

Federal Court



Cour fédérale

Date: 20141217

Docket: IMM-5299-13

Citation: 2014 FC 1232

Toronto, Ontario, December 17, 2014

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

LOULA OMAR MAHAMOUD

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of the decision of a member [Member] of the Refugee Protection Division [RPD, Board] wherein the Board determined that the Applicant was not a Convention refugee or a person in need of protection.

II. Facts

[2] The Applicant is a 38 year old citizen of Djibouti. She claims that she was forced by her family to marry a man 21 years older than herself, who would not allow her to leave the house, and who violently assaulted her on a number of occasions. The marriage took place without her consent or her presence on June 27, 2011.

[3] At the beginning of the RPD hearing, Applicant's prior counsel submitted 3 police reports and 2 medical reports, which the Applicant testified had recently arrived in the mail from her aunt in Djibouti. The Applicant testified that incidents of violence by her husband "used to happen all the time", but that there were three times she reported it to the police (Certified Tribunal Record [CTR], p 182). The Applicant provided documentary evidence for the following 3 incidents:

- A. September 19, 2011 – police certificate and medical certificate;
- B. April 17, 2012 – police certificate and medical certificate; and
- C. November 7, 2012 – police report with details of verbal complaint.

[4] The Applicant's original French basis of claim [BOC] states that on September 19, 2011, the first incident of physical abuse occurred. She describes the incident in detail in her BOC. She also described in the BOC that following that incident, she stayed with her aunt for a week, after which her husband gave money to her family and her family brought her back to his home by force. Thereafter, her husband, according to her testimony: did not allow her to leave the house;

insulted her; and hid a knife in his pillow, telling her that she was a slave that he bought and that if she did not obey him, he would kill her. She was scared, cried regularly, and lacked sleep and appetite.

[5] The RPD hearings involved some confusion, at least partially stemming from translation issues, which included the alleged April 17, 2012 incident. The BOC does not mention April 17. However, the Applicant gave testimony at the hearing that there had been an incident on this date and submitted a police certificate, as well as a medical certificate describing her injuries from this date.

[6] Dates became confused surrounding the 3 incidents at the hearing, but there was medical evidence and police reports to back the three separate incidents up. The medical evidence appears consistent with the police reports, but these were not discussed in the Decision. Rather, the Board focused on the date confusion in the oral testimony, and the fact that the BOC only accounted for two incidents. The Applicant explained in the hearing that she had asked her first counsel (a law student) to include the April 17 incident, but he did not do so. Subsequent counsel, who represented her at the RPD hearing, orally advised of the amendment when he realized that the BOC the Board had was not an amended version.

[7] The nature of the testimony was significant in terms of abuse, and the medical reports were consistent with significant abuse. The Applicant alleges that her husband came home early in the morning after having been out with his friends the whole night, and she got up early that morning to prepare breakfast for him. He was not happy with the tea and poured the hot tea on

her. He verbally insulted her, became very aggressive, and threw a number of objects at her: glasses, chairs, metal objects, a pan, etc. He then kned her in the stomach several times, punched her in the face several times, and struck her violently with a wooden stick. After that, he tore her clothes with a knife, threatened to cut her throat, injured her collarbone with the knife, and dragged her half naked to the door of the house.

[8] The Applicant testified that with her aunt's and neighbour's help, she obtained a plane ticket and fled to the United States [U.S.], where she stayed with her neighbour's friend until the friend took her to catch a flight to Canada, where her brother lives and where she ultimately made a claim for refugee protection.

III. Decision

[9] The RPD found the Applicant not to be credible, on the following grounds:

- A. The Applicant testified in a vague and evasive manner throughout the hearing.
- B. Contradiction #1: When the Applicant testified that she got her passport in June 2012, the Member confronted her with the fact that she had earlier testified that she only decided to leave Djibouti on November 7, 2012. The Board found her explanation, that she always knew she would leave, to be evasive.
- C. Contradiction #2: The Applicant testified that her husband spilled hot tea on her on April 17, 2012, but the police report indicated that this incident had occurred on November 7, 2012. When confronted with this, she "adjusted" her testimony to be that this incident occurred on November 7.

