

Federal Court



Cour fédérale

Date: 20110218

Docket: IMM-3342-10

Citation: 2011 FC 193

Ottawa, Ontario, February 18, 2011

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

NATALYA ZOLOTOVA

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] Justice Bertha Wilson explained in *R v Lavallee*, [1990] 1 SCR 852, [1990] 4 WWR 1, the battered woman syndrome may, sometimes, prevent women from taking action, even when they

live in a situation of perpetual violence that may seem impossible to endure for a person living in a normal environment:

... The obvious question is if the violence was so intolerable, why did the appellant not leave her abuser long ago? This question does not really go to whether she had an alternative to killing the deceased at the critical moment. Rather, it plays on the popular myth already referred to that a woman who says she was battered yet stayed with her batterer was either not as badly beaten as she claimed or else she liked it. Nevertheless, to the extent that her failure to leave the abusive relationship earlier may be used in support of the proposition that she was free to leave at the final moment, expert testimony can provide useful insights. Dr. Shane attempted to explain in his testimony how and why, in the case at bar, the appellant remained with Rust:

She had stayed in this relationship, I think, because of the strange, almost unbelievable, but yet it happens, relationship that sometimes develops between people who develop this very disturbed, I think, very disturbed quality of a relationship. Trying to understand it, I think, isn't always easy and there's been a lot written about it recently, in the recent years, in psychiatric literature. But basically it involves two people who are involved in what appears to be an attachment which may have sexual or romantic or affectionate overtones.

And the one individual, and it's usually the women in our society, but there have been occasions where it's been reversed, but what happens is the spouse who becomes battered, if you will, stays in the relationship probably because of a number of reasons.

One is that the spouse gets beaten so badly -- so badly -- that he or she loses the motivation to react and becomes helpless and becomes powerless. And it's also been shown sometimes, you know, in -- not that you can compare animals to human beings, but in laboratories, what you do if you shock an animal, after a while it can't respond to a threat of its life. It becomes just helpless and lies there in an amotivational state, if you will, where it feels there's no power and there's no energy to do anything.

...

Apparently, another manifestation of this victimization is a reluctance to disclose to others the fact or extent of the beatings. For example, the hospital records indicate that on each occasion the appellant attended the emergency department to be treated for various injuries she explained the cause of those injuries as accidental...

[2] In an immigration case which focuses on gender, the reasons of the Refugee Protection Division of the Immigration and Refugee Board's (Board) decision must reflect the specific situation of an applicant, with particular attention to the Gender-Related Guidelines.

[3] The Women Refugee Claimants Fearing Gender-Related Persecution, Guidelines Issued by the Chairperson Pursuant to subsection 65(3) of the former *Immigration Act*, RSC 1985, c I-2, November 13, 1996 (Gender-Related Guidelines) state: "... Where a woman claims to have a gender-related fear of persecution, the central issue is thus the need to determine the linkage between gender, the feared persecution and one or more of the definition grounds."

[4] The Gender-Related Guidelines were issued in order to assure a certain coherence in tribunal decisions: "... when the panel is faced with a case where the applicant has made a claim of persecution based on her membership in a particular social group, i.e. women victims of violence, in all fairness, the claim cannot be examined without reference to the Guidelines" (*Khon v Canada (Minister of Citizenship and Immigration)*, 2004 FC 143, 130 ACWS (3d) 583, at para 20).

[5] In regard to state protection, contradictory evidence must be assessed by the Board:

[39] Having laws on the books does not equate with actual, experienced state protection for citizens. It has been held that when examining whether a state is making serious efforts to protect its citizens, it is at the operational level that protection must be evaluated particularly in instances of violence against women (see *Garcia v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 118, at paragraph 15).

(*Gilvaja v Canada (Minister of Citizenship and Immigration)*, 2009 FC 598, 178 ACWS (3d) 201).

[6] The Board must analyse an applicant's personal situation in light of contradictory evidence. It is by the analysis of the evidence of the Board that its reasonableness or the lack thereof is determined.

II. Introduction

[7] This case is one of domestic abuse. The Applicant is a female who alleges she had been abused by a male who occupies an influential position in Kazakhstan.

[8] The Board's Decision does not reflect consideration of the Gender-Related Guidelines, nor does it reflect significant evidence submitted by the Applicant.

[9] In regard to state protection, the Board's Decision does not address documentary evidence which contradicts its conclusion. The documentary evidence appears to support the Applicant's testimony.

III. Judicial Procedure

[10] 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 Board, dated May 13, 2010, wherein the Applicant was determined to be neither a Convention refugee within the meaning of section 96 of the IRPA nor a person in need of protection, as defined in subsection 97(1) of the IRPA.

IV. Background

[11] The Applicant, Ms. Natalya Zolotova, was born in Almaty, Kazakhstan. She is of Russian extraction.

