

Date: 20041029

Docket: IMM-330-04

Citation: 2004 FC 1494

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, October 29, 2004

Present: THE HONOURABLE JUSTICE MR. SIMON NOËL

BETWEEN:

MALIKA BELANI

Applicant

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an application for judicial review of a decision rendered by the Refugee Protection Division (the “tribunal”) of the Immigration and Refugee Board (the “IRB”) on December 29, 2003, in which the IRB ruled that the applicant was not a Convention refugee. The applicant is asking this Court to issue a writ of *certiorari* to set aside the decision and order a new hearing before a differently constituted panel in a manner consistent with the reasons for the decision to be rendered in the case at bar.

ISSUES

[2] Did the tribunal err either in basing its decision on an erroneous finding of fact, or in otherwise acting contrary to the law, in rendering its decision?

CONCLUSION

[3] For the reasons mentioned below, I answer this question in the affirmative.

FACTS

[4] The applicant, Malika Belani (Ms. Belani, or the “applicant”), is a citizen of Algeria who is claiming asylum because she is a member of a particular social group, a woman victim of domestic violence who is subject to honour crimes. Ms. Belani says she is afraid to return to Algeria because she fears that her family will kill her because she lost her virginity during a rape committed by her future husband in the United States when she went there to marry him.

[5] On September 16, 2000, Ms. Belani went to San Francisco in the United States to join her new husband. Before she went there, a “fatiha” was held in Algeria. A fatiha is a Muslim religious ceremony which means religious marriage. However, according to the applicant, the marriage must also be registered (the civil marriage) before the couple engages in sexual relations. Ms. Belani and her new husband intended to register their marriage when Ms. Belani arrived in the United States. This never happened because when she arrived at her husband’s residence, the marriage quickly deteriorated.

[6] Ms. Belani indicated that after she arrived in the United States, her husband pressured her to have sexual relations, which she did not want before civil registration of the marriage, and she further alleged that her husband raped her. After the rape, Ms. Belani met a young Algerian woman, and she sought refuge in her home for a few months. Her husband was very angry that she had left the marital home and told her that he would report her to the U.S. authorities and that she would be deported to Algeria. He also phoned Ms. Belani’s family in Algeria to tell them that she had left the marital home without a reason. Her family was upset and angry at her for bringing dishonour to the family.

[7] Her sister, Karima Belani (Karima), a Canadian citizen, asked her to join her in Canada. Despite this fact, she did not arrive in Canada until September 30, 2002, two years after she was raped and then left the marital home. She indicated her intention to claim refugee status on October 6, 2002. Her claim for refugee protection was heard on December 4, 2003.

IMPUGNED DECISION

[8] The tribunal did not find the applicant credible and therefore held that there were no grounds to allow the claim. The tribunal expressed serious doubts as to the facts submitted.

[9] Among other things, the tribunal noted that Ms. Belani did not remember the name of the counsel she reportedly consulted in San Francisco in the fall of 2001. He apparently advised her not to file a claim in the United States and to leave the country. The tribunal was not satisfied that even though she trusted her sister Karima, who had strongly urged her to leave the United States and come to Canada, Ms. Belani did not follow her advice, and it took her about two (2) years to leave the United States. Also, Ms. Belani never filed a report with the U.S. authorities in San Francisco regarding the rape she said she suffered. Also, she did not consult a physician following the rape:

The tribunal wishes to point out that despite the story submitted by the applicant, the applicant never took any steps in response to the events that she claimed to have experienced in the United States at the hands of her husband. It should be noted that she has not heard from this person since she fled the marital home. Also the applicant, who did not seek medical attention after the alleged rape in the United States, did not report the rape to the physician she consulted in Canada after she arrived. When she sought asylum, she mentioned that she had had to see a physician. Also, it appears that she had her triglyceride levels tested and subsequently underwent a medical checkup, because, according to her testimony, she was weak. At no time did the applicant tell her physician that she had undergone that type of physical assault. As a result, the tribunal finds this event to be odd, to say the least, and strongly doubts that it occurred.

[10] Because the tribunal did not find the applicant credible, and had therefore not discharged the burden of proving that she had

grounds to fear persecution if she were to return to Algeria, there was no reason to consider whether there was a threat to her life or a threat of cruel and unusual treatment.

[11] Finally, the tribunal denied the applicant's claim on the grounds that she risked being subjected to torture because, in addition to not believing her story, it considered that it was not the Algerian authorities who were involved in this case, but rather the applicant's family. The tribunal specified in this regard: "the torture must be inflicted by a state authority or a person who would act on its behalf" (see page 4 of the decision). The applicant's situation, if true, was not covered by the *Convention against Torture*.

POSITIONS OF THE PARTIES

The applicant

[12] The applicant alleged that the tribunal's decision was based on errors of law and arbitrary or absurd findings of fact in which the evidence was ignored. She also alleged that the tribunal should have read the IRB Chairperson's Guidelines on gender-related claims.

[13] The applicant pointed out several errors committed by the tribunal, including that the decision to leave the United States was not made in September 2000 but after the rape in November 2000. Also, although the tribunal found that the applicant was actually married, while finding her story lacked credibility, it noted that it had no documents indicating that the applicant was in fact married (despite the applicant's explanation that it was an unregistered religious marriage). The tribunal also did not find the applicant's story credible because she was unable to recall the name of the lawyer she had consulted in San Francisco. The applicant argued that these determinations were errors.

