

Federal Court



Cour fédérale

Date: 20120912

Docket: IMM-5813-11

Citation: 2012 FC 1078

Ottawa, Ontario, September 12, 2012

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

DARSHAN KAUR

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of a decision of the Immigration and Refugee Board, Refugee Protection Division (the Board), dated August 5, 2011, wherein the applicant was determined to be neither a Convention refugee within the meaning of section 96 of the Act, nor a person in need of protection as defined in subsection 97(1) of the Act. This conclusion was based on the Board's findings on credibility and subjective fear.

[2] The applicant requests that the Board's decision be set aside and the matter be referred back for redetermination by a differently constituted panel.

Background

[3] The applicant, Darshan Kaur, is a citizen of India from rural Punjab. She married Malkit Singh in 1971. The couple have two adult children. Their daughter, Palvinder Kaur lives in England and their son, Balbir Singh lives in India with his father.

[4] The applicant testified that her husband treated her as a servant, requiring her to care for their children, do domestic chores, work for the family farm and do extra farm work for other farmers. If she refused to perform this extra work, for which her husband was paid, he would beat her. In addition, the applicant testified that her husband would rape her and prostitute her out to other men in the village. Meanwhile, he had many affairs with other women. The applicant testified that she unsuccessfully sought protection from this abuse from the police and at a women's shelter.

[5] With the aid of neighbours, the applicant left India for the United States in 2008. She lived in New Jersey between May and August 2008. On August 22, 2008, with the help of an acquaintance of her neighbour in India, the applicant came to Canada. She claimed refugee status on July 8, 2009.

[6] After the applicant left India, her husband began cohabitating with another woman in their matrimonial home.

[7] On June 21, 2011, Dr. Lydia Kwa completed a psychological assessment of the applicant. A report of this assessment was filed with the Board. Dr. Kwa first summarized the domestic abuse suffered by the applicant. Dr. Kwa noted that the applicant continued to experience lower back pains and an impaired wrist due to this abuse. Dr. Kwa further noted that the applicant's husband had forbidden her to go to the temple and had also been physically violent to their children. Dr. Kwa explained that when the applicant's daughter was a teen, the applicant's mother took her to England to escape the abuse and possible prostitution by her father. Dr. Kwa also noted that the applicant's daughter is very supportive of her mother and calls her every day. Conversely, the applicant's son lives with his father and is invested in inheriting his property. He is therefore not as supportive of his mother as his sister is.

[8] Dr. Kwa explained that although the applicant has relatives in England, she has not fled there because she believes that her husband could easily locate her there. However, to protect her, no one has told the applicant's husband of her whereabouts since she left India in 2008. Her escape from India was made possible with the assistance of several people in her village.

[9] Turning to her psychological findings, Dr. Kwa noted that the applicant showed marked signs of psychological and psychological distress at various points in her assessment. Dr. Kwa found that clinical interviewing, *in situ* observations and responses on the paper-and-pencil questionnaire all point to the applicant suffering from complex Post-Traumatic Stress Disorder (PTSD). Dr. Kwa also described the applicant as having a severe level of anxiety.

[10] The hearing of the applicant's refugee claim was held on June 27, 2011. At the end of the hearing, Mr. Khan, the applicant's immigration consultant, requested additional time to make written submissions. The Board approved the request and allowed additional submissions to be filed until July 22, 2011.

[11] On July 21, 2011, Mr. Khan faxed a letter to the Registrar, requesting additional time to make his submissions. Mr. Khan stated that he received no response to this request. Conversely, in the Board's decision, the Board noted that Mr. Khan was granted an extension to file additional submissions until July 30, 2011.

