

Federal Court



Cour fédérale

Date: 20141201

Docket: IMM-1441-14

Citation: 2014 FC 1156

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, December 1, 2014

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

**SOUMAYA AKHROUF YAHIA AISSA,
MERIEM MARIA AKHROUF and
MOHAMED DJAOUED AKROUF**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION CANADA**

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA), of a decision by the Refugee Protection Division (RPD) of the Immigration and Refugee Board, dated January 30, 2014, rejecting the

applicants' claim for refugee protection and finding that the applicants are neither "Convention refugees" nor "persons in need of protection" under sections 96 and 97 of the IRPA.

[2] For the reasons set out below, I am of the view that the application for judicial review must be dismissed.

II. Alleged facts

[3] The principal refugee claimant, Soumaya Akhrouf Yahia Aissa (the female applicant), and her children are Algerian citizens. The female applicant was appointed as the designated representative of her two minor children.

[4] In February 2002, the female applicant divorced her first husband, in Algeria, after he was convicted of a criminal offence and imprisoned.

[5] On December 18, 2003, she married Abdel Moumene Akhrouf (the husband). They had a happy marriage until the female applicant became pregnant in 2004. The husband did not want to have children and tried to get her to have an abortion. However, the female applicant refused.

[6] When the female applicant was six months pregnant, her husband told her that he wished to marry a second wife. Upon learning this, the female applicant left the matrimonial home and went to live with her parents. However, the female applicant's parents pushed her to return to her husband; a second divorce would have brought great dishonour to their family. Under pressure, the female applicant returned to her husband.

[7] The husband subsequently married his second wife and the female applicant alleges that after she gave birth the husband only visited her sporadically to give her money.

[8] In 2007, the female applicant became pregnant again and her husband encouraged her to have an abortion. When the female applicant refused to have an abortion, the husband allegedly abandoned her for several months. The female applicant said that she then asked for a divorce, which the husband reportedly refused.

[9] The female applicant submits that the violence against her began a few months later. The female applicant alleges that her husband beat her, insulted her, forced her to wear a hijab and prevented her from taking her kids to school or to the doctor. The female applicant submits that the abuse she suffered got worse over the years.

[10] When the female applicant became pregnant for the third time, her husband and his brother allegedly forced her to have an abortion. To that end, the two men reportedly administered medication to her by injection.

[11] Between 2005 and 2010, the husband took the female applicant on four trips: Morocco (2005), Tunisia (2008), Spain (2009) and Italy (2010). Furthermore, in May 2010, the husband suggested to the female applicant that she go visit her brother in Montréal with the children, telling her that he would join them later. However, the husband did not join the female applicant and, for that reason, she believed he wanted to get rid of her. After having spent two months in

Canada, the female applicant asked that her husband buy her return tickets, which he only did under pressure from the female applicant's family.

[12] The female applicant submits that upon her return to Algeria, the abuse she suffered at the hands of her husband increased. She alleges that she was confined, called names and slapped. Furthermore, her husband reportedly took her car away from her.

[13] During a visit by the female applicant to her parents, her husband allegedly changed the locks of the house and informed the female applicant that she would be forced to live in a dangerous neighbourhood for women. The female applicant refused to move, and following the intervention of her husband's sister, her husband reconsidered his decision. The female applicant then apparently filed for divorce, but submits that those around her were opposed to the idea. She alleges that she consulted a lawyer about wanting a divorce, but he allegedly informed her that she had no grounds for divorce.

[14] Following these events, the female applicant decided to leave her country and come to Canada.

[15] The female applicant and her two children arrived in Montréal on December 10, 2010.

[16] On December 11, 2010, the female applicant's parents supposedly informed her by telephone that her husband allegedly threatened them and informed them that he would use his contacts to come to Montréal to take her back to Algeria.

[17] On January 25, 2011, the female applicant and her two children filed claims as refugees and persons in need of protection with the Citizenship and Immigration Canada office.

[18] On April 29, 2011, the female applicant filed an application for separation from bed and board and for custody of her two minor children before the Superior Court of Québec. For his part, the female applicant's husband brought a motion of declinatory exception to challenge the jurisdiction of the Superior Court of Québec. On November 21, 2011, the Superior Court of Québec rendered a judgment declaring that it had jurisdiction to rule on the merits of the motion. On May 14, 2013, the Court of Appeal of Québec, per Justice Bich, unanimously set aside the decision of the Superior Court of Québec (*Droit de la famille – 131294*, 2013 QCCA 883).

[19] On May 30, 2011, a default judgment ordering the female applicant to return to the matrimonial home was rendered by an Algerian family court.

[20] On May 26, 2011, an Algerian criminal court rendered a decision sentencing the female applicant to a term of imprisonment of two months and a fine of 50,000 dinars. She was convicted of abandoning the matrimonial home.

[21] On January 20, 2013, the Al-Harrach Algerian court rendered another decision sentencing the female applicant to a term of imprisonment of one year and a fine of 600,000 dinars.

[22] The female applicant claimed refugee status to avoid reprisals and abuse by her husband and his brothers. She states that she wanted to escape from an extremist mentality based on the wearing of the hijab, compliance with Sharia law and a woman's submission to the authority of her husband and his family.

III. Decision

[23] The heart of the determination of the RPD rests on the female applicant's lack of credibility and on the lack of reasonable or serious possibility that the female applicant and her children would be persecuted if they were to return to Algeria.

[24] To assess the credibility of the female applicant, the RPD considered the prior decisions of the Superior Court of Québec and the Appeal Court of Québec and the related files.

[25] The RPD drew negative inferences as to the female applicant's credibility owing to

- (i) contradictions between her testimony and her Personal Information Form (PIF);
- (ii) inconsistencies in some of the facts related by the female applicant during her testimony;
- (iii) discrepancies between the female applicant's testimony and her expert witness's report;
- (iv) discrepancies between the female applicant's exhibits and her testimony; and (v) the fact that the judgment of the Court of Appeal of Québec contradicts the female applicant's testimony.

Essentially, the RPD doubts the female applicant's testimony as to the conflictual relationship between her and her husband. The RPD found that the female applicant was not the victim of abuse at the hands of her husband, as alleged by her. The overall negative inferences raised by the RPD were considered in this judgment and are summarized in Appendix A.

[26] The RPD also analyzed the female applicant's risk of persecution upon her return to Algeria.

[27] Following an analysis of the expert witness's credentials, the RPD found that she is an expert in Algerian statutory law relating to family matters. However, the RPD noted that she is not an expert in matters related to torture.

[28] The RPD considered the analysis of the expert witness, but found that although the female applicant will face the full brunt of the law upon her return to Algeria, nothing in the evidence indicates that she will face persecution, discrimination or violation of her fundamental rights. According to the RPD, a penalty consisting of serving a sentence of imprisonment does not constitute a risk to life or cruel and unusual punishment pursuant to section 97 of the IRPA. In support of its arguments, the RPD noted that section 283 of the *Criminal Code*, RSC 1985, c C-46 provides that depriving a father of the possession of his children is liable to a sentence of imprisonment for a term not exceeding ten years.

[29] Moreover, the RPD dismissed the understanding and application of the concept of torture by the female applicant's expert witness. First, the RPD determined that given the female applicant's weak credibility, there is no evidence that she was the victim of violence. Second, contrary to the expert witness's submissions, the RPD is of the view that the female applicant would not be tortured and detained upon her arrival at the airport. Finally, the RPD determined that the female applicant's incarceration in the female wing of a prison intended for men, in accordance with the conditions of detention in Algeria, would not constitute torture or

persecution. The RPD nonetheless recognized that such detention conditions are not consistent with international standards. The RPD noted that the documentary evidence provided, the detention conditions of Algerian women are better than those of men.

[30] Furthermore, the RPD noted that there is the possibility that the prison sentence could either be commuted or reduced in duration as the affidavit submitted by the husband in support of his motion for a declinatory exception states that he undertakes to abandon the proceedings which he initiated in Algeria if the female applicant undertakes to return to the matrimonial home. Moreover, according to the RPD, given the Algerian government's willingness to consider alternative sentencing for offenders and the fact that the female applicant's husband would support a revocation of judgment, there is a possibility that the female applicant would not be compelled to serve her prison sentence.

[31] Finally, the RPD determined that the proceedings instituted by the husband to be reunited with his children indicate that he is attached to his children and that they would not be mistreated upon their return to Algeria.