[12] Ms. Zolotova was married for 41 years; her husband died in March 2006. She has two children, both of whom are Canadian citizens; her daughter, Svetlana, resides in Canada and her son, Mr. Igor Tyulpa, in the United States.

[13] Ms. Zolotova worked as a controller for various government agencies in Kazakhstan.

[14] In 2006, following the loss of her husband, Ms. Zolotova entered into a relationship with Mr. Boris Mejebitski, who was her supervisor at the Ministry of Energy. The latter, allegedly, had a certain influence as he was responsible for a sector of the Ministry and had important influential contacts.

[15] Mr. Mejebitski and Ms. Zolotova began to live together in June of 2006. Ms. Zolotova alleges that Mr. Mejebitski subsequently became extremely violent.

[16] Ms. Zolotova allegedly called the local police on at least six occasions; however, on no occasion did the police provide assistance. On July 16, 2006, Ms. Zolotova alleges that Mr. Mejebitski threw a bottle at her. A neighbour, Irina, assisted her, called for medical emergency assistance in addition to the police having been called by the medical personnel. Ms. Zolotova did not press criminal charges.

[17] Ms. Zolotova alleges that she had also been hospitalized from March 7 to March 20 2007 after having been beaten by Mr. Mejebitski. The same neighbour, allegedly, also assisted and had taken her to the hospital. The hospital staff called the police. A police officer visited her at the hospital and allegedly had told her that the police authorities do not involve themselves in family matters.

[18] After having received an invitation from her daughter in Canada, Ms. Zolotova successfully obtained a Canadian visitor's visa in early 2007. On April 20, 2007, during her son's visit from the United States, she allegedly asked Mr. Mejebitski to leave the apartment subsequent to his again having beaten her. At the time, she was examined by a doctor who treated her for bruises and contusions.

[19] Ms. Zolotova and her son further allege that they presented themselves at the public prosecutor's office, and later consulted a lawyer, neither of which offered any substantial assistance.

[20] Ms. Zolotova then, with assistance from abroad, left for Canada and arrived in the first part of May 2007. Shortly, subsequent to her arrival, she applied for refugee status.

[21] On May 13, 2010, the Board found Ms. Zolotova not to be a Convention refugee.

V. Decision under Review

[22] The Board determined that Ms. Zolotova is not a "Convention refugee", within the meaning of section 96 of the IRPA, nor a "person in need of protection" due to risk to life or a risk of cruel

and unusual treatment or punishment or danger of torture, as defined in subsection 97(1) of the IRPA.

[23] The Board accepted Ms. Zolotova's identity and Kazak nationality. The Board also explicitly specified having taken the Gender-Related Guidelines into consideration.

[24] The Board concluded that Ms. Zolotova has not provided credible or plausible evidence to support her claim, particularly in light of available documentary evidence. Thus, the Board determined that the case was for the most part about the issue of state protection. The Board concluded that Ms. Zolotova had not made serious attempts to seek protection, and, had not rebutted the presumption of state protection with clear and convincing evidence.

VI. Position of the Parties

[25] The Applicant submits the Board erred in law and in fact:

- a) Ignoring important evidence from the most recent U.S. Department of State (DOS) Report that directly contradicts the Board's findings on state protection;
- b) Ignoring the medical, psychological expertise, the affidavit of the Applicant's son and other specific corroborating evidence;
- c) Failing to take into account the significance of the Applicant's six failed attempts to obtain police protection;
- d) Ignoring the Applicant's explanation as to why she did not make a criminal complaint after she had been hospitalised on July 16, 2006, and why she did not rid herself of Mr. Mejebitski;

- e) Failing to consider whether the Prosecutor’s reasons for refusing to act were nothing but a pretext, especially since the Applicant did have a corroborative witness and she did have medical evidence to the effect that she had been beaten;
- f) Wrongly relying on the existence of nongovernmental “crisis centers” as an indication that protection was available which documentation material, if scrutinized, would have determined that was not the case.

[26] The Respondent submits that there is no ground for judicial review in the present case. The battered woman syndrome, according to the Respondent, is not applicable in the Applicant’s case. According to the Respondent, the Applicant did not make serious enough attempts to claim protection which appears to have been available to her in Kazakhstan.

VII. Issues

- [27] (1) Did the Board err in its assessment of the specific subjective and objective evidence duly submitted for consideration?
- (2) Did the Board err in finding that state protection was available to the Applicant?

VIII. Pertinent Legislative Provisions

[28] The following provisions of the IRPA are pertinent:

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d’être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(ii) the risk would be faced by the person in

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays

every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

[29] The Gender-Related Guidelines address the evidentiary matters:

2. Decision-makers should consider evidence indicating a failure of state protection if the state or its agents in the claimant's country of origin are unwilling or unable to provide adequate protection from gender-related persecution. If the claimant can demonstrate that it was objectively unreasonable for her to seek the protection of her state, then her failure to approach the state for protection will not defeat her claim. Also, the fact that the claimant did or did not seek protection from non-government groups is irrelevant to the assessment of the availability of state protection.