- D. Contradiction #3: The Applicant's BOC referred to only two events, but she referred to three in her testimony. Her explanation for the omission of the April 17 incident from the BOC – that she had told her previous counsel about the April 17 incident but he had refused to amend the BOC, telling her she would be able to do so at the hearing – was found not to be logical, especially given that the Applicant described the incident as very important.
- E. Delay: The Board concluded that the Applicant did not behave like someone who fears for her life, because she obtained her American visa in June 2012 but did not leave the country until November 15, 2012. The Board found her explanation that she could not leave while her husband was in Djibouti, because he watched her constantly, unsatisfactory as she was able to leave her house at some point to go to an interview at the U.S. embassy.

IV. Relevant Provisions

[10] Sections 96 and 97 of *IRPA* are attached below as Appendix A.

V. Issue

[11] This matter raises the following issue:

A. Was the Decision reasonable?

VI. Standard of Review

[12] The RPD's findings of fact and mixed fact and law are reviewable on a standard of reasonableness: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 51.

[13] When reviewing a decision on the standard of reasonableness, the Court is concerned with "the existence of justification, transparency and intelligibility within the decision-making process" and with "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

VII. Parties' Submissions

[14] The Applicant submits that the Board erred by:

- A. ignoring relevant evidence that directly contradicts the conclusions she reached;
- B. after making negative credibility findings with respect to parts of the Applicant's testimony, failing to consider parts of her testimony that were considered credible and that clearly expressed a subjective fear of persecution;
- C. failing to give full and proper consideration to the documentary evidence submitted by the Applicant, which is consistent with her allegations of domestic abuse and directly contradicts the Board's conclusions, namely the police certificates and medical certificates;

- D. failing to consider the Chairperson's *Gender Guidelines*, below, in determining whether or not the Applicant has a well-founded fear of persecution; and
- E. failing to consider the country condition evidence and the existence of a nexus under section 96 of *IRPA*.

[15] The Applicant also points out that switching the hearing from French to English to accommodate new counsel created a number of problems for the Applicant. There were also issues regarding the Somali dialect used at the hearing, which was clear from the transcript.

[16] The Respondent submits that: the Board's finding that the Applicant's fear of being targeted at the hands of her husband was not credible, was reasonable; the Board did consider the Applicant's personal story and documentation; and the general country documentation on the challenges of Djibouti was not relevant once the Applicant's own story of being a victim of domestic violence was impugned. The Respondent stressed that credibility findings are the domain of the Board, and that the ultimate conclusion of the Board was reasonable.

VIII. Analysis

[17] I do not agree with the Respondent, and find the Decision unreasonable for the reasons below.

A. *The Board did not assess the corroborating evidence that supported the plausibility of the Applicant's story*

[18] First and foremost, I find the Board's decision unreasonable because the Member did not consider the evidence in its entirety before deciding the value to be placed on critical elements of the evidence. Rather, she dismissed the claim on the basis of the Applicant's testimony alone, failing to properly consider, with an open mind, the police certificates and medical certificates.

[19] Specifically, the Board focused on the fact that the Applicant had not referred to the April 17 incident or complaint to the police in her BOC, and that the Applicant said that the hot tea incident took place on April 17, contrary to the police report and her later testimony. The Board did not go on to consider whether the police certificates and medical certificates were sufficient to support the Applicant's claim despite contradictions in her testimony.

[20] I find Justice Campbell's decision in *RER v MCI*, 2005 FC 1339 particularly pertinent to this case. In *RER*, the principal Applicant claimed that he had been detained and tortured by the police in Peru because of his political opinions. He submitted cogent supporting evidence of his past torture, and of the rape of his wife perpetrated by state agents in Peru. The RPD began by making a negative credibility finding against the principal Applicant as a result of a focus on discrete features of his testimony. Then, based on the negative credibility finding, it rejected other very cogent documentary evidence tendered by the principal Applicant.

[21] Justice Campbell found that the Board Member had no regard for relevant evidence that went directly to the issues of the Applicants' credibility. He wrote:

[...] I conclude that, from the words used in the reasons, the RPD used a linear approach in evaluating the evidence submitted by the principal Applicant. I find that the use of this linear approach denied natural justice to the principal Applicant for two reasons.

