Date: 20070515

Docket: IMM-5872-06

Citation: 2007 FC 519

Ottawa, Ontario, May 15, 2007

Present: The Honourable Mr. Justice Harrington

BETWEEN:

ARIETE ALEXANDRA PIRES SANTANA

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] In April 2003, the Canadian authorities granted refugee status to Ms. Santana on the basis of her sexual orientation. She submitted that she was a lesbian and that her personal history was tainted by persecution, rape and other ill treatment suffered in her native Angola and in Portugal where she lived for a few years. However, last year the refugee status that she had been conferred was vacated in accordance with section 109 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act). This is an application for judicial review of that decision.

[2] Section 109 of the Act states as follows:

109. (1) The Refugee Protection Division may, on application by the	**109.** (1) La Section de la protection des réfugiés peut, sur demande du

Minister, vacate a decision to allow a claim for refugee protection, if it finds that the decision was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter.	ministre, annuler la décision ayant accueilli la demande d'asile résultant, directement ou indirectement, de présentations erronées sur un fait important quant à un objet pertinent, ou de réticence sur ce fait.
(2) The Refugee Protection Division may reject the application if it is satisfied that other sufficient evidence was considered at the time of the first determination to justify refugee protection.	(2) Elle peut rejeter la demande si elle estime qu'il reste suffisamment d'éléments de preuve, parmi ceux pris en compte lors de la décision initiale, pour justifier l'asile.
(3) If the application is allowed, the claim of the person is deemed to be rejected and the decision that led to the conferral of refugee protection is nullified.	(3) La décision portant annulation est assimilée au rejet de la demande d'asile, la décision initiale étant dès lors nulle.

[3] The Minister's position is that once Ms. Santana arrived in Canada, she became involved in a romantic relationship with a man, which led to marriage, that a child was born of this union and that her attempts to sponsor him failed.

[4] While Ms. Santana admitted all of these allegations, she reaffirmed the truthfulness of her submissions and the documents on which her refugee claim in Canada was based. She alleged that she had been in conflict, confused and unhappy, as she wanted a child and had attempted to change her sexual orientation on that very basis. Following this experience, the marriage failed, she realized that a man could not satisfy her sexual needs and she is currently in a homosexual relationship.

[5] The Minister emphasized the fact that the hearing was held in October 2002 and that the decision in Ms. Santana's favour was made in April 2003. On the day of the hearing, Ms. Santana lived with the man she would later marry. However, she argued that they were simply co-tenants

and did not become more intimate until December 2002. The man in question did not testify since he has been deported.

[6] Then the Minister alleged that additional information was submitted to him at the panel's request in January 2003. This apparently had the effect of giving Ms. Santana a second chance to file all of the evidence of her claim, including her homosexual experience. However, it must be pointed out that the additional information to be submitted had nothing to do with this aspect of the matter.

[7] With all due respect, the Minister's argument does not stand up because it would mean that homosexual individuals deemed to be credible would have to remain celibate until refugee status had been granted to them, before becoming involved in a heterosexual relationship. That is not the issue. The Minister must establish rather that the impugned decision allowing Ms. Santana's refugee claim resulted from misrepresentations of the significant fact that she was not or had never been a lesbian and that, consequently, her story was no more than lies.

[8] The human race is extremely complex, particularly when it comes to the sexuality of its members. In this case, there was no reason to believe that the panel had any more expertise than this Court to address this issue. At best, this Court can recognize that the panel does not have a specific knowledge of it.

[9] This impugned decision must be set aside because it is patently unreasonable. The fact that Ms. Santana had a heterosexual relationship with a man in Canada as such does not require the

intervention of this Court since it cannot be inferred based on this element alone that she directly or indirectly misrepresented an important element regarding the subject of her story, or that she concealed this fact when she applied for refugee status in Canada.

[10] A significant decision on this subject, bearing on the predecessor of section 109 of the Act as it reads today, is *Coomaraswamy v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 153, [2002] 4 F.C. 501 (C.A.). As Mr. Justice Evans writes at paragraph 17:

> Of course, when attempting to establish for the purpose of subsection 69.2(2) that a claimant made misrepresentations at the determination hearing, the Minister may adduce evidence at the vacation hearing that was not before the Board when it decided the refugee claim. Similarly, a claimant may adduce new evidence at the vacation hearing in an attempt to persuade the Board that she did not make the misrepresentations alleged by the Minister.

[11] In this case, it is a matter of pure conjecture and not at all of inference.

[12] In *Dumitru v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 239 (QL), Mr. Justice Noël writes the following at paragraph 10:

> In *Minister of Employment and Immigration v. Robert Satiacum* (A-554-87), June 16, 1989, MacGuigan J.A. stated, at page 15:
>
> > The common law has long recognized the difference between reasonable inference and pure conjecture. Lord Macmillan put the distinction this way in *Jones v. Great Western Railway Co.* (1930), 47 T.L.R. 39 at 45, 144 L.T. 194 at 202 (H.L.):
> >
> > > The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible but it is of no legal value, for its essence is that it is a mere guess. An inference in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof. The attribution of an occurrence to a cause is, I take it, always a matter of inference.

> In *R. v. Fuller* (1971), 1 N.R. 112 at 114, Hall J.A. held for the Manitoba Court of Appeal that "[t]he tribunal of fact cannot resort to speculative and conjectural conclusions." Subsequently a unanimous Supreme Court of Canada expressed itself as in complete agreement with his reasons: [1975] 2 S.C.R. 121 at 123, 1 N.R. 110 at 112.

See also *Espino v. Canada (Minister of Citizenship and Immigration),* 2006 FC 1255, [2006] F.C.J. No. 1578 (QL).

ORDER

THE COURT ORDERS that:

1. This application for judicial review is allowed.
2. The decision of the Refugee Protection Division of the Immigration and Refugee Board dated September 27, 2006, is set aside.
3. The matter is referred to a different member of the Refugee Protection Division for reconsideration in accordance with these reasons.

Sean Harrington
Judge

Certified true translation

Kelley A. Harvey, BCL, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5872-06
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