Federal Court  Cour fédérale

Date: 20130605

Docket: IMM-7016-12

Citation: 2013 FC 601

Ottawa, Ontario, June 5, 2013

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

BEVERLY NDJIZERA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, RCS 2001, c 27 [Act], of a decision made by a member of the Immigration and Refugee Board [Board], dated May 14, 2012, whereby the Board decided that the applicant was neither a Convention refugee nor a person in need of protection pursuant to section 96 and subsection 97(1) of the Act. The main issues before the Board were the applicant's credibility and lack of corroborating evidence. For the reasons that follow, the Court is of the view that its intervention is warranted in this case.

Background

[2] The applicant, Beverly Ndjizera, is a 26-year-old Namibian woman of Herero ethnicity. She alleges a well-founded fear of persecution and a risk to her life, a risk of torture and a risk of unusual treatment or punishment at the hands of her stepfather, who has abused her and who has pledged to marry her against her will.

[3] In her Personal Information Form [PIF], the applicant explains that in December 2008, she visited her mother and stepfather and learned that her stepfather wished to take her as his second wife, a practice permitted in the Herero culture. After the applicant expressed her opposition to the marriage, her stepfather became violent and told her she had no say in the matter.

[4] The applicant then decided with her boyfriend that she would get pregnant in order to make her stepfather lose interest in her. She gave birth to a son on December 31, 2009. She returned to her parent's home shortly after she gave birth, only to realize her stepfather had not changed his mind. He got angry when she maintained her refusal. He locked her inside the house and beat her with an electric cattle prod, which left scars on her legs. The applicant managed to escape, barefoot. She injured her feet in the process and required medical attention. Before she escaped, her stepfather told her that he would get her to marry him no matter where she went.

[5] The applicant made a complaint before the traditional council. She was told they could do nothing, as polygamous marriage is allowed in the Herero culture. She then went to the Okatjoru Police Station to seek protection and received the same response.

[6] The applicant fled Namibia on January 16, 2011 and arrived in Canada on January 17, 2011. She claimed refugee protection on January 19, 2011.

[7] In support of her claim, she submitted letters from her mother and aunt and a sworn declaration from her boyfriend. All three documents confirmed the applicant's story and indicated that her stepfather was still looking for her. The applicant also submitted a letter from her boyfriend, which indicated that the hospital had refused to provide him with a medical report because he and the applicant were not married.

[8] At the hearing before the Board, the applicant testified that the police had not opened a file following her complaint and that she was unable to obtain a written declaration from the traditional council because her stepfather was a member of the council and would be the one who would have to "put a stamp on it." When asked why this information was not included in her PIF, the applicant answered that she did not know who would read her PIF and whether it was safe to include this information.

[9] The applicant also testified at the hearing that she had been seen by a counsellor and a psychiatrist at the YMCA shelter where she was staying, but that she was unable to obtain a report from them. She also testified that she had seen another doctor in Canada who had prescribed sleeping pills to her, but that the doctor's office was closed when she went to get a report.

The Impugned Decision

[10] The Board rejected the applicant's claim on the basis that she had not provided sufficient credible evidence to support her claim.

[11] In particular, the Board took issue with the fact that the applicant provided no corroborating evidence in the nature of a police report, medical report, or letter from the traditional council. The Board found it implausible that the police in Namibia would not open a file on the applicant's complaint. The Board also found the applicant's explanation for why she could not obtain a letter from the council was inadequate, considering that the applicant had omitted to mention the explanation in her PIF.

[12] With regards to the lack of a medical report from the applicant's doctor in Canada who had prescribed her sleeping pills, the Board found that the applicant's explanation that the doctor's office was closed when she went to get a report was inadequate for a claimant who was represented by legal counsel. The Board also found that the applicant had not established why she was unable to authorize her hospital in Namibia to forward her medical record to her.

[13] Finally, the Board rejected the declarations of the applicant's aunt, mother and boyfriend, as they were not sufficiently independent or objective.

