Federal Court Cour fédérale

Date: 20140417

Docket: IMM-4966-13

Citation: 2014 FC 374

Ottawa, Ontario, April 17, 2014

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

PIERRETTE SOPHIE MANEGE
GLORIA DOMINA T MANEGE

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants, two sisters from Burundi, seek judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the "*Act*"], of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the "Board") made on April 22, 2013, which found that the applicants were not Convention refugees nor persons in need of protection under sections 96 or 97 of the *Act*.

[2] For the reasons that follow the application is allowed.

Background

[3] The applicants are sisters and citizens of Burundi. They arrived in Canada in January 2011 at the ages of 17 and 14 respectively. They claim a fear of persecution due to their father's political opinions.

[4] The applicants recounted that their family's troubles began on December 19, 1994, when their uncle was murdered on account of his political affiliations. Their father and his family attempted to investigate the murder and after being targeted for his inquiries, the applicants' father took his own family to Mozambique. The family moved back to Burundi in August 2009.

[5] Upon their return to Burundi, the applicants' father joined the Movement for Solidarity and Democracy Party ["MSD"]. Due to their father's MSD membership, the applicants' safety was threatened. The applicants recounted that on March 22, 2010, armed men came to their house demanding to know the whereabouts of their parents and where the applicants went to school. The applicants' father also received phone calls threatening harm, rape and murder of the girls. On June 15, 2010, unknown persons watched the applicants at their school and school administrators alerted their father.

[6] The applicants' father advised them of these threats only after the June 15, 2010 incident. The applicants were then moved from house to house of other family members and, in light of unsuccessful attempts to seek police protection, were sent to live with their uncle in Canada in January 2011.

The decision

[7] The applicants had an expedited hearing in February 2012, a full year after they arrived in Canada, followed by a hearing before the Board in February 2013. At the expedited hearing, the older applicant, Pierrette, was 18 years of age and was appointed as the designated representative for her younger sister.

[8] The determinative issue for the Board was credibility. The Board found the applicants' credibility to be undermined by omissions and contradictions that went directly to the core of their claims.

[9] The Board noted that there was a contradiction between the applicants' testimony and a letter their father filed with the police; in the former, it was alleged that two armed men went to their home on March 22, 2010 and threatened their maid, whereas the letter indicated that the applicants were threatened directly. The Board did not accept the applicants' explanation that their father inflated the account in his letter to the police because the police would not have taken him seriously if only their maid was threatened. When asked who threatened them, Pierrette gave a name that differed from the one given in a previous interview with the immigration officer at the expedited hearing (although at the expedited hearing, Pierrette indicated that she was not certain of the name). The Board also remarked that the applicants were inconsistent in their explanation as to why they were being threatened; in one instance, they stated that it was because their father was pursuing justice for crimes committed during the civil war, and in another instance, they stated it was because their father was a member of the MSD. The Board also noted that the applicants had omitted to mention that, between the threats at their house and the school

event, their father had received additional threats of violence and rape of the applicants; these threats were not mentioned until the oral hearing.

[10] The Board gave little probative value to two letters from the applicants' father and the scanned copy of his MSD membership card. The Board concluded that the applicants had produced no evidence of their father's involvement in the MSD, which was central to their claim. The Board also rejected the applicants' testimony that their parents and siblings in Burundi continued to receive threats.

[11] In addition, the Board found the applicants' failure to claim asylum in Kenya and Germany, while they were in transit to Canada, to be inconsistent with their alleged fear, notwithstanding their explanation that their parents were sending them to Canada because they had family here.

The issues

[12] The applicants allege that the Board's credibility and plausibility findings were not reasonable, and in particular, that the Board erred by: failing to consider the Chairperson Guideline 3, *Child Refugee Claimants: Procedural and Evidentiary Issues*, and the Chairperson Guideline 4, *Women Refugee Claimants Fearing Gender-Related Persecution*, when assessing their credibility; making unreasonable and non-specific implausibility findings; and concluding that they lacked subjective fear on the basis that they did not claim refugee protection while transiting in safe third countries.

[13] The parties agree that the applicable standard of review is that of reasonableness.

[14] The role of the Court is, therefore, to determine whether the Board's decision "falls within 'a range of possible, acceptable outcomes which are defensible in respect of the facts and law' (*Dunsmuir*, at para. 47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome." (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 59).

