

REGISTRY NO. IMM-xxxx-xx

FEDERAL COURT

BETWEEN:

MK

Applicant

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

MEMORANDUM OF ARGUMENT

INTRODUCTION

MK is an illiterate woman, a national of India and a widow. Her claim for protection dealt with a risk to her life as a result of a property dispute with her son and daughter-in-law in India. At the hearing, the Board Member requested post-hearing evidence in the form of a Death Certificate or similar document corroborating MK's husband's death. Less than 10 days after the hearing, the Board was provided with a translated Death Certificate. The Board's decision makes no mention of its request for post-hearing evidence, and makes a significant adverse credibility finding based on the "failure" of the claimant to provide the requested corroborative evidence.

PART I - FACTS

1. The Applicant was born on xxxx in xxxx, India. She is a citizen of the country of India. The applicant is of the xxx religion and the xxxx ethnicity.
Affidavit of Applicant, paragraph 2
2. The Applicant is illiterate. The Applicant has never received any education of any nature in her life. The Applicant has no concept of

the Judeo-Christian calendar, nor does she know the dates of significant events in her life. The Applicant does not know her own date of birth, and has only indicated the date in the second paragraph of her affidavit because it is the date that she is told that exists in her official documents, namely her passport.

Affidavit of Applicant, paragraph 3

3. Approximately 35 years ago, in or about the year of 1971 the Applicant was married to her husband. The Applicant's husband died, and she became a widow approximately 8 or 9 years ago. In the Applicant's Personal Information Form, she indicated that her husband died in the year 1998.

Affidavit of Applicant, paragraph 4

4. The Applicant has three children; two sons and one daughter. The Applicant does not know their exact date of births, but with the assistance of her brother-in-law the Applicant indicated their approximate years of birth in her Personal Information Form.

Affidavit of Applicant, paragraph 5

5. Since birth, the Applicant has always worked within the home. She has never worked outside of her father's home, her husband's home, or her son's home.

Affidavit of Applicant, paragraph 6

6. The Applicant's Personal Information Form was submitted to the Immigration and Refugee Board [hereinafter "Board"] in respect of her claim for protection. The Board marked and entered the Applicant's Personal Information Form as Exhibit C1.

Affidavit of Applicant, paragraph 7

7. After the Applicant arrived in Canada to visit her sister, the Applicant attended at Citizenship and Immigration along with her brother-in-law

to make a claim for protection. The Applicant's claim for protection was based on her fear against her son, who had expropriated her land. The Applicant was in fear of both her son and her daughter-in-law and felt that she could not return to India.

Affidavit of Applicant, paragraph 8

8. To corroborate the Applicant's claim, the Applicant provided her counsel with her husband's revised written will indicating that her husband, to deal with any dispute that would arise with respect to his property, left all of his land and house in only the Applicant's name. The Applicant has been advised by her counsel that her husband's revised written will was provided to the Board prior to her refugee hearing. The Applicant has been further advised by her counsel that the revised written will of her husband along with a translation was accepted as evidence and marked as Exhibit C2 by the Board.

Affidavit of Applicant, paragraph 9

9. The Applicant, along with her sister and brother-in-law as observers, attended at her refugee claim. The Applicant has been informed that the date of her refugee hearing was xxxx. At that time the Applicant testified as to her problems in India before the Board.

Affidavit of Applicant, paragraph 10

10. During the hearing the Applicant was asked questions about her husband's death. The Applicant has been advised by her counsel and believes the same to be true, that the Board requested additional corroborative evidence with respect to the Applicant's husband's death. The Applicant has been advised by her counsel that the Board requested a death certificate of her husband.

Affidavit of Applicant, paragraph 11

11. The Applicant has been advised by her counsel that the Board indicated that it would accept evidence, namely the death certificate, after the hearing concluded. The Applicant has been advised by her counsel that the Board provided a reasonable amount of time (several weeks) to provide the death certificate or other corroborative evidence as to her husband's death.

Affidavit of Applicant, paragraph 12

12. The Applicant has been advised by her counsel that on xxxx, less than ten days after her refugee hearing, her counsel provided a translated death certificate of Nachatter her husband.

Affidavit of Applicant, paragraph 13

13. The Applicant has been advised by her counsel that on or about xxxx, his office received the Board's decision with respect to the Applicant's claim. The Board rejected the Applicant's refugee claim and claim for protection and determined that she was not a convention refugee or a person in need of protection.

Affidavit of Applicant, paragraph 15

14. The Applicant has been advised by her counsel that in the decision, the Board did not find her to be a credible and trustworthy witness respecting the central elements of her claim.