The Parties' Positions

The Applicant

[14] The applicant argues that the Board applied the wrong standard of proof with regard to her section 96 claim. She submits that the Board wrongly considered whether she had established on a

"balance of probabilities" that she would face persecution. The applicant explains that the applicable test is a less stringent one, described in the jurisprudence as a "reasonable chance", "good grounds" or "more than a mere possibility" of persecution (*Adjei v Canada (Minister of Employment and Immigration)*, [1989] 2 FC 680 (FCA) [*Adjei*]; *Ponniah v Canada (Minister of Employment and Immigration)*, [1991] FCJ No 359 (FCA); *Matthews v Canada (Minister of Citizenship and Immigration)*, 2012 FC 535; *Mugadza v Canada (Minister of Citizenship and Immigration)*, 2008 FC 122 [*Mugadza*]; *Ospina v Canada (Minister of Citizenship and Immigration)*, 2011 FC 681 [*Ospina*]; *Cordova v Canada (Minister of Citizenship and Immigration)*, 2009 FC 309; and *Chichmanov v Canada (Minister of Employment and Immigration)*, [1992] FCJ No 832 (FCA)).

[15] The applicant also raises three arguments concerning the Board's assessment of her credibility. First, she submits that the Board erred in drawing an adverse credibility finding from the lack of corroborating evidence from authorities and doctors, as it has been held that the lack of corroborating evidence cannot lead to an adverse credibility finding in the absence of existing credibility concerns (*Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 (FCA); *Sadeghi-Pari v Canada (Minister of Citizenship and Immigration)*, 2004 FC 282; *Mejia v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1091; *Ayala v Canada (Minister of Citizenship and Immigration)*, 2011 FC 611; and *Ali v Canada (Minister of Citizenship and Immigration)*, 2012 FC 259).

[16] Second, the applicant submits that the Board committed a reviewable error when it assumed, without explanation or reference to the documentary evidence, that on a balance of probabilities, police in Namibia would open a file and take notes when the applicant made a complaint about her

stepfather (*Leung v Canada (Minister of Employment and Immigration)*, [1994] FCJ 774). Similarly, the Board erred in considering, without an evidentiary basis, that medical record from the hospital in Namibia could have been obtained if the applicant had provided "a signed authorization or other identity material."

[17] Third, the applicant submits that the Board erred in rejecting the declarations from the her mother, aunt and boyfriend on the sole basis that the authors have a close relationship with her (*Kimbudi v Canada (Minister of Employment and Immigration)*, [1982] FCJ 8 (FCA); *Woldegabriel v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1223; and *Kaburia v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 516).

The Respondent

[18] It is the respondent's position that the Board did not apply the "balance of probabilities" test with regards to the alleged risk of persecution. The respondent submits that the applicant is confusing the standard of proof for factual findings, which is the balance of probabilities, with the legal test for a well-founded fear of persecution, which amounts to a "serious possibility" of persecution. To succeed in a section 96 claim, a claimant must establish "on the balance of probabilities" that he or she has a well-founded fear of persecution, the latter expression being understood as encompassing the "serious possibility" legal test (*Lopez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1156 [*Lopez*]; *Saverimuttu v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1021; and *Li v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1).

[19] With regards to the Board's credibility findings, the respondent submits that the Board first found that the applicant lacked credibility on the basis that she omitted to mention in her PIF that her stepfather was a member of the traditional council. It was then open to the Board to find the lack of corroborating evidence significant in assessing her credibility (*Elazi v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 212; *Luzi v Canada (Minister of Citizenship and Immigration)*, 2004 FC 916; *Amarapala v Canada (Minister of Citizenship and Immigration)*, 2004 FC 12; *Syed v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 357; *Bin v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1246; *Nallanathan v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 326; and *Nadarajalingam v Canada (Minister of Citizenship and Immigration)*, [2001] FCJ No 730).

[20] Finally, the respondent argues that this Court should not intervene in the Board's decision not to give any weight to the documents provided by the applicant's family and boyfriend, as it is within the jurisdiction of the Board, as the trier of fact, to determine questions of credibility and weigh the evidence (*Brar v Canada (Minister of Employment and Immigration)*, [1986] FCJ 346 (FCA); *Castro v Canada (Minister of Employment and Immigration)*, [1993] FCJ 787).

Issues

[21] This application for judicial review raises two issues:

1. Did the Board apply the wrong test for determining a well-founded fear of persecution?
2. Did the Board commit a reviewable error in its assessment of the applicant's credibility?

Applicable Standard of Review

[22] The first issue in this case is a pure question of law, which is reviewable on the standard of correctness (*Ospina*, above, at para 20; *Mugadza*, above, at para 10; and *Rahman v Canada (Minister of Citizenship and Immigration)*, 2009 FC 768 at para 36). On the other hand, credibility findings and the weighing of evidence by the Board are questions of fact to be reviewed against the standard of reasonableness (*Aguebor v (Canada) Minister of Employment and Immigration*, [1993] FCJ 732 (FCA) at para 4; *NOO v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1045 at para 38).

