

FEDERAL COURT

BETWEEN:

**A, B
AND C**

Applicants

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

MEMORANDUM OF ARGUMENT

INTRODUCTION

The decision contains manifest errors on consequential elements of the Applicants' Refugee claim. A review of the deficient decision discloses that the Member either disregarded the evidence before him or otherwise misconstrued it. Indeed, on one central element, there does not appear to be any evidentiary basis for the Member's finding. Viewed in context, the decision is deficient and it cannot be said that the Applicant's received a fair hearing.

PART I - FACTS

1. [REDACTED]

PART II - ISSUES

- i. Did the Board Member commit a “manifest error” on the face of the record in that he:
 - Incorrectly identified the Principal Applicant;
 - Incorrectly stated a central fact at issue (the date the Applicant’s had claimed to leave India) without any factual or evidentiary basis;
 - Incorrectly stated a central fact at issue (that the male claimant was a member of the Resident’s Welfare Association) without any factual or evidentiary basis; or
 - Made other errors that disclosed that he had no regard or otherwise misconstrued the evidence before him.

- ii. In the face of the decision’s manifest errors, did the decision maker properly hear the claim? Were the Applicant’s afforded a fair hearing?

PART III – ARGUMENT

Pursuant to the provisions of section 72(1) of the *Immigration and Refugee Protection Act* S.C. 2001, c. 27 [the Act] the Applicant filed an application for leave to appeal the decision of the Board. The Applicant seeks judicial review pursuant to section 18.1 of the *Federal Courts Act*, R.S. 1985, c. F-7.

Obtaining Leave

2. Judicial review may only be commenced with leave of this Honourable Court. The criterion for granting leave is set out in the Federal Court decision of *Bains v. Canada (Minister of Employment & Immigration)*(1990), 109 NR 239, [1990] FCJ No. 457 (CA). In that case, the applicant had challenged the constitutionality of the requirement of obtaining leave to review a decision made within the context of a refugee claim.

3. *Bains* was followed by the Federal Court of Appeal decision in *Krishnapillai v. Canada* (CA) [2002] 3 FC 74, where the court stated essentially that leave is granted if the application discloses a “fairly arguable case” [*Krishnapillai*, paragraph 11].

4. In the instant matter, the Applicant submits that, *inter alia*, the following reviewable errors were made by the Board:

- a. Failing to identify the correct principal applicant and finding that he was a member of the RWA;
- b. Erroneously finding that only the male claimant was beaten in March 2005; and
- c. Erroneously, and without regard to the evidence before him, finding that the claimant's indicated they left India in May 2005.

These errors are integral touchstones to the concept of judicial review and the function of this Honourable Court, and that therefore, this Application for Leave and Judicial Review raises 'an arguable case'.

REVIEWABLE ERROR – INCORRECT IDENTIFICATION OF THE PRINCIPAL APPLICANT

5. In the decision, the Member identified the principal claimant as a male and indicated that "he" was a member of the RWA. It appears clear that the Member's use of the masculine pronoun erroneously identified the male claimant as the principal claimant, and erroneously identified him as a member with RWA.
6. The female claimant, Mrs. B, was clearly identified by counsel during the hearing as the principal applicant. As a result, Mrs. B was questioned first by the RPO and the Member. Mrs. B's narrative was also relied upon by her husband, the male claimant.
7. In both her PIF narrative and her testimony before the Board, the Principal Applicant indicated that she was a member with the RWA.

The Member also had a letter from the RWA before him as Exhibit P16.

8. The Member's failure to identify and distinguish the principal claimant goes to the heart of the claim. The Member's failure to correctly attribute the membership of the principal applicant to the RWA is similarly a central element of the claim.
9. Either the Board Member had no regard to the evidence before him, or he completely misconstrued the evidence relating to these central issues. In either event, the Member has committed a reviewable error.
10. As a result, it cannot be said that the Member properly discharged his duty to properly hear the claim.

REVIEWABLE ERROR – DISREGARD FOR OR MISCONSTRUING THE EVIDENCE BEFORE HIM ON A CENTRAL ELEMENT OF THE CLAIM

11. In his decision, the Board Member stated the following at page 3:

“...all of these documents date from to [sic] April 2004, the child's school year, to August 1, 2005, although the claimants stated that they left their country on May 16, 2005”

12. The Board Member has either disregarded the evidence before him or has manifestly misconstrued the PIF and the testimony of the claimants. The PIF is clear as to the date the Applicant's left India (November 14, 2005) as well as the date they arrived in Canada (November 14, 2005).