2. Les décideurs doivent examiner la preuve démontrant l'absence de protection de l'État si l'État et ses mandataires dans le pays d'origine de la revendicatrice ne voulaient pas ou ne pouvaient pas assurer une protection appropriée contre la persécution fondée sur le sexe. Si la revendicatrice peut montrer clairement qu'il était objectivement déraisonnable pour elle de demander la protection de l'État, son omission de le faire ne fera pas échouer sa revendication. En outre, que la revendicatrice ait ou non cherché à obtenir la protection de groupes non gouvernementaux ne doit avoir

aucune incidence sur l'évaluation de la protection qu'offre l'État.

When considering whether it is objectively unreasonable for the claimant not to have sought the protection of the state, **the decision-maker should consider, among other relevant factors, the social, cultural, religious, and economic context in which the claimant finds herself.** If, for example, a woman has suffered gender-related persecution in the form of rape, she may be ostracized from her community for seeking protection from the state. Decision-makers should consider this type of information when determining if the claimant should reasonably have sought state protection.

Au moment d'évaluer s'il est objectivement déraisonnable pour la revendicatrice de ne pas avoir sollicité la protection de l'État, **le décideur doit tenir compte, parmi d'autres facteurs pertinents, du contexte social, culturel, religieux et économique dans lequel se trouve la revendicatrice.** Par exemple, si une femme a été victime de persécution fondée sur le sexe parce qu'elle a été violée, elle pouvait ne pas demander la protection de l'État de peur d'être ostracisée dans sa collectivité. Les décideurs doivent tenir compte de ce type d'information au moment de déterminer si la revendicatrice aurait dû raisonnablement demander la protection de l'État.

In determining whether the state is willing or able to provide protection to a woman fearing gender-related persecution, **decision-makers should consider the fact that the forms of evidence which the claimant might normally provide as "clear and convincing proof" of state inability to protect, will not always be either available or useful in cases of gender-related persecution.**

Pour déterminer si l'État veut ou peut assurer la protection à une femme qui craint d'être persécutée en raison de son sexe, **les décideurs doivent tenir compte du fait que les éléments de preuve pouvant normalement être fournis par la revendicatrice comme une « preuve claire et convaincante » de l'incapacité de l'État d'assurer la protection ne seront pas toujours disponibles ou utiles dans les cas de persécution fondée sur le sexe.**

For example, where a gender-related claim involves threats of or actual sexual violence at the hands of government authorities (or at the hands of non-state agents of persecution, where the state is either unwilling or unable to protect), the claimant may have difficulty in substantiating her claim with any "statistical data" on the incidence of sexual violence in her country.

In cases where the claimant cannot rely on the more standard or typical forms of evidence as "clear and convincing proof" of failure of state protection, **reference may need to be made to alternative forms of evidence to meet the "clear and convincing" test.** Such alternative forms of evidence might include the testimony of women in similar situations where there was a failure of state protection, or the testimony of the claimant herself regarding past personal incidents where state protection did not materialize.

Par exemple, lorsqu'une revendication fondée sur le sexe repose sur des menaces ou des actes réels de violence sexuelle de la part des autorités gouvernementales (ou d'agents de persécution non gouvernementaux dans le cas où l'État ne peut ou ne veut offrir une protection), il pourrait être difficile pour la revendicatrice de justifier sa revendication à l'aide de « données statistiques » concernant les incidents de violence sexuelle dans son pays d'origine.

Dans les cas où la revendicatrice ne peut compter sur les éléments de preuve plus courants ou typiques comme « preuve claire et convaincante » de l'incapacité de l'État d'assurer la protection, **il pourrait être nécessaire de s'en remettre à d'autres éléments de preuve pour satisfaire au critère de la « preuve claire et convaincante ».** Il pourrait s'agir de témoignages de femmes se trouvant dans des situations similaires et pour lesquelles l'État a omis d'assurer la protection ou du témoignage de la revendicatrice elle-même concernant des incidents personnels précédents lors desquels l'État n'a pas assuré sa protection.

IX. Standard of Review

[30] [9] It is also well settled that questions relating to the adequacy of state protection are questions of mixed fact and law and that the applicable standard is that of reasonableness (*Hinzman v. Minister of Citizenship and Immigration*, 2007 FCA 171).

(*Gaymes v Canada (Minister of Citizenship and Immigration)*, 2010 FC 801, [2010] FCJ No 982 (QL/Lexis)).

[31] Therefore, the appropriate standard to apply to the Board's Decision is one of reasonableness.

X. Analysis

(1) Did the Board err in its assessment of the specific subjective and objective evidence duly submitted for consideration?

[32] The Board determined that the Ms. Zolotova had not provided credible and trustworthy evidence to support her claim. It is in the analysis of the evidence by the Board that reasonableness or the lack thereof is determined.

Attempts to obtain police protection

[33] In regard to police protection, the Board found Ms. Zolotova not credible:

[10] Chief among the panel's concerns is the claimant's seemingly contradictory assertions and behaviour. For example, the claimant alleges that she would have made six telephone calls to the local police, who refused to help her. Yet, the claimant's only actual police report indicates that the claimant herself refused to make a complaint ...

(Board's Decision at p 3).

[34] Ms. Zolotova claims that she attempted on six separate occasions to obtain police protection, and that all six attempts had failed. She also provided evidence of an official police report of aggression directed against her, dated July 16, 2006, which clearly specified:

[...] elle s'est adressée le 16.07.2006 au Département d'enquête de l'arrondissement Almalinski de la ville d'Almaty à cause du fait de l'agression (coup à la tête) sur elle entrepris par un objet solide par une personne non établie.

La citoyenne Zolotova a refusé de déposer une pl[ai]nte officielle suite a cette agression en le motivant par ce qu'elle n'a pas eu de pertes financières [...]

(Respondent's Memorandum of Argument, Affidavit de Sheila Markland, pièce "A").

[35] In her Affidavit, dated June 29, 2010, Ms. Zolotova provided an explanation as to why she had failed to file a complaint to the police after she had been hospitalized on July 16, 2006:

*At the hearing the Board Member asked me why I did not make a criminal complaint on July 16th 2006, on that day my neighbour called an ambulance after Boris assaulted me. The ambulance staff called the police. I explained that I was very frightened. The police officer was a native Kazak and I am Russian. I was shaking with fear, and I was afraid to accompany the police at night. I did not identify Boris. I was also afraid that Boris would give money to the police. **I also explained that Boris had a great deal of influence as the Chief dispatcher for all of Kazakhstan. He had a lot of connections and the police are corrupt.***

(Applicant's Written Representations at para 11: English translation of para 35 of Applicant's Affidavit as provided by her counsel).

[36] The Board did not explain why it chose to reject this explanation or why it did not consider the evidence that might have supported it. Certain facts appear to corroborate the explanations as to the background in regard to ethnicity and the significance of the workplace. Moreover, Ms. Zolotova's son submitted an affidavit in which he confirms that his mother tried to ask for police protection:

6. She had filed multiple complaints to police, but the answer was always the same: the police do not solve family problems.

(Affidavit of Igor Tyulpa, Applicant's Record (AR) at p 61).

[37] Again, the Board did not explain why it chose to discard or ignore the evidence without regard to the specific proof, provided by Ms. Zolotova, which necessitated consideration of the Gender-Related Guidelines.

Attempts to obtain help from Prosecutor and lawyer

[38] Ms. Zolotova alleged that she also tried to obtain assistance from the state prosecutor. In his affidavit, Ms. Zolotova's son, Mr. Igor Tyulpa, explains their visits to the Prosecutor and to the lawyer:

7. Together we visited the prosecutor on April 23rd, 2007 to lodge a complaint. We were told that without witnesses they could not help and that neither they, nor the police could prevent this man from coming to my mom's apartment.

8. The same day we went to see a lawyer, Attorney Alexander Malchenko, and he told us that there are many similar cases that remain unsolved. He told us that Boris Mejebitski is a powerful man and that it would be very difficult to prove anything against him. The lawyer also told us that since my mother is Russian and a woman, nobody would consider this case very seriously.

(Affidavit of Igor Tyulpa, AR at p 61).

[39] Again, the Board did not give credence to Ms. Zolotova's testimony, nor to her son:

[10] ... The claimant alleges that she would have sought out counsel and gone to the prosecutor's office in April of 2007. This was just prior to her departure. Yet the claimant said that the prosecutor refused to do anything. According to the claimant, she would have been told that she required "witnesses". This does not seem consistent with the available documentary evidence ... Finally, the claimant alleges that she sought out legal counsel only after she was at the point of deciding to leave her country in April of 2006. According to the claimant, said counsel provided absolutely no information on any options available to her. The panel does not

believe this is credible or plausible, especially in light of the available documentary evidence which speaks to legal resources. The panel does not believe that this claimant is either credible or plausible.

(Board's Decision at pp 3-4).

[40] The Board did not refer to the documentary evidence to conclude that Ms. Zolotova's testimony was not consistent with existent "legal resources" in Kazakhstan. In regard to Kazakhstan's legal system, the Court points out an extract from the 2009 Human Rights Report which was before the Board, itself:

e. Denial of Fair Public Trial

The law does not provide adequately for an independent judiciary. The executive branch limited judicial independence. Prosecutors enjoyed a quasijudicial role and had authority to suspend court decisions.

Corruption was evident at every stage of the judicial process. Although judges were among the most highly paid government employees, lawyers and human rights monitors alleged that judges, prosecutors, and other officials solicited bribes in exchange for favorable rulings in the majority of criminal cases.