[14] The applicant maintained that the tribunal had to comment on the applicant's explanations before dismissing her testimony and that it ignored the documentary evidence that corroborated her allegations and actions. According to the applicant, the decision did not take into account the experience of a woman suffering from battered-woman syndrome. While it is true that the applicant did not consult a physician or file a complaint with the U.S. authorities, the tribunal should have considered the reason for which she did not: including the possibility that she was suffering from

post-traumatic stress syndrome and that she was ashamed and afraid of being sent back to Algeria by the U.S. authorities because she had no status in the United States.

[15] The applicant pointed out that in *Khon v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 143, at para. 20, the Refugee Protection Division (RPD) tribunal was encouraged to consult the IRB Chairperson's Guidelines on gender-related claims.

[16] The applicant argued that the tribunal erred in finding it unreasonable that the applicant had remained in the United States for two years although her sister Karima had strongly encouraged her to join her in Canada and that the applicant had not filed a complaint with the U.S. authorities as Karima had suggested, without taking into account the applicant's testimony that she was suffering from severe depression and psychological paralysis.

[17] Finally, the applicant was of the opinion that the tribunal had misunderstood the claim anyway since it had declared that the applicant feared she would be persecuted "because of her failure to live with her husband." According to the applicant, it was clear that her claim was based on her fear of forced marriage and

retaliation from her own family or the future husband's family for having lost her virginity (see paragraphs 4 and 5 of the Applicant's response). The applicant said this misunderstanding compromised the RPD's whole review and tainted its decision.

Respondent

[18] The respondent argued that it was reasonable for the tribunal to find that the applicant was not credible given the implausibilities identified by the tribunal and the applicant's conduct following the alleged incidents. The respondent cited case law stating that the delay in leaving a country despite the alleged fear and the failure to seek asylum as soon as possible are relevant and sometimes sufficient in themselves to warrant the dismissal of a claim for refugee protection. The respondent was of the view that it was reasonable for the tribunal to find the applicant's explanation of her delay in leaving the United States and her failure to seek asylum unsatisfactory, and that it appeared that the applicant preferred to find work rather than take steps to ensure her safety.

[19] The respondent argued that the tribunal was correct not to consider the affidavit from Karima, the applicant's sister, stating that the applicant was in a state of psychological distress because the document came from a relative of the applicant, and furthermore, the reference to the applicant's psychological state was not supported by any independent evidence. There was no credible and probative evidence of the applicant's state of health, therefore the tribunal did not need to consider it.

[20] Finally, the respondent argued that the tribunal was not bound by the IRB Chairperson's Guidelines on gender-related claims because they do not have the force of law.

ANALYSIS

Standard of review

[21] The tribunal's decision is based on the finding that the applicant lacked credibility. The standard of review in such a case is that of a patently unreasonable decision since such findings lie "at the heart of the discretion of the triers of fact": (*Canadian Union of Public Employees, Local 301 v. Montreal (City)*, [1997] 1 SCR 793, at page 844):

Credibility findings made by the tribunal will not be set aside by the Court unless they have clearly been made without proper regard to the evidence: *Rajaratnam v. Canada (Minister of Employment and Immigration)* (1991), 135 N.R. 300 (FCA)). This means that the applicant must prove, by a preponderance of the evidence, the existence of a palpable and overriding error that affects the assessment of the facts. The standard of review for such findings of fact made by an administrative tribunal is a standard of deference: *Montreal (City), supra*. In other words, it must be shown that the evidence, viewed reasonably, is incapable of supporting a tribunal's findings of fact (which is the very nature of credibility findings): *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 SCR 487.

ANALYSIS

[22] The decision raises two concerns:

- The tribunal did not comment on or dismiss the affidavit from Karima, psychologist and sister of the applicant, which corroborated the applicant's version. This is a relevant and important document that supports the applicant's argument. If the applicant's version was not credible, what about the affidavit? The decision partly accepts some elements of Karima's affidavit (stating that she had asked the applicant to file a complaint, see a physician, etc.), but does not provide any comments on the medical situation or the rape. These elements corroborate the applicant's version, and the failure to mention the affidavit appears to me to be a material error that taints the decision. I would also like to note that the sister, Karima, attended the hearing and did not have to testify;

- The decision also did not comment on the applicant's response that she was ashamed of the events and therefore did not consult a physician. Given the Guideline on gender-related claims, which asks the decision-maker to adopt a sensitive approach when dealing with such a subject, it seems to me that it would have been appropriate to review and comment on this subject, especially in view of the fact that the tribunal used the argument that the applicant did not consult a physician after the rape to find that she was not credible. Although the Guideline does not create an obligation to follow it, the Court notes that it is a guideline, and it must be used at least as a reference. The tribunal did not refer to the Guideline and does not seem to have followed it in that the tribunal did not comment on the answer that the applicant was ashamed to report these facts to a physician.

[23] These two concerns seem important to me given that she was found to lack credibility. For these reasons, the decision is patently unreasonable. In my opinion, the interests of justice will be better served if the judicial review is allowed, and a new panel conducts a

full review of the situation, without taking into account the decision under review.

[24] The lawyers were asked to submit a certified question but declined.

ORDER

THIS COURT'S JUDGMENT is that:

- The application for judicial review is allowed.
- The tribunal's December 29, 2003 decision is set aside.
- A new hearing be held before a differently constituted panel

to reconsider the applicant's claim for refugee protection.

"Simon Noël" _____

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-330-04

STYLE OF CAUSE: MALIKA BELANI

Applicant

And

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: October 21, 2004

REASONS FOR ORDER: The Honourable Justice Simon Noël

DATED: October 29, 2004

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