

Federal Court



Cour fédérale

Date: 20140708

Docket: IMM-1180-13

Citation: 2014 FC 663

Ottawa, Ontario, July 8, 2014

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

BIBI SALAMU ODIA

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

OVERVIEW

[1] Ms. Bibi Salamu Odia is a citizen of the Democratic Republic of Congo [DRC] seeking protection from pressure, amounting to persecution, exerted by her in-laws to marry the brother of her deceased husband, believed to be HIV positive. She is seeking judicial review of a decision of a member of the Refugee Protection Division [RPD] of the Immigration and Refugee

Board of Canada, dated January 15, 2013, whereby she was found to lack credibility and, as a result, determined not to be a Convention refugee or a person in need of protection.

[2] The applicant argues that the RPD member breached the requirement of procedural fairness by failing to meet her legitimate expectation that the *Guideline 4: Women Refugee Claimants Fearing Gender-related Persecution* [Gender Guidelines] would be applied and followed, as well as, more generally, that his assessment of her credibility was unreasonable.

ISSUES AND STANDARD OF REVIEW

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

- i) Did the RPD member breach the procedural fairness requirement by failing to meet the applicant's legitimate expectation that the Gender Guidelines be considered in a meaningful way?
- ii) Was the RPD member's decision reasonable?

[4] The appropriate standard of review for issues of procedural fairness is correctness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43), whereas reasonableness applies to the RPD member's credibility assessment (*Aguilar v Canada (Minister of Citizenship and Immigration)*, 2012 FC 150 at para 14; *Mejia v Canada (Minister of Citizenship and Immigration)*, 2009 FC 354 at para 26; *Zarza v Canada (Minister of Citizenship and Immigration)*, 2011 FC 139 at para 16).

ANALYSIS

Application of the Gender Guidelines and Procedural Fairness

[5] The applicant contends that in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, the Supreme Court of Canada outlined a number of criteria to determine what procedural rights the duty of fairness requires. The following were identified:

- i) The nature of the decision being made;
- ii) The nature of the statutory scheme and the terms of the statute pursuant to which the body operates;
- iii) The importance of the decision;
- iv) The legitimate expectation of the person challenging the decision;
- v) The choices of procedure made by the agency itself and its institutional constraints; and,
- vi) The influence of the principles in the Canadian Charter of Rights and Freedoms on procedural protection.

[6] The applicant argues that she had a legitimate expectation that the Gender Guidelines would be taken into account in a meaningful way, and that the RPD member would conduct the hearing and question the applicant while being alert and sensitive to the fact that she endured gender-related persecution in the DRC. On the contrary, the RPD member was insensitive, intimidating, and impatient with the applicant, which made her uncomfortable and which led to her inability to properly and fully convey her story at the hearing.

[7] I have listened to the audio recording of the hearing before the RPD and find that the RPD member's questioning was not intimidating and that he showed an adequate level of patience in the circumstances. He let the applicant's counsel intervene during his questioning, as often as counsel requested.

[8] However, I disagree with the RPD member's conclusion that the applicant's credibility was undermined by her testimony, which he found contained "serious omissions and contradictions that go to the heart of her claim for refugee protection, and by implausibilities." I find rather that the applicant seemed fragile, vulnerable, and confused during her testimony, and that she had difficulty following his line of questioning. The RPD member often had to raise the same question more than once and had to reformulate his questions in order to be on the same page as the applicant. However, once the question was understood, the applicant would answer in a straightforward manner, consistent with her account, as recounted in her Personal Information Form [PIF].

[9] I agree with the applicant that in order for the RPD to take the Gender Guidelines into account in a meaningful way, it has to assess a claimant's testimony while being alert and sensitive to her gender, the social, cultural, economic and religious norms of her community, and "to the factors which may influence the testimony of women who have been the victims of persecution" (*Bennis v Canada (Minister of Immigration and Citizenship)*, 2001 FCT 968 at para 14). Here, it is in the assessment of the applicant's testimony that the RPD member lacked the requisite sensitivity. In that sense, the Gender Guidelines were not properly applied and the applicant's expectations were not satisfied.

