

Federal Court



Cour fédérale

Date: 20240830

Docket: IMM-565-22

Citation: 2024 FC 1359

Toronto, Ontario, August 30, 2024

PRESENT: Madam Justice Whyte Nowak

BETWEEN:

NOORJAHAN BHUIYAN

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Noorjahan Bhuiyan [the Applicant], is a citizen of Bangladesh. She is a Sunni Muslim who lived without status in the United States with her husband for over 25 years until the evening of August 6, 2019, when she says her husband's history of escalating violence against her came to a head and he beat her and kicked her out of their home where they lived with their children. The Applicant refused to return home and instead fled the United States,

eventually claiming refugee status in Canada on September 4, 2019. She claims that her life is at risk if she is forced to return to Bangladesh.

[2] The Refugee Protection Division of the Immigration and Refugee Board [RPD] found that the Applicant is neither a convention refugee under section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] nor a person in need of protection under subsection 97(1) of the IRPA. The Applicant's appeal of that decision was dismissed by the Refugee Appeal Division [RAD] [RAD Decision]. The determinative issue for the RAD was the Applicant's failure to credibly establish both the core allegations of risk and an objective basis for future risk.

[3] This is a judicial review of the RAD Decision.

[4] Although a high degree of deference must be given to the RAD on issues of credibility, I find that the RAD committed a number of significant errors in its consideration and treatment of the evidence and in its application of the "Chairperson's Guideline 4: Gender Considerations in Proceedings before the Immigration and Refugee Board" [the *Gender Guidelines*]. As such, this application for judicial review is granted.

II. The Legal Framework

[5] A refugee claimant is considered a *convention refugee* under section 96 of the IRPA where they face "more than a mere possibility" of persecution if they return to their country of nationality. A claimant must demonstrate on a balance of probabilities that they have both a

subjective fear and that there is an objective basis for that fear (*Adjei v Canada (Minister of Employment and Immigration)*), [1989] 2 FC 680 (FCA) at pp. 682-683).

[6] A claimant is considered *a person in need of protection* under subsection 97(1) of the *IRPA*, where they establish on an objective basis that there are “substantial grounds to believe” that they face a personalized danger of torture, risk of cruel and unusual treatment or punishment, or a threat of death, should they return to their country of nationality (*Li v Canada (Minister of Citizenship and Immigration)*), 2005 FCA 1 at paras 29 and 33).

III. Facts

[7] The Applicant married Mohammed Ibrahim Bhuiyan [Husband or Father] as part of an arranged marriage in 1995 when she was 20 years old. Her Husband worked as a chef in New York City while the Applicant worked as a childcare worker, food server and housekeeper. They have a son and daughter and, according to the Applicant, they lived happily for the first several years of their marriage until her Husband developed a drinking problem.

[8] The Applicant claims that her Husband started to abuse her when he was drinking. It started with emotional and verbal abuse and then eventually it turned physical. The Applicant says that these episodes of abuse were hidden from the children given that her Husband would start drinking after the children went to bed.

A. *The August 6th Incident*

[9] According to the Applicant, her Husband was very intoxicated and became “vicious” on the evening of August 6, 2019. She says that he became violent and emotionally and verbally abusive and beat her on her body and face and dragged her to the door and “literally kicked [her] out of the house” [the August 6th Incident]. The Applicant says that she refused to return to the marital home that night and stayed at the home of friends of a co-worker before fleeing to Canada and claiming refugee status.

B. *The Applicant’s Basis of Claim [BOC]*

[10] The following excerpt from the BOC provides the basis for the Applicant’s claim under sections 96 and 97 of the *IRPA*:

