Federal Court | Cour fédérale

Date: 20110114

Docket: IMM-2940-10

Citation: 2011 FC 43

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, January 14, 2011

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

OLGA BORISOVNA ABBASOVA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Preliminary

[1] For decision-makers at all levels, procedural fairness sounds a rarely heard alarm, and that alarm must be heard if injustice is not to be done.

[2] This is an exceptional case, one that turns on its facts, which reveals a woman who was allegedly abused or persecuted on the basis of her status as a woman. In the context of a decision by a pre-removal risk assessment (PRRA) officer, Guideline 4—Women Refugee Claimants Fearing Gender-related Persecution, effective November 13, 1996 (which also applies to PRRA officers, according to the case law), states that difficulties faced by a claimant in testifying call for sensitive handling. In this type of case, according to the Guidelines, the quasi-judicial and judicial system becomes, in a way, the voice of those who seemingly have or who have no voice.

II. Introduction

[3] The PRRA officer does not indicate in his decision why he disregarded the new preliminary psychological evidence that he did not have an opportunity to discuss with the parties at a hearing. As Justice Léonard Mandamin observed in a decision dealing with procedural fairness, psychological evidence should be relevant in the case of women refugees:

> [19] The documentary evidence discloses that women are at a higher risk of sexual assault and other gender related crimes because of the conflict in Columbia. The Applicant is a vulnerable female who is a reported rape victim. In these circumstances the Guidelines concerning Women Refugee Claimants Fearing Gender-Related Persecution issued by the Chairperson pursuant to section 159(1)(h) of *IRPA* are applicable and the psychological assessment should be relevant. The PRRA Officer gives no reason for ignoring the expected psychological assessment of the Applicant, nