of the proceedings; however, their argument is essentially based on the Board's refusal to designate a representative for them for the hearing because of their fragile psychological state, not because they were unable to appreciate the nature of the proceedings.

[24] Contrary to the applicants' submissions, the Board noted in its reasons:

The panel noticed no significant problems in the manner both claimants delivered their testimonies. PC [Principal Applicant] provided all the answers with no hesitation, had good eye contact and was confident in the way he testified.

No one other than the person presiding at the hearing was in a better position to assess the way the applicants testified, to verify if their psychological vulnerability prevented them from properly responding to the questions or understanding them, and to assess their credibility.

[25] The Court also notes that neither the intervenor who accompanied the applicants for moral support nor their counsel made any objection that would suggest that the applicants did not

understand the questions or the procedure or that the Board should provide them with other accommodations.

[26] After reviewing the transcript of the testimony, the Court must find that the applicants appeared to have understood both the questions and the nature of the proceedings. Assisted by counsel who looked after their interests, and by the shoulders of a support person ordered by the Board, the applicants were able to answer the questions with full knowledge of the situation. It was open to the Board to dismiss their application for a representative and to uphold that decision, absent evidence before or during the hearing that the applicants were unable to understand the nature of the proceedings or the questions.

[27] We note that “the intention of Guideline [8] is to provide procedural accommodation(s) for individuals who are identified as vulnerable persons by the Board.” These accommodations aim to take into account the vulnerability of certain individuals “so that they are not disadvantaged in presenting their cases.”

[28] Paragraph 4.2 of Guideline 8 states that the “Division has a broad discretion to tailor procedures to meet the particular needs of a vulnerable person . . .” One of the methods listed to tailor procedures is “allowing a support person to participate in a hearing”. This support was provided by the Board when it allowed the intervenor Woodbury to attend the hearing as moral support for the applicants.

[29] In light of the foregoing, the Court finds that the Board considered the applicants' psychological state and put into place the necessary accommodations contemplated by Guideline 8. From the members' attitude and comments, the Board appears to have been alive to the applicants' situation, to have adjusted the proceedings accordingly and to have been prepared to make further adjustments to facilitate their testimony and proper comprehension. The Board was not required to mention this expressly in its reasons but nonetheless noted that the applicants had no difficulty in testifying. Accordingly, it is difficult for the Court to find that there was a breach of procedural fairness. For these reasons, the Court does not see how the Board breached procedural fairness.

[30] As for the rest, the applicants were unable to demonstrate how the Board's decision could be unreasonable. On the contrary, it is one of the possible acceptable outcomes and can be justified in fact and in law. Deference must therefore be given to this decision. The applicants' application will therefore be dismissed.

[31] Since the applicants did not propose any question for certification, none will be certified.

JUDGMENT

FOR THESE REASONS, THE COURT:

Dismisses the application for judicial review.

“Maurice E. Lagacé”

Deputy Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-179-08

STYLE OF CAUSE: KIRPAL SHARMA ET AL. v. MINISTER OF
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AND JUDGMENT BY:** LAGACÉ D.J.

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