Federal Court  Cour fédérale

Date: 20120709

Docket: IMM-2622-11

Citation: 2012 FC 863

Ottawa, Ontario, July 9, 2012

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

AMANDA BIBIANA HERMAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of a decision by the Refugee Protection Division (RPD) of the Immigration and Refugee Board (the Board), dated May 24, 2011, wherein the applicant was determined to be neither a Convention refugee within the meaning of section 96 of the Act nor a person in need of protection as defined in subsection 97(1) of the Act. This

conclusion was based on the Board's finding that evidence in areas crucial to the applicant's claim lacked credibility.

[2] The applicant requests that the Board's decision be set aside and the claim remitted for redetermination by a differently constituted board of the RPD.

Background

[3] The applicant, Amanda Bibiana Herman, is a citizen of St. Lucia. She has three daughters, two of which hold Canadian citizenship.

[4] The applicant was born in St. Lucia but lived in Canada from 1999 to 2005. In 2005, immigration officials returned her to St. Lucia for overstaying in Canada. After returning to St. Lucia, the applicant met and began a relationship with Richard Plummer. The couple subsequently moved in together.

[5] After a few peaceful months, Mr. Plummer began drinking heavily and using drugs. His attitude changed and he became increasingly rude and violent towards both the applicant and her children. Subsequently, Mr. Plummer attacked and harmed the applicant. A similar incident happened a few months later at which time Mr. Plummer threatened to kill the applicant. He also threatened that if she sought help from the police, he would find out as he had many friends that were police officers. The applicant did not leave Mr. Plummer as she and her children were financially dependent on him.

[6] After another abusive incident, the applicant decided to report Mr. Plummer to the police. Initially, the police were very concerned and responsive. However, when they discovered that the complaint was against Mr. Plummer, they became dismissive and told the applicant to seek help elsewhere. When the applicant returned home, Mr. Plummer attacked and assaulted her again. In fear for her life, the applicant decided to flee the country.

[7] On August 3, 2009, the applicant arrived in Canada on a six month visitor visa. After her arrival, the applicant called home and discovered that Mr. Plummer was searching for her and had threatened to kill her should she return.

[8] The applicant filed a refugee claim on or about October 14, 2010. The hearing of the applicant's refugee claim was held on April 4, 2011. On the day of the hearing, the applicant sought to file three supporting letters from her mother, friend and neighbour. These letters were respectively dated three, four and fourteen months prior to the date of the hearing.

Board's Decision

[9] The Board issued its oral decision on April 4, 2011. Written reasons were issued on May 24, 2011.

[10] The Board found that the evidence submitted in areas crucial to the applicant's claim lacked credibility despite the following important factors in her favour:

1. Length of stay in Canada (from 1999 to 2005 and from August 2009 to October 2010) during which time she gained extraordinary experience and acculturation beyond that of normal refugee claimants;

2. Representation by an experienced and licensed immigration consultant; and

3. Absence of any credible exceptional impediments to advancing her claim and complying with the rules on disclosure.

[11] The Board found that the applicant had not provided any reasonable or credible explanation for the late disclosure of her supporting letters. Rather, the applicant's late disclosure reflected conduct that was inconsistent with individuals having a serious desire to diligently pursue their case. The Board found the applicant's explanations for the breach of the disclosure rules unsatisfactory. This finding was further supported by the fact that the applicant had previously been returned to St. Lucia for having overstayed in Canada. As such, the Board found that the applicant was acting in a variety of ways that were substantially inconsistent with that of a person having had her experiences and facing her alleged risk and fear.

[12] In summary, the Board concluded that there was no serious possibility that the applicant would sustain serious and persistent harm of persecution should she return to St. Lucia, nor that she would face a risk to her life, a risk of cruel and unusual treatment or punishment or a danger of torture. As such, the Board rejected the applicant's refugee claim.

