Federal Court  Cour fédérale

**Date: 20120615**

**Docket: IMM-7273-11**

**Citation: 2012 FC 763**

**Ottawa, Ontario, June 15, 2012**

**PRESENT: The Honourable Mr. Justice Russell**

**BETWEEN:**

**MANJOLA LUMAJ; MAXIMUS LUMAJ**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

### INTRODUCTION

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (Act) for judicial review of the decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board, dated 22 September 2011 (Decision), which refused the Applicants' application to be deemed Convention refugees or persons in need of protection under sections 96 and 97 of the Act.

**BACKGROUND**

[2] The Principal Applicant is a 28-year-old citizen of Albania. The Minor Applicant is her son, Maximus, who is two years old and a citizen of the United States (USA). The Principal Applicant fears harm an Albania from a blood feud.

[3] In the early 2000s, the Principal Applicant was involved with the youth wing of the Democratic Party – a political party opposed to the Albanian government. The Principal Applicant was twice arrested and detained because of her political activities, once on 1 September 2000 and again on 22 June 2001. After the second detention, the police began to repeatedly call her in for questioning.

[4] The Principal Applicant was called in to the police station in Lezhe, Albania, on 30 June 2002. A police officer took her to a cell in the station's basement. He grabbed her, called her a democratic slut, and then raped her. The police officer released the Principal Applicant after holding her in the station for several hours. After she was released, she went home to her family. Although the family was upset by the rape, they did not tell anyone because it would ruin the family's reputation. The family took the Principal Applicant to see a doctor, but begged him not to tell anyone about the rape.

[5] In September 2002, the police came to the Principal Applicant's home twice. On their second visit, they tied up the Principal Applicant's family and threatened them with guns. After this event, the Principal Applicant fled to the USA and claimed asylum.

[6] The Principal Applicant based her asylum claim in the USA on the persecution she had suffered because of her political beliefs. She told the American authorities about all of her arrests and about her family being tied up and threatened. The Principal Applicant did not tell the American authorities she had been raped in 2002. Her asylum claim in the USA was unsuccessful, so she appealed to the Board of Immigration Appeals (BIA), where she was also unsuccessful. From the BIA, the Principal Applicant appealed to the United States Court of Appeals for the Sixth Circuit (Sixth Circuit Court).

[7] In September 2006, the Sixth Circuit Court upheld the initial negative decision by an immigration judge (Immigration Judge). It upheld the Immigration Judge's finding that the Principal Applicant's asylum claim was out of time. The Sixth Circuit Court also upheld the BIA's finding that the Principal Applicant was not eligible for 'withholding of removal' – a process by which people who fear persecution can remain in the USA. The BIA found that the Principal Applicant had not provided evidence she or her family were politically persecuted. The Sixth Circuit Court found the Principal Applicant had not shown this finding was incorrect and found she had not provided properly authenticated documents to demonstrate her political affiliation.

[8] In 2009, the Principal Applicant's brother (Nogaj) went to a bar in Albania. There, Nogaj overheard Eduard Cini (Cini), the owner of the bar, bragging that he had raped the Principal Applicant in 2002 when he was a police officer. Motivated by revenge, Nogaj planted a bomb in Cini's bar. The bomb did not explode and Nogaj was arrested together with two accomplices. The attempted bombing angered Cini's family, so they declared a blood feud against the Principal Applicant's family. Although the Principal Applicant's family sought the assistance of peace

negotiators to end the blood feud, the Cini family would not end the feud. This is the blood feud the Principal Applicant fears on return to Albania.

[9] After her unsuccessful appeal to the Sixth Circuit Court, the Principal Applicant came to Canada on 8 May 2010. She and the Minor Applicant claimed protection in Canada on 26 May 2010. The Minor Applicant relied on his mother's claim. The RPD joined the claims under subsection 49(1) of the *Refugee Protection Division Rules* SOR/2002-228 (Rules) and heard them together on 19 August 2011.

[10] To support her claim for protection, the Principal Applicant provided several documents to the RPD, including a report from the physician who examined her after the rape in 2002 (Physician's Report). The Physician's Report indicates that the Principal Applicant was raped and was prescribed bed rest and sedatives.

