Federal Court Cour fédérale

Date: 20130923

Docket: IMM-6636-12

Citation: 2013 FC 973

Ottawa, Ontario, September 23, 2013

PRESENT: The Honourable Madam Justice Gleason

BETWEEN:

ISTVANNE REZMUVES, MELISSZA REZMUVES (a minor) and ISTVAN REZMUVES (a minor) by their Litigation Guardian ISTVANNE REZMUVES

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants are all citizens of Hungary of Roma ethnicity. The adult applicant, Istvanne Rezmuves, is the mother and the other two applicants are her children. They made claims for refugee protection based on discrimination and victimization they alleged they had encountered and would in future encounter in Hungary by reason of their ethnicity.

[2] Their claims for refugee protection were joined for hearing before the Refugee Protection Division of the Immigration and Refugee Board [the RPD] with the claim of Ms. Rezmuves' now-estranged spouse. At the commencement of the hearing, counsel who then acted for the applicants requested disjoinder of the applicants' applications from that of Mr. Resmuves due to a conflict of interest which had developed between the spouses. The RPD panel member who heard the case, Edward C. Robinson [the Member], refused the motion and the case proceeded. Counsel chose to remain on the record for the applicants, and Mr. Resmuves proceeded without counsel.

[3] In a decision dated June 13, 2012, the Member rejected the applicants' and Mr. Resmuves' applications and found that Ms. Resmuves' claim to have been harassed, assaulted and raped by members of the Hungarian Guard was not credible. The Member premised this credibility determination in large part on the fact that Mr. Resmuves did not believe that the rape had occurred.

[4] The applicants argue that the Member's decision should be set aside because, among other things, he erred in refusing the motion for disjoinder, thereby violating their rights to procedural fairness, and committed a reviewable error in finding Ms. Rezmuves' claim to lack credibility. The applicants assert that the Member's treatment of Ms. Rezmuves' evidence violates the principles enshrined in IRB Guideline 4: *Women Refugee Claimants Fearing Gender-Related Persecution*, Guidelines issued by the Chairperson pursuant to section 65(3) of the *Immigration Act*, effective date: November 13, 1996 [the Gender Guidelines] and that his credibility findings are perverse because the fact that a spouse – and most especially an estranged

one – does not believe that his wife has been raped provides no basis for rejecting the wife's testimony.

[5] I agree with the applicant that the refusal to disjoin the cases resulted in a violation of the applicants' procedural fairness rights and that the Member's credibility finding was perverse. I have accordingly determined that the Member's decision must be set aside, for the reasons set out below.

Standard of Review

[6] The parties disagree as to the standard to be applied to the review of the Member's refusal to disjoin the claims; the applicants assert that the issue is one of procedural fairness to which the correctness standard applies, whereas the respondent argues that the determination involves the application by the Member of the provisions contained in the *Refugee Protection Division Rules*, SOR/2002-228 [the Rules] to the facts of the case and is therefore subject to review on the reasonableness standard.[1] Both parties concur that the reasonableness standard of review applies to the assessment of the Member's credibility determination.

[7] I agree that the reasonableness standard does apply to the credibility determination as has been firmly settled by the case law (see e.g. *Aguebor v Canada (Minister of Employment & Immigration)* (1993), 160 NR 315 at para 4, [1993] FCJ No 732 (Fed CA); *Singh v Canada (Minister of Employment & Immigration)* (1994), 169 NR 107 at para 3, [1994] FCJ No 486 (Fed

[1] The SOR/2002-228 version of the Rules was in force at the time of the decision under review. It was replaced on December 15, 2012 by *Refugee Protection Division Rules*, SOR/2012-256. The two versions are substantially similar with respect to the joinder and separation of claims.

CA); *Cetinkaya v Canada (Minister of Citizenship & Immigration)*, 2012 FC 8 at para 17, [2012] FCJ No 13 (FC) and *Rahal v Canada*, 2012 FC 319 at para 22, [2012] FCJ No 369 ("*Rahal*")). However, the deferential standard, in my view, does not apply to the Board's refusal to disjoin the claims as the refusal resulted in a denial of procedural fairness and, in the circumstances of this case, the Member is not entitled to deference in respect of his ruling on the joinder issue even if it does involve application of a provision in the Rules.

[8] The relevant provisions of the Rules provided as follows with respect to joinder and disjoinder of claims before the RPD:

Claims automatically joined **49.** (1) The Division must join the claim of a claimant to a claim made by the claimant's spouse or common-law partner, child, parent, brother, sister, grandchild or grandparent.	Jonction automatique de demandes d'asile **49.** (1) La Section joint la demande d'asile du demandeur d'asile à celle de son époux ou conjoint de fait, son enfant, son père, sa mère, son frère, sa soeur, son petit-fils, sa petite-fille, son grand-père et sa grand-mère.
Applications joined if claims joined (2) Applications to Vacate Refugee Protection or Applications to Cease Refugee Protection are joined if the claims of the protected persons were joined.	Jonction de demandes d'annulation ou de constat de perte d'asile (2) La Section joint les demandes d'annulation ou les demandes de constat de perte d'asile dans le cas où les demandes d'asile des personnes protégées étaient jointes.
Application to join **50.** (1) A party may make an application to the Division to join claims, Applications to Vacate Refugee Protection or	Demande de jonction **50.** (1) Toute partie peut demander à la Section de joindre plusieurs demandes

Applications to Cease Refugee Protection.

Application to separate

(2) A party may make an application to the Division to separate claims or Applications that are joined.

Form of application and providing application

(3) A party who makes an application to join or separate must follow rule 44, but the party is not required to give evidence in an affidavit or statutory declaration. The party must also

(*a*) provide a copy of the application to any person who will be affected by a decision of the Division on the application; and

(*b*) provide the Division with a written statement of how and when the copy of the application was provided to any affected person, together with proof that the party provided the copy to that person.

Time limit

(4) Documents provided under this rule must be received by their recipient no later than 20 days before the hearing.

Factors

(5) In deciding the application, the Division must consider any relevant factors, including

d'asile, d'annulation ou de constat de perte d'asile.

Demande de séparation

(2) Toute partie peut demander à la Section de séparer des demandes d'asile, d'annulation ou de constat de perte d'asile qui ont été jointes.

Forme et transmission de la demande

(3) La partie fait sa demande selon la règle 44, mais elle n'a pas à y joindre d'affidavit ou de déclaration solennelle. De plus, elle transmet :

a) à toute personne qui sera touchée par la décision de la Section à l'égard de la demande une copie de la demande;

b) à la Section une déclaration écrite indiquant à quel moment et de quelle façon une copie de la demande a été transmise à toute personne touchée, avec preuve de transmission à l'appui.

Délai

(4) Les documents transmis selon la présente règle doivent être reçus par leurs destinataires au plus tard vingt jours avant l'audience.

Éléments à considérer

(5) Pour statuer sur la demande, la Section prend en

(*a*) whether the claims or Applications involve similar questions of fact or law;	*a*) si des questions similaires de droit ou de fait découlent des affaires;
(*b*) whether allowing the application would promote the efficient administration of the work of the Division; and	*b*) si le fait d'accueillir la demande favoriserait l'efficacité du travail de la Section;
(*c*) whether allowing the application would likely cause an injustice.	*c*) si le fait d'accueillir la demande causerait vraisemblablement une injustice.

[9] There appears to be little authority on the issue of the standard of review applicable to a claim that the RPD erred in refusing to join or disjoin refugee claims for hearing, or, indeed, on the principles to be applied in determining whether the RPD should grant a motion for disjoinder.

[10] In *Lu v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1517, Justice Layden-Stevenson declined to rule on the standard of review issue, holding that the application in that case failed, regardless of the standard, because there was no basis in the record before her to support the claim that the applicants were relying on different factual situations. She thus found the refusal of joinder in that case to have been both reasonable and correct.

[11] In *Tamas v Canada (Minster of Citizenship and Immigration)*, 2012 FC 1316, my colleague, Justice Russell, dismissed an allegation that the Board erred in refusing a request for an adjournment and in ordering disjoinder of the wife's claim from those of the rest of her family. Justice Russell determined that the correctness standard was applicable to the review of

the RPD's decision to refuse the adjournment and order disjoinder because the claim involved an alleged violation of the applicants' procedural fairness rights. He found there had been no denial of procedural fairness in that case as the wife was not a necessary witness in the husband's claim.

[12] Apart from these two cases, the issue does not appear to have been considered in the jurisprudence.

