



RPD File No. / N° de dossier de la SPR : MB2-03566  
MB2-03567

UCI / IUC : XXXX XXXXXXXX

Private Proceeding / Huis clos

## Reasons and decision – Motifs et décision

<b>Claimant(s)</b>	XXXX XXXX XXXXXXXXXX XXXX	<b>Demandeur(e)s d'asile</b>
<b>Date(s) of hearing</b>	October 2, 2018; January 24, 2019; February 26, 2019 and December 19, 2019	<b>Date(s) de l'audience</b>
<b>Place of hearing</b>	Montréal, Quebec	<b>Lieu de l'audience</b>
<b>Date of decision and reasons</b>	February 28, 2020	<b>Date de la décision et des motifs</b>
<b>Panel</b>	José Tshisungu Wa Tshisungu	<b>Tribunal</b>
<b>Counsel for the claimant(s)</b>	Tony Manglaviti	<b>Conseil(s) du (de la/des) demandeur(e)s d'asile</b>
<b>Designated representative</b>	N/A	<b>Représentant(e) désigné(e)</b>
<b>Counsel for the Minister</b>	Josée Barrette	<b>Conseil du (de la) ministre</b>

## REASONS FOR DECISION

### INTRODUCTION

[1] **XXXX XXXX** and his spouse **XXXX XXXX** are citizens of India who are claiming refugee protection under section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act* (IRPA). The spouse is partially basing her claim on her husband's allegations.

### ALLEGATIONS

[2] In support of his claim, the principal claimant states that he is retired from the military and is being persecuted by the Indian police. The alleged persecution has taken the form of being arrested by the police, detained, tortured, subjected to intense interrogation, accused of colluding with Punjabi independence militants and turning people against the police and the Congress Party.

[3] Before being released, the police took his fingerprints and his photograph so that they could arbitrarily incriminate him afterwards. He was told to report to the police regularly in order to provide information about independence militants.

[4] As for the associate claimant, the persecution she alleges to have faced took the form of being arrested and raped at the police station.

[5] Fearing for their lives, the couple sought exile in Canada in order to claim refugee protection here.

### ANALYSIS

[6] Having analyzed all of the evidence, both documentary and testimonial, the panel arrives at the following conclusions.

#### **Applicable legal provisions**

[7] The allegations refer to two of the five Convention grounds, namely imputed political opinion and a particular social group, that of family. Consequently, section 96 of the IRPA must be applied in this case.

### **Claimants' identity**

[8] The claimants established their identity to the panel's satisfaction through their testimonies and photocopies of their identity documents, the originals of which were held by an immigration officer.

### **EXCLUSION OF AMRIK SINGH**

[9] The Minister intervened in this case to submit numerous pieces of documentary evidence labelled M-1 to M-59, to question the principal claimant, and to present submissions in which the panel was asked to apply the exclusion clause, namely Article 1F(a) of the *United Nations Convention Relating to the Status of Refugees*.

[10] To begin, it is worth reviewing said article.

[11] Article 1F(a): "the provisions of the Convention shall not apply to any person where there are serious reasons for considering that the person has committed a crime against peace, a war crime or a crime against humanity..."

### **Issue**

[12] With respect to the exclusion application, the issue is as follows: having been in the Indian XXXX for XXXX years, is the principal claimant a person who has committed a crime against peace, a war crime or a crime against humanity or an accomplice under section 98 of the IRPA? Section 98 states, "A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection."

[13] In support of the exclusion application, the Minister submitted in evidence numerous pieces of evidence totalling 1,151 pages. Exhibits M-5 and M-16 summarize the serious human rights violations in Jammu and Kashmir during the period when the principal claimant was a member of the Indian XXXX XXXX. In Exhibit M-5, India grants special powers to the army as follows.

[14] "Any commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the armed forces may, in a disturbed area: (a) if he is of opinion that it is necessary so to do for the maintenances of public order, after giving such due warning as he may consider necessary, fire upon or otherwise use force, even the causing of death."

[15] In M-16, the document's authors describe the criminal behaviour of Indian military personnel in Jammu and Kashmir:

“Indian troops continue to summarily execute detainees, kill civilians in reprisal attacks and burn down neighborhoods and villages as collective punishment...”

[16] When questioned about all of the evidence which seems to show that crimes had been committed, the principal claimant testified as to why he joined the army, his military training, his duties and the regions where he practised his profession.

[17] Considering the evidence on the record, and despite the principal claimant's allegations that he was not aware of the crimes the army was committing in India, the issue for the panel is this: what was the principal claimant's individual responsibility as a member of the army?

[18] Article 25 of the Rome Statute cited by the Minister does not clear the principal claimant of individual responsibility. His involvement, which implies full knowledge of the army's intention to commit crimes, has not been demonstrated. The Minister did not discharge his burden of proof to demonstrate that the principal claimant ordered, facilitated or encouraged the commission of the crimes.