First, it is only fair and reasonable for parties to litigation to expect that the decision-maker will consider the evidence in its entirety, with an open mind, before making findings about the value to be placed on critical elements of the evidence. For the general proposition that the evidence must be considered in its entirety see *Owusu-Ansah v. Canada (Minister of Employment and Immigration)* (1989), 98 N.R. 312 (F.C.A.). In the present case, I find that the RPD was in error in not considering the whole of the evidence, including the wife's rape evidence and the cogent independent evidence about the apparent effects of the torture and rape in the form of photographs and reports, before making the critical finding of negative credibility against the principal Applicant (also see *Gonzalez v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 422, and *Herabadi v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 1729).

Second, I find that the RPD was in error by rejecting evidence which comes from sources other than the testimony of the principal Applicant simply on the basis that the principal Applicant is not believed. In my opinion, each independent source of evidence requires independent evaluation. This is so because the independent sources might act to substantiate an Applicant's position on a given issue, even if his or her own evidence is not accepted with respect to that issue.

[Emphasis added] (RER at paras 8-10)

[22] In this case, there was significant confusion regarding the translation. The Board Member took a hypercritical view of dates, which the Applicant attempted to correct. I find, in sum, that the Board used the same linear approach found to be improper by Justice Campbell in *RER*, by failing to consider the evidence in its entirety, and in particular, that the Member completely failed to acknowledge the documentary evidence which buttressed the oral testimony of the Applicant. Instead, she found against the Applicant on the basis of minor inconsistencies

in the Applicant's testimony, which were compounded by the translation difficulties that occurred at the hearing. In order to properly reject the objective evidence that corroborated the Applicant's subjective fear, the Board had to explain, at a minimum, why it found against the Applicant without taking into account the police certificates and medical certificates that corroborated and supported her allegations of domestic violence in Djibouti.

[23] The Board also took a very narrow view of the evidence in refusing to take into account the Applicant's explanation for the omission of the April 17 incident in the BOC. The Applicant explained that she had had a student lawyer who would not include the April 17 incident as an amendment, telling her instead that she could make the amendment at the hearing. Applicant's counsel corroborated this story, explaining to the Board that the Applicant had discharged her prior counsel and hired him instead on this basis. The Board rejected the Applicant's explanation for the omission on the basis that it was "not logical, especially given that the claimant described the incident as very important" (Decision, CTR, p 17, para 23), despite the fact that the claimant had evidence in writing that she had previously attempted to raise the April 17 incident.

[24] The police certificates and medical certificates independently supported the Applicant's claim, and as Justice Campbell points out in *RER*, above, each independent source requires independent evaluation. Justice Campbell expanded on this point in *Isakova v MCI*, 2008 FC 149:

If the RPD properly makes a credibility or implausibility finding with respect to one aspect of an applicant's evidence, this will not necessarily provide a basis for rejecting the entirety of the applicant's claim. Justice Martineau makes this point in *R.K.L. v. Canada (Minister of Citizenship and Immigration)* [2003] F.C.J. No. 162, 2003 FCT 116 at para. 11-14:

However, not every kind of inconsistency or implausibility in the applicant's evidence will reasonably support the Board's negative findings on overall credibility. It would not be proper for the Board to base its findings on extensive "microscopic" examination of issues irrelevant or peripheral to the applicant's claim: see *Attakora v. Canada (Minister of Employment and Immigration)*, (1989), 99 N.R. 168 at para. 9 (F.C.A.) ("Attakora"); and *Owusu-Ansah v. Canada* [...]

[...]

Finally, the applicant's credibility and the plausibility of testimony should be assessed in the context of her country's conditions and other documentary evidence available to the Board. Minor or peripheral inconsistencies in the applicant's evidence should not lead to a finding of general lack of credibility where documentary evidence supports the plausibility of the applicant's story: see *Attakora, supra*; and *Frimpong* [...]

[...]

[...W]hen evidence which supports an applicant's claim is not mentioned and other evidence is selectively relied upon, the RPD errs by ignoring relevant evidence (*Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1425 (QL), at para.15).

[Emphasis added] (*Isakova*, above, at paras 8-10)

[25] The Board's fixation on the details of particular dates caused it to forget the substance of the facts on which the Applicant based her claim. Even if the Board was right to doubt some aspects of the circumstances which had led the Applicant to leave Djibouti, there were facts in evidence, including undisputed documentary evidence, which could provide support for her claim that there was a real danger that she might be subject to persecution or risk to her life or risk of cruel and unusual treatment in Djibouti. The Board did not take account of this evidence.

[26] The Board Member's failure to consider the documentary evidence submitted by the Applicant is sufficient to dispose of this claim in the circumstances. However, I allow this application for the following reasons as well.

B. *False inconsistency and Delay issue*

[27] The Board Member found a contradiction between the Applicant's testimony that she had decided to leave the country following the incident on November 7, 2012 and her later testimony that she had already obtained her passport in June 2012. When the Board Member asked the Applicant to explain how it was that she applied for a U.S. visa and a passport before she had made the decision to leave, the Applicant replied:

I always knew that I can't stay in this marriage with this man. He wasn't respecting me. He wasn't treating me well. He was beating me up all the time. I knew I was leaving him and he knew I was going to leave.

(CTR, p 201)

[28] In my view, the Board's finding that there was an inconsistency, and its finding that the Applicant's explanation for the apparent inconsistency was evasive (Decision, CTR, p 15, para 16), were both unreasonable.

[29] In apparent expectation that there could only be one specific day where the decision to leave was formed and conclusively made, the Board Member required the Applicant to specify a date, then drew a negative inference from the fact that the November 7 date came after steps taken by the Applicant to plan her departure. Yet, the Applicant had made it clear from the very

beginning, before she was confronted with any inconsistency, that she had always wanted to leave:

BY PRESIDING MEMBER (to interpreter)

- When exactly did you take the decision to leave?

BY CLAIMANT (to presiding member)

- I always wanted to leave, that is the situation, but the last incident when that happened, that's when I decided to leave.

[Emphasis added] (CTR, p 164)

[30] In my view, applying for a passport and a U.S. visa in June is completely consistent with deciding in November, following a particularly violent beating, and a few days before her husband was to leave on a business trip, that the time had come and she was now going to take the definitive action of leaving.

[31] The dates of preparations for her departure also came up with respect to the issue of delay. When the Board asked the Applicant why, though she had obtained her American visa in June 2012, she had not left Djibouti until November 15, the Applicant explained that she could not leave Djibouti until her husband went away on business because her husband watched her constantly. The Board questioned why she could not have left before if she was able to leave the house for a visa interview, and the Applicant explained that she had taken a risk to attend the interview, but had made it back to the house before her husband returned from the market.

[32] I find the Board's rejection of the Applicant's explanation for the alleged inconsistencies, and reliance on the Applicant's delay in leaving Djibouti, to be unreasonable for two reasons.

The Applicant did not explain why the Applicant's explanation, which was consistent with the fact that she was experiencing domestic abuse and was afraid of her husband, was not believed. Her explanation was consistent with her testimony that, as soon as her husband went away on business on November 10, she sold the furniture in the house to raise funds, bought a plane ticket immediately, and then left on November 15, which confirms that it takes longer to organize a departure than it does to attend a visa interview.

IX. Conclusions

[33] The Board based its findings on inconsistencies such as dates, without regard to key evidence, and by drawing conclusions that were simply unreasonable in a global view of the claim. The Board erred by failing to consider the totality of the evidence, focusing instead on minor inconsistencies in the Applicant's testimony. In my view, it made its conclusions based on erroneous findings of fact made without regard to the material before it: *Owusu-Ansah v Canada (MEI)* (1998), 98 NR 312 (FCA).

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is granted.

This case does not raise a serious question of general importance warranting certification.

"Alan Diner"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5299-13

STYLE OF CAUSE: LOULA OMAR MAHAMOUD v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: DECEMBER 10, 2014

JUDGMENT AND REASONS: DINER J.

DATED: DECEMBER 17, 2014

APPEARANCES:

Edward C. Corrigan

FOR THE APPLICANT

Alison Engel-Yan

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Edward C. Corrigan
Barrister and Solicitor
London, Ontario

FOR THE APPLICANT

William F. Pentney
Deputy Attorney General of
Canada

FOR THE RESPONDENT

APPENDIX A

Sections 96 and 97 of the *Immigration and Refugee Protection Act*, (S.C. 2001, c. 27):

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,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(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.

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

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

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) 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) 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 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) 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) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le

- (i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,
- (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,
- (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and
- (iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

cas suivant :

- (i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
- (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) 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) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.