[12] On July 29, 2011, Mr. Khan requested a further extension to file additional submissions until August 11, 2011. On August 2, 2011, the Board refused this request and stated that it would be entering into deliberations on August 4, 2011. It would therefore only consider additional submissions filed before that date. On August 2, 2011, Mr. Khan was on holidays. He therefore called the Vancouver Refugee Protection Division office and spoke with case management officer, Sylvia Yu. Ms. Yu reiterated that the Board would be entering into deliberations on August 4, 2011, and additional submissions would therefore need to be filed before that date. However, Mr. Khan's understanding from that conversation was that a compromise was made with the deadline for submissions extended to midnight on August 4, 2011.

[13] Mr. Khan faxed his additional submissions at approximately 9:00 p.m. Pacific Standard Time on August 4, 2011. The following day, Ms. Yu left a voicemail at Mr. Khan's office indicating that the Board had not received his submissions. As Mr. Khan was travelling home at the

time, he did not receive this voicemail until Monday, August 8, 2011. When he contacted Ms. Yu on August 8, 2011, he was informed that the Board had not received Mr. Khan's additional submissions. As these additional submissions were not before it, the Board rendered its decision without considering them.

Board's Decision

[14] The Board issued its decision on August 5, 2011. Notice of the decision was sent out on August 11, 2011.

[15] At the outset, the Board stated that it considered the *Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution* (the Gender Guidelines) both at the hearing and in rendering its decision.

[16] The Board accepted the applicant's identity and citizenship of India. The Board also summarized the applicant's allegations as presented in her Personal Information Form (PIF) and testimony.

[17] The Board identified credibility as the determinative issue. It acknowledged that when a claimant swears to the truth of certain facts, there is a presumption that they are true unless there is reason to doubt them. However, in this case, the Board found that there were reasons to doubt the applicant's truthfulness based on contradictions, inconsistencies and omissions in her evidence.

[18] The Board acknowledged the applicant's psychological report. It noted the evidence provided therein that the applicant's daughter was very supportive of her and was in daily contact with her. However, the Board then highlighted the applicant's testimony at the hearing that she had no corroborative evidence from her mother or daughter because she had no contact with her family. Her only explanation for this contradiction was that she had been in contact with her daughter when she lived in the United States and it was this contact that she referred to in her interview with Dr. Kwa. The Board found this explanation not credible as Dr. Kwa's interview was held in June 2011, long after the applicant's stay in the U.S. in 2008.

[19] The Board then noted the lack of corroboration for the applicant's allegations. It noted the applicant's testimony that her situation was well known in her village and that friends and neighbours had assisted her on several occasions. The Board found that had the events occurred as suggested, the applicant would have been able to obtain written corroboration. The Board therefore drew a negative credibility inference from the lack of corroboration evidence.

[20] The Board also noted that the applicant told Dr. Kwa of the forced prostitution that her husband imposed on her, but she did not mention this in her PIF or to Mr. Khan, whom she viewed as a son. However, the Board found that it would have been reasonable to assume that the applicant would have told Mr. Khan that she had more to say about her claim but was not comfortable talking to a man about it. The Board observed that the applicant had been able to mention the raping in her PIF narrative. It therefore drew a negative credibility inference from the applicant's late disclosure of the forced prostitution.

[21] The Board then indicated that it relied on its common sense in finding that elements of the applicant's story were implausible. For example, the Board found that the applicant was not as vulnerable as suggested. In support, the Board noted that the applicant had travelled internationally on several occasions beginning in January 1999. The Board acknowledged the applicant's testimony that her controlling husband allowed her to travel because she would receive money from her family in England on these trips. However, the Board found that this did not explain her trip to Canada and the United States between April and December 2001. In addition, the Board noted that international travel requires certain preparation and involves various aspects in which the applicant would need to fend for herself. The Board noted that the applicant apparently managed quite well. This suggested that she was quite capable of negotiating some fairly complex situations.

[22] The Board also found that the applicant's mother and daughter apparently assisted her up until she came to Canada. They paid for her trips to England, she stayed with them on several occasions and they gave her money to take back to her husband. Therefore, the Board did not find that there was a serious possibility that the applicant would have no choice but to go back to living with her husband should she return to India.

