Date: 20060214

Docket: IMM-1760-05

Citation: 2006 FC 161

Ottawa, Ontario, February 14, 2006

PRESENT: THE HONOURABLE MR. JUSTICE SHORE

BETWEEN:

FATMA ALLY NAHIMANA

NAWEL AYMAN OWISS

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

INTRODUCTION

[1] The best interest of a child constitute the very basis by which a child is to be treated and considered by a tribunal in Canada.

[2] As stated by Mr. Justice McGuigan in *Ye v. Canada(Minister of Employment and Immigration)*:

We may well wonder whether this judgment does not involve the imposition of Western concepts...and whether it is correct to interpret...in light of a linear Western model...[1]

JUDICIAL PROCEDURE

[3] This is an application for judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. (IRPA), of a decision of the Refugee Protection Division of the Immigration and Refugee Board (Board) dated February 23, 2005, wherein it decided that the Applicants were not Convention refugees or persons in need of protection, pursuant to sections 96 and 97 of IRPA.

BACKGROUND

[4] The principal Applicant, Ms. Fatma Ally Nahimana, alleges she is a citizen of Burundi. She claims that she was born on February 7, 1987 and that she was a minor when she fled her country (14 years old) and still a minor (16 years old) when she entered Canada.

[5] The Co-Applicant, Nawel Ayman Owiss, Ms. Nahimana's daughter, was born in the United States in 2003. Her claim is based on the same facts as in her mother's claim.

[6] Ms. Nahimana claims refugee protection in Canadaon the basis of ethnicity, imputed political opinion and membership in a particular social group.

[7] Ms. Nahimana claims that her father was a member of FRODEBU, a political party, and was constantly threatened because of his political affiliation and because he was Hutu. In October 1999, when she was twelve years old, she saw men with machetes belonging to an armed Tutsi militia (the "Sans Défaite") attack her father and step-mother. Ms. Nahimana ran away and went to her school where she told Sheikh Ibrahim what happened. She asked him to take her to her birth mother's house but he said this was too dangerous. He told her it would be best for her to leave the country. He sent her to Kenya with a friend of her father who was leaving that day.

[8] Her father's friend brought Ms. Nahimana to his friend Michael's house in Nairobi. Soon afterward, she and Michael began an intimate relationship and he eventually started selling her to his friends. In May 2001, Michael agreed to let her leave. He gave her a false Tanzanian passport with a U.S. Visa for her to travel to the United States.

[9] Michael travelled with Ms. Nahimana and left her in New York with a couple he knew. She remained there as a babysitter to their child. While in the United States, she met a Sudanese man and became pregnant. Her daughter was born on January 23, 2003. The woman she was living with then told her she should come to Canadaand make a refugee claim.

[10] Ms. Nahimana arrived in Canada in November 2003 and made a claim for refugee protection at that time.

DECISION UNDER REVIEW

[11] The Board determined that Ms. Nahimana and her daughter are neither Convention refugees nor persons in need of protection. They will not face a serious possibility of persecution in Burundi or the United States in the case of the daughter. Furthermore, it was concluded that Ms. Nahimana's removal to Burundi would not subject her personally to danger on any substantial grounds of torture and will not subject her personally to a risk to her life or a risk of cruel and unusual treatment or punishment.

[12] The Board rejected Ms. Nahimana's credibility on material aspects of her claim and was not persuaded, on a balance of probabilities, that she is who she says she is.

The panel does not have before it any credible or trustworthy evidence in support of the claimant's identity, or ethnicity, or in regards to the events she alleged, which form the basis of her claim for protection.

[13] The Board held that Ms. Nahimana's evidence was contradictory, unreliable and did not have the "aura of a genuine recounting of actual events and experiences". The Board

further found that Ms. Nahimana's explanations were not reasonable and added inconsistencies to her story. The Board found that her entire claim was implausible.

[14] The Board also had doubts as to Ms. Nahimana's age.

