Date: 20060213

Docket: IMM-4175-05

Citation: 2006 FC 190

Montréal, Quebec, February 13, 2006

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

MARY BORTEY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an application for judicial review under section 72 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 May 21, 2005, in which the Board vacated its previous decision to allow the applicant's claim for refugee protection after it found that the latter was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter.

FACTUAL BACKGROUND

[2] The applicant is Ghanaian. She is 36 years old. She presented a claim to obtain refugee status on July 28, 1999. In support of her original claim for refugee status, she alleged that the chief of her village asked to marry her and become his fourth wife. She stated that if she was to accept the proposal, she would be subjected to genital excision. The applicant refused the proposal despite her family's pressures. As a result, she alleged that she was persecuted by her family and by village members. She further alleged that she left Ghana on July 23, 1999, and arrived in Canada illegally on July 26, 1999. She stated that she was single and that she did not possess any travel documents. On September 26, 2000, the Board granted refugee status to the applicant, although it stated that it had doubts as to the credibility of certain elements of her asylum claim.

[3] On October 28, 2000, in Montréal, the applicant married Mr. Kwaku Boateng, a Ghanaian citizen. The applicant applied for permanent residence in Canada on November 4, 2000, and presented a photocopy of her birth certificate to support her application. Her husband, Kwaku Boateng, had presented a claim for refugee status on May 29, 1998. In it, he had stated that he had been married to one Mary Bortey, born on November 13, 1962. On July 15, 1998, Mr. Boateng filed his PIF form with the Board, in which he indicated that he had been married to Mary Bortey since 1992 and that they had lived in Tema, Ghana, with their children. On May 11, 1999, the Board denied refugee status to Mr. Boateng.

[4] On June 5, 2000, Mr. Boateng filed an H&C application. He claimed to be divorced and filed a statutory declaration signed by his father-in-law, Mr. Joseph Bortey, to support the claim that the couple had divorced on March 15, 1999. Mr. Boateng filed an application for permanent

residence on December 16, 2000 in which he stated that he was now married to Mary Bortey, the applicant, born March 6, 1969. He stated that he had lived at 3290 Rue Goyer apt. 9, between July 1999 and July 2000. He also stated that he had lived at 3405 rue Linton, apt. 108 since July 2000. The applicant shared the same address since her arrival in Canada in August 1999.

DECISION UNDER REVIEW

[5] The Board vacated the September 26, 2000, decision which had granted refugee protection to the applicant, as it found that she had obtained her refugee status as a result of direct or indirect misrepresentations or the withholding of material facts relating to a relevant matter, pursuant to section 109(1) of the Act.

[6] The Board found grave factual inconsistencies and implausibilities which led it to conclude that the applicant was not credible.

[7] When Ms. Bortey testified, she could not remember how she had entered Canada, or if she had been arrested by an Immigration agent at the border. However, she had stated in her notification of claim to be a Convention refugee that she had arrived to the border by taxi. Her contradictions and vague testimony on this issue affected her credibility.

[8] Having been asked as to how she had met her husband, whom she stated having met in Montréal, she answered that she had met him during the Montréal Jazz Festival. However, the Jazz Festival had ended a few weeks before her arrival in Canada in late July 1999. The Festival had taken place during the first two weeks of July; she had stated that she had met her husband for the

first time during the Jazz Festival two weeks after it had ended. Once confronted with this fact, she testified that the woman who had taken her to downtown Montréal for the concert had told her it was part of the Jazz Festival. The Board did not believe her answer.

[9] The Board also asked the applicant to explain how she could have signed, jointly with her husband, a Hydro Quebec form dated June 30, 1999, since she had previously stated that she had arrived in Canada on July 26, 1999. It was the Board's view that the applicant was not able to give adequate explanation on this matter. Incidentally, the evidence contradicted the content of the applicant's PIF, as she had stated that she was still in Ghana on that date, fleeing from her family and the village chief, hiding in a church. The Board found this inconsistency to be quite grave, as it contradicted the applicant's alleged persecution.

[10] As indicated above, Mr. Boateng stated in his PIF that he was married to one Mary Bortey, also from Tema, since December 19, 1992. Asked by the Board to explain this discrepancy, the applicant stated that Mary Bortey is a common name and that her husband was previously married to another woman bearing the same name as her. The Board found this explanation implausible. The Board could accept that the first name Mary is common, but not a family name like Bortey without specific evidence on record that this is so. Indeed, that two Mary Borteys lived in the same part of the same town and had married the same man seemed too coincidental and the Board concluded accordingly that the applicant's testimony and that of her husband smacked of invention. That being said, the Board also considered a picture said to be that of Mr. Boateng's first wife as well as two statutory declarations from her parents and the parents of the other Mrs. Bortey, but did not attribute weight to this evidence which was found to be unreliable in the circumstances.

[11] Consequently, the Board found that the applicant obtained refugee status on the basis of misrepresentations and the withholding of material facts. It also concluded that once these misrepresentations were set aside, there was no other sufficient evidence considered at the time of the first determination on which on which a decision in favour of the applicant could have been based.

ANALYSIS

[12] Section 109 of the Act provides:

109. (1) The Refugee Protection Division may, on application by the Minister, vacate a decision to allow a claim for refugee protection, if it finds that the decision was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter.	**109.** (1) La Section de la protection des réfugiés peut, sur demande du ministre, annuler la décision ayant accueilli la demande d'asile résultant, directement ou indirectement, de présentations erronées sur un fait important quant à un objet pertinent, ou de réticence sur ce fait.
(2) The Refugee Protection Division may reject the application if it is satisfied that other sufficient evidence was considered at the time of the first determination to justify refugee protection.	(2) Elle peut rejeter la demande si elle estime qu'il reste suffisamment d'éléments de preuve, parmi ceux pris en compte lors de la décision initiale, pour justifier l'asile.
(3) If the application is allowed, the claim of the person is deemed to be rejected and the decision that led to the conferral of refugee protection is nullified.	(3) La décision portant annulation est assimilée au rejet de la demande d'asile, la décision initiale étant dès lors nulle.

[13] In *Sethi v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1434 at paras. 17-20 (F.C.) (QL), 2005 FC 1178, Justice Tremblay-Lamer stated that there were different standards of review applicable to s. 109(1) and (2) of the Act:

> Applying the factors of the pragmatic and functional approach, RPD decisions are not protected by a strong privative clause and materiality or relevance is a hallmark legal concept, with respect to which the RPD does not possess relative expertise vis-à-vis the Court. However, for the purposes of subsection 109(1), the RPD must assess the evidence relied upon in the first place to justify granting refugee status in light of the evidence presented during the application to vacate; namely, the new evidence presented by the Minister to show that misrepresentations were made and the refugee's own oral testimony, if any, to the contrary. And as such, the nature of the RPD's determination under subsection 109(1) is, at least in part, contingent upon its first-hand assessment of the putative refugee, her candour, general demeanour and overall credibility. This Court has repeatedly underscored that the RPD is in a privileged position in this regard (A*guebor v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 732 (C.A.)(QL); *N'Sungani v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 2142 (F.C.)(QL)) **Therefore, in my view, a high measure of curial deference is owed to subsection 109(1) determinations and patent unreasonableness is the appropriate standard to apply.**
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> However, the corollary determination made by the RPD as to whether "other sufficient evidence was considered at the time of the first determination to justify refugee protection" (under subsection 109(2)) constitutes, in my opinion, a different exercise: it is not premised, even if only in part, upon the RPD's assessment of the refugee's testimony and credibility at the time of the application to vacate. Rather, the inquiry required under subsection 109(2) entails deciphering whether any of the evidence cited in support of the original positive determination is left "untainted" by the fact of the newly discovered material misrepresentations (see *Babar v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 301 (T.D.)(QL); *Duraisamy v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1915 (T.D.)(QL)).
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> The RPD is, as stressed already, by virtue of its position adept at drawing inferences regarding the plausibility of an individual's story of persecution (*Aguebor*, supra) and, by the same token, judging whether misrepresentations about a relevant matter were made, based directly on the documentary and oral evidence that is submitted. But to accomplish its task under subsection 109(2), the RPD must examine the evidence from the original refugee claim hearing. The material misrepresentations having been found, this inquiry in no way depends upon the RPD's current assessment of the refugee at the hearing.
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> In other words, the RPD is not in a privileged to position relative to this Court to undertake this exercise and determine whether other sufficient evidence in support of the initial grant of refugee status remains. **Thus the standard of reasonableness simpliciter should in my view apply in respect of determinations made pursuant to subsection 109(2).**
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> (My emphasis)

[14] Essentially, the applicant disagrees with the credibility finding drawn by the Board and the way it weighed the evidence in determining that the previous decision was obtained as a result of directly or indirectly misrepresenting or withholding material facts as to a relevant matter. The

applicant submits that it was unreasonable for the Board to reproach her for being vague with respect to the mode of transportation she had used to travel to the U.S./Canada border. After all, the events in question had occurred more than six years earlier. The applicant alleges that it was unreasonable for the Board to expect her, having recently arrived from Africa, to know the difference between the numerous musical events and festivals taking place in Montréal. It was conceivable that the applicant would think that the concert she had attended was part of the Montréal Jazz Festival. The applicant also states that the Board erred by making adverse findings of credibility concerning the date of filing of the Hydro Quebec forms. The applicant further submits that the Board erred in making adverse findings of credibility based on its own plausibility findings concerning the likelihood of the existence of two persons bearing the name Mary Bortey and living in the same village. The applicant argues that in African countries, it is quite common to see many people bearing the same names.

[15] In my opinion, the conclusions drawn by the Board that the applicant obtained refugee status on the basis of misrepresentations and the withholding of evidence are based on the evidence on record and are not patently unreasonable. Moreover, the overall result reached by the Board, that there was insufficient remaining evidence on which a decision in favour of the applicant could have been based, has not been seriously challenged and must be sustained whatever standard of review is applied here. It falls to the Board as the trier of fact to evaluate the evidence and give due weight to it. Notwithstanding this, the Board cannot find a lack of credibility where the inconsistencies, upon which the finding is based, are not supported by the evidence: see *Ahortor v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 705 at paragraph 41 (F.C.T.D.) (QL), 21 Imm. L.R. (2d) 39. In the present case, the Board's reasons regarding the applicant's credibility and regarding the documentation submitted by the applicant are clearly set out in the decision. The

Board's findings of credibility, which have been described at length above, were based on internal contradictions and inconsistencies. The applicant has failed to demonstrate that those reasons disclose any reviewable error. The applicant has also submitted that in discarding the documentary evidence pertaining to her identity, the Board made a reviewable error. In my opinion, this case can be distinguished from *Ramalingam v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 10 (F.C.T.D.) (QL), 77 A.C.W.S. (3d) 156; *Osipenkov v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 59 (F.C.) (QL), 2003 FCT 57 and *Rasheed v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 715 (F.C), 2004 FC 587, which have been cited by applicant's counsel. In view of the negative credibility findings it made, the Board could discard corroborative documentary evidence emanating from family members and which was in any event unreliable. Accordingly, the present application must fail.

ORDER

THE COURT ORDERS that the application for judicial review be dismissed. No question of general importance has been raised and none shall be certified by the Court.

"Luc Martineau"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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