[13] Until recently, it has been taken as trite law that claims of violation of procedural fairness by an administrative tribunal are subject to full curial review and that it is for the court to determine whether a tribunal has violated a party's procedural fairness rights; some cases qualify this type of review as review on the correctness standard (see e.g. *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50, [2008] SCJ No 9 ("*Dunsmuir*"); and *Khosa v Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12 at para 43, [2009] SCJ No 12).

[14] A recent decision of the Québec Court of Appeal, however, casts doubt on this point and holds that the deferential reasonableness standard is to be applied by a court in assessing whether a tribunal has violated a party's procedural fairness rights if what is at issue is a procedural ruling that involves the tribunal's interpretation of a provision in its constituent statute or other disposition that is closely related to its mandate and function.

[15] In *Syndicat des employés de Au dragon forgé inc. c Commission des relations de travail*, 2013 QCCA 793 [*Syndicat des employés de Au dragon forgé*], the Court of Appeal was faced with a claim by an applicant trade union that its procedural fairness rights were violated by the Québec Labour Commission in a displacement certification application because the

Commissioner refused to provide the names of certain employees the Commission found had failed to pay the membership fees to a rival trade union that was seeking to displace the applicant. This information was relevant to the applicant's position as the rival union was required to file evidence of support of over 55% of employees in the unit to be eligible to displace the applicant union as the bargaining agent. The rival union filed its membership evidence with the Commission, and the applicant union provided evidence that eight employees had failed to pay the mandatory membership fee when they signed their membership cards in the rival union. During the hearing, the Commissioner advised the parties that the Commission had determined that six employees had in fact failed to pay the required dues to join the rival union and that their cards would therefore be discounted. The applicant union requested disclosure of which cards were being rejected, but the Commissioner refused to provide the names, relying on section 36 of the *Québec Labour Code*, RSQ c C-27 [the *Labour Code*], which provides in relevant part that "the fact that a person belongs to [a union] shall not be revealed by anyone during the certification or decertification proceedings, except to the Commission […] and every […] person who becomes aware of the fact that the person belongs to [a union] is bound to secrecy".

[16] The Québec Superior Court set aside the decision of the Labour Commissioner, finding that the Commissioner had violated the *audi alteram partem* rule in refusing to disclose the requested employee names to the applicant union. On appeal, this decision was overturned, and Justice Bich, writing for the Court, held that the reasonableness standard of review was applicable to the assessment of the claimed violation of the *audi alteram partem* rule. She wrote in this regard at para 47:

> "Considering all this, I am of the view that the reasonableness standard must also apply to questions of natural justice in the context of the interpretation by an administrative tribunal of its constituent statute and also to the provisions which the tribunal must interpret and apply, as is the case here. Clearly it is unnecessary to state that an interpretation which is counter to a clear legislative provision would be unreasonable."
>
> [unofficial translation]

[17] In result, the Court of Appeal restored the decision of the Labour Commissioner, finding the refusal to disclose the names of the employees whose cards were discarded was reasonable. Subsequent jurisprudence from the Province of Québec has also applied the reasonableness standard to assessment of claims of violation of procedural fairness that are tied to a tribunal's procedural rulings made under the legislation or regulations that apply to the tribunal (see e.g. *Desrochers c Centrale des syndicats du Québec*, 2013 QCCQ 6259; and *Aubé c Lebel*, 2013 QCCQ 6531).

[18] In my view, the decision of the Québec Court of Appeal in *Syndicat des employés de Au dragon forgé* does not require that the reasonableness standard be applied to assess the claimed violation of procedural fairness made by the Member in this case. In the first place, the decision does not constitute binding authority for this Court, whereas the decisions from the Supreme Court of Canada, indicating that the correctness standard applies to claimed violations of procedural fairness, are binding on me. Secondly, and more fundamentally, there is an important distinction between the legislative provision considered in *Syndicat des employés de Au dragon forgé* and the provisions of the Rules that the Member applied in the present case.

