Date: 20090112

Docket: IMM-2266-08

Citation: 2009 FC 29

Ottawa, Ontario, January 12, 2009

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

SABINE SEMEXTANT

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The Federal Court of Appeal and this Court have established that a refugee claimant has an obligation to claim asylum as soon as possible upon entry in a country where protection is available; thus, the Immigration and Refugee Board (Board) may recognize delay as a significant mitigating factor in the evaluation of subjective fear:

> [24] There is a well-established principle to the effect that any person having a well-founded fear of persecution should claim refugee protection in Canada as soon as he or she arrives in the country, if that is his or her intent. On this point, the Federal Court of Appeal has already concluded that any delay in claiming refugee protection is an important factor which the Board may take into consideration in its analysis. Such a delay indicates a lack of a subjective fear of persecution, since there is a presumption to the effect that a person having a well-founded fear of persecution

> will claim refugee protection at the first opportunity. Accordingly, in conducting its assessment, the Board is entitled to take into consideration the applicant's delay in claiming refugee protection. (*Thomas v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No.241 (QL), at paragraph 4; *Huerta v. Canada (Minister of Citizenship and Immigration)*, [1993] F.C.J. No. 271 (QL); *Espinosa v. Canada* (*Minister of Citizenship and Immigration*), 2003 FC 1324, [2003] F.C.J. No. 1680 (QL), at paragraph 16) (Emphasis added).

(*Singh v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 62, 159 A.C.W.S. (3d) 568; reference is also made to *Huerta v. Canada (Minister of Citizenship and Immigration)* (1993), 40 A.C.W.S. (3d) 487, [1993] F.C.J. No. 271 (QL); *Sainnéus v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 249, [1993] F.C.J. No. 321 (QL)).

[2] In the present case, the Applicant did not provide a reasonable explanation for the delay. The Board was, therefore, justified to conclude as it did on a lack of subjective fear (*Sainnéus*, above).

[3] Consequently, there was no error on the part of the Board in concluding that the Applicant's behaviour, in and of itself, undermined the credibility of her testimony.

II. Judicial Procedure

[4] On April 18, 2008, the Board concluded that the Applicant was not a Convention refugee nor a person in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA).

[5] The decision of the Board is based on the Applicant's absence of credibility and her lack of subjective fear. The Federal Court is to determine, subsequent to an application for leave, whether the Board decision should be upheld.

III. Background

[6] The Applicant, Ms. Sabine Semextant, is a citizen of Haïti.

[7] She alleges that, in 1999, she was forced to leave her country for the United States (U.S.) because of her mother's political affiliation that placed her family in jeopardy.

[8] More particularly, she claims that, after the capture of one of the members of the political group in question (unidentified by the Applicant), she and her family were forced to hide in separate locations. Subsequently, she was brought to a beach and told to board a boat for the U.S.

[9] She was allegedly told that the rest of her family would eventually meet her in the U.S.

[10] Ms. Semextant arrived in the U.S. and was greeted by her father's second wife, Rosaline. She never saw the rest of her family again.

[11] She remained in the U.S. with Rosaline for eight years and never claimed asylum before entering Canada, on March 6, 2007.

[12] Ms. Semextant claims that she was adopted by Rosaline during her stay and that Rosaline tried to apply for U.S. residency on her behalf. The application in the U.S. was considered abandoned because it was not completed in time.

[13] In Canada, the hearing before the Board was held on December 19, 2007. Ms. Semextant was duly represented by counsel.

IV. Issue

[14] Did the Board err in determining that the Applicant was not credible?

V. Analysis

Standard of Review

[15] It is trite law that an assessment of evidence and an evaluation of credibility of an applicant is of the Board's purview. This Court must refrain from interfering in questions of fact.

> [17] … The Court must demonstrate a high degree of deference since it is up to the Board to weigh the applicants' testimony and assess the credibility of their statements. If the Board's findings are reasonable, no intervention is warranted…

(*Bunema v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 774, 160 A.C.W.S. (3d) 865 at para. 1; reference is also made to *Desronvilles v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 711, 158 A.C.W.S. (3d) 978 at para. 9: *Étienne v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 64, 308 F.T.R. 76 at paras. 10-14; *Singh*, above at para. 28; *Kengkarasa v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 714, 158 A.C.W.S. (3d)

973; *Encinas v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 61, 152 A.C.W.S. (3d) 497 at para. 21).

[16] The Supreme Court of Canada, in respect of the standard of "unreasonableness", recognizes that due deference is to be applied in regard to credibility matters (*Dunsmuir v. New* Brunswick, 2008 9 SCC, [2008] 1 S.C.R. 190; *Singh*, above; *Navarro v. Canada (Minister of Citizenship and Immigration)*, 169 A.C.W.S. (3d) 626 at paras. 12-14).

