
CANADA / JUDGMENT

TB2-02483

COURT

Refugee Protection Division

DECIDED

29 August 2012

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RPD File No. / N° de dossier de la SPR : TB2-02483

Private Proceeding / Huis clos

Reasons and Decision ? Motifs et décision

Claimant(s)

XXXX XXXX XXXX

Demandeur(e)(s) d'asile

Date(s) of Hearing

August 27, 2012

Date(s) de l'audience

Place of Hearing

Toronto, Ontario

Lieu de l'audience

Date of Decision

August 29, 2012

Date de la décision

Panel

James V. Railton

Tribunal

Counsel for the Claimant(s)

Adela Crossley

Barrister and Solicitor

Conseil(s) du (de la/des) demandeur(e)(s) d'asile

Tribunal Officer

N/A

Agent(e) du tribunal

Designated Representative(s)

N/A

Représentant(e)(s) désigné(e)(s)

Counsel for the Minister

N/A

Conseil du (de la) ministre

- [1] XXXX XXXX XXXX claims to be a XXXX-year-old citizen of Saint Vincent and the Grenadines ("St. Vincent") and is seeking refugee protection pursuant to subsections 96 and 97(1) of the Immigration and Refugee Protection Act.¹
- [2] The complete story alleging the basis of the claimant's fear in her home country is captured in her Personal Information Form (PIF) 2. The following outlines the allegations of the claimant. The claimant alleges that, at the age of XXXX, she entered into a common law relationship with XXXX XXXX ("XXXX") in XXXX 2005, when XXXX would have been approximately 30 years of age.
- [3] He started to abuse her in early 2006. The claimant alleged that XXXX has many friends among the police in St. Vincent.
- [4] The claimant came to Canada in 2007 and made her claim for protection in XXXX 2012.

DECISION

- [5] I find that the claimant is neither a Convention refugee nor a person in need of protection on account of her delay in claiming. I also find that should the claimant return to her home country, she would not be subjected personally to a risk to life or to cruel and unusual treatment or punishment. Further, on substantial grounds, I find³ she does not face a danger of torture.

ANALYSIS

- [6] I find that the claimant is a national of Saint Vincent and the Grenadines based on a copy of her passport⁴. I also find that the claimant has established her personal identity.

- [7] In hearing this claim, the determinative issue is the credibility of the claim put forward, together with the apparent lack of subjective fear. These two issues are so inextricably bound together that I shall analyse them together.
- [8] The claimant's story of abuse at the hands of her domestic partner provide a nexus to the Refugee Convention, especially in light of Chairperson's Gender Guidelines.⁵
- [9] The Federal Court, in Maldonado⁶ held that:

When an applicant swears to the truth of certain allegations, this creates a presumption that those allegations are true unless there be reason to doubt their truthfulness.

- [10] The only evidence of the abuse that the claimant suffered is her own testimony and a letter from her best friend, who is a permanent resident of Canada, now living in Calgary. The claimant stated that a second cousin, XXXX XXXX, another permanent resident of Canada, contacted her by telephone in 2007, allegedly out of the blue, during which conversation the claimant gave evidence that she confided in her cousin and told her about the ongoing abuse at the hands of XXXX. The evidence is, further, that Ms. XXXX then arranged for the claimant to come to Canada, which the claimant did, in XXXX 2007.
- [11] On entry, Canadian authorities granted the claimant permission to remain in Canada up to XXXX XXXX, 2007. The claimant admitted that she was aware that she was time limited for her sojourn in Canada to that date. I asked the claimant what she did in light of the deadline. She admitted she did nothing. When asked to explain why, if she was so afraid of returning to St. Vincent and facing XXXX, she did not do anything about her status, she said that she did not know anything about the system and she received advice from family members, including XXXX XXXX and her Aunt XXXX XXXX. When pressed why she did not do more, she testified that she was upset by what had happened back home and distracted by her new surroundings. I pointed out that one could give her several weeks to become less upset and acclimatised but by the end of July and during August with the deadline looming, she should have done something.
- [12] Claimant's Counsel asked her what her plans were. The claimant testified her plan was to get away from XXXX but when she found she was pregnant, she really did not have a plan. Counsel asked if she thought about being out of status. The claimant replied that was when she heard about making an application for permanent residence ("APR") on humanitarian and compassionate ("H & C") grounds from her cousin, XXXX XXXX. The claimant chose Montreal counsel, XXXX XXXX, according to the claimant, a member of le Barreau du Québec. The claimant went to Montreal to seek Mr. XXXX advice. According to the claimant, he discussed all her options with her, including making a claim for refugee protection, but recommended that the best course would be for the claimant to wait three years after her entry to Canada, especially in light of the fact that the claimant gave birth to a child in XXXX 2007, before making an APR on H & C grounds. This is what the claimant did: she filed the application in 2010, three years after she entered Canada. In February 2012, the claimant received a negative result from her application and then filed her claim for refugee

protection, just shy of five years after entering Canada. I find that this delay is significant.

