Federal Court  Cour fédérale

Date: 20110729

Docket: IMM-244-11

Citation: 2011 FC 933

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, July 29, 2011

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

DANIEL GRATINI SANTANA and YUDELKA MARGARI RAMIREZ HENRIQUEZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

A. INTRODUCTION

[1] The applicants are seeking judicial review of the decision by the Refugee Protection Division of the Immigration and Refugee Board (Board) dated December 6, 2010, in accordance

with paragraph 72(2)(*d*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act). In that decision, the Board rejected the applicants' refugee claim and found that they are not refugees or persons in need of protection under sections 96 and 97 of the Act.

B. THE FACTS

[2] The applicants are spouses and citizens of the Dominican Republic. Their conjugal and marital relationship began in March 2006.

[3] The female applicant's father persecuted them because the male applicant is mulatto and the female applicant is white. He apparently put both psychological and physical pressure on the applicants to try to end their relationship.

[4] On June 24, 2006, the female applicant's father convinced one of his employees, a man named Pedro, to attack the male applicant. The male applicant was then lacerated in his right kidney and shot in the hand. Hospitalized, he filed a complaint with police upon his release. The police received his complaint but did nothing because the female applicant's father has a great deal of financial influence in the city.

[5] The female applicant then became pregnant. When her father found out, he forced her to take medication so that she would abort. She purportedly had an emergency caesarean in her fifth month of pregnancy in May 2007.

[6] The applicants left the Dominican Republic for Antigua in August 2007. They left for Canada in September, when they found out that they had been discovered by the female applicant's father. They arrived in Canada on September 8, 2007.

[7] On July 15, 2008, the female applicant gave birth to a girl, a Canadian citizen by birth in the country.

C. BOARD'S DECISION

[8] The Board did not find the applicants credible. Consequently, it did not find that they are Convention refugees or persons in need of protection. When questioned by the Board, the male applicant could not explain what the female applicant's father does for a living. Furthermore, the Board noted that his account of the facts surrounding his attack and hospitalization varied. The male applicant could not explain why there are two contradictory versions of the attack by Pedro. The Board noted discrepancies between what was indicated at the hearing and what is stated in the police report. The male applicant's Personal Information Form fails to mention his alleged follow-up with police to inquire about news on his complaint. Furthermore, the Board found that the male applicant's testimony on his employment history was evasive and that he contradicted himself.

[9] The Board did not attach any probative value to the police report produced by the male applicant because it contains no identity number, complaint number, file number or signature and also because it fails to mention the date or the location of the attack.

[10] In its decision, the Board makes no mention of the medical report describing the male applicant's injuries as a result of the attack.

[11] The Board also found that the female applicant is not credible because her testimony fluctuated with respect to the circumstances surrounding her pregnancy and abortion. The Board also rejected the statement written by the female applicant's mother and the medical report because they differ.

[12] The Board found that the applicants did not establish the essential elements that would enable it to allow their refugee claim.

D. APPLICABLE LAW

Immigration and Refugee Protection Act, S.C. 2001, c. 27:

Convention refugee	Définition de « réfugié »
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,	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*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of	*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

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.

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.

Person in need of protection

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

(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(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,

Personne à protéger

97. (1) A qualité de personne à protéger la personne qui se 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) 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) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(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.
Person in need of protection	Personne à protéger
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

E. ISSUES AND STANDARD OF REVIEW

[13] There are three issues in this application:

a) Are the findings with respect to the applicants' credibility reasonable?

b) Did the Board properly consider the documentary evidence submitted by the applicants?

c) Did the Board properly apply the Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution (Guidelines)?

[14] The standard of review applicable to the three issues raised in this application for judicial review is reasonableness (*Kar v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 143 at paragraph 31; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraph 53 (*Dunsmuir*)).

[15] The Court must therefore examine the justification, transparency and intelligibility of the decision and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at paragraph 47).

F. ANALYSIS

a) Are the findings with respect to the applicants' credibility reasonable?

