Federal Court  Cour fédérale

Date: 20120119

Docket: IMM-1764-11

Citation: 2012 FC 82

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, January 19, 2012

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

QAMILE PETI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] Ms. Qamile Peti (Ms. Peti) is submitting this application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA), with respect to a decision of the Immigration and Refugee Board (IRB) dated February 22, 2011, that she

is neither a Convention refugee nor a person in need of protection pursuant to sections 96 and 97 of the IRPA.

[2] For the following reasons, this application for judicial review is dismissed.

II. Facts

[3] Ms. Peti is a retiree from Albania who is seeking Canada's protection.

[4] On April 13, 2008, she saw two men talking in an alleyway close to her home. She saw one of the men pull out a firearm and shoot at the other man. Frightened, she went home, told her neighbours about the incident and spent the night with them, in order to avoid being found and threatened by the murderer.

[5] The next morning, Ms. Peti sought refuge with her sister. After a few days, she contacted her neighbour, Ms. Nadira Dama, to find out what happened further to the events of April 13, 2008. The latter informed her that the victim had died and that a man had gone to Ms. Peti's home.

[6] Ms. Peti therefore decided to stay at her sister's. Three weeks later, she again telephoned Ms. Dama. Her neighbour had allegedly found a slug from a firearm in front of Ms. Peti's apartment door. She encouraged her to remain hidden. Ms. Peti's sister advised her to leave the country immediately.

[7] She left Albania for Canada on May 12, 2003, and filed her refugee protection claim on November 13, 2008.

[8] On February 22, 2011, the IRB found that Ms. Peti is not a Convention refugee or a person in need of protection. The IRB identified several inconsistencies and contradictions between Ms. Peti's testimony and her Personal Information Form (PIF) which significantly undermine her credibility.

III. Legislation

[9] Sections 96 and 97 of the IRPA read as follows:

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 each of those countries; or	*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*) not having a country of nationality, is outside the country of their former habitual residence and is	*b*) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle,

unable or, by reason of that fear, unwilling to return to that country.

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

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*) 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 themself 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

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au

accepted international standards, and	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.

IV. Issue and standard of review

A. Issue

[10] This application for judicial review raises one issue:

- ***Did the IRB err in finding that Ms. Peti's credibility was undermined by the contradictions and inconsistencies that it had identified between her testimony and her PIF?***

B. Standard of review

[11] In *Mejia v Canada (Minister of Citizenship and Immigration)*, 2009 FC 354, [2009] FCJ No 438, at para 26, it was found that the standard of review applicable to the credibility of testimony is reasonableness (see also *Zarza v Canada (Minister of Citizenship and Immigration)*, 2011 FC 139, [2011] FCJ No 196 at para 16).

[12] A decision by the IRB on a refugee protection claim filed under sections 96 and 97 of the IRPA is reviewable on a standard of reasonableness because it is a question of mixed fact and law (see *Gonzalez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1292 at para 10).

[13] The Supreme Court of Canada, at paragraph 47 of *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] SCJ No 9, specified that 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."

V. Positions of the parties

A. Ms. Peti's position

[14] Ms. Peti contends that the IRB's decision contains errors that warrant this Court's intervention. She states that the IRB's finding concerning her memory problems was made without

taking all the evidence into account. In that respect, she relies on *Yu v Canada (Minister of Citizenship and Immigration)*, 2005 FC 794, [2005] FCJ No 988.

[15] She also argues that her son's testimony corroborates the existence of her memory problems. She explains her evasive answers at the hearing and the repeated intervention of the Board member and her counsel by memory losses that occur more or less spontaneously, contrary to what the IRB seems to believe.

[16] Moreover, at the hearing of this application for judicial review, Ms. Peti's counsel pointed out to the Court several passages from her testimony that would explain what he characterized as a shift, that is, passing quickly from one idea to another.