[23] The Board then noted the extensive trips abroad that the applicant made between 1999 and 2008. The Board acknowledged the applicant's testimony that she did not claim asylum in England during these trips because her family, who had land in India for which they travelled back and forth, feared her husband who had threatened that he would kill them if they helped her. However, the Board found it implausible that the applicant's daughter, who had also been abused by her father and the applicant's mother who had helped her in the past and who had full knowledge of the

alleged abuse, would not assist her. With this family support, the Board deemed it illogical that the applicant would reavail herself repeatedly to the abuse when she was in a position to escape.

[24] Further, the Board deemed it illogical that the applicant would not seek asylum in the United States. The Board noted the applicant's testimony that her neighbour in India and his acquaintance in the United States helped her escape her abusive situation. However, it found it illogical that they would then not help her seek asylum there. Thus, the Board found that the applicant's failure to claim in the United States and on the several occasions that she visited England indicated a lack of subjective fear. Similarly, as the applicant's reason in coming to Canada was to seek refugee protection, the Board found that her delay in seeking it for eleven months indicated a lack of subjective fear.

[25] For these collective reasons, the Board determined that the applicant lacked subjective fear and that her evidence was not credible.

[26] The Board noted that a negative credibility determination made under section 96 of the Act is not necessarily determinative of a claim made under subsection 97(1) of the Act. However, the Board found that there was no personal or documentary evidence that would provide a foundation for establishing a personal risk for the applicant under subsection 97(1) of the Act. The Board found that there was insufficient credible evidence on which to come to a positive finding on this claim. The Board therefore rejected the applicant's claim under both sections 96 and 97 of the Act.

Issues

[27] The applicant submits the following points at issue:

1. Did the Board err in his credibility assessment:
 - a. By failing to properly apply the Gender Guidelines?
 - b. By failing to evaluate the psychological report and the PTSD diagnosis when evaluating the applicant's credibility?
2. Did the Board's failure to consider Mr. Khan's submissions result in a denial of procedural fairness sufficient to warrant the decision being overturned?

[28] I would rephrase the issues as follows:

1. What is the appropriate standard of review?
2. Did the Board err in its credibility analysis?
3. Did the Board commit a procedural fairness violation?

Applicant's Written Submissions

[29] The applicant submits that the Board erred in its assessment of credibility and denied her procedural fairness.

[30] On the question of credibility, the applicant submits that the applicable standard of review is reasonableness.

[31] The applicant submits that the Gender Guidelines recognize that women fleeing gender-based persecution will face special problems in demonstrating that their claims are credible and trustworthy. Further, the United Nations High Commissioner for Refugees (UNHCR) Guidelines, referenced in the Gender Guidelines, state that it may be necessary to use gender-sensitive techniques in eliciting testimony from women applicants. The applicant submits that her case, which includes personal and humiliating stories of long-term sexual abuse, anal rape and forced prostitution, falls squarely within the types of cases referred to in the Gender Guidelines and in the UNHCR Guidelines. The applicant also submits that the unchallenged evidence that she showed symptoms of complex PTSD heightened the requirement of sensitive handling by the Board.

[32] The applicant notes that it is not sufficient for a board to state that it considered the Gender Guidelines; they must be properly applied in the hearing and decision making process. The applicant highlights various examples that she submits shows that the Board failed to apply the Gender Guidelines.

[33] First, the applicant notes the Board's treatment of her repeated returns to her husband and her successful independent travel abroad. The applicant submits that the Board's findings on these facts suggest that it assumed that if the applicant was capable of finding an airport loading gate, she would also be capable of leaving her abusive husband and claiming refugee status when abroad. The applicant submits that there is extensive jurisprudence overturning decisions in which negative inferences have been drawn from the fact that a victim did not leave her abuser earlier. The applicant submits that the Board's finding that she did not subjectively fear her husband because she returned to him applies a reasonable man standard and is based on stereotypes about abused women

and how they should act. This egregious error is not in accordance with understandings of the battered wife syndrome and casts a cloud over the entire decision.