Issues

[13] The applicant submits the following issues for consideration:

1. Did the Board, in the totality of its decision, make an unreasonable decision?

2. Did the Board err in law by both ignoring and misconstruing relevant evidence in its entirety, properly before it which substantiated the applicant's claim to be a Convention refugee or a person in need of protection and accordingly made erroneous findings of fact or inferences that were patently unreasonable, unsupported by the evidence, in disregard to the evidence, in its entirety, perverse, capricious and based on irrelevant considerations?

3. Did the Board err in law by its failure to properly consider all of the evidence in a fair and judicious manner?

4. Did the Board properly take into account the IRB Gender Guidelines where it was required to do so?

5. Did the Board err by making adverse findings of credibility in a perverse and capricious manner?

6. Did the Board err in making findings on the documentary evidence, based on what the documents did not say rather than on what they did say?

7. Did the Board err in law in its interpretation of the meaning of persecution, the definition of Convention refugee and a person in need of protection?

[14] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Were the Board's reasons adequate?

3. Did the Board err in making a negative credibility finding?

4. Did the Board err in denying the applicant's refugee claim?

Applicant's Written Submissions

[15] The applicant submits that the Board's reasons were inadequate. This deprived her of a fair hearing. The adequacy of reasons is a question of procedural fairness that is reviewable on a standard of correctness. In this case, the Board's reasons, when read as a whole, were not meaningful or sufficient and provided an inadequate analysis of the issues.

[16] The applicant also submits that the Board was unreasonably harsh, overzealous and/or hypercritical in finding defects in her overall credibility. The Board merely mentioned the Gender Guidelines, without properly applying them. Further, the Board strictly enforced the 20 day advance disclosure rules without any sensitivity to the applicant's circumstances or her background as a domestic violence victim.

[17] The applicant also submits that the Board erred by drawing negative inferences from the lack of corroborating police and medical evidence. The applicant had specifically explained that the police refused to take her seriously when she went to report her partner's abuse. This general police apathy towards domestic abuse victims in St. Lucia was noted in the documentary evidence that was before the Board.

[18] The applicant also submits that the Board came to an unreasonable decision on her delay in claiming. The applicant gave a reasonable explanation for her delay; namely, her lack of funds and

her ignorance of Canadian refugee policies. Upon being informed of her right to apply for refugee protection, the applicant promptly filed her claim. The applicant submits that a delay in making a claim cannot be a decisive factor in refusing that claim. In addition, a claim may be credible even though it is not made at the earliest possible opportunity.

[19] The applicant submits that the Board also made unreasonable speculations as to her awareness of the disclosure rules, thereby perversely disregarding the supporting letters. The fact that she was represented by a consultant was irrelevant to the question of her awareness of the disclosure rules. The applicant gave reasonable explanations for her late submission of the supporting letters, namely, her ignorance of the rules and her recent receipt of the letters. Furthermore, provisions in the rules themselves clearly indicate that they are not to be applied in a rigid manner. In fact, boards are granted a measure of discretion in deciding whether to enforce the disclosure rules.

[20] The applicant also submits that the Board made erroneous findings of fact. It did not refer to or assess pivotal documentary evidence before it that supported the applicant's well-founded fear and personalized risk of harm. In addition, the Board did not undertake a thorough and balanced review of the evidence that described both the serious nature of domestic abuse in St. Lucia and the limited state protection available to abuse victims there.

[21] Nevertheless, the applicant submits that a positive Convention refugee determination can still be rendered despite an adverse credibility finding. The key question is whether the applicant meets the subjective and objective elements of the refugee test. In addition, negative credibility

findings cannot be made based on the absence of evidence and findings of fact based on speculation are inherently unreasonable.

[22] In summary, the applicant submits that the Board erred by not carefully examining her evidence or grasping the nature of her matter. The decision contains errors of fact and law that both individually and cumulatively warrant this Court's intervention.

Respondent's Written Submissions

[23] The respondent submits that the Board reasonably found that the applicant's conduct was inconsistent with that of a person having a serious desire to act diligently in pursuing their case. The applicant, who had retained a consultant six months prior to the hearing, provided no reasonable explanation for her late disclosure of letters written several months prior to the hearing. Furthermore, the applicant did not explain how her profile as a domestic violence victim affected her ability to provide disclosure in a timely manner and in accordance with the rules.

[24] The respondent submits that given the applicant's questionable credibility and the nature of her claim, it was reasonable for the Board to draw a negative inference from the fact that she was unable to provide objective documentary evidence in support of her claim.

[25] The respondent submits that a delay in seeking protection points to a lack of subjective fear of persecution or negates a well-founded fear of persecution. Delay in claiming protection can be a determinative factor where an applicant fails to provide a satisfactory explanation for that delay.

[26] In this case, the respondent submits that the Board reasonably found that the applicant's previous experience in Canada, her one year delay in claiming and the expiration of her visitor visa undermined her alleged fear of persecution. It was also notable that the applicant provided inconsistent testimony to explain her delay in claiming. At one point, she blamed the delay on her lack of funds to hire counsel, while later she blamed the delay on her own ignorance. Given the applicant's extensive experience in Canada and this inconsistent testimony, the respondent submits that the Board reasonably drew a negative credibility inference.

Analysis and Decision

[27] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[28] It is established jurisprudence that credibility findings, described as the "heartland of the Board's jurisdiction", are essentially pure findings of fact and are therefore reviewed on a reasonableness standard (see *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] SCJ No 12 at paragraph 46; *Demirtas v Canada (Minister of Citizenship and Immigration)*, 2011 FC 584, [2011] FCJ No 786 at paragraph 23; and *Lubana v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116, [2003] FCJ No 162 at paragraph 7).

[29] In reviewing the Board's decision on a standard of reasonableness, the Court should not intervene unless the Board came to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 47; and *Khosa* above, at paragraph 59). It is not up to a reviewing court to substitute its own view of a preferable outcome, nor is it the function of the reviewing court to reweigh the evidence (see *Khosa* above, at paragraphs 59 and 61).

[30] Conversely, the existence of a Board's reasons is a matter of procedural fairness and natural justice and the appropriate standard of review is correctness (see *Poggio Guerrero v Canada (Minister of Citizenship and Immigration)*, 2010 FC 384, [2010] FCJ No 448 at paragraph 19). However, the Supreme Court of Canada recently explained that where reasons are issued, the reasoning contained therein is reviewable on a reasonableness standard. As stated by Justice Abella in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 at paragraph 22:

> It is true that the breach of a duty of procedural fairness is an error in law. Where there are no reasons in circumstances where they are required, there is nothing to review. But where, as here, there are reasons, there is no such breach. Any challenge to the reasoning/result of the decision should therefore be made within the reasonableness analysis. [emphasis added]

[31] **Issue 2**

Were the Board's reasons adequate?

An administrative tribunal's written reasons are intended to inform the affected individual of the underlying rationale for the decision. Therefore, reasons must be proper, adequate and intelligible and include considerations of the parties' substantial points of argument (see *Syed v*

Canada (Minister of Employment and Immigration) (1994) 83 FTR 283 (FCTD), [1994] FCJ No 1331 at paragraph 8; and *Via Rail Canada Inc v Lemonde*, [2001] 2 FC 25, [2000] FCJ No 1685 at paragraph 22). However, reasons need not be perfect. They must be examined in the full context of the decision and in the particular circumstances of the specific case (see *Guerrero* above, at paragraph 30). It is not necessary that all relevant factors be discussed in detail as long as the reasons serve the purpose and function for which they are required (see *Abu Ganem v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1147, [2011] FCJ No 1404 at paragraph 47).