[17] The IRB noted the lack of evidence such as an expert report or a medical certificate to establish that she suffers from diminished cognitive abilities. Ms. Peti argues that the IRB must take her son's testimony into account, because memory loss may be established by testimony alone. She also notes that the IRB was required to inform her in advance if it wanted her to produce a medical certificate showing test or X-ray results.

[18] Ms. Peti argues that if the IRB claims to have expertise in assessing the cognitive abilities of elderly persons, it had to take notice of this, pursuant to paragraph 170(*i*) of the IRPA, and allow her to be heard on this issue (see *Kirichenko v Canada (Minister of Citizenship and Immigration)*, 2011 FC 12).

[19] At paragraph 21 of its decision, the IRB wrote:

> The panel does not believe the claimant when she states that she did not talk about her problems because she did not want to cause pain and make her children suffer, and that she, therefore, allegedly waited six months before confiding in one of her Canadian sons or their spouses…the panel has difficulty understanding why the claimant did not talk about her intentions of living in Canada, because she feared for her life well before six months after her arrival. The panel finds all of this not credible.

[20] Ms. Peti alleges that she believed that she could stay in Canada for the entire duration of her five-year visitor's visa. She contends that she decided not to burden her son with her problems and that this explanation is plausible and entirely justified in the circumstances. According to her, the reasons given at paragraph 21 of the IRB decision, reproduced above, are entirely implausible (*Florez v Canada (Minister of Immigration and Citizenship)*, 2004 FC 1230 at paras 8 and following).

[21] Ms. Peti refers to the documentary evidence filed in the record that shows that she is in danger because she witnessed a murder by a member of organized crime in Albania. This documentary evidence also shows that she cannot obtain adequate protection in Albania. She therefore considers the IRB's decision is unreasonable and that the Court must allow her application for judicial review.

B. Respondent's position

[22] The respondent states that Ms. Peti's credibility is undermined by the fact that the IRB noted several deficiencies and contradictions concerning elements that are central to her claim. These

deficiencies undermine Ms. Peti's credibility. The respondent argues that the IRB's decision is reasonable considering the many gaps in the evidence submitted by the applicant.

[23] The respondent notes the well-established case law of this Court that a refugee claimant has the burden of proving the elements on which his or her claim is based. He cites section 7 of the *Refugee Protection Division Rules*, SOR/2002-228 (RPDR), which reads as follows:

Documents establishing identity and other elements of the claim	Documents d'identité et autres éléments de la demande
7. The claimant must provide acceptable documents establishing identity and other elements of the claim. A claimant who does not provide acceptable documents must explain why they were not provided and what steps were taken to obtain them.	7. Le demandeur d'asile transmet à la Section des documents acceptables pour établir son identité et les autres éléments de sa demande. S'il ne peut le faire, il en donne la raison et indique quelles mesures il a prises pour s'en procurer.

[24] In assessing Ms. Peti's credibility, the IRB can take into account contradictions between her testimony and her PIF. The IRB cannot disregard, in a PIF, omissions of elements central to the refugee claim before it (see *Pinon v Canada (Minister of Citizenship and Immigration)*, 2010 FC 413 at para 17; *Cortes v Canada (Minister of Citizenship and Immigration)*, 2009 FC 583 at para 27; and *Tejeda v Canada (Minister of Citizenship and Immigration)*, 2009 FC 421 at para 15).

[25] Moreover, the respondent notes that it is up to Ms. Peti to submit the evidence that clearly shows that she fears persecution in her country of origin. To do this, she must establish that there is a subjective fear of persecution and an objective basis for that fear. Failure to prove these two elements is fatal and the IRB may legitimately reject a claim on this ground alone (see *Chan v*

Canada (Minister of Employment and Immigration), [1995] 3 SCR 593 at paras 119-120 and 148-151; *Rajudeen v Canada (Minister of Employment and Immigration)*, [1984] FCJ No 601 (FCA); *Herrera v Canada (Minister of Citizenship and Immigration)*, 2007 FC 979 at paras 23-25; and *Vasanthakumar v Canada (Minister of Citizenship and Immigration)*, 2006 FC 959 at para 11). In the case at bar, Ms. Peti did not discharge this burden and the IRB was correct to reject her refugee claim.

