

Federal Court



Cour fédérale

Date: 20150312

Docket: IMM-8071-13

Citation: 2015 FC 317

Toronto, Ontario, March 12, 2015

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

**NANA JOY MOLEFE
KAGISO MOLEFE**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The applicants, Nana Joy Molefe and her son Kagiso Molefe, are citizens of Botswana. In this application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], they challenge the decision of the Refugee Protection Division of the Immigration and Refugee Board which rejected their refugee claim. For the reasons that follow, the application is dismissed.

I. BACKGROUND

[2] Ms Molefe's claim stems from a property dispute with half-siblings. When she was a child, her father moved to South Africa for work and, while there, married a second wife and started a second family. In 1999, he contacted Ms Molefe and sought her assistance, as he had been ejected from his home in South Africa by the second wife and was both ill and homeless. Ms Molefe brought her father back to Botswana and cared for him and her mother until both passed away.

[3] Trouble arose after Ms Molefe's father died in April 2008. He left all of his land in Botswana to her. Ms Molefe alleges that her four South African half-brothers want the estate and have tried to intimidate her into surrendering her land. These efforts have included an assault on Kagiso (now in his early 20s) at his school in June 2009 and an incident in July 2009 during which three of the half-brothers were seen pouring a liquid around her home in Gaborone. Ms Molefe left her home at that time and moved in with friends. On March 3, 2010, she left Botswana with Kagiso and a young boy, now 12, whom I will refer to as LM. The three arrived in Canada the next day and made refugee claims.

[4] Ms Molefe initially declared in her claim that LM was her grandson but eventually admitted that he was her "mother's sister's son" – that is, her first cousin. She then offered a third story at the Board hearings: LM was the adopted son of one of her daughters. Due to concerns about the boy's parentage and care in Canada, the Board assigned a designated

representative to LM. He had moved away from Ms Molefe and into his biological father's custody in Saskatchewan by the time the hearings began.

[5] The Board conducted four days of hearings. LM was found to be a vulnerable person requiring special assistance that would not be available to him in Botswana. The Board was satisfied that there was more than a mere possibility of persecution and serious risk of harm to LM and his claim was approved.

[6] The Board accepted that Ms Molefe's half-brothers assaulted Kagiso on June 4, 2009. With respect to the alleged incident of July 17, 2009, the Board found several inconsistencies in Ms Molefe's evidence and contradictions with the narrative in her Personal Information Form [PIF].

[7] According to Ms Molefe, she reported the matter to the police and provided a written statement, but they refused to write a report or otherwise intervene. Ms Molefe could not provide a copy of her statement. She provided an affidavit from another brother and letters from a friend and her paternal uncle, none of which mention the purported incident. Moreover, she and Kagiso had lived in the village where the property is located and while it was occupied by three of her half-brothers, for several months prior to coming to Canada. The Board also noted that the applicant returned to Botswana following a trip to Nigeria and that her daughters continued to live in Botswana without harassment, notwithstanding the continued presence of the half-brothers. In the result, the Board was not convinced that the alleged incident of July 17, 2009 actually occurred.

[8] The Board considered objective documentary evidence relating to gender based discrimination in Botswana and concluded that the government was increasingly recognizing equality rights and that the police were active in their efforts to prevent and investigate crime. The Board found that state protection was available to the claimants but there was no evidence that they had sought to take advantage of it. While this might have been understandable in the case of a poorly educated woman restricted by living in a rural area, the Board considered, the applicant was well-educated, had worked for an international company and lived for some time in the capital, Gaborone. This profile, the Board concluded, gave her an advantage in seeking the assistance of the police. As a result, the Board found that it was “unable to invoke the Chairperson’s Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution” to rebut the presumption in Ms Molefe’s case.

[9] Among the documents presented in support of the claim was a report from Dr Devins, a registered psychologist, about Ms Molefe’s state of mind and fear of a return to Botswana.

II. ISSUES

[10] The issues raised by the parties are as follows:

1. Did the Board err in its analysis of credibility?
2. Did the Board err in its analysis of state protection?
3. Did the Board err in its assessment of the psychological report?

III. ANALYSIS

A. *Standard of review*

[11] Credibility findings are questions of fact. The standard of review is reasonableness: see e.g. *Triana Aguirre v Canada (Citizenship and Immigration)*, 2008 FC 571 at paras 13-14; *Smith v Canada (Citizenship and Immigration)*, 2012 FC 1283 at para 18.

[12] The other two issues raise questions of mixed fact and law, whose legal aspects lie within the Officer's expertise. The standard of review is reasonableness: *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 53-55.

B. *Did the Board err in its analysis of credibility?*

[13] The applicants argue that the Board erred by making a global finding that Ms Molefe was not credible and in discounting all of her supporting evidence. They argue that, when evaluating the principal claimant's testimony, the Board should have taken her social, cultural, religious, and economic context into account, pursuant to the *Chairperson's Guidelines Regarding Women Refugee Claimants Fearing Gender-Related Persecution [Gender Guidelines]*.

[14] I agree with the respondent that, in this case, the Board had good reasons to question the truthfulness of Ms Molefe's story. Ms Molefe misinformed the Board about her relationship with LM. She offered three incompatible answers at the hearing: biological grandson, first cousin and adopted grandson. While it may be, as counsel argued at the hearing of this application, that there are different perspectives about family membership in Botswana, that explanation was not clearly before the Board. It was, therefore, reasonable for the Board to draw an adverse inference from the evidence about LM in the circumstances.

[15] Ms Molefe also failed to provide any corroborating evidence to support her story about the incident of vandalism at her residence. She provided contradictory information about the alleged arson attack in her PIF and at the hearing. Given these contradictions in the testimony, the Board could reasonably insist on corroborating evidence.

[16] Contrary to the applicants' argument, the Board did not refuse to consider their corroborating documents after it made a general adverse finding of credibility. It referenced the letters from Ms Molefe's friends and family and observed that they did not speak about the arson attack. The documents provided by Ms Molefe did not corroborate her story, and she could not provide any other document to corroborate it (such as a copy of her statement to the police). Therefore, the Board reasonably determined that the attack likely never occurred.

[17] It was also open to the Board to draw an adverse credibility inference from Ms Molefe's reavallment of the protection of Botswana following a trip to Nigeria, and to consider the fact that she and Kagiso had remained in Botswana for an extended period after the July 2009 event allegedly occurred. During that time, they moved back to the village where the disputed property is located and inhabited by the half-brothers.

[18] The Board's analysis contains some confusion about where Ms Molefe's daughters were living at that time. They were living in Gaborone and not the applicants' home village. But that confusion did not materially undermine the Board's analysis. The Board could reasonably infer that the brothers had no interest in harming Ms Molefe and her family since she remained for

five months in Gaborone – where she alleges that the July 2009 attack occurred. The brothers had not launched a renewed attack on her or disturbed her daughters in that same city.

[19] The Board’s credibility findings are, therefore, reasonable. The Court should not interfere: *Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 (FCA); *Mohacsi v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 429 at para 18.

C. *Did the Board err in its analysis of state protection?*

[20] The applicants argue that the Board erred by relying on the improvements in state protection in Botswana. The *Gender Guidelines* make clear that positive changes may not always have a positive impact on a particular woman’s situation. In this instance, the applicants contend, the Board failed to understand that a victim of gendered abuse might have difficulty providing as clear and convincing proof to rebut the presumption of state protection as a claimant who has not suffered such abuse. The Board further erred, in their submission, by speculating that the principal claimant could benefit from state protection simply because she is educated and urbanized: *Tumisang v Canada (Citizenship and Immigration)*, 2012 FC 589.

[21] In my view, the Board properly applied the test for state protection. It reasonably assessed the evidence on record, including the documentary evidence. On judicial review, the Court cannot reweigh the evidence in a manner more favourable to the applicant.

[22] Refugee claimants must seek protection in their home countries when such protection “might reasonably have been forthcoming”: *Canada (Attorney General) v Ward*, [1993] 2 SCR

689 at 724. In the present case, Ms Molefe failed to rebut the presumption of state protection with “relevant, reliable and convincing evidence which satisfies the trier of fact on a balance of probabilities that the state protection is inadequate”: *Canada (Minister of Citizenship and Immigration) v Flores Carrillo*, 2008 FCA 94 at para 30.

[23] The Board reviewed the documentary evidence reasonably. It also observed that a woman with the principal claimant’s profile would have greater ease than most in accessing state protection.

[24] This case is distinguishable from *Tumisang*. In that matter, the Board did not question the claimant’s credibility and did not doubt that she had suffered gendered abuse. In the present case, the Board did not think the principal claimant was credible. Further, she did not adduce sufficient evidence to prove persecution due to gender or membership in a particular social group.

[25] The Court has recognized that the *Gender Guidelines* are not intended as a cure for deficiencies in a refugee claim. Their aim is to ensure a fair hearing: *Newton v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 738 (TD) at para 18; *Keleta v Canada (Minister of Citizenship and Immigration)*, 2005 FC 56; *Karanja v Canada (Minister of Citizenship and Immigration)*, 2006 FC 574 at paras 5-6. I am satisfied from a review of the transcript and the Board’s reasons that Ms Molefe received a fair hearing.

[26] Contrary to the applicants’ argument, it is not at all clear that the basis of the controversy with Ms Molefe’s half-siblings was gender based, as the Board noted at one point during the

hearings. The controversy arose over the distribution of the father's estate. Counsel argued that this stemmed from customary practices that exclude women from the inheritance of land. Yet there was little evidence to support a finding that this was the reason for the dispute. Indeed, her two full brothers in Botswana were content that she receive the inheritance and the customary practice has been found to be unconstitutional by the High Court. In any event, there is no evidence that Ms Molefe would be persecuted *as a woman* if she abandoned her claim to the inheritance. She failed to establish a sufficient nexus to a Convention ground.

[27] The *Gender Guidelines* direct the Board to consider the "social, cultural, religious and economic context in which the claimant finds herself". The Board took note of Ms Molefe's social and economic context when making its determination on the availability of state protection. It could not consider only those factors favourable to her claim and disregard those that did not support it. The onus remained on Ms Molefe to rebut the presumption, which she failed to do.

D. *Did the Board err in its assessment of the psychological report?*

[28] The applicants argue that the Board ignored Dr Devins's psychological report when evaluating the credibility and sufficiency of Ms Molefe's testimony. It was important for the Board to assess her state of mind. They contend that, by failing to do so, it committed a reviewable error.

[29] While the Board did not expressly refer to the psychological report in its reasons, I am satisfied that it took the report into consideration and gave it the weight that it deserved. It is trite

law that the Board need not refer to each and every piece of evidence before it. And it is also trite law that the more important the evidence is that is not specifically mentioned and analysed, the more willing a court may be to find reviewable error: *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 (TD) at paras 14-17.

[30] In *Dessie v Canada (Citizenship and Immigration)*, 2011 FC 1497, a case cited by the applicants that applied these principles, the Court stressed at para 8 that the evidence was relevant to the central issue in the case and was, thus, very important. That cannot be said about Dr Devins's report in this instance.

[31] Expert opinion reports should not be given exalted status in administrative proceedings simply because they are prepared by a licensed professional. That is particularly true, when as here, the report is not relevant to the Board's key credibility findings and determination on state protection. In *Czesak v Canada (Citizenship and Immigration)*, 2013 FC 1149 at paras 37-40, Justice Annis warned of the dangers posed by expert reports submitted to administrative tribunals.

Moreover, I am of the view that decision-makers should be wary of reliance upon forensic expert evidence obtained for the purpose of litigation, unless it is subject to some form of validation. This remark would apply to the report of Dr. Koczorowska which went as far as to advocate on the applicant's behalf in the guise of an opinion on the very issue before the panel.

Our legal system has a long experience in dealing with forensic experts testifying on matters relating to technical evidence for the purpose of assisting courts in their determinations. From that experience, the courts have developed what I would describe as a guarded and cautionary view on conclusions of forensic experts which have not undergone a rigorous validation process under court procedures.

[...]

This is not to say that every expert report prepared for litigation should be dismissed as having no, or little, weight. But what the court's experience with forensic experts does suggest in relation to these reports being proffered before administrative tribunals where there exists no defined procedure to allow for their validation, is that caution should be exercised in accepting them at face value, particularly when they propose to settle important issues to be decided by the tribunal. In my view therefore, unless there is some means to corroborate either the neutrality or lack of self interest of the expert in relation to the litigation process, they generally should be accorded little weight.

[Emphasis added]

[32] In my view, Dr Devins's report crosses the line separating expert opinion from advocacy.

Indeed, it concludes as follows:

Ms Molefe's condition can improve with appropriate care and guaranteed freedom from her threat of removal. It is fortunate, therefore, that she is currently receiving ongoing counselling. This should not be interrupted. If refused permission to remain in Canada, her condition will deteriorate. As noted, it will be impossible for Ms Molefe to feel safe anywhere in Botswana.

[33] Dr Devins has provided similar reports in many other cases. Indeed, by his own estimate in his report, he has assessed more than 3,900 refugee claimants since 1996. The language of his report in this instance is very similar to that reported in other cases such as *Mico v Canada (Citizenship and Immigration)*, 2011 FC 964 and *Fidan v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1190. It lacks, in my view, what Justice Annis has described as "the required imprimatur of reliability": *Czesak*, above, at para 41.

[34] In light of these observations, I am unable to conclude that the report was of such importance to a central issue of the case that the failure to mention it and analyse it requires a finding that the decision was not made in accordance with the evidence.

IV. CONCLUSION

[35] This was, essentially, a claim of persecution arising from a dispute over land ownership. As recently stated by Justice Harrington in *Kenguruka v Canada (Citizenship and Immigration)*, 2014 FC 895 at para 6, “a property rights claim is not a basis for a refugee claim under the United Nations Convention relating to the Status of Refugees and section 96 of the IRPA ...”.

[36] The section 97 claim failed because the Board was not satisfied that the half-brothers constituted a serious risk of harm to the applicants, in light of the availability of state protection. That was a conclusion reasonably open to the Board on all of the evidence.

[37] For these reasons, the application is dismissed. No questions were proposed for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed. No questions are certified.

“Richard G. Mosley”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-8071-13

STYLE OF CAUSE: NANA JOY MOLEFE, KAGISO MOLEFE v THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: MARCH 10, 2015

JUDGMENT AND REASONS: MOSLEY J.

DATED: MARCH 12, 2015

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