

Date: 20070522

Docket: IMM-4270-06

Citation: 2007 FC 539

Ottawa, Ontario, May 22, 2007

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

MASTEWAL FELEKE

Applicant

-and-

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (“the Act”), for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (“RPD”) dated July 14, 2006, which determined that Mastewal Fekele (“the Applicant”) was not a Convention refugee or a person in need of protection, and forms the basis for the present review.

BACKGROUND FACTS

[2] The Applicant is a citizen of Ethiopia who bases her Convention refugee claim on an alleged fear of persecution by reason of her political opinion and her membership in a particular social group, namely the All Ethiopian Unity Party (“AEUP”).

[3] According to the Applicant’s Personal Information Form (“PIF”) Narrative dated April 4, 2005, the Applicant’s father was one of the founding members of an AEUP office and was detained, interrogated and beaten by the government more than five times. The Applicant joined the organization in May 2000 and took part in demonstrations, meetings and other activities.

[4] In 1999, the Applicant was detained for five days at a police station and asked questions relating to her membership in the AEUP. In August 2000, three armed security agents came to the Applicant’s house and interrogated the Applicant about the AEUP. She was then beaten and then detained for two weeks in a district detention centre. The Applicant was arrested for a third time in February 2004 and was detained for three months and two days. While she was detained, the Applicant was subjected to a series of interrogations and beatings. The Applicant, in her PIF, also states that during her last detention, she was raped three times by a police officer. The Applicant was not brought before a court of law nor charged with a crime.

[5] On November 3, 2004 the Applicant left Ethiopia and arrived in Toronto the following day on a work permit. The Applicant was employed as a live-in caregiver until February 25,

2005 when her contract was terminated due to a conflict with one of the children in her care.

The Applicant made a claim for protection with immigration officials in April 2005.

ISSUE

[6] This application raises the following issue: Did the RPD err by not appropriately considering the Applicant's psychological report when making its negative credibility findings?

ANALYSIS

Standard of Review

[7] The standard of review for credibility issues and questions of fact is that of patent unreasonableness (*Aguebor v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 732 (QL) at para. 4; *Harb v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 108 (QL) at para. 14; *Umba v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 17 (QL)).

Consideration of Psychological Reports in Making Findings of Credibility

[8] The jurisprudence of this Court supports the notion that the RPD has a duty to consider documentary evidence that supports the Applicant's position (*Bains v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 497; *Maldonado v. Canada (Minister of Employment and Immigration)*, [1980] 2 F.C. 302). Justice Shore recently held, in *Assouad v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 1216 that "A Board is

under a duty to justify its credibility findings with specific and clear reference to the evidence, particularly when the evidence is cogent and relevant to the Applicant's allegations."

[9] The consideration of documentary evidence includes the consideration of psychological assessments when making findings of credibility. In *Ozturk v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1545 at para. 13, I found that "an applicant's mental health is of the utmost importance when one is evaluating an applicant's testimony and the credibility of his claim."

[10] In considering mental health assessments when evaluating the Applicant's credibility, there are two reasons why the assessment may aid an Applicant. First, it may serve as corroborative evidence of an Applicant's story or second, it may provide an explanation for the inconsistencies in the Applicant's evidence. Jurisprudence of this court has supported the notion that mental health assessments may be tendered for either purpose. For example, in *Yilmaz v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1970, Justice Russell, on reviewing whether a mental health assessment was properly considered as corroborative evidence of an applicant's story, held that, "It is not, of course, patently unreasonable for the Member to consider the psychological assessment in light of her own findings, and to give it little or no weight because it is based upon assumptions that she has concluded are false."

[11] Justice O’Keefe, in evaluating whether a mental health assessment was considered as an explanation for inconsistencies in the applicant’s evidence, in *Perera v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 1590 stated at para. 29:

It is clear from the decision that there were differences between the applicant’s statements in her PIF and her testimony, but these must be weighed in light of the psychiatrist’s report that she attempts to block out the difficulties in Sri Lanka to handle stress. Although the Board did not accept the psychiatrist’s report, it gave no reasons for not accepting the report’s conclusion that the applicant’s PTSD was a result of the events in Sri Lanka. If correct, this medical condition could explain some of the differences between the PIF and the applicant’s oral testimony.

[12] In *Krishnasamy v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 561 at para. 15-18, it was held that in every case where a mental health assessment is tendered as an explanation for inconsistencies of an applicant’s evidence, it is not always the case that it will definitively provide the reason for the inconsistencies. Rather, it is for the RPD to decide after reviewing all the evidence.