The panel also notes that the claimant appeared to have the appearance, the demeanour and the maturity of someone older. The panel is not persuaded the claimant was a minor at the time she entered Canada or at the time of her hearing before the Board.

ISSUES

[15] The issues in the present case are the following:

1. Did the Board err in rejecting the credibility of Ms. Nahimana's evidence?

2. Did the Board err by not considering Ms. Nahimana's particular circumstances?

ANALYSIS

Standard of review

[16] The reasons of the Board are essentially based on its assessment of the credibility of Ms. Nahimana's evidence. Credibility finding of the Board are entitled to the highest degree of deference. The standard of review for findings of credibility is that of patent unreasonableness. (*Aguebor*)[2]

Credibility

[17] Before a credibility finding is set aside, one of the following criteria must be established: the Board did not provide valid reasons for finding that an applicant lacked credibility; the inferences drawn by the Board are based on implausibility findings that in the view of the Court were reached without even the minimum due substantiation; the decision was based on inferences that were not supported by the evidence; or the credibility finding was based on a finding of fact that was perverse, capricious, or without regard to the evidence. (*Bains, Bulambo*)[3]

[18] The Board's decision was based on misstatements and misunderstandings of her evidence and especially on inferences that were not supported by the evidence and on findings of fact that were made without regard to the evidence. The Board has made serious errors in its assessment of Ms. Nahimana's credibility.

[19] The Board also erred in its discussion of languages in Burundi. While the evidence does state that French and Kirundi are the official languages of the country, all of the evidence also states that Swahili is widely spoken in Burundi.[4]

[20] The evidence before the Board was that the language that most of the inhabitants of Ms. Nahimana's neighbourhood, Buyenzi, speak is Swahili. The evidence also confirms the fact it is not unusual for someone from Buyenzi, who has little or no formal education, not to speak French or Kirundi. The Board therefore erred in impugning Ms. Nahimana's credibility for this reason.[5]

[21] The most serious error made by the Board is that it examined the original of a document seized by an Immigration Officer, without giving Ms. Nahimana or her counsel the opportunity of examining the original document and making representations with respect to its concerns thereto. (*Kamulete*; *Lawal*)[6]

[22] The Board expressed numerous further concerns about Ms. Nahimana's evidence. For example, the Board did not understand why the Sheikh sent her to Kenya or why Ms. Nahimana did not have more information about the woman she was living with in the U.S. Ms. Nahimana did provide explanations to address the Board's concerns. However, the Board ignored her testimony and treated the evidence as though the explanations were never given, finding that she was not credible and that her story was not plausible.

[23] There were many inconsistencies and gaps in Ms. Nahimana's evidence. There were errors that she could not always correct, there were also many details that she did not know or could not explain. This made her story seem very implausible. As the Federal Court of Appeal held in *Giron v. Canada(Minister of Employment and Immigration)*,*[7]* credibility findings based on internal inconsistencies and contradictions are "...the heartland of the discretion of triers of fact...". It was therefore open to the Board to find that Ms. Nahimana was not credible.

[24] However, even though the burden is on Ms. Nahimana to establish the facts to support her claim, there is a need for the Board to substantiate and motivate its decision by giving reasons with respect to what it deemed to be inconsistencies in her story. In making its decision, the Board should have been more sensitive to the fact that Ms. Nahimana was a minor at the time of the relevant events, including at the time of the hearing, and that she comes from a society where women are told very little. It was therefore plausible that she would have trusted the men who helped her without questioning them.

[25] The Board states in its decision that it was not convinced that Ms. Nahimana was a minor when she enteredCanada because she had the appearance, the demeanour and the maturity of someone older. This remark, in and of itself, without drawing on other inconsistencies would not be appropriate if it, alone, was the only reason for an adverse finding. This inference was not demonstrated on the basis of any articulated evidence, specialized or otherwise (e.g. drawing on any specific, or specialized, demonstrated knowledge of Africa) and it was patently unreasonable for the Board to rely on this to support its conclusion that Ms. Nahimana was not credible.

