Federal Court  Cour fédérale

Date: 20100521

Docket: IMM-5479-09

Citation: 2010 FC 561

Ottawa, Ontario, May 21, 2010

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

EMMA BADALYAN
MARIA MANDALYAN

Applicants

and

THE MINISTER OF CITIZENSHIP AND
AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] In 2006, Emma Badalyan and her daughter, Maria Mandalyan, claimed refugee protection in Canada. It appears that they had been pursued by men working for the Armenian president who were looking for documents. Their claim for refugee protection was rejected by a member of the Refugee Protection Division (RPD) of the Immigration and Refugee Board (IRB), who determined that the applicants are not Convention refugees or persons in need of protection under subsection

97(1) of the *Immigration and Refugee Protection Act*. The applicants are now seeking judicial review of that decision.

[2] Both applicants are Armenian citizens, while Ms. Badalyan's other daughter, Anna Mandalyan, is, for her part, a Canadian citizen currently living here.

[3] Ms. Badalyan's husband, Vladimir Mandalyan (who died in 2005), was manager of a chain of restaurants. In 1994, after the fall of the communist regime, the chain was privatized. Mr. Mandalyan was alleged to have had documents in his possession linking Serge Serkassian, the current president of Armenia and at that time head of the secret police, to a corruption scheme involving the privatization of the restaurants.

[4] Following Mr. Mandalyan's death, two men allegedly visited Ms. Badalyan and demanded the documents in question. She was unable to find them. The men apparently returned several times, becoming more violent and threatening each time. Ms. Badalyan and her daughter then went to the police, but since they did not know the identity of their aggressors, they refused to file a complaint.

[5] When they got back from the police station, they received another threatening call. They deduced that these men must have been told about their visit to the police station. The threats continued. In November 2006, the two men allegedly kidnapped Ms. Mandalyan and threatened to kill her if they did not get the documents by the end of the month. They apparently came back again

in December. In desperation, the applicants left Armenia that same month and claimed refugee protection upon their arrival at Dorval.

DECISION UNDER REVIEW

[6] The RPD cast doubt on the applicants' credibility on several grounds, specifically:

a. Because Ms. Badaylan's son-in-law, Artyom Gejakushyan (Artyom), seemed to know more about the reasons for the persecution than the applicants.

b. Because the applicants failed to indicate in their PIF that Ms. Badalyan's husband had allegedly been kidnapped and held in Moscow for two years, while Artyom attested to the fact that he had been.

c. Because upon their arrival, the applicants did not know the identity of their persecutors, while now they say that it was Serge Sarkassian, the country's strongman. If they did not know this when they filled out their PIF, why was this detail not added in July 2009, when they amended their PIF?

d. Because documents dating back to 1994 could not cause serious problems for a man who was elected easily in a country where corruption is rampant and not shocking to most people.

e. Because the applicants would not have been able to leave the country if Mr. Sarkassian was determined to get a hold of those old documents.

[7] The member noted that she had taken into account both the psychological report and the Chairperson's Guidelines regarding women who are victims of violence.

[8] Essentially, the applicants raise two issues: the lack of procedural fairness (which is reviewable on a standard of correctness), and findings of fact made in a capricious manner (which are reviewable on a standard of reasonableness).

PROCEDURAL FAIRNESS

[9] At the hearing before the RPD, counsel for the applicants was expecting Ms. Badalyan's son-in-law, who knew more about Ms. Badalyan's husband's past than she did, to testify first, and had made an application to that effect. This was important due to the fact that Ms. Badalyan suffered from post-traumatic stress, according to the report by the psychologist, Mr. Woodbury. This post-traumatic stress made her nervous testifying and could have given the impression that she was being a bit vague, which was what in fact happened. Her counsel had also assured her that she would not be the first to testify.

[10] I refer to the Federal Court of Appeal's decision in *Canada (Minister of Citizenship and Immigration) v. Thamotharem*, 2007 FCA 198. This decision concerns the statutory powers given to the Chairperson of the Immigration and Refugee Board to issue guidelines and make rules. Guideline 7 (*Concerning Preparation and Conduct of a Hearing in the Refugee Protection Division*), provides that ''[i]n a claim for refugee protection, the standard practice will be for the R[efugee] P[rotection] O[fficer] to start questioning the claimant'' (para. 19), although the member of the RPD hearing the claim ''may vary the order of questioning in exceptional circumstances'' (para. 23).

[11] The Federal Court of Appeal concluded that the Guideline did not breach procedural fairness and did not fetter the presiding member's discretion. However, as counsel for the applicants noted, the case before the Federal Court of Appeal was concerned with who should question witnesses first, and not the order in which they should be called to testify. Given that the burden of proof rests on the applicants, their counsel is suggesting that the applicants should have the right to choose the order of questioning, at least where special circumstances are involved, as in this case.

[12] It should be noted that paragraph 19 of the Guideline 7 stipulates:

19. In a claim for refugee protection, the standard practice will be for the RPO to start questioning the claimant. If there is no RPO participating in the hearing, the member will begin, followed by counsel for the claimant. Beginning the hearing in this way allows the claimant to quickly understand what evidence the member needs from the claimant in order for the claimant to prove his or her case.	19. Dans toute demande d'asile, c'est généralement l'APR qui commence à interroger le demandeur d'asile. En l'absence d'un APR à l'audience, le commissaire commence l'interrogatoire et est suivi par le conseil du demandeur d'asile. Cette façon de procéder permet ainsi au demandeur d'asile de connaître rapidement les éléments de preuve qu'il doit présenter au commissaire pour établir le bien-fondé de son cas.

[13] The applicants, however, refer to paragraph 51 of the decision, which reads as follows:

> In summary, the procedure prescribed by Guideline 7 is not, on its face, in breach of the Board's duty in fairness. However, in some circumstances, fairness may require a departure from the standard order of questioning. In those circumstances, a member's refusal of a request that the claimant be questioned first by her counsel may render the determination of the claim invalid for breach of the duty of fairness.

[14] At the hearing the member stated, as can be seen from page 243 of the tribunal record:

> [TRANSLATION]
>
> Mr. Jankowski, you have asked that we start with the witness's testimony. I, however, would prefer to begin with the ladies, have the witness leave the room and have him come back to testify a bit later. I am the one leading these proceedings – and I think it would be better for the claimants if they testified first. It is also a matter of credibility. And that is that.

[15] It goes without saying that the Board is master of its own procedure, provided that the principles of natural justice are upheld. In my view, the decision was perfectly reasonable. The parties could not be excluded from the hearing, but a third witness could be, particularly when there were legitimate concerns with regard to credibility.

[16] The applicants maintain that, since the burden of proof rests on them, they should have the right to choose the order of questioning. However, the hearing was inquisitorial rather than adversarial and the member was more than justified in choosing the order of questioning.

CREDIBILITY

[17] It is not necessary to address the Minister's concerns with regard to the psychologist's qualifications. The member had the right to take into account inconsistencies in the various statements made at different times, and to draw negative conclusions from the fact that there was no mention in Ms. Badalyan's PIF that her husband had been kidnapped and held for two years or that the persecutor was the president of the country. Her findings largely fall within a range of possible,

acceptable outcomes which are defensible in respect of the facts and law, as explained in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 47. This omission has nothing to do with whether or not she suffers from post-traumatic stress.

CERTIFICATION OF A SERIOUS QUESTION OF GENERAL IMPORTANCE

[18] The applicants proposed the following question:

> Does the Board's discretionary power with regard to the order of the questioning of witnesses infringe on the rights of refugee claimants to procedural fairness?

[19] I am not inclined to certify this question. In my view, it is of no general importance and should not be certified. While the facts might be slightly different, I think that the Federal Court of Appeal's observations in *Thamotharem* are relevant here. Logic would dictate that the refugee claimant be questioned first.

ORDER

FOR THESE REASONS;

THE COURT ORDERS that:

1. The application for judicial review is dismissed.

2. No serious question of general importance arises from the matter.

''Sean Harrington''
Judge

Certified true translation

Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5479-09
STYLE OF CAUSE:	Emma Badalyan et al. v. MCI
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	May 18, 2010
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