I cannot return to Bangladesh because I fear that my husband will travel to the country and retaliate against me for refusing to return home after he kicked me out of the house, taking steps to divorce him and seeking spousal support. In addition, I fear my husband’s family and particularly his brothers Milon Bhuiyan and Ishak Bhuiyan who are strong supporters of the Awami League and have direct connections to high level party officials, including Shamim Osman. If I am forced to return to Bangladesh, I believe that my husband or his family members will locate, retaliate, beat or even kill me. The government and police notoriously support and offer cover to supporters and members of the AWL, particularly those connected to higher ranking officials. I cannot obtain state protection, because the ruling government party has placed police personnel in their positions based on a patronage system. Therefore the police support the government and follow the government’s orders. I will not be safe [from] my husband, his family or their AWL associates anywhere within the country because, as members of the Awami Party, they can locate me through the vast Awami network anywhere within the country and hurt or kill me. The Bangladesh authorities also look down on people of Hindu or mixed Hindu and Muslim creed and do not

treat us equally to Bangladeshi Muslims, and so I cannot expect the same. For these reasons I ask for Canada's protection.

C. *The Applicant's Letters of Support*

[11] The Applicant submitted letters of support to corroborate her claim. The letters of support were from her: landlord, friends, son and daughter, brother, co-worker, co-worker's friend, mother and step-mother [the Letters of Support]. Key aspects of the Letters of Support from the Applicant's and Brother, mother, children and stepmother are summarized in the paragraphs that follow.

[12] **Saiul Haque** (the Applicant's brother) says that he witnessed the Husband's excessive drinking in 1997 and when he saw him be aggressive toward the Applicant, he asked his sister if her Husband drank like that regularly. When she said "yes", he asked if he hit her too, to which she responded by hanging her head. He says that while he chose to never stay with his sister again, the kids called him numerous times about her Husband's "alcohol infused violence" in their home starting in 2000. He also saw marks and bruises on her arms and face. He says he got a call from his mother on the evening of the August 6th Incident. He understood from his mother that the Applicant was bleeding and had a bump on her head. He stated that the Husband's family is searching for the Applicant and threatening the Applicant's family and friends with violence.

[13] **Rani Haque** (the Applicant's mother) says that she was in Bangladesh at the time of the August 6th Incident. She received a call from the Applicant's Husband who shouted at her and called her a "whore." He told her that he had beat the Applicant and kicked her out of the house.

She could tell he had been drinking. She was aware that the Husband had a drinking problem and stated, "I know he beat my daughter several times." She also stated that the Husband's family contacted her after the August 6th Incident asking where the Applicant was. They threatened the Applicant.

[14] **Mohammed Bhuiyan** (the Applicant's son) says he did not witness the abuse but was aware that his parents often had disagreements, which led to a lot of yelling and crying. His Father was intoxicated when this happened. He recalled being in his sophomore year when he heard them arguing followed by a "thump." On the evening of August 6, 2019, he received a call from his Father who was intoxicated advising him that he had kicked the Applicant out of the house. He met up with the Applicant that night to give her some of her belongings and saw that she was bleeding from her nose. He was upset that she would not come home. He was surprised to learn from the Applicant in their call later that night that she had been abused for years, as he had not witnessed it. He now believes her, stating, "I believe my mom when she says she's been through this abuse for years." He also states, "I don't know who [the Father] knows [in Bangladesh] or what kind of things he is capable of there. All I know is that he has family there that respect and support him and that he has property there that is of value. He does not visit Bangladesh that often."

[15] **Samiron Nhuiyan** (the Applicant's daughter) stated that she was in Florida on the night of the August 6th Incident when she got a call from her Father who "was ranting about how he kicked my mother out and that he couldn't stand her." She tried to call the Applicant and reached her 3 hours later. She said the Applicant was "hurt and startled" and said she would not

go back to their home at least until the daughter got back. When she returned to New York, the Applicant was still hesitant to go back home as she did not feel safe in the Father's presence. The daughter states, "[t]hough it breaks my heart to see my parents drift apart, this is just a result of years of arguments and torment. My father is not a bad man but he has too many episodes to be able to satisfy my mother's needs and to secure her safety." She also stated, "I love my parents but my mom is better off in Canada where she can build a life for herself and no longer be verbally or physically abused."

[16] **Jharna Evam (aka Jamila Akter)** (the Applicant's stepmother who lives in Bangladesh at the home of the Applicant's father who is deceased) says that on August 11, 2019 the Husband's brothers, Milon Bhuiyan and Ishak Bhuiyan [the Brothers-in-Law] came to her house looking for the Applicant. They said the Applicant was an "evil woman as she dishonoured her husband's family and relatives." They threatened to kill the Applicant if they ever find her.

