Federal Court  Cour fédérale

Date: 20110822

Docket: IMM-7548-10

Citation: 2011 FC 1016

Ottawa, Ontario, August 22, 2011

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

SYEDA KAZMI KHATOON

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant seeks an order setting aside the November 18, 2010 decision of the Refugee Protection Division of the Immigration Refugee Board of Canada (the Board), which found the applicant to be neither a Convention refugee nor a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, 2001, c. 27 (*IRPA*). For the reasons that follow this application for judicial review is dismissed.

[2] The applicant is a citizen of Pakistan. She was married twice. Both of her husbands are deceased. Her first husband was a Sunni Muslim. She too was a Sunni Muslim. After her first husband's death she married a Shia Muslim and converted to Shi'ism. Before the Board she claimed persecution at the hands of her former in-laws; however, it was not clear if the persecution was at the hands of the Sunni in-laws or the Shia in-laws. Her Personal Information Form (PIF) narrative stated one husband's family was her persecutor and at her hearing she claimed it was the other husband's. Before the Board it was also unclear why these individuals were threatening her. The evidence before the Board was that it was the Sunni in-laws that demanded she return to Sunni'ism, and took an interest in the property that her second husband left her. At other times, the applicant testified it was the second husband's in-laws who threatened her and took interest in the property left to her by her first husband. When confronted with these inconsistencies at the hearing, the applicant was unable to provide a satisfactory explanation.

[3] The applicant also testified that her persecutors "pushed her around" on one occasion. On another occasion, the applicant claimed that while riding in a taxicab her persecutors chased her down on motorcycles and fired shots at her. She could not remember exact details of this alleged incident nor did she report it to the police. The Board did not believe that these events happened.

[4] Following the hearing the applicant submitted post-hearing evidence in accordance with Rule 37 of *Refugee Protection Division Rules* (SOR/2002-228). Counsel for the applicant submitted a report prepared on June 7, 2010 by Dr. J. Pilowsky of Toronto. This evidence took the form of a psychologist's report which opined that the applicant had some cognitive impairment and suffered from depression and anxiety. In this report, the psychologist wrote:

> [w]hen her house was raided on one occasion, the patient struck her head on the floor; since that time, she has suffered from significant cognitive dysfunction, with respect to her memory, concentration, as well as focus.

[5] The Board did not give any weight to the new expert report and the applicant seeks judicial review on this basis. It is said that the Board erred in reaching this conclusion.

[6] It is also argued that the reasons given for dismissing the report are deficient, and do not meet the standards of intelligibility and transparency and do not withstand a probing examination, as they must. In this regard, the standard of review is that of correctness.

[7] In my view, the reasons which underlie the Board's decision for giving the medical report no weight meet the legal standard governing the adequacy of reasons. They are clear, patent and compelling. There are four reasons that arise from a reading of the decision in the context of the proceedings as a whole, including the transcript, which meet the criteria of intelligibility and justification.

[8] The first reason for rejecting the report relates to the timeliness of raising the issue of memory loss. The Board states;

> In his written submissions, counsel stated that the issue of the claimant's memory or the lack of it was raised during the hearing. I do not recall and there is nothing in my notes that the claimant's memory or the lack of it was made an issue during the hearing. On the contrary, my notes show that the claimant remembered her being in Canada three times, which was reflective of her good memory. As a result, counsel submitted a psychologist report on the claimant's alleged loss or impairment of memory caused, among other things, by her stroke in August 2008 and an article on "Memory Problems after a Stroke". There was nothing stated in the claimant's narrative

> about her having a stroke, neither was it ever mentioned in her oral testimony, as well as in her son's oral testimony. For the claimant to submit, at this late stage, documentary evidence in support of allegations not raised during the hearing of her claim is contrary to the Board's guidelines and Section 31 of the Personal Information Form. I give no weight to the claimant's post hearing documentary evidence. [Emphasis added]

[9] While counsel for the respondent fairly concedes that the lack of memory was mentioned on several occasions during the hearing, the transcript of proceedings indicates that it was never raised as a substantive medical issue; rather the applicant's inability to recall was characteristic of witnesses who testify several years after the event in question. The applicant suffered a stroke, but it was never mentioned, either in the applicants PIF, in her testimony or the testimony of her son, nor was memory loss mentioned prior to the hearing. Indeed, in the three medical reports before the Board, some of which were detailed, memory loss as consequence of the stroke or assault was never raised. It was only after the hearing that the issue of a medical explanation for her performance on the witness stand was raised. In sum, the Board took into account the late arrival of the medical report and it reasonably formed part of the rationale for giving the report no weight.