Reasonableness of the decision

[10] The RPD cast doubt on four different facts from the applicant's narrative:

- i) The timing of the death threats to her, whether they occurred in September 2008 or in July 2009;
- ii) The timing of her decision to leave the country, whether it occurred in September 2008 or in July 2009;
- iii) The timing of the death threats to her brother and sister; and
- iv) The implausibility of her not leaving her house for 15 months.

[11] In regard to the first three elements, it seems that these issues were the subject of some confusion for a good part of the hearing. However, and as indicated above, once the RDP member and the applicant finally dissipated that confusion, the applicant's testimony was consistent with her PIF, and she was able to properly explain the sequence of events leading to her refugee claim.

[12] As to the RPD member's implausibility finding, the applicant explained during the hearing that, for a period of 15 months prior to fleeing the DRC, she was taking refuge ("à l'abri") on her property, which was 40 square meters in size and surrounded by high walls. The applicant's testimony on this issue was rather spontaneous; at one point, she added that, as a result of being somewhat inactive during this lengthy period of time, she had gained weight and had pictures to prove it. The RDP member did not indicate in his reasons why he did not find it plausible for a woman in the applicant's situation to go into hiding for a certain period of time, in

the face of being forced to marry a man suspected of being HIV positive, and while being the subject of death threats.

Proposed Question for Certification

[13] At the hearing, counsels for the parties were asked if they proposed any question of general importance for certification. Counsel for the applicant asked me if he could follow up in writing after the hearing on that question, which he did by submitting the following question:

What criteria should be applied to determine whether the Board Member has meaningfully applied the Gender Guidelines?

[14] The test for certification is set out in paragraph 74(d) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, and subsection 18(1) of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22. The threshold required for certifying a question is whether “there [is] a serious question of general importance which would be dispositive of an appeal” (*Canada (Minister of Citizenship and Immigration) v Zazai*, 2004 FCA 89 at para 11).

[15] A “serious question of general importance” is a question that transcends the particular factual context in which it arose, lending itself to a generic approach leading to an answer of general application (*Boni v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 68 at paras 4-11).

[16] The certification process should not be used as a tool to obtain from the Federal Court of Appeal declaratory judgments on fine questions which need not be decided to dispose of a

particular case (*Liyanagamage v Canada (Minister of Citizenship and Immigration)* (1994), 176 NR 4).

[17] The proposed question does not warrant certification. The issue has been canvassed at length by this Court's case law, and it has set forth clear parameters for assessing whether the RPD has properly applied the Gender Guidelines.

[18] While the Gender Guidelines are not binding on the RPD, this Court has often asserted that the RPD must nonetheless apply the principles enshrined in them in a meaningful way (*A.M.E. v Canada (Minister of Citizenship and Immigration)*, 2011 FC 444). It is not sufficient for the RPD to simply say that the Gender Guidelines were applied and then fail to demonstrate how they were applied (*Yoon v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1017 at para 5; *Myle v Canada (Minister of Citizenship and Immigration)*, 2006 FC 871). The analysis relating to the sufficiency of the application of the Gender Guidelines is subsumed in the standard of review of reasonableness as applied to credibility findings (*Hernandez v Canada (Minister of Citizenship and Immigration)*, 2009 FC 106 at para 13; *Higbogun v Canada (Minister of Citizenship and Immigration)*, 2010 FC 445 at para 22). It requires an inherently fact-specific analysis by the Court.

[19] As such, the applicant has failed to raise a serious question of general importance.

CONCLUSION

[20] In light of the above, I grant this application for judicial review. The errors made with respect to applying the Gender Guidelines and the flawed credibility assessment require that this decision be quashed and remitted to a differently constituted panel for redetermination.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted and the file is remitted back for redetermination by a different member of the Refugee Protection Division of the Immigration and Refugee Board; and
2. No questions of general importance are certified.

"Jocelyne Gagné"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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STYLE OF CAUSE: BIBI SALAMU ODIA v THE MINISTER OF
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