Federal Court  Cour fédérale

Date: 20110112

Docket: IMM-2177-10

Citation: 2011 FC 28

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, January 12, 2011

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

NADINE KAMDEM LIPDJIO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), of a decision by the Refugee Protection Division of the Immigration and Refugee Board (the panel) dated March 30, 2010, that the applicant is not a Convention refugee or a person in need of protection under the Act.

Facts

[2] The applicant is a citizen of Cameroon who claims to have a well-founded fear in her country by reason of her sexual orientation.

[3] At the age of 17, she gave birth to her son after she had been raped. She allegedly became a lesbian following this trauma.

[4] Her problems result from events that occurred in the night of August 3 to 4, 2008. She allegedly went to a lesbian club with her spouse, Ghislaine Péhou. During the evening, she found her spouse kissing a person named Sandrine. A fight followed, which caused physical damage to the night club. The applicant allegedly managed to flee with the help of a security guard before the police could intervene.

[5] She then went to her apartment, took clothing and money and hid in an inn. She then took steps to find a safe haven, after a friend informed her that her spouse had been arrested without a warrant.

[6] She left Cameroon on August 7, 2008, with the help of a smuggler and arrived in Canada on August 8, via Paris, using false identity documents, which the smuggler took back. She filed her claim for refugee status on August 22, 2008, because she was waiting for her own identity documents before doing so.

Impugned decision

[7] The panel found that the applicant was not credible and that her story was a complete fabrication for the sole purpose of obtaining refugee status.

Issues

[8] This application for judicial review raises the following issues:

1. Did the panel err in arguing that it had a specialized knowledge of homosexuality?
2. Did the panel err in finding that the applicant was not credible?

Analysis

A. *Standard of review*

[9] Questions of fact and questions of mixed fact and law are reviewable according to the reasonableness standard (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190). Where the issue is credibility and assessment of the evidence, it is well established that the Court will intervene only if the decision is based on an erroneous finding of fact made in a perverse or capricious manner or without regard for the evidence (*Aguebor v Canada* (*Minister of Employment and Immigration*), (1993), 160 NR 315, [1993] FCJ No 732 (QL), at para 4 (FCA)). Questions of procedural fairness are reviewed on a standard of correctness (*Ha v Canada* (*Minister of Citizenship and Immigration*), 2004 FCA 49, 3 FCR 195).

B. *The panel's specialized knowledge of homosexuality*

[10] In his memorandum, counsel for the applicant pointed out the panel's failure to comply with section 18 of the *Refugee Protection Division Rules*, which provides that the panel is obliged to give

the applicant advance notice of its intention to use information or an opinion that is within its specialized knowledge. It reads:

> Before using any information or opinion that is within its specialized knowledge, the Division must notify the claimant or protected person, and the Minister if the Minister is present at the hearing, and give them a chance to
>
> (a) make representations on the reliability and use of the information or opinion; and
>
> (b) give evidence in support of their representations.

[11] As stated by Justice Campbell in *Isakova v Canada* (*Minister of Citizenship and Immigration*), 2008 FC 149, [2008] FCJ No 188 (QL), at paragraph 16:

> The purpose of Rule 18 is to enable a claimant to have notice of the specialized knowledge and to give him or her the opportunity to challenge its content and use in reaching a decision. Therefore, in order for Rule 18 to be effective, the RPD member who declares specialized knowledge must place on the record sufficient detail of the knowledge so as to allow it to be tested. That is, the knowledge must be quantifiable and verifiable.

[12] Justice Teitelbaum in *Mama v Canada* (*Minister of Employment and Immigration*) (1994), 51 ACWS (3d) 128, 1994 FCJ No 1515 (QL), stated at paragraph 21 that unverifiable personal knowledge does not qualify as specialized knowledge:

> The applicant submits (and I agree), that the personal and professional experiences of the Board members, the full extent of which was unclear, hardly justified their claim to "specialized knowledge." The Board did not purport to take judicial notice of any facts with respect to European border controls and there was no evidence whatsoever before it as to the efficacy of these.

[13] Counsel for the applicant alleges that the panel's error is a breach of the rules of natural justice and provides a basis for his application for review given that, first, the procedure provided

under section 18 of the *Refugee Protection Division Rules* was not followed and, second, that the panel erred by relying on its non-existent specialized knowledge.

[14] At the beginning of the hearing, counsel for the respondent admitted the panel's error concerning its specialized knowledge. However, she argued that such an error is not always fatal and that the applicant's credibility remained tainted by the numerous contradictions found in her testimony.

[15] Counsel for the respondent relied principally upon *N'Sungani v Canada* (*Minister of Citizenship and Immigration*), 2004 FC 1759, 22 Admin LR (4th) 225, at paragraphs 25, 26, 32 and 33 and on *Jarada v Canada* (*Minister of Citizenship and Immigration*), 2005 FC 409, [2005] FCJ No 506 (QL), at paragraph 22.

[16] It is true that in the cited decisions, the error with respect to specialized knowledge did not lead to setting aside the panel's decision. However, Justice Tremblay-Lamer noted at paragraph 32 of *N'Sungani*, cited by the respondent, that:

> In my view, the principal established in *Yassine*, *supra*, stands with a caveat taken from *Hu*, *supra*: provided credibility determinations were properly arrived at, and wholly determinative of the application, then the *Mobil Oil*, supra, exception can be invoked to deny a new hearing, assuming there is no reason to suspect that the specialized knowledge in dispute in any way shaped the Board's credibility findings. [The decisions cited in this excerpt are the following: *Yassine v Canada* (*Minister of Citizenship and Immigration*) (1994), 172 NR 308, 27 Imm LR (2d) 135; *Hu v Canada* (*Minister of Citizenship and Immigration*), 2003 FCT 603, 4 Admin LR (4th) 296; *Mobil Oil Canada Ltd. v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202.]

In the case before us, it is apparent from reading the decision that the panel's error with respect to its specialized knowledge did indeed lead it to make the finding it did. In fact, at the outset the panel

refused to believe that the applicant was a lesbian because she discovered her sexual orientation following a rape, rather than admitting that it was innate.

[17] This Court is not able to agree with the respondent's position. Here it is interesting to recall what Justice Teitelbaum wrote in *Cortes v Canada* (*Minister of Citizenship and Immigration*), 2009 FC 583, [2009] FCJ No 734 (QL), at paragraph 36:

> In my opinion, the "specialized knowledge" relied on in this case was mischaracterized. Here, the decision maker drew on the specialized and general knowledge it had acquired over the years to point out to the applicant that this was the first time it had heard such an argument and that its professional knowledge and experience in cases from Mexico demonstrated the contrary. The "knowledge" relied on in this case was neither quantifiable nor verifiable.

[18] This Court shares that opinion in this case, since the opinion expressed by homosexuals who have testified before the Commissioner that their "homosexuality is innate" is neither verifiable nor quantifiable. Therefore, the panel erred by relying on an alleged specialized knowledge.

C. *Applicant's credibility*

[19] The respondent noted in his memorandum that the panel's statement as to its specialized knowledge was not determinative of or central to the decision, but that the decision relied more on the applicant's lack of credibility.

[20] A reading of the decision and the hearing transcript shows that the panel first confronted the applicant with its "specialized knowledge" without giving her prior notice or informing her that it would take this knowledge into consideration. It immediately called into question the very basis of the claim, i.e. the applicant's homosexuality.

[21] This error goes to the heart of the issue and this Court cannot agree with the respondent's position that this statement was neither determinative of nor central to the decision.

[22] In its decision, the panel then focused on what it considered to be significant contradictions in finding that the applicant was not credible. It relied on separate contradictions related to inconsistencies in specific dates.

[23] At the hearing, counsel for the respondent pointed out six contradictions that would affect the applicant's credibility. She primarily relied on the applicant's testimony with respect to the exact moment when she allegedly began having relations with her spouse, then on the inconsistencies with respect to the date of her mother's death and the precise date when she began working for her girlfriend Ghislaine and finally on the lack of effort to maintain contact with her since she arrived in Canada. Upon reading the transcript, it is clear that there are no inconsistencies in the applicant's testimony with respect to when she began having sexual relations with her spouse. However, the error in the exact year of her mother's death and the exact date that she began working for her spouse must be recognized. In our opinion, the panel's position on the innate nature of homosexuality directly affected the entire assessment of the applicant's credibility.

[24] In her affidavit, the applicant submits that she was very upset after having been confronted by the panel with respect to the innate nature of homosexuality. This confrontation allegedly reduced her ability to concentrate.

[25] Therefore, this Court finds that the application for judicial review must be allowed because the panel's error with respect to its specialized knowledge goes to the heart of the issue and because

its finding on the applicant's credibility, in its entirety, is a direct result of it, thus rendering this decision patently unreasonable. Neither party proposed a question for certification and I see none.

[26] For all these reasons, this application for judicial review is allowed, and the matter is referred back to a differently constituted panel for reconsideration and redetermination. No question is certified.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that

1. The application for judicial review is allowed;
2. The case is referred back to a differently constituted panel for redetermination; and
3. No question is certified.

"André F.J. Scott"
Judge

Certified true translation
Catherine Jones, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2177-10
STYLE OF CAUSE:	**NADINE KAMBEM LIPDJIO v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	December 14, 2010
REASONS FOR JUDGMENT:	SCOTT J.
DATED:	December 17, 2010

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