[26] Also, the respondent notes that Ms. Peti arrived in Canada on May 12, 2008, but did not file her refugee claim until November 13, 2008, that is, six months later. According to the respondent, this behaviour is inconsistent with her claim that she fears for her life and safety if she were to return to Albania. This Court's case law in this regard is well established and teaches that the panel may take into account the actions of a claimant in analyzing the claimant's credibility (*Manirakiza v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1309 at para 18 (*Manirakiza*); *Sainnéus v Canada (Minister of Citizenship and Immigration)*, 2007 FC 249 at para 12 (*Sainnéus*); *Huerta v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 271 (FCA); *Canada (Minister of Citizenship and Immigration) v Hund*, [2009] FCJ No 148 at para 50 (TD); *Ngwenya v Canada (Minister of Citizenship and Immigration)*, 2008 FC 156 at paras 22-23; *Aslam v Canada (Minister of Citizenship and Immigration)*, 2006 FC 189 at para 28; *Singh v Canada (Minister of Citizenship and Immigration)*, 2007 FC 62 at para 24 (*Singh*); *Espinosa v Canada (Minister of Citizenship and Immigration)*, [2003] FCJ No 1680 (TD) at paras 17 and 20; *Dydyuk v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 717 at para 10; *Kandiah v Canada (Minister of Citizenship and Immigration)*, 2005 FC 181 at para 4; and *Toora v Canada (Minister of Citizenship and Immigration)*, 2006 FC 828 at para 27).

[27] Consequently, the IRB may determine that Ms. Peti lacks credibility. Her subjective fear is based above all on her credibility (see *Sainnéus* and *Manirakiza* above; see also *Rocha v Canada (Minister of Citizenship and Immigration)*, 2010 FC 195 at para 6).

[28] The respondent contends that the IRB may rely on rationality and common sense and its own perception of human behaviour to determine whether an allegation is plausible or not (see *Shahamati v Canada (Minister of Citizenship and Immigration)*, [1994] FCJ No 415 (FCA) at para 2; *Yin v Canada (Minister of Citizenship and Immigration)*, 2010 FC 544 at para 59; *Utrera v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1212 at para 61; *Lin v Canada (Minister of Citizenship and Immigration)*, [2007] FCJ No 368 (TD) at para 5; *Khan v Canada (Minister of Citizenship and Immigration)*, 2005 FC 403 at paras 14 and 19; *Li v Canada (Minister of Citizenship and Immigration)*, [2002] FCJ No 470 (TD) at para 9; and *Saliaj v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1247). The respondent claims that the IRB correctly found that it is implausible that Ms. Peti would have waited six months before speaking to her son about her alleged problems.

[29] In addition, the respondent states that a visitor's visa does not make it possible to rebut the presumption that a real refugee would claim protection upon arrival in Canada.

[30] Given all of these gaps, the IRB did not attach any probative value to the documentary evidence submitted by Ms. Peti. According to the respondent, the Federal Court of Appeal clearly stated, at paragraphs 7 to 9 of *Sheikh v Canada (Minister of Employment and Immigration)*,

[1990] 3 FC 238, [1990] FCJ No 604 (FCA), that a lack of credibility concerning elements central to a claim may extend to other elements of it.

[31] Ms. Petit contends that the IRB did not take into account her son's testimony. However, the IRB dealt with it at paragraph 12 of its decision. The respondent states that the son's testimony is from an interested person who has no medical expertise. The respondent cites *Cicek v Canada (Minister of Citizenship and Immigration)*, [1997] FCJ No 1425, in which Justice Pinard wrote the following at paragraph 9:

> Absent any medical evidence on the record, I am of the opinion that this Court ought not to interfere with the tribunal's finding of credibility in this instance. There was ample evidence for the tribunal to arrive at its conclusion, given the noted inconsistencies, contradictions, and implausibilities. As shown by the tribunal's decision and by the transcript of the hearings, the applicant was provided with sufficient opportunity to respond to the tribunal's credibility concerns. Yet she was unable to satisfactorily explain any of the contradictions which were brought to her attention. Under such circumstances, the applicant having also failed to point to any specific erroneous finding of fact by the tribunal, I must conclude that she has not met the burden of proof to show that the tribunal's conclusions were unreasonable.