[19] In this regard, the Québec *Labour Code* circumscribes the scope of permissible disclosure of otherwise relevant information and thus limits parties' procedural fairness rights in respect of such information. It is well-settled that common law procedural fairness rights may be limited by statute (so long as there is no violation of a party's constitutional rights under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11) (see e.g. *Innisfil (Township) v Vespra (Township)*, [1981] 2 SCR 145 at 171-72 [*Innisfil*]; *Telecommunications Workers Union v. Canada (Radio-television and Telecommunications Commission)*, [1995] 2 SCR 781 at para 21, 125 DLR (4th) 471; *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52 at paras 19-21, [2001] 2 SCR 781; and *Singh v Canada (Minister of Employment and Immigration)*, [1985] 1 SCR 177 at para 33, 17 DLR (4th) 422). And, as Justice Bich notes, a decision made in violation of a clear legislative provision is unreasonable. *Syndicat des employés de Au dragon forgé* can therefore be read as a case where the content of parties' procedural fairness rights were fixed by statute and the tribunal's interpretation of that statute was subject to reasonableness review, as is normally the case when a tribunal interprets a provision in its constituent statute (*Dunsmuir* at para 54; *Smith v Alliance Pipeline Ltd*, 2011 SCC 7 at para 28, [2011] 1 SCR 160; and *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 30, [2011] 3 SCR 654).

[20] Sections 49 and 50 of the Rules, on the other hand, do not in any way define the scope of the procedural fairness rights that a party before the RPD enjoys at common law. Rather, paragraph 50(c) of the Rules merely requires the RPD to determine whether providing for joinder

or disjoinder would "likely cause an injustice", which does not circumscribe the rights a party would otherwise enjoy to procedural fairness as such rights exist to prevent injustice.

[21] Thus, in my view, the Member is not entitled to deference in respect of his decision to refuse the motion for disjoinder. The question for determination by me is therefore whether in refusing the motion the Member violated the applicants' procedural fairness rights and not whether he behaved reasonably.

Was there a denial of procedural fairness?

[22] As noted, counsel who first represented the applicants was acting for both the applicants and Mr. Rezmuves when she initially appeared before the RPD. At the outset of the hearing, she renewed a request she had previously made in writing for disjoinder of the cases and told the Member that a conflict of interest had developed between her respective clients such that she could not continue to act for all of them. The Member asked her to provide details of what the conflict of interest involved and counsel indicated that she could not do so without violating solicitor-client privilege. The Member then refused the request for disjoinder, stating that he needed more information or, as he put it, more "meat", in respect of the request, but as it was not forthcoming, the request would be refused. He further ruled that the case would nonetheless proceed that day and gave counsel the option of selecting which client she wished to represent. Counsel decided she would continue to act for Ms. Resmuves and the children (for whom Ms. Resmuves was designated as representative as they were minors).

[23] The Personal Information Form that Ms. Resmuves filed as well as her testimony before the Member revealed that the key incidents which led her to flee Hungary involved sexual assault and an incident of gang-rape that she alleged was committed by members of the Hungarian Guard, who operated openly in her village. Her husband relied on additional incidents of alleged persecution in support of his claim for protection.

[24] As in the normal course, the Member conducted the hearing in an inquisitorial fashion and questioned both Ms. Resmuves and her spouse. Neither was provided the opportunity to cross-examine the other. During the course of his questioning of Mr. Resmuves, the Member asked him if he loved his family and if he believed that his wife had been raped. Mr. Resmuves replied that he did still love his family and indicated that he did not believe that his wife had been raped. The Member also questioned Ms. Resmuves as to whether her husband believed that she had been raped and she confirmed that he did not believe her.

[25] In his decision, the Member stated as follows:

> If the female claimant was specially targeted by the Hungarian Guards who are also police officers and on two prior occasions was sexually assaulted (they forced her on to a wall, tried to kiss her and touched her inappropriately, etc) by these men and as she said she 'protested' against what they were doing to her, but more importantly she told her husband about it 'and he knew it was real', but when she was actually abducted and raped by these same individuals he didn't believe her. Instead he believed they had 'a consensual relationship'. It does not make sense to me that if his wife told him the bad things these men had done to her previously, and he knew it was real but he did nothing about it, but when she is subsequently raped, he doesn't believe she is raped and claimed that she had consensual sex.
>
> I therefore find on a balance of probabilities that the female claimant was not targeted by any Hungarian Guards who are also

> police officers and was raped. She, as her husband believed, had a consensual relationship with someone which brought a serious strain on their marriage. He seems to love his wife and family and wants to keep his family together. For example, when he was asked 'Do you love your family,' he replied, 'For me, my family is everything.' I believe that the claimant loves his family. But I also believe that because of the stigma associated with his wife's action and as his wife testified that she has been disowned by her family, he decided to move away from Hungary and start a new life in Canada far away from the stigma and seeing those who know about the event. When she was asked why she waited two days to tell her husband about the rape, she replied that 'I knew that our lives would be ruin by this.' When Budapest was suggested as a possible IFA to avoid the problems associated with the stigma and the people who knew about it, she said that 'We have a big family in Budapest' as well.
>
> I therefore find on a balance of probabilities that this entire claim is based on the claimants trying to escape their past, but I find that it is not a past based on persecution but the stigma of what she did. She may have been disowned by her family but certainly not persecuted or harmed in anyway by them.