[34] Similarly, the applicant submits that the Board failed to apply the Gender Guidelines when it drew a negative credibility inference from the fact that the applicant informed the woman psychologist, but not Mr. Khan, of her husband's forced prostitution. In this way, the Board gave little consideration to the shame that the applicant would feel in revealing this information to Mr. Khan who was like a son to her. The applicant submits that this ignores the Gender Guidelines that clearly provide that people who have suffered sexual abuse are often reluctant to testify.

[35] The applicant also submits that the Board evinced no sensitivity to her situation when it drew a negative credibility finding from the lack of corroborating evidence. The Board did not consider the likely humiliating and degrading effect on the applicant should she have to request letters describing the rapes from friends and neighbours. Further, the applicant submits that this Court has repeatedly held that corroborating evidence is not a requirement for a successful refugee claim.

[36] The applicant submits that the Board also relied on assumptions based on its own cultural background, rather than on the applicant's background. For example, the applicant notes that: the Board found it implausible that the applicant's mother would tell her to run away or commit suicide if the abuse was true; the Board did not reference materials in the National Documentation Package on widespread honour killings, domestic violence and the shameful effect of publicly acknowledging abuse in India; and the Board did not find it likely that the applicant's daughter

would not assist her despite the applicant's testimony that her husband had threatened to kill anyone who did help her. The applicant notes that this Court has held that plausibility findings should only be made in the clearest of cases.

[37] The applicant submits that the Board also erred by impugning her credibility based on her inability to explain why other individuals, including her abusive husband, acted in irrational ways.

[38] The applicant further submits that the Board erred by not mentioning the psychological report or the PTSD diagnosis at any point in the decision. The Board did not evaluate whether the applicant's condition affected her ability to give testimony. Thus, her evidence was not evaluated from the lens of her psychological make-up. This was a reviewable error.

[39] The applicant also submits that the Board erred in drawing a negative inference on her failure to claim in the United States and her delay in claiming in Canada. In so doing, the Board ignored existing jurisprudence requiring different treatment of delay in domestic abuse cases.

[40] Finally on the issue of credibility, the applicant submits that the Board's conclusion was unclear as to what inconsistencies or implausibilities led to its final determination. The applicant submits that many of the implausibilities suggested in the decision are based on stereotypes and assumptions that taint the final conclusion.

[41] The applicant also submits that there was a breach of procedural fairness in this case. Such questions are reviewable on a standard of correctness. The applicant submits that given the

importance to refugee claimants of the issues at stake in a refugee hearing, more than a minimal duty of fairness is owed.

[42] The applicant refers to the chain of events pertaining to Mr. Khan's supplemental submissions. The applicant highlights the Board's lack of response to Mr. Khan's first request for a time extension. The applicant also notes that Ms. Yu first contacted Mr. Khan to inquire about the submissions on August 5, 2011. This supports Mr. Khan's understanding that the submissions were due by midnight on August 4, 2011, not before August 4, 2011 as initially contemplated in the Board's letter dated August 2, 2011. Further, if Ms. Yu misled Mr. Khan, she bears the responsibility of his reliance on her advice.

[43] By failing to take Mr. Khan's additional submissions into account, the applicant submits that there was a breach of procedural fairness requiring the overturning of the decision. The applicant notes that there was sufficient proof, in the form of Mr. Khan's affidavit and a fax confirmation sheet, to indicate that the documents were filed before midnight on August 4, 2011. This evidence was uncontested by Ms. Yu and the respondent. Mr. Khan's testimony should therefore be presumed true. Further, these submissions were extremely relevant as they emphasized the applicant's delay in claiming based on her lack of knowledge, the battered wife syndrome, the psychological report and the Gender Guidelines. They also referred to judicial guidance on how to evaluate credibility in the context of a domestic violence claim.

