Date: 20071212

Docket: IMM-5982-06

Citation: 2007 FC 1306

Ottawa, Ontario, December 12, 2007

PRESENT: The Honourable Mr. Orville Frenette

BETWEEN:

LYUBOV TSYMBALYUK

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision of the Refugee Protection Division (the "Board"), of October 17, 2006, in which it determined that Lyobov Tsymbalyuk (the "Applicant") is not a Convention refugee or a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. Leave to apply for judicial review was granted by Justice Simpson on August 30, 2007.

[2] The Applicant is a citizen of Ukraine, who alleges that she fears persecution because of membership in a particular social group, that of domestically abused females.

[3] The Applicant came to Canada in April 2005 and immediately claimed refugee status. According to the Applicant, she had been abused by her ex-husband, Alexander Tsymbalyuk-Andrushchenko ("Alexander") in Ukraine, both during and after their marriage. The Applicant married Alexander in the 1980s. In 2001, she secretly initiated divorce proceedings against him, and obtained a divorce in April 2002. However, the Applicant continued to live with Alexander until January 2005.

[4] Although the Applicant complained that she had "many conflicts with Alexander," in her Personal Information Form ("PIF"), she described four particular incidents. In 1991, after a dispute between Alexander and his parents in which the Applicant became involved, Alexander started hitting the Applicant with his fists. In 1995, Alexander slashed the Applicant's right arm with a knife. In December 2003, Alexander pushed the Applicant down the stairs. She was taken to the hospital by ambulance and was treated for an injured collarbone. A doctor called the police, who questioned the Applicant, but did nothing to punish Alexander. In June 2004, Alexander turned a hot jam pot on the Applicant's hand.

[5] Finally, "after one terrible incident" in January 2005, the Applicant left Alexander and moved to a nearby village. However, Alexander found the Applicant, confronted her and threatened to take her life. This repeated several times, as each time the Applicant moved, Alexander was able to track her down. Eventually, the Applicant fled to Canada and claimed refugee protection, in April 2005.

THE BOARD'S DECISION

[6] After summarizing the Applicant's allegations, the Board found that the Applicant did not have a well-founded fear of persecution in her country, because it determined that material aspects of the Applicant's testimony were lacking in credibility.

[7] The Board is persuaded that at least some of the claimant's evidence has been fabricated and that the incidents outlined in the PIF did not occur as described, or in the alternative, did not occur at all. Specifically, the Board is not persuaded that the claimant was abused as she has alleged that her husband followed her to various neighbouring [sic] villages, or that she fled Ukraine because of spousal abuse. Having made a finding that these incidents did not occur or that they occurred differently than described by the claimant, the Board concludes that there is a lack of genuine subjective fear if being returned to her country of origin.

[8] The Board went on to highlight eight specific concerns it had with the Applicant's credibility, which it described as material inconsistencies and omissions between the Applicant's PIF, the Port of Entry ("POE") notes, and the Applicant's testimony at the hearing.

ISSUE

[9] In my opinion, the sole issue that arises in this application for judicial review is whether the Board made a reviewable error in its credibility of assessment of the Applicant.

ANALYSIS

[10] According to the Applicant, the Board erred in its assessment of each "credibility concern," by failing to take account of evidence from the PIF and misinterpreting the POE notes. However, the Respondent submits that the Board's findings are clear, that it was in the best position to assess the Applicant's credibility, and that therefore its findings should not be interfered with by this Court.

[11] The Federal Court has outlined the principles applicable to judicial review of the Board's findings on the issue of credibility on a number of occasions. The determination of an Applicant's credibility is the heartland of the Board's jurisdiction, and the Court is not to substitute its own opinion for that of the Board, in the absence of an erroneous finding of fact made in a perverse or capricious manner or without regard to the material before it. (*Aguebor v. Canada (Minister of Employment and Immigration)* (1993), 160 N.R. 315, [1993] F.C.J. No. 732 (C.A.) (QL); *R.K.L. v. Canada (Minister of Citizenship and Immigration*, 2003 FCT 116, [2003] F.C.J. No. 162 (T.D.) (QL) [*R.K.L.*]; *Mohacsi v. Canada (Minister of Citizenship and Immigration),* [2003] 4 F.C. 771, [2003] F.C.J. No. 586 (T.D.) (QL))

[12] Nevertheless, the Court may interfere with the Board's credibility findings in certain circumstances. For example, if the Board engages in a microscopic examination of peripheral or irrelevant issues, then the Court's intervention is justified. (*Attakora v. Canada (Minister of Employment and Immigration)* (1989), 99 N.R. 168, [1989] F.C.J. No. 444 (C.A.) (QL); *R.K.L.*, supra; *Hilo v. Canada (Minister of Employment and Immigration)* (1991), 130 N.R. 236, [1991] F.C.J. No. 228 (C.A.) (QL))

[13] In this case, the credibility concerns highlighted by the Board must be examined by the Court to determine if the Board was justified in its finding that the Applicant lacked credibility.

(a) The January 2005 incident and the post-moving out period

[14] According to the Board, the January 2005 incident, which caused the Applicant to move to a neighbouring village, was not mentioned in the POE notes, nor was it described in the Applicant's PIF. Furthermore, the Applicant did not mention ongoing physical violence after she moved away from Alexander.

[15] For ease of reference, here is the entirety of the POE notes regarding the Applicant's response to the question of why she was seeking refugee status: "It because [sic] of my ex-husband. He would abuse me physically. He would beat me. After our divorce, we continued to live in the same apartment. He once attacked me with a knife and I had a surgery on my collarbone area because of this attack…"

[16] In her PIF, the Applicant states "After one terrible incident, in January of 2005, I took my personal belongings and left Alexander." The Applicant does not describe the incident further.

[17] In considering the POE notes, the Board does not take account of the fact that the POE is a refugee claimant's first contact point with Canadian authorities, and that refugee claimants may be frightened and hesitant to interact with authorities (*R.K.L.*, supra). By itself, this omission on the

part of the Applicant may not be sufficient to ground a negative credibility finding. Nevertheless, as the Respondent points out, in her PIF the Applicant did describe other incidents in detail, yet failed to describe the incidents which were apparently key elements which caused her, first, to move away from Alexander, and second, to leave Ukraine. “[i]t is not enough for an Applicant to say that what he said in oral testimony was an elaboration. All relevant and important facts should be included in one's PIF.” *(Basseghi v. Canada (Minister of Citizenship and Immigration)* [1994] F.C.J. No. 1867 (T.D.) (QL)). However, the Board had the opportunity to question the Applicant on this point and obtain clarification of points it considered important.

(b) The knife incident

[18] The Board also notes that there are inconsistencies with regard to the Applicant’s claims of being attacked with a knife and of being injured on her collarbone. In the POE notes, it seems to appear that the knife attack and collarbone injury all arose from the same incident, apparently after the Applicant's divorce. However, in her PIF and her testimony, the Applicant states that the knife incident occurred in 1995, and her collarbone was injured when Alexander pushed her down the stairs in 2003. When asked about this inconsistency at the hearing, the Applicant replied that she thought there was a mistake because there were two separate incidents. (Transcript of Hearing, Certified Tribunal Record at page 153)

[19] The POE notes clearly state that the Applicant had surgery on her collarbone because of the knife attack, while the Applicant clearly testifies that there were two separate incidents. It was up to the Board to determine whether it found the Applicant’s explanation of this inconsistency to be

satisfactory. It determined that it did not. In my opinion, I would have decided this issue differently. The Board's finding on this issue is therefore not patently unreasonable but I believe it must be assessed in the general tread of interpretation of the facts by the Board, where it engaged in microscopic examination of secondary issues.

(c) The divorce in 2001

[20] According to the Board, although the Applicant's PIF makes no reference to physical conflicts with Alexander other than the 1995 and 2003 incidents, at the hearing the Applicant testified that there were a number of smaller incidents in the intervening years. Furthermore, the Board found that the Applicant failed to offer a satisfying explanation as to why she sought a divorce in 2001 when there were only "minor" incidents between the Applicant and Alexander, nor as to why she took no steps to leave the apartment when she commenced divorce proceedings. Finally, the Applicant's claim that Alexander did not react aggressively or violently when informed of the divorce, "appears inconsistent with the other information regarding the husband." Yet in his testimony the Applicant made reference to her moving from place to place throughout February, March and April of 2005, and her husband locating her and abusing her in every place where she might go.

[21] In my opinion, these findings are patently unreasonable. Not only has the Board ignored specific descriptions of particular incidents in the Applicant's PIF, but it also ignores the Applicant's statements in her PIF to the effect that the incidents she has described are not the only

times that Alexander reacted violently towards her. The Applicant, in her PIF, also describes the events that finally led to her decision to seek a divorce:

> In 2001 Alexander started drinking heavily. His behaviour became even more unpredictable. Alexander made two attempts to commit suicide. Meanwhile my emotional health was deteriorating. In the fall of 2001 I secretly started the divorce procedure. I managed to obtain a divorce in April of 2002. When my ex-husband learned about the divorce he did not react. He told me that it was a waste of time. We still were living in the same apartment building and the divorce did not change his abusive attitude

During the hearing, the Board questioned the Applicant as to why she continued to live with Alexander even after the divorce. In response the Applicant explained that, although she tried to find her own apartment, she could not get a new apartment without Alexander's consent. The Board in its decision completely fails to address these explanations. In my opinion, the Board was under an obligation to assess what are apparently reasonable explanations for the issues identified by the Board.

