

**Date: 20061013**

**Docket: IMM-1231-06**

**Citation: 2006 FC 1205**

**Ottawa, Ontario, October 13, 2006**

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

**BETWEEN:**

**JASMIN AKTER**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This application is for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated February 8, 2006, finding that the applicant was not credible and was therefore neither a Convention refugee nor person in need of protection.

**ISSUE**

[2] Did the Board commit any reviewable error in its negative credibility findings?

[3] For the following reasons, the application shall be allowed.

**BACKGROUND**

[4] The applicant is a 30-year-old woman, citizen of Bangladesh. Her estranged husband, as well as her parents and siblings reside in Bangladesh.

[5] Along with her father, the applicant participated in the country's 2001 election campaign on behalf of the Awami League (AL). In December 2001, Bangladesh National Party (BNP) and Jamaat goons set fire to her father's store, as a result of their support of the opposition party, AL.

[6] In March 2002, she was promoted as executive member of her branch of the AL, responsible for women labourers in the garment sector. During that same year, she rejected the advances and marriage proposal of Humayun, a BNP goon who continued to harass her. This harassment persisted even after her marriage to Ripon Hossain on January 31, 2003. Humayun told her husband that he had intimate relations with his wife, which led to different incidents of abuse at the hands of her husband.

[7] On July 4, 2004, while her husband was out of the country, the applicant was abducted by Humayun and three other men, blindfolded and taken to a house where she was tortured and gang raped. She was found unconscious in a ditch and taken to Mirpur General Hospital where she woke up. She was treated by Dr. Khaleda Akler and released on the third day, July 7, 2004. Upon learning of what had happened to the applicant, her husband told her father that she must not return to his home again.

[8] The applicant stayed at a friend's house while her father made arrangements with an agent to seek refuge in Canada.

[9] The applicant left Bangladesh on her birthday, August 6, 2004, and arrived in Canada on August 11, 2004, after spending four days in New York. On August 13, 2004, she filed her claim for protection as a Convention refugee because she had a well-founded fear of persecution from her husband and supporters of the governing BNP for reasons of her membership, as a woman, in a particular social group. She also feared persecution from supporters of the BNP because of her political opinion, as an active member of the Bangladeshi opposition party, AL, which she joined on August 15, 1999.

[10] Her claim for protection was rejected. It is that decision which forms the basis of this application for judicial review.

### **DECISION UNDER REVIEW**

[11] The Board's decision was based solely on the applicant's credibility. The Board found that her demeanour betrayed her. She was not spontaneous in her responses to the questions put to her. Rather she relied heavily on her Personal Information Form (PIF) instead of giving a spontaneous recollection of the facts as she alleged. Moreover, she was vague and there was no mention in her PIF of some of the incidents she testified to having occurred in 2001. Finally, the Board found that her lack of spontaneity in the manner in which she answered the questions did not help her credibility. She also confused the dates and sometimes she could not recall the dates in question.

[12] The applicant explained that she suffers from memory loss and cannot remember lots of things after the incidents of July 4, 2004. However, the Board did not accept her explanation.

[13] The Board also found that the supporting medical letter of certificate provided by the applicant lacked in specifics. As a result, the Board gave no probative value to the medical letter and doubted that she was gang raped. The Board stated as follows:

[...] If the panel was to believe that the letter was issued based on the medical records, as stated in the letter, then the panel expected to see some specifics of the treatment provided during her stay in the hospital until July 7, 2004, including the tests done to verify the rape and tests ensuring the claimant did not or would not contract sexually transmitted disease (STD), as she alleges to have been gang raped. The panel does not understand why the letter would not mention any follow up at least to monitor future pregnancy as a consequence. She said that her medical tests taken did not show any of this even though her monthly cycle (period) had stopped. The panel does not give any probative value to the letter due to lack of corroboration, in general, with her testimony, as well as the letter itself lacking in several specifics. The panel doubts her alleged rape.

[14] Finally, the Board considered the Chairperson's Guidelines on Gender Related Claims. However, the Board concluded that given the applicant's lack of credibility, the Guidelines were not applicable.

## ANALYSIS

### *Standard of review*

[15] Where questions of credibility are involved in assessing refugee claims, the standard of review is patent unreasonableness. The Federal Court of Appeal in *Aguebor v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 732 (F.C.A.) (QL) stated at paragraphs 2 to 4:

In his memorandum, counsel for the appellant relied on the decision of this Court in *Giron v. Minister of Employment and Immigration* [(1992), 143 N.R. 238 (F.C.A.)] in support of his argument that a court which hears an application for judicial review may more easily intervene where there is a finding of implausibility. Because counsel are using *Giron* with increasing frequency, it appeared to us to be useful to put it in its proper perspective.

It is correct, as the Court said in *Giron*, that it may be easier to have a finding of implausibility reviewed where it results from inferences than to have a finding of non-credibility reviewed where it results from the conduct of the witness and from inconsistencies in the testimony. The Court did not, in saying this, exclude the issue of the plausibility of an account from the Board's field of expertise, nor did it lay down a different test for intervention depending on whether the issue is "plausibility" or "credibility".

There is no longer any doubt that the Refugee Division, which is a specialized tribunal, has complete jurisdiction to determine the plausibility of testimony: who is in a better position than the Refugee Division to gauge the credibility of an account and to draw the necessary inferences? As long as the inferences drawn by the tribunal are not so unreasonable as to warrant our intervention, its findings are not open to judicial review. In *Giron*, the Court merely observed that in the area of plausibility, the unreasonableness of a decision may be more palpable, and so more easily identifiable, since the account appears on the face of the record. In our opinion, *Giron* in no way reduces the burden that rests on an appellant, of showing that the inferences drawn by the Refugee Division could not

reasonably have been drawn. In this case, the appellant has not discharged this burden.

*Did the Board err when it found that the applicant's evidence lacked credibility?*

[16] The Board referred to several areas where it doubted the applicant's evidence. Most importantly, it found that she was not spontaneous and failed to mention dates. While the Board was at liberty to find that such behaviour did not support her credibility, it erred in using these signs of demeanour as the basis for doubting the applicant's evidence including that she had been gang-raped.

[17] There is a limited jurisprudence relating to refugee applicants who allege being victim of gang rape. However, these cases all reflect a certain demeanour marked by lethargy, lack of memory, reluctance to relive the incidents through testimony and memory loss. These are all symptoms shown by the applicant and which form the basis for the Boards credibility findings. (*Annan v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 1038 (F.C.T.D.) (QL); *Sivayoganathan v. Canada (Minister of Citizenship and Immigration)*, [1994] F.C.J. No. 1653 (F.C.T.D.) (QL); *Schopova v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 904, [2003] F.C.J. No. 1155 (F.C.) (QL); and *Sivalingham v. Canada (Minister of Citizenship and Immigration)*, [1994] F.C.J. No. 1554 (F.C.T.D.) (QL)).

[18] Based on the jurisprudence on this subject matter, the Board erred in rejecting the applicant's testimony based on her behaviour and it was therefore unreasonable for the Board to draw a hasty conclusion while ignoring the unusual circumstances upon which the applicant allegedly sought refuge in Canada.

[19] As is noted by counsel for the applicant, following James C. Hathaway in *The Law of Refugee Status*, (Markham: Butterworths, 1991) at page 72, "persons suffering from genuine,

post-traumatic anxiety are often unable adequately to recall information, much less relate it in an articulate manner”.

[20] Moreover, a review of the transcripts of the hearing reveals that at the point at which the applicant was been questioned about the events of July 4, 2004, the Board intervene as follows

(page 24 of the Minutes of a Hearing on May 31, 2005):

BY R.P.O. (TO Claimant)

Q. So continue on the story you were telling us, on what happened on the 4<sup>th</sup> of July, 2004.

A. So they beat me up from the street. For a little while, they drive, drove me and stopped, and then they took me into a room. And then, they opened the blindfold and showed me a gun, a pistol, and said “If you scream, I’ll kill you.” And after that, they asked me to undress.

BY PRESIDING MEMBER (to Claimant)

Q. How many were they?

A. Four.

Q. So all four of them misbehaved with you? Yes?

A. One person who had a video camera, who turned on the video camera. They were creating pressure on me to undress.

Q. Okay. We don’t want to go through all that. Okay. They were four?

A. Yes.

Q. There were four men.

A. Yes.

Q. The question was if all four of them misbehaved with you?

A. Three persons.

BY R.P.O. (to Claimant)

Q. And how did you get out of that house?

A. I don’t know actually, because the time I get out from that room, I didn’t have my sense.

BY PRESIDING MEMBER (to Claimant)

Q. Somebody helped you, or ... When you came to your senses, what do you remember?

A. When I regained my senses, then I saw I’m in the hospital.

Q. Somebody told you later on how they found you and brought you to the hospital?

A. Yes, later I was told.

Q. Okay. Tell us what you were told?

A. A guard who rescued me from the street and then who brought me to the hospital.

[21] This passage of the Board's questions to the applicant is revealing. When the applicant sought to go into detail of what had transpired, the Board said "Okay. We don't want to go through all that. Okay..."

[22] While the Board may have intended to show sensitivity by shutting off the applicant's testimony in this way, it is not reasonable for the Board to refuse to hear the details of the applicant's story, gruesome and distressing as this might be and then turn around and say that the applicant is not credible and only to conclude as follows:

The panel doubts her alleged rape.

[23] The applicant's testimony is not contradicted. The tribunal had a medical report regarding the applicant's hospitalization from July 4 to 7, 2004, which corroborates her testimony that she was tortured and raped. There is no apparent mistake in the medical report. The tribunal made no finding that the medical report was a forged document. It can be read at paragraph 2 and 3 of the medical report:

The examining Doctor also found that there was four circumscribed burn marks on her back, which seemed to me by cigarette, of about 7x8mm in diameter and of skin depth.

The doctor based on the examination and the Patient's statement confirmed that she was tortured and raped. After proper treatment of her womb she recovered and was discharged on 7th July 2004.

[24] For this reason alone, the Board erred by reaching its decision on an erroneous finding of fact and made a perverse and capricious conclusion without regard to the material before it contrary to section 18.1(4)(d) of the *Federal Courts Act*, R.S.C. 1985, ch. F-7.

[25] The Board unfairly assessed the applicant's testimony and failed to consider relevant evidence when it concluded that she was not raped.

[26] The parties did not submit questions for certification.

**JUDGMENT**

**THIS COURT ORDERS** that:

1. The application for judicial review is allowed;
2. The matter is sent back for redetermination by a newly constituted panel.
3. No question is certified.

Judge

“Michel Beaudry”

**FEDERAL COURT**

**NAME OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** IMM-1231-06

**STYLE OF CAUSE:** JASMIN AKTER  
and THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION

**PLACE OF HEARING:** Montreal, Quebec

**DATE OF HEARING:** October 4, 2006

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AND JUDGMENT:** Beaudry J.

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