Affidavit of Applicant, paragraph 16

15. At page 5 of the decision the Board emphasizes that the Applicant's husband's revised will dated April 6, 1999. The Board notes that in the Applicant's Personal Information Form and narrative the Applicant indicated that her husband committed suicide and died in 1998, prior to the completion, signing and registration of his revised will on April 6, 1999. The Applicant feels aggrieved that the Board did not understand from her testimony that she did not know the exact date of her

husband's death, and that she approximated his death to approximately 8 or 9 years prior to her refugee claim.

Affidavit of Applicant, paragraph 17

16. At page 5 of the decision the Board writes:

In addition, the claimant has provided no independent evidence, documentary or otherwise, that her husband committed suicide by drinking poison and died some time in 1998.

Affidavit of Applicant, paragraph 18

17. The Applicant feels aggrieved that the Board made this determination in spite of her counsel providing post-hearing evidence corroborating her husband's death in the form of his death certificate.

Affidavit of Applicant, paragraph 19

18. The Board also noted at page 5 of the decision that:

Also in evidence before me are documents related to the claimant's application for her Canadian Temporary Resident Visa (TRV) that was issued to her in India on October 30, 2003. However, in these documents the claimant declares that as of October 30, 2003 her marital status as "married" (as opposed to widowed). The claimant also does not state in these documents that her husband is deceased, refers to her husband, Nachatter Singh, as her spouse, that his marital status is "married", and that his occupation is that of a farmer in India.

Affidavit of Applicant, paragraph 20

19. The Applicant feels aggrieved that the Board did not understand that at no time in her entire life has the Applicant ever completed documents on her own; nor could she ever at any time read any document prepared on her behalf. The Applicant testified before the Board that her son (who was desirous of securing her land in India) assisted the Applicant with the preparation of her TRV application form. At no time has the Applicant intentionally intended to mislead

anyone about her husband's death or the fact that she has been a widow for the past 7 years.

Affidavit of Applicant, paragraph 21

20. At page 6 of the decision the Board specifically notes:

At the hearing, the claimant was questioned about whether she obtained a death certificate to verify her husband's death in India in 1998...

Affidavit of Applicant, paragraph 22

21. The Applicant has been advised by her counsel that nowhere in the decision does the Board reference the provision of the translated death certificate as post-hearing evidence by her counsel.

Affidavit of Applicant, paragraph 23

22. The Board further notes the following:

As she states in her PIF and testimony, I accept that the claimant received no formal education in India. However, the claimant's allegation that her husband committed suicide in 1998 because of the problems he had with her son xxxx is the most central element of her refugee protection claim, as her husband's death led to her subsequent alleged serious mistreatment at the hands of her son xxxx and his wife over an alleged property dispute. The Immigration Refugee Board's file indicates the Screening Form was sent to the claimant's counsel, the claimant and her counsel were put on notice that the claimant's current civil or marital status was an identified issue in her refugee protection claim and that the claimant was to provide documentary evidence to support her claim such as a death certificate for her husband. For these reasons, I find the claimant's explanation for not providing a death certificate or other similar document to verify her husband's alleged suicide in India in 1998 to be unreasonable...

Affidavit of Applicant, paragraph 25

23. The Applicant feels aggrieved that the Board found her explanation “for not providing a death certificate or any similar document to verify her husband’s alleged suicide ... to be unreasonable”. The Applicant feels aggrieved because she has been advised by her counsel and believes that he provided the translated death certificate to the Board for consideration as it went to a central element of her claim, namely her status as a widow in India.

Affidavit of Applicant, paragraph 26

PART II - ISSUES

1. Did the Board Member fail to observe a principle of natural justice, procedural fairness or other procedure that he was required by law to observe, specifically that the claimant’s husband’s death certificate was provided by counsel as post-hearing evidence pursuant to a direction by the Board Member himself?
2. Did the Board Member base his decision on erroneous findings of fact that he made in a perverse or capricious manner or without regard to the material before him?
3. Did the Board Member err in law in making the decision in that he failed to have regard to the totality of evidence properly before it?

PART III – ARGUMENT

The Board’s Error Mandates A Review By This Honourable Court.

1. 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)¹. In that

¹ *Bains v. Canada (Minister of Employment & Immigration)*(1990), 109 NR 239, [1990] FCJ No. 457 (CA)

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.

2. *Bains* was followed by the Federal Court of Appeal decision in *Krishnapillai v. Canada* (CA) [2002] 3 FC 74², where the court stated essentially that leave is granted if the application discloses a “fairly arguable case” [*Krishnapillai*, paragraph 11].
3. In the instant matter, the Applicant submits that the following clear reviewable errors were made by the Board:
 - a) failure to consider the evidence going to “the most central element of [the] refugee protection claim”, which the Board itself requested; and
 - b) thereby breached the requirements of natural justice.

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’.

The Board Breached Its Duty Of Natural Justice

4. It is clear from a review of the decision that a significant adverse credibility finding was made by the Board. This adverse credibility finding made by the Board is found at pages 5 to 6 of the decision revolves around the claimant’s failure to provide a Death Certificate or other corroborative document establishing that she was a widow.

² *Krishnapillai v. Canada* (CA) [2002] 3 FC 74

5. The Board specifically provided an opportunity for the claimant to provide post-hearing evidence and provide a Death Certificate or corroborative evidence of that nature:

Mr. Sharma: ...You will note that on page 14 of the Port of Entry notes, "N/A" is listed under "spouse". But we will attempt to obtain –

Presiding Member: Yes, if you could make any efforts at all to try and obtain –

Mr. Sharma: Okay, we will do that. Maybe an affidavit from a village elder. I don't know.

Presiding Member: Yes. **I am prepared to accept any corroborative evidence, posthearing evidence [emphasis added].**

Mr. Sharma: Okay. If you can just give us a couple of weeks.

Presiding Member: **Yes, that shouldn't be a problem [emphasis added].**

Transcript page 35, Affidavit of Applicant paragraph 24

Also, contained within the transcript is the Presiding Member's comments to the claimant:

Presiding Member: ...And I indicated to Mr. Sharma that if you were able to obtain some kind of independent verification of your husband's death that that would greatly assist me in making my decision [emphasis added]. And Mr. Sharma has said that he will work with you to attempt to obtain a document that would verify that you are currently a widow in India.

Transcript page 36, Affidavit of Applicant paragraph 25

6. This opportunity for the claimant to provide corroborative evidence is also reflected at page 6 of the Decision:

At the hearing, the claimant was questioned about whether she obtained a death certificate to verify her husband's death in India in 1998...

7. It is clear that the Decision did not merely fail to refer to the provision of the post-hearing evidence (the death certificate). A review of the Decision reveal that the Board's analysis and reasons did not consider, at all, the provision of the death certificate by the claimant. The Decision was made as if the post-hearing evidence did not exist or was not provided:

...In addition, **the claimant has provided no independent evidence, documentary or otherwise, that her husband committed suicide** by drinking poison and died some time in 1998...

*Affidavit of Applicant, paragraph 18
Decision page 5.*

As she states in her PIF and testimony, I accept that the claimant received no formal education in India. However, **the claimant's allegation that her husband committed suicide in 1998 because of the problems he had with her son xxxx is the most central element of her refugee protection claim**, as her husband's death led to her subsequent alleged serious mistreatment at the hands of her son xxxx and his wife over an alleged property dispute. The Immigration Refugee Board's file indicates the Screening Form was sent to the claimant's counsel, the claimant and her counsel were put on notice that the claimant's current civil or marital status was an identified issue in her refugee protection claim and **that the claimant was to provide documentary evidence to support her claim such as a death certificate for her husband. For these reasons, I find the claimant's explanation for not providing a death certificate or other similar document to verify her husband's alleged suicide in India in 1998 to be unreasonable... [emphasis added].**

Affidavit of Applicant paragraph 28

Decision, page 6.

8. The Board's finding with respect to the Applicant "...not providing a death certificate..." constitutes, in the words of the Board, "...the most central element of her refugee protection claim...". The Board's failure to consider the post-hearing evidence is therefore an incurable, and reviewable, error.

9. The Applicant, in post-hearing evidence, provided a translated Death Certificate for the Applicant's husband less than 10 days after the refugee hearing. The Death Certificate corroborated the Applicant's husband's death, and corroborated the Applicant's status in India as a widow.
Affidavit of Applicant paragraph 13
Exhibit C

10. Provision of the post-hearing evidence was done via facsimile transmission and is confirmed by an Affidavit by Applicant's counsel's assistant.
Affidavit of Applicant paragraph 14
Exhibit D

11. The Death Certificate confirmed the Applicant's husband death occurred *after* the revised written will that was previously provided to the Board and marked as an exhibit C2 at the hearing and attached as Exhibit B to the Applicant's Affidavit.
Exhibit C

12. The post-hearing evidence goes to a determinative issue of the decision, therefore, the failure of the Board to consider such evidence constitutes a reviewable error.

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

ALL OF WHICH IS RESPECTIVELY SUBMITTED

Dated this ___ day of xxxxx, xxxx.

Solicitors for the Applicant

Per: _____

RAJ SHARMA
Solicitor for the Applicant

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MEMORANDUM OF ARGUMENT

Attention: Mr. Raj Sharma

Solicitor's File No. xxxx