(c) Remaining inconsistencies: "taking care" and husband/ex-husband

[22] The Applicant states in her PIF that Alexander took care of her while she was recovering from surgery following her collarbone injury. During her testimony, the Applicant stated that Alexander did some shopping and sometimes brought her tea during this time. The Board "does not find that the activities described by the claimant being performed by her husband, as consistent with the statement "…Alexander took care of me". Furthermore, the Board noted that at different times during her testimony, the Applicant referred to Alexander as her husband and as her ex-husband.

[23] In my opinion, the Board's finding with regard to being "taken care of" is patently unreasonable. It is not implausible that a woman, who is subjected to ongoing abuse from her partner, or even continuing indifference, would consider being brought tea to be being taken care of. For the Board to consider this as an inconsistency amounts, at the very least, to a microscopic examination of the Applicant's allegations. Similarly, in my opinion, the Board's taking issue with the Applicant's switching between the term "husband" and "ex-husband", particularly when speaking through an interpreter, is a microscopic examination of the Applicant's testimony. While inconsistencies that, on their own, seem to be of little importance can gain importance when considered in the context of the claim as a whole, in this case, the Board once again ignored the Applicant's explanation, that she switched back and forth because she did not "think it would be something important to say or not to say, to say it this way." (*Nejme v. Canada (Minister of Citizenship and Immigration)*, [1994] F.C.J. No. 1822 (T.D.) (QL); Transcript, Certified Tribunal Record at page 134).

(d) The documentary and physical evidence

[24] In support of her claim, the Applicant provided a medical report documenting her treatment following the December 2003 incident. The Board gave this document little weight, based on the fact that documentary evidence demonstrates that fraudulent documentation could easily be obtained from Ukraine. Additionally, although the Applicant presented physical scars, the Board determined that "in light of the credibility concerns the Board has with the claimant's testimony and the information contained in her PIF and the POE notes, the Board is not persuaded that the scars were sustained as a result of spousal abuse."

[25] While it is up to the Board to determine what weight it will give to documents provided by a claimant, it must base this decision on the evidence. In *Papaskiri v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 49, 40 Imm. L.R. (3d) 211, the Federal Court found that more is required for such a finding than documentary evidence that the kind of document in question is easy to obtain fraudulently in the country in which it originated.

(e) False documentation

[26] The case law clearly supports the proposition that a Court must disregard a document which it proven to be false. It is also acceptable in the assessment of documents to consider particularly documentary evidence showing the prevalence of the use of forged documents in Refugee or Immigration cases.

[27] However, in order to reject an official document, there must be evidence that supports the conclusion of invalidity. Without such evidence, a Board or a member's decision of forgery cannot be sustained this constitutes a reviewable error.

> *Ramalingan v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 10;
> *Halili v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 999, [2002] F.C.J. No. 1335;
> *Cheema v. Canada(Minister of Citizenship and Immigration)*, 2004 FC 224, [2004] F.C.J. No. 255;
> *Iqbal v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1219, [2006] F.C.J. No. 1526

[28] There was no evidence in this case to support the conclusion that the impugned documents were not authentic. In particular, the medical reports confirm the injuries sustained by the Applicant. Injuries which left scars and marks exhibited to the Board.

[29] It is exact to say that the medical report did not mention the cause of those injuries but the Board did not consider the fact that the medical doctor, seeing these injuries, called the Police to report them and the latter did not act upon this report.

[30] Why did the Board practically ignore this fact? The Board accorded little importance to the Applicant's scars which were easily visible, it concluded they were not convinced they resulted from spousal abuse.

(f) The timing of the divorce

[31] The Board found it "implausible" that the Applicant continued to live with her husband after the divorce or why she did not initiate proceedings before 2001. One wonders why the Board was not more attentive to the chairperson's guidelines on this point and did not attempt to understand the socio-economic disadvantages of abused woman in Ukraine.

[32] IN my opinion, considering the totality of the evidence, that the interpretation of the Board is patently unreasonable by ignoring clear evidence, speculating on issues and doing a microscopic examination of peripheral and secondary issues while practically ignoring important physical

evidence, including scars, medical documentation which clearly supported the Applicant's version of the facts.

[33] Therefore, the Board's decision being patently unreasonable cannot stand and therefore this application for judicial review must be granted.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that :

This application for judicial review be allowed and that the Applicant is granted a new hearing before a different instituted panel.

"Orville Frenette"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

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