[32] The IRB wrote, at paragraph 13 of its decision, "…the panel did not notice anything indicating that the claimant would have memory problems such that she cannot recount in the same manner at the hearing the significant events that she alleged having experienced in her PIF". The respondent contends that the IRB was able to hear Ms. Peti's oral testimony for nearly two hours. He notes the observation by the IRB, which wrote that Ms. Peti was able to give "… informed testimony, with confidence and poise" (see IRB decision at para 11). It was reasonable for the IRB to find that this was not a memory problem, but rather a lack of credibility.

[33] The respondent states that Ms. Peti did not show how the IRB's decision is based on findings of fact made in a perverse or capricious manner, or that it made its decision without regard for the evidence before it (see *Vargas v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1347 at para 19; *Serrato v Canada (Minister of Citizenship and Immigration)*, 2009 FC 176 at para 16 (*Serrato*); and *Kar v Canada (Minister of Citizenship and Immigration)*, 2009 FC 143 at para 30 (*Kar*)).

[34] Finally, the respondent alleges that the IRB was not required to proceed with an analysis of State protection in Albania. Since it was reasonable for the IRB to find that Ms. Peti was not credible, this finding is determinative in itself (see *Salim v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1592 at para 31; *R.G. v Canada (Minister of Citizenship and Immigration)*, 2010 FC 801 at para 26; *Cienfuegos v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1262 at paras 24-25; *Gonzalez v Canada (Minister of Citizenship and Immigration)*, 2009 FC 369 at para 10; and *Karanja v Canada (Minister of Citizenship and Immigration)*, 2006 FC 574 at para 8).

VI. Analysis

- ***Did the IRB err in finding that Ms. Peti's credibility was undermined by the contradictions and inconsistencies that it had identified between her testimony and her PIF?***

[35] Ms. Peti alleges that she suffers from diminished cognitive abilities, that is, that she experiences difficulty in remembering events from her past. Her son testified and corroborated that his mother has trouble remembering certain events.

[36] Ms. Peti argues that the IRB did not take into account all of the evidence adduced to establish her memory problems. She alleges that this error vitiates the IRB's credibility finding. Consequently, the IRB's decision is unreasonable.

[37] The Court wishes to point out that "…credibility is central to most, if not all, of the findings that the Board makes when assessing asylum claims" (see *Umubyeyi v Canada (Minister of Citizenship and Immigration)*, 2011 FC 69, [2011] FCJ No 76 at para 11). The IRB may make a negative finding concerning the applicant's credibility if it identifies contradictions between the applicant's testimony and supporting evidence submitted (see *Aguebor v Canada (Minister of Employment and Immigration*), [1993] FCJ No 732 (*Aguebor*)).

[38] In addition, "[t]he Court should not interfere with the findings of fact and the conclusions drawn by the Board unless the Court is satisfied that the Board based its conclusion on irrelevant considerations or that it ignored evidence" (see *Kengkarasa v Canada (Minister of Citizenship and Immigration)*, 2007 FC 714, [2007] FCJ No 970 at para 7; see also *Miranda v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 437). Our case law also specifies that it is up to the IRB to assess the evidence and the testimony and to attach probative value to them (see *Aguebor*; and *Romhaine v Canada (Minister of Citizenship and Immigration)*, 2011 FC 534, [2011] FCJ No 693 at para 21).

[39] In the case at bar, the IRB wrote, at paragraph 12 of its decision, that "[h]er son, Mr. Peti, tried to explain the disparities between the claimant's testimony and PIF by the fact that the claimant had changed since the last time that she had come to Canada. She was forgetting things, such as anniversary dates and to take her medications. She had a headache, which allegedly required a scan. No expert evidence was submitted to the panel of the results of the scan or of other medical, neurological or cognitive problems that the claimant could have." The IRB attached little probative value to the testimony of Mr. Peti, Ms. Peti's son, because he is an interested person in this case. In addition, no evidence was submitted in support of Ms. Peti's position. It was not up to the IRB to require that relevant documents be filed to establish elements of a claim. Under section 7 of the RPDR, this onus was on Ms. Peti.

[40] Ms. Peti notes that the IRB was required to advise her if it had expertise that would enable it to make a determination concerning her medical condition. She cites paragraph 170(*i*) of the IRPA, which states: "The Refugee Protection Division, in any proceeding before it…may take notice of any facts that may be judicially noticed, any other generally recognized facts and any information or opinion that is within its specialized knowledge." However, section 170 of the IRPA cannot apply in this case since the IRB does not have expertise to enable it to make a determination on a matter requiring medical expertise, namely, the assessment of a person's cognitive abilities. The IRB is required to assess the probative value of the evidence submitted by Ms. Peti, which it did in a reasonable manner in this case. It does not have the expertise to make a medical diagnosis. Consequently, the Court cannot concur with Ms. Peti's claim.

[41] Moreover, Ms. Peti waited six months before filing her refugee protection claim with the Canadian authorities. In her PIF, she mentioned that she did not wish to frighten her children with her problems and that she was happy to obtain a visitor's visa to Canada. The IRB found that it was implausible that she did not relate her problems to her children upon her arrival in Canada. At paragraph 21 of its decision, it wrote that "[t]he claimant had already confided in her sister in Albania, in her sister's children and in her neighbours." As Justice Snider indicated at paragraph 5 of *Sun v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1255, [2008] FCJ No 1570, "[i]n assessing the reasonableness of the Board's decision, certain principles are well established in the jurisprudence…[a] lack of credibility finding can be based on implausibilities, contradictions, irrationality and common sense". The IRB's finding is reasonable in the circumstances.

[42] The respondent contends that [TRANSLATION] "possession of a visa does not rebut the presumption that a true refugee would claim protection at the first opportunity" (see paragraph 27 of the respondent's memorandum). The Court recognizes the soundness of that argument. An applicant's behaviour may become important in analyzing his or her credibility and determining his or her subjective fear. At paragraph 23 of *Niyonkuru*, Justice de Montigny wrote: "[i]t is true that the applicant had a visa which allowed him to remain in Canada until January 2003. The fact remains that his actions were not those of someone truly fearing for his life if he were to return home. Not only are the reasons he gave for waiting for the end of his training before going to the Immigration Canada office unconvincing, but it was also apparent from the transcripts that he had the time to travel on weekends." The IRB can take this factor into account when assessing Ms. Peti's credibility.

[43] In short, the IRB found Ms. Peti's account implausible. It did not attach any probative value to the documentary evidence she submitted or to the letters from her sister and her neighbour, Ms. Dama. In *Sheikh*, the Federal Court of Appeal specified that a lack of credibility respecting the central elements of a claim may extend to other elements of it (see *Sheikh* at paras 7-9). In this case, the Court sees no grounds that warrant intervention. The IRB properly found that Ms. Peti's lack of credibility could undermine the other documentary evidence filed in support of her claim.

VII. Conclusion

[44] It was reasonable for the IRB to find that Ms. Peti is not a Convention refugee or a person in need of protection under sections 96 and 97 of the IRPA.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that

1. the applicant's application for judicial review is dismissed; and

2. there is no question of general interest to be certified.

"André F.J. Scott"
Judge

Certified true translation
Susan Deichert, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1764-11
STYLE OF CAUSE:	QAMILE PETI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	November 28, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	SCOTT J.
DATED:	January 19, 2012

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