

Federal Court



Cour fédérale

Date: 20120516

Docket: IMM-7347-11

Citation: 2012 FC 589

Toronto, Ontario, May 16, 2012

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

**MOTLALEPULA TUMISANG AND
LONE TUMELO TUMISANG**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR ORDER AND ORDER

[1] The present Application concerns a decision of the Refugee Protection Division of the Immigration and Refugee Board (RPD) rejecting a claim for refugee protection based on a well-founded fear of gender-related domestic violence. In doing so, I find that the RPD failed to properly apply the *Chairperson's Guidelines on Women Refugee Claimants Fearing Gender-related Persecution* (the *Guidelines*).

[2] The evidence presented with respect to the Applicant's claim has three components: a history of abuse in relation to two partners in Botswana; an arson attack on her home presumed to be at the hands of her then common-law partner, which caused her to flee Botswana for Canada; and the contents of a psychological report which goes to prove that the abuse and attack suffered by the Applicant have left her in a very vulnerable mental state. Principle findings made by the RPD in the decision under review are that the Applicant's credibility is not in issue, and nor is the nature of her claim on Convention grounds, namely women victims of domestic violence.

[3] The RPD rejected the Applicant's claim on the central finding that, should she return to Botswana, she would receive state protection. In making the finding of the availability of state protection the RPD purported to apply *Guideline 4*, which states as follows:

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.

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.

[Footnotes removed] [Emphasis added]

In purporting to apply the *Guideline*, the RPD provided a backward and forward-looking analysis resulting in the conclusion that it is reasonable for the Applicant to seek state protection:

After reviewing the documentary evidence, the panel determines that Botswana is aware of police corruption and has the means to deal with it effectively. The panel concludes that it was not reasonable for the claimant, a woman with post-secondary education and years of being a self-employed businessperson, not to seek police protection because of perception of corruption in their ranks.

[Emphasis added] (Decision, para. 16)

[4] The psychological report was placed before the RPD to establish that it would be unreasonable to expect the Applicant, in her present mental state, to seek state protection if she were to return to Botswana. The only recognition given to the contents of the report is the RPD's comment that the Applicant suffers "from chronic adjustment disorder, among other symptoms" (Decision, para. 5). Indeed, the report provides the following expert evidence:

During waking hours, Ms. Tumisang experiences surges of threat and vulnerability in association with reminders of her traumatic past. Ms. Tumisang feels as if she were in imminent danger. The response is accompanied fear and startle. The response is elicited by environmental stimuli, such as men who resemble her former partners, crowds, people who are arguing or shouting, a knock at the door, a telephone ringing, television programs and movies that depict domestic violence, loud noises, standing in the shower stall, and questions about her past. The response often arises spontaneously when Ms. Tumisang is alone and not absorbed in activity. Ms. Tumisang avoids going out of her home and does not ride the subway when unaccompanied by another person. She avoids men who resemble her former partners, police officers, crowds, and people who are arguing or shouting. She does not watch television programs or movies that depict domestic violence. She tries not to think or talk about her past. She is vigilant for signs of danger across situations.

[Emphasis added] (Tribunal Record, p. 138)

[5] In describing the Applicant as a “woman with a post-secondary education and years of being a self employed businessperson”, I find that the RPD concluded, as a fact, that there is no impediment to the Applicant seeking state protection upon return to Botswana. Given the critical evidence of the Applicant’s current mental state, and given that the evidence is relevant to the critical issue of the availability of state protection, and given that, in my opinion, the *Guideline* required the RPD to consider this evidence, and given that the evidence was apparently ignored by the RPD in reaching the decision under review, I find that the decision is made in fundamental error of fact.

[6] As a result, I find that the decision under review to be made in reviewable error.

ORDER

THIS COURT ORDERS that:

The decision under review is set aside and the matter is referred back to a differently constituted panel for redetermination.

There is no question to certify.

“Douglas R. Campbell”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-7347-11

STYLE OF CAUSE: MOTLALEPULA TUMISANG AND LONE TUMELO
TUMISANG v THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: MAY 14, 2012

**REASONS FOR ORDER
AND ORDER BY:** CAMPBELL J.

DATED: MAY 16, 2012

APPEARANCES:

Robert Israel Blanshay FOR THE APPLICANTS

Prathima Prashad FOR THE RESPONDENT

SOLICITORS OF RECORD:

Robert Israel Blanshay FOR THE APPLICANTS
Barrister & Solicitor
Toronto, Ontario

Myles J. Kirvan FOR THE RESPONDENT
Deputy Attorney General of Canada