[15] It is also well-established that boards and tribunals are ideally placed to assess the credibility of refugee claimants *Aguebor v Canada (Minister of Employment and Immigration)* (1993), 160 NR 315, [1993] FCJ No 732 at para 4 (FCA) [*Aguebor*]; and that given its role as trier of fact, the Board's credibility findings should be given significant deference (*Lin v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1052 at para 13, [2008] FCJ No 1329; *Fatih v Canada (Minister of Citizenship and Immigration)*, 2012 FC 857 at para 65, 415 FTR 82).

[16] As the respondent pointed out, credibility findings are factual and case specific and rely on the assessment by the decision-maker of several factors, including the observation of the witnesses and their responses to questions posed. The Board is, therefore, entitled to draw inferences based on implausibility, common sense and rationality (*Aguebor*, *supra* at para 4).

[17] Credibility findings are owed significant deference but are not beyond review, for example, where the contradictions or omissions are insignificant or result from a microscopic examination, or when explanations have been unreasonably discounted, or where relevant contextual information has not been considered, the Court may intervene.

Were the Board's credibility findings reasonable?

[18] The applicants submit that the Board erred by failing to apply Guidelines 3 and 4 and that both should have been considered together because they were minors threatened with gender-based violence due to the political views of their father.

[19] The applicants submit that the Board should consider their age at the time of the persecutory events and at the time their testimony is given. They were 16 and 14 years old, respectively, when the events occurred and their parents disclosed that threats to rape and murder them had been made on account of their father's political affiliations. They were 18 and 16 years old, respectively, at the time of the expedited hearing and 19 and 17 at the time of the refugee hearing.

[20] The applicants submit that, had Guideline 3 been properly applied, the Board would have recognized and accepted their limited knowledge of their father's political activities, of the details of the threats made against them, and of their family's situation in Burundi. The applicants note that they had testified that their parents preferred not to discuss politics, the graphic nature of the threats, and the family's insecurity with them.

[21] The applicants submit that the Board also failed to consider or even to acknowledge Guideline 4 in evaluating their claims, which involved threats of gender-based violence. The applicants submit that it was reasonable for them to not mention the threats of rape against them in their Personal Information Forms ["PIFs"], because they were young girls without the benefit of their parents in Canada, their parents were reluctant to share the full graphic details of such

threats, and they were assisted by a male lawyer in preparing their PIFs. If Guideline 4 had been applied, it would have highlighted the appropriate context underlying their actions and narrative.

[22] The respondent submits that the Chairperson Guidelines are flexible and that failure to mention or to fully apply them does not in itself vitiate a decision. The respondent notes that the jurisprudence has established that the Chairperson Guidelines cannot cure the deficiency the Board found in the applicants' claim; the applicants were not credible and the Guidelines can not be used to salvage the inconsistencies and omission.

[23] The respondent also notes that Guideline 3 takes into account factors such as age and maturity and that, in this case, the applicants were not young children. As a designated representative for her younger sister, Pierrette assumed obligations, which she acknowledged, such as instructing counsel and acting in the best interest of her sister.

[24] With respect to Guideline 4, the respondent submits that the Board is presumed to have taken it into account as the decision does not suggest otherwise. There was no insensitivity or impermissible reasoning regarding the threats of rape on the part of the Board. Moreover, this is not an exclusively gender-based claim, but a claim based on political persecution of the applicants' father.

The Board's credibility findings are not reasonable

[25] Despite the deference that is owed to the Board in its assessment of credibility, it is not apparent from the decision that the Board considered how the application of the Guidelines should inform its assessment of the applicants' evidence.

[26] I acknowledge that the Board need not specifically mention the Guidelines and that the Guidelines are not the law but, as the name implies, are intended to guide the Board. But if the Board is not so guided, the Guidelines have no purpose. Apart from the transcript of the expedited hearing and the Board hearing, which reveals only that Pierrette, who was appointed as the designated representative, was cautioned about her evidence and that it would be given on behalf of both her and her sister, there is no indication that the Board was alert to the applicants' youth or to the gender-based violence they indicated they feared.

