

Date: 20090219

Docket: IMM-2909-08

Citation: 2009 FC 174

Ottawa, Ontario, February 19, 2009

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

SANJIVKUMAR RAM TRIPATHI

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Sanjivkumar Ram Tripathi is a citizen of India whose refugee claim was rejected by the Refugee Protection Division of the Immigration and Refugee Board. While the Board accepted as credible Mr. Tripathi's claim that he had been targeted by Hindu extremists while living in Mumbai, it found that he was not entitled to refugee protection as he had a viable internal flight alternative within India.

[2] For the reasons that follow, I am of the view that the Board's decision is unreasonable because of the failure of the Board to consider a central aspect of Mr. Tripathi's claim in relation to its IFA analysis. As a consequence, the application for judicial review will be allowed.

Background

[3] Mr. Tripathi testified that in September of 2004, he was approached by two representatives of the Shiv Sena movement. Shiv Sena is a pro-Hindu, right-wing party affiliated with the Indian People's Party (the Bharatiya Janata Party or "BJP"). The leader of Shiv Sena has been investigated for inciting violence between Muslims and Hindus, but has never been charged with a crime.

[4] The two men asked Mr. Tripathi to plant a bomb in a Mumbai factory belonging to a Mr. Al Hatimi, a Muslim individual with whom Mr. Tripathi had regular business dealings. Shiv Sena wanted the factory blown up because most of the employees working there were Muslim.

[5] Mr. Tripathi refused to plant the bomb, telling the Shiv Sena representatives that his religion did not allow him to commit such a violent act. Mr. Tripathi says that the two men then told him that if he refused to do their bidding, they would kill him for being a bad Hindu. The threats were repeated two days later at another meeting of the three men.

[6] Shortly thereafter, the police raided Mr. Tripathi's home, accusing him of being involved in drug trafficking. Mr. Tripathi was taken into police custody, where he says that he was beaten and tortured for several days. While he was in custody, police officers told Mr. Tripathi that those who

did not dedicate themselves to “Hinduvata” (or Hindu nationalism) would not survive. The police also made comments suggesting that there was a relationship between the police and the two people who had asked Mr. Tripathi to plant the bomb.

[7] Mr. Tripathi was released from detention after his father paid a bribe to the police. He was told by the police not to go public about his discussion with members of Shiv Sena, his arrest or his treatment in custody. He was also told to report to the police when requested to do so.

[8] As a result of the injuries he suffered at the hands of the police, Mr. Tripathi spent several days in hospital. Shortly after he left the hospital, he received a telephone call, with the caller threatening him with death. Mr. Tripathi then left Mumbai, living in hiding in various locations within India until February of 2005, when he left India for Canada on a student visa.

[9] Several months after arriving in Canada, when he realized that the police and Hindu nationalists were continuing to harass his family, Mr. Tripathi filed his application for refugee protection. Sometime after Mr. Tripathi filed his refugee claim, his family left Mumbai, relocating elsewhere in India. They have not been bothered further by either members of Shiv Sena or by the police.

The Board’s Decision

[10] The Board accepted Mr. Tripathi’s story as credible. While seemingly also accepting that the Shiv Sena organization is well-established throughout India, the Board nevertheless concluded

that Mr. Tripathi had a viable internal flight alternative in either Lucknow or Allahabad, where the members of his family now resided.

[11] In coming to this conclusion, the Board observed that Mr. Tripathi no longer had any business dealings with Mr. Al Hatimi. As a consequence, the Board was of the view that Shiv Sena would no longer be interested in using Mr. Tripathi to target Mr. Al Hatimi. In the Board's view, this meant that Mr. Tripathi would be able to live safely with members of his family in either Lucknow or Allahabad.

The Status of the Transcript from the Earlier Hearing

[12] The decision under review arose out of Mr. Tripathi's second refugee hearing. An earlier hearing was completed in 2006, but for some reason did not result in a decision having been rendered.

[13] The transcript of Mr. Tripathi's testimony at the earlier hearing was put before the Board as part of the record in the second hearing. While conceding that the transcript forms part of the evidentiary record in this case, counsel for the respondent took issue with Mr. Tripathi's reliance on portions of that transcript in support of his arguments before this Court.

[14] Relying on the decision in *Diamanama v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 121, counsel for the respondent argued that the Board "was not

bound by the testimony given during the first hearing” [my translation], and could draw its own conclusions, based upon the testimony given before it.

[15] A review of the *Diamanama* decision discloses that what the Court said was that a second decision maker is not bound by a credibility finding made in the context of an earlier hearing, nor is the second decision maker required to accept the facts as found by an earlier panel. That is not the situation here. No credibility assessment was ever made by the earlier panel, nor were any facts found in the context of Mr. Tripathi’s first hearing, as no decision was rendered in relation to that hearing.

[16] Moreover, *Diamanama* makes it clear that a second hearing panel is entitled to use the transcript from an earlier hearing for whatever purposes it wishes: see para. 10.

[17] Given that the transcript from the first hearing was part of the evidentiary record before the Board on the second hearing, I see nothing inappropriate in counsel for Mr. Tripathi relying on portions of that transcript in support of his arguments. Moreover, the essential points made by Mr. Tripathi in his testimony at his first hearing were repeated by him at his second hearing, albeit in a somewhat less detailed fashion.

Analysis

[18] I am of the view that the Board's decision is unreasonable, because of the failure of the Board to properly understand and address the reasons for Mr. Tripathi's fear, in considering whether he in fact had a viable internal flight alternative within India.

[19] While it is true that Mr. Tripathi was initially approached by Shiv Sena because of his relationship with Mr. Al Hatimi, the fact that Mr. Tripathi no longer has a business relationship with Mr. Al Hatimi is not the end of the matter.

[20] Mr. Tripathi's evidence, which was accepted as credible by the Board, was that once he refused to plant the bomb in Mr. Al Hatimi's factory, members of Shiv Sena threatened to kill him in order to make an example of him, so that no one else would refuse to support the nationalist Hindu cause.

[21] Mr. Tripathi also testified that Shiv Sena members always eliminated the evidence against them, which is why its members were never charged with criminal offences. Because he could provide evidence against the organization, Mr. Tripathi testified that his life continued to be in danger in India.

[22] Although the Board accepted that the Shiv Sena organization is well-established throughout India, no consideration was given as to whether Mr. Tripathi would be at risk in Lucknow or Allahabad from members of Shiv Sena seeking either to silence him, or to make an example out of

him. Nor did the Board address Mr. Tripathi's claim that he would be at risk throughout India at the hands of police officers working in conjunction with Shiv Sena.

[23] The failure of the Board to understand or come to grips with the basis for Mr. Tripathi's ongoing fear in considering whether he had a viable internal flight alternative within India resulted in the decision lacking the justification, transparency and intelligibility required of a reasonable decision: see *Dunsmuir v. New Brunswick*, 2008 SCC 9, at paragraph 47.

Conclusion

[24] For these reasons, the application for judicial review is allowed.

[25] In the interests of economy, counsel for Mr. Tripathi has asked that the matter be returned to the same member for re-determination, taking into account the Court's reasons. Counsel for the respondent did not object to this, and an order will go to this effect.

Certification

[26] Neither party has suggested a question for certification, and none arises here.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is allowed, and the matter is remitted to the same member (if he is available) for re-determination on the basis of the existing record, in accordance with these reasons;
2. In the event that the member is no longer available, Mr. Tripathi is entitled to a new refugee hearing before a different member; and
3. No serious question of general importance is certified.

“Anne Mactavish”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2909-08

STYLE OF CAUSE: SANJIVKUMAR RAM TRIPATHI v.
THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: February 10, 2009

**REASONS FOR JUDGMENT
AND JUDGMENT:** Mactavish, J.

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