Ms. Nahimana's personal circumstances

[26] The Board did not take into consideration the fact that Ms. Nahimana was a child when the events in question took place as well as when she entered Canada and at the time of the hearing. They treated her as an adult and assessed her evidence as that of an adult. Furthermore, the Board did not consider that Ms. Nahimana is Muslim and from Africa. In such societies and cultures, female adults and children are treated very differently than in Western culture. It was incumbent on the Board, as a specialized tribunal, in its approach to consider Ms. Nahimana's particular circumstances, context, culture, age, experience and even demeanor which can also be reflected in the life's experience, one has undergone, when attempting to understand and to assess her evidence. In *Zekiye Incirciyan*,[8] the Immigration Appeal Board found that Mrs. Incirciyan, a Turkish widow with no close male relatives in her country, was a refugee because of her membership in the particular social group of single

women living in a Muslim country without any protection of a male relative. In her particular circumstances, the authorities were unwilling to protect her (neither was there any male relative, nor other male, under whose protection could she place herself). In this regard, no mention is made in the Board's decision of any consideration of the Guidelines, known as Women Refugee Claimants Fearing Gender-Related Persecution, as to why they were, or were not, even taken into purview as is the practice in decisions which are reviewed by this Court in similar circumstances.

[27] In *Ye*, above, Mr. Justice MacGuigan allowed the appeal of the denial of Convention Refugee status because the Board ignored the appellant's evidence and made erroneous findings of fact, largely as a result of cultural misunderstanding:

We may well wonder whether this judgment does not involve the imposition of Western concepts on a subtle oriental totalitarianism, and whether it is correct to interpret Chinese law enforcement in the light of the more linear Western model, when the social control exercised by the Chinese State is omnipresent, though the co-opting of the vigilance of its citizens generally. The respondent conceded during oral argument that in none of the hundreds of relevant cases which have come before this Court in recent years did the Chinese authorities ever lie in wait to make an arrest after having delivered a summons.

[28] The Supreme Court held in *Gordon v. Goertz*[9] that the best interests of the child is the only relevant issue in determining custody. The Court must determine what is in the best interests of the child before making a decision as to the appropriate custody arrangements. Although *Gordon v. Goertz* is a family law case, the principle of the best interests of the child applies to this case. The best interests of the child is a prime concern in this proceeding where a child is involved.

[29] This is supported by article 3(1) of the United Nations *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, which states that the best interests of the child is a primary consideration in all matters concerning children, including legal proceedings. As well, article 22(1) of the *Convention on the Rights of the Child* deals specifically with refugee matters, stating that states must ensure children refugees or refugee claimants receive adequate protection.

States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.	Les Etats parties prennent les mesures appropriées pour qu'un enfant qui cherche à obtenir le statut de réfugié ou qui est considéré comme réfugié en vertu des règles et procédures du droit international ou national applicable, qu'il soit seul ou accompagné de ses père et mère ou de toute autre personne, bénéficie de la protection et de l'assistance humanitaire voulues pour lui permettre de jouir des droits que lui reconnaissent la présente Convention et les autres instruments internationaux relatifs aux droits de l'homme ou de caractère humanitaire auxquels lesdits Etats sont parties.

[30] In *Uthayakumar v. Canada (Minister of Citizenship and Immigration)*[10], Mr. Justice Blais allowed an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board which concluded that the applicants were not Convention refugees because the Board had committed a patently unreasonable error of fact in finding that the applicants were not credible. The applicants were children and the Board had not taken that into consideration in assessing their credibility.