D. *The New Evidence Considered by the RAD*

[17] The Applicant submitted new evidence [the New Evidence] before the RAD, which the RAD accepted including:

- i. A copy of an Action for Divorce dated October 21, 2020 (i.e., after the RPD Hearing) which shows that it was filed by her Husband and the Applicant is not seeking spousal support; and
- ii. A medical report dated January 21, 2021 [the Medical Report], from the Applicant's Family Physician at St. Michael's Hospital [the Doctor]. The Doctor stated that the Applicant suffers from "severe anxiety and has symptoms of PTSD due to a number of traumatic events in her past including intimate spouse violence resulting in significant injuries." The Doctor noted that the possibility of being forced to return to

Bangladesh, “where her husband currently resides” and where the Applicant claims to have “no supports,” has resulted in flashbacks to the assaults and worsened mental health. The Doctor also stated that the Applicant suffers from debilitating concentration difficulties when put under high pressure as well as severe trauma-related anxiety, which the Doctor felt was contributing to discrepancies in her written and oral statements to the board.

[18] The Doctor was of the opinion that deportation to Bangladesh “would constitute irreparable harm to her mental health and puts her physical health at extreme risk.”

E. *The RAD Decision*

[19] The RAD accepted the following facts as having been established on the evidence: (i) the Applicant is a divorced woman of mixed Sunni Muslim and Hindu religious heritage and is a Sunni Muslim herself; (ii) she has anxiety and PTSD; (iii) she has not travelled to Bangladesh in over 25 years, since she was a child; and (iv) she has a Grade 8 education and speaks Bangla and some English.

[20] However, the RAD considered that the Applicant had *not* made out other key allegations including: (i) that she initiated the divorce from her Husband; (ii) that she asked for spousal support; (iii) that her Husband or Brothers-in-Law have sought to harm her, or that there is a serious possibility that they would seek to harm her in Bangladesh on a forward-looking basis; and (iv) that she has no close family or social support in Bangladesh.

[21] In concluding that the Applicant's credibility was undermined and the presumption of the truthfulness of her testimony had been rebutted, the RAD highlighted inconsistencies both with respect to the Applicant's history of abuse and the Applicant's divorce.

[22] In considering the Applicant's alleged history of abuse, the RAD focused on inconsistencies between the evidence of the Applicant, her children and her brother. The Applicant was asked to explain why her son said in his letter of support that the alleged abuse came as a huge surprise to him because he had never seen signs or patterns of abuse before, whereas the brother gave evidence that the children called him often to complain about the abuse. The Applicant suggested that this was because the son had become "normalized" to the abuse such that he "underemphasized" the abuse compared to the brother who "overemphasized" the abuse. The RAD held that the inconsistency between these witnesses was not sufficiently explained.

[23] With respect to the Applicant's divorce, the RAD identified the following inconsistencies which undermined the Applicant's stated fear of persecution by her Husband: (i) where the Husband resides, with the preferred evidence showing that the Applicant's Husband resides in the United States and not in Bangladesh; and (ii) the fact that the Husband initiated the divorce and the Applicant did not seek spousal support, which contradicts the Applicant's stated fear that her Husband would retaliate against her in Bangladesh for having taken steps to divorce him and because she sought spousal support.

[24] While the RAD believed the Medical Note to be genuine and accepted the Applicant's reasonable explanation for providing it after the RPD hearing, it nevertheless gave it little weight by reason that "the note's conclusions are based on key details and risk profiles that are significantly different from those established on the RPD record" such that the opinion is "clouded: by unreliable or untrue information." That information included the facts related to where the Applicant's Husband currently resides and whether she has family or support in Bangladesh.

[25] The RAD also considered whether the evidence made out an objective basis for future risk based on the Applicant's residual profile as a single divorced woman with no family or male support in Bangladesh. On this issue too, the RAD found inconsistencies in the Applicant's evidence denying that she had family members in Bangladesh with whom she had contact and support. The RAD found that she did, including the Applicant's mother, stepsister and stepmother, and "in-laws" with whom she had contact on Facebook.