[19] Furthermore, in *Ezokola*, the Supreme Court addresses the mode of complicity in the commission of crimes, which leads to a second issue: did the principal claimant significantly, voluntarily and knowingly contribute to the crimes committed by the Indian army?

[20] In his final arguments, the Minister responded yes to this question, referring to the concepts of criminal intent and knowledge as defined in the Rome Statute. In the panel's view, both of these concepts imply conduct that results in consequences that the perpetrator is aware of. However, the panel notes that since the claimant did not commit any crimes, his intentions and knowledge of the circumstances of the crimes cannot reasonably be examined to establish individual responsibility.

[21] In *Ezokola*, the Court establishes six criteria for assessing the contribution of a person in committing crimes. The panel has been diligent in examining them. It arrived at the following conclusions.

[22] First, the Indian army is not an institution dedicated to committing crimes such that anyone who calls upon it could *ipso facto* be accused of being complicit in crimes against peace, war crimes and crimes against humanity.

[23] Second, the fact that the principal claimant was a XXXX, as noted in his military booklet, confirms that his role was in the XXXX XXXX; however, having that role does not demonstrate that knowing how to XXXX is criminal knowledge, particularly given that learning to XXXX is part of all military training.

[24] Third, in the panel's view, medals won and ranks obtained are not evidence that the principal claimant was rewarded for crimes against humanity.

[25] Fourth, neither the length of his career nor the method of recruitment lead the panel to have serious reasons to think that the principal claimant committed a crime against peace, a war crime or a crime against humanity. Moreover, the Minister's argument is presented in the conditional, and is clearly a general assumption as opposed to an established fact.

## **DETERMINATION**

[26] For these reasons, the panel refuses the Minister's application and concludes that the principal claimant, Amrik Singh, did not voluntarily and significantly contribute to crimes committed by certain members of the Indian army. Consequently, he is not excluded from the refugee protection system.

## **INCLUSION OF CLAIMANTS**

### **Credibility**

[27] The panel finds their allegations to be credible, for the following reasons.

[28] First, they testified directly about the persecution they faced in India. What might have appeared to the panel, in some instances, to be contradictions and inconsistencies, were examined in light of a XXXX report entered on the record as C-8. From it, the panel concludes that this is the result of the principal claimant's XXXXandXXXX XXXX. It goes without saying, having read the report, that the panel cannot draw a negative inference as to the credibility of the testimony.

Furthermore, during the subsequent hearings, the panel did not identify any fatal aspects that could have marred the couple's sworn testimony.

[29] Second, the panel is of the opinion that the incidents, considered cumulatively, are equivalent to persecution on grounds with a nexus to the Convention. Being tortured or raped at the police station by police officers constitutes persecution, particularly considering that the role of the state is to protect its citizens and not to torture and rape them. The claimants cannot expect any protection from such a state. Also, given its control over the national territory, there is no part of India where the claimants could safely relocate without the risk of blackmail, bullying and harassment from a corrupt and predatory police force.

[30] Third, the disastrous human rights situation weighs in favour of the claimants and provides an objective basis for their fear of returning. In this case, there is extensive documentation from independent and reliable sources about human rights violations in India. I need only consider these excerpts from Exhibit 2.1: *India. Country Reports on Human Rights Practices for 2018* (National Documentation Package on India). It states:

Human rights issues included reports of arbitrary killings; forced disappearance; torture; rape in police custody; arbitrary arrest and detention; harsh and life-threatening prison conditions; and reports of political prisoners in certain states.... Widespread corruption; lack of criminal investigations or accountability for cases related to rape... remained major issues.

[31] The panel is of the opinion that this documentation is consistent with the claimants' testimony. It demonstrates that the Indian government cannot offer adequate protection to the claimants. As a result, the panel concludes that there is a reasonable chance of persecution if the claimants were to return to India.

[32] It should also be noted that in assessing this case, the panel took into consideration, with respect to XXXX XXXX, the Chairperson's *Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution*.

## DETERMINATION

For all these reasons, the panel allows the refugee protection claims filed by XXXX XXXX and XXXX XXXX. It determines that they are Convention refugees.

## DETERMINATIONS

### EXCLUSION

[33] The panel refuses the Minister's application and concludes that the principal claimant, XXXX XXXX, did not voluntarily and significantly contribute to the crimes committed by certain members of the Indian army. Consequently, he is not excluded from the refugee protection system.

### INCLUSION

[35] The panel allows the refugee protection claims filed by XXXX XXXX and XXXX XXXX. It determines that they are Convention refugees.

*José Tshisungu Wa Tshisungu*

**José Tshisungu Wa Tshisungu**

February 28, 2020

**Date**

IRB translation

Original language: French