

Federal Court



Cour fédérale

**Date: 20130305**

**Docket: IMM-4015-12**

**Citation: 2013 FC 219**

**Ottawa, Ontario, March 5, 2013**

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

**BETWEEN:**

**RUTH MORENAKANG MMONO**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

**I. INTRODUCTION**

[1] The Applicant, a female citizen of Botswana, claimed refugee protection on the basis of fear of her common law spouse. Her claim was denied by a member [Member] of the Immigration and Refugee Board [Board]. This is the judicial review of the Board's decision.

II. FACTS

[2] The Applicant's claim is based on a continuing violence against her by her common law husband, including verbal abuse, threats, assaults and sexual assault. She made five police reports but no action was taken.

[3] When the Applicant arrived in Canada, she claimed that she knew no one here. However, she had a telephone number and an address in her diary which turned out to be her first cousin in Nova Scotia where she was expected to stay.

[4] As a result of the requisite immigration medical examination, she was found to be HIV positive. She believes she contracted HIV from her common law spouse.

[5] The Member denied the Applicant's claim based on credibility. There was no documentary or photographic evidence of her common law relationship. There were inconsistencies in her account of attending at the police station to file a complaint. There was no evidence of filing any complaints to police. There were contradictions whether she had sought medical assistance for the sexual assault.

[6] The Member further found inconsistencies and self-serving statements in a letter concerning police reporting. The Applicant's explanation for the Nova Scotia address and telephone number was nonsensical. Finally, the Member was unable to find a causal link between her HIV condition and the facts of this case.

[7] The Member found that in view of the documentary lacuna and the contradictions in her evidence, the Applicant had failed to establish an objective fear of persecution.

[8] Despite the Applicant claiming that there are eight issues in this case, there are but two:

- (a) Was the decision sustainable?
- (b) Did the Member fail to consider all possible grounds for claiming refugee status?

### III. ANALYSIS

[9] The standard of review of the first issue is reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190) and for the second issue, it is correctness (*Saha v Canada (Minister of Citizenship and Immigration)*, 2009 FC 304, 176 ACWS (3d) 499).

[10] There is no basis and none show that the IRB Guideline 4, *Women Refugee Claimants Fearing Gender-Related Persecution: Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act*, effective date: November 13, 1996 [*Gender Guidelines*] were misapplied. The real problem with the Guidelines is the Respondent's submission that the *Gender Guidelines* do not apply unless the material elements of the case are made out. The *Gender Guidelines* apply throughout the process (*N (F) v Canada (Minister of Citizenship and Immigration)*, 182 FTR 294, [2000] FCJ No 738 (Fed TD)).

[11] There are a number of adverse credibility findings. While there may be some arguable points on some of the findings, when looked at as a whole, there is no basis for Court intervention.

[12] The Applicant argued that the Member failed to consider all the grounds for a refugee claim even if the claimant did not raise it. That is the effect of *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, 103 DLR (4th) 1.

[13] The Board is not required to make a claimant's case or advance a grounds for a claim that an applicant did not contend.

[14] However, the Court of Appeal did require the Board to consider evidence that obviously emerged from the evidence.

... As this Court recently said in *Pierre-Louis [sic] v. M.E.I.*, [F.C.A., No. A-1264-91, April 29, 1993.] the Refugee Division cannot be faulted for not deciding an issue that had not been argued and that did not emerge perceptibly from the evidence presented as a whole. [*Ibid.*, at 3.] Saying the contrary would lead to a real hide-and-seek or guessing game and oblige the Refugee Division to undertake interminable investigations to eliminate reasons that did not apply in any case, that no one had raised and that the evidence did not support in any way, to say nothing of frivolous and pointless appeals that would certainly follow.

*Guajardo-Espinoza v Minister of Employment and Immigration*  
(F.C.A.), 161 NR 132, 1993 CarswellNat 306, para 5

[15] The Applicant raised the issue of being infected with HIV. The Board only considered her condition as not providing a causal link in her narrative of abuse, assaults and sexual assault. The Board did not consider, in light of the mixed evidence of the state's ability to care for HIV patients, how the Applicant would be affected by her HIV condition in Botswana.

IV. CONCLUSION

[16] Therefore, this judicial review will be granted on this limited point and the matter returned to the same Member (if possible) for a consideration of this aspect of the Applicant's case in the overall context of the evidence.

In the event this new consideration cannot be accomplished by the Member, the Applicant will be entitled to a new determination.

[17] There is no question for certification.

**JUDGMENT**

**THIS COURT’S JUDGMENT is that** the application for judicial review is granted in part, the decision is suspended and the matter is to be determined by the Member in accordance with these Reasons or, as provided in the Reasons, the decision is quashed and the matter is to be referred to a different Member for a new determination.

“Michael L. Phelan”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-4015-12

**STYLE OF CAUSE:** RUTH MORENAKANG MMONO

and

THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** January 15, 2013

**REASONS FOR JUDGMENT  
AND JUDGMENT:** PHELAN J.

**DATED:** March 5, 2013

**APPEARANCES:**

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