(2009 Human Rights Report: Kazakhstan, March 11, 2010, Tribunal Record at p 54).

Medical and psychological expert reports

[41] The Board's Decision mentions other corroborating evidence, but completely fails to explain why no weight was given to certain reports in evidence which had been duly provided:

[10] ... Further the claimant had corroborative evidence in medical reports that she produced for her hearing, as well as the neighbour who would have seen her after the incident of July 2006 ...

(Board's Decision at p 4).

[42] To corroborate her version of the facts, Ms. Zolotova had submitted to the Board numerous reports, none of which were specifically discussed in the decision:

- Medical report (August 14, 2006);
- Medical report (March 20, 2007);
- Medical certificate (April 20, 2007);
- Psychological evaluation by Anna Insky (April 15, 2009);
- Letter from psychotherapist, Karine Peel (January 17, 2010);
- Medical certificate from the CLSC de la Montagne (May 5, 2009);
- Descriptions of medications prescribed to Applicant;
- Affidavit sworn by claimant's son, Igor Tyulpa (December 17, 2009).

(AR and following at p 37).

[43] In *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35, 83 ACWS (3d) 264, the Court established that the more relevant the evidence, the higher the burden on the decision maker to cite and analyse the evidence which contradicts its findings:

[17] However, the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence": *Bains v. Canada (Minister of Employment and Immigration)* (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact.

[44] Medical evidence can be singularly important in the particular case of an abused woman.

The Gender-Related Guidelines provide:

For a discussion of the battered woman syndrome see *R. v. Lavallee*, [1990] 1 S.C.R. 852. In *Lavallee*, Madame Justice Wilson addressed the mythology about domestic violence and phrased the myth as "[e]ither she was not as badly beaten as she claims, or she would have left the man long ago. Or, if she was battered that severely, she must have stayed out of some masochistic enjoyment of it." The Court further indicated that a manifestation of the victimization of battered women is a "reluctance to disclose to others the fact or extent of the beatings". In *Lavallee*, the Court indicated that expert evidence can assist in dispelling these myths and be used to explain why a woman would remain in a battering relationship.

Une discussion sur le syndrome de la femme battue figure dans *R. c. Lavallee*, [1990] 1 R.C.S. 852. Dans *Lavallee*, le juge Wilson traite du mythe concernant la violence familiale : « Elle était certainement moins gravement battue qu'elle le prétend, sinon elle aurait quitté cet homme depuis longtemps. Ou, si elle était si sévèrement battue, elle devait rester par plaisir masochiste ». La Cour ajoute qu'une autre manifestation de cette forme d'oppression est « apparemment la réticence de la victime à révéler l'existence ou la gravité des mauvais traitements ». Dans *Lavallee*, la Cour a indiqué que la preuve d'expert peut aider en détruisant ces mythes et servir à expliquer pourquoi une femme reste dans sa situation de femme battue.

[Emphasis added].

(Gender-Related Guidelines at para 31).

[45] In addition, the Board ignored the medical evidence although it appears central to the assessment of Ms. Zolotova's credibility. The medical evidence shows that Ms. Zolotova suffered from physical symptoms, which could well have been caused at the hands of Mr. Mejebitski (see for instance Applicant's Record at p 42: "traumatisme crânien, commotion cérébrale, fractures des côtes IV-V à gauche, fracture interne des os du nez. Contusions multiples, ecchymoses. État de choc. Contusion au niveau des reins). Moreover, the psychological reports specify that she suffers from "Post Traumatic Stress Disorder", emanating from the violence to which she was subjected by

Mr. Mejebitski in Kazakhstan” (Report from Ms. Karine Peel, Psychotherapist, January 17, 2010, AR, at p 55). Ms. Anna Insky, Psychologist, came to a similar conclusion (Report from Anna Insky, April 15, 2009, AR at p 46).

[46] Due to a lack of adequate consideration of the Gender-Related Guidelines, the Board appears to ignore, and, thus, fails to understand, acknowledge and recognize the battered woman syndrome by its omission to assess core evidence:

[10] ... The claimant alleges that she is unable to get rid of her “boyfriend” from her own apartment. Yet the claimant, by her own admission, did nothing in order to have him removed during their relationship or subsequent to its ending in April of 2006 ...

(Board’s Decision at p 4).

[47] The Board also stated: “... The claimant did not make any formal reports regarding any criminal activity against her live-in “boyfriend”, nor did she take any affirmative action to have him removed from her apartment. The claimant’s only assertion was to the effect that said individual Boris had ‘influence’” (Board’s Decision, at para 11).