IV. Issues

[32] There are three issues:

1. Did the RPD err in its assessment of the female applicant's credibility?

2. Did the RPD err in its assessment of the risk of persecution and cruel and unusual treatment or punishment?
3. Did the RPD err in its analysis of the best interests of the children?

V. Parties' submissions

A. *Applicants' submissions*

(1) Credibility findings

[33] The female applicant submits that the RPD erred in its assessment of her credibility for the following reasons:

1. The RPD's findings that the female applicant implicitly accepted her husband's second marriage under pressure from her parents does not change the fact that this situation was forced upon her.
2. The RPD unreasonably found that it is implausible that a second divorce was a source of dishonour for the female applicant's parents, as it was required to assess cultural norms with extreme caution (*Giron v Canada (Minister of Employment and Immigration)*, [1992] FCJ No 481 (FCA) (QL)).
3. The RPD failed to rely on real and not illusory implausibility (*Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 (FCA) (QL) [*Aguebor*])

in finding that the explanation for the religious divorce is not sufficient to make plausible the fact that the female applicant asked her husband for a divorce in 2007.

4. The female applicant's explanation to justify why she continued to have intimate relations with her husband is reasonable and should not have been rejected based on speculation by the Court of Appeal of Québec.
5. The RPD did not consider all of the female applicant's explanations by finding that she did not experience abuse following her refusal to have an abortion in 2007, such as the fact that she was forced to wear a ball cap instead of a hijab when she traveled.
6. The RPD unreasonably drew negative inferences from the female applicant's return to Algeria in September 2010.

[34] In addition, the female applicant submits that the negative inferences as to the female applicant's credibility were not based on all the evidence before the RPD. The RPD ignored the husband's bigamy, the possible manipulation of the state registrar raised by the expert witness allowing the husband's second marriage, the threats from the husband's brothers and the domestic violence.

[35] The female applicant argues that the RPD erred in its application of the *Chairperson's Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution (Guideline 4)*. According to that guideline, the RPD was required to consider the impact of domestic violence on the female applicant's behaviour. Although deference should be owed to the credibility

findings, failure to consider *Guideline 4* is a palpable error (*Njeri v Canada (Citizenship and Immigration)*, 2009 FC 291 [*Njeri*]).

[36] The female applicant also submits that the RPD gave too much weight to the findings of the Court of Appeal of Québec and the Superior Court of Québec case.

(2) Persecution and the risk of cruel and unusual treatment or punishment

[37] First, the female applicant notes that the expert witness found that a return to Algeria would deprive her of her children, her civil and civic rights, and her family.

[38] The female applicant also submits that the RPD erred in summarily finding the female applicant guilty without her ever being charged and that the risk of imprisonment is the result of lawful sanctions.

[39] Furthermore, the female applicant criticized the RPD's logic that the female applicant was not the victim of cruel punishment since the abduction of a child by a parent with intent to deprive the other parent who has the lawful care or charge of the child of the possession of the child is punishable by a term of imprisonment of ten years in Canada. The female applicant notes that she was not convicted of [TRANSLATION] "child abduction", but of [TRANSLATION] "family abandonment" and [TRANSLATION] "family neglect". Furthermore, the female applicant argues that the RPD failed to analyze the punishment imposed in Algeria in the light of international law and restricted its analysis to the compliance of detention standards with international law.

[40] The female applicant argues that the RPD should not have considered her husband's testimony to determine the female applicant's reasons for returning to Algeria in 2010, as his explanation is no more reasonable than that of the female applicant. Furthermore, the female applicant notes that her husband was not heard by the panel and was therefore not cross-examined by the female applicant and her counsel.

(3) The reasons for the children's claims

[41] The female applicant argues that the panel should have considered the uncontradicted evidence that the husband is an absentee father who did not take care of his children.

[42] Moreover, the female applicant submits that the RPD erred in finding that the proceedings instituted by the husband in Algeria indicate that the children are precious to their father.

[43] The female applicant also submits that the panel should have followed *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, by placing greater emphasis on the best interests of the child, in accordance with the international conventions signed by Canada. In addition, the female applicant submits that in accordance with the *Chairperson Guideline 3, Child Refugee Claimants (Guideline 3)*, the RPD must consider objective factors where a child is too young to give testimony. However, the female applicant submits that the RPD violated those standards by ignoring the fact that the children would be deprived of their mother upon their return to Algeria.

