

Federal Court



Cour fédérale

**Date: 20100804**

**Docket: IMM-6318-09**

**Citation: 2010 FC 801**

**Ottawa, Ontario, August 4, 2010**

**PRESENT: The Honourable Madam Justice Bédard**

**BETWEEN:**

**ROXANNE GAYMES**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Defendant**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application for judicial review, submitted pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the “Act”), of a decision by the Refugee Protection Division of the Immigration and Refugee Board (the “Board”), dated November 23, 2009, where it determined that the Applicant was neither a Convention refugee within the meaning of section 96 of the *Act* nor a person in need of protection as defined by section 97 of the *Act*.

## **BACKGROUND**

[2] The Applicant is a 36 year-old citizen of St-Vincent and Grenadines (St-Vincent). The Applicant has faced difficult challenges in the course of her life. She was sexually abused by her father until the age of 10. Her situation was publicly known and she was humiliated by people in her community. She came to Canada in 1996 to visit a friend and remained illegally in Canada until 2003, when she decided to return to St-Vincent because she started suffering from a mental illness that took the form of periods of blackouts. Before leaving Canada, she was diagnosed with depression and post-traumatic stress disorder. Back in St-Vincent, she was diagnosed with a form of schizophrenia. More recently, she was diagnosed with Dissociative Identity Disorder (DID).

[3] The Applicant claims that in December 2006, during a period of blackout, she was raped by two men following which she was raped by the police officer who was supposed to help her. The Applicant further alleges that this police officer called her at home a few days following the incident to ensure that she would “keep her mouth shut”. The Applicant stated that she did not complain to the authorities because she feared that they would not believe her and would choose to protect their colleague. She stated that she decided that it would be better for her to leave the country and on March 10, 2008, she fled to Canada. She claimed refugee protection on May 9, 2008.

[4] The Applicant claims that her life would be in danger and that she would be exposed to a risk of serious harm amounting to persecution at the hands of the police officer who raped her in December 2006 should she return to St-Vincent.

### **THE DECISION UNDER REVIEW**

[5] The Board denied the Applicant's claim of protection for two reasons. First, the Board concluded that the Applicant had not provided credible and trustworthy evidence about the central element of her claim, namely the rape by the police officer. Second, the Board concluded that the Applicant had not rebutted the presumption of availability of state protection.

### **ISSUES**

[6] With respect to the credibility findings, the Applicant contends essentially that the Board erred in its assessment of the Applicant's credibility because it did not take into consideration the medical evidence concerning the Applicant's mental health condition in the assessment of her behaviour and her credibility. The Applicant also contends that the Board did not follow the *Chairperson's Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution*.

[7] The Applicant also contends that the Board erred in its assessment of the evidence regarding the availability of state protection and, that if it had considered the medical evidence in assessing the subjective fear of the Applicant and the situation of women in

St-Vincent in assessing her objective fear, it would have concluded that the Applicant had rebutted the presumption that state protection is available.

## **THE STANDARD OF REVIEW**

[8] It is trite law that in matters of assessment of evidence and assessment of credibility, the applicable standard of review is that of reasonableness (*Dunsmuir v. New-Brunswick*, 2008 SCC 9; *Ndam v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 513; *Martinez v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 798. “Credibility determinations, which lie within “the heartland of the discretion of triers of fact”, are entitled to considerable deference upon judicial review and cannot be overturned unless they are perverse, capricious or made without regard to the evidence.” (*Siad v. Canada (Secretary of state) (C.A.)*, [1997] 1 F.C. 608 at paragraph 24. The Court must not substitute its own view even if an alternative outcome appears preferable, nor is it its function to reweigh the evidence. The Court’s role when reviewing a decision under the standard of reasonableness has been defined in *Dunsmuir*, above, at paragraph 47:

A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[9] It is also well settled that questions relating to the adequacy of state protection are questions of mixed fact and law and that the applicable standard is that of reasonableness (*Hinzman v. Minister of Citizenship and Immigration*, 2007 FCA 171).

## ANALYSIS

### *Did the Board err in its assessment of the Applicant's credibility?*

[10] The Board concluded that the Applicant had not provided credible and trustworthy evidence about the central element of her claim, that is, the December 2006 rape. The Board's conclusion was based on a negative credibility finding. At the hearing, counsel for the Applicant argued that the Board did not seem to have questioned the actual incident itself, namely the rape, and that the Board's concerns were more about the Applicant's behaviour after the incident. I disagree. I find it is quite clear, when reading the decision, that the Board did not believe that the alleged rape by a police officer occurred. The Board made the following comments regarding the December 2006 incident:

[9] The panel determines that as the claimant has not provided credible and trustworthy evidence, she is not a "Convention refugee", nor is she a "person in need of protection" for a risk to life or a risk of cruel and unusual treatment or punishment or danger of torture.

...

[11] The claimant alleges that if she returned to Saint Vincent, she would face a risk to her life and serious harm amounting to persecution at the hands of a local police officer who would have participated in a rape of the claimant in December of 2006. However, the panel has serious problems with respect to this particular incident which affects the credibility and believability of the claimant's allegations. [emphasis added]

...