I accordingly find that the panel committed a patently unreasonable error of fact which influenced its final conclusions. The panel clearly did not take into consideration the fact that the applicants were ten and twelve years of age when they travelled to Canada and these two children clearly did not have to keep a log throughout their travels. Furthermore, it was quite possible, and perhaps even likely realistic, that both of the applicants could not precisely remember all of the circumstances of the journey, which must certainly have been very stressful under the circumstances.

Mr. Justice Blais also referred to the Immigration and Refugee Board Chairperson's Guidelines on Child Refugee Claimants which should be applied when dealing with minors in the context of refugee protection claims.

[31] The Board erred in not referring and in not even considering the possibility of putting into practice the Guidelines on Child Refugee Claimants.

Daughter's claim

[32] As for Ms. Nahimana's daughter, the principal Applicant's dependent, she is a U.S. citizen, having been born in the U.S. Although she could eventually be granted status in Canada, she already has citizenship status in the U.S. and benefits from the protection of the U.S. government. There is no reason to interfere with the decision from the Board in the case of Ms. Nahimana's daughter as it was within the purview of the Board to make this decision. The application for Ms. Nahimana's daughter is unwarranted. It must be dismissed as she has the protection of the U.S.

CONCLUSION

[33] The application on behalf of Nawel Ayman Owiss, Ms. Nahimana's daughter, is dismissed as it was open to the Board to make that particular decision and therefore there is no reason to interfere.

[34] The application on behalf of Ms. Nahimana is allowed because the decision of the Board was patently unreasonable.

[35] Ms. Nahimana deserves a fair hearing which included the understanding of her subjective elements of evidence without any unreasonable inferences. Even, if the ultimate conclusion is the same as that of the Board, the means do not necessarily justify the ends and the ends do not necessarily justify the means. The fact that the applicants may be precursors for individuals who may want to come to be reunited with them should be considered, only, if and when the situation arises. Recognizing that each case is a case unto itself, any other case will have to be considered singularly, on its own merits. The merits of the applicants' review

should be examined solely on their own allegations. The references made in regard to family members and acquaintances who allegedly assisted the principal claimant flee can only be understood in light of the principal applicant being only 12 years old when the events leading to this claim unfolded.

[36] For all the above reasons, in making these erroneous findings without substantiation in respect of the evidence, the Board's decision is set aside and the matter is remitted for re-determination by a differently constituted panel.

ORDER

THIS COURT ORDERS

1. The matter is to be remitted to a differently constituted panel for re-consideration;

2. No question to be certified.

"Michel M.J. Shore"

JUDGE

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[1] [1992] F.C.J. No. 584 (F.C.A.) (QL).

[2] *Aguebor v. (Canada) Minister of Employment and Immigration*, [1993] F.C.J. No. 732 (QL), (1993) 160 N.R. 315 (F.C.A.), at para. 4.

[3] *Bains v. Canada(Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1144 (QL), at para. 11; *Bulambo v.Canada(Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1682, 2003 FC 1330, at para. 3.

[4] Exhibits "D" and "E" of Applicant's Affidavit.

[5] *Ibid*.

[6] *Kamulete v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 894, 2004 FC 735, at para. 10; *Lawal v. Canada(Minister of Employment and Immigration)*, [1991] 2 F.C. 404, [1991] F.C.J. No. 211.

[7] [1992] F.C.J. No. 481 (C.A.) (QL), (1992) 143 N.R. 238, at page 239 (F.C.A.).

[8] Immigration Appeal Board Decision M87-1541X, August 10, 1987, in James C. Hathaway, *The Law of Refugee Status*, Toronto/Vancouver, Butterworths Canada Ltd., 1991, at page 162.

[9] [1996] 2 S.C.R. 27.

[10] [1999] F.C.J. No. 1013 (QL).

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1760-05
STYLE OF CAUSE:	FATMA ALLY NAHIMANA NAWEL AYMAN OWISS v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	January 31, 2006
REASONS FOR ORDER	
AND ORDER BY:	The Honourable Mr. Justice Shore
DATED:	February 14, 2006
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