

Federal Court



Cour fédérale

Date: 20100916

Docket: IMM-416-10

Citation: 2010 FC 928

Ottawa, Ontario, September 16, 2010

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

BETTINA TING TING OOI

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Refugee Protection Division of the Immigration and Refugee Board of Canada (the Board) dismissed the applicant's asylum claim based on her alleged homosexuality. The Board found the applicant, a female citizen of Malaysia, not credible; in any event, the latter failed to provide clear and convincing evidence to rebut the presumption of state protection.

[2] The legality of the impugned decision is challenged by the applicant on the grounds that the Board acted capriciously and arbitrarily:

- (a) in failing to take account of the fact that the applicant was a minor before 2004 and should not have been asked about the immigration file or the whereabouts of her mother;
- (b) in ignoring the UNHCR and the IRB Guidelines with respect to gender related claims; and
- (c) in making a selective reading of the documentary evidence with respect to the treatment reserved for homosexuals in Malaysia.

Negative Credibility Finding

[3] First, having carefully read the impugned decision in light of the evidence on record, there is no reason to disturb the negative credibility finding made by the Board. This, in itself, constituted a sufficient basis to dismiss the applicant's asylum claim.

[4] It is not challenged that the applicant was 16 years old when she left Malaysia on January 31, 2002, with her mother, brothers and sister (the family). They arrived in Vancouver as visitors with a certain Eiew Kooi Yeap who falsely identified himself as the applicant's father. Indeed, the family had already made a previous permanent residence application of which the applicant claimed to have no knowledge. The family lived in Vancouver for approximately six (6) months before moving to Calgary. According to her personal information form (PIF), it is during this period that the applicant discovered she was gay and met a girlfriend in Vancouver who she continued to date upon her return from Calgary.

[5] In April 2003, the applicant's mother married Mr. Chieu Min Lam who sponsored the family's application for permanent residency. However, after the wedding, the immigration authorities completely lost track of the family. Mr. Lam informed the authorities that he had not heard of the family since August 22, 2003 and he thought that his spouse and the children had returned to Malaysia. Mr. Lam officially withdrew from his application on December 24, 2003. Not only the whereabouts of the family during the following three (3) year period is unclear, but the timeline of the personal transformations that the applicant allegedly underwent during this period, and which constitute the basis for her claim, is unclear and inconsistent. In September 2006, the applicant applied to be recognized as a Convention refugee or a person requiring protection.

[6] It is arguable whether the applicant's lack of knowledge of the family immigration file could provide grounds to dismiss the applicant's asylum claim. The Board certainly had an interest to find out where the applicant was living during all these years, which raises the question of whether she, her mother and the rest of her family had stayed in Canada or returned to Malaysia after Mr. Lam cancelled his sponsorship application. It is only in September 2006 that the applicant alleges that her family rejected her because of her homosexuality, while in August 2004, her mother apparently paid for the applicant's trip from Vancouver to Montréal where she claims to have lived with another girlfriend. It can certainly be argued that these peripheral facts were relevant in ascertaining whether the applicant's story was true and why she had waited so long to make her asylum claim.

[7] That being said, apart from the lack of clarity with respect to the whereabouts of the family and the applicant, the Board questioned the truthfulness of key allegations made by the applicant

presented as evidence of her sexual orientation. The clear and unmistakable reasons given by the Board for not believing the applicant are not capricious or arbitrary.

[8] The applicant had previously stated that she first met her girlfriend in June 2003 in Vancouver, claiming to remember the date as it was close to her birthday. When confronted with her statement that she had brought this same girlfriend to her mother's wedding, which was in April 2003, the applicant corrected herself, stating that the meeting occurred in 2002, before her mother's wedding (Trial Transcript, pages 188-189). Furthermore, although apparently the applicant's family rejected her following the revelation that she was a lesbian, she continued to live with her family. She was unable to provide the exact address at which she lived during this time with her family. The applicant then reportedly lived in Montreal with a female friend from August 2004 to September 2006. However, the applicant provided no proof of residence or of how she supported herself during those two years.

