

Federal Court



Cour fédérale

Date: 20150327

Docket: IMM-6097-14

Citation: 2015 FC 393

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, March 27, 2015

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

**NERDA SAMEDY JOSEPH
RICHESSE NEISSA SAMEDY**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Nature of the case

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA), for judicial review of a decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board (IRB), dated July 24, 2014, rejecting the claim for refugee protection made by the principal claimant, Nerda Samedy Joseph (hereinafter

the applicant), and her daughter, Richesse Neissa Samedy (jointly the applicants), and determining that they are not “Convention refugees” or “persons in need of protection” within the meaning of sections 96 and 97 of the IRPA.

II. Background

[2] The applicant is a citizen of Haiti and has two young daughters. The applicant’s younger daughter was born in Canada. The applicant is also married to a Haitian citizen who is a judge in the city of Miragoâne. The following overview is the account of the facts as alleged by the applicant.

[3] The applicant’s mother died when the applicant was born. The applicant therefore lived with her father during her childhood.

[4] At the age of 6, the applicant was sexually assaulted by bandits who wanted to punish her father for belonging to the Tontons Macoutes, an armed militia created under the Duvalier regime.

[5] At the age of 12, the applicant was raped a second time by a group of men who had come to beat her father. She was then cared for by two of her aunts, who criticized her for living with her father. The applicant left her father’s residence to live with her aunts.

[6] At the age of 17, the applicant went back to live with her father because she believed the threats against his life had ended.

[7] In 2002, a year after the applicant chose to live with her father, armed men entered her father’s home, raped her in appalling circumstances and killed her father in front of her. The

applicant then wandered the streets for two weeks because the members of her family refused to take her in, fearing for their safety. The applicant eventually stayed with a friend of her father.

[8] In 2004, the applicant began a relationship with a police officer named Pierre Leroy (Leroy), who turned out to be jealous and abusive. According to the applicant, Leroy behaved violently, humiliated her in front of her friends, accused her of having relations with other men and sometimes prevented her from going out.

[9] In September 2004, Leroy beat the applicant's classmate, who had come to visit her. He also insisted that the applicant move in with him, which she did.

[10] The applicant ended her relationship with Leroy in October 2004. After she told him that the relationship was over, he became aggressive and allegedly threatened to kill her.

[11] On December 31, 2004, Leroy ran into the applicant on [TRANSLATION] "the road to the airport" and tried to convince her to resume their relationship. When the applicant refused, he told her that he would try to find out where she lived.

[12] In April 2005, the applicant met a lawyer named Jean Maxon, who became her spouse. When Leroy learned of that relationship, he began threatening the applicant, her spouse, her friends and her family.

[13] In July 2007, Leroy forced his way into the applicant's home while her husband was out, hit her, forced her to get into his car and left her on the side of the road far from her residence. The applicant was pregnant at the time. She filed a complaint with the police, and Leroy was jailed in July 2007.

[14] After being released, Leroy continued harassing the applicant by telephone.

[15] In February 2012, Leroy forced his way into the applicant's home while her husband was out. He beat the applicant and forced her to get into his car with her daughter, dragging the applicant by the hair. After driving far away from the residence, Leroy threw the applicant out of the car and beat her, leaving her alone and injured on the side of the road. She was eventually taken to the hospital, where she stayed for three days.

[16] The applicant filed a complaint with the police, and Leroy was arrested and jailed again.

[17] In April 2012, the applicant visited Canada with her daughter. When she returned to Haiti, she learned that Leroy had been released after bribing the authorities.

[18] In May 2012, Leroy ran into the applicant on the street and tried to convince her to leave her husband, which she refused to do.

[19] On the evening of May 11, 2012, while the applicant was pregnant, Leroy forced his way into her home and pointed a weapon at her daughter. He then kidnapped the applicant and her daughter and drove them to an abandoned house, where he raped and beat the applicant in front of her daughter. The kidnapping allegedly lasted three days, during which time the police and the applicant's husband looked for the kidnap victims.

[20] Following the kidnapping, the applicant confined herself to her home and posted a bodyguard at her door. However, Leroy continued harassing her husband.

[21] Realizing that Leroy was continuing to pressure her friends to obtain her address and that the Haitian authorities were not protecting her, the applicant left her country and arrived in Canada on June 28, 2012.

[22] On August 9, 2012, the applicant's second daughter was born.

[23] On August 14, 2012, the applicants filed their claim for refugee protection.

[24] Some of the above allegations were not included in the applicant's initial Personal Information Form (PIF). In her affidavit dated August 13, 2013, the applicant made significant changes to her initial allegations, adding that she had been raped at the ages of 6, 12 and 18. In that affidavit, the applicant also alleged that she had been kidnapped and raped by Leroy in May 2012.

[25] On September 19, 2013, the applicant filed an application with the RPD to be declared a "vulnerable person" and to have a hearing with a female panel and a female interpreter pursuant to *Chairperson's Guideline 8: Procedures With Respect to Vulnerable Persons Appearing Before the IRB* (Guideline 8). The applicant relied on a report from her clinical counsellor, Renée Lemieux, dated August 19, 2013, stating that she suffers from symptoms of post-traumatic stress disorder (PTSD). On October 2, 2013, the application was allowed by the RPD.

[26] The applicant was heard by the member on March 25, May 26 and June 2, 2014.

III. Decision

[27] The RPD found that the applicant was not a credible witness for the following reasons:

1. There were several major omissions from the applicant's initial PIF. For example, the July 2007 incident was not mentioned, nor were the other incidents that followed it but preceded the applicant's first visit to Canada. The applicant also failed to mention the rape and forcible confinement in May 2012. The RPD rejected the applicant's explanation that she had felt uncomfortable explaining those facts to her first counsel (a man), since one of the important aspects of her claim for refugee protection concerned the forcible confinement and violence she had suffered, events that she could explain to a man.
2. The RPD found that the applicant had been in Canada for a few months by the time she completed her claim for refugee protection and therefore that, [TRANSLATION] "with the initial stress, upheaval and worries past her, it would have been reasonable for her to disclose . . . the fact that she feared being forcibly confined."
3. The acknowledgment of complaint and the medical certificate confirming the events of February 2012 state that the applicant was raped. However, the applicant did not allege either in her PIF or at the hearing that she had been raped during those events. In addition, the acknowledgment of complaint refers to [TRANSLATION] "police officer Pierre Leroy" even though Leroy was no longer a police officer when the complaint was filed. Moreover, although the applicant said that she had filed a complaint with the police, the acknowledgment of complaint indicates that the complaint was filed by her husband.
4. The arrest warrant and order of committal issued against Leroy following the incident in February 2012 refer to a murder attempt, whereas the applicant alleged that she had been

kidnapped. The RPD found that the applicant's explanation that the Haitian authorities had seen the events she went through as a murder attempt because of the bruises she had was unsatisfactory.

5. Because of the applicant's lack of credibility, the RPD gave little weight to the acknowledgment of complaint for the rape in May 2012 and the letters from the applicant's relatives.
6. Certain allegations made by the applicant during the hearing contradicted her PIF.
7. The complaint filed with the police by the applicant's husband on May 12, 2012, for the kidnapping that took place during the night of May 11 to 12, 2012, indicates that the applicant was forcibly confined for a few days.

[28] Finally, the RPD noted the applicant's PTSD but found that it did not originate with the events she had allegedly gone through in Haiti, since the RPD attached no credibility to her allegations.

IV. Issue

[29] Only one issue will be dealt with in this decision:

1. Did the RPD err in assessing the applicant's credibility?

V. Analysis

A. *Standard of review*

[30] The question of whether the RPD erred in assessing the applicant's credibility is a question of mixed fact and law subject to the standard of reasonableness (*AB v Canada (Citizenship and Immigration)*, 2014 FC 899, at para 21 (*AB*); *Mico v Canada (Citizenship and Immigration)*, 2011 FC 964, at para 20 (*Mico*); *Cato v Canada (Citizenship and Immigration)*, 2010 FC 1313, at para 13 (*Cato*)).

B. *Consideration of the effects of post-traumatic stress*

[31] In light of the facts of this case, there is no doubt that the applicant testified before the RPD while she was in a vulnerable state. This is illustrated by the following uncontradicted passage from the applicant's affidavit:

[TRANSLATION]

During the hearing in May 2014, I had a headache in the middle of the hearing and asked to be excused so I could take some medication. Near the end of the break, my counsel came to get me. She later told me that she called me but that I did not hear her. She told me that I took off my shoes in the corridor and that the member had to call a security guard to take me back to the room. I learned that I had disconnected and had asked if my father was in the room.

[32] The RPD's reasons for decision show that the key negative inferences drawn by it are based mainly on the inconsistency of the applicant's story, her dissociation from the events and her inability to explain the events in chronological order.

[33] While it is not for an expert to determine if the inconsistencies in a refugee protection claimant's testimony can be excused by post-traumatic stress syndrome (*Diaz Serrato v Canada (Citizenship and Immigration)*, 2009 FC 176, at para 22), the fact remains that caution must be exercised where there is a connection between the inconsistencies or omissions identified by the RPD and the cognitive errors referred to in a medical or psychological report (*Garay Moscol v Canada (Citizenship and Immigration)*, 2008 FC 657, at para 10).

[34] The respondent argues that the RPD was not bound by the psychological evidence because it found that the facts alleged by the applicant were not credible. The respondent also argues that *Chairperson's Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution* (Guideline 4) is not enough to make up for the applicant's lack of credibility.

[35] However, the mere fact that the RPD mentioned that it had considered Guideline 4 and the applicant's medical and psychological reports is not enough to make up for a lack of intelligibility in a decision (*Cato*, at paras 18, 19 and 31).

[36] Moreover, in the case of a person suffering from PTSD, medical evidence is essential in analyzing the credibility of a refugee protection claimant, since it helps explain the claimant's memory problems; failure to consider such evidence may be fatal to the reasonableness of the decision. In *Cato*, at paras 30 and 31, Justice Scott stated:

The evidence included articles that purport to explain the memory problems encountered by sufferers of PTSD.

Whilst this Court has held that there is no obligation to comment on every document presented in evidence, it is also clear that there exists an obligation to comment on documentary evidence presented when such evidence goes to the very heart of the matter, as in this case (*Gill v Canada (Minister of Citizenship and Immigration)* 2003 FCT 656 at para 16). The document intended to

explain the memory problems encountered by the principal applicant.

[Emphasis added]

[37] In *Cato*, Justice Scott held that the RPD had erred in finding that negative inferences could be drawn about the credibility of a refugee protection claimant suffering from PTSD based on the claimant's inability to recall the circumstances surrounding the alleged traumatic events (at para 23). In this case, I am of the opinion that the RPD made a similar error when it found that the applicant would normally have been able to give her counsel and the RPD a coherent explanation of the events that were not related to the rapes committed against her.

[38] More recently, Justice Russell found that the RPD's failure to consider medical evidence indicating that PTSD sufferers "often lacked temporal sequencing" and "present memory losses that enlarge well beyond the most horrifying traumatic perceptions" was a reviewable error (*AB*, at paras 72-74, emphasis added). In this case, the essence of the RPD's decision is in fact based on the applicant's inability to provide a chronological and coherent explanation of the traumatic events she experienced. In my opinion, the RPD unreasonably ignored the difficulty the applicant had remembering the events she had experienced in chronological order.

[39] Although the RPD can assess a health expert's testimony in light of its earlier negative credibility findings about a refugee protection claimant, particularly where the facts on which the expert's report are based are found not to be credible (*Napoleon v Canada (Citizenship and Immigration)*, 2011 FC 822, at paras 17, 22, 23), a health expert's report based on a current examination of a patient's symptoms must be given more weight than a report based exclusively on a patient's own account of what happened (*Mico*, at para 54). In *Mico*, Justice Russell

explained that, while the RPD was not obliged to accept the medical evidence, it was obliged to say why that evidence could not affect its conclusions.

[40] Here, the psychotherapist states in her report that she found that the applicant experienced episodes of dissociation and had difficulty remembering various events in chronological order. In addition, the psychiatrist's report written by Luc Bourgon from the Ottawa Hospital indicates that the applicant was hospitalized on February 28, 2014, following a severe blackout and that complete neurological testing showed she was suffering from severe PTSD. The RPD dismissed the value of the opinion of those practitioners for two reasons: (1) the applicant's lack of credibility; and (2) the fact that the symptoms were not associated with the applicant's alleged traumatic experiences in Haiti. First of all, even assuming that the applicant's symptoms are not related to what she went through in Haiti, this does not change the fact that those symptoms affect her ability to testify. Moreover, finding that the inconsistency in the applicant's statements makes it possible to disregard the opinion of the practitioners who examined her amounts to rejecting a diagnosis because of the symptoms. This is circular and illogical reasoning.

[41] It seems to me that such circular reasoning goes against the reality reflected in section 8.1 of Guideline 8, which states:

8.1 A medical, psychiatric, psychological, or other expert report regarding the vulnerable person is an important piece of evidence that must be considered. Expert evidence can be of great assistance to the IRB in applying this guideline if it addresses the person's particular difficulty in coping with the hearing process, including the person's

8.1 Les rapports médicaux, psychiatriques et psychologiques ou d'autres rapports d'experts portant sur la personne vulnérable constituent des éléments de preuve importants qui doivent être examinés. Les éléments de preuve d'experts peuvent être d'une grande utilité à la CISR pour l'application des présentes directives s'ils portent sur la

ability to give coherent testimony.

[Emphasis added]

difficulté particulière qu'éprouve la personne à composer avec le processus d'audience, notamment sa capacité de témoigner avec cohérence.

[Soulignements ajoutés]

[42] In my opinion, the RPD made a superficial and inadequate analysis of the impact of the applicant's psychological problems on her ability to testify, thereby violating Guideline 8.

[43] The respondent argues that the health experts' reports cannot establish the facts underlying the claim for refugee protection. However, those reports can confirm the vulnerable state the applicant was in during the hearing.

[44] Furthermore, the RPD does not seem to have called the applicant's psychological problems into question (RPD's Reasons, at para 70). Yet it failed to analyze the documentary evidence dealing with the impact of PTSD on an individual's ability to answer questions involving memory. Hilary Evans Cameron states the following in an article entitled "Refugee Status Determination and Limits of Memory" (2014) 22 Int'l J Refugee L No 4, 469-511:

In addition, studies of soldiers, peacekeepers, and crime victims show some of the most dramatic examples of memory distortions for even central elements of lived events. One typical study surveyed Desert Storm veterans shortly after their return home and again about two years later. The veterans were asked 19 'yes/no' questions about their experiences in war. 'Did you see other killed or wounded?' Did you see 'bizarre disfigurement of bodies?' Did you observe death of a close friend?' Eighty-eight percent changed at least one of their answers; just under one in ten (8 per cent) changed a third of their answers (for the three questions above, the change rate was 27 per cent, 33 per cent and 8.5 percent respectively). The changes ran in both directions, with 70 per cent claiming to have experienced something in the second interview that they had denied at first, and 46 per cent specifically denying at

the second interview something that they claimed to have experienced at the first.

[Emphasis added]

[45] According to Guideline 4, footnote 30, refugee women who have been raped and are suffering from PTSD have symptoms that include difficulty in concentration and memory loss or distortion. The RPD's conclusion that the applicant should have coherently explained her fear of being forcibly confirmed in her claim for refugee protection because [TRANSLATION] "the initial stress, upheaval and worries" were past her therefore takes no account of the duration and effects of PTSD as explained in the evidence submitted.

[46] It is true that the RPD noted certain contradictions that were objectively verifiable. For example, it is surprising that the complaint filed by the applicant's husband on May 12, 2012, concerning the kidnapping that occurred during the night of May 11 to 12, 2012, states that the applicant was raped and forcibly confined for a few days. However, the decision is not based on that objectively verifiable negative inference.

[47] Since it is clear from the reasons for decision that the RPD relied mainly on temporal inconsistencies and memory problems as a basis for disregarding the impact of the PTSD diagnosis on the applicant's ability to testify, I am of the view that the RPD engaged in a circular and inadequate analysis in which it disregarded the experts' diagnosis on the basis of the symptoms associated with that diagnosis. Given the impact that the applicant's severe PTSD may have on her ability to give coherent testimony, this reasoning is unreasonable.

[48] For the reasons set out above, I am of the opinion that the RPD's analysis is incomplete and unreasonable and that this application for judicial review must be allowed.

JUDGMENT

THE COURT ORDERS that:

1. This application for judicial review is allowed.
2. No serious question of general importance is certified

“George R. Locke”

Judge

Certified true translation
Michael Palles

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-6097-14

STYLE OF CAUSE: NERDA SAMEDY JOSEPH, RICHESSE NEISSA
SAMEDY v THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: MARCH 4, 2015

JUDGMENT AND REASONS: LOCKE J.

DATED: MARCH 27, 2015

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