- [13] The claimant admitted that, during those three years, she lived and worked illegally in Canada. I find that such actions without reasonable explanation indicate that the claimant is prepared to flout Canada's immigration laws and so I have drawn an adverse inference from this. I find the claimant's explanation that family members advised her against making a refugee claim and that her legal counsel recommended an APR for H & C grounds insufficient to overcome the egregious delay as "a refugee claim should not be looked at simply as one of many choices as to how best to seek status in Canada".⁷
- [14] The claimant provided a copy of an excerpt from the H & C Reasons for Decision, contained in a facsimile transmission from an Immigration Officer to her Montreal counsel, being three pages of eight, including the fax cover page. In other words, the claimant provided only the first two pages containing the application summary and two of the factors for consideration but lacking the balance of the factors for consideration or what the Immigration Officer did with the factors before coming to her conclusion. Claimant's Counsel said she would be prepared to provide the balance but the claimant then stated that she had left it at home. Claimant's Counsel also stated that the reason she left the pages out is that it would tend to show the incompetence of former counsel. This is not acceptable and I have drawn an adverse inference for the failure to produce the whole document.
- [15] I am somewhat comforted in this finding as the claimant, represented by experienced counsel from Ontario now, did not complain about Mr. XXXX advice to le Barreau and they have not brought suit against him for negligence or incompetence. The suggestion by Counsel is that XXXX XXXX did not competently complete the APR and may have not given the claimant competent advice regarding which route to Canadian residency she should follow.
- [16] The cases of Cromhout and Shakiban indicate that I can ignore allegations of counsel incompetence unless a formal complaint has been lodged with a governing body, and unless evidence is tendered to confirm that counsel was informed of the allegation⁸. "The claimant cannot cite a professional error on the part of her former counsel without supplying the latter's explanations regarding the error complained of and with no evidence that the matter has been submitted to the Bar for investigation."⁹ The claimant admitted that she has not complained to the Bar of Quebec and has not brought action against her former solicitor. I have no evidence that the claimant informed her counsel that she would raise with this Division his alleged incompetence.
- [17] I find, while delay is generally not a determinative factor in a refugee claim, there are circumstances where the delay can be such that it assumes a decisive role; what is fatal to the claim is a claimant's inability to provide any satisfactory explanation for the delay.¹⁰
- [18] The claimant admitted that she is computer-savvy as she used computers in high school and college in her home country. The claimant used electronic mail to keep in touch with her friend and she stated that she researched the Immigration Canada web site after her APR

failed. Therefore, I find there was a lack of serious effort on the part of the claimant to claim refugee protection in a timely manner. "Serious efforts require more than having a friend inquire about the asylum process."¹¹ This is tantamount to what the claimant states she did when she noted the advice she received from her aunt and her cousin.

- [19] I find that the claimant lacks the requisite subjective fear based on her actions and I also find this negatively impacted her credibility.
- [20] The subjective fear relates to the existence of a fear of harm in the mind of the claimant. The objective basis requires there be a valid basis for the fear.¹² Both subjective fear and an objective basis for it are crucial elements. In *Kamana*¹³, Madam Justice Tremblay-Lamer held that the panel's finding that the claimant had not credibly established the subjective element was reasonable and that:

The lack of evidence going to the subjective element of the claim is a fatal flaw which in and of itself warrants dismissal of the claim, since both elements of the refugee definition-subjective and objective-must be met.