[26] The RAD expressly considered the *Gender Guidelines* in its reasons. Despite recognizing the impact of trauma and PTSD on the Applicant, it held that these could not explain or cure the inconsistencies in the Applicant's narratives and explanations. According to the RAD, the Applicant's credibility issues undermined her core allegations of subjective fear.

IV. Preliminary Issue

[27] The Applicant submitted new evidence that post-dates the RAD Decision. It includes a letter from the Applicant's daughter, evidence of the Applicant's Husband's travel to Bangladesh

and his remarriage, and further evidence regarding the risk the Applicant faces in Bangladesh. The Applicant submits that the Post-Hearing Evidence should be accepted by this Court under the exception recognized in *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 which allows for the submission of general background information that may be of assistance to the Court (*Access Copyright* at para 19).

[28] I agree with the Respondent that the Post-Hearing Evidence does not provide general background information and is better characterized as information going to the merits of the RAD Decision on the issue of the risk of persecution by the Applicant's Husband. Accordingly, it shall be given no weight.

V. Issues and Standard of Review

[29] The Applicant raises the following issues on this application:

- A. Whether the RAD made cumulative unreasonable credibility findings and misinterpreted the *Gender Guidelines*;
- B. Whether the RAD unreasonably found that the Applicant would not be at risk in Bangladesh based on her residual profile; and
- C. Whether the RAD erred in not holding a hearing under subsection 110(6) of the *IRPA*.

[30] For the reasons detailed in the paragraphs that follow, I find that the first issue is dispositive of this application. In considering this issue which goes to the merits of the RAD Decision, the Court must apply the reasonableness standard (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para. 25).

[31] The role of a reviewing court on a reasonableness review is limited to determining whether the decision is based on “an internally consistent and rational chain of analysis” and is “justified in relation to the facts and law that constrain the decision maker” (*Vavilov* at para 85). A reviewing court must consider whether the decision as a whole is transparent, intelligible and justified (*Vavilov* at para 15). The role of the Court is not to engage in a reweighing or *de novo* assessment of the evidence nor may this Court substitute its opinion for the RPD’s credibility findings. The RPD and RAD are owed a high degree of deference in this regard (*Noël v Canada (Citizenship and Immigration)*, 2020 FC 281 at para 16). Even so, it has been recognized that credibility findings are not immune from review and must be justified on the evidence (*N’kuly v Canada (Citizenship and Immigration)*, 2016 FC 1121 [*N’kuly*] at para 24).

[32] In cases involving allegations of domestic abuse such as this one, the Court must also ensure that the decision maker has complied with the *Gender Guidelines* which call for their review of the Applicant’s evidence through a lens of empathy and open-mindedness (*Duversin v Canada (Citizenship and Immigration)*, 2018 FC 466 [*Duversin*] at paras 30-31). At the same time, the *Gender Guidelines* are not intended to serve as a cure for all deficiencies in the applicant’s claim or evidence, nor can they be used to corroborate any evidence of gender-related persecution (*Duversin* at paras 30-31 citing *Karanja v Canada (Citizenship and Immigration)*, 2006 FC 574 at para 5).

VI. Analysis

[33] An analysis of the RAD Decision starts with a review of the Applicant’s actual statement about her fears of persecution in Bangladesh. What becomes apparent from her BOC is that: (i)

the Applicant fears not just her Husband, but also the Brothers-in-Law; (ii) she fears retaliation from her Husband not just for reasons related to seeking a divorce and spousal support, but for refusing to return home; (iii) the fear associated with her Husband was not that he lived in Bangladesh, but that he would travel there to seek retaliation against her; and (iv) she believed her Brothers-in-Law could harm her with impunity in Bangladesh. In this light, a number of related and cumulative errors on the part of the RAD become apparent which are sufficient to warrant this Court's intervention.

[34] By way of overview, I find that the RAD erred in three significant ways: first, in its failure to consider the totality of the Applicant's evidence going to her subjective fear of persecution by her Husband and Brothers-in-Law; second, by failing to analyze significant evidence going to the Applicant's future risk of persecution; and third, in its application of the *Gender Guidelines*.