[26] In the circumstances, the refusal of the disjoinder motion amounted to a violation of procedural fairness because Mr. and Ms. Resmuves were opposed in interest, Mr. Resmuves was questioned about his views on Ms. Resmuves' claim, Ms. Resmuves was not afforded the opportunity to cross-examine Mr. Resmuves and his views about her truthfulness were used by the Member as the primary reason to reject her claim. This is fundamentally unfair as Ms. Resmuves had no ability to test the unfavourable evidence of her estranged spouse nor to point out the rather obvious reasons why, following their separation, he might be pre-disposed against her.

[27] In the absence of authority directly on point, an analogy may be drawn to the criminal context, where severance of the trials of co-accuseds will typically be granted if one wishes to

call the other to provide exculpatory evidence (see e.g. *R v Boulet* (1987), 40 CCC (3d) 38 at 43 (Que CA); *R v Torbiak* (1978), 40 CCC (2d) 193 at para 20, [1978] OJ No 580 (Ont CA); *R v Savoury* (2005), 201 OAC 40 at paras 22-29, 200 CCC (3d) 94; *R v Chow*, 2005 SCC 24 at para 10, [2005] 1 SCR 384). In that context, severance is required to ensure a fair trial so as to afford the accused the ability to have all exculpatory evidence heard as a co-accused is not compellable due to the presumption of innocence.

[28] Here, the Rules did not provide for the right of Ms. Resmuves to cross-examine her co-applicant ex-spouse. In this regard, the Rules contemplate that co-applicants will share a common interest in the proceeding because no provision is made for a co-applicant to cross-examine another applicant. Such a provision would be expected if co-applicants with opposing interests were anticipated because cross-examination is available under the Rules in other instances where an adverse party may testify. For example, if as opposed to being a co-applicant, Mr. Resmuves had been called as a witness, Ms. Resmuves' counsel would have been entitled to cross-examine him under Rule 57(3). Likewise, the Rules provided that counsel may question (but not cross-examine) their own clients (Rule 57(2)). However, no provision is made for cross-examination of an unrepresented co-applicant. Thus, the Rules, themselves, appear to contemplate that claims will not be joined if the co-applicants are adverse in interest.

[29] More importantly, procedural fairness requires that the right of cross-examination be afforded to a refugee claimant when confronted with testimony that is adverse to the claimant's position. Cross-examination is fundamental to the truth seeking function of a court; in *Wigmore on Evidence* (Chadbourne Rev 1970) vol 3 at §1367 cross-examination is stated to be "beyond

any doubt the greatest legal engine ever invented for the discovery of truth". In many instances, cross-examination has been found to be no less important in the administrative context (see e.g. *Innisfil* at 166-167 and *Armstrong v Canada (Commissioner of the Royal Canadian Mounted Police)*, [1994] 2 FC 356 at para 26, 73 FTR 81), affd [1998] 2 FC 666, 156 DLR (4th) 670 (FCA).

[30] The recent decision of this Court in *Nagalingam v Canada (Minister of Citizenship and Immigration)*, 2012 FC 176, 405 FTR 62 [*Nagalingam*] likewise supports the conclusion that the applicants ought to have been afforded the right to cross-examine Mr. Resmuves. In *Nagalingam*, this Court considered the refusal of the Minister's Delegate to permit the applicant to cross-examine a witness who filed affidavit evidence that was adverse to the applicant's position. In finding that the Delegate had erred, my colleague, Justice Russell, stated at para 165:

> Given the important interests at stake in the Applicant's case, including freedom from persecution and torture and the rights to life, liberty and security of the person, it is my view that both section 7 of the *Charter of Rights and Freedoms* and the common-law principles of natural justice required that he be given an opportunity to test the evidence given by Detective Fernandes [by cross examination].

Similar logic applies in this case (although section 7 of the *Charter* is not engaged).

