

Federal Court



Cour fédérale

**Date: 20140711**

**Docket: IMM-3277-13**

**Citation: 2014 FC 682**

**Ottawa, Ontario, July 11, 2014**

**PRESENT: The Honourable Mr. Justice Manson**

**BETWEEN:**

**FLORENCIA VERTI FREEMAN, BY THEIR  
LITIGATION GUARDIAN HARLAN ISHON  
MORTON & LINECIA SHANIQUA  
DOUGLAS**

**Applicants**

**and**

**MINISTER OF CITIZENSHIP &  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

[1] This is an application for judicial review of the decision of Michael Sterlin, a member of the Refugee Protection Division of the Immigration and Refugee Protection Board [the Board], pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act]. The Board dismissed the Applicants' claim for refugee protection, concluding that they

were not convention refugees or persons in need of protection under sections 96 and 97 of the Act.

I. Issues

[2] The issues in the present application are as follows:

- A. Did the Board breach its duty of procedural fairness to the Applicants?
- B. Were the Board's credibility findings unreasonable?

II. Background

[3] The Applicants are citizens of Saint Kitts and Nevis. They consist of the Principal Applicant [the PA], and her two minor children, Harlan Ishon Morton and Linecia Shaniqua Douglas [the Minor Applicants].

[4] According to the Applicants' joint Personal Information Form [PIF] narrative, the PA is seeking state protection as a result of abuse from a former partner, Nigel Harris, and members of the public in Saint Kitts.

[5] The PA alleges that she began a same-sex relationship with an individual named Tammie Elliott in June, 2005. Subsequently, Ms. Elliott began a relationship with a man named Joseph. In 2009, the PA began her relationship with Mr. Harris. The PA and Ms. Elliott continued their relationship in secret.

[6] On November 5, 2010, Joseph found the PA and Ms. Elliott having sex at Ms. Elliott's residence. Joseph beat Ms. Elliott and the PA, verbally abused them, and forced them outside without their clothes. Upon witnessing this, neighbours verbally abused the PA and Ms. Elliott and threw stones at them until a bystander, Bernard Mills, gave assistance. Mr. Harris subsequently discovered this incident and threatened the PA over the telephone.

[7] Ms. Elliott left for Canada on December 28, 2010, and on January 2, 2011, the PA moved to live with a friend of her mother's in the north of the country.

[8] In May, 2011, the PA encountered Mr. Harris in a shop. He verbally and physically abused her. The shopkeeper told the PA not to return to the shop. Mr. Harris followed the PA home and spoke to the PA's mother's friend who was hosting the PA. The PA's mother's friend told the PA that she could no longer stay at her home. The PA moved in with her mother.

[9] The PA left for Canada on September 18, 2011, and applied for refugee protection.

[10] The PA retained her current counsel on February 19, 2013, eleven days prior to her hearing before the Board on February 28, 2013. In her Affidavit, the PA states that she switched from her previous counsel when that counsel could not explain why Legal Aid denied the PA's funding request and because she feared that she was incompetent.

[11] At the outset of its decision, the Board notes that during the hearing the Applicants' new counsel requested an adjournment to acquaint himself with the file and prepare the PA for her

testimony. The Board indicates that it was reluctant to grant the adjournment because the request was made at a late stage in the proceeding. However, the Board gave the Applicants' counsel additional time to prepare on the day of the hearing and allowed the Applicants to submit evidence following the hearing, with the caveat that such evidence might be afforded less weight because the Applicants could not be questioned in relation to that evidence.

[12] The determinative issue for the Board was credibility. The Board did not believe that the PA was bisexual. The Board drew a negative inference from the lack of corroborative evidence presented at the hearing of other bisexual relationships or the PA's relationship with Mr. Harris. Post-hearing, the PA submitted a letter purported to be from her landlord, which stated that the PA lived at Zion Village in Nevis with her children since 2005, and that Mr. Harris started living with them in 2009. The Board gave this letter little weight, as it contradicted the declarations made in the residence section of the Applicants' PIF, which stated they had lived in Zion Village in Nevis since 1999.

[13] The Board drew a negative inference from the fact that there was no corroborative police or medical reports arising from the incidences of verbal and physical abuse by Mr. Harris or Joseph, notwithstanding the post hearing evidence of Mr. Mills, who attested to the stoning of the PA, and Ms. Elliott, and injuries sustained by both women.

[14] The Board found it implausible that the PA would have remained in Saint Kitts for almost a year after the incident with Joseph and Ms. Elliott, given that she stated she feared living in Saint Kitts after that date. The Board also drew a negative inference based on the fact

that the PA did not claim asylum in the United States, despite holding an American visa, and the fact that she initially denied having left for the United States in 2011, despite having a passport stamp indicating that she had.

[15] The PA testified that she lived in hiding from May, 2011, to September, 2011. However, she continued working at her job during this time. The Board found this implausible.

[16] The Board also drew a negative inference from inconsistent answers given in response to questions posed by the Board to the PA and Ms. Elliott, who also testified. These included:

- The first time Ms. Elliott and the PA had sex. Ms. Elliott testified that this occurred on September 29, 2010, while the PA testified that it occurred on September 29, 2009, and in 2006 in her PIF narrative. Additionally, each woman claimed it occurred at their own residence;
- The frequency with which Ms. Elliott and the PA had sex. Ms. Elliott stated four times per week, the Applicant stated two times;
- The PA claims that she attends 519 Church, a gay and lesbian community centre in Toronto, regularly on Wednesdays with Ms. Elliott. However, Ms. Elliott states that she stopped attending 519 Church, but when they did attend they did so on Thursdays.

[17] The Board acknowledged a letter of support from 519 Church, but found that it did not outweigh the credibility concerns noted above.

III. Standard of Review

[18] The standard of review is correctness for the procedural fairness issue (*Lai v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 125, at para 51) and reasonableness for the credibility findings.

IV. Analysis

A. *Did the Board Breach its Duty of Procedural Fairness to the Applicants?*

[19] The Applicants argue that the Board improperly refused to grant an adjournment of the hearing on the basis that it was requested at a late stage on the proceedings. Further, the Applicants argue that the Board refused their request for an adjournment without hearing the full details of the request. The Applicants state that the short period of time given to counsel to prepare his materials and witnesses, together with the fact that the probative value of any post-hearing submissions was discounted, was a breach of procedural fairness.

[20] In their Further Memorandum, the Applicants note that a written request for a postponement was filed prior to the hearing. This request was made by way of two letters. The first, dated February 21, 2013, requested a postponement to prepare additional evidence. The second, dated February 27, 2013, lists six alternate hearing dates.

[21] Firstly, the Respondent is correct that no written request was made in accordance with the *Refugee Protection Division Rules*, (SOR/2012-256) [the Rules]. The Applicants wrote the

Board on February 21, 2013, to request an adjournment. However, this request did not include alternative hearing dates as required by 54(2)(c) of the Rules. The Applicants attempted to remedy this by providing alternative hearing dates in a letter dated February 27, 2013. However, as this letter was sent one day before the Applicants' hearing before the Board, it did not comply with Rule 54(2)(b), which states that all adjournment requests are to be received three working days before the hearing at issue.

[22] The transcript demonstrates that the Applicants' counsel did make an oral request prior to the commencement of the hearing. Pages 2-9 of the transcript are almost exclusively focussed on dealing with the Applicants' request. While some of the language used by the Board suggests that he had not yet decided on the adjournment request, it is not an accurate characterization to suggest, as the Respondent does, that the Applicants withdrew their adjournment request and agreed to proceed with the hearing. As is clear from page nine of the transcript, the Board ultimately refused the request for an adjournment, leaving the Applicants with no other choice but to proceed.

[23] While it is not clear from the Board's reasons, there are several indications in the transcript that the Board refused the Applicants' request because it was made at a late stage in the proceedings.

