

Federal Court		Cour fédérale
---------------	---	---------------

Date: 20090630

Docket: IMM-2111-08

Citation: 2009 FC 687

Toronto, Ontario, June 30, 09

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

NADINE KUTA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] The present Application concerns a decision denying refugee protection to a citizen of Burundi who fled that country for fear of persecution based upon her gender and her Tutsi ethnicity. Ms. Kuta's claim for protection was rejected by the Refugee Protection Division (RPD) on March 6, 2008 on the basis of a global negative credibility finding.

[2] The negative credibility finding is the result, in large part, of the Applicant's apparent inability to give clear and consistent evidence of her suffering as a sexual assault survivor in Burundi at the hands of her ex-husband in 2003 and the Hutu militia in 2006. With respect to this finding, Counsel for the Ms. Kuta relies on evidence of Ms. Kuta's psychological condition at the time of the hearing to argue that the RPD's decision is rendered in fundamental error.

[3] The psychological evidence is contained in the following letter dated October 4, 2007 written by Ms. Kuta's physician and addressed to Counsel for Ms. Kuta:

Dear Mr Confente,
Re: KUTA, Nadine
DOB 25-05-69

In response to your letter dated September 10, 2007, Nadine Kuta joined our medical practice in February 2007. However, she has been attending the Centre de Sante Communautaire for assistance with integration and counselling since August 2006.

As you are aware, Nadine is from Burundi. She tells me that she was a victim of violence in her home country. She witnessed the murder of her family and is now the only surviving family member. As a result, she suffers from anxiety, depression, insomnia, loneliness and chronic headaches.

Symptoms of depression include changes in appetite which may lead to weight loss or weight gain, sleep disorders such as early morning wakening, decreased interest, poor concentration, difficulty making decisions, guilt and feelings of worthlessness, decreased energy, and in severe cases, suicidal ideation.

Anxiety however is characterised by a heightened sense of fear and can manifest itself in excessive palpitations, nausea, shortness of breath, trembling and sweating.

It is very common to have both conditions simultaneously as is the case with Nadine.

In effect, Nadine suffers from Post traumatic stress disorder. This is defined as exposure to a traumatic event experienced or witnessed by the person usually resulting in injury to self or injury or death to others. The usual response in a person with the disorder is to feel intense fear, helplessness or horror. The traumatic event is persistently re-experienced through recurrent distressing dreams or flashbacks. Symptoms persist for more than 1 month.

Nadine is currently taking fluoxetine (Prozac) 20 mg for her depressive symptoms and ativan .05mg to help with anxiety and insomnia, when she needs it. She also takes advil occasionally for her headaches. Furthermore, she sees our mental health counsellor and social worker Lubna Moric and Jocelyn Bond respectively about her post traumatic stress disorder.

It is possible that her condition can affect her memory. Certainly, preoccupation with distressing events may affect one's ability to remember things. In addition, she may experience ante grade amnesia, confusion and drowsiness with ativan. However this is more likely to occur with much higher doses. (See enclosed copy of information about the medication she is currently on taken from the 2005 Compendium of Pharmaceuticals and Specialties).

I hope this is the information you require.

Yours truly,
Dr. Nasima Mottiar MD CCFP

(Tribunal Record, pp. 108-109)

[4] Counsel for Ms. Kuta advances the importance of this evidence by reference to the Immigration and Refugee Board's "*Guideline 4: Women Refugee Claimants Fearing Gender-related Persecution: Guidelines issued by the Chairperson pursuant to section 65(3) of the Immigration Act*" as follows:

D. SPECIAL PROBLEMS AT DETERMINATION HEARINGS

Women refugee claimants face special problems in demonstrating that their claims are credible and trustworthy.

Some of the difficulties may arise because of cross-cultural misunderstandings. For example:
[...]

3. Women refugee claimants who have suffered sexual violence may exhibit a pattern of symptoms referred to as Rape trauma Syndrome and may require extremely sensitive handling. [...]

Counsel for Ms. Kuta argues that the RPD's failure to acknowledge *Guideline 4*, and, indeed, to consider the Applicant's testimony in the manner it describes constitutes a reviewable error. I agree with this argument.

[5] The approach adopted by the RPD as evidenced in the decision was to first take instances of Ms. Kuta being: "utterly confused", stating that "there was an error in her PIF", giving "internally inconsistent" testimony, being "mixed up", "failing to bring to her hearing key documents that would have helped corroborate her account", having "great difficulty recalling", and having "great difficulty" explaining details (Decision pp. 3 - 4) as evidence that Ms. Kuta was lying in the giving of her evidence, and to then discount the evidence of her suffering Post Traumatic Stress Disorder.

The following passages from the RPD's decision are evidence of this approach:

The panel accepts that people's memories can be affected by stress. However, in this case, the panel is not persuaded that either stress or the possibility the claimant might have Post Traumatic Stress Disorder (PTSD) can reasonably explain the multiple inconsistencies in her evidence. When it comes to one's children in particular, it is hard to imagine a mother not recalling the last time she held her own son and daughter in her arms. (Decision, p. 6) [Emphasis added]

[...]

Doctor Mottiar has come to her medical conclusions based on the account the claimant has provided to her. These conclusions are not based on verifiable, independent, objective evidence. Even if the

claimant might be suffering from PTSD, the panel has no credible evidence before it that this is the result of the persecutory events the claimant has alleged, since the panel is persuaded these events never happened. (Decision, p. 7) [Emphasis added]

[6] The unchallenged evidence before the RPD was that Ms. Kuta was suffering PTSD at the time she testified. I find it is an error for the RPD to not have, unequivocally, accepted this fact. It is clear that the purpose of *Guideline 4* is to alert RPD members of the need to use evidence of this condition as a lens through which to view the evidence given by a suffering claimant, and to take care, not only in obtaining the evidence in a sensitive way, but also to be very cautious in arriving at credibility conclusions where the evidence exhibits the kinds of problems identified in the decision presently under review.

[7] During the course of the hearing of Ms. Kuta's claim, Counsel for Ms. Kuta squarely placed her psychological condition before the RPD with the following comment at a point in the proceeding when an adjournment was required to give Ms. Kuta a chance to recover from being emotionally upset:

I think we are on the subject of a sexual assault, sexual violence. And we have the letter from Dr. Motilla (ph) and it seems that this event had an impact on Ms. Kuta. If I can suggest that we take a 5 or 10 minute break, just for her to calm down. Because I think it is the subject that has a huge impact on her ability to recall incidents.

(Transcript of the Hearing, p. 56)

In my opinion, the RPD's failure to properly apply *Guideline 4* in evaluating Ms. Kuta's evidence taints the quality of the whole of the decision under review. As a result, I find the decision is unreasonable.

ORDER

Accordingly, I set aside the decision under review and refer the matter back for redetermination by a differently constituted panel.

There is no question to certify.

“Douglas R. Campbell”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2111-08

STYLE OF CAUSE: NADINE KUTA v. THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JUNE 29, 2009

**REASONS FOR ORDER
AND ORDER BY:** CAMPBELL J.

DATED: JUNE 30, 2009

APPEARANCES:

Omar Shabbir Khan FOR THE APPLICANT

Jamie Todd FOR THE RESPONDENT

SOLICITORS OF RECORD:

Omar Shabbir Khan
Khan Professional Offices
Hamilton, Ontario FOR THE APPLICANT

John H. Sims, Q.C.
Deputy Attorney General of Canada FOR THE RESPONDENT