[31] The Member thus erred in relying on the evidence of Mr. Resmuves to deny Ms. Resmuves' claim without providing her an opportunity to test his evidence. Such cross-examination is envisaged under the Rules only if the claims had been disjoined. The Member's refusal of the disjoinder request and consequent denial of the right of the applicants to cross-examine Mr. Resmuves therefore violated the applicants' procedural fairness rights and must result in the decision's being set aside.

Were the Member's Credibility Findings Unreasonable?

[32] While my determination on the procedural fairness issue is sufficient to dispose of this application, I feel I must address the Member's credibility findings because they are so perverse they cannot escape comment.

[33] I start my analysis with the recognition that credibility determinations fall squarely within the core of the RPD's mandate and, accordingly, are normally provided considerable deference. As I noted at para 42 in *Rahal*:

> **…** the starting point in reviewing a credibility finding is the recognition that the role of this Court is a very limited one because the tribunal had the advantage of hearing the witnesses testify, observed their demeanor and is alive to all the factual nuances and contradictions in the evidence. Moreover, in many cases, the tribunal has expertise in the subject matter at issue that the reviewing court lacks. It is therefore much better placed to make credibility findings, including those related to implausibility.

[34] This, however, does not mean that credibility findings are immune from review. Where, as here, they are perverse, capricious or made without regard to the evidence, they will be set aside under subsection 18.1(4) of the *Federal Courts Act*, RSC 1985, c F-7.

[35] Mr. Resmuves' evidence that he did not believe Ms. Resmuves had been raped is opinion evidence regarding her credibility. Absent additional evidence to establish some relevant basis in fact for why he did not believe her account, his evidence on this point was not probative and could not form the basis for a finding that Ms. Resmuves was not credible. Credibility assessments must be left to the trier of fact, and opinion evidence on credibility is not relevant, absent special circumstances (see e.g. *R v D(D)*, [2000] 2 SCR 275 at 287, [2000] SCJ No 44;

and *R v Marquard*, [1993] 4 SCR 223 at 249, [1993] SCJ No 119). In general, evidence from a witness on the credibility of a second witness is not admissible. Justices Bryant, Lederman and Fuerst state this rule at §10.135 in their *The Law of Evidence in Canada* (3rd ed) (Markham, Ont: LexisNexis, 2009) ("*The Law of Evidence*") as follows:

> Questioning which seeks to obtain the belief of one witness as to the credibility of another witness, even indirectly, is inadmissible.

[36] Moreover, the Member's line of questioning evinces a sexist attitude that is out of place in any hearing, and most especially objectionable in a hearing before the RPD where a woman is testifying about incidents of alleged sexual assault and rape that have led her to seek protection in Canada.

[37] The common law doctrine of recent complaint - under which a failure to report a sexual assault quickly was a factor that could be considered as undercutting a complainant's credibility – was abolished by statute in criminal matters in 1983 (*Criminal Code*, RSC 1985, c C-46 at s 275). *The Law of Evidence in Canada* notes, at §1.63, that this doctrine was "based on stereotypical myths [which] made it easy for the accused to undermine the testimony of the victim and to escape conviction". The Ontario Court of Appeal commented on the doctrine as follows in *R v WB* (2000), 49 OR (3d) 321 at paras 145 – 146, 134 OAC 1

> The annulment of the law relating to recent complaint was a clear rejection by Parliament of the two assumptions underlying the common law doctrine. By repealing this judge-made rule, Parliament declared that it was wrong to suggest that complainants in sexual cases were inherently less trustworthy than complainants in other kinds of cases, and that it was wrong to assume that all victims of sexual assaults, whatever their age and whatever the circumstances of the assault, would make a timely complaint. Both assumptions reflected stereotypical notions which demeaned

> complainants (most of whom were female) and ignored the realities of human experience. It made no sense to suggest that all persons subjected to a traumatic event such as a sexual assault could be expected to react in the same way and make a timely complaint: R v W(R), [1992] 2 SCR 122 at 136. Indeed, that assumption is now so obviously wrongheaded that it is difficult to believe that it was ever part of the accepted wisdom of the common law.
>
> By removing the doctrine of recent complaint, Parliament sought to eliminate a rule which treated complainants in sexual assault cases as second-class persons. In addition, Parliament sought to dispel an assumption which had a real potential to mislead the trier of fact and distort the search for the truth. The abrogation of the rule struck a blow for both equality and the truth-finding function of the criminal trial process.

[38] The same stereotypical assumptions underlie the Member's line of questioning about what Mr. Resmuves believed and his conclusions regarding Ms. Resmuves' credibility.