13. During the hearing, and in response to direct questions by the Member and RPO the Principal Applicant provided the same information - that the Applicants left India on November 14, 2005.
14. At no time did either the male claimant or the PA indicate that they left India on May 16, 2005.
15. In addition, the PIF and/or the testimony disclosed the illegal arrest and detention of the adult claimant's on October 3, 2005, as well as a call from the PA's aggrieved brother-in-law on October 5, 2005, and a raid by the police on their home on October 6, 2005 (the Applicants were not there, but in Faridabad during this incident). Obviously, these events cannot be reconciled by the Member's erroneous finding that the Applicant's stated that they left India on May 16, 2005.
16. The decision discloses an incorrect statement attributed to the claimants and which cannot be reconciled given the context of their allegations. There was no basis for the Member to state "...although the claimants stated that they left their country on May 16, 2005." Such a mis-statement goes to a central issue of the claim – and gives no assurance to a reviewing Court that the tribunal properly considered the evidence before it.
17. Indeed, on the basis of the tribunal's errors, one can surmise that the Applicants were not afforded a fair hearing as the decision's errors go to the heart of the claim for protection.

REVIEWABLE ERROR – DISREGARD FOR OR MISCONSTRUING THE EVIDENCE BEFORE HIM ON A CENTRAL ELEMENT OF THE CLAIM

18. In his decision, the Board Member found that in March 2005 individuals with the Bajrang Dal organization came to the Applicant's

home and beat the male claimant [“...the extremists were not happy with the claimants’ actions. They came to the claimant’s home and beat him.”]

19. In fact, the evidence before the Board indicated that during that incident, both adult claimants were assaulted by the individuals with the Bajrang Dal.

20. In addition, the Member found in his decision that the claimants “did not identify the group in question in response to question 28 of the Personal Information Form (PIF)...” The claimant’s PIF and testimony clearly indicated that they were persecuted by a orthodox religious fundamentalist organization (Bajrang Dal) and a vindictive individual with the Indian Police. In addition, their previous counsel directly addressed the identification of the particular social group in response to a direct question by the Member in his submissions.

21. When these errors is viewed in context, it is clear that the impugned decision requires the oversight of this Honourable Court.

22. This Court has commented with respect to “manifest error of fact” on consequential findings:

[4] There is no doubt on the face of the tribunal record that at least three of the IRB's consequential findings were made in manifest error of fact. In particular, the findings with respect to the place of the Applicant's detention, the circumstances of a bribe paid, and the reference to the documentary evidence with respect to a finding about the Applicant's release from detention, are simply wrong.
Vijayasingha v. Canada (Minister of Citizenship & Immigration Canada) 2004 FC 221

23. To paraphrase Mr. Justice Campbell in *Vijayasingha, supra*, the failure to correctly identify the principal claimant, the error of attributing

membership in the RAW to the male claimant, the failure to note that the PA was beaten in the incident involving the Bajrang Dal in March, and the bizarre finding (without any evidentiary or other basis) that the claimant's stated they left India in May 2005, are simply wrong, are a manifest error of fact and are 'consequential findings' – and as a result require the intervention of this Honourable Court.

PART IV - ORDER REQUESTED

It is respectfully requested that this Honourable Court set aside the decision of the Immigration and Refugee Board, Refugee Protection Division and order a new hearing of this matter.

PART V - LIST OF AUTHORITIES

Bains v. Canada (Minister of Employment & Immigration)(1990), 109 NR 239, [1990] FCJ No. 457 (CA)

Krishnapillai v. Canada (CA) [2002] 3 FC 74

Vijayasingha v. Canada (Minister of Citizenship & Immigration Canada) 2004 FC 221

ALL OF WHICH IS RESPECTIVELY SUBMITTED

Dated this ___ day of xxx, xxx.

RAJ SHARMA
Solicitor for the Applicants

RAJ SHARMA
Solicitor for the Applicant

REGISTRY IMM-xxxx-xx

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