B. *Respondent's submissions*

[44] The respondent begins with an analysis of the female applicant's behaviour regarding her first divorce in Algeria. The respondent submits that although the female applicant stated that her first husband filed for divorce, the female applicant's expert witness submitted that the female applicant's first husband would have been unable to exercise his civil rights while in prison. It was therefore legitimate for the RPD to find that the female applicant herself filed for divorce and that she did not fear stigmatization within Algerian society.

[45] The respondent pointed out the factual contradictions in the female applicant's submissions with respect to her requests for divorce. In her affidavit and PIF, the female applicant indicates that she asked her husband for a divorce in 2007, although she testified that she filed for divorce in 2010. The respondent notes that the female applicant stated that she sought a religious divorce in 2007, but abandoned the idea upon her husband's refusal. The respondent submits that the female applicant's explanation contradicts the opinion of her expert witness noting that it is not the husband who determines whether a divorce ought to be granted, but the judge.

[46] The respondent also argues that the female applicant was inconsistent by stating, before the Court of Appeal, that she learned about her husband's second marriage three months after its celebration while in her PIF she stated that her husband told her about it prior to the marriage.

[47] The respondent submits that there is contradiction between the fact that the female applicant's husband allegedly insisted that she have an abortion in 2004, 2007 and 2009 and the fact that she continued to have intimate relations with him to have children.

[48] The respondent submits that there is contradiction between the fact that the female applicant alleges having been the victim of abuse and the fact that she travelled with her husband to Morocco in 2005, to Tunisia in 2008, to Spain in 2009 and to Italy in 2010, and without her husband to Canada in 2010. While on those trips, the respondent notes, the female applicant did not wear a hijab.

[49] Moreover, the respondent notes that the female applicant had a credit card and a vehicle until summer 2010, which indicates that the husband did not exercise excessive control on the female applicant.

[50] The respondent submits that the RPD reasonably found that the female applicant's return to Algeria in 2010 was contradictory with her version of the facts.

[51] The respondent argues that the female applicant simply referred to *Guideline 4* without indicating how the RPD erred. The respondent submits that *Guideline 4* cannot be rehabilitate the female applicant's credibility (*Gyorgyjakab v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1119, at paragraph 13).

[52] The respondent submits that the punishment imposed on the female applicant by the Algerian courts cannot be regarded as persecution or a risk that would make it possible to confer refugee protection, as the punishment is prescribed by a law of general application (*Zolfagharkhani v Canada (Minister of Employment and Immigration)*, [1993] 3 FCR 540 (FCA) [*Zolfagharkhani*]). In addition, the respondent submits that the RPD adequately considered all the risks associated with the female applicant's return to Algeria.

[53] The respondent further argues that the expert witness could not link domestic violence to torture insofar as the allegations of domestic violence were not considered credible by the RPD.

[54] With respect to the conditions of detention in Algeria, the respondent reiterates the RPD's argument that the conditions of detention for women are better than those for men.

[55] Finally, the respondent points out that there is no evidence that the children would be subject to abuse upon their return to Algeria as the husband has shown an interest in his children through the numerous legal proceedings undertaken to see them again. Also, the respondent submits that to consider [TRANSLATION] "the best interests of the child" as the female applicant submits, is inconsistent with the scheme of the IRPA, as this is not an H&C application.

VI. Analysis

A. *Standard of review*

[56] The reasonableness standard applies to the assessment of the credibility (*Baksh v Canada (Citizenship and Immigration)*, 2011 FC 1500, at paragraph 16). When *Guideline 3* and *Guideline 4* are used to assess the credibility of a refugee claimant, the standard of review of reasonableness is applied to those guidelines (*Hernandez v Canada (Citizenship and Immigration)*, 2009 FC 106, at paragraph 13; *Correa Juarez v Canada (Citizenship and Immigration)*, 2010 FC 890, at paragraph 12 [*Juarez*]; *Manege v Canada (Citizenship and Immigration)*, 2014 FC 374, at paragraphs 12-14 [*Manege*]).

[57] In the case at bar, the standard of review of reasonableness is also applied to the findings of the RPD concerning the risk of cruel and unusual treatment or punishment, since it is a question of mixed fact and law (*Dunsmuir v New Brunswick*, 2008 SCC 9, at paragraph 53 [*Dunsmuir*]).