[39] Indeed, in proceeding in this fashion, the Member ignored the Gender Guidelines. They provide in relevant part that:

> Women refugee claimants face special problems in demonstrating that their claims are credible and trustworthy. Some of the difficulties may arise because of cross – cultural misunderstandings. For example:
>
> 1. Women from societies where the preservation of one's virginity or marital dignity is the cultural norms may be reluctant to disclose their experiences of sexual violence in order to keep their 'shame' to themselves and not dishonour their family or community

[40] While the Gender Guidelines are not binding on the RPD, this Court has often set aside decisions where the RPD failed to apply the principles enshrined in the Guidelines. For example, in *Evans v Canada (Minister of Citizenship and Immigration)*, 2011 FC 444, my colleague,

Justice Mosley, reviewed another decision by Member Robinson, in which the Member had found that the applicant had undertaken an "elaborate scheme of fabrication based on exaggerations and embellishments to bolster her claim for refugee status". Justice Mosley concluded that the Member's credibility findings were made in a perverse and capricious manner:

> At paragraph 18 of its decision, the Board made the following implausibility finding, impugning the applicant's credibility:
>
> > The panel also looked at the claimant's testimony that she was not allowed to have friends and even sit outside of the house because that meant to her husband that she was looking for other men to be exaggerations and embellishments. For example, this is the same man who would force her to have sex with other men while he watches. As such the panel finds that the claimant's husband was hardly the kind of person to confine the claimant because of jealousy.
>
> This reasoning fails to appreciate the psychological dimensions of abuse and the many forms in which abuse manifests in an abuser. It wrongly assumes that someone who is jealous or controlling would not subject another to demeaning sexual acts. Forcing the applicant to perform sex acts with his friends and business associates was another way for Mr. Evans to assert control of her. Jealousy and controlling behaviour can coexist. Both are rooted in control and a lack of regard for the individual and her body. The logic of the Board on this issue demonstrates both an insensitivity to the applicant's situation and a lack of awareness to the broader issue of domestic abuse and sexual assault. As such, this finding of credibility was made in a perverse and capricious manner.

[41] A similar conclusion pertains in this case.

[42] Thus, for these reasons, the Member's decision must be set aside.

Certified Question

[43] The applicants submit the following question for certification under section 74 of the IRPA:

> What is the applicable standard of review for an alleged error in failing to disjoin claims before the IRB?

[44] Paragraph 74(d) of the IRPA provides that "an appeal to the Federal Court of Appeal may be made only if, in rendering judgment, the judge certifies that a serious question of general importance is involved and states the question". The case law establishes three criteria for such a question, namely, that it must transcend the interest of the parties, must concern issues of broad significance or general application and must be determinative of the appeal (*Liyanagamage v Canada (Minister of Citizenship and Immigration)* (1994), 176 NR 4, 51 ACWS (3d) 910; *Zazai v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89 at para 11, 318 NR 365; *Di Bianca v Canada (Minister of Citizenship & Immigration)* 2002 FCT 935 at para 22, 224 FTR 168; and *Xiong Lin Zhang v Canada (Minister of Citizenship and Immigration)*, 2013 FCA 168 at paras 9-10, 446 NR 382).

[45] Here, the respondent opposes certification of the question as it submits that the law is settled and the appropriate standard is that of reasonableness. I, however, have found precisely the opposite and believe the issue has not been canvassed in any degree in the case law. I also believe that the issue will arise in other cases as disjoinder applications are bound to reoccur, as will applications for judicial review in respect of them. I accordingly determine that the question as posed by the applicants is appropriate for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted and the Member's decision dated June 13, 2012 is set aside;

2. The applicants' claims shall be remitted to the RPD for re-determination by a different RPD member;

3. The following question of general importance is certified:

> What is the applicable standard of review for an alleged error in failing to disjoin claims before the IRB?; and

4. There is no order as to costs.

"Mary J.L. Gleason"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6636-12
STYLE OF CAUSE:	*Istvanne Rezmuves, Melissza Rezmuves (a minor), and Istavn Rezmuves Jr. (a minor), by their Litigation Guardian Istvanne Rezmuves v The Minister of Citizenship and Immigration*
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	March 28, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	GLEASON J.
DATED:	September 23, 2013

APPEARANCES:

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Khatidja Moloo	FOR THE RESPONDENTS

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