[10] Second, the Board indicated that the applicant's memory was adequate, when necessary, but when confronted with significant inconsistencies, became unclear. The Board noted this selective nature of the loss of memory arose at critical junctures in the applicant's evidence, such as when pressed as to who was riding in the taxi with her at the time she was shot at by men riding motorcycles. The Reasons state;

> It was only when she was confronted with her written statement about her in laws being Sunnis when her memory started to fail and gave inconsistent testimony. … It was more of the claimant being caught off guard with a major inconsistency…

[11] In sum, the Board had regard to both when the memory lapses arose and in respect of what subject. The question of the applicant's ability to recall became, in the Board's assessment, inextricably linked to findings of credibility. It is within the domain of the trier of fact to observe discrepancies between what is recalled and what is not, and to draw conclusions about credibility therefrom.

[12] Third, the expert report itself is, on its face, of limited value. The report notes that:

> I am told that she suffered a lapse in her memory and provided confusing responses during questioning at her hearing as her stress levels mounted.

[13] Far greater precision is required in order to demonstrate that findings of fact should be set aside on the basis of a medical condition, or, more accurately, to demonstrate that a medical condition excuses testimony which has otherwise been disbelieved. Here, the doctor neither observed the witness testify nor did she examine what she remembered and what she forgot and the questions or circumstances which triggered either an ability to recall or a sudden lapse of memory.

[14] More significantly, the report is premised on the existence of the very events which the Board doubted ever happened. The Board found that the applicant's evidence was marked with discrepancies between the narrative in her PIF and her oral testimony. Multiple concrete examples were given, all of which were material to the core elements of the applicant's claim for protection. The Board found that there was no credible evidence to support her claim.

[15] The report attributes the memory loss to being struck on the head when being assaulted "when her house was raided.", an event which the Board doubted ever happened. It is, of course, these same events, rejected by the Board as being based in fact, that are relied on by the psychologist as the catalyst for the memory loss she experienced. The words of Justice Maurice Lagacé in *Diaz Serrato v Canada (Citizenship and Immigration)*, 2009 FC 176 are directly on point:

> The RPD did conduct a thorough analysis of all of the evidence filed in support of the applicant's claim and it was entitled to afford little probative value to the psychologist's report since it was based on the applicant's own allegations. The medical expert tried by his report to excuse the weaknesses of the applicant's testimony, but the medical expert was not present at the hearing to hear the applicant's testimony and to judge the inconsistencies in his claim; and in this regard the RPD benefited of the advantage of having heard the applicant, of having read his written declaration and of deciding if the alleged Post Traumatic Stress Syndrome could constitute a valid excuse for the inconsistencies or not.
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> …
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> If, as it is obviously the case here, the RPD did consider the report, but did not believe that the psychological opinion expressed therein explained the inconsistencies, then the RPD was entitled to give it little or no weight (*Min v. Canada (Minister of Citizenship and Immigration)* 2004 FC 1676 (CanLII), 2004 FC 1676 at paragraph 6).

[16] In sum, the decision to give the report no weight is reasonable, and the reasons expressed, while they could have been more fulsome and analytical, meet the criteria governing the sufficiency of reasons. Finally, courts have to be cautious of the distinction between genuine memory loss induced by medical condition or trauma and a loss of memory which arises intermittently to conveniently explain certain lacunae or inconsistencies in a witnesses' testimony. In this case, the Board observed the witness and considered the report. It came to its conclusion that the difficulties

in recollection were in the later category and gave the report no weight. This was a decision to take within its discretion.

[17] The weight to be assigned evidence is a matter of discretion and is to be assessed against a standard of reasonableness. *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, provides that where the Board's decision is based on an assessment or weighing of the evidence before it, as is the case herein, its decision is reviewable only where it is based on an erroneous finding of fact, made in a perverse or capricious manner or without regard to the material before it.

[18] The application for judicial review is dismissed.

[19] No question for certification has been proposed and none arises.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be and is hereby dismissed. No question for certification has been proposed and none arises.

"Donald J. Rennie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7548-10
STYLE OF CAUSE:	SYEDA KAZMI KHATOON v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto
DATE OF HEARING:	July 18, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	Rennie J.
DATED:	August 22, 2011

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