Respondent's Written Submissions

[44] The respondent submits that the Board reasonably found the applicant not credible. The respondent notes that the standard of review of questions of credibility is reasonableness. The respondent submits that as the Board is in the best position to assess the merits of the claim, it is entitled to a high degree of deference. Further, where a board finds a claimant not credible with respect to a material element of her refugee claim, that claim may be rejected.

[45] The respondent notes that the Board based its credibility findings on multiple implausibilities, inconsistencies and omissions in her evidence. There were also contradictions in the applicant's evidence that influenced the Board's findings. The respondent submits that the Board is entitled to make reasonable findings based on implausibility, common sense and rationality and to find that a story lacks credibility where crucial information is missing from an applicant's PIF without an acceptable or sufficient explanation.

[46] The respondent also submits that in assessing subjective fear, the Board was entitled to take into account the applicant's delay in claiming asylum in the U.S. and in claiming refugee protection after arriving in Canada.

[47] The respondent submits that the Board did not ignore the evidence or fail to apply the Gender Guidelines. The Board is presumed to have considered all the evidence and has the discretion in weighing it. The respondent submits that the Board's decision clearly indicates that it considered the psychological report, which it referenced a number of times in coming to its

conclusions on the applicant's credibility. Further, the respondent submits that the Board's negative credibility inferences did not result from the applicant's difficulty in communicating her evidence but rather from her inability to provide plausible explanations for contradictions in her story. Such deficiencies are not cured through application of the Gender Guidelines.

[48] In summary, the respondent submits that the Board correctly applied the Gender Guidelines in coming to its negative credibility finding. The respondent submits that the applicant does not raise errors in the Board's decision, but rather questions the weight that it assigned to the evidence before it. Reweighing of the evidence is not a valid basis for judicial review of the Board's decision.

[49] The respondent also submits that there was no breach of procedural fairness. The respondent notes that Mr. Khan failed to provide his submissions before the deadline set out by the Board and therefore, the Board did not consider them before it entered into deliberations. The respondent submits that Mr. Khan was notified on two occasions; once in writing and once in his conversation with Ms. Yu, that submissions needed to be received prior to August 4, 2011 when the Board would be entering into deliberations. The respondent submits that there was no evidence that anyone at the Refugee Protection Division instructed Mr. Khan that his submissions received by the end of day on August 4, 2011 would be accepted. As counsel, Mr. Khan's conduct should not be separated from that of his client except in extraordinary circumstances. No such circumstances arose in this case. Thus, the respondent submits that the applicant has not demonstrated that the Board committed a procedural fairness violation.

Analysis and Decision

[50] Issue 1

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[51] It is established jurisprudence that credibility findings, described as the “heartland of the Board’s jurisdiction”, are essentially pure findings of fact that are reviewable on a reasonableness standard (see *Lubana v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116, [2003] FCJ No 162 at paragraph 7; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at paragraph 46; and *Demirtas v Canada (Minister of Citizenship and Immigration)*, 2011 FC 584, [2011] FCJ No 786 at paragraph 23). The Board’s consideration of the Gender Guidelines in the context of an assessment of credibility is also reviewable on a standard of reasonableness (see *Higbogun v Canada (Minister of Citizenship and Immigration)*, 2010 FC 445, [2010] FCJ No 516 at paragraph 22; and *Torales Bolanos v Canada (Minister of Citizenship and Immigration)*, 2011 FC 388, [2011] FCJ No 497 at paragraph 16).

[52] Similarly, the weighing of evidence and the interpretation and assessment of evidence are reviewable on a standard of reasonableness (see *Oluwafemi v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1045, [2009] FCJ No 1286 at paragraph 38).

[53] In reviewing the Board's decision on a standard of reasonableness, the Court should not intervene unless the Board came to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 47; and *Khosa* above, at paragraph 59). It is not up to a reviewing Court to substitute its own view of a preferable outcome, nor is it the function of the reviewing Court to reweigh the evidence (see *Khosa* above, at paragraphs 59 and 61).