[32] The Supreme Court of Canada recently elaborated on the application of *Dunsmuir* above, in the context of the sufficiency of reasons. On behalf of a unanimous court, Justice Abella explained that the adequacy of reasons is not a stand-alone basis for quashing a decision. Rather, "reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes" (see *Nurses' Union* above, at paragraph 14). Although courts should not substitute their own reasons, they may, if necessary, look to the record to assess the reasonableness of the outcome (see *Nurses' Union* above, at paragraph 15). The *Dunsmuir* criteria will be met "if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (see *Nurses' Union* above, at paragraph 16). In *Nurses' Union* above, the reasons were upheld because they "showed that the arbitrator was alive to the question at issue and came to a result well within the range of reasonable outcomes" (at paragraph 26).

[33] In this case, the applicant submits that the Board's reasons, when read as a whole, were not meaningful or sufficient and provided an inadequate analysis of the issues. However, I find the

Board's reasons sufficient to allow this Court to understand the reasoning that led to its final decision. Although relatively brief, the decision describes the applicant's responses at the hearing. The Board also described specific factors that led to its negative credibility finding. As a whole, I find that these reasons sufficiently convey the Board's reasoning on credibility which was the determinative issue in this case.

[34] **Issue 3**

Did the Board err in making a negative credibility finding?

It is well established that credibility findings demand a high level of judicial deference and should only be overturned in the clearest of cases (see *Khan v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1330, [2011] FCJ No 1633 at paragraph 30). The Court will generally not substitute its opinion unless it finds that the decision was based on erroneous findings of fact made in either a perverse or capricious manner or without regard for the material before it (see *Bobic v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1488, [2004] FCJ No 1869 at paragraph 3). In reviewing a board's decision, isolated sections should not be scrutinized. Rather, the Court must consider whether the decision as a whole supports the ultimate credibility finding (see *Guarin Caicedo v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1092, [2010] FCJ No 1365 at paragraph 30).

[35] In this case, the applicant's criticism of the Board's credibility findings rests primarily on three grounds: delay in filing the claim; awareness of disclosure rules; and lack of corroborating evidence.

[36] On the first ground, it is established jurisprudence that a delay in filing a refugee claim can point to a lack of subjective fear of persecution (see *Pina Gaete v Canada (Minister of Citizenship and Immigration)*, 2011 FC 744, [2011] F.C.J. No. 938 at paragraph 23). As observed by the Board, it is notable that the applicant in this case had prior experience with Canadian immigration officials, which included being removed for failing to abide to immigration requirements. She was also cognizant of the time limit of her visitor visa. Nevertheless, she waited eight months after the expiry of her visitor visa to file a refugee claim. This Court has held that the more inexplicable the delay, the greater the probability that the subjective fear is absent (see *El Hage v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1177, [2008] FCJ No 1459 at paragraph 13).

[37] Based on the evidence before the Board, including the applicant's past immigration experience and the delay in filing after the expiry of her visitor visa, I find that the Board drew a reasonable negative credibility inference on the applicant's subjective fear. The applicant's past experience with immigration matters in Canada renders her allegations of ignorance of claim filing procedures questionable.

[38] On the second ground, the Board found that the applicant, who had the benefit of an experienced immigration consultant to help her, did not provide any reasonable or credible explanation for the lateness of disclosure of her supporting letters. All three letters were dated several months before the hearing.

[39] The applicant submits that she did give reasonable explanations for the delay; namely, her lack of awareness of the rules and her recent receipt of the letters. In addition, the applicant submits

that the Board was empowered with a certain level of discretion in deciding whether to strictly enforce the 20 day disclosure rule. In support, the applicant refers to four cases. However, I note that these cases pertain more specifically to the application of the Gender Guidelines to victims of abuse than to the Board's discretion in applying the disclosure rules.

[40] Again, bearing in mind the applicant's prior experience with Canadian immigration and her lack of explanation on how her profile as a domestic violence victim affected her ability to provide disclosure in accordance with the rules, I find the Board came to a reasonable finding on her failure to meet the disclosure rules. The applicant has not submitted jurisprudence that clearly supports her assertion that the Board should have granted an exception to the rules in this case.