[23] The reasonableness standard calls for the consideration of "the existence of justification, transparency and intelligibility within the decision-making process" as well as "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

Analysis

Did the Board apply the wrong test for determining a well-founded fear of persecution?

[24] The applicant directs the attention of the Court to the two following paragraphs from the Board's reasons:

> 6) …Based on the evidence and submissions before me it has not been established on the balance of probabilities that you have a well-founded fear of persecution in Namibia for any Convention reason…
>
> 24) Based on the foregoing analysis and having reviewed the evidence properly before me and the submissions, and having considered closely the Chairperson's Gender Guidelines, I conclude that it has not been established that, on a balance of probabilities, you have a well-founded fear of persecution in Namibia for any Convention reason…

[25] The issue raised by the applicant has been addressed on many occasions by this Court. It is trite law that in order to succeed with a section 96 claim a claimant must demonstrate a "serious possibility" of persecution, as opposed to a possibility of persecution on the "balance of probabilities" (*Ospina*, above; *Mugadza*, above; and *Lopez*, above). However, the applicant has not convinced me that the Board misconceived the applicable legal test.

[26] I agree with the respondent that a distinction must be made between the applicable standard of proof and the applicable legal test. Although the legal test is that of a "serious possibility" or a "reasonable chance" of persecution, a claimant must still establish his or her claim on the balance of probabilities. As Justice Mosley held in *Lopez*, above, at para 20, which is cited by the respondent:

> To establish a well-founded fear of persecution a claimant must prove that they have (1) a subjective fear of persecution; and (2) that this fear is well-founded in an objective sense; *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, [1993] S.C.J. No. 74 at para. 47 (QL) [*Ward*]. The applicant must demonstrate on a balance of probabilities that they meet this test: *Saverimuttu v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1021, [2002] F.C.J. No. 1329, at para. 18 (QL). That being said, the applicant does not have to demonstrate that the persecution would be more likely than not, as noted by the Court of Appeal in *Adjei v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 680 (F.C.A.): "there need not be more than a 50% chance (i.e., a probability), and ... there must be more than a minimal possibility. We believe this can also be expressed as a "reasonable" or even a "serious possibility", as opposed to a mere possibility." (emphasis added)
>
> See also *Adjei*, above, at para 5.

[27] The case at bar can be easily distinguished from the cases cited by the applicant where this Court found that the Board misapplied the legal test. In *Ospina*, above, the Board had written:

> Overall, I find that there is no objective basis to this claim as the evidence before me does not lead me to find, on a balance of probabilities, that the claimant would be pursued by the agent of persecution if he returns to Colombia.

[28] Similarly, in *Mugadza*, above, the Board had written:

> The panel rejected the claimant's credibility in regard to material aspects of his claim and was not persuaded, on a balance of probabilities, that he was targeted by the authorities of his country or that he will be personally targeted in the future if he returns.

[29] It was apparent in both cases that the Board had required evidence that the applicant would be persecuted on the balance of probabilities. In the case at bar, the Board correctly required that it be established, on a balance of probabilities, that the applicant has a well-founded fear of persecution. It is true that the Board never specifically referred to the "serious possibility" test. However, when reading the reasons as a whole, I am satisfied that the Board applied that test when it referred to a "well-founded fear of persecution."

[30] However, the Board's credibility findings contain reviewable errors that justify the Court's intervention.

Did the Board commit a reviewable error in its assessment of the applicant's credibility?

[31] In my view, the Board made a reviewable error when it rejected the evidence emanating from the applicant's mother, aunt and boyfriend for the sole reason that the applicant has a close relationship with these persons. The following paragraph contains the Board's only reference to these declarations:

> 22) You supplied a document called a Sworn Statement from you boyfriend in Namibia, a declaration from you boyfriend, a letter from your aunt and a letter from your mother. In my view the documents

> you have supplied to help establish crucial allegations in your claim are not sufficiently independent or objective and I find that even if you have had varying degrees of closeness with some of these people in your life, on the whole the sources of these documents are highly proximate to you by relationship, whether family relationship or intimate relationship in the case of you boyfriend.