[58] As stated by the Supreme Court of Canada in *Dunsmuir*, at paragraph 47:

In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

B. *Credibility analysis*

[59] The role of this Court in reviewing the RPD's findings regarding a claimant's credibility is a limited one as the RPD is in a better position to interpret the claimants' answers, demeanor and behaviour during their hearing (*Aguebor*, at paragraph 4; *Rahal*, at paragraph 42).

[60] This Court owes findings of credibility a significant measure of deference when assessing a claimant's credibility (*Njeri*, at paragraph 11). Based on the female applicant's allegations, this Court must also consider whether the RPD adequately considered *Guideline 4*. To the extent that a female applicant files a refugee claim on the basis of gender-related persecution, the RPD should be particularly sensitive to a female applicant's difficulty in testifying, although *Guideline 4* is not "intended to serve as a cure for all deficiencies in the applicant's claim or evidence" (*Karanja v Canada (Citizenship and Immigration)*, 2006 FC 574, at paragraph 5). This guideline specifically applies to women who fear persecution as a consequence for failing to conform to, or for transgressing, certain gender-discriminating religious or customary laws and practices in their country of origin.

[61] While *Guideline 4* need not be specifically mentioned in a decision and is not the law, it must be apparent from the decision that it was considered (*Manege*, at paragraph 26). However, the failure to mention or fully apply *Guideline 4* is not, on its own, fatal when determining whether the decision was unreasonable (*Manege*, at paragraph 27; *Henry v Canada (Citizenship and Immigration)*, 2013 FC 1084, at paragraph 50). According to Justice Pelletier in *Newton v Canada (Citizenship and Immigration)*, [2000] FCJ No 738 (QL), at paragraph 17, "the question

becomes whether the panel was sensitive to the factors which may influence the testimony of women who have been the victims of persecution” in determining whether the failure to consider *Guideline 4* is fatal.

[62] Finally, Justice Kane’s analysis in *Manege*, at paragraph 33, is likely to shed light on the scope to be given to the consideration of *Guideline 4*:

In the present case, unlike *Diallo*, the Board did not state that it did not have to consider the Guidelines. However, as noted, I have no indication whether or not the Board did consider the Guidelines. I have a similar concern about the circular nature of the argument that the application of the Guidelines can not cure a credibility finding. In my view, if the credibility finding is made without regard to the Guidelines, or to the relevant context or circumstances, then the finding may not be reasonable. It is not a matter of curing the finding, but of examining whether the finding is reasonably made and if the appropriate youth or the gender-based considerations had been taken into account.

[Emphasis added.]

[63] In the case at bar, the female applicant states that she is in a vulnerable position at the hands of her husband and claims that she is living in an environment in which her freedom is being violated. She claims that she was forcibly confined, abused and insulted. She claims that she was forced to wear a hijab against her will and, although the respondent submits that she was not wearing a hijab on her trips, the photographic evidence reveals that she was wearing a ball cap and that she was therefore covering her head while travelling.

[64] While forced adherence to strict Islamic religious codes may constitute “persecution” within the meaning of section 96 of the IRPA or “cruel treatment” within the meaning of section 97 of the IRPA (*Ghulam Redha v Canada (Citizenship and Immigration)*, 2013 FC 373, at

paragraph 16), the numerous inconsistencies in the female applicant's testimony indicate that this is not such a case. Furthermore, the decision reveals that the RPD treated the female applicant's submissions with consideration and sensitivity. Also, specific mention of *Guideline 4* by the RPD is not required, but preferable, and the numerous inconsistencies and gaps in the evidence in the female applicant's record cannot be cured by the application of *Guideline 4*.

[65] I note that the RPD drew negative inferences from the fact that the female applicant provided a contradictory version by alleging in her PIF and her affidavit that she filed for divorce in 2007 and then stated, upon examination, that she filed for divorce in 2010. During her testimony, the female applicant rather claimed that she asked her husband for a divorce on a number of occasions, but stated that it was in 2010, upon her return from Canada, that she became more firm in saying that she wanted a divorce. On the one hand, discrepancies between the versions of events offered by a claimant could lead the RPD to draw negative inferences about the claimant's credibility (*Su v Canada (Citizenship and Immigration)*, 2013 FC 518, at paragraph 8). On the other hand, the RPD examines claimants and is in a unique position for their testimonies. I am of the view that it is not my place to substitute my judgment for that of the RPD, which, all in all, is reasonable.