[54] Conversely, the appropriate standard of review for issues of procedural fairness is correctness (see *Wang v Canada (Minister of Citizenship and Immigration)*, 2008 FC 798, [2008] FCJ No 995 at paragraph 13; and *Khosa* above, at paragraph 43). No deference is owed to the Board on these issues (see *Dunsmuir* above, at paragraph 50).

[55] **Issue 2**

Did the Board err in its credibility analysis?

It is well established that credibility findings demand a high level of judicial deference and should only be overturned in the clearest of cases (see *Khan v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1330, [2011] FCJ No 1633 at paragraph 30). The Court should generally not substitute its opinion unless it finds that the decision was based on erroneous findings of fact made in either a perverse or capricious manner or without regard for the material before it (see *Bobic v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1488, [2004] FCJ No 1869 at paragraph 3).

[56] In this case, the applicant submits that the Board erred in its credibility analysis by not properly applying the Gender Guidelines and by not evaluating the psychological report and the applicant's PTSD diagnosis in assessing credibility.

[57] The Gender Guidelines are intended to address situations where women applicants exhibit a pattern of symptoms referred to as battered women syndrome and are thereby reluctant to testify (see *Borisovna Abbasova v Canada (Minister of Citizenship and Immigration)*, 2011 FC 43, [2011] FCJ No 40 paragraph 54).

[58] At the outset of its decision, the Board stated that it considered the Gender Guidelines both at the hearing and in its decision making process. It is established jurisprudence that merely making such a statement is insufficient: “[t]he sensitivity that the RPD must show toward women who are persecuted because of their gender must manifest itself in more than merely a formal and ritual reference to the Guidelines” (see *Vargas v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1347, [2008] FCJ No 1706 at paragraph 15).

[59] Boards must exhibit a special knowledge of gender persecution and apply this knowledge in an understanding and sensitive manner (see *Keleta v Canada (Minister of Citizenship and Immigration)*, 2005 FC 56, [2005] FCJ No 54 at paragraph 14). They should “consider the evidence from the perspective of the teller, and, in particular, give careful consideration to what conduct might be expected of a woman living under the violent conditions described” (see *Griffith v Canada (Minister of Citizenship and Immigration)*, 171 FTR 240, [1999] FCJ No 1142 at paragraph 3).

Further, if an applicant is not believed, the Board must give reasons that are responsive to what is known about women suffering from domestic violence (see *Griffith* above, at paragraph 25).

[60] In this case, the Board acknowledged the applicant's evidence, including her testimony and the psychological report. However, it identified contradictions, inconsistencies and omissions in the evidence for which it found the applicant provided unsatisfactory explanations. As explained by Madam Justice Judith Snider in *Abdul v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 260, [2003] FCJ No 352 at paragraph 15:

The Board is entitled to make reasonable findings based on implausibilities, common sense and rationality, and is entitled to reject uncontradicted evidence if not consistent with the probabilities affecting the case as a whole (*Aguebor, supra; Shahamati v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 415 (C.A.) (QL)). While the Board may reject even uncontradicted testimony, the Board cannot ignore evidence explaining apparent inconsistencies and then make an adverse credibility finding (*Owusu-Ansah v. Canada (Minister of Employment and Immigration)*, [1989] F.C.J. No. 442 (C.A.) (QL)). [...]

[61] In this case, the Board highlighted the following contradictions, inconsistencies and omissions in the evidence:

- Contradictions between the psychologist's report and the applicant's testimony on the contact she maintained with her daughter;
- Lack of evidence from her daughter, mother, friends and neighbours in her village in India that corroborated the abuse;
- Late disclosure and lack of corroborating evidence from her mother on the forced prostitution;
- Repeated independent travel abroad that rendered her alleged vulnerability implausible;

- Lack of reason for her husband allowing her to travel to North America in 2001;
- Support provided by her mother and daughter when she travelled to England on three separate occasions;
- Failure to claim asylum on all her trips abroad between 1999 and 2007;
- Repeated reavilment to her abusive husband even though support was available to her from her mother and daughter in England;
- Failure to seek asylum in the United States, particularly in light of the free assistance she received from her neighbour in India to travel there and from his acquaintance in the United States when she arrived; and
- Delay in claiming in Canada in light of her reason for coming to Canada to seek refugee protection.