[32] Recently, albeit in the context of an application for permanent residence, Justice Kane wrote in *Gilani v Canada (Minister of Citizenship and Immigration)*, 2013 FC 243 at paras 26-28:

> (26) As noted by Justice de Montigny in *Ugalde*:
>
> > [26] However, jurisprudence has established that, depending on the circumstances, evidence should not be disregarded simply because it emanates from individuals connected to the persons concerned: *R v Laboucan*, 2010 SCC 12, at para 11. As counsel for the Respondent rightly notes, *Laboucan* concerned a criminal matter; however, immigration jurisprudence from this Court has established the same principle. Indeed, several immigration cases hold that giving evidence little weight because it comes from a friend or relative is an error.
> >
> > [27] For example, in *Kaburia v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 516, Justice Dawson held at paragraph 25 that, "solicitation does not per se invalidate the contents of the letter, nor does the fact that the letter was written by a relative." Likewise, Justice Phelan noted the following in *Shafi v Canada (Minister of Citizenship and Immigration)*, 2005 FC 714, at para 27:
> >
> > > The Officer gives little weight to other witnesses' affidavit evidence because it comes from a close family friend and a cousin. The Officer fails to explain from whom such evidence should come other than friends and family.
> >
> > Similarly, Justice Mactavish stated the following in *Ahmed v Canada (Minister of Citizenship and Immigration)*, 2004 FC 226, at para 31:
> >
> > > With respect to [*sic*] letter from the President of the organization, I do not understand the Board's criticism of the letter as being "self-serving", as it is

> likely that any evidence submitted by an applicant will be beneficial to his or her case, and could thus be characterized as 'self-serving'.
>
> [28] In light of this jurisprudence, and under the circumstances, I do not believe it was reasonable for the Officer to award this evidence low probative value simply because it came from the Applicants' family members. Presumably, the Officer would have preferred letters written by individuals who had no ties to the Applicants and who were not invested in the Applicants' well-being. However, it is not reasonable to expect that anyone unconnected to the Applicants would have been able to furnish this kind of evidence regarding what had happened to the Applicants in Mexico. The Applicants' family members were the individuals who observed their alleged persecution, so these family members are the people best-positioned to give evidence relating to those events. In addition, since the family members were themselves targeted after the Applicants' departure, it is appropriate that they offer first-hand descriptions of the events that they experienced. Therefore, it was unreasonable of the Officer to distrust this evidence simply because it came from individuals connected to the Applicants.
> (emphasis added)

(27) Other cases have looked at the particular circumstances and reiterated that evidence should not be discounted solely because it is self serving. An additional passage in *Ahmed*, is relevant, where Justice Mactavish applied that principle:

> [32] That said, although there are problems with the Board's findings regarding the evidentiary value of the letter in assessing the nature of Mr. Ahmed's involvement with the Anjuman Hussainia, these findings were not patently unreasonable. The Board noted that the letter was written long after the alleged incidents took place, and made no reference to any of Mr. Ahmed's accomplishments or specific responsibilities within the Anjuman organization. Further, the Board's negative credibility finding regarding Mr. Ahmed's problems with the SSP did not hinge solely on this letter. The Board questioned several aspects of his claim, including the very existence of a tailor shop, and the extent of Mr. Ahmed's involvement in the rally. In these circumstances, it was not patently unreasonable for the Board to view this letter as being of little probative value.

> (28) Similarly in *Ray v Canada (Minister of Citizenship and Immigration)*, [2006] FCJ 927, at para 39, Justice Teitelbaum stated that while it is an error to attribute little probative value on the basis that the documents are self serving, other basis may support the low probative value attributed.
>
> [emphasis added]

[33] It is significant that the declarations at issue went to the heart of the applicant's claim and corroborated much of her submissions. Although it is not this Court's role to reweigh the evidence that was before the Board, it was incumbent on the Board to provide a reasonable explanation for why it rejected the declarations, other than on the basis of the applicant's relationship with the authors of the letters provided as evidence. This is even more the case when one considers that in the Refugee Protection Division File Screening Form attached to the notice to appear before the Board, under the heading Instructions to Counsel/Claimant, the applicant was instructed to provide "Affidavits/letters from mother, siblings, boyfriend, relatives and friends" (page 39 of Certified Tribunal Record).

[34] Because of this finding, I need not address the applicant's other arguments. I note, however, that although I agree with the applicant that the lack of corroborating evidence should not lead to an adverse credibility finding in the absence of existing credibility concerns, in this case the applicant was also found to be lacking in credibility because she had failed to mention in her PIF that her father was a member of the traditional council.

[35] For all of the above reasons, the application for judicial review is granted. The Board's decision is quashed and the matter is remitted to a differently constituted panel. The parties did not suggest any question for certification and this application raises none.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted;
2. The impugned decision is quashed and the matter is remitted back for redetermination by a differently constituted panel of the Board;
3. No question is certified.

"Jocelyne Gagné"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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