A. *Errors in the RAD's Assessment of the Applicant's Subjective Fear*

[35] I find that the RAD made a number of significant and cumulative errors in determining that the Applicant lacked credibility in her subject fear of persecution.

[36] First, the RAD erred in restricting its consideration of the Applicant's allegations of abuse to the allegations that the Applicant suffered a history of abuse with no consideration being given to the evidence going to the August 6th Incident. Not only is one incident of spousal violence sufficient to constitute a basis for a finding of past abuse, but it was the August 6th Incident which was the critical event that triggered the Applicant's subjective fear of retaliation.

[37] The second and related error, is the RAD's failure to address the evidence related to the August 6th Incident. That evidence included direct and circumstantial evidence given by not only the Applicant's brother, children, and mother, but also five other witnesses. In assessing the Applicant's credibility, the RAD should have considered the Letters of Support and whether they corroborate the Applicant's evidence regarding the August 6th Incident. The Letters of Support provide evidence regarding:

- the Applicant's state of mind on the evening of August 6, 2019 (given by both her children, her mother, and her co-worker);
- the Husband's state of mind on the evening of August 6, 2019 and the fact that he exhibited aggression (given by the Applicant's mother and both children);
- the witnesses' belief that the Husband had been drinking on the evening of the August 6th Incident (given by the Applicant's mother and son);
- the injuries seen on the Applicant's face and body both on the evening of August 6, 2019 and in the days after (given by her son, friend, co-worker and her co-worker's friend with whom she stayed);
- the fact that the Applicant did not return to her home after August 6, 2019 (the children and the co-worker's friend with whom she stayed); and
- the fact that after August 6, 2019, the Husband's family were looking for the Applicant in Bangladesh and threatened her (the mother and step-mother).

[38] Third, I agree with the Applicant that the RAD overzealously focused on the discrepancy in the evidence related to whether or not the Applicant took steps to divorce her Husband and seek spousal support. The RAD failed to consider the Applicant's fear of retaliation based on her refusal to return home after the August 6th Incident, which was addressed by multiple witnesses, including her son and stepmother. That evidence explained the significance of the

Applicant's refusal to return home and provided a motive for future persecution: leaving a marriage is not acceptable in her culture; despite having kicked her out of their house, the Husband expected her to return; and her Brothers-in-Law viewed her as an "evil woman" for having left her Husband, which dishonoured both the Husband and their family.

[39] The RAD failed in its duty to consider the totality of the evidence and instead engaged in a selective consideration of the Applicant's evidence, while at the same time ignoring a significant amount of evidence in the record (*Vavilov* at para. 126 and *Apena v Canada (Citizenship and Immigration)*, 2023 FC 91 at paras 38-43). These errors are neither superficial nor peripheral and raise sufficiently serious shortcomings in the merits of the RAD Decision as to justify this Court's intervention (*Vavilov* at para 100).

B. *Errors in the RAD's Assessment of an Objective Forward-Facing Risk*

[40] I find that the RAD erred in two critical respects in its analysis of the objective risk of persecution the Applicant faces should she return to Bangladesh.

[41] First, given the RAD's finding that there was no agent of persecution, the RAD's analysis of an objective risk of persecution on the part of the Applicant was limited to its assessment of whether the Applicant faces forward facing risk based on her residual profile. The RAD did not engage in an analysis of the evidence regarding threats made by the Brothers-in-Law to harm the Applicant in Bangladesh. The Letters of Support from the Applicant's mother and stepmother provide direct evidence that the Brothers-in-Law were not just looking for the Applicant in Bangladesh, but they had articulated a motive and intention to harm her. This evidence should

have been addressed as part of the RAD's consideration of whether the Applicant had established an objective basis for her fear of future harm if she were forced to return to Bangladesh.

[42] Second, the RAD rejected the Doctor's assessment of the risk the Applicant faced if she had to return to Bangladesh because the RAD considered the Medical Report to be "clouded by unreliable or untrue information" related to where the Applicant's Husband currently resides and whether she has family or support in Bangladesh.