[17] In findings, wherein evidence supports the Board's credibility finding and that the Board's reasons stated is in clear and unmistakable terms, the Court is not to disturb the Board's decision. (*Aguebor v. Canada (Minister of Employment and Immigration)* (1993), 42 A.C.W.S (3d) 886, [1993] F.C.J. No. 732 (QL) (F.C.A.) at para. 4; *Kirbyik v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1192, 118 A.C.W.S. (3d) 870 at paras. 5-7; *Egeresi v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1133, 125 A.C.W.S. (3d) 1047 at para. 5).

Applicant's lack of credibility

[18] In the present case, on the basis of a lack of subjective fear, the Board found that Ms. Semextant's story was not credible:

(a) Ms. Semextant testified that, after living in Florida, she and her adoptive mother moved to Georgia in mid-January 2006, although her Personal Information Form (PIF) indicates that she lived in Florida until October 2006 but that she moved to Georgia in September 2006 (Tribunal Record at pp. 6, 13, 15, 98, 100 and 101);

(b) She failed to provide any corroborating evidence with respect to her move to Georgia (Tribunal Record at p. 6);

(c) Ms. Semextant did not act like a person fearing for her life:

(i) omitting to claim asylum while living the U.S. and waiting for eight years before finally doing so in Canada;

(ii) then waiting five months to claim asylum although she apparently feared for her life since September 2006 (Tribunal Record at p. 6);

(iii) failing to undertake any action to rectify her status in the U.S., even though she feared to return to Haïti (Tribunal Record at pp. 5-6).

(d) She provided no satisfactory explanation for neglecting to submit a U.S. residency application by which to rectify her status. All the documents which had been requested by the U.S. authorities had been issued to Ms. Semextant before she filed her application for residency on October 20, 2005; therefore, the Board failed to understand how her alleged adoptive mother could have then claimed that she was unable to obtain these very same documents in time for the application to be examined (Tribunal Record at pp. 5-6).

(e) Ms. Semextant omitted to provide any corroborating evidence with respect to her alleged adoption (Tribunal Record at p. 5).

(f) She could not remember when and why her baptism certificate had even been issued to her, although, she, herself, provided this document to support her claim (Tribunal Record at p. 7)..

[19] The Board was entitled to conclude that Ms. Semextant's failure to claim asylum earlier negated her subjective fear of persecution.

[20] Indeed, Ms. Semextant's behaviour with respect to her alleged risks of return to Haïti, and her uncle's situation, was incompatible with her fear, recognizing that she had had several opportunities to claim refugee status or residency, but had omitted to do so.

[21] Furthermore, due to Ms. Semextant's assertion that she was adopted by a U.S. resident, the Board was justified to conclude that it was most improbable that she could not have become an American resident herself by virtue of the alleged successful adoption (Decision of the Board, Tribunal Record at p. 5; *Yala v. Canada (Minister of Citizenship and Immigration)* (1999), 89 A.C.W.S. (3d) 338, [1999] F.C.J. No. 384 (QL)).

[22] The Federal Court of Appeal and this Court have established that a refugee claimant has an obligation to claim asylum as soon as possible upon entry in a country where protection is available; thus, the Board may recognize delay as a significant mitigating factor in the evaluation of subjective fear:

> [24] There is a well-established principle to the effect that any person having a well-founded fear of persecution should claim refugee protection in Canada as soon as he or she arrives in the country, if that is his or her intent. On this point, the Federal Court of Appeal has already concluded that any delay in claiming refugee protection is an important factor which the Board may take into consideration in its analysis. Such a delay indicates a lack of a subjective fear of persecution, since there is a presumption to the effect that a person having a well-founded fear of persecution will claim refugee protection at the first opportunity. Accordingly, in conducting its assessment, the Board is entitled to take into consideration the applicant's delay in claiming refugee protection. (*Thomas v. Canada (Minister of Citizenship and*

> *Immigration)*, [1998] F.C.J. No.241 (QL), at paragraph 4; *Huerta v. Canada (Minister of Citizenship and Immigration)*, [1993] F.C.J. No. 271 (QL); *Espinosa v. Canada* (*Minister of Citizenship and Immigration*), 2003 FC 1324, [2003] F.C.J. No. 1680 (QL), at paragraph 16) (Emphasis added).

(*Singh*, above; reference is also made to *Huerta* and *Sainnéus*, above).

[23] In the present case, Ms. Semextant did not provide a reasonable explanation for the delay. The Board was, therefore, justified to conclude as it did on a lack of subjective fear (*Sainnéus*, above).

[24] Consequently, there was no error on the part of the Board in concluding that Ms. Semextant's behaviour, in and of itself, undermined the credibility of her testimony.

[25] The Board, therefore, was in a position to reject Ms. Semextant's claim for refugee protection, simply, on the basis of incompatible conduct with a "subjective fear":

> [8] There are many ways to make determinations in matters of credibility. In assessing the reliability of the applicant's testimony the Board may consider, for example, vagueness, hesitation, inconsistencies, contradictions and demeanour (*Ezi-Ashi v. Canada (Secretary of State)* [1994] F.C.J. No. 401, at paragraph 4). In *El Balazi v. Canada (Minister of Citizenship and Immigration)* 2006 FC 38, [2006] F.C.J. No. 80, at paragraph 6, Mr. Justice Yvon Pinard states that even in some circumstances, the applicant's conduct may be enough to deny a refugee claim:
>
> > The respondent correctly says that the IRB may take into account a claimant's conduct when assessing his or her statements and actions, and that in certain circumstances a claimant's conduct may be sufficient, in itself, to dismiss a refugee claim (*Huerta v. Minister of Employment and Immigration* (March 17, 1993), A-448-91, *Ilie v. Minister of Citizenship and Immigration* (November 22, 1994), IMM-462-94 and *Riadinskaia v. Minister of Citizenship and Immigration* (January 12, 2001), IMM-4881-99). (Emphasis added).

(*Biachi v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 589, 152 A.C.W.S. (3d) 498).

[26] Finally, the Board was entitled to ask Ms. Semextant to produce documentary evidence to prove her adoption and her move to Georgia since her testimony was not credible. In the absence of documentary evidence in that regard, the Board, therefore, was in a position to draw a negative inference:

> [28] It is trite law that the Board may draw an unfavourable conclusion about Mr. Singh's credibility when his story is implausible and when he does not submit any evidence to corroborate his allegations. In *Encinas v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 61, [2006] F.C.J. No. 85 (QL), Mr. Justice Simon Noël wrote the following:
>
> > [21] I would add that it is clear from reading the transcript of the hearing that the applicants did not discharge their onus of proof to convince the RPD that their claim was well-founded. Indeed, the RPD informed them more than once that certain facts should have been put in evidence (the employment relationship in 2003, for example). Consequently, the RPD, not having at its disposal the evidence that it would have liked to receive, found that the version of the facts in the claim was not credible. That finding was certainly open to the RPD. (See *Muthiyansa and Minister of Citizenship and Immigration*, 2002 FCT 17, [2001] F.C.J. No. 162, at para. 13.) (Emphasis added).

(*Singh*, above; reference is also made to *Encinas*, above).

[27] Furthermore, Ms. Semextant argued that the Board erred by not having considered the Chairperson's Guidelines on Gender-Related Claims (Guidelines).

[28] The Board did specifically specify having taken the Guidelines into consideration; however, since Ms. Semextant was found not to be credible, the Guidelines did not apply to the present case.

[29] As stated by this Court in *Munoz v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1273, 307 F.T.R. 67:

> [31] Second, the RPD was presented with an account that was not credible, in which there was no credible allegation related to the claimant's gender. Moreover, as mentioned above, the RPD stated in clear, explicit and intelligible terms the valid reasons why it doubted the truthfulness of Ms. Munoz's allegations, given her lack of credibility.
>
> [32] The defects noted by the RPD were based on the evidence submitted, pertained to major points in Ms. Munoz's claim and were relevant and sufficient to reject the applicant's credibility. In this case, the RPD considered that since the applicant's account had been deemed not credible, her claim raised no such issues.
>
> [33] The Guidelines are used to ensure that gender-based claims are heard with sensitivity. In this case, the RPD followed the "spirit" of the Guidelines by means of active listening, despite the fact that this particular case does not even lead to the application of the Guidelines primarily because the RPD considered Ms. Munoz and the basis of her evidence to be not credible.
>
> [34] Finally, it is important to reiterate that, in the caselaw, it has consistently been held that the RPD is not bound by the Guidelines in cases where they do not apply (*Ayub*, supra, at paragraph 19; *Balasingam*, supra).
>
> [35] Consequently, failure to consider the Guidelines on gender-based persecution does not in itself give rise to a reversible error where there is a sufficient basis for the tribunal's conclusion, as in this case (*Sy v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 379, [2005] F.C.J. No. 462 (QL), at paragraph 18.)

[30] Finally, contrarily to what Ms. Semextant implies, since no evidence had been provided to the contrary and because her story was not believed by the Board, it adduced no evidence of a personal risk should she return to Haïti.

VI. Conclusion

[31] Ms. Semextant has not made her case; therefore, the application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS that

1. The application for judicial review be dismissed;

2. No serious question of general importance be certified.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2266-08
STYLE OF CAUSE:	SABINE SEMEXTANT v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Montreal (Quebec)
DATE OF HEARING:	December 18, 2008
REASONS FOR JUDGMENT AND JUDGMENT:	SHORE J.
DATED:	January 12, 2009

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