[62] The Board drew negative inferences from all the above and ultimately rendered its negative credibility finding based on these collective contradictions, inconsistencies and omissions.

[63] Standing alone, some of these contradictions, inconsistencies and omissions suggest a somewhat strict objective view of what someone in an abusive situation should do. However, on judicial review, isolated sections of the decision should not be scrutinized; rather, the Court must consider whether the decision as a whole supports a negative credibility finding (see *Guarin Caicedo v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1092, [2010] FCJ No 1365 at paragraph 30).

[64] In this case, I find that the majority of the Board's findings result from an assessment of the facts, rather than from a reflection of insensitivity to the applicant's situation or a misunderstanding of the dynamics of abusive relationships. In addition, I do not find the Board's findings immaterial or non-existent. Instead, I find that they arise from the evidence on the record.

[65] Perhaps most notable is the applicant's repeat trips abroad at which time she received support from both family and neighbours. The Board highlighted the help that the applicant's mother provided (including paying for her flights, having her as a guest in her home and giving her money), her close relationship with her daughter (as clearly stated in the psychologist report and as evidenced through her trips to England) and the help from her neighbour in India (including financial aid to travel to the United States and support from the neighbour's acquaintance in the United States). The Board relied heavily on the availability of this support in drawing negative inferences on the applicant's credibility.

[66] Where there are concerns with an applicant's credibility, boards may rely on the lack of documentary evidence corroborating that applicant's claims in drawing negative credibility inferences (see *Richards v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1391, [2011] FCJ No 1697 at paragraph 23). The requirement to submit corroborating documentary evidence is pertinent where it concerns critical aspects of an applicant's claim (see *Guzun v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1324, [2011] FCJ No 1615 at paragraph 20).

[67] In this case, the evidence suggested that both the applicant's mother and her neighbour in India knew of the abuse. In addition, they have both offered her help: her mother when she visited

her in England and her neighbour when he helped her leave India for the United States. As this abuse lay at the core of the applicant's claim, I do not find that the Board erred in drawing negative inferences from the lack of corroborating evidence from the applicant's mother and the neighbour who helped her leave India.

[68] The Board also found that there was no logical explanation for why the applicant did not seek asylum in the United States and delayed in filing her refugee claim in Canada. A failure to seek asylum in a signatory country, through which an applicant travels before arriving in Canada, is a relevant consideration in rejecting a claim (see *Modernell Gilgorri v Canada (Minister of Citizenship and Immigration)*, 2006 FC 559, [2006] FCJ No 701 at paragraphs 24 to 27). The Board inquired about this at the hearing:

Q: Why did you not seek refugee protection when you were in the United States?

A: Nobody told me. I was not aware of the system and I'm illiterate.

Q: Did you tell your neighbour why you were going to the United – It was your neighbour that helped you get to the United States. Is that correct?

A: Yes.

Q: Did you tell your neighbour why you were going to the United States?

A: Like, it was him who volunteered this help because he – he did see or he witnessed the abuse that I was undergoing. So he was – he voluntarily helped me.

Q: All right. So he – he helped you get the visa. Did he not give you any assistance in telling you what to do once you got there?

A: He – he did – that neighbour did help me to come to America and he also told me that he has somebody or some associate who will be

able to help me. And that associate or person whom he knew, the help that he gave me was to send me here.

