

Federal Court



Cour fédérale

Date: 20120117

Docket: IMM-3791-11

Citation: 2012 FC 61

Montréal, Quebec, January 17, 2012

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

DERIA UWITONZE

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] In a situation where an applicant has not established identity, a negative conclusion ensues as to credibility and a disposal of a claim is usually the norm. As stated by this Court in *Najam v Canada (Minister of Citizenship and Immigration)*, 2004 FC 425:

[16] The proof of a claimant's identity is of central importance to his or her claim. I agree with the Respondent that if the identity of the claimant is not proven, the claim must fail; that means the Board need not pursue an analysis of the evidence in relation to other aspects of the claim. As Joyal J. states at paragraph 13 of the *Husein, supra* decision:

... In my respectful view, once the Board had concluded that identity had not been established or that the main applicant had not proven who she allegedly is, it was not necessary for the Board to analyze the evidence any further. Identity was central to the case. The main applicant's failure to prove that she belonged to a persecuted clan effectively undermined any claim of a well-founded fear of persecution. [Emphasis added]

II. Judicial Procedure

[2] This is an application for judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, ch 27 [*IRPA*], of a decision by the Refugee Protection Division of the Immigration and Refugee Board [Board], rendered on May 10, 2011, wherein it was determined that the Applicant is not a Convention refugee nor a person in need of protection, pursuant to sections 96 and 97 of the *IRPA*.

III. Background

[3] The Applicant, Ms. Deria Uwitonze, is twenty-one years old and is from Burundi

.

[4] The Applicant is a Tutsi, whose parents were killed by Hutus in 1993. She has a sister and a brother, with whom she lived from 1993 to 2000.

[5] On October 24, 2000, she alleges that their home in the province of Kayanza was burned down by rebel forces.

[6] After the fire, the Applicant's sister became engaged to a Hutu merchant in Bujumbura, Burundi; the Applicant and her brother joined the couple in Bujumbura.

[7] The Applicant's brother in-law was a member of the Conseil national pour la défense de la démocratie [CNDD] which took power in Burundi in 2005. The Applicant alleges that her brother-in-law wished her to marry Mr. Adolphe Nshimirimana, Director of National Documentation for the CNDD.

[8] The Applicant refused both the advances of Mr. Nshimirimana and her brother-in-law.

[9] Later, in 2005, the Applicant moved to Ngagara to live with a Hutu family, friends of her brother-in-law, who were also CNDD partisans. The Applicant was mistreated and beaten by the mistress of the household.

[10] During her time with this family, the Applicant developed a romantic relationship with the neighbour's son. She continued to refuse Mr. Nshimirimana's marriage proposals.

[11] In mid-November 2007, the Applicant alleges that she was raped by two men when she had been left alone in the house.

[12] In May 2008, the Applicant moved to live with family friends of her boyfriend. The Applicant sought refuge in Canada on July 22, 2008.

[13] If the Applicant returns to Burundi, she fears being forced to marry a man her brother-in-law wishes her to marry; she also fears being raped again.

[14] To establish her identity, the Applicant submitted the following documents: national identity card, student card, and an excerpt of a birth certificate.

IV. Decision under Review

[15] The Board determined that the Applicant was not credible for the following reasons.

[16] First, the Board found that the Applicant was not credible with respect to her alleged identity. The Applicant alleges that she is Deria Uwitonze, born on January 23, 1990. After considering the evidence before it, the Board determined that she was Deria Girukwishka, born on November 23, 1990. This conclusion is based on the following:

- a) The expert report concluded that the three documents filed by the Applicant to prove her identity were inconclusive;
- b) The alleged reason for which she claims she obtained a birth certificate was determined implausible;
- c) The Applicant's testimony in respect of the alleged fees paid and the fingerprints taken for her to obtain a national identity card was not supported by the objective documentary evidence before the Board;
- d) The American authorities confirmed that the Applicant is actually Deria Girukwishka, born on November 23, 1990;
- e) The Board considered the Applicant's allegation to the effect that she used a name linked to the alias, used in her passport, for her e-mail address. The passport was not in her possession at the time she created her e-mail address (at the end of 2007). The Board

found that the term “Gideria” stands for the following: GI which is the first syllable of her name Girukwishka, and Deria which is her first name.

[17] Second, the Board concluded that the Applicant fabricated her narrative to justify her claim. The Board did not believe that her brother-in-law forced her to marry Mr. Nshimirimana, nor that Mr. Nshimirimana asked her to marry him, nor that he intended to marry her or even have any contact with her. Accordingly the risk to her life was not credible. The following issues were noted:

- a) The Applicant’s lack of knowledge about Mr. Nshimirimana;
- b) The implausibility of her allegation that she did not know that Mr. Nshimirimana was married.

[18] In respect of the allegation that the Applicant fled her country by using a false identity, the Board found that it was inconsistent to the evidence submitted by the Canada Border Services Agency [CBSA].

[19] The Board did not believe the Applicant was raped. She neglected to mention the reason she abandoned her studies and left the country was because of the rape although questioned repeatedly in this regard. Another reason for not believing the Applicant’s allegation of rape is that she no longer is concerned about the possible consequences of the alleged rape on her health.

[20] The Board found the Applicant’s allegation that she was threatened by the individuals who killed her parents not to be credible because she would have been only three years old when her parents were allegedly killed.

[21] In assessing the Applicant's fear of rape in Burundi, the Board found that the Applicant is not credible. Her level of education, her ability to travel, her resourceful independence, her connection to a family in Burundi and the possible connection through her father to an influential network in Burundi make her narrative implausible.

V. Issue

[22] Did the Board err in its consideration of the Applicant's evidence and in making an adverse finding as to credibility?

VI. Relevant Legislative Provisions

[23] Sections 96 and 97 of the *IRPA* are applicable in these proceedings:

Convention refugee

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

Définition de « réfugié »

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

habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Person in need of protection

Personne à protéger

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

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

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

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

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(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,

(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) 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.

(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.

Person in need of protection

(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.

Personne à protéger

(2) A également qualifié 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.

VII. Position of the Parties

[24] The Applicant submits the Board erred in fact and law:

- a) As to her alleged rape;
- b) As to the Board not having applied the Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution [Guidelines];
- c) As to the Board's assessment of credibility in respect of the national identity card.

[25] The Respondent specified that the Board was justified in finding that the Applicant was not credible. In response to the Applicant's allegation to the effect that the Board should have

considered the reluctance of the Applicant to disclose her experience of sexual violence, the Respondent submits that this allegation constitutes an *ex post facto* explanation and that no indication was given that her counsel intervened or raised any concerns during the first hearing to draw the Board's attention on this alleged reluctance to testify or her incapacity to do so.

VIII. Analysis

[26] Credibility and questions of fact and law are reviewable according to a standard of reasonableness as per *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190.

[27] The highest level of deference is due to a Board's conclusion in respect of findings of credibility. As explained by Justice Yvon Pinard in *Profète v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1165:

[11] The applicant also claimed that the panel erred in finding that his testimony had been evasive, ambiguous and not credible. This argument cannot warrant this Court's interference, since assessing testimony is at the very heart of the jurisdiction of the panel, which had the benefit of seeing and hearing the applicant.

[28] This Court in *Jarada v Canada (Minister of Citizenship and Immigration)*, 2005 FC 409, also stated:

[22] That said, disregarding this provision is not critical, as the Board relied on a number of other contradictions and implausibilities in finding that the applicant was not credible. It is well-settled case law that the reasons of an administrative tribunal must be taken as a whole in determining whether its decision was reasonable, and analysis does not involve determining whether each point in its reasoning meets the reasonableness test (see in particular *Stelco Inc. v. British Steel Canada Inc.*, [2000] 3 F.C. 282 (F.C.A.); *Yassine v. M.E.I.*, [1994] F.C.J. No. 949 (F.C.A.)). In the case at bar, the Board based its finding on several points, and the rejection of one of them does not make its decision unreasonable.

[29] In the present case, the discrepancies noted by the Board appear to cumulatively support a negative credibility finding.

[30] The finding of an absence of credibility is essentially based on the Applicant's elementary lack of knowledge concerning the basic information of her claim.

[31] At the outset, the Board was not satisfied that the Applicant had established her identity. It was clearly reasonable for the Board to reject the Applicant's explanations. The Board did make efforts to ascertain the authenticity of the Applicant's documents (*Zheng v Canada (Minister of Citizenship and Immigration)*, 2008 FC 877).

[32] In a situation where an applicant has not established identity, a negative conclusion ensues as to credibility and a disposal of a claim is usually the norm. As stated by this Court in *Najam v Canada (Minister of Citizenship and Immigration)*, 2004 FC 425:

[16] The proof of a claimant's identity is of central importance to his or her claim. I agree with the Respondent that if the identity of the claimant is not proven, the claim must fail; that means the Board need not pursue an analysis of the evidence in relation to other aspects of the claim. As Joyal J. states at paragraph 13 of the *Husein, supra* decision:

[...] In my respectful view, once the Board had concluded that identity had not been established or that the main applicant had not proven who she allegedly is, it was not necessary for the Board to analyze the evidence any further. Identity was central to the case. The main applicant's failure to prove that she belonged to a persecuted clan effectively undermined any claim of a well-founded fear of persecution. [Emphasis added]

[33] In the present case, ample evidence before the Board supports its decision to reject the Applicant's identity documents and to consider them wholly unreliable; nevertheless, the Board

continued its analysis pursuant to section 97 of the *IRPA*. The Court notes that the application for judicial review could have been dismissed at the identity stage. In fact, how can the Board analyze the credibility of the allegation in support of a claim when the Applicant's identity itself is not established?

[34] The Board could have considered the possibility that the Applicant may have had a gender-based claim for refugee protection as a result of an alleged sexual assault even though it found her not to be credible but the Board's line of reasoning is explained by her behaviour and the ambiguity with respect to the core issues.

[35] The Board drew negative inferences with respect to the Applicant's credibility from the narrative's internal inconsistencies and from the omission in testimony of a crucial element of the claim: the Applicant did not mention, during the first hearing, having been raped by two men, yet, she submits that the Board should have considered the Guidelines.

[36] The Applicant's counsel did tell the Board before the hearing that the Applicant may have problems answering questions.

[37] The reading of the transcript reveals the following:

PAR LA MEMBRE AUDIENCIÈRE

- [...]]

R. Oui, effectivement. Bien premièrement, regardez, Madame, elle est prête à procéder aujourd'hui. Il n'y a pas de problème à cet effet-là, mais je de la difficulté parce qu'elle a de la misère à parler. Elle va pas plus que chuchoter.

- Hum-hum.
- [...]
- ...aussi, elle a de la misère à répondre aux questions sans pleurer. Et même dans mon bureau... je sais que c'est normal, mais je vous avertis...
- Oui.
- R. ...d'avance que je ne sais pas comment elle va être aujourd'hui, mais même dans mon bureau, très mal à l'aise. Elle est très... c'est pour ça que j'avais... c'est quelque chose que j'ai constaté dernièrement, puis moi, je veux m'assurer qu'elle est bien. Vous comprenez?
- Hum-hum.
- Puis elle n'a pas de problème à procéder, c'est moi qui ai peur pour elle dans le sens que c'est très important qu'elle est capable.
- Oui.
- R. Et c'est une... je voulais soulever mes inquiétudes par rapport à elle, parce que je vois quelque chose qui ne va pas avec elle. Alors...
- Q. En quoi...?
- R. Je l'ai envoyé à PRAIDA pour essayer de commencé un suivi, mais, c'est...
- Q. En quoi? Un suivi, vous voulez dire psychologique?
- R. Oui.
- Q. Mais est-ce qu'ils ont commencé?
- R. Oui. Elle a vu quelqu'un, mais elle va aller après l'audience. Ils lui ont dit de revenir après l'audience. On va vous envoyer voir un médecin et c'est le tout début de processus. Elle est pas incapable là, mais j'ai des inquiétudes c'est tout. En ce qui concerne (...inaudible...) qu'ils sont arrivés avec tel que relaté dans le FRP. Elle a vraiment de la difficulté et au niveau de sa mémoire là, elle a des problèmes.
- [...]

- Je vais lui demander de me parler du Burundi. On va voir comment elle va réagir sur ça.
- R. OK.
- Et par la suite, je verrai. Écoutez.
- [...]
- R. ...je voulais un représentant désigné.
- Oui, mais...
- R. Mais je sais que ce n'est pas nécessairement ce cas-là, mais j'ai déjà vu avec quelqu'un qui a des difficultés, mais honnêtement, je veux dire, honnêtement, je savais pas quoi faire, parce que je me sentais que, j'avais des doutes qu'elle serait capable de ...
- Oui
- R. ...de le faire.
- OK.
- R. Mais ça, ça, c'est moi. Ce sont mes inquiétudes. C'est pas elle qui m'a dit ça directement.

(Tribunal Record [TR] at pp 285 to 287).

[38] In those circumstances, where reference was made to possible psychological problems, the Board might have considered the Guidelines in respect of the omission to mention the rape.

[39] Nevertheless, in context of the testimony, this error is not determinative. As specified by Justice Yves de Montigny in *Kaur v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1066:

[15] Does this mean that this error is fatal? I do not think so. In view of the other reasons given by the RPD for concluding that the applicant was not credible and that

her conduct was inconsistent with a genuine fear of persecution, which had nothing to do with the fact that she was a woman, the application of the Guidelines would not in any way change the outcome of the applicant's claim. This Court has often repeated that the RPD's decision will not be reversed in such circumstances if the evidence was otherwise sufficient to support its conclusion. As Judith A. Snider J. wrote in a judgment of this Court, *Sy v. Canada (Minister of Citizenship and Immigration)*, 2005 FC379, (2005), 271 F.T.R. 242 (F.C.), [2005] F.C.J. No.462 (QL), at paragraphs 17 and 19:

Nevertheless, a failure by the Board to consider the Guidelines in an appropriate case will not necessarily result in a successful judicial review application. [Emphasis added].

IX. Conclusion

[40] In conclusion, the Board's decision regarding the Applicant's lack of credibility was grounded in reason and common sense. The Board noted that the Applicant's behavior was implausible because she was not concerned by the consequences of the rape on her health. Moreover, it is important to note that, during the second hearing, when questioned by her counsel, the Applicant did not have any difficulties in recounting the alleged rape.

[41] Even if the Guidelines issue was not appropriately addressed in this instance, this error alone does not provide a sufficient basis for setting aside the Board's decision as a lack of credibility was determined in addition to an unestablished identity framework from which the Board could have, on this alone, begun and ended its analysis.

[42] For all of the above reasons, the Applicant's application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS that the Applicant's application for judicial review be dismissed.
No question of general importance for certification.

“Michel M.J. Shore”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3791-11

STYLE OF CAUSE: DERIA UWITONZE v
THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Montreal, Quebec

DATE OF HEARING: January 16, 2012

**REASONS FOR JUDGMENT
AND JUDGMENT:** SHORE J.

DATED: January 17, 2012

APPEARANCES:

Jessica Lipes FOR THE APPLICANT

Yaël Levy FOR THE RESPONDENT

SOLICITORS OF RECORD:

Jessica Lipes, Attorney FOR THE APPLICANT
Montréal, Quebec

Myles J. Kirvan FOR THE RESPONDENT
Deputy Attorney General of Canada
Montréal, Quebec