[66] Moreover, why did the female applicant return to her husband in 2010 when she was in Canada if, as she alleges, her husband was so abusive that she ran away from him? This behaviour cannot be reasonably explained. Considering that a claimant's return to the country in regard to which he or she alleges a fear of persecution allows the RPD to draw negative inferences about the claimant's subjective fear (*Bromberg v Canada (Citizenship and*

Immigration), [2002] FCJ No 1217 (QL), at paragraphs 23-24), I am of the view that the RPD reasonably drew negative inferences from that part of the female applicant's testimony. Again, I do not believe that consideration of the guideline can remedy the shortcomings in the female applicant's allegations in this regard.

[67] The female applicant further stated that she returned to Algeria in 2010 so that the children could start school (hearing transcript, page 19). However, the female applicant also claimed that her children would be abused if they were to return to Algeria. It seems to me that these two versions are hard to reconcile. Moreover, the female applicant did not provide any convincing evidence of cruel treatment of the children.

[68] The RPD found that it was contradictory that the female applicant asserts both that she was forced to have an abortion and that she later had intimate relations with her husband in order to have children. If, as the female applicant states, the control her husband had over her was such that he had the power to force her to have an abortion, why was she hoping to have children with him? During her examination, the female applicant indicated that because she could not divorce a second time she was forced to have children with a man who abused her. Hence, the female applicant intended to have children with a man she could not run away from and then ran away from that man to protect the children he did not want to have.

[69] In addition, it seems inconsistent to me that the husband, who, according to the female applicant, did not want to have children, had two children with his second wife.

[70] Taken in isolation, these shortcomings in the female applicant's testimony could possibly be explained in light of *Guideline 4*. However, in considering the record as a whole, I am of the view that the RPD's decision is reasonable and defensible in respect of the facts and the law.

[71] Finally, it seems to me that one of the weakest aspects of the female applicant's testimony was the control her husband exercised over her. On the one hand, the female applicant described her husband as an absentee man, a man who showed up at her home only two weekends per month, a man who wanted to get rid of her by sending her to Canada and who did not take care of his children. On the other hand, the female applicant stated that her husband exercised excessive control over her, that she could not listen to music, that she could not go out, that she had to wear a hijab, that she could not take her children to school or to the doctor. Even in an attempt to reconcile these different versions, I am of the view that the RPD's decision is reasonable.

[72] All in all, it seems that the relationship between the female applicant and her husband is highly conflictual. Nevertheless, the female applicant has failed to demonstrate that the living conditions her husband imposed on her justify a claim for refugee protection under sections 96 or 97 of the IRPA. The female applicant was given an opportunity to provide psychological reports describing her state to support her case, but she failed to do so. She was given an opportunity to provide letters from close relatives corroborating her version, but she failed to do so. Indeed, the female applicant provided conflicting testimony that does not make it possible to establish that she had indeed been the victim of violence or abuse.

[73] The female applicant further submits that the RPD should not have based its findings on the decision of the Court of Appeal, as the issue before the Superior Court was not the merits of the case. In *Kovacs v Canada (Citizenship and Immigration)*, 2005 FC 1473, at paragraph 10, the Honourable Madam Justice Snider states:

Similarly, in this case, I would say that the decision of the OSC is not binding on the Board. Nevertheless, it is relevant and important evidence that places the Applicants' claim in context. The Board is entitled to and, in fact, should take into account the findings of the OSC where they are directly relevant to the facts before the Board. However, the Board must carry out its own analysis and reach its own conclusions on the matters before it; it cannot be bound by the actions of the OSC, particularly where the issues and questions are different.

[Emphasis added.]

In the case at bar, I am of the view that the RPD conducted its own analysis and considered the totality of the evidence in the record, including the decision of the Court of Appeal. On the one hand, the hearing transcript shows that the RPD dealt with the findings of the Court of Appeal by considering the respondent's version. On the other hand, provincial court judgments are relevant and important evidence that the RPD ought to have considered: *Pacificador v Canada (Citizenship and Immigration)*, 2003 FC 1462, at paragraph 83.