[41] Finally, the applicant criticizes the Board for drawing a negative inference from the lack of corroborating police and medical evidence. In its decision, the Board noted that corroborating documentary evidence is not a prerequisite in all cases. However, it found that the applicant had not provided any reasonable or credible explanation for the lateness of disclosure and had not alleged, corroborated or established an inability to meet the disclosure timelines for reasons out of her control.

[42] It is established jurisprudence that a board can draw a negative inference from an applicant's failure to produce extrinsic documents corroborating her allegations when her credibility is at issue (see *Richards v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1391, [2011] FCJ No 1697 at paragraph 23; and *Nechifor v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1004, [2003] FCJ No 1278 at paragraph 6). The requirement to submit corroborating evidence is

more acceptable where it pertains to critical aspects of an applicant's claim (see *Guzun v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1324, [2011] FCJ No 1615 at paragraph 20).

[43] In this case, the applicant's failure to meet the disclosure timelines, coupled with her previous immigration experiences and her delay in filing a refugee claim several months after her visitor visa had expired, clearly placed her credibility at issue. It was therefore reasonable for the Board to consider whether she had any corroborating evidence to support her claims and to draw negative inferences from the lack of any such evidence.

[44] In summary, I find that when read as a whole, the decision supports the Board's final credibility finding.

[45] **Issue 4**

Did the Board err in denying the applicant's refugee claim?

The Federal Court of Appeal recently held that where a board makes a general finding that an applicant lacks credibility, this determination is sufficient to dispose of the claim unless there is independent and credible documentary evidence capable of supporting a positive disposition of the claim (see *Canada (Minister of Citizenship and Immigration) v Sellan*, 2008 FCA 381, [2008] FCJ No 1685 at paragraph 3). In this case, I have found that the Board came to a reasonable negative credibility decision based on the evidence before it. This finding is sufficient basis on which to dispose of the applicant's claim. The applicant has not demonstrated that independent and credible documentary evidence exists to support her claim (see *Sellan* above, at paragraph 3).

[46] In summary, I find that the Board's decision was transparent and intelligible and within the range of possible outcomes. I would therefore dismiss the application for judicial review.

[47] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

Immigration and Refugee Protection Act, SC 2001, c 27

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.
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,	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) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	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) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
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 themself 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	(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) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

Refugee Protection Division Rules, SOR/2002-228

29. (1) If a party wants to use a document at a hearing, the party must provide one copy to any other party and two copies to the Division, unless these Rules require a different number of copies.	29. (1) Pour utiliser un document à l'audience, la partie en transmet une copie à l'autre partie, le cas échéant, et deux copies à la Section, sauf si les présentes règles exigent un nombre différent de copies.
. . .	. . .
(4) Documents provided under this rule must be received by the Division or a party, as the case may be, no later than	(4) Tout document transmis selon la présente règle doit être reçu par son destinataire au plus tard :
(a) 20 days before the hearing; or	a) soit vingt jours avant l'audience;
(b) five days before the hearing if the document is provided to respond to another document provided by a party or the Division.	b) soit, dans le cas où il s'agit d'un document transmis en réponse à un document reçu de l'autre partie ou de la Section, cinq jours avant l'audience.
69. The Division may	69. La Section peut :
(a) act on its own initiative, without a party having to make an application or request to the Division;	a) agir de sa propre initiative sans qu'une partie n'ait à lui présenter une demande;

(b) change a requirement of a rule;

(c) excuse a person from a requirement of a rule; and

(d) extend or shorten a time limit, before or after the time limit has passed.

b) modifier une exigence d'une règle;

c) permettre à une partie de ne pas suivre une règle;

d) proroger ou abréger un délai avant ou après son expiration.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2622-11
STYLE OF CAUSE:	AMANDA BIBIANA HERMAN - and - THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	January 12, 2012
REASONS FOR JUDGMENT AND JUDGMENT OF:	O'KEEFE J.
DATED:	July 9, 2012

APPEARANCES:

Marc J. Herman	FOR THE APPLICANT
Veronica Cham	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Herman & Herman Toronto, Ontario	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT