Date: 20070904

Docket: IMM-4140-06

Citation: 2007 FC 883

Montréal, Quebec, September 4, 2007

PRESENT: The Honourable Maurice E. Lagacé

BETWEEN:

COMFORT EDOBOR, BRADLEY ISERHIEN AND ELYZAH ISERHIEN

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicants apply pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) for judicial review of a decision of the Immigration and Refugee Board (Refugee Protection Division) (the Board) dated June 23, 2006, which determined that the applicants are not Convention refugees or persons in need of protection.

FACTS

[2] Comfort Edobor (the "principal applicant") and her children Bradley Iserhien and Elyzah Iserhien are citizens of Nigeria. They fled Nigeria and came to Canada on July 7, 2005. The applicants made a refugee claim on July 28, 2005 alleging a well-founded fear of persecution on the grounds of membership in a particular social group, namely, for the principal applicant, abused women in Nigeria, for the minor female applicant, females facing genital mutilation, and for the minor male applicant, males facing tribal facial scarring.

[3] According to the principal applicant's Personal Information Form ("PIF") Narrative, the principal applicant was in an abusive common law relationship with the chief of the Oshodi village. She claims that her common law partner would psychologically, physically and sexually abuse her, accuse her of having an affair, force her to stop applying makeup and change her mode of dressing, and isolate and threaten her.

[4] In 2005, the principal applicant's PIF states that her partner wanted to have the female minor applicant circumcised despite the principal applicant's objections. The circumcision was scheduled for February 25, 2005, but two days prior to that date, the applicants fled to Warri.

[5] The principal applicant's partner and his family located the applicants and forced them to return on March 1, 2005. The principal applicant claims that as a result of this, her partner prevented her from working, beat her, and threatened to attack her with acid if she told anyone.

[6] The principal applicant also states that on March 14, 2005, when her partner was away on business, four of his relatives came and threatened to take the female minor applicant away unless the principal applicant swore an oath, at the family shrine, that they would all be present at the next family ritual on August 15, 2005.

In her PIF, the principal applicant claims she went to the police on April 20, 2005 regarding her daughter's impending circumcision, but the police refused to intervene because they said it was a family and customary issue. On June 10, 2005, the applicants fled to Lagos where the principal applicant's brother resided, and then travelled to Canada.

ISSUES

[7] This case raises the following issues:

1. Whether the Board erred in making its credibility findings?
2. Did the Board err by ignoring some evidence central to the applicants' claim?
3. Did the Board err by relying on evidence not submitted by the applicants, but by an anonymous third party?

Legislation

Immigration and Refugee Protection Act (S.C. 2001, c.27)	***Loi sur l'immigration et la protection des réfugiés*** (L.C. 2001, ch. 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,	**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

(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself 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.

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 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

(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.

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 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 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.	(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.

Standard of review

[8] The Board's findings with respect to plausibility and credibility warrant a high level of deference, and are reviewable on the standard of patent unreasonableness (see *Miranda v. Canada (Minister of Employment and Immigration),* [1993] F.C.J. No. 437 (C.A.) (QL); *Aguebor* v. *Canada (Minister of Employment and Immigration)* (1993), 160 N.R. 315 (F.C.A.); *Rahman v. Canada (Minister of Citizenship and Immigration),* [2006] F.C.J. No. 1235 at para. 26-28 (C.A.) (QL)).

[9] In order for an alleged error of fact to be reviewable, the Tribunal must have made an "erroneous" finding of fact and that erroneous finding must have been made in a perverse or capricious manner, or without regard for the material before the Tribunal, and the decision attacked must be "based" on the erroneous finding (see *Rohm and Haas Canada Ltd. v. Canada (Anti-Dumping Tribunal),* [1978] F.C.J. No. 522 (C.A.) (QL); more recently *Zrig v. Canada (Minister of Citizenship and Immigration),* [2003] F.C.J. No. 565 (C.A.) (QL); *Harb v. Canada (Minister of Citizenship and Immigration),* [2003] F.C.J. No. 108 (C.A.) (QL)).

[10] The principal applicant submits that the Board erred by not considering local custom and culture when it made the finding that it was implausible that the common law partner's family would wait 5 months to carry out the circumcision in August when the principal applicant and her children had fled prior to the first date being set in February. She asserts that August 15th was a

ceremonious day and that, by custom, most families have their children circumcised on ceremonious days.

[11] The respondent submits that the Board made this finding due to inconsistencies in the principal applicant testimony. In particular, the respondent argues that the principal applicant testified that the initial date set for the daughter's circumcision was a market day, that there were a number of market days between the first scheduled circumcision and the second, and finally, that the principal applicant could not explain why the family would wait until August to schedule the second date and why the first scheduled circumcision was not scheduled in August to begin with.

[12] This Court has held that a Board may err when it fails to assess the evidence in its proper context (see *Giron v. Canada (Minister of Employment and Immigration)* (1992), 143 N.R. 238, 33 A.C.W.S. (3d) 1270 (F.C.A.); *Jack v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 93). In *Rani v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 73 at paragraph 8, Mr. Justice O'Reilly held that, "The Board has a duty to assess the evidence before it and to do so in a manner that is sensitive to the social and cultural context from which it arises."

[13] The country documentation in front of the Board, including its National Documentation Package for Nigeria, clearly indicates that the practice of female genital mutilation in Nigeria is carried out of adherence to a cultural dictate.

[14] The principal applicant, in her testimony, did provide an explanation of why the family waited approximately 5 months to circumcise the minor female applicant, namely that circumcision is traditional and ceremonial and is done in accordance with the traditional calendar. While the principal applicant stated that it is usually done on a market day, she also stated that because there was a festival coming up in August, the family decided this was the best time to conduct the circumcision.

[15] The Board was not sensitive to the social and cultural context surrounding the principal applicant's evidence as to why her daughter's circumcision would take place at a certain date. Contrary to the Board's reasons, there was an explanation for why August 15 was chosen for the circumcision date. Both the country documentation and the principal applicant's testimony attest to the cultural and ceremonial backdrop to which circumcisions take place in Nigeria and thus could provide a rationale for the chosen date, albeit 5 months later than originally scheduled. Consequently, the Court finds that the Board's credibility finding was made without regard to the evidence before the Board.

[16] The principal applicant also submits that the Board erred in finding that while the principal applicant went to the police in April 2005, prior to the pending circumcision in August, the principal applicant did not provide a satisfactory explanation as to why she did not report the pending circumcision to the police in February. The respondent simply submits that the Board was entitled to find her testimony not credible.

[17] This Court has held that a contextual approach is to be taken in conformity with the Board's Gender Guidelines, especially when it comes to a battered woman (*Garcia v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 79). Justice Campbell in *Garcia*, referred to the Supreme Court of Canada's case of *R. v. Lavallee*, [1990] 1 S.C.R. 852, wherein the Court stated that a contextual approach is needed when questioning why a woman did not seek help or leave earlier. Indeed, the Supreme Court has stated that the mental state a battered woman may be in may affect whether or not she does seek help.

[18] While the Board, in its decision, did mention the Gender Guidelines, the Board was nevertheless insensitive to the principal applicant's situation when, in its reasons, it stated that the principal applicant "*was unable to give the panel a satisfactory explanation as to why she did not report the pending circumcision to the police in February*".

[19] The Board also misconstrued the evidence in its decision, when it neglected to mention that the principal applicant went to see the police due to the beatings she received from her partner.

[20] Questions regarding the evaluation of evidence are considered questions of fact and thus are reviewed by a standard of patent unreasonableness (*Aguebor, supra*; *Umba v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 25; *Harb v. Canada (Minister of Citizenship and Immigration)*, 2003 FCA 39).

[21] The jurisprudence of this Court supports the notion that the Board has a duty to consider documentary evidence that supports the Applicant's position (*Bains v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 497 (QL); *Maldonado v. Canada (Minister of Employment and Immigration)*, [1980] 2 F.C. 302). Justice Shore recently held, in *Assouad v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 1216 (QL) that "A Board is under a duty to justify its credibility findings with specific and clear reference to the evidence, particularly when the evidence is cogent and relevant to the Applicant's allegations."

[22] The applicants submitted documents central to their claims including two notes from her mother stating that threats were still being made against the principal applicant, a letter from the Family Services of Peel confirming that the principal applicant received counselling services for her trauma from her abusive relationship, and a medical certificate from a doctor confirming that the female minor applicant had not been circumcised. While, it is open for the Board to find the applicants not credible, the Board still had a duty to address whether or not the evidence submitted by the applicants affected its decision.

[23] In reviewing the procedural framework in which the decision to consider extrinsic evidence was made, the Court need not engage in an assessment of the appropriate standard of review. Rather, the Court is required to evaluate whether the rules of procedural fairness or the duty of fairness have been adhered to (*Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] S.C.J. No. 18; *Ha v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 49).

[24] The Board, in its decision, held that Exhibit C4, a package of documents submitted to the board by an unknown outside source, casts a shadow on the principal applicant's credibility. The Board did not accept the principal applicant's story that she did not know of the existence of these documents, and that they could be false documents fabricated by a third person who has a personal vendetta against the principal applicant.

[25] This Court has held that if the Board relies on "extrinsic evidence" not brought forward by the applicant but from an outside source, the board must give the applicant the opportunity to respond to the evidence (*Shah v. Canada (Minister of Employment and Immigration),* [1994] F.C.J. No. 1299 (Fed. C.A.) (QL); *Ardiles v. Canada (Minister of Citizenship and Immigration*, 2002 FCT 1323). The importance of giving notice and providing an opportunity to respond to the evidence is accentuated when the board intends to rely on the evidence to make a decision.

[26] The applicant submits that the Board failed to authenticate the documents, and that it was an error of law for the Board to treat the documents as documents submitted by the principal applicant, and thus rely on them to question the credibility of the principal applicant. The respondent submits that the applicants were afforded an opportunity to respond to the evidence.

[27] The Court finds that the applicants were given an opportunity to address whether the Board should consider Exhibit C4. Indeed, the Board adjourned the first hearing in order for all parties to look at the documents and investigate whether they could be authenticated. The Board, after

reviewing the documents, concluded that there was no way to authenticate them as they were sent in anonymously.

[28] Counsel for the applicants was advised, in writing, to make submissions and was also notified that the Board was not going to pursue verifying the documents. Counsel got the impression from this correspondence that the documents were not an issue, but the Board clarified this in the next hearing. Counsel was then given the opportunity to respond to the documents orally. Having fulfilled its obligation to give the applicants the opportunity to address the use of Exhibit C4, it was entirely up to the Board, while taking the applicants' submissions into consideration, to rely on the documents in Exhibit C4.

[29] In the light of the foregoing (failure to be sensitive to the social and cultural context, misconstruction of evidence, failure to consider documents central to the claim, relying on documents submitted by an unknown outside source), the Court concludes that on the overall the Board's decision is patently unreasonable and should be quashed.

[30] The parties were invited to present questions of importance for certification but declined.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application for judicial review is allowed;

2. The matter be returned to a differently constituted Board for re-determination; and

3. No question is certified**.**

"Maurice E. Lagacé"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Mr. BONIFACE AHUNWAN	FOR THE APPLICANTS
Mr. DAVID JOSEPH	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Mr. BONIFACE AHUNWAN BARRISTER & SOLICITOR TORONTO, ONTARIO	FOR THE APPLICANTS
JOHN H.SIMS,Q.C. DEPUTY ATTORNEY GENERAL OF CANADA DEPARTMENT OF JUSTICE TORONTO, ONTARIO	FOR THE RESPONDENT