[43] The RAD asked the Applicant to explain the statement in the Medical Report suggesting that her Husband "currently resides" in Bangladesh. The Applicant provided the following explanation:

"...my ex-husband live in America and he is American citizens. When doctor took my interview that time my ex-husband went to Bangladesh, every year he goes back home 2/3 time. When the doctor took my interview that no interpreter with me, may be that's why happened miss understood."

[44] While the RAD considered this explanation plausible, it rejected the Applicant's explanation as "not credible" since it did not match the evidence that her Husband lives in New York and does not visit Bangladesh often. To be clear, the Applicant herself was consistent in her evidence that her husband lived in New York and the only evidence in the record that suggested otherwise, was this stray line in the Medical Report.

[45] I find that the RAD's rejection of the expert risk assessment was based on an inconsistency that is neither material to the foundation of the Doctor's opinion, nor to the core aspects of the Applicant's fear of future persecution. It is a reviewable error to take an approach

that unduly focuses on irrelevant matters in order to discredit evidence: *Papaskiri v Canada (Minister of Citizenship and Immigration)*, 2004 FC 69 at paragraph 33 citing *Attakora v Canada (Minister of Employment and Immigration)* (1989), 99 N.R. 168 (F.C.A.) at page 169. In this case, the key foundation for the Doctor's risk assessment is the fact that she had suffered from "intimate spouse violence" and the Doctor's opinion that the Applicant's mental health had worsened.

[46] Accordingly, I find that the RAD erred in failing to consider the Doctor's risk assessment contained in the Medical Report as part of its assessment of the forward facing risk the Applicant faces if she returns to Bangladesh.

C. *Errors in the RAD's Application of the Gender Guidelines*

[47] I acknowledge that the RAD made a genuine attempt to adhere to the *Gender Guidelines* as part of its analysis. However, I find the overall treatment of the Applicant fell short. To be fair to the RPD and RAD, there is very little guidance in the case law that speaks to how the *Gender Guidelines* practically affects their analysis in this sensitive area. I have set out below how the *Gender Guidelines* ought to have been applied at various junctures of the decision-making process in this case:

(1) *By being alive to the power dynamics of an RPD hearing*

[48] Subsection 5.2.2 of the *Gender Guidelines* states that members should apply trauma-informed adjudication principles where trauma impacts a person's ability to fully participate in the proceedings, including where trauma becomes apparent during the course of the proceeding.

[49] The Applicant in this case was unable to answer very basic questions at the outset of the RPD hearing. The most obvious example being when she was asked when the last time she saw her mother was and she answered that it was two years ago with her counsel having to correct the record by acknowledging that the mother had been with her at the hearing that very morning. The Applicant eventually acknowledged in her new affidavit evidence to the RAD that she felt intimidated by being questioned by an authority figure. This explanation was never squarely addressed by the RAD and should have been considered when assessing the Applicant's credibility.

(2) *By cross-examining the Applicant in a trauma-informed manner*

[50] By no means do I suggest that an applicant cannot be cross-examined on sensitive issues; however, it requires giving genuine affect to the presumption of truthfulness and then conducting the cross-examination with tact and sensitivity as required by subsection 5.4.4 of the *Gender Guidelines*.

[51] The RPD Member in this case immediately set about cross-examining the Applicant in an aggressive manner, beginning with what should have been considered uncontroversial

background matters. No attempt was made by the Member to engage in rapport-building, nor to explain the context for difficult lines of questioning as suggested by section 5.4.3 of the *Gender Guidelines*, particularly in his line of cross-examination on inconsistencies in the Applicant's evidence about how often the Husband verbally and physically abused her.

(3) *When asking for and assessing explanations for inconsistencies in the evidence related to gender violence*

[52] Section 7.4 of the *Gender Guidelines* instructs administrative decision-makers that where a credibility concern arises from a person's evidence or testimony, members should: explain the concern; provide an opportunity for the person to respond to the concern; consider the response and whether trauma or its aftereffects may reasonably explain the perceived discrepancy; evaluate the totality of the circumstances and the internal consistency of the evidence; and explain in their reason for decision whether the response reasonably accounts for the discrepancy.

