

Federal Court



Cour fédérale

Date: 20140430

Docket: IMM-1060-13

Citation: 2014 FC 401

Toronto, Ontario, April 30, 2014

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

KELLY DANIELLE OCKHUIZEN

Applicant

and

**MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] Kelly Danielle Ockhuizen seeks judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board which dismissed her claim for refugee protection on credibility grounds.

[2] Notwithstanding the deference owed to the Board's findings of fact, I have concluded that the Board's decision was unreasonable. Consequently, the application for judicial review will be granted.

I. Background

[3] Ms. Ockhuizen is a 26 year old woman from Botswana. She asserts that she is a lesbian, and that when her parents discovered her sexual orientation they tried to force her into an arranged marriage with a much older man. When she spurned her intended spouse's advances, Ms. Ockhuizen says that he raped her.

[4] Ms. Ockhuizen says that she tried to report the assault to the police, but that when she explained the situation to them, the police ridiculed her and sent her away. Ms. Ockhuizen and her girlfriend then fled to another city.

[5] Several months later, Ms. Ockhuizen alleges that her father and five unknown people came to her home and beat her. With the help of her girlfriend, she then arranged to flee to Canada, where she immediately claimed refugee protection.

II. The Board's Decision

[6] The Board did not believe that Ms. Ockhuizen had been subjected to the threat of a forced marriage, that she had been raped, or that she is in fact a lesbian.

[7] With respect to the alleged forced marriage, the Board noted that Ms. Ockhuizen had testified that her marriage had not yet been finalized when the rape took place. The Board found that it was not plausible that Ms. Ockhuizen's parents would not have arranged a marriage by this time, when the groom had been chosen some seven months before.

[8] The Board also found it unlikely that a university-educated woman such as Ms. Ockhuizen, who had not been raised in a rural environment, would have been forced into an arranged marriage.

[9] Based upon the country condition information, the Board further found that the police in Botswana would have received Ms. Ockhuizen's rape complaint if she had made one. As a consequence, the Board found that she had not tried to file such a complaint.

[10] The Board also found that Ms. Ockhuizen's alleged failure to seek medical attention following the rape was implausible, given the prevalence of HIV/AIDS in Botswana, concluding that this cast further doubt on her story.

[11] In addition, the Board found that Ms. Ockhuizen had provided insufficient evidence of her supposedly long-standing relationship with her girlfriend, or even of her existence, ultimately concluding that Ms. Ockhuizen had not established that she was in fact a lesbian.

[12] Finally, the Board chose to ascribe little probative value to medical reports and other documents that were submitted by Ms. Ockhuizen after her refugee hearing in support of her claim.

III. Analysis

[13] The Board rejected Ms. Ockhuizen's allegation that she was being forced into a marriage by her parents in part because of its finding that it was implausible that her parents would have waited seven months "to arrange a marriage", when the groom had been chosen some seven months before.

[14] However, Ms. Ockhuizen had testified that the marriage had in fact been arranged seven months earlier. Taking the Board's finding at face value, it does not accord with the evidence that was before it.

[15] It may be that the Board really meant to say was that it was implausible that Ms. Ockhuizen's parents would have waited seven months to arrange a marriage ceremony. If that is what the Board meant, the finding is equally problematic.

[16] The jurisprudence is clear that plausibility findings should be made "only in the clearest of cases": *Valtchev v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 at para. 7, [2001] F.C.J. No. 1131.

[17] This is because plausibility findings "can be influenced by cultural assumptions or misunderstandings", with the result that such findings "must be based on clear evidence, as well as a clear rationalization process supporting the Board's inferences, and should refer to relevant evidence which could potentially refute such conclusions": *Santos v. Canada (Minister of Citizenship & Immigration)*, 2004 FC 937 at para. 15, [2004] F.C.J. No. 1149.

[18] The Board has not identified any evidence with respect to marriage customs in Botswana that would support its finding as to the implausibility of the delay in arranging a marriage ceremony. Nor did it consider Ms. Ockhuizen's explanation that the dowry had only just been paid by her intended husband at the time of the rape.

[19] The Board also rejected Ms. Ockhuizen's claim that she was being forced into a marriage by her parents, because she was university-educated and had not been raised in a rural environment. However, the country condition information relied upon by the Board to support its finding does not indicate that forced marriages only occur in relation to women raised in rural environments. Nor does the Board explain how Ms. Ockhuizen's level of education would have a bearing on her parents' decision to try to force her into a marriage.

[20] The Board based its finding that Ms. Ockhuizen had not been raped in part on her alleged failure to seek medical treatment after the assault. According to the Board, this was implausible, given the prevalence of HIV/AIDS in Botswana. The difficulty with this finding is that Ms. Ockhuizen had testified that she had in fact sought medical treatment for possible sexually-transmitted diseases after the rape, with the result that the Board's finding was made without regard to the evidence before it.

[21] In finding that the police would have received her rape complaint if Ms. Ockhuizen had made one, the Board had regard to country condition information that indicated that laws against rape are enforced in Botswana. The Board did not, however, consider whether this would still be the case where the victim was a lesbian. In failing to consider this question, the Board failed to engage with this aspect of Ms. Ockhuizen's profile, and how it may have affected the police response to her complaint.

[22] This is a real concern, in light of the country condition information that indicates that homosexuality is illegal in Botswana, is considered taboo, and is viewed by the Courts in that country as "an offence to public morality".

[23] The Board's finding that Ms. Ockhuizen had not established that she was in fact a lesbian appears to have been based, in part, on its findings that her story of forced marriage and rape were not credible. Given the concerns identified above with respect to these findings, it follows that the Board's finding regarding Ms. Ockhuizen's sexual orientation is also suspect.

[24] In light of these errors, I am satisfied that the Board's decision was unreasonable. Given my conclusion in relation to these issues, it is not necessary to address the arguments relating to the Board's treatment of the post-hearing evidence.

IV. Conclusion

[25] For these reasons, the application for judicial review is allowed. I agree with the parties that the case does not raise a question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is allowed, and the matter is remitted to a differently constituted panel for re-determination.

"Anne L. Mactavish"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1060-13

STYLE OF CAUSE: KELLY DANIELLE OCKHUIZEN v MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

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