

Federal Court



Cour fédérale

Date: 20121120

Docket: IMM-3350-12

Citation: 2012 FC 1338

Ottawa, Ontario, November 20, 2012

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

AZRA IQBAL

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [“IRPA”] of a decision by the Refugee Protection Division [“RPD”] that Azra Iqbal was neither a “refugee” within the meaning of section 96 of the IRPA nor a “person in need of protection” under section 97 of the IRPA.

I. Facts

[2] The Applicant is a citizen of Pakistan. She married her first cousin, Irfan, in 2006. She lived with her husband together with her brother-in-law, Kazim and his wife and children.

[3] Irfan confessed to the Applicant that he is homosexual and since they married, they only had sexual relations on two occasions.

[4] Kazim's wife compelled the Applicant to undergo a physical examination because she was unable to conceive and the village midwife confirmed that the Applicant is infertile. During the month of March 2009, Kazim approached the Applicant and offered to have sexual relations with her because she was apparently unable to conceive with her husband. He claims that it was to safeguard his brother's reputation and the family's honor. The Applicant refused and she disclosed the inappropriate advances to Kazim's wife and to her uncle, her father's brother. Kazim then convinced his wife and uncle that the Applicant had tried to seduce him.

[5] The Applicant claims that a few weeks later, when she was alone in the house, Kazim tried to rape her. She complained to her husband and uncle who did not react. On the same night, the lady servant allegedly warned the Applicant that Kazim was planning on accusing her of adultery with the support of the mosque's Imam.

[6] The next day, the Imam allegedly told the Applicant that a man called Bashir Ahmad admitted to having had a sexual relation with the Applicant and that she would be punished with one hundred lashes on her back. The Applicant asked for more information about Mr. Ahmad but the Imam replied that he was hiding out of fear of being punished.

[7] The Applicant allegedly tried to explain to the Imam and Kazim that the latter made up this story, as a revenge of her refusal to have sexual relations with him, but they beat her.

[8] The Applicant claims that the following day, the lady servant informed the Applicant that Kazim and her uncle had left to go to the mosque to obtain a Fatwa against her. The Applicant immediately left for Islamabad and stayed with a friend.

[9] She arrived in Canada on June 5, 2009 with a visitor visa issued on April 8, 2009. Her husband had sent her passport to allow her to visit her parents in Canada. Before leaving, she had heard that a Fatwa had been issued against her. After her arrival in Canada, she heard that Kazim and the Imam had made a verbal complaint to the police who are now looking to arrest her. She filed a refugee claim on October 9, 2009.

II. Decision under Review

[10] The RPD was satisfied with the Applicant's identity. The Applicant claims that she needs to be granted refugee status because she is at risk of being a victim of Koranic punishment because of allegations that she committed adulterous acts, in contravention to Islamic law.

[11] The RPD generally refused the Applicant's claim on the basis that there is a lack of credibility and plausibility with respect to a number of determinative issues.

[12] As for the analysis as to whether she is a "person in need of protection", the RPD found that the claimant is not at risk of cruel or unusual treatment or punishment if returned to Pakistan.

[13] The RPD found incongruous that the Applicant's husband is still sharing a house with his brother who allegedly tried to rape his wife, fabricated a story of adultery, had a Fatwa issued against her and made a complaint to the police against his wife.

[14] The Applicant explained that her husband was angry when she told him that Kazim had tried to rape her, that he does not believe she committed adultery, that he gave her the passport to enable her to go to Canada to visit her family and that he would like to reconcile with the Applicant.

[15] The decision-maker examined the letter from the Applicant's lawyer. The Applicant's uncle, who is the brother of her mother, allegedly hired a lawyer in Kabarwala, Pakistan to determine the Applicant's legal situation in Pakistan as of April 2011 and to explain what would happen should she return to Pakistan. He stated that there is no FIR registered yet against her but that there was indeed, an oral complaint for adultery made by Kazim Hussain and Qari Maqbool Ahmed, her other uncle, and that the police are looking for the Applicant to arrest her and start an investigation.

[16] He also states that if a woman is apprehended for adultery, she may face imprisonment for a period of five years or a fine or both. Moreover, such women are also generally rejected by their families. A religious edict may also be issued against her and according to the Applicant's uncle such edict has already been issued.

[17] The RPD found that the letter from the lawyer does not have a probative value because as stated in documentary evidence, lawyers' correspondence from Pakistan frequently contains falsified information. Moreover, the Applicant did not submit declarations of a number of family members, including some living in Montreal, who could have confirmed the truthfulness of her story and the Applicant's well-founded fear of persecution. The RPD deemed that it would have been useful to her case to submit declarations from her husband as well as from her uncle, who hired the lawyer. The RPD was not satisfied with the Applicant's explanation as to why she did not submit additional affidavits.

[18] The fact that a complaint for adultery was made is improbable as the Applicant has never heard of Bashir Ahmad. Moreover, considering that a complaint of adultery requires the examination on oath of the complainant as well as four male adult eyewitnesses who must testify of the sexual act, the RPD concluded that it is improbable that the Applicant would be brought to trial. For all these reasons, the Respondent concluded that the Applicant is not a Convention refugee under section 96 or a person in need of protection within the meaning of section 97(1) of the IRPA.

III. Applicant's Submission

[19] The Applicant first submits that the Board members of the RPD lack competency to decide upon refugee claims as the legislative changes that occurred in December 2011 regarding the appointment of RPD decision-makers can in no way guarantee that they are prepared for such work.

[20] Second, the Applicant submits that the RPD erroneously refused to accommodate her request of being heard by a female adjudicator, which was supported by a psychological report.

[21] Third, the Applicant submits that the RPD's assessment of the Applicant's credibility is unreasonable as it should have considered the fact that her testimony is tainted by her cultural views.

[22] Fourth, the Applicant submits that the RPD erred when it rendered its decision without giving any consideration to the *Guideline 4: Women Refugee Claimant Fearing Gender-Related Persecution* [the "Guidelines"].

[23] Finally, the Applicant submits that the RPD erred by not finding that the Applicant faces the risk of honor killing.

IV. Respondent's Submission

[24] The Respondent first argues that the Applicant is precluded from making allegations of institutional bias and incompetence at the judicial review stage as she was in a position to make such allegations before the RPD. Moreover, those arguments are unfounded as similar allegations have been rejected by this Court in *Gillani v Canada (Minister of Citizenship and Immigration)*, 2012 FC 533 at paras 36-40, 2012 CarswellNat 1387.

[25] Second, the Respondent submits that the RPD did not err in deciding that the case could be heard by a male Board member, after considering the psychological report. The RPD's reasons for not accommodating the Applicant's request are reasonable.

[26] Third, the Respondent argues that the RPD's credibility findings are reasonable and supported by the lack of reliable and probable evidence presented by the Applicant. Moreover, the documentary evidence is insufficient to support the Applicant's case and it does not constitute a substitute for a claimant's lack of credibility.

[27] Fourth, the Respondent submits that the RPD did not ignore the Guidelines but that the determinative issue was the lack of credibility of the Applicant.

[28] Finally, as the RPD found the Applicant not to be credible, it was not under a duty to analyze societal attitude towards women who committed adultery, such as honour killing.

V. Issues

[29] The present judicial review raises the following issues:

- 1) Does the appointment process for RPD Members raise an issue of incompetence or reasonable apprehension of bias?

- 2) Did the RPD err in not accommodating the Applicant's request to be heard by a female decision-maker?

- 3) Did the RPD make unreasonable credibility findings?

- 4) Did the RPD commit a reviewable error by not considering the Guidelines when it rendered its decision?

- 5) Did the RPD come to an unreasonable conclusion when it disregarded the Applicant's fear of facing honour killing?

VI. Standard of Review

[30] The applicable standard of review to the first issue is correctness as it raises a procedural fairness question (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 44, [2009] 1 SCR 339). The applicable standard to the credibility findings is reasonableness as it is a question of fact (*Aguebor v Canada (Minister of Employment and Immigration)*, 160 NR 315 at para 4, 1993 CarswellNat 303 (FCA)). The RPD's decision to disregard the Guidelines and to not accommodate the Applicant's request to be heard by a male decision-maker need to be reviewed under the standard of reasonableness (*Hernandez v Canada (Minister of Citizenship and Immigration)*, 2009 FC 106 at para 13, 2009 CarswellNat 544). Finally, the applicable standard of review to the RPD's finding on the risk of honor killing is reasonableness as it is a question of mixed fact and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 164-166, [2008] 1 SCR 190).

VII. Analysis

A. Does the appointment process for RPD Members raise an issue of incompetence or reasonable apprehension of bias?

[31] This Court agrees with the Respondent's argument that the Applicant is precluded from raising the incompetence or reasonable apprehension of bias on the part of the Board Member at the judicial review stage. Indeed, when the Applicant was before the RPD, she was in possession of all the necessary information to raise the issues of incompetence and reasonable apprehension of bias that she is now submitting to the Court. Therefore, this is a subject matter that should have been addressed by the RPD but the Applicant chose not to raise it. It has been established by this Court that such objection should be raised at the earliest opportunity; otherwise it amounts to an implied waiver to raise the matter (*Hernandez v Canada (Minister of Citizenship and Immigration)*, 91 ACWS (3d) 811 at para 6, 1999 CarswellNat 1953).

B. Did the RPD err in not accommodating the Applicant's request to be heard by a female decision-maker?

[32] The RPD's decision of February 27, 2012, by which it declines the Applicant's request to be heard by a female decision-maker, is reasonable. The RPD coordinating officer rendered its decision after examining the psychological report. Therefore, consideration was given to it and it was decided that fairness of the hearing would not be compromised if the RPD hearing proceeded with a male decision-maker. Moreover, the presiding member also gave consideration to the psychological report before deciding to proceed.

[33] The RPD rightly found that the Applicant is not in a position to make a request to have a female RPD decision-maker decide her case as until February 2012, she was represented by a

male counsel. Moreover, both male and female RPD Board members are appropriately trained to handle sensitive cases and this consideration should not on its own, warrant the right to be heard by a female decision-maker. Such reasons given by a tribunal have been approved by this Court in *Gyorgyjakab v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1119 at para 11, 2005 CarswellNat 2446, in which the decision of the male decision-maker not to recuse himself was upheld:

[11] Nowhere in the Guidelines is there mention of the fact that a male Board member should not preside the hearing, stating simply that some level of accommodation may be necessary. That being said, there is nothing in the decision of the Board which would indicate that this was not the case. On the contrary, the Board member specifically stated that:

At the outset of the hearing, counsel for the claimant expressed surprise that, given the nature of the case, the member hearing the claim was a male.

The panel does not find counsel's surprise to merit a change of panel. It is noted that counsel for the claimant is himself a male. Furthermore, the Refugee Protection Officer assisting the panel is a female. As well, there was no specific request made in advance of the hearing for a female panel member that the tribunal could have considered in scheduling the hearing. Lastly, all members of the tribunal are trained to be sensitive to gender issues and conduct themselves in accordance with the Chairperson's Gender Guidelines.

(...)

I may add that the same request was made again at the beginning of the RPD's hearing. Based on the fact that no additional evidence was presented, the member refused the request and proceeded.

C. *Did the RPD make unreasonable credibility findings?*

[34] The decision-maker considered the evidence pertaining to the situation faced by women in Pakistan. However, it is a long-standing principle that the existence of objective evidence is insufficient ground to allow a refugee claim (*Kaba v Canada (Minister of Citizenship and Immigration)*, 2007 FC 647 at para 1, 2007 CarswellNat 2822). Indeed, the Applicant needs to bring convincing and probative evidence as to her personal situation to demonstrate her subjective fear. The decision-maker reasonably concluded that there is no probative evidence that establishes the basis for the Applicant's alleged fear of persecution.