[9] The conclusion of non-credibility is based on the evidence and constitutes a reasonable option despite the fact that the applicant continues to claim that she is gay. In the case at hand, the applicant provided inconsistent, hesitant or uncorroborated testimony on a number of key points in her case, such as her allegedly troubled relationship with her family stemming from her homosexuality and her place of residence and financial activities over a period of two years.

[10] Additionally, the Board was allowed to find that the applicant's behaviour was inconsistent with someone fearing for her life. This conclusion was based on her long delay in claiming refugee

protection and her failure to produce any written document from her immigration file. In the case at bar, the applicant spent over four (4) years in Canada before claiming refugee status. The sole explanation given by the applicant to not seek refugee status earlier is because she was not aware of the appropriate procedures for claiming that protection.

[11] Perhaps, an initial delay of one (1) year could be reasonable in the circumstances that the applicant has described, provided that we believe her: arriving new to a country and suddenly realizing that your sexual orientation is different from what your culture expects of you. However, delaying almost three years following an estrangement with one's only family in the new country is highly unusual. Given the circumstances, such a long delay could justify the conclusion that the applicant did not have a well-founded fear of persecution. The Board was also allowed to dismiss the applicant's explanation that she was unaware of the procedure to claim refugee status.

Guidelines on gender related claims

[12] I will now briefly deal with the second ground of attack made by the applicant, that the Board ignored both the UNHCR and the IRB Guidelines on gender related claims. This allegation is simply not supported upon reading the Board's assessment of the particular facts alleged by the applicant and its review of the documentary evidence dealing with homosexuals in Malaysia.

[13] The key issue is whether or not the Board's decision reflects the values that the Guidelines are intended to impress upon the decision maker. The Court is satisfied that it does in this case. The

Board may not have specifically mentioned that it was considering the Guidelines, but it is apparent that the Board had them in mind when conducting its inquiry into the situation of female homosexuals in Malaysia. The Board simply did not believe the applicant's story. Moreover, the documentary evidence with respect to the treatment of lesbians in Malaysia is sparse, nearly absent, and in examining the issue, the Board was allowed to dismiss the applicant's general allegations of fear of persecution which appear to be based on pure speculation.

Examination of the documentary evidence

[14] I am also satisfied that the Board has amply fulfilled its obligations of considering the documentary evidence submitted to it.

[15] The Board was not required to explicitly state in its decision which pieces of evidence it relied upon and what probative value it gave each examined document. The Board's analysis is short but it is thorough and hits all of the necessary points:

- The Board mentions the National Documentation Package on Malaysia, submitted as Exhibit A-1;
- Differences in the situation of male homosexuals v. female homosexuals are observed (no women were imprisoned for homosexuality);
- The participation of the openly lesbian Malaysian softball team in the 2002 Gay Games in Sydney, Australia, is noted;
- The vibrancy and visibility of the gay community in Kuala Lumpur is discussed. (The applicant had argued that Kuala Lumpur was violent and that one of her friends was attacked, but no evidence supporting these allegations was submitted); and
- Finally, it was noted that the National Documentation Package on Malaysia recorded that the Malaysian government harshly punishes anonymous and criminal violence against women.

[16] Therefore, the third ground of attack made by the applicant must be dismissed.

Conclusion

[17] The present application must fail. Overall, the impugned decision is reasonable. Despite the best efforts made by applicant's counsel to question the Board's rationale and findings, the decision to dismiss the claim on the grounds that the applicant is not credible, or subsidiarily that state protection is available for lesbians in Malaysia, falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

[18] No question of general importance is raised in this case.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review be dismissed and no question is certified.

“Luc Martineau”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-416-10

STYLE OF CAUSE: **BETTINA TING TING OOI**
and
THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: September 8, 2010

REASONS FOR JUDGMENT: MARTINEAU J.

DATED: September 16, 2010

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