C. *Persecution and the risk of cruel and unusual treatment or punishment*

[74] First, I accept, as the applicants point out, that the RPD's analysis based on section 283 of the *Criminal Code* is questionable. The female applicant is not charged with child abduction in Algeria and, therefore, the RPD should not have compared the ten-year sentence provided for in section 283 of the *Criminal Code* to the sentence imposed on the female applicant for

[TRANSLATION] “family abandonment” and [TRANSLATION] “family neglect”. However, that does not indicate that the sentence imposed on the female applicant is cruel and unusual.

[75] According to the expert witness’s testimony before the RPD, the female applicant will be subjected to the following upon her return to Algeria:

1. Arrest at the airport.
2. Loss of custody of the children upon her arrival and difficulty regaining custody of the children owing to the crime committed.
3. Deprivation of liberty for a period of two months.
4. Difficulty in withdrawing from her marriage.

[76] It appears to me that the legal process to which the female applicant would be subjected upon her return to Algeria is harsh. No person appreciating the importance of a united family would wish to see a mother potentially denied custody of her children. However, since the female applicant has failed to establish that she was the victim of abuse at the hands of her husband, it is clear that she exposed herself to the laws of general application in Algeria by leaving to come to Canada and by refusing to return to her country. I do not believe it is unreasonable to conclude, as the RPD did, that the sentence she exposed herself to is not excessive.

[77] Moreover, I am of the view that the RPD adequately analyzed the evidence before it regarding detention conditions in Algeria. I am also of the view that the expert witness's testimony was adequately considered with respect to the assessment of the risk of torture which the female applicant would face. Thus, notwithstanding this comparison, the RPD's finding that "none of these consequences to be endured by the claimant upon her return to Algeria constitute persecution, discrimination, or a threat to her basic human rights in a fundamental way" appears reasonable to me in respect of the facts and the law.

D. *The best interests of the children*

[78] I find it entirely reasonable that the multiple proceedings instituted by the husband in Algeria and in Canada indicate that the children are precious to him.

[79] As for the consideration of the best interests of the female applicant's children, the Federal Court of Appeal, in *Canada (Citizenship and Immigration) v Varga*, 2006 FCA 394, at paragraph 13 [*Varga*], states:

Neither the Charter nor the *Convention on the Rights of the Child* requires that the interests of affected children be considered under every provision of *IRPA*: *de Guzman v. Canada (Minister of Citizenship and Immigration)*, [2006] 3 F.C.R. 655, 2005 FCA 436 at para. 105. If a statutory scheme provides an effective opportunity for considering the interests of any affected children, including those born Canada, such as is provided by subsection 25(1), they do not also have to be considered before the making of every decision which may adversely affect them. Hence, it was an error for the Applications Judge to read into the statutory provisions defining the scope of the PRRA officer's task a duty also to consider the interests of the adult respondents' Canadian-born children.

The jurisprudence establishes that the teachings in *Varga* applies to sections 96 and 97 of the IRPA (*Kim v Canada (Citizenship and Immigration)*, 2010 FC 149 [*Kim*]; *Hernandez v Canada (Citizenship and Immigration)*, 2011 FC 703, at paragraph 43). Thus, as Justice Shore wrote in *Kim* at paragraph 76:

The Canadian immigration system provides for several methods by which to gain entry into Canada, one of which is to be a refugee under section 96. Section 96 provides a strict definition that is either met or not by the claimant in question. If the definition is met, then the claimant may be able to enter Canada as a refugee. If, on the other hand, the definition is not met, then the claimant may not enter Canada pursuant to that section and other options become available to him or her. One remaining option is pursuant to section 25, wherein the Minister in his discretion may grant an exemption "from any applicable criteria or obligation of" the IRPA. It is under section 25 that a substantive and thorough analysis of the best interests of the child is performed. At the stage of a section 96 application, it is sufficient that the best interests of the child are taken into account procedurally, as directed by the Guidelines. The Court must reiterate that the best interests of the child cannot shoehorn a refugee claimant into the section 96 definition if the child's claim would otherwise be rejected, but it can influence the process which leads to that decision.

[80] In this case, I am of the view that the best interests of the female applicant's children pursuant to the application of sections 96 and 97 of the IRPA and *Guideline 3* was adequately taken into account. The RPD considered the female applicant's allegations pertaining to the fact that she might be separated from her children following her return to Algeria, but concluded that the two children are also precious to their father.

[81] Moreover, it is under section 25 of the IRPA that an exhaustive and complete analysis of the best interests of the female applicant's two children may be conducted.

VII. Conclusion

[82] I conclude that this application for leave and for judicial review must be dismissed.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is dismissed.
2. There is no serious question of general importance to certify.

“George R. Locke”

Judge

Certified true translation
Daniela Guglietta, Translator

Appendix A

The RPD drew the following negative inferences from the female applicant's testimony:

1. The female applicant mentioned at the hearing of November 15, 2011, that her husband advised her of the second marriage three months after the fact, yet she stated in her PIF that her husband advised her of the marriage before it took place. According to the decision of the Court of Appeal of Québec dated May 14, 2013 the husband served by a bailiff on the female applicant a notice of a contracted marriage with a second wife.
2. Not objecting to her husband's second marriage in order to comply with the wishes of her parents is tantamount to accepting her husband's second marriage.
3. The female applicant stated that according to her parents, being divorced would be a source of dishonour; however, the applicant had already been divorced from her first husband because he was imprisoned.
4. The female applicant stated that her first husband had initiated the divorce. However, according to Samia Amor (the female applicant's expert witness), her first husband would not have had the ability to exercise his civil rights while he was imprisoned.
5. The female applicant first testified that the first time she asked her husband for a divorce was in September 2010; whereas at paragraph 19 of her detailed affidavit as well as in her written narrative, she stated that she asked him for a divorce in 2007 after her husband attempted to force her to have an abortion. To explain this contradiction, the female applicant stated that in 2007 she asked her husband to grant her a religious divorce which he refused to do and therefore she did not institute divorce proceedings. However, according to the female applicant's expert witness, it is not for the husband to decide whether or not to grant a religious divorce.
6. The female applicant's testimony with respect to her husband's attempt to force her to have an abortion lacks credibility because she stated that she continued to have intimate relations with her husband because she wanted to have children. Furthermore, the female applicant alleged that her husband never wanted to have children with her.
7. The female applicant alleges that after she refused to have an abortion in 2007, her husband began to physically abuse her and to impose measures (1) prohibiting her from going out, (2) forcing her to wear a hijab, (3) prohibiting her from listening to music and (4) prohibiting her from driving the children to their doctor's appointments or to school. These statements contradict several other factual elements. First, the female applicant is not wearing a hijab in the family photos taken in Venice and in Italy in 2009, in identity documents and immigration documents. Second, since the female applicant asserted that her husband only visited her sporadically, it is unlikely that he was capable of restricting her liberty. Third, her husband stated that she had a vehicle at her disposal, as well as a credit card. Finally, according to the female applicant, she participated in five family vacations abroad from 2005 to 2010.

8. Although the female applicant stated that her husband encouraged her to come to Canada to get rid of her, she begged him to allow her to return to Algeria two months later. Thus, despite the abuse the female applicant claimed to have suffered at the hands of her husband, she pleaded with him to allow her to return to Algeria only to flee back to Canada four months later.
9. The female applicant stated that she returned to Algeria to confront her husband and determine why he did not join her in Canada. In its decision, the RPD submits that the female applicant could have confronted her husband by telephone. Furthermore, the RPD notes that according to the decision of the Court of Appeal of Québec, the husband stated that the female applicant tried on several occasions to convince him to take up residence in Canada, which he refused to do. For her part, the female applicant denied having asked her husband to move to Canada.
10. In her written narrative, the female applicant stated that she sought help from the judicial system upon her return to Algeria in 2010; however, her complaints were not taken seriously. Yet, at her hearing, the female applicant admitted that she did not seek help from the judicial system, but rather from a lawyer.
11. The female applicant stated that her husband allegedly told her to do what she saw fit, and even to take the children with her when she threatened to go to Canada if he refused to give her a divorce.
12. The female applicant stated that she left a note for her husband before she left for Canada. However, if that were the case, the female applicant's husband would not have harassed her parents in order to find out where his wife and children had gone.
13. The evidence submitted does not support the female applicant's allegations that she was the victim of physical and psychological abuse.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1441-14

STYLE OF CAUSE: SOUMAYA AKHROUF YAHIA AISSA, MERIEM MARIA AKHROUF, AND MOHAMED DJAOUED AKROUF v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: MONTRÉAL, QUEBEC

DATE OF HEARING: SEPTEMBER 3, 2014

JUDGMENT AND REASONS: LOCKE J.

DATED: DECEMBER 1, 2014

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