[11] The Principal Applicant also provided a letter from the National Reconciliation Committee in Albania (Reconciliation Committee), which attested to the blood feud between the Principal Applicant's family and the Cini family (Reconciliation Letter). She provided two other letters, one from the head of Commune Balldre (Commune Letter) – the municipality in Albania where the Principal Applicant's family lived – and one from the head of Balldre I Ri (Balldre Letter) – the village where the Principal Applicant's family lives. In addition, the Principal Applicant provided an article from the Shekulli Chronicle, a daily newspaper published in Tirana Albania (Shekulli Article). The Shekulli Article said that Nogaj had placed three kilograms of trinitrotoluene – an explosive – in an establishment owned by Cini.

[12] After the hearing, the RPD considered the Applicants' claims and made its Decision on 22 September 2011. The RPD rejected the claims for protection and advised the Applicants of its decision on 30 September 2011.

**DECISION UNDER REVIEW**

[13] The RPD rejected the Minor Applicant's claim because he had not shown why he could not return to the USA without a serious risk of harm. It rejected the Principal Applicant's claim because it did not believe she was raped.

**Principal Applicant was not Raped**

[14] After reviewing the Principal Applicant's allegations, including her belief that she was at risk from the blood feud, the RPD analysed the merits of her claim. It concluded she was not raped and had fabricated this event to support her claim.

[15] The RPD found the rape was fabricated because the Principal Applicant had not mentioned it to the American authorities when she claimed asylum in the USA. The Principal Applicant testified at the RPD hearing she had not told the American authorities because it was difficult to mention the rape. Rape is shameful in Albania and she did not have the courage at that time to tell the American authorities. The RPD rejected this explanation; she had told her parents and her physician about the rape, so she should have been able to tell the American authorities. The rape was the most significant incident of political persecution the Principal Applicant had experienced, so it did not make sense for her not to mention it.

[16] The RPD found the Principal Applicant was not credible because she had not mentioned the rape to the American authorities. She had sworn to tell the whole truth before the American immigration judge, but had omitted this important detail. The Principal Applicant did not tell the whole truth, so she could not be believed. The RPD also found the Principal Applicant's withholding of information about the rape was inconsistent with her Canadian claim.

[17] The RPD said it considered the Immigration and Refugee Board Chairpersons *Guideline 4: Women Refugee Claimants Fearing Gender Related Persecution* (Gender Guidelines). It found that the Principal Applicant's decision not to tell the American authorities about the rape was not explained by her shame. She had already told her parents and her physician, so the RPD did not accept she was too ashamed to tell her American lawyer or to raise the issue in her American claim. The RPD also found Nogaj's involvement with Cini involved no gender issues, so the Gender Guidelines were not applicable.

[18] The RPD further found the Principal Applicant's story about the blood feud was implausible. It was implausible that Nogaj would have learned the identity of the man who raped the Principal Applicant in a bar, as he would have to have been sitting in the right place to overhear the conversation. It was also implausible that, in the bar, Cini would have given sufficient detail for Nogaj to learn Cini had raped the Principal Applicant. Although it was possible that any one of the events required for Nogaj to learn that Cini had raped the Principal Applicant had occurred, it was implausible that all of them had occurred. This finding led the RPD to conclude that Nogaj did not know who had raped the Principal Applicant.

[19] The RPD found Nogaj was involved in blowing up Cini's bar, but this did not have anything to do with the rape. The Shekulli Article did not mention that Cini was a former police officer or say what motivated Nogaj, so it could not link the bombing with the rape.

[20] The RPD noted it has found in many claims from Albanian that it is easy for families to falsely create the appearance of a blood feud. The families involved only have to tell the Reconciliation Institute they are in a blood feud and they receive a letter attesting to this fact. Families may be motivated to create the appearance of a blood feud because of friendship, money, or a fear of harm. The RPD rejected the Reconciliation Letter because the author relied on his agents and did not have first hand information about the blood feud. This letter did not outweigh the RPD's other credibility concerns.

**Conclusion**

[21] The RPD found the Principal Applicant was not credible and there was no independent evidence to establish her claim. It concluded she had not established a serious possibility of harm on return to Albania, so it rejected her claims for protection under sections 96 and 97 of the Act.

## STATUTORY PROVISIONS

[22] The following provisions of the Act are applicable in this proceeding:

| **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 | **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 |

social group or political opinion,

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;

[…]

[…]

**Person in Need of Protection**

**Personne à protéger**

**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

**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

(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

| | |
|---|---|
| in or from that country, | 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. |
| […] | […] |

**ISSUES**

[23] The Applicants raise the following issues in this application:

a. Whether the RPD's credibility finding was reasonable;

b. Whether the RPD based its Decision on erroneous findings of fact;

c. Whether the RPD ignored the Gender Guidelines;

d. Whether the RPD erred by not considering the risk she faced from the blood feud;

e. Whether the RPD fettered its discretion.

**STANDARD OF REVIEW**

[24] The Supreme Court of Canada in *Dunsmuir v New Brunswick* 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the

reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[25] The standard of review applicable to the first issue is reasonableness. In *Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 (FCA) the Federal Court of Appeal held that the standard of review on a credibility finding is reasonableness. Further, in *Elmi v Canada (Minister of Citizenship and Immigration)* 2008 FC 773, at paragraph 21, Justice Max Teitelbaum held that findings of credibility are central to the RPD's finding of fact and are therefore to be evaluated on a standard of review of reasonableness. Finally, in *Wu v Canada (Minister of Citizenship and Immigration)* 2009 FC 929, Justice Michael Kelen held at paragraph 17 that the standard of review on a credibility determination is reasonableness.

[26] It is well established that the RPD's findings of fact are to be evaluated on the reasonableness standard. See *Emile v Canada (Minister of Citizenship and Immigration)* 2011 FC 1321 at paragraph 22, and *Dunsmuir*, above, at paragraph 53. The standard of review applicable to the second issue is also reasonableness.

[27] With respect to the third issue, *Hernandez v Canada (Minister of Citizenship and Immigration)* 2009 FC 106 establishes at paragraph 13 that, where the Gender Guidelines are used as part of the RPD's analysis of credibility, their application becomes subsumed in the examination of the credibility finding. See *Plaisimond v Canada (Minister of Citizenship and Immigration)* 2010 FC 998 at paragraph 32 and *Higbogun v Canada (Minister of Citizenship and Immigration)* 2010 FC 445 at paragraph 22. The standard of review applicable to the credibility finding is reasonableness, so the standard of review applicable to the third issue is also reasonableness.

[28] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa* 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[29] The risk the Principal Applicant alleged from the blood feud was a risk of harm under section 97. The fourth issue the Applicants raise challenges whether the RPD properly considered her claim under section 97. In *Bouaouni v Canada (Minister of Citizenship and Immigration)* 2003 FC 1211 Justice Edmond Blanchard wrote that "whether the Board properly considered both [section 96 and 97] claims is a matter to be determined in the circumstances of each case." Justice Carolyn Layden-Stevenson held in *Brovina v Canada (Minister of Citizenship and Immigration)* 2004 FC 635 at paragraph 17 that a section 97 analysis need not be conducted in every case; only where there was evidence before the RPD to support that analysis must it be conducted.

[30] With respect to the fourth issue, then, the Court must determine if there was evidence before the RPD to support an analysis under section 97. If there was, the Court must then determine whether the RPD actually did conduct a section 97 analysis. The Court must "undertake its own analysis of the question" (*Dunsmuir*, above, at paragraph 50). The standard of review on the fourth issue is therefore correctness.

[31] The standard of review with respect to the fifth issue is also correctness. In *Zaki v Canada (Minister of Citizenship and Immigration)* 2005 FC 1066, Justice Judith Snider held at paragraph 14 that the fettering of discretion is an issue of procedural fairness. Justice Richard Mosley made a similar finding in *Benitez v Canada (Minister of Citizenship and Immigration)* 2006 FC 461 at paragraph 133. Finally, the Federal Court of Appeal held in *Thamotharem v Canada (Minister of Citizenship and Immigration)* 2007 FCA 198 at paragraph 33 that the standard of review with respect to fettering of discretion is correctness.

**ARGUMENTS**

**The Applicants**

[32] The Applicants argue the RPD erred when it rejected the Principal Applicant's claim solely because it found she was not raped in 2002. The Principal Applicant's claim was based on her fear of harm from the blood feud. The rape touched off the blood feud, but is not the source of the Principal Applicant's fear. The RPD failed to consider the risk she faces from the blood feud, which means the Decision must be returned.

**Rape Finding was Unreasonable**

[33] When it found the Principal Applicant was not raped, the RPD ignored evidence which proved otherwise. The RPD ignored the Physician's Report. *Zapata v Canada (Solicitor General)*, [1994] FCJ No 1303 shows that the RPD's failure to consider a medical report can be a reviewable error. Had the RPD considered the Physician's Report, it may have found the Principal Applicant was raped even though she did not mention this to the American authorities.

[34] The RPD also failed to appreciate the impact of its finding that Nogaj was involved in bombing Cini's bar. The RPD found Nogaj was involved but did not realize he would not have done this without motivation. Nogaj was motivated to bomb Cini's bar out of revenge for the rape, so his participation in the bombing suggests the Principal Applicant was actually raped.

**Credibility Finding Unreasonable**

*RPD Ignored the Gender Guidelines*

[35] The RPD found the Principal Applicant was not credible because she did not tell the American authorities she was raped when she claimed asylum in the USA. This finding was unreasonable because the RPD ignored the Gender Guidelines. The Gender Guidelines say that

> Women refugee claimants face special problems in demonstrating that their claims are credible and trustworthy. Some of the difficulties may arise because of cross-cultural misunderstandings. For example:
>
> > 1. Women from societies where the preservation of one's virginity or marital dignity is the cultural norm may be reluctant to disclose their experiences of sexual violence in order to keep their "shame" to themselves and not dishonour their family or community.

[36] The Gender Guidelines indicate that the RPD must be cautious about making credibility findings based on the failure to disclose rape, particularly where cultural taboos operate against disclosure. The Principal Applicant raised the Gender Guidelines at the hearing and testified that in Albania shame is associated with rape. She also testified she was ashamed to tell her husband about the rape because of Albanian cultural norms. However, the RPD did not appreciate the importance of cultural traditions and shame or how these would discourage the Principal Applicant from talking

about the rape. The RPD also did not consider how the rape by a police officer could have made the Principal Applicant reluctant to disclose the rape to American authorities.

[37] Although the Gender Guidelines are not law, *Khon v Canada (Minister of Citizenship and Immigration)* 2004 FC 143 establishes at paragraph 20 that a failure to consider them can be a reviewable error:

> The Guidelines are issued in order to assure a certain coherence in the tribunal's decisions. As MacKay J. indicated, when the panel is faced with a case where the applicant has made a claim of persecution based on her membership in a particular social group, i.e. women victims of violence, in all fairness, the claim cannot be examined without reference to the Guidelines.

*Microscopic Evaluation*

[38] The RPD's credibility finding was also unreasonable because it examined the evidence microscopically. The RPD found the Principal Applicant was not credible because she did not raise the rape in her claim in the USA. However, the RPD focussed on this one detail without appreciating the whole of her evidence. All the details she gave to the American authorities were the same as those she provided to the RPD, with the exception of the rape. The RPD latched on to a single omission, which was explained by shame and cultural factors; this microscopic approach to the evidence renders the Decision unreasonable.

**Documentary Evidence**

[39] The RPD's treatment of the Reconciliation Letter was unreasonable because it was based on speculation. The RPD said that "As I have said in many Albanian claims, it is easy for two families to falsely create the appearance of a blood feud." Other than its past experience, the RPD had no

reason to find the Reconciliation Letter was false. The RPD rejected this letter because it could be false, not because there was a reason to believe it was false. This is unreasonable.

[40] The Court has found letters from the Reconciliation Institute are reliable evidence of blood feuds. See *Murati v Canada (Minister of Citizenship and Immigration)* 2010 FC 1324 at paragraphs 37 and 44 and *Precectaj v Canada (Minister of Citizenship and Immigration)* 2010 FC 485 at paragraphs 10 and 12. The RPD is not an expert on the authenticity of documents, so it cannot make a finding that documents are inauthentic without evidence that this is so. See *Ramalingam v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 10. The RPD's rejection of the Reconciliation Letter was unreasonable. The RPD also did not mention the Commune Letter, which shows it ignored evidence which was before it.