[13] Justice Layden-Stevenson, in *Krishnasamy, supra* at para. 14, held that the “conclusion was open” to the member and that the member was “alert and sensitive to the medical reports prior to and throughout the hearing.” My colleague concluded that “her negative finding of credibility was one she was able to make, even taking into account the medical reports.” She acknowledged that “if the ID had failed to consider the report, or had disbelieved its contents, the situation might well be different” but found that this was not the case here. She concluded that “The ID Member’s determination that the psychiatric report did not provide the better

explanation for the inconsistencies and evasiveness in Mr. Krishnasamy's evidence was a determination for the member to make."

Did the RPD err in its determination that the psychological report did not provide an explanation for the inconsistencies in the Applicant's evidence?

[14] The RPD, in its decision, stated the reasons why the Applicant's psychological report did not change its finding on credibility:

The panel has reviewed the evidence that the claimant has filed in support of her claim. There is the psychological report dated July 10, 2006 from Dr. Judith Pilowsky. Dr. Pilowsky found the claimant credible and assessed her as suffering from Post Traumatic Stress Disorder in the severe range. However, in the final analysis it is for the panel to assess credibility at the hearing, and the panel cannot delegate this important function to Dr. Pilowsky. The panel does not take issue with Dr. Pilowsky's clinical observations or diagnosis, but the panel cannot rely on such assessment to revive a story that the panel has found to contain significant credibility problems.

(Applicant's Record, p. 17-18)

[15] While the RPD did turn its mind to the psychological report, the RPD erroneously evaluates the psychological report's usefulness. The RPD considered the report's corroborative nature rather than as an explanation for the discrepancies in the Applicant's evidence. Indeed the Court in *Yilmaz, supra*, accentuated the importance of evaluating the evidence for the purpose it was tendered at para. 70:

Thus, the report was not adduced in order to corroborate the incidents *per se* but rather as a means of providing an explanation to the tribunal as to why the applicant had obvious difficulties during the court of the hearing in answering straightforward questions. The tribunal in its reasons for decision acknowledged that the applicant had had difficulty during the course of the hearing in answering

questions but dismissed the report because it disbelieved the applicant due to his inconsistent testimony. However, the report was not adduced to prove the testimony but to provide an explanation for the applicant's difficulty. It is submitted that it is here that the tribunal goes in error because it failed to appreciate the reason why the report was adduced into evidence and failed to deal with its import....

[16] The Court in *Perera, supra* also supports the notion that, if a psychological report is tendered for the reason of explaining the applicant's behaviour in giving evidence, the RPD is obliged to explain whether it accepts the medical assessment as explaining the discrepancies and not just whether it accepts the report as corroborative evidence or "reviving" the Applicant's story as the RPD in this case has characterized it.

[17] I agree with the Applicant that the RPD did not consider the impact of the psychological report on the discrepancies of Applicant's evidence, all the while acknowledging the Applicant's difficulties during her testimony, citing that the Applicant "said that she was upset and not thinking clearly". In fact, the Applicant stated at one point during her testimony:

There are all kinds of emotion that's going on at this point, because I also have to deal that I was questioned about me being violated and also there is the issue of my father, and I am dealing with all kinds of things and that's probably I'm not thinking clearly, but sometimes I don't even know when all those things are coming in my head. I don't even know what I am exactly doing.

(Certified Tribunal Record, pgs. 404-405.)

[18] The medical assessment, which the RPD accepted, stated that the Applicant suffered from "cognitive difficulties, avoidance behaviours, generalized anxiety symptoms", all of

which could have provided an explanation for the Applicant's behaviour. The RPD, in finding a decision either way, with regards to credibility, had an obligation to explain how the diagnosis impacts the RPD's assessment of any discrepancies.

The AEUCRO letter is objective evidence supporting the Applicant's claim she is a member of the AEUP

[19] The RPD erred when it found that the letter from the All Ethiopian Unity Cultural and Relief Organization ("AEUCRO") did not provide objective evidence as to how the AEUCRO determined that the Applicant was a member of the AEUP party. The RPD erred when it reasoned that the letter did not prove that in the future the Applicant would come to the attention of the authorities. Rather, the letter was properly submitted as corroborative evidence of the Applicant's involvement in the AEUP. As a result, when the matter will be re-examined by a new panel, an assessment should be made of the impact of being a member of the AEUP party in light of both, the corroborative evidence provided by the Applicant, and, the documentary evidence showing that the government is very harsh with perceived members of the opposition.

[20] For these reasons, the application for judicial review of the RPD's decision is granted and the matter is referred back for re-determination by a different panel.

JUDGMENT

The application for judicial review of the RPD's decision is granted and the matter is referred back for re-determination by a different panel.

“Danièle Tremblay-Lamer”

Judge