- [21] I do not accept her explanations as to why the claimant delayed in leaving her country for about a year after she felt her life threatened and failed to claim in Canada when she arrived or for almost five years after coming to Canada. I accept that her youth might explain her delay in departure but she did not provide a reasonable explanation for her delay in claiming, other than she chose another route. Counsel intimated that sometimes the advice is to go the H & C route when the evidence for a refugee claim is weak. Perhaps that is the reason here and the reason also the claimant did not complain about her former counsel, as he gave valid advice: her claim was weak. She testified that she told the claimant about XXXX but we do not have his rebuttal evidence regarding that aspect of her testimony, which we could have had. It may even have been revealed had we the balance of the Reasons for Decision in the H & C matter.
- [22] The fact that the claimant delayed in claiming protection for over four years after her permission to remain in Canada expired on XXXX XXXX, 2007, without any application for an extension means that the claimant does not, subjectively, fear serious harm or persecution at the hands of her common-law spouse in her country. I find for this reason the claimant lacks the requisite subjective fear to return to her home country.
- [23] I find that the claimant's egregious delay without a reasonable explanation therefore is significant. Furthermore, as stated by the Federal Court, "... a negative finding regarding subjective fear may render the assessment of the objective aspect of the complaint superfluous and may in itself warrant the dismissal of the claim".¹⁴
- [24] As noted, I also found credibility problems in this claim which caused it to doubt the evidence that has been put forward.

[25] The claimant initially testified that she was approached with a message from XXXX at a Vincentian picnic in XXXX 2007, alarming her to the point she finally realized she could not return home. This is in keeping with her PIF narrative:

"A month after I came to Canada I found out I was pregnant, I was expecting XXXX baby. At that moment I became really worried for my safety. I really wanted to be in this child's life for the rest of my life and I knew that if I was forced to return to St. Vincent XXXX would harm me and my son would be left without a mother to care for him. At this time, I do not think that XXXX knows that we have a child together.

"XXXX had friends in high places. Before I knew it, people I hardly knew were giving me messages here in Toronto. I went to the Vincentian picnic and a man came over out of nowhere and told me that XXXX wants me to go back to St. Vincent I do not even know how he knew I was here, he called me by my name and gave XXXX message.

"When I came to Canada I did not know how the system works, I wanted to claim refugee but my cousin XXXX and my aunt XXXX XXXX advised me not to do so ..."15

[26] The claimant later changed her testimony that the picnic encounter was in XXXX 2008. I find that this change in the claimant's testimony from a question by the panel to one by her counsel is better explained by her not wanting to show that her fear crystallised before she went out of status. Whether this is so or not, I draw an adverse inference from the claimant changing her testimony without any explanation for the change other than she must have been in error the first time.

[27] Another credibility concern not resolved in the claimant's favour is her evidence about her cousin, XXXX XXXX. The claimant came to Canada because of her cousin XXXX sympathy and financial aid. The issue arose because the claimant did not talk to Ms XXXX, she alleged, very much at all, as she was only her second cousin and the claimant had had a falling out with her mother, Ms XXXX cousin. This is why, she explained, when the abuse became unbearable in 2006, the claimant did not call on her Canadian cousin to rescue her until 2007. Of course, this is possible. Ms XXXX also provided a letter to corroborate the claimant's story.¹⁶ However, Ms XXXX was present at the hearing as an observer and yet the claimant or her current counsel chose not to call her as a witness to corroborate the claimant's story. If the story is true, the cousin, present at the hearing, could easily have testified as to what she was told by the claimant in 2007. She could also have testified as to what the family were thinking as the date for the claimant to return to her home country approached. Like the claimant, Ms XXXX and the aunt had six months to come up with a plan to keep the claimant here, yet they chose to allow the claimant to go out of status and expose her to deportation for overstaying. As a result of the claimant's failure to call her cousin as a corroborating witness, I draw an adverse inference.

[28] The Panel recognizes that corroborating evidence is not always required. However, when credibility, like in this case, is one of the determinative issues, corroborating evidence would have been helpful in off-setting the Panel's concerns. The Panel notes the Federal Court case of Bhagat,¹⁷ which stated the following:

Corroborating evidence is not always necessary to establish the applicant's subjective fear. The Board, however, determined that in the particular circumstances of this case, corroborating evidence of persecution was expected. An absence of corroborating evidence, then, permitted it to make a negative inference against credibility of the applicant. The respondent relies on *Sheik v. Canada (M.E.I.) (C.A.)*, [1990] 3 F.C. 238, at page 244, for its argument that the Board did not err in law when making that conclusion:

The concept of "credible evidence" is not, of course, the same as that of the credibility of the applicant, but it is obvious that where the only evidence before a tribunal linking the applicant to his claim is that of the applicant himself (in addition, perhaps, to "country reports" from which nothing about the applicant's claim can be directly deduced), a tribunal's perception that he is not a credible witness effectively amounts to a finding that there is no credible evidence on which the second-level tribunal could allow his claim.

[29] On account of these and other adverse inferences and the claimant's delay in claiming refugee protection, I find that the claimant is not credible and I extend that to all of the evidence.

[30] The Claimant's Counsel provided a great deal of evidence on Vincentian state protection in the context of domestic violence. In her submissions, she also referred at length to the Board's own material on domestic violence in St. Vincent as well as the case law. Having found that the claimant is not credible, I find that an assessment of state protection for victims of domestic violence in Saint Vincent and the Grenadines is not required. I also find that the Guidelines are not of help in assessing this claim.

[31] Therefore, after a thorough review of all the evidence in this case, I find that there is not a serious possibility or reasonable chance that the claimant would face persecution for a Convention ground or is in need of protection under section 97(1) if required to return to her home country.

CONCLUSION

[32] Having considered all the evidence, and based on the above analysis, I find the claimant not to be a Convention refugee as the claimant has not established that there is a reasonable chance or serious possibility that she will face persecution for a Convention ground or that she will face a risk to her life or cruel and unusual treatment or punishment or a danger, believed on substantial grounds to exist, of torture should she return to her home country. The Panel rejects this claim pursuant to both sections 96 and 97(1) of the IRPA.

(signed)

"James V. Railton"

James V. Railton

August 29, 2012

Date

REFUGEE PROTECTION DIVISION / DOMESTIC VIOLENCE / GENDER-RELATED PERSECUTION / SUBJECTIVE FEAR / DELAY IN MAKING A CLAIM / UNREASONABLE DELAY / HUMANITARIAN AND COMPASSIONATE REVIEW / DENIED / FEMALE / NEGATIVE / SAINT VINCENT AND THE GRENADINES

1 As enacted by S.C. 2001, c. 27, (the "Act" or "IRPA")

2 Exhibit C-1, Q.31

3 Wherever the panel has written "I find", "the claimant established" or other such words indicating a finding of fact has been made by the panel, one should read into the finding that it was made on the civil standard, that is to say, findings are made on a balance of probabilities and no higher standard. The panel is aware that the claimant has the burden to establish her claim with "clear, cogent and convincing evidence", which does not raise the standard of proof but merely indicates that a panel must be satisfied the facts in issue are more likely than not to have occurred. Should the panel not be able to determine if a fact in issue is established by the claimant, when it is her burden to do so, then the panel will find the fact has not been established. On the other hand, the panel is aware that, once the facts respecting an allegation of persecution is found, then the panel must determine if, on those facts, there is more than a mere possibility of persecution in the future, that is to say, a "reasonable chance" of persecution for a Convention ground, as set out in Adjei.

4 Exhibit R/A-2

5 Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution: Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act, IRB, Ottawa, March 9, 1993; Update: November 1996, as continued in effect by the Chairperson on June 28, 2002 pursuant to section 159(1)(h) of the Immigration and Refugee Protection Act (the "Guidelines")

6 *Maldonado v. Canada (Minister of Employment and Immigration)*, [1980] 2 F.C. 302 (C.A.), at 305.

7 *Stojmenovic v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 873 (CanLII)

8 *Cromhout, Melody Angel v. Canada (MCI)*, 2009 FC 1174; *Shakiban, Rafe v. Canada (MCI)*; 2009 FC 1177. See also, *Ortiz Juarez v. Canada (MCI)*, 2006 FC 288

9 *Ramiro Gonzalez v. Canada (MCI)*, 2006 FC 1274

10 *Espinosa v. Canada (MCI)*, 2003 FC 132; see also *Nyayieka v. Canada (MCI)*, 2010 FC 690

11 Ortiz Garzon v. Canada (MCI), 2011 FC 299

12 Rajudeen, Zahirdeen v. M.E.I. (F.C.A., no. A-1779-83), Heald, Hugesson, Stone (concurring), July 4, 1984.

13 Kamana, Jimmy v. M.C.I. (F.C.T.D., IMM-5998-98), Tremblay-Lamer, September 24, 1999.

14 Ahoua, Wadjams Jean-Marie v. Canada (M.C.I.), 2007 FC 1239 at paragraph 16.

15 Exhibit C-1, Q.31, page 6 (unnumbered), last paragraph and page 7, top

16 Exhibit C-3, item 1

17 Bhagat v. Canada (Citizenship and Immigration), 2009 FC 1088

RPD.15.7 (May 18, 2010)

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