[27] As the respondent notes, the failure to mention or fully apply the Guidelines does not, on its own, render the decision unreasonable. In *Henry v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1084 at para 50, [2013] FCJ No 1222, Justice Noël held:

> 50 Furthermore, the Applicant claims that the RPD fails to consider the *Chairperson Guideline 3: Child Refugee Claimants*. However, as stated by Justice Beaudry in *Allinagogo v Canada (Minister of Citizenship and Immigration)* 2010 FC 545 at para 14, [2010] F.C.J. No. 649, "[t]his argument cannot succeed as there is no obligation for the Board to mention the guidelines in its decision and the reasons show that the Board properly considered the [...] Applicant's claim". This decision relates to the *Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution*, but this Court sees no difference as to the application of this principle to Guideline 3. What is more, the Guideline 3 requires the decision-maker to give primary consideration to the best interest of the child and, in fact, the RPD stated on numerous occasions that the main concern in the case at bar was for the Applicant to remain with his mother and to avoid future separation. Therefore, this Court finds that the RPD did not fail to consider the Guideline 3 as the reasons show that it did. [Emphasis added.]

[28] However, in the present case, there is no indication that the Board considered the applicants' age or best interests; all the decision does is identify inconsistencies in the applicants'

testimony, some of which are minor or not irreconcilable given their explanations, and holds them to the same standards as any adult claimant.

[29] I also accept that the Chairperson Guidelines do not prevent negative credibility inferences from being made against the applicants. However, the Guidelines do encourage the Board to consider the applicants' testimony in accordance with their circumstances as vulnerable people coming from societies that operate in a different cultural milieu than Canada.

[30] In *Juarez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 890 at paras 17-20, [2010] FCJ No 1107, Justice Kelen articulated the relevant principles as follows:

> 17 The relationship between the Gender Guidelines and the onus of the applicant to prove her claim with credible evidence is set out in *Karanja v. Canada (MCI)*, 2006 FC 574, per Justice Pinard at paragraphs 5-7 of his decision:
>
> > 5 The applicant is correct that the Gender Guidelines (issued on March 9, 1993 by the Chairperson of the Immigration and Refugee Board pursuant to paragraph 159(1)(h) of the *Immigration Act* and entitled Women Refugee Claimants Fearing Gender-Related Persecution) indicate that in the context of a gender-based claim, the Board should be particularly sensitive to a female applicant's difficulty in testifying. However, the Gender Guidelines, in and of themselves, are not intended to serve as a cure for all deficiencies in the applicant's claim or evidence. The applicant bears the onus of proving her claim. As Justice Pelletier indicated in *Newton v. Minister of Citizenship and Immigration* (2002), 182 F.T.R. 294, at paragraph 18, "the Guidelines cannot be treated as corroborating any evidence of gender-based persecution so that the giving of the evidence becomes proof of its truth" and, at paragraph 17:
> >
> > > The Guidelines are an aid for the CRDD panel in the assessment of the evidence of women who allege

> that they have been victims of gender-based persecution. The Guidelines do not create new grounds for finding a person to be a victim of persecution. To that extent, the grounds remain the same, but the question becomes whether the panel was sensitive to the factors which may influence the testimony of women who have been the victims of persecution...
>
> 6 Furthermore, the Board's failure to specifically mention the Gender Guidelines does not mean that they were not considered and is not material or fatal to the Board's decision. The Board is presumed to have taken all of the evidence into account, and there is nothing that suggests that the Board did not consider the Gender Guidelines (see *S.I. v. Canada (M.C.I.)*, [2004] F.C.J. No. 2015 (F.C.) (QL); *Farah v. Canada (M.C.I.)*, [2002] F.C.J. No. 416 (T.D.) (QL); and *Nuray Gunel v. The Minister of Citizenship and Immigration* (October 6, 2004), IMM-8526-03).
>
> 7 The Gender Guidelines specifically state that the female refugee claimant must demonstrate that the harm feared is sufficiently serious to amount to persecution. In this case, there were numerous negative credibility findings by the Board and such findings are open to the Board to make. [Emphasis in original]
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> 18 The principles in *Karanja*, supra were followed in *Allfazadeh v. Canada (MCI)*, 2006 FC 1173, per Justice Harrington where he held at paragraph 6 that the RPD is presumed to have considered the Gender Guidelines, in my decision in *Cornejo*, *supra*, where I held at paragraph 27 that the Gender Guidelines are not intended to serve as a cure for deficiencies in a refugee claim, and in *I.M.P.P. v. Canada (MCI)*, 2010 FC 259, per Justice Mosley at paragraph 47.

[31] The Guidelines do not cure any reasonably made credibility findings. However, the Guidelines have not provided guidance to the Board in the present case as it appears that the

Board did not acknowledge or consider the Guidelines at all; there is nothing in this decision to signal that the Board was sensitive to the situation of these girls – either due to their youth or their allegations of rape, which they did not disclose until the expedited hearing and again at the Board hearing.

[32] In *Diallo v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1450 at paras 32-33, 259 FTR 273 [*Diallo*], Justice Mactavish considered the application of the Gender Guidelines noting:

> [32] The Chairperson's Gender Guidelines recognize that cross-cultural misunderstandings can come into play when gender-based claims are assessed by the Board. In order to minimize the risk of this happening, members are alerted to the effect that social, cultural, traditional and religious norms can have on the testimony of those claiming to fear gender-based persecution.
>
> [33] In this case, the Board's reasoning as to the need to consider the Gender Guidelines is somewhat circular. The Board held that it did not have to consider the applicability of the Gender Guidelines because Ms. Diallo was not credible. However, the Gender Guidelines exist, in part, to ensure that social, cultural, traditional and religious norms do not interfere with the proper assessment of an applicant's credibility. [Emphasis added.]

[33] In the present case, unlike *Diallo*, the Board did not state that it did not have to consider the Guidelines. However, as noted, I have no indication whether or not the Board did consider the Guidelines. I have a similar concern about the circular nature of the argument that the application of the Guidelines can not cure a credibility finding. In my view, if the credibility finding is made without regard to the Guidelines, or to the relevant context or circumstances, then the finding may not be reasonable. It is not a matter of curing the finding, but of examining whether the finding is reasonably made and if the appropriate youth or the gender-based considerations had been taken into account.

[34] The evidence of the applicants given during the hearing is that: their father did not discuss politics with them; they only learned of the threats made against them when their parents told them they had been watched at school; they only obtained specific details from their mother on the threats made against them after persistence; their parents mentioned other threats which they did not want to tell them about; their father preferred not to discuss with them the insecurity under which the family continued to live; and, their father saw himself as their protector and generally shielded them from the grotesque details of the threats made against them.

[35] Although the applicants were not young children, their testimony and evidence does not appear to have been considered by the Board in the context described; they were deliberately insulated from the political issues faced by their father and had limited knowledge about it. This is precisely what Guideline 4 addresses. The Board expected the applicants to have a much more detailed knowledge of their father's political involvement, the events and the threats than was reasonable under the circumstances described.

[36] The individual inconsistencies noted by the Board are not all irreconcilable and the applicants offered explanations that the Board did not accept. Again, the Board did not appear to have considered that these applicants did not have first hand knowledge, given that their parents had shielded them until they were sent to Canada.

[37] I also note that the applicants played no role in reporting the threats to the police and that their evidence about two armed men coming to their house remained consistent, although the letter from their father referred to three men and more direct threats.

[38] Upon re-determination, it will of course be open to the Board to assess the credibility of the applicants, who are no longer minors; however, the fact that they fled to Canada while still under the age of 18 should not be ignored. Although they are now more mature, they remain young women who fled their home as youth facing threats of violence, including sexual violence.

Did the Board err in finding that the applicants lacked subjective fear?

[39] Credibility was the determinative issue for the Board, however, the Board also found that the applicants' failure to seek asylum in Kenya and Germany, while in transit to Canada, demonstrated a lack of subjective fear. This finding is not reasonable based on the applicants' circumstances and youth. I note that the applicants did not sojourn in either country and never left the airport en route to Canada. The applicants were 17 and 14 years of age at the time they travelled and had been instructed by their parents to make an asylum claim upon arriving in Canada, because they have family in Canada. The Board unreasonably expected the applicants to appreciate that their failure to seek asylum in the very first country they landed would jeopardize their claim and undermine their subjective fear of persecution.

[40] As Justice Scott's observed in *Ruiz v Canada (Minister of Citizenship and Immigration)*, 2012 FC 258 at para 61, [2012] FCJ No 282:

> [61] It goes without saying that a child does not have the same abilities as an adult. Even though the IRB seemed to have taken C. Ruiz's age into account in its decision, it found that he should have behaved like an adult and claimed asylum at the earliest opportunity. However, C. Ruiz was just 15 years old. It seems unlikely to us that an adolescent would know the complexities and subtleties of the administrative apparatus with respect to asylum and be able to gauge the rough waters of the immigration process in the United States without an adult's help. Imposing such a burden on an adolescent seems unreasonable to us.

[41] The application for judicial review is allowed. No question was proposed for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed;

2. No question was proposed for certification.

"Catherine M. Kane"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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