[24] According to 54(3) and 54(2)(b) of the Rules, an oral application to adjourn is permitted prior to the commencement of a board's hearing where "...the application is made for medical reasons or other emergencies." In this case, the Applicants' grounds for an adjournment was a

recent change in counsel, allegedly as a result of incompetence, which necessitated witness preparation and the additional filing of documents. This does not constitute a medical or other emergency which would warrant an oral application for an adjournment. As such, the request for an adjournment was not properly before the Board.

[25] Moreover, even if the request were properly before the Board, 54(4)(a) and 54(4)(b) of the Rules state that an application to adjourn must not be allowed unless there are exceptional circumstances, such as the accommodation of a vulnerable person or an emergency where the party requesting the adjournment has acted diligently. There is no allegation that a vulnerable person is at issue, and it is clear that the Board felt that the Applicants had not acted diligently. Further, the grounds for the adjournment cannot be characterized as an emergency.

[26] There was no breach of the duty of procedural fairness.

B. *Were the Board's Credibility Findings unreasonable?*

[27] In their initial Memorandum, the Applicants assert that the Board made a number of unreasonable credibility findings. These include:

- The Board was incorrect when he concluded that the PA and Ms. Elliott were inconsistent as to where they first had sex;
- That the Board incorrectly stated that the PA never stated that she and Mr. Harris lived in a common-law relationship; and
- That the Board stated that Ms. Elliott incorrectly referred to evidence in her PIF, when Ms. Elliott's PIF was not before the Board, nor was it before counsel.



[28] The Applicants also argue that the basis for the Board's credibility findings was unreasonably unclear and the Board ignored sworn affidavit evidence submitted by Mr. Mills, who helped her following the November 5, 2010, incident with Joseph and the testimony of Ms. Elliott, as well as the evidence of the PA's mother, Floretta Freeman.

[29] In their Further Memorandum of Argument, the Applicants argue that the Board trivialized the corroborative evidence and wrongly drew negative inferences from the failure of the Applicants to produce corroborative evidence. Furthermore, the Applicants argue that a consideration of whether corroborative evidence exists should only be undertaken after the witness is assessed on credibility (*Chen v Canada (Minister of Citizenship and Immigration)*, 2012 FC 95, at para 18).

[30] With regard to where Ms. Elliott and the PA first had sex, the Applicants claim that the Board erred in this finding. However, no rationale for this assertion is given. Likewise, I find that there is no evidence to support the argument that the Board ever said that Mr. Harris and the PA lived in a common-law relationship. Rather, the Board stated that the PA did not state that she lived with Mr. Harris. Finally, contrary to the Applicants' assertions, Ms. Elliott's PIF narrative was in evidence, as indicated by an exhibit number in the Board's reasons. The Applicants are essentially asking the Court to reweigh the evidence, which I will not do.

[31] While I agree with the Applicants that a failure to file corroborative evidence is not sufficient to find a negative credibility finding (*Chen* at para 18), the Board's remaining credibility findings include:

- The PA's evidence was inconsistent with regards to her residence and the period of her cohabitation with Mr. Harris;
- It was implausible that the Applicants remained in Saint Kitts for as long as they did following the attack by Joseph;
- The PA initially did not admit to entering the United States in 2011;
- It was implausible that the Applicants did not apply for American visas for monetary reasons; and
- There were inconsistencies between the testimony of Ms. Elliott and the PA, specifically with regard to their sexual encounters and how often and when they attend the 519 Church community centre.

[32] While several of these credibility findings may be questionable, particularly given the length of time that has elapsed since the events in question, the Board's conclusions are reasonable and within the range of possible, acceptable outcomes as given in *Dunsmuir v New Brunswick*, 2008 SCC 9.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that:**

1. The application is dismissed;
2. There is no question for certification.

"Michael D. Manson"

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Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** IMM-3277-13

**STYLE OF CAUSE:** FLORENCIA VERTI FREEMAN ET AL v CANADA  
(MINISTER OF CITIZENSHIP AND IMMIGRATION)

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** JULY 8, 2014

**JUDGMENT AND REASONS :** MANSON J.

**DATED:** JULY 11, 2014

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