[48] As Justice Wilson explained in *Lavallee*, above, the battered woman syndrome may, sometimes, prevent women from taking action, even when they live in a situation of perpetual violence that may seem impossible to endure for a person living in a normal environment:

... The obvious question is if the violence was so intolerable, why did the appellant not leave her abuser long ago? This question does not really go to whether she had an alternative to killing the deceased at the critical moment. Rather, it plays on the popular myth already referred to that a woman who says she was battered yet stayed with her batterer was either not as badly beaten as she claimed or else she liked it. Nevertheless, to the extent that her failure to leave the abusive relationship earlier may be used in support of the proposition that she was free to leave at the final moment, expert testimony can provide useful insights. Dr. Shane attempted to

explain in his testimony how and why, in the case at bar, the appellant remained with Rust:

She had stayed in this relationship, I think, because of the strange, almost unbelievable, but yet it happens, relationship that sometimes develops between people who develop this very disturbed, I think, very disturbed quality of a relationship. Trying to understand it, I think, isn't always easy and there's been a lot written about it recently, in the recent years, in psychiatric literature. But basically it involves two people who are involved in what appears to be an attachment which may have sexual or romantic or affectionate overtones.

And the one individual, and it's usually the women in our society, but there have been occasions where it's been reversed, but what happens is the spouse who becomes battered, if you will, stays in the relationship probably because of a number of reasons.

One is that the spouse gets beaten so badly -- so badly -- that he or she loses the motivation to react and becomes helpless and becomes powerless. And it's also been shown sometimes, you know, in -- not that you can compare animals to human beings, but in laboratories, what you do if you shock an animal, after a while it can't respond to a threat of its life. It becomes just helpless and lies there in an amotivational state, if you will, where it feels there's no power and there's no energy to do anything.

...

Apparently, another manifestation of this victimization is a reluctance to disclose to others the fact or extent of the beatings. For example, the hospital records indicate that on each occasion the appellant attended the emergency department to be treated for various injuries she explained the cause of those injuries as accidental...

[49] If the Board had adequately taken into consideration that Ms. Zolotova might have been suffering from the battered woman syndrome, it would not have held against her the fact that she did not remove her aggressor from her apartment. In *Griffith v Canada (Minister of Citizenship and Immigration)* (1999), 171 FTR 240, 90 ACWS (3d) 118, the Court stated:

[27] In my opinion, these statements of the CRDD do not disclose the degree of knowledge, understanding, and sensitivity required to avoid a finding that a reviewable error has been made in judging the applicant's statements and conduct.

[28] The pitfall exposed in the statements is that the panel members' interpretation of an "objective" standard is being used as the standard against which the actions of the applicant are being judged; that is, the objective standard of the "reasonable man" so commonly used in criminal and civil law. The issue is not whether men or women are decision makers, but rather whether a male norm is being unfairly applied. About this, Wilson J. in *Lavallee* at 874 says this:

If it strains credulity to imagine what the "ordinary man" would do in the position of a battered spouse, it is probably because men do not typically find themselves in that situation. Some women do, however. The definition of what is reasonable must be adapted to circumstances which are, by and large, foreign to the world inhabited by the hypothetical "reasonable man".

[50] In another case regarding an abused woman, also in Kazakhstan, the Court clearly explained the importance of applying the Gender-Related Guidelines when considering the specific situation of an applicant (*Khon*, above):

[18] Although the panel is not obliged to apply the Guidelines because they do not have the force of law, they must be examined by the members of the panel in appropriate cases.

[19] In *Fouchong v. Canada (Secretary of State)*, [1994] F.C.J. No. 1727, MacKay J. addresses the application of the Guidelines, in paragraphs 10 and 11:

[10] I am further persuaded that in the circumstances of this case the tribunal erred in its failure to explicitly assess the applicant's claim in relation to the Guidelines, because here submissions of counsel made specific reference to those in relation to the applicant's claim. The Guidelines are not law, but they are authorized under s. 65(3) of the Act. They are not binding but they are intended to be considered by members of the tribunal in appropriate cases. In a memorandum accompanying their circulation, the Chairperson of the I.R.B. advised, *inter alia*, that while they are not to be considered binding

Refugee . . . Division Members are expected to follow the Guidelines unless there are compelling or exceptional reasons for adopting a different analysis. Individuals have a right to expect the Guidelines will be followed unless compelling or exceptional reasons exist for departure from them.

[11] Neither the terms of the Guidelines nor of the Chairperson's memorandum of advice create the basis for the court to determine that in this case the tribunal erred by not explicitly referring to the Guidelines. The basis of my conclusion is the nature of the applicant's claim and the reference by counsel at the hearing to the use of the Guidelines in assessing the claim. In fairness the claim could not be assessed without reference to the Guidelines. I do not suggest what the outcome of that assessment might be but in the circumstances in which this claim was made and presented, it was not sufficient for the tribunal to simply set out in its conclusion, "This is not a situation of spousal abuse. This is a situation where the claimant fears criminal attacks by a former spouse". [Emphasis added].

[20] The Guidelines are issued in order to assure a certain coherence in the tribunal's decisions. As MacKay J. indicated, when the panel is faced with a case where the applicant has made a claim of persecution based on her membership in a particular social group, i.e. women victims of violence, in all fairness, the claim cannot be examined without reference to the Guidelines.

