

Federal Court



Cour fédérale

Date: 20110411

Docket: IMM-4432-10

Citation: 2011 FC 444

Ottawa, Ontario, April 11, 2011

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

ALISON MICHELE EVANS

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (“IRPA”) of the decision made on June 16, 2010 by the Refugee Protection Division of the Immigration and Refugee Board, wherein it was determined that the applicant is not a Convention refugee or a person in need of protection, pursuant to sections 96 and 97 of the IRPA. For the reasons that follow, this application is allowed.

BACKGROUND:

[2] The applicant, a citizen of Guyana and Antigua, came to Canada on February 7, 2008 and filed for refugee status on February 14, 2008. She is 32 years old. Her claim for protection was based on domestic abuse at the hands of her ex-husband. Since the age of 16, the applicant reports having been physically, sexually and emotionally abused.

DECISION UNDER REVIEW:

[3] The Board found, on a balance of probabilities, that the applicant engaged in an “elaborate scheme of fabrication based on exaggerations and embellishments to bolster her claim for refugee status”. In reaching this finding, the Board noted that the applicant’s oral evidence regarding her reason for divorce was inconsistent with her divorce decree; that she did not submit a police report to support her claim; that she did not indicate in her personal information form (“PIF”) that her ex-husband was arrested; and that the letter submitted from the applicant’s friend used to support her claim was not corroborative evidence. The Board also rejected the applicant’s testimony that she was forced to stay with her husband for financial support and found that she embellished the claim that her ex-husband did not allow her to have friends over or sit outside.

ISSUES:

[4] The issues are as follows:

- a. Did the Board take into account the *Gender Guidelines* where required to do so?
- b. Did the Board err by making adverse findings of credibility in a perverse and capricious manner?
- c. As a whole, was the Board’s decision reasonable?

RELEVANT STATUTORY PROVISIONS

[5] Section 96 of the *Act* outlines the definition of a Convention refugee:

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d’être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n’a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

[6] Section 97 of the *Act* describes what is meant by “person in need of protection”:

97. (1) A person in need of protection is a person in Canada

97. (1) A qualité de personne à protéger la personne qui se

whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,	(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,	(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as	(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait

being in need of protection is also a person in need of protection.

partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

ANALYSIS

Standard of Review

[7] The reasonableness standard applies to credibility findings made by the Board: *Aguirre v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 571. Because deference is owed to the trier of fact, the Court must not intervene unless the Board's determination does not fall within the range of possible, acceptable outcomes which are defensible in respect of the facts and law: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 47; *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, 304 D.L.R. (4th) at paras. 52-62.

[8] In cases where a refugee claimant has alleged various forms of physical, sexual and psychological abuse, this Court must review the Board's decision with an eye to the *Guidelines issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act: Women Refugee Claimants Fearing Gender-Related Persecution* ("Gender Guidelines"). In such instances the *Gender Guidelines* "become subsumed in the standard of review of reasonableness as applied to credibility findings": *Hernandez v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 106 at para. 13; *Higbogun v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 445 at para. 22.

- (i) Did the Board take into account the *Gender Guidelines* where required to do so?

[9] The *Gender Guidelines* acknowledge the difficulty for women in relaying certain traumas to their community or to their state. Sexual abuse is one of those traumas. At C.2 of the *Gender Guidelines* it says:

When considering whether it is objectively unreasonable for the claimant not to have sought the protection of the state, the decision-maker should consider, among other relevant factors, the social, cultural, religious, and economic context in which the claimant finds herself. If, for example, a woman has suffered gender-related persecution in the form of rape, she may be ostracized from her community for seeking protection from the state. Decision-makers should consider this type of information when determining if the claimant should reasonably have sought state protection.

[10] The *Gender Guidelines* also assist in ensuring that social, religious and cultural norms are recognized and do not interfere with a correct assessment of credibility: *Diallo v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1450 at para. 33.

[11] Here, a consideration of the religious and cultural norms of the Christian Guyanese community is important for properly assessing the applicant's evidence. In both her PIF as well as in oral testimony, the applicant explained that she did not disclose the fact that she was raped because she was embarrassed and ashamed, and because she felt her community would not accept her, in large part for religious reasons:

MEMBER: Now, your husband, according to your PIF, from when you were 16 he has been taking advantage of you. Just tell me in your own words why didn't you go to the police.

CLAIMANT: Cause I'm a Christian, sir, and in my family it's all about - - the way my Mom always stressed that the way we've been brought up. So it's like a shame on my family. And I'm scared that nothing is going to happen but then my character is going to be damaged, because this is what like people in the village like they degrade you and things happen instead of help you; they try to think it's well, you wanted it or it's your fault. So I never said anything to my parents or to nobody because I was embarrassed.

[12] More than not being able to tell anyone, the applicant felt as though she could not seek support from anyone in her community. In fact, her family encouraged her to live with Mr. Evans because he was the father of her child. She was 16 at the time. He provided food, shelter and financial resources to the applicant, until she fled. This was part of the reason why she commenced a relationship with Mr. Evans, despite the rape:

MEMBER: Now let's fast forward to a point where when did he first - - apart from the first time when he raped you - - okay, because you just testified that he became your boyfriend.

CLAIMANT: Well, I have the baby for him. So it's my baby Daddy. So I don't have anywhere to go. I don't have nobody to help me support the baby. So he told me he's going to pay for the room of his friend and he comes sometimes. [...].

[13] Despite this testimony, the Board came to the conclusion that the applicant was not financially dependent on Mr. Evans and rejected the applicant's claim that she left him but had to return to him due to a lack of financial means. The Board based this finding on the fact that the applicant worked from January 2006 to June 2007 and so "had some assistance", at least for a period of time. Although the applicant may have enjoyed a certain level of financial autonomy during the year and half in which she worked, it does not follow that she was not dependent on her ex-husband throughout the duration of their 12-year relationship. The Board failed to consider that the applicant was a vulnerable minor when she began relying on Mr. Evans for financial support and that she appeared to have done so because she could not rely upon her family, due to their disapproval of pre-marital sex and pregnancy. In this way, the *Gender Guidelines* were not applied by the Board to ensure adequate consideration of social, religious and cultural norms.

[14] The Board also placed little probative value on a personal letter from a friend of the applicant, Ms. Greene. This document gave some weight to the applicant's claim. Although a personal letter may have little value and may, in many cases, be self-serving, in situations involving alleged domestic abuse, the *Gender Guidelines* instruct that "where the claimant cannot rely on the more standard or typical forms of evidence as "clear and convincing proof" of failure of state protection, reference may need to be made to alternative forms of evidence to meet the "clear and convincing" test." The applicant testified that she could not go to the police due to the treatment she would receive from her community and so the letter should have been considered in light of this evidence. In failing to do so, the Board also failed to properly apply the *Gender Guidelines*.

[15] So, while the Board did state that the *Gender Guidelines* were considered, the analysis given in this decision with respect to the applicant's financial dependence and the personal letter suggests they were not applied in a meaningful way. This Court has held that it is not sufficient for a Board to simply say that the *Gender Guidelines* were applied and then fail to demonstrate how they were applied: *Yoon v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 1017 at para. 5; *Myle v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 871.

- (ii) Did the Board err by making adverse findings of credibility in a perverse and capricious manner?

[16] When assessing refugee claims where the alleged ground of persecution is domestic abuse and where claimants come from abusive and controlling relationships, the Board must be mindful of the applicant's background when making credibility findings. See: *Henry v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1060.

[17] At paragraph 18 of its decision, the Board made the following implausibility finding, impugning the applicant's credibility:

The panel also looked at the claimant's testimony that she was not allowed to have friends and even sit outside of the house because that meant to her husband that she was looking for other men to be exaggerations and embellishments. For example, this is the same man who would force her to have sex with other men while he watches. As such the panel finds that the claimant's husband was hardly the kind of person to confine the claimant because of jealousy.

[18] This reasoning fails to appreciate the psychological dimensions of abuse and the many forms in which abuse manifests in an abuser. It wrongly assumes that someone who is jealous or controlling would not subject another to demeaning sexual acts. Forcing the applicant to perform sex acts with his friends and business associates was another way for Mr. Evans to assert control of her. Jealousy and controlling behaviour can coexist. Both are rooted in control and a lack of regard for the individual and her body. The logic of the Board on this issue demonstrates both an insensitivity to the applicant's situation and a lack of awareness to the broader issue of domestic abuse and sexual assault. As such, this finding of credibility was made in a perverse and capricious manner.

(iii) As a whole, was the Board's decision reasonable?

[19] Not all of the Board's findings were unreasonable. The applicant gave evidence that she was severely assaulted by her ex-husband, passed out and was taken to the police by her neighbour where she had to file a police report in order to obtain the stitches she needed from the hospital. However, the applicant did not produce a police report or a medical report, even when given extra

time by the Board to do so. The Board was thus justified in drawing an adverse credibility finding. Failure to provide corroborating documentation can be considered if the Board does not accept an applicant's explanation for failing to produce certain evidence: *Amarapala v. Canada (Minister of Citizenship and Immigration.)*, 2004 FC 12 at paras. 9-12.

[20] The applicant also testified that Mr. Evans was eventually arrested and kept in jail for two days. In her PIF, she omitted such information. Although not every omission from a PIF will have a negative impact on an applicant's credibility (*Jones v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 405, 54 Imm. L.R. (3d) 128 at para. 22; *K.I.N. v. Canada (M.C.I.)*, 2005 FC 282 at para. 23), in this instance, the arrest was an important piece of information which the applicant ought to have included. It was therefore open to the Board to make a negative credibility finding based on the inconsistency between the applicant's PIF and her oral testimony: *Sun v. Canada (M.C.I.)*, 2008 FC 1255 at para. 5; *Basseghi v. Canada (M.C.I.)*, [1994] F.C.J. No. 1867 (QL) at para. 33.

[21] Finally, the Board's negative credibility finding regarding the divorce decree cannot be held to be unreasonable. At the hearing, the applicant testified that the reason for her divorce was abuse while the decree produced in evidence stated that it was for malicious desertion. When asked about this contradiction, the applicant said that her ex-husband had other girlfriends and children on the side. It is therefore reasonable that the Board made an implausibility finding regarding what was said by the applicant in her testimony and what was written in an official document.

[22] Despite these conclusions, on balance, the errors made with respect to applying the *Gender Guidelines* and the flawed reasoning regarding the abuse alleged by the applicant, require that this decision be quashed and remitted to a differently constituted panel for redetermination.

[23] No serious questions of general importance were proposed for certification.

JUDGMENT

IT IS THE JUDGMENT OF THIS COURT that the application is granted, the decision of the Refugee Protection Division dated June 16, 2010 is set aside and the matter is remitted to a differently constituted panel for redetermination. No questions are certified.

“Richard G. Mosley”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4432

STYLE OF CAUSE: ALISON MICHELE EVANS

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: March 3, 2011

**REASONS FOR JUDGMENT
AND JUDGMENT:** MOSLEY J.

DATED: April 11, 2011

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