[53] In this case, the Applicant attempted to explain the inconsistency between her son's statement that the abuse came as a huge surprise to him and the brother's evidence that the children called him often to complain about the abuse. The Applicant attempted to explain the inconsistency based on her suggestion that her son had become "normalized" to the abuse. The RAD found this explanation insufficient.

[54] While decision-makers are required to probe internal inconsistencies in a witness' evidence and as well as inconsistencies in the evidence as between witnesses, they should

approach the explanations provided from a trauma-informed perspective. In this case, the RAD set the bar too high in expecting a woman with limited education to be able to explain the complexities of the impact of gender violence on her son. Not only may experts disagree over any such explanation, but it may also take bystanders of domestic violence years to unpack their own trauma in order to recognize what they did and did not see.

Viewing testimony through a lens of open-mindedness and empathy allows for the possibility that satisfactory and coherent explanations may be beyond the purview of lay witnesses. The RAD failed to grapple with this possibility.

(4) *When considering inconsistencies in the witness' evidence*

[55] I acknowledge that the RAD had good reason to doubt the credibility of the evidence of the Applicant's brother and it was open to the RAD to reject his evidence. Still, it is a basic tenant of the assessment of evidence more generally (irrespective of the *Gender Guidelines*) that a decision-maker take into account bias, interest and motivation to be untruthful when assessing credibility (*Magonza v Canada (Minister of Citizenship and Immigration)*, 2019 FC 14 at para 19). In the context of gender violence, a witnesses' evidence may be motivated (whether intentionally or unintentionally) by trauma and/or fear (whether for the Applicant or themselves).

[56] Administrative-decision makers should consider whether the reason for inconsistency in a witness' evidence could be explained by reasons consistent with gender violence and weighed against competing explanations, such as mistaken belief or falsehood. The RAD baldly stated that it considered the *Gender Guidelines* when assessing the brother's evidence; however, it is

unclear how in fact it did so, which constitutes a reversible error (*Okpanachi v Canada (Citizenship and Immigration)*, 2022 FC 212 at para 27).

- (5) *By identifying and avoiding myths and stereotypes in assessing evidence related to gender violence*

[57] It is telling that the son states that he was surprised to learn from his mother that she had been abused for many years, while at the same time acknowledging that he often witnessed his parents arguing, yelling and crying when his father was intoxicated. The RAD failed to consider the son's evidence through a lens of open-mindedness that allowed for the fact that the son did not recognize verbal and emotional abuse. The RAD itself fell into this error, engaging in an analysis of the inconsistencies with respect to the evidence of physical abuse without acknowledging the consistency of the evidence as a whole with respect to the Applicant's allegations of verbal and emotional abuse.

[58] I pause to emphasize just how dependent the RPD, RAD, counsel, and by extension, the Courts are on the *Gender Guidelines* in being able to identify the various myths and stereotypes that influence the assessment of evidence of gender violence. In the civil and criminal context, parties tend to be better positioned to call sophisticated expert evidence that can assist in this regard. That is not feasible in the immigration context, which highlights the need for the review and update of the *Gender Guidelines* on a regular basis. In this case, for example, the RPD member engaged in a line of cross-examination in which the Applicant was asked whether she would still fear her Husband knowing that he had stopped drinking. The *Gender Guidelines*

provide no guidance on whether this line of questioning was appropriate or based upon a myth about the root cause of gender violence.

VII. Conclusion

[59] For the above reasons, this application for judicial review is granted. There is no question that the RAD remains entitled to assess the Applicant's credibility based on the inconsistencies in her evidence; however, it is required to do so taking into consideration her complete testimony, the totality of the evidence, and by adhering to the *Gender Guidelines*.

[60] Neither party has raised any questions for certification and I see none arising.

JUDGMENT in IMM-565-22

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted.
2. The decision under review is set aside and the matter is referred back for redetermination by a different decision-maker.
3. There is no question of general importance for certification.

"Allyson Whyte Nowak"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-565-22

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DATED: AUGUST 30, 2024

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