[13] However, the panel has serious doubts with respect to the credibility of the central allegation, that being the rape of December 2006.

[11] The Board based its negative credibility findings on two main elements.

[12] First, the Board took issue with the fact that the Applicant never mentioned the rape incident in the background information that she provided with her refugee claim application and during her interview with the immigration officer. On both occasions, the Applicant indicated that her fear was related to discrimination and harassment from people in the community in relation to the abuse she suffered as a child. The Board did not accept the Applicant's explanation when she stated that she had not mentioned the rape incident at the beginning because "it was very fresh and painful and she did not want to speak out about it." The Board rejected that explanation because the incident was supposed to be the central allegation of the refugee claim and because 18 months had elapsed since the alleged incident had occurred when she made her refugee claim.

[13] Second, the Board concluded that the Applicant's behaviour, after the alleged rape, was not consistent with that of a person fleeing persecution or harm. The Board based its finding on the fact that the Applicant waited 15 months after the alleged incident before leaving St-Vincent and that, during that interval, she resided at the same place and took computer courses. The Board also noted that the Applicant waited another two months after her arrival in Canada before claiming refugee status. The Board found that the Applicant gave vague evidence when confronted with those delays. Regarding the delay between the alleged incident and her departure for Canada, the Applicant stated that she was waiting to save the money she needed to buy her plane ticket to come to Canada. The Board noted that the Applicant had a valid passport and could have left her country for a closer destination. Regarding the delay in filing her refugee claim, the Applicant stated that she was unaware of

the refugee process. The Board did not accept this explanation given that the Applicant had resided in Canada for a period of close to 7 years during her first stay.

[14] The Applicant contends that the Board erred in its assessment of her behaviour, which was central to the Board's negative credibility findings, because it ignored the medical evidence concerning her mental health and more specifically, Dr. J.A. O'Neil's medical report.

[15] In his report, Dr. O'Neil confirmed the DID diagnosis. No mention is made about the rape incident, but Dr. O'Neil made the following comments about the impact of the Applicant's condition on her ability to testify and recount events:

With respect to memory and testifying, Ms Gaymes' memory is enormously dependent on her states of mind at the time she is being questioned, and this will depend a great deal on context. Her memory in the trusted safety of her therapist's office would be expected to be very different from her memory, or even ability to speak, in more threatening surroundings. In people with DID, all states of mind may be considered as altered states of consciousness, as even the so-called 'host' state (i.e. 35-year old 'Roxanne'), the 'Apparently Normal Personality', has discontinuous access to her life history and to her identity over time. She would be expected to have especially meagre access to memories of traumatic events, as this is generally the purview of posttraumatic self states. When in a more 'obvious' altered state, i.e. 'Mia', then she would likely claim not to be Roxanne, nor to being 35 years old. And would be expected to have access only to those memories of certain nontraumatic events, as people with IDI often have nontraumatic alters (such as Cass-19) specialized in certain tasks of everyday life, e.g. applying for jobs, filling out forms, speaking a foreign language, interacting with psychiatrist, lawyers, judges, etc.

[16] The Applicant insists that the Board made no mention of that report in its decision despite the fact that it was central to the assessment of the Applicant's credibility. She

argues that her mental health condition had a bearing on her behaviour and that her credibility could not be adequately assessed without consideration of her medical condition. She further alleges that her medical condition could explain why she waited 15 months before coming to Canada and why she did not talk about the rape at the point of entry. She contends that by not taking into account that highly relevant evidence, the Board made an unreasonable credibility finding that was not supported by the evidence. The Applicant cites decisions where the Court held that ignoring or not properly addressing medical evidence showing a causal relationship between a person's medical condition of her or his ability to testify or on his or her credibility constitutes a reviewable error (*Lahpai v. Canada (Minister of Citizenship)*, [2001] F.C.J. No. 232; *Pulido v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 209; *Hassan v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 1359;

[17] While I agree with the principles enunciated in those decisions, each case is to be assessed upon its own set of circumstances. In this case, I disagree with the Applicant's assertions.

[18] First, I agree that the Board did not mention specifically Dr. O'Neil's report in its decision. However, in the circumstances of this particular case, I am of the view that this omission does not mean that the Board ignored the Applicant's medical condition and the report evidencing that condition. Second, it is evident, in view of the transcript of the hearing that the Board member was fully aware and sensitive to the Applicant's condition



and the challenges she had faced. The Board member even had a discussion before the hearing with the Applicant's counsel regarding the Applicant's condition. Second, even if there is no specific mention of Dr. O'Neil's report, the Board indicated that it considered the Applicant's medical condition. The Board wrote the following:

[12] Firstly, the panel does take into consideration the psychological evidence concerning the claimant, especially her past history as a victim of sexual abuse. The panel was provided with her medical records during her first stay in Canada in 2003. Further the panel also has documentation attesting to the claimant's medical condition in her country. The panel has also taken into consideration, in addition the current evidence, the Chairperson's guidelines on Women Refugee Claimants Fearing Gender-Related Persecution.[emphasis added]

[13] However, the panel has serious doubts with respect to the credibility of the central allegation that being the rape of December 2006.