Position of the applicants

[16] The applicants contend that the Board asked unreasonable questions about the facts they allege. The Board's finding on their credibility therefore becomes arbitrary, even capricious. According to them, the Board should have contacted the female applicant's father if it wanted to know what he does for a living. Furthermore, it should have made inquiries of the female applicant's mother if it wanted to know why she wrote curettage instead of caesarean in her sworn statement.

[17] In their reply, the applicants add that the circumstances surrounding their situation are not normal. They therefore cannot confirm what the female applicant's father does for a living. The Board was unreasonable to doubt their credibility because they did not know what the female applicant's father does for a living.

[18] The applicants also argue that credibility and implausibility findings must be drawn clearly and precisely. In their case, they are erroneous because they are deficient and vague. The applicants cite two decisions to support this: *Isakova v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 149 and *Valtchev v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776, 208 F.T.R. 267.

[19] In their reply, the applicants also claim that the Board should have verified in what context the word "curettage" is used in the Dominican Republic before drawing a negative inference from it with respect to their credibility. The applicants maintain that the Board cannot penalize them because it did not make an effort to research this [TRANSLATION] "crucial" point. The applicants also claim that the Board disregarded the submissions by their counsel on the use of the word "curettage", and that even the Board's interpreter did not know how to translate the word "curettage", which was used in a piece of documentary evidence submitted before the Board.

[20] The applicants also note that the male applicant's employment is not directly related to their refugee claim. It is unreasonable for the Board to use the male applicant's testimony on this point to determine that he is not credible.

Position of the respondent

[21] The respondent submits that the applicants are now presenting new explanations that were not before the Board.

[22] The respondent claims that it is normal for the applicants to know what the female applicant's father, their persecutor, does for a living. Because the applicants must establish the merits of their claim, the Board may ask such a question. The respondent cites several decisions in support of this, namely *Gill v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1498, 148 A.C.W.S. (3d) 297 at paragraph 25, and *Samseen v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 542, 148 A.C.W.S. (3d) 780 at paragraph 14.

[23] The respondent notes that the female applicant stated in her testimony that she underwent a medical procedure when she was 3 or 4 weeks pregnant. The Board was able to therefore reject her explanation because she contradicted her own medical report.

[24] In his supplementary memorandum, the respondent states that the applicants never complained about the quality of the interpretation at the hearing. They cannot now complain of a breach of the duty of procedural fairness. The respondent cites the decision by the Federal Court of Appeal in *Geza v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 124, 267 D.L.R. (4th) 54, which specifies the following, at paragraph 66: "Parties are not normally able to complain of a breach of the duty of procedural fairness by an administrative tribunal if they did not raise it at the earliest reasonable moment." Furthermore, the respondent questions why the female applicant

used two different terms to describe her surgical procedure if she does not know the meaning of the terms used.

[25] In reply to the applicants' argument that the Board should have done research to clarify the use of the word "curettage" in the Dominican Republic, the respondent claims that the Board was not required to do so. The respondent cites *El Jarjouhi v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 466, 48 A.C.W.S. (3d) 790, 1994 CarswellNat 2253, which specifies that applicants cannot count on the Board to make their case.

[26] The respondent claims that the reasons stated in the Board's decision in finding that the applicants lack credibility are clear, precise and well articulated. According to him, the applicants' allegations were unproven. The applicants are not credible because they contradict each other. The respondent cites *Hossain v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 160, 102 A.C.W.S. (3d) 1133 at paragraph 6, and *Tcheremnykh v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1310, 99 A.C.W.S. (3d) 306 at paragraph 9, which state that, in the presence of contradictory evidence and implausible explanations, the Board can attach no probative value to certain pieces of evidence and determine a lack of credibility.

[27] The respondent contends that the Board may doubt the male applicant's account on his follow-up with police because those statements were omitted in his Personal Information Form. *Hammoud v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 251, 1999 CarswellNat 970, supports this finding.

[28] According to the respondent, even if the male applicant's employment was not at issue in his refugee claim, the Board was still entitled to consider the quality of his testimony on this point. Given the other shortcomings in the applicants' record, it was reasonable for the Board to consider this testimony evasive and contradictory and to determine that the applicants lack credibility (*Qasem v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1182, 118 A.C.W.S. (3d) 705).

Analysis

[29] The Board must make a judgment and assess the true value of the testimony and other evidence submitted before it in support of a refugee claim under the Act. In this case, the Board based its finding that the applicants lack credibility on several inconsistencies and implausibilities in their testimony.

[30] The applicants are dissecting and analyzing in isolation each of the implausibilities noted and criticisms made in the Board's decision. However, the Board did not base its decision with respect to the applicants' credibility on each element taken in isolation, but rather on an overall finding. The applicants' arguments are relying on a false reading of the Board's decision. The Board was not concerned with what the female applicant's father does for a living, but rather with the fact that the male applicant could not explain why he did not know what his persecutor does for a living, even after living with the female applicant for several months. The same can be said for the use of the word "curettage". It is not the use of this word that led the Board to find the female applicant's

account implausible, but rather the contradictions in her testimony with respect to the timing and the nature of her procedure.

[31] The Court cannot agree with the applicants' argument that there was a breach of the principles of procedural fairness because their counsel did not have the opportunity to explain why she used the word "curettage". The applicants were represented by counsel for the entire hearing, even if it was by two different counsel. The applicants chose to change counsel after the first day and before counsel could explain her choice of words. The Board had nothing to do with that situation.

[32] The reasons for the decision are clear and the finding that the applicants lack credibility is reasonable under the circumstances.

b) Did the Board properly consider the documentary evidence submitted by the applicants?

Position of the applicants

[33] The applicants claim that the Board erred by rejecting the police report because it stated that the male applicant appeared without an identity card. In their reply, the applicants add that the Board should have informed them if it did not attach any probative value to the report. They state that this lack of notice by the Board prevented them from adequately responding to its questions.

[34] According to the applicants, the Board must consider all of the evidence, including the fact that abortions are illegal in the Dominican Republic, which may have explained the use of the word "caesarean" in the female applicant's medical report. In their reply, the applicants reiterate the same argument and add that this therefore explains the use of the word "curettage" because abortion, a practice that is apparently illegal, is not to be mentioned.

[35] The applicants also make another criticism of the Board. Its decision does not explain why it excluded the medical report written after the male applicant was attacked. According to the applicants, this error vitiates the Board's decision, which makes it unreasonable as a result. They also claim that the Board disregarded the evidence submitted on the violence and corruption in the Dominican Republic. In reply to the respondent, the applicants state that it is impossible for a doctor to determine the cause of injuries in a report. The Board is not entitled to exclude evidence on the ground that a testimony is not credible. They cite *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, 157 F.T.R. 35, 83 A.C.W.S. (3d) 264 (*Cepeda-Gutierrez*) in support of this.

Position of the respondent

[36] The respondent acknowledges the Board's error with respect to the police report, but claims that it does not change the reasonableness of the decision. The respondent also notes that the description of the attack in the male applicant's Personal Information Form contradicts the version in the police report. Under these circumstances, this report cannot be determinative with respect to

the refugee claim. The respondent also argues that the Board is a specialized tribunal that has some experience in assessing the documentary evidence before it.

[37] The respondent contends that the female applicant's credibility is tainted by the quality of her responses to the questions on the nature of her medical procedure rather than on the illegality of abortion in the Dominican Republic. The respondent adds that the applicants did not establish a connection between the objective documentary evidence and their personal situation, citing *Al-Shammari v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 364, 23 Imm. L.R. (3d) 66 at paragraph 24. In reply to the argument that the illegal nature of abortion explains the different terms used to describe the surgical procedure performed on the female applicant, the respondent maintains that it is speculation to claim that doctors would not use the word "abortion" because it is a crime.

[38] According to the respondent, the Board could have rejected the evidence on this point because the statement by the female applicant's mother specifies that it was a curettage, while the medical report talks about a caesarean.

[39] The respondent maintains that the Board considered the medical report submitted by the male applicant because it mentions it in its decision. According to him, the Board did not err by not directly addressing its probative value. He cites *Ahmad v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 471, 122 A.C.W.S. (3d) 533. The respondent also relies on *Singh v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 472, 2001 CarswellNat 971, which specifies that a finding of lack of credibility may extend to all documents emanating from a

testimony. The respondent also notes that the report does not mention the cause of the injuries. Again, he relies on *Singh v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 426, 2004 CarswellNat 4431, more specifically at paragraph 15, which states the following: “A medical certificate that reports certain injuries does not prove that they are the result of the persecution described by an applicant.”

Analysis

[40] A close reading of the Board’s decision convinces us that it should have considered all of the evidence submitted by the applicants. In our opinion, the Board was not entitled to disregard the police report as it was not contradicted by the male applicant’s statements in his Personal Information Form. On the contrary, the versions are the same except for some minor differences. Furthermore, the male applicant explained why his identity number does not appear. Under these circumstances, this decision by the Board seems unreasonable.

[41] The medical report and the contradictions between the various pieces of evidence on the nature of the female applicant’s surgical procedure allowed the Board to weigh their probative value. The same can be said for the medical report on the male applicant’s injuries (see *Cepeda-Gutierrez*, above). As these elements are at the very heart of the applicants’ submission, the Board had to clearly explain the probative value that it attached to them. These errors are sufficient for us to allow the application for judicial review.

c) Did the Board properly apply the Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution (Guidelines)?

Position of the applicants

[42] The applicants claim that the Board did not take the Guidelines into account when the female applicant testified before it. The Guidelines require that the Board be particularly sensitive to women who suffer from trauma as a result of a rape or an assault. In her affidavit, the female applicant stated that she had the impression that the Board became angry with her. The applicants also cite the Supreme Court of Canada decision in *R. v. Lavallée*, [1990] 1 S.C.R. 852, 108 N.R. 321, which describes the battered woman syndrome.

[43] The applicants submit that the Board lacked sensitivity with respect to the female applicant, particularly during her examination, in which it asked her the difference between a curettage and a caesarean, and what her mother meant when she talked about curettage. The applicants cite *Kaur v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1066, 163 A.C.W.S. (3d) 444 and submit that, contrary to its claims, the Board did not consider the Guidelines. Consequently, the Board's decision is unreasonable.

Position of the respondent

[44] In reply, the respondent maintains that, even if the female applicant experienced traumatic events, it was reasonable for the Board to expect her to explain her condition, the progress of her pregnancy and the nature of the surgery performed.

[45] The respondent notes that the applicants were represented by counsel before the Board. He cites *Arthur v. Canada (Attorney General)*, 2001 FCA 223, 111 A.C.W.S. (3d) 240 at paragraph 8, which states that an allegation that the Board was not impartial must be supported by "material evidence demonstrating conduct that derogates from the standard." The respondent criticizes the applicants for citing no specific example from the hearing transcript to support their statements.

[46] In his supplementary memorandum, the respondent also highlighted the fact that the applicants did not submit any concrete evidence to establish that the female applicant suffered from post-traumatic shock. The respondent also claims that the gaps and contradictions that taint the female applicant's credibility can be found not only in her testimony but also in the documentary evidence submitted before the Board. The respondent notes that the purpose of the Guidelines is not to rectify the deficiencies in the evidence of a refugee claimant.

Analysis

[47] The decisions cited by the applicants do not apply in this case. In fact, a close reading of the transcript of the female applicant's testimony does not reveal any hint of bias or unacceptable conduct by the Board. The Board can and must question seemingly contradictory evidence. That is its duty. There is no evidence that the Board lacked sensitivity in this case.

G. CONCLUSION

[48] Because the Board erred in assessing the documentary evidence submitted by the applicants, the application for judicial review is allowed.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that:

1. It allows the application for judicial review.

2. There is no question of general interest to certify.

"André F.J. Scott"
Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-244-11
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