[51] The Board did not give proper consideration to significant evidence submitted by the Applicant. It was not open to the Board to reach a decision without examining the corroborating evidence. While the Board may claim to have taken the Gender-Related Guidelines into consideration, it is the view of the Court that the reasons of the decision do not reflect the singularly specific situation of an abused woman, one, who, appears to have been caught in a situation of “the abused woman syndrome” according to the evidence.

(2) Did the Board err in finding that state protection was available to the Applicant?

[52] The Board determined that Ms. Zolotova did not rebut the presumption of state protection of Kazakhstan. In its decision, the panel found:

[11] ... that this case is for the most part, about the issue of State Protection. States are presumed to be able to protect their citizens. The protection must be adequate but need not be perfect. In the current context, the claimant alleges that no one in authority would assist her with her problems with her now next-boyfriend. ... Yet the panel does not believe that the claimant's assertions are supported by

documentary evidence. Firstly, while the panel acknowledges that the documentation does say about problems of domestic abuse in Kazakhstan, it is quite clear that the authorities have taken the issue seriously. Not only at the time the claimant was there, but even more so should she return to her country today ...

(Board's Decision at p 4).

State Protection of Kazakhstan - documentary evidence

[53] The Board determined that “ ... it is quite clear that the authorities have taken the issue seriously.” Nevertheless, the U.S. DOS Report for 2009, which was submitted before the Board, in its findings, clearly contradicts the Board's characterization of the protection available in the case of domestic abuse in Kazakhstan:

According to NGOs domestic violence increased. Although official statistics were scarce, activists assessed that one in four families experienced domestic violence. The government reported 761 domestic violence crimes during the year. NGOs reported that 40 percent of such crimes went unreported.

Police intervened in family disputes only when they believed the abuse was life-threatening. According to NGO estimates, police investigated approximately 10 percent of such cases. NGOs conducted training for police officers on how to handle victims of domestic violence.

NGOs reported that women often withdrew their complaints as a result of economic insecurity. When victims pressed charges for domestic violence or spousal rape, police sometimes tried to persuade them not to pursue a case. When domestic violence cases came to trial, the charge was most often light battery, for which judges sentenced domestic abusers to incarceration at a minimum security labor colony and 120 to 180 hours of work. Sentences for more serious cases of battery, including spousal battery, range from three months to three years' imprisonment; the maximum sentence for aggravated battery is 10 years' imprisonment.

According to the government, there were 25 crisis centers in the country providing assistance to women and two centers that provided assistance to men. All the crisis centers received funding through government and international grants to NGOs. A number of smaller NGOs provided assistance to victims. Six of the crisis centers also provided shelter for victims of violence. [Emphasis added].

(2009 Human Rights Report, Tribunal Record at pp 70-71).

[54] The Board did not explain why it did not take into consideration this contradictory documentary evidence. Moreover, the only document mentioned in the Board's Decision regarding State protection is the "United States (US). 11 March 2010. Department of State. "Kazakhstan." Country Reports on Human Rights Practices for 2009." as appears at footnote 4 of the decision. The Board did not mention any other documentation describing Kazakhstan at the time of the events in 2006-2007.

[55] In addition, the Board omitted to evaluate whether Kazakhstan's framework of protection is effectively implemented in the country. In *Elcock v Canada (Minister of Citizenship and Immigration)* (1999), 175 FTR 116, 91 ACWS (3d) 820, the Court explained that the willingness to effectively implement the framework of protection in the country must be taken into consideration:

[15] ...Ability of a state to protect must be seen to comprehend not only the existence of an effective legislative and procedural framework but the capacity and the will to effectively implement that framework.

[56] Thus, in the situation of battered women, "real capacity to protect women" must be considered and "good intentions to improve the situation" on the part of the state is not sufficient (*Simpson v Canada (Minister of Citizenship and Immigration)*, 2006 CF 970, 150 ACWS (3d) 457, at para 38).

[57] In *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, 103 DLR (4th) 1, (at para 48), the Supreme Court stated: "Moreover, it would seem to defeat the purpose of international protection if a claimant would be required to risk his or her life seeking ineffective protection of a state, merely to demonstrate that ineffectiveness."

[58] In *Avila v Canada (Minister of Citizenship and Immigration)*, 2006 FC 359, 295 FTR 35,

Justice Luc Martineau reiterates:

[27] ... The Board must consider not only whether the state is actually capable of providing protection but also whether it is willing to act. In this regard, the legislation and procedures which the applicant may use to obtain state protection may reflect the will of the state. However, they do not suffice in themselves to establish the reality of protection unless they are given effect in practice: see *Molnar v. Canada (Minister of Citizenship and Immigration)*, 2002 FCTD 1081, [2003] 2 F.C. 339 (F.C.T.D.); *Mohacsi v. Canada (Minister of Citizenship and Immigration)*, 2003 FCTD 429, [2003] 4 F.C. 771 (F.C.T.D.).

[59] Justice Martineau also mentions that "... the degree to which a state tolerates corruption in the political or judicial apparatus correspondingly diminishes its degree of democracy" (at para 31).

Regarding Ms. Zolotova, the Board concluded, that regardless of the corruption in Kazakhstan, she should have made other attempts to claim the protection of the state:

[11] ... Even if the panel were to accept the statement that corruption can be a problem in countries like Kazakhstan. The fact that the claimant did not make serious attempts to claim the protection that appears to be available indicates, in the panel's mind, that she has not rebutted with "clear and convincing evidence" an absence of State Protection. The panel believes that the claimant is not a person requiring protection. [Emphasis added].

(Board's Decision at p 5).

[60] Corruption does not, understandably, appear to lend itself to protection in this case.

The Applicant did not claim protection

[61] The Board did not accept that Ms. Zolotova took "all avenues in seeking out assistance."

When asked if she had consulted with any one of the 25 crisis centers that apparently exist in Kazakhstan, Ms. Zolotova answered, due to circumstances, external and internal, that she had not attempted to do so. Ms. Zolotova testified of previous occasions where she has been denied state

protection and had also submitted substantial documentary evidence which would appear to support her contention; however, the Board failed to analyze the said evidence. Due to error, this Court allows a judicial review, wherein, the state's inability to protect might appear in the form of "past personal incidents where state protection did not materialize" because it could not:

[47] And finally, while the Board claimed to have taken the Gender Guidelines into consideration "*WOMEN REFUGEE CLAIMANTS FEARING GENDER-RELATED PERSECUTION*" Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the *Act* (Guidelines), in my view, the reasons for the decision in this case do not reflect the special situation of an abused woman and particularly one that encountered gender related violence at such a young age. The Gender Guidelines state that the claimant needs to demonstrate that it was objectively unreasonable for the applicant to seek the protection of her state and that this analysis should consider the "social, cultural, religious and economic context in which the claimant finds herself". In this case, this young woman was up against an influential family that was sabotaging efforts to protect herself.

[48] While the applicant had the onus to provide "clear and convincing evidence" of the state's inability to protect because of the influence of this family, the Guidelines state that this evidence might have to be in the form of "past personal incidents where state protection did not materialize", which is the extent of what the applicant could have been expected to provide given her circumstances. (Emphasis added).

(*Gilvaja*, above).

[62] Moreover, section C.2 of the Gender-Related Guidelines stipulates:

2. ... Also, the fact that the claimant did or did not seek protection from non-government groups is irrelevant to the assessment of the availability of state protection. [Emphasis added].

[63] The Board also refers to new legislation regarding penalties for domestic violence, and it adds: "[d]espite this, that penalties were certainly in existence at the time the claimant was there."

(Board's Decision, at para 11). In the 2009 Human Rights Report, it is stated:

Violence against women, including domestic violence, was a problem. On December 7, President Nazarbayev signed a new law on domestic violence. The law defines for the first time "domestic violence" and "victim"; identifies various types

of violence, such as physical, psychological, sexual, and economic; and outlines the responsibilities of the local and national governments and NGOs in providing support to domestic violence victims. The law also outlines mechanisms for issuance of restraining orders and provides for 24-hour administrative detention of abusers. The criminal procedure code sets the maximum sentence for spousal assault and battery at 10 years in prison, which is the same as for any beating.

(Tribunal Record at p 70).

[64] In fact, the said legislation, specified, did not exist at the time when the alleged events of violence occurred, in 2006-2007. The Board should have based its decision on a change of circumstances in Kazakhstan, if that was effectively the basis of its decision; however, the Board cannot conclude that Ms. Zolotova did not make serious attempts to claim state protection, based on the new legislation. The Board did not mention on what grounds it sustained the contention of: “Despite this [the new legislation], that penalties were certainly in existence at the time the claimant was there.” It was not reasonable to conclude that Ms. Zolotova did not sufficiently seek state protection, based on a non-documented opinion in regard to Kazakhstan’s state protection at the time of the events, in 2006, when the above documentation refers to 2009, and, even then, the legislation is not proven to have been applied.

[65] Ms. Zolotova, did, in fact, seek state protection, as she testified, she had sought assistance from the police, the state prosecutor, and a lawyer, without success.

XI. Conclusion

[66] The Board erred, in fact and law, by applying an unfair burden of proof, and in doing so, confused, mischaracterized the evidence and engaged in speculation that was wholly unsupported

by the evidence. The Board failed to adequately motivate significant portions of its decision, without regard to the documentary evidence.

[67] Therefore, for all of the above-reasons, the application for judicial review is granted and the matter is remitted for redetermination by a differently constituted panel.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be granted and the matter be remitted for redetermination by a differently constituted panel. No question for certification.

“Michel M.J. Shore”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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