**The RPD Fettered its Discretion**

[41] In *G. (X.M.) (Re)*, [1994] CRDD No 280, the Convention Refugee Determination Division found the claimant was truthful in his PIF narrative and testimony before it, even though he had provided inconsistent information to immigration officials. The CRDD looked at the totality of the evidence and concluded, despite the inconsistent information, that the claimant was truthful. In this case, the RPD failed to examine the Principal Applicant's credibility on the totality of the evidence and so fettered its discretion. *Yhap v Canada (Minister of Employment and Immigration)*, [1990] 1 FC 722 establishes that the RPD cannot fetter its discretion in this way.

**Implausibility Finding Unreasonable**

[42] The RPD also made an unreasonable factual finding when it found the Principal Applicant's story of how her brother discovered Cini was the man who raped her was implausible. In *Valtchev v Canada (Minister of Citizenship and Immigration)* 2001 FCT 776, Justice Francis Muldoon found at paragraph 7 that

> A tribunal may make adverse findings of credibility based on the implausibility of an applicant's story provided the inferences drawn can be reasonably said to exist. However, plausibility findings should be made only in the clearest of cases, i.e., if the facts as presented are outside the realm of what could reasonably be expected, or where the documentary evidence demonstrates that the events could not have happened in the manner asserted by the claimant. A tribunal must be careful when rendering a decision based on a lack of plausibility because refugee claimants come from diverse cultures and actions which appear implausible when judged from Canadian standards might be plausible when considered from within the claimant's milieu. [citation omitted]

[43] The RPD's finding that Nogaj's encounter with Cini in the bar was implausible ignored the presumption that a claimant's testimony is true. The encounter at the bar is not outside the realm of what can reasonably be expected. Further, the documentary evidence before the RPD did not show that the events the Principal Applicant described could not have happened.

**The Respondent**

[44] The Respondent argues the Decision was reasonable because it was based on all the evidence before the RPD. The RPD reasonably found the Principal Applicant's account of the blood feud was implausible and considered the Gender Guidelines when it denied her claim. The Principal

Applicant failed to establish her claim with evidence other than her own testimony. The outcome falls within the *Dunsmuir* range.

**No Evidence Ignored**

[45] Contrary to the Applicants' assertion that the RPD ignored the Physician's Report, the record shows the RPD examined and weight this document. The RPD discussed the Physician's Report with the Principal Applicant at the hearing. At page 293 of the Certified Tribunal Record (CTR), the hearing transcript reveals the following exchange which is sufficient to show the Applicants why the RPD chose not to rely on the Physician's Report:

| | |
|---|---|
| RPD: | How did [the Physician's Report] from the medical clinic get here? |
| Applicant: | My mother she went to the office, to the doctor's office and she obtained it. |
| RPD: | And did it come in an envelope? |
| Applicant: | Yes. |
| RPD: | Can I see the envelope? |
| Applicant: | Yes. |
| RPD: | So what do you know about this letter that your mother got? |
| Applicant: | I know that she went there and she asked for the letter with regards to the visit. |
| RPD: | Yes. Do you know what was the basis of this letter; how did they know to write this letter? |
| Applicant: | It is the doctor who examined me the day that I went there with regards to the rape. |
| RPD: | But the letter is written in 2011. |

Applicant: I obtained the letter now, yes.

RPD: When did the actual rape occur?

Applicant: On June 30, 2002.

[46] At page 308 of the CTR, an additional exchange about the Physician's Report occurred:

Counsel: Now, with respect to the medical document [the Physician's Report] that was obtained […] how were you able to obtain this document? […]

Applicant: My mother she went and asked the then physician, she went to the same clinic where I was… where I went for the visit.

Counsel: And how would the physician be able to recall this incident or provide details of this information, is your understanding? [sic]

Applicant: From what I know he is an older physician, he has been there for a long time. My mother probably she mentioned the timeframe when this visit happened and maybe based on the records that he has provided… he provided the letter.

RPD: Physicians in Albania, it is not… if someone comes in who has been injured by a criminal act are they obliged to call the police by law? My understanding is they are.

Applicant: Not that I know, especially in that time, I did not know.

RPD: I just heard a case this morning where I was told that even though the injured person did not want the police notified the police still called… the physician still called the police to come and do an investigation.

Applicant: I do not know if that is the case.

[47] The RPD considered all the evidence and concluded it was inadequate to establish the Principal Applicant's claim. This was a reasonable basis to conclude she was not credible.

**Discretion not Fettered**

[48] The RPD conducted a full analysis of the Principal Applicant's claim and did not fetter its discretion *G. (X.M.)*, above, is distinguishable on its facts. In *G. (X.M.)*, the RPD had port of entry notes before it but did not evaluate the claimant's testimony against those notes. Here, there were no port of entry notes for the RPD to compare to the Principal Applicant's testimony. The RPD analysed the omission of the rape from the Principal Applicant's American asylum claim against her oath to tell the truth and reasonably concluded she was not credible.

**Credibility Finding Reasonable**

[49] Although *Maldonado v Canada (Minister of Citizenship and Immigration)*, [1980] 2 FC 302 establishes that a claimant's testimony is presumed true, this presumption is rebuttable. The RPD had reason to doubt the Principal Applicant's testimony and it set out its credibility findings in clear and unmistakeable terms. The RPD is in the best position to assess a claimant's credibility, so the Court should not interfere with its findings on this issue.

*Omission of the Rape*

[50] The RPD's finding the Applicant was not credible because she did not mention the rape in her American asylum claim was reasonable in light of her oath to tell the truth. She did not live up to her oath by omitting this detail and the RPD reasonably rejected her explanation for not telling the American authorities about it. It was reasonable for the RPD to find it unlikely that the Applicant was too ashamed to mention the rape, given her testimony that she had told her parents and physician about the rape. The RPD raised its concern about this at the hearing when it said

> And even in 2005 when you made your appeal you did not have anything to lose by coming forward at that time and saying I was actually raped by the police because of my activities for the Democratic Party before I left Albania. You had, you could have brought forward the medical certificate from 2002 that you brought forward today. So you do not have anything more than you think of to tell as to why you made this decision not to… not to talk about the rape at all in the United States?

[51] Although the RPD could have found the Principal Applicant credible on the same facts, this does not mean it committed a reviewable error.

**Blood Feud Implausible**

[52] It was reasonable for the RPD to find that, although any one of the elements required for Nogaj to find out that Cini had raped the Principal Applicant, it was unlikely that all the required events would have occurred at the same time. It is open to the RPD to make findings based on common sense and rationality, so this finding should stand.

[53] The RPD put its concerns about the Shekulli Article to the Applicant at the hearing. It was reasonable for the RPD to find there were significant omissions from this article, including its silence on Nogaj's motivation. The Shekulli Article also did not mention that Cini is a former police officer. The story of how Nogaj found out that Cini was the man who raped the Principal Applicant was implausible and was not corroborated by the evidence, so it was open to the RPD to find the bombing of Cini's bar was unrelated to the rape.

[54] The RPD's treatment of the Reconciliation Letter and Commune Letter was reasonable. These letters were based on second-hand information and this reasonably affected the weight the RPD put on them.

[55] The Applicant's testimony was implausible and unsupported, which cast doubt on her credibility.

**Gender Guidelines Considered**

[56] There is nothing on the record which shows the Applicant needed alternate arrangements to testify. The Applicant was able to testify about the rape for her Canadian claim. The Gender Guidelines cannot serve as a cure-all for deficiencies in a claimant's testimony, and they do not assist the Principal Applicant in this case.

**ANALYSIS**

[57] One of the RPD's principal findings is that "On a balance of probabilities, I am satisfied that the claimant's withholding of information of her 2002 rape in the USA is not consistent with her Canadian claim."

[58] Both sides appear to regard this finding as important for the Decision as a whole and I agree. The RPD goes on to examine other evidence for the blood feud and to weigh it against what it calls "my credibility concerns"

[59] I think this means that, had the RPD accepted the Principal Applicant's explanation as to why she did not raise the rape issue in the USA and that she had indeed suffered in this horrendous way, it might have looked more favourably upon the other evidence.

[60] In assessing this crucial issue, the RPD rejects the Applicants' explanation because

> I do not accept that she would withhold the most serious event that she experienced due to her political activities from her lawyer or the U.S. authorities. According to the claimant, it was vital to her safety that at the time of her U.S. Claim, she be accepted.

[61] The RPD concludes that the rape did not occur and "the account of the rape has been created to support the claimant's Canadian claim. Since this is the basis of the claim, I rejected the application." In coming to its conclusions on this point, the RPD says at paragraph 23 of the Decision it has considered the Gender Guidelines:

> I considered the Gender Guidelines, however, the account of the brother's actions in 2009 are outside any gender issues. The claimant's withholding of information about the 2002 rape might be explained if she had not voluntarily told her parents and a medical doctor. Since she had already told a person in authority in 2002, i.e. the medical doctor, I do not accept that shame would cause her to not tell her U.S. lawyer in 2003.

[62] I take it from this that the RPD is saying that gender issues cannot be used to explain the Principal Applicant's not raising the rape with the US authorities.

[63] The RPD's reasoning here is, in my view, rife with error.

[64] First, there is a world of difference between the Principal Applicant telling her parents and a medical doctor about the rape and raising it in a public context. The Principal Applicant was very young when the rape occurred and the evidence shows that she could not keep the incident from her parents and was taken to see a doctor. It is a mischaracterization to suggest that the Principal Applicant willingly and without reservation recounted the facts of the rape to her parents and doctor. The doctor may have been a "person in authority" but doctors are not public tribunals.

[65] Second, the RPD failed to adequately take into account the Principal Applicant's testimony that in Albania rape is shameful and brings dishonour to the victim's family. The Principal Applicant also said her family begged the doctor not to tell anyone about the rape, but the RPD did not address this evidence either. The RPD has, in my view, only paid lip service to the Gender Guidelines which specifically note that

> Women from societies where the preservation of one's virginity or marital dignity is the cultural norm may be reluctant to disclose their experiences of sexual violence in order to keep their "shame" to themselves and not dishonour their family.

[66] This is not to say the RPD could not have found the account of the rape not credible. However, it was required to give more than passing consideration to the Applicant's explanation with reference to the Gender Guidelines. See *Khon*, above, at paragraph 20.

[67] Most importantly, in coming to its conclusion, the RPD fails to mention the Physician's Report which says the Principal Applicant was raped and suffered "localized contusions in various parts of the body." Dr. Sadik Isufaj based his report "on the registry of the patients it results (*sic*) that this examination was conducted on 30/06/2002."

[68] It seems clear to me that the attending physician would be the obvious person to provide the information that he or she obtained from the registry of patients. It is also clear from the Physician's Report that Dr. Sadik Isufaj bases his information on what is contained in the registry of patients.

[69] The transcript of the hearing reveals that the RPD mused as follows about this letter:

> The medical letter it is…the attending physician in 2002 is the same physician who signs the letter in 2011, not impossible. But I am not sure I know where this came from, like where he got the information that… and it is a form letter of some kind.

[70] The RPD muses about the Physician's Report but nowhere tells us what weight it should have, or whether it is accepted as evidence, or rejected. At the same time, this letter is crucial to the Principal Applicant's account that she was raped. If accepted, it directly contradicts the RPD's finding that the "account of the rape has been created to support the claim." The Physician's Report was so crucial that the RPD was obliged to address it and provide clear findings on whether it was accepted and what weight it should receive. It goes to the heart of the Decision and yet the RPD does not address it. This is a reviewable error. See *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 at paragraph 15 and *O.E.N.R. v Canada (Minister of Citizenship and Immigration)* 2011 FC 1511 at paragraphs 35 and 36.

[71] Counsel agree that there is no question for certification and the Court concurs.

## JUDGMENT

**THIS COURT'S JUDGMENT is that**

1. The application is allowed. The decision is quashed and the matter is returned for reconsideration by a differently constituted RPD.

2. There is no question for certification.

"James Russell"
Judge

**FEDERAL COURT**

**NAME OF COUNSEL AND SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | IMM-7273-11 |
| **STYLE OF CAUSE:** | **MANJOLA LUMAJ; MAXIMUS LUMAJ**<br><br>- and -<br><br>**THE MINISTER OF CITIZENSHIP AND IMMIGRATION** |
| **PLACE OF HEARING:** | Toronto, Ontario |
| **DATE OF HEARING:** | April 24, 2012 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | HON. MR. JUSTICE RUSSELL |
| **DATED:** | June 15, 2012 |

**APPEARANCES:**

| | |
|---|---|
| Christina M. Gural | **APPLICANTS** |
| Alexis Singer<br>Aleksandra Lipska | **RESPONDENT** |

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