[69] The Board ultimately found that had this neighbour helped the applicant come to the United States, he, or his acquaintance there, would also have logically helped her seek asylum. Further, even if these people did not consider that she could seek asylum in the United States, the Board deemed it illogical that they would help her come to Canada without ensuring that she knew what to do on her arrival here. I do not find that the Board failed to apply the Gender Guidelines in coming to this conclusion. Rather, I find that it was a reasonable finding based on the evidence before him.

[70] In summary, I do not find that the Board failed to apply the Gender Guidelines in assessing the applicant's claim. Nor do I find that the PTSD symptoms described in the psychologist report would have greatly impacted the specific contradictions, inconsistencies and omissions that the Board identified in the applicant's evidence. I find that the Board's finding on credibility was within the range of possible and acceptable outcomes based on the evidence before it.

[71] **Issue 3**

Did the Board commit a procedural fairness violation?

The applicant also submits that there was a breach of procedural fairness in this case. This breach allegedly arose from the Board's lack of consideration of Mr. Khan's additional submissions filed at 9:00 p.m. on August 4, 2011.

[72] The evaluation of this issue necessitates a review of the timeline of events.

[73] The applicant's refugee hearing was held on Monday, June 27, 2011. At the end of the hearing, Mr. Khan requested additional time to make written submissions. The Board provided Mr. Khan with over three weeks to file those submissions, setting a due date of Friday, July 22, 2011.

[74] On Thursday, July 21, 2011, the day before the initial due date, Mr. Khan requested an extension. Although Mr. Khan submits that he did not receive any response to this request, the Board's decision indicates that it was approved with a new due date set for Saturday, July 30, 2011.

[75] With regards to Mr. Khan's allegation, it is notable that although he allegedly did not receive a response to his extension request, he did not file additional submissions by the initial due date of July 22, 2011.

[76] Nevertheless, on Friday, July 29, 2011, the day before the second due date, Mr. Khan requested another extension until August 11, 2011. On Tuesday, August 2, 2011, the Board refused this request. It did however notify Mr. Khan that it would be entering into deliberations on Thursday, August 4, 2011 and would at that time consider any submissions filed before August 4, 2011. On receipt of this letter, Mr. Khan indicated that he contacted the RPD Registry Office in Vancouver on August 2, 2011. Ms. Yu, the case management officer indicated that she had been instructed by the Board that unless submissions were received by August 4, 2011, they would not be considered. However, Mr. Khan indicated in his sworn affidavit that he understood from their conversation that it would be acceptable for him to file his additional submissions by midnight on August 4, 2011.

[77] Mr. Khan did ultimately file his submissions before midnight on August 4, 2011. However, aside from his sworn affidavit, there was no evidence that the deadline for receipt of submissions before August 4, 2011 had been extended. Without any such evidence and in light of the repeated extensions granted (from July 22nd to July 30th and finally to August 3rd), I do not find that there was a breach of procedural fairness.

[78] It is important to recall that many refugee claims are before the Immigration and Refugee Board. To ensure fairness to all claimants, consideration must be made to the Immigration and Refugee Board's timelines and efforts of expediency. In this case, I find that the Board struck a fair balance between allowing the applicant to present her case and minimizing backlogs in the refugee claim process. As such, I do not find that the Board's failure to consider Mr. Khan's additional submissions, filed on the evening of August 4, 2011, after the extended due date, was a breach of procedural fairness.

[79] In summary, I find that the Board came to a reasonable finding on credibility based on the evidence before it and in accordance with the Gender Guidelines. In addition, I do not find that there was any breach of procedural fairness. This application for judicial review should therefore be dismissed.

[80] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

“John A. O’Keefe”

Judge

ANNEXRelevant Statutory Provisions*Immigration and Refugee Protection Act, SC 2001, c 27*

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.

72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.

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

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) 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.

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 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

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

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

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

(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 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.

(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 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.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5813-11

STYLE OF CAUSE: DARSHAN KAUR
- and -
THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: March 21, 2012

**REASONS FOR JUDGMENT
AND JUDGMENT OF:** O'KEEFE J.

DATED: September 12, 2012

APPEARANCES:

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