[19] What one can understand from reading this passage is that the Board considered the Applicant's medical condition but that did not lead it to conclude that it had an effect on the Applicant's credibility with respect to the rape incident.

[20] Moreover, when mentioning the "current evidence", the Board was most probably referring to Dr. O'Neil's report and the therapist's report since those reports are the only current medical pieces of evidence that were offered to the Board. In any event, the Board is presumed to have considered all the evidence before it and it does not need to mention every piece of evidence in its reasons. (*Florea v. Canada*, [1993] F.C.J. No. 598 (F.C.A.)). More recently, the Federal Court of Appeal reiterated that the Board's decision must be viewed as a whole:

[7] The Applicant argues that the Board's decision was unreasonable because it failed to mention certain evidence supportive of her claim in its reasons. While a decision will be unreasonable if the Board ignores relevant evidence (*Gould v. Attorney General of Canada*, 2004 FCA 246), it is clear that it does not have to mention and discuss every piece of evidence placed before it in its decision (*Dossa v. Canada (Pension Appeals Board)*, 2005 FCA 387). Viewing the record as a whole, we find that the Board did not err in this regard, as it engaged in a full and meaningful review of the material before it. Reweighing the evidence is not the province of this Court. (*Litke v. Canada (Human and Resources and Social Development)*, 2008 FCA 366.

[21] While I agree that in certain circumstances, a failure to mention a piece of evidence that is central to the issue and that points to a different conclusion from the Board's finding may constitute an error (*Cepeda-Gutierrez v. Canada*, [1998] F.C.J. No 1425; *Hinzman v. Minister of Citizenship and Immigration*, 2007 FCA 171), I am of the view that, in this case, the absence of mention of Dr. O'Neil's report is not fatal because it was not central to the Board's determination.

[22] In his report, Dr. O'Neil's confirms the diagnosis of DID and the possible impact thereof on the Applicant's memory and behaviour when she swings from one personality to another. Counsel for the Applicant argued that Dr. O'Neil's report should have been considered because the Applicant's mental condition may explain why she waited 15 months after the incident before leaving St-Vincent, why she did not mention the incident when she filled out her refugee claim documents and why she did not mention it when interviewed by the immigration officer.

[23] The Applicant's submissions are not supported by the evidence, be it the medical evidence or the testimony that the Applicant gave at the hearing.

[24] I have read the transcripts of the hearing. The Applicant's testimony was coherent and she did not have any memory problems. Moreover, the Applicant never relied on her medical condition to explain why she waited 15 months before leaving St-Vincent, why she waited two months after her arrival in Canada before claiming asylum and why she did not mention the incident at the point of entry. She gave straightforward explanations: she waited 15 months before leaving because that is the time that it took her to save the money she needed to buy a plane ticket; she did not mention the rape at the point of entry because "she was not ready to talk about it because it was still fresh in her memory"; and she waited two months before claiming asylum because she did not know about the refugee process. The Board considered the Applicant's evidence, including her medical condition, and concluded that the alleged incident had not been proven.

[25] Therefore, I conclude that the Board's findings are supported by the evidence and that they are reasonable; its reasoning is clear, the conclusions are well explained and fall within "the range of possible outcomes which are defensible in respect of the facts and the law" (*Dunsmuir*, above, at paragraph 47). I see no reason for the Court to intervene. Moreover, I find that it was not unreasonable for the Board to consider the discrepancy between the initial narrative of the Applicant and the version that she later provided in her Personal Information Form and at the hearing, since the rape is supposed to constitute the

core of her claim (*Ratnavelu v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 938; *Moscol v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 657; *Ramay v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 954; *Chavez v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 10. I also find that it was not unreasonable for the Board to conclude that the Applicant's remaining in St-Vincent for 15 months after the alleged incident was inconsistent with a fear of harm or persecution (*Caballero v. Canada (Minister of Employment and Immigration)(F.C.A.)*, [1993] F.C.J. No 483; *Khan v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 403; *Nyachieo v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 869. In substance, the Applicant is asking the Court to re-assess and re-weigh the evidence presented before the Board. That is not the Court's role.

[26] Given that the issue of credibility is determinative, there is no need for me to address the issue of the availability of state protection (*Houshan v. Canada (Citizenship and Immigration)*, 2010 FC 650; *Carillo v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94.

[27] No question was proposed for certification under paragraph 74(d) of the *Act*, and no such question will be certified.

**JUDGMENT****THIS COURT ORDERS AS FOLLOWS:**

The application for judicial review is dismissed.

“Marie-Josée Bédard”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-6318-09

**STYLE OF CAUSE:** ROXANNE GAYMES v. MCI

**PLACE OF HEARING:** Montreal

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