[35] A negative credibility finding regarding a significant element of the claim may warrant dismissing the claim for refugee protection (*Sheikh v Canada (Minister of Employment and Immigration)*, 11 Imm LR (2d) 81 at para 7, 71 DLR (4th) 604 (FCA)). First, a reading of the transcripts of the hearing reveals that the Applicant was unclear as to who hired the lawyer. The lawyer's letter was examined by the RPD and it concluded that it has no probative value considering that it is specified in the documentary evidence that lawyers' correspondence from Pakistan is sometimes falsified. Moreover, the RPD rightly concluded that the Applicant could have submitted more compelling evidence related to her situation such as affidavits of family members who should be concerned about her situation in Pakistan and who could have corroborated her version of the facts.

[36] Moreover, the finding that it is incongruous that the Applicant's husband is still sharing a house with his brother who allegedly tried to sexually assault the Applicant and who allegedly had a Fatwa issued against her is reasonable. The following comments made by this Court in

Valtchev v Canada (Minister of Citizenship and Immigration), 107 ACWS (3d) 293 at para 7, 2001 CarswellNat 1534, apply to the RPD's finding as to the implausibility of an important portion of the Applicant's submissions:

[7] 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. [See L. Waldman, *Immigration Law and Practice* (Markham, ON: Butterworths, 1992) at 8.22]

The RPD's decision is reasonable because important factual aspects of the case, as presented by the Applicant, do not fall within the realm of reasonability. Moreover, the finding as to the implausibility of the Applicant's story is confirmed by the absence of credible evidence to support her claim.

[37] Furthermore, a review of the transcripts of the Certified Tribunal Record reveals that the Applicant lacked precision on a number of subject matters and that her testimony contained a number of inconsistencies: the moment she heard that a Fatwa had been issued against her and her inability to obtain further evidence from her uncle, husband, sister etc.

[38] Moreover, as the RPD did not find that her testimony and the lawyer's correspondence could establish that a Fatwa had been issued against the Applicant, it was reasonable to conclude that the conditions to bring the Applicant to trial for adultery are not met.

[39] In conclusion, the Board's decision is reasonable and supported by fact and law. The intervention of this Court is not warranted. The Board's findings on the Applicant's credibility are justified in details in the decision as he gave a number of valid justifications to explain its negative credibility findings.

D. Did the RPD commit a reviewable error by not considering the Guidelines when it rendered its decision?

[40] It has been established by this Court that the Guidelines do not consist in a cure for the lack of credibility of the Applicant's evidence. In *Munoz v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1273 at paras 31 and 33, 302 FTR 67, this Court made the following comments:

31 Second, the RPD was presented with an account that was not credible, in which there was no credible allegation related to the claimant's gender. Moreover, as mentioned above, the RPD stated in clear, explicit and intelligible terms the valid reasons why it doubted the truthfulness of Ms. Munoz's allegations, given her lack of credibility.

[...]

33 The Guidelines are used to ensure that gender-based claims are heard with sensitivity. In this case, the RPD followed the "spirit" of the Guidelines by means of active listening, despite the fact that this particular case does not even lead to the application of the Guidelines primarily because the RPD considered Ms. Munoz and the basis of her evidence to be not credible.

[41] A general review of the transcript reveals that the RPD followed the “spirit” of the guidelines (see pages 169, 170, 179, 180 and 181 of the Tribunal record). In addition, her testimonial has revealed a number of inconsistencies, the lawyer’s correspondence was not considered to be probable and the Applicant did not submit evidence corroborating her alleged risk of persecution. Therefore, the guidelines were followed and the credibility findings and lack of convincing evidence did support a conclusion of a lack of subjective fear.

E. Did the RPD come to an unreasonable conclusion when it disregarded the Applicant’s fear of facing honour killing?

[42] The RPD did not fail to address the question of honour killing. Indeed, as the Court found that the Applicant lacks credibility, it was under no duty to analyze the specific question of honour killing raised by the Applicant. Indeed, the RPD found most of the Applicant’s evidence and testimonial to be without probative value. It concluded that the Applicant did not establish that she was persecuted because of adulterous acts. The RPD therefore committed no error by not analyzing whether or not the Applicant faces the specific risk of honour killing as she did not present credible evidence to establish a fear of persecution.

[43] The parties were invited to submit a question for certification but none was proposed.

ORDER

THIS COURT ORDERS that the application for judicial review be rejected and no question is certified.

“Simon Noël”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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