Federal Court  Cour fédérale

Date: 20121030

Docket: IMM-851-12

Citation: 2012 FC 1267

Ottawa, Ontario, October 30, 2012

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

LIZELDA KAMBANDA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of a decision of the Immigration and Refugee Board, Refugee Protection Division (the Board), dated January 5, 2012, wherein the applicant was determined to be neither a Convention refugee within the meaning of section 96 of the Act nor a person in need of protection as defined in subsection 97(1) of the Act.

[2] The applicant requests that the Board's decision be set aside and the application be referred back to the Board for redetermination by a different panel.

Background

[3] The applicant is a citizen of Namibia. She claimed refugee protection in Canada due to a fear of persecution at the hands of her abusive former partner.

[4] The applicant began a relationship with Kandjimbi Kakahona in January 2010. The applicant and her daughter began cohabiting with Kakahona two months later, eventually moving into the applicant's mother's home. Kakahona was jealous, controlling and assaulted the applicant. The applicant's mother forced Kakahona to leave her home. Kakahona continued to threaten to kill the applicant and attempted to set the home on fire.

[5] The applicant arrived in Canada in September 2010. She gave birth to her son from her relationship with Kakahona in Toronto. She made a claim for refugee status.

[6] Her claim was heard by the Board on December 16, 2011.

Board's Decision

[7] The Board rendered its negative decision on January 5, 2012. The Board began by summarizing the applicant's allegations.

[8] The Board found that the applicant had not established a serious possibility of persecution on a Convention ground or a risk of death or cruel and unusual punishment or torture upon return to Namibia. The Board therefore rejected her claim.

[9] The Board identified credibility and state protection as the determinative issues. The Board considered the Gender Guidelines when determining the claim.

[10] On credibility, the Board noted that while the applicant described three police complaints in her oral evidence, her Personal Information Form (PIF) narrative only described one. The Board did not accept the applicant's explanation of forgetting to mention the other two visits to a police station, the phone call to the police station after the third complaint or her visit to the Women & Children Protection Unit (WCPU). The applicant also omitted from her narrative the fact that the police stated they would investigate the complaint. There was also a discrepancy in the dates of the police complaints which the applicant could not explain.

[11] In the Board's view, a claimant complaining to the police against her persecutor is an important element of the claim. Therefore, it was reasonable to assume the applicant would have wanted the Board to be aware of the additional police complaints. The Board acknowledged that a claimant's memory could be affected by abuse, but noted that the applicant did remember to recount one police complaint and that the events took place approximately one year before the hearing.

[12] The Board drew an adverse credibility inference against the applicant and found that on a balance of probabilities, there was insufficient evidence to establish that the applicant went to the

police at all. Therefore, the Board found there was not enough credible evidence to determine if the applicant was a Convention refugee or a person at risk.

[13] On state protection, the Board recited the legal principles of state protection and found that as Namibia was a democracy, the presumption of protection applied.

[14] The Board found that the applicant had not provided clear and convincing evidence that state protection in Namibia was inadequate. The Board did not accept the applicant's evidence that she complained to the police three times. Even if the Board accepted that testimony, she still did not make a complaint with the national police commissioner. The Board described the applicant's evidence of women in her neighbourhood who were not protected in similar fact situations to be vague at best and found there was insufficient evidence to establish whether these situations actually occurred.

[15] Even if the Board accepted the applicant's testimony that she complained to the police three times, this did not amount to an exhaustion of avenues of protection as she did not make a complaint to the national police commissioner and by her own testimony, her complaint was still being investigated when she fled Namibia.

[16] The Board reviewed country conditions evidence relating to Namibia's efforts to protect women from domestic abuse. The Board found that law enforcement was responsible for investigating criminal complaints and referring victims of violence to appropriate agencies such as WCPU and that magistrates could grant protection orders to protect victims from domestic violence.

The Board found that the WCPU provided such services as police protection, offering a sympathetic ear to victims of abuse, providing temporary shelter and assisting with arresting and prosecuting perpetrators.

[17] The Board went on to review legislation criminalizing domestic violence and marital rape in Namibia and making protection orders available. The Board described the availability of shelters as described in a response to request for information. The Board identified two non-governmental organizations dedicated to providing services to victims of domestic abuse.

[18] The Board acknowledged that one source indicated the police do not like getting involved in family matters, but found the police have a duty to protect members of the public and that there was a complaints mechanism for police who did not carry out their duties.

[19] In conclusion, the Board found that adequate state protection was available due to Namibia's serious efforts to protect women from domestic violence and that the applicant did not take the initiative to secure available protection in Namibia. Therefore, her claim was rejected.

Issues

[20] The applicant submits the following point at issue:

1. Did the Board err regarding the credibility findings of the applicant?
2. Did the Board err in its conclusion that the Namibian authorities would be reasonably forthcoming with serious efforts to protect the applicant?

3. Did the Board err when it failed to examine the contrary documentation on country conditions in Namibia?

[21] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Did the Board err in rejecting the applicant's claim?

Applicant's Written Submissions

[22] The applicant's affidavit indicates that she in fact visited the police four times before leaving Namibia: one each in June, July, August and September 2010. She failed to mention the September visit in the hearing because she was not asked about it.

[23] The applicant submits that reasonableness is the appropriate standard of review.

[24] The applicant first submits that the Board erred in its credibility finding, as the failure to mention all the incidents in her PIF is not a fundamental enough reason to doubt her overall credibility. The Board ignored the legal presumption that sworn testimony is accurate. Plausibility findings should only be made in the clearest of cases. The Board failed to fully examine the issues, instead focusing on a single aspect. What is plausible or implausible should be determined by examining documentary evidence, which the Board failed to do.

[25] On the issue of state protection, the Board failed to consider the applicant's past experience seeking protection from the police and their failure to provide such protection. The Board never acknowledged the police report the applicant placed in evidence. The threshold to establish the incapacity of Namibia to provide protection should be lowered given the applicant's past negative experiences with the police. The Board did not refute the applicant's statement that she sought police protection, rather, it was the number of times that was disputed. The Board should have considered that the police may have the ability to offer protection without choosing to act on that ability. The Board should have considered the applicant's evidence of similar fact situations. The Board failed to put weight on the applicant's evidence of the lack of state protection.

[26] The question of state protection is a question of degree. While the Namibian government has made effort to protect women, the documentary evidence shows the problem of domestic violence is still widespread. The applicant's persecutor is undeterred by the laws implemented to deter domestic violence. This Court has recognized persecution may originate from sections of the population that do not respect the standards established by the laws of the country concerned.

[27] On the issue of contrary documentary evidence, the applicant submits the Board failed to mention parts of the response to information request document indicating protection was inadequate and that there was a high rate of domestic violence in Namibia. The applicant argues the fact that primary assistance for victims of domestic violence comes from non-governmental organizations is evidence of the failure of state protection. The Board failed to consider that the efforts made by Namibia could have no impact on a woman's fear of gender-related persecution, as described in the Gender Guidelines. The Board failed to consider the applicant's particular circumstances as

someone who had been refused police protection in the past. The Board thoroughly examined the positive aspects of the country conditions report but only provided two instances of the negative aspects and provided a merely pro forma country condition analysis.

[28] The Gender Guidelines require that the Board must take into consideration the applicant's gender and puts the onus on the Board to consider the evidence relating to the failure of the state to provide protection to the applicant. The Guidelines further state that if an applicant was able to demonstrate it was objectively unreasonable for her to seek the protection of the state, then her failure to approach the state for protection will not defeat her claim. The fact that the applicant did or did not seek protection from non-government groups is irrelevant to the assessment of the availability of state protection. The Board failed to effectively address the evidence relating to state protection in relation to the applicant's gender.

Respondent's Written Submissions

[29] It was open to the Board to draw a negative inference from the inconsistencies in the applicant's evidence regarding her alleged interactions with the police. It is proper and reasonable for a panel to decide adversely with respect to an applicant's credibility on the basis of contradictions and inconsistencies with an applicant's story.

[30] The Board identified three inconsistencies in the applicant's evidence: the number of police visits, the descriptions of police interaction and the description of the WCPU referral. It is well established that the Board may find that PIF omissions result in a lack of credibility.

[31] The Board's finding that the applicant did not rebut the presumption of state protection is determinative of her claim. Given the finding that the applicant's evidence regarding her alleged attempts to contact the police were not credible, it was open to the Board to find that she had failed to rebut the presumption.

[32] The proper test for state protection is a determination of whether it is adequate, rather than effective. The onus to rebut the presumption remains on the applicant at all times. Clear and convincing evidence is required, which the applicant failed to provide.

[33] The Board did not err in holding that the applicant's evidence of similarly situated persons was insufficient and did not err in finding such evidence was not clear and convincing.

[34] The applicant has not indicated what documentary evidence was before the Board that was not addressed. The onus is on the applicant to provide evidence that it was objectively reasonable for her not to seek the assistance of the state.

[35] The Board is a specialized tribunal and expert in its field. It is not open to this Court to substitute its own view of matters of fact for those of the Board.

[36] The Board reviewed the country condition documentation at length and reasonably determined that the evidence indicated state protection would be available. The Board did not err by giving little weight to the statement filed with the police by the applicant. The Board noted the information given in the statement was inconsistent with the applicant's testimony. The Board is

presumed to have taken all of the evidence into consideration and explicitly noted evidence that the Namibian police do not always like to become involved in family matters. The fact that documentary evidence led the Board to a different conclusion than the applicant's does not mean it was ignored.

[37] The Board explicitly stated that it considered the Gender Guidelines. There is no indication the applicant experienced any difficulty in testifying. The Guidelines are directed towards the conduct of a fair hearing and the applicant has not overcome the presumption that the Board took into consideration all of the evidence before it. A refugee claimant bears the onus of proving her claim.

Analysis and Decision

[38] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[39] It is established jurisprudence that credibility findings, described as the "heartland of the Board's jurisdiction", are essentially pure findings of fact that are reviewable on a reasonableness standard (see *Lubana v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 at paragraph 7, [2003] FCJ No 162; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at

paragraph 46, [2009] 1 SCR 339; *Demirtas v Canada (Minister of Citizenship and Immigration)*, 2011 FC 584 at paragraph 23, [2011] FCJ No 786). Similarly, the weighing of evidence and the interpretation and assessment of evidence are reviewable on a standard of reasonableness (see *Oluwafemi v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1045 at paragraph 38, [2009] FCJ No 1286).

[40] In reviewing the Board's decision on the standard of reasonableness, the Court should not intervene unless the Board came to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 47; *Khosa* above, at paragraph 59). As the Supreme Court held in *Khosa* above, it is not up to a reviewing court to substitute its own view of a preferable outcome, nor is it the function of the reviewing court to reweigh the evidence (at paragraph 59).

[41] **Issue 2**

Did the Board err in rejecting the applicant's claim?

On the issue of credibility, deference is owed to the Board due to its expertise and the centrality of an oral hearing to credibility determinations. In this case, the Board identified several discrepancies between the applicant's PIF narrative, oral testimony and the written record of her complaint to the police.

[42] The Board is entitled to consider inconsistencies when assessing a claimant's credibility (see *Selvam v Canada (Minister of Citizenship and Immigration)*, 2007 FC 513 at paragraph 29, [2007] FCJ No 695). However, the inconsistencies must be rationally related to the applicant's credibility

and must be major enough by themselves to call into question the applicant's credibility (see *Fatih v Canada (Minister of Citizenship and Immigration)*, 2012 FC 857 at paragraph 69, [2012] FCJ No 924). Not every kind of inconsistency will reasonably support a finding of credibility, since a microscopic examination of peripheral issues would be improper (see *Gebremichael v Canada (Minister of Citizenship and Immigration)*, 2006 FC 547 at paragraph 37, [2006] FCJ No 698).

[43] In this case, the inconsistencies identified by the Board are highly relevant to the applicant's claim and central to the issue of state protection, since they pertain to the extent to which she sought protection before leaving Namibia. It is not a "microscopic examination" for the Board to highlight differences between a PIF narrative, oral testimony and documentary evidence. The applicant provided little explanation for these discrepancies and it was therefore reasonable for the Board to draw negative inferences. Little more than a year had passed between the submission of the PIF and the applicant's hearing. She was represented by counsel in preparing her PIF.

[44] The applicant is correct that there is a presumption that sworn testimony is true (see *Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 at paragraph 6, [2001] FCJ No 1131). This is only a presumption, however, and the Board is able and expected to reject that presumption in the face of evidence undermining credibility, such as major inconsistencies.

[45] The credibility finding was not made without reference to documentary evidence, as the inconsistency between the text of the police complaint and the applicant's oral testimony was one of the inconsistencies identified.

[46] In her affidavit, the applicant states there were actually four police complaints. In a judicial review, the only evidence considered should be that before the decision maker under review. Therefore, I cannot consider this evidence.

[47] Therefore, I do not find the credibility determination to be unreasonable.

[48] On the issue of state protection, the applicant first argues the Board did not properly consider the applicant's previous experience with the police. Since I found above that the credibility finding was reasonable, this argument fails.

[49] The applicant additionally argues the Board failed to properly consider country conditions evidence that contradicted the finding of state protection. The applicant points to negative excerpts from the response to request for information document the Board relied on in its finding.

[50] The Board is presumed to have considered all of the evidence before it (see *Oprysk v Canada (Minister of Citizenship and Immigration)*, 2008 FC 326 at paragraph 33, [2008] FCJ No 411). However, the more important the evidence that is not mentioned, the more willing a court may be to infer from silence that the tribunal made a finding of fact without regard to the evidence (see *Pinto Ponce v Canada (Minister of Citizenship and Immigration)*, 2012 FC 181 at paragraph 35, [2012] FCJ No 189).

[51] Here, the unmentioned evidence highlighted by the applicant includes the number of units of the WCPU, the number of cases of gender-based violence reported each year and flaws in the protection order system.

[52] The applicant argues the number of gender-based violence cases is high, but provides no independent evidence of this claim, as the source document of that number makes no such comment. The number of units of the WCPU, for a population of two million, is equally difficult to analyze in the abstract and the applicant points to no independent source corroborating her claim that this is an insufficient number. Finally, the flaws in the protection order system were repeated verbatim by the Board at paragraph 33 of its decision.

[53] The applicant argues that the Board should have inferred from the existence of non-governmental organizations providing services to victims of domestic abuse that the state was unable to do so. Such an inference would mean there is no country in the world that offers adequate state protection given the ubiquity of such organizations in Canada and elsewhere.

[54] The applicant argues that the Board failed to consider her personal circumstances in the context of state protection. Those personal circumstances, however, were duly considered by the Board but rejected at the credibility stage. As that credibility finding stands, she cannot argue that the Board was wrong to not consider her personal evidence at the state protection stage.

[55] For all of these reasons, the applicant has not established the Board failed to consider any of evidence relevant to state protection.

[56] On the issue of the proper application of the Gender Guidelines, the applicant first argues that the Board did not heed the Guidelines' warning that ostensibly positive changes in country conditions may have no impact on a woman's fear of gender-related persecution. As described above, I find that the Board properly considered all the country conditions evidence before and did not assume that all changes are effective, as evidenced on one point by the Board's consideration of evidence about the flaws in the protection order regime.

[57] The Guidelines also establish that an applicant may demonstrate it is objectively unreasonable for her to seek the protection of her state. There is, however, no indication the Board was unaware of this principle, given its thorough analysis of state protection based on country conditions evidence apart from the applicant's own experience.

[58] The Guidelines are a very important tool in considering refugee claims based on gender-related persecution, but they do not guarantee success to every applicant. I find no evidence that the Guidelines were contradicted in this case.

[59] Based on these findings, the application for judicial review is dismissed.

[60] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

***Immigration and Refugee Protection Act*, SC 2001, c 27**

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.
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 unable or, by reason of that fear, unwilling to return to that country.	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.
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 in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-851-12
STYLE OF CAUSE:	LIZELDA KAMBANDA - and – THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	October 24, 2012
REASONS FOR JUDGMENT AND JUDGMENT OF:	O'KEEFE J.
DATED:	October 30, 2012

APPEARANCES:

Tricia Simon	FOR THE APPLICANT
Amy King	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Tricia Simon Toronto, Ontario	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT