

Federal Court



Cour fédérale

Date: 20160318

Docket: IMM-3606-15

Citation: 2016 FC 329

Ottawa, Ontario, March 18, 2016

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

SHEREENA SALIJH STERLING

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Refugee Protection Division [RPD] made a “no credible basis” finding in respect of a claim grounded in sexual orientation – alleged bisexuality. As a result of that finding, the Applicant could not appeal to the Refugee Appeal Division [RAD] and obtained leave for judicial review of the RPD’s decision [Decision].

II. Background

[2] The Applicant, a Jamaican citizen, claimed refugee protection because of her bisexuality. The narrative contained allegations of sexual assault by a 26 year old neighbour when the Applicant was around the age of 5, as well as numerous other sexual assaults. It also outlined the timeline of the Applicant's awareness of her growing attraction to women.

The Applicant claimed that she was blackmailed when her first lesbian relationship became known in her community in Jamaica. She also provided details of numerous other relationships.

[3] The RPD rejected the refugee protection claim because of lack of credibility. This credibility finding was based significantly on the Applicant's inability to recall details of personal relationships and trauma experienced. In particular, the RPD was concerned about the Applicant's inability to recall details of her childhood experiences and her most recent relationship.

[4] The Applicant also described coming to Canada as a visitor and becoming involved with a man who abused her, leading the Applicant to a suicide attempt. She admitted that she began to research how to stay in Canada and discovered, on a website, that a claim for asylum could be based on sexual orientation.

It appears that the "convenience" of a claim of bisexuality was a theme running through the RPD's credibility finding.

[5] Importantly, the RPD had before it a psychologist's report [Report] which addressed the psychological impact on the Applicant of the alleged events. The Report also provided an explanation for the Applicant's inability to remember key events and circumstances.

[6] The RPD rejected the Report because it did not adequately explain the Applicant's memory issues given that the RPD had concluded that the Applicant was not credible. Having rejected the Applicant's story as not credible, a psychologist's report based on that story can be given little weight.

III. Analysis

[7] The issues in this case – the treatment of the Report, the credibility findings, the “no credible basis” finding – are all subject to a reasonableness standard of review (*Sukhu v Canada (Citizenship and Immigration)*, 2008 FC 427, 166 ACWS (3d) 345).

[8] The RPD's decision suffers from circular reasoning – a Catch 22 situation. The RPD found the Applicant's story not credible; therefore, any report (or this Report in particular) cannot be given weight in terms of explaining credibility concerns if that Report is based on a non-credible story.

[9] In *Ameir v Canada (Minister of Citizenship and Immigration)*, 2005 FC 876, 140 ACWS (3d) 338 [*Ameir*], the reasoning of which was relied on by the RPD, the Court held that a psychologist's report based solely on an applicant's non-credible story can be given little weight.

The proposition, as far as it goes, is reasonable on a theory akin to “garbage in, garbage out”.

The psychologist has no first-hand knowledge of the facts alleged.

[10] However, the *Ameir* decision goes further to find that where reports are based on clinical observations that can be drawn independently from a claimant’s credibility, such expert reports can serve as corroborative evidence in determining credibility and should be dealt with accordingly.

[11] A psychologist’s report based on the expert’s observation and the conclusion that such observations or manifestations are consistent with the claimant’s narrative are often relied upon with respect to physical injuries. For example, a doctor, while having no first-hand knowledge of whether the patient was in a car accident, can validly opine that the injuries observed by him/her are consistent with injuries from a car accident as the patient describes.

[12] In the Report in issue, the psychologist performed an analogous function in explaining the reasons for defective memory which formed a basis for the adverse credibility finding.

The RPD was unreasonable in not considering the psychologist’s report from that perspective. The RPD’s reason was tantamount to, “I do not believe you, therefore I do not believe anything that explains why I might be wrong”.

[13] Given the Report, the RPD could not make a “no credible basis” finding. Such a finding is predicated on the absence of any credible evidence to support a claimant’s case.

[14] The RPD cannot insulate itself from appellate review merely by making such a finding. A court must carefully examine such a finding because it has significant legal consequences and could possibly be made too easily or conveniently.

[15] In this case, the RPD did not properly consider the psychologist's objective considerations. Those observations offer "some" credible grounds for aspects of the Applicant's narrative. Unless the RPD had a basis for rejecting the psychologist's observations and explanation for memory deficiencies, it cannot make a "no credible basis" finding.

[16] As the *Ameir* decision underscores, the RPD may assign little weight to such a report (presuming it had grounds to do so), but that is a different finding than a "no credible basis" finding.

[17] The RPD also ignored various relevant documents in evidence, which also undermines the "no credible basis" finding.

IV. Conclusion

[18] This judicial review will be granted, the decision quashed and the matter referred back to a different panel.

[19] There is no question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted, the decision is quashed and the matter is referred back to a different panel.

"Michael L. Phelan"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3606-15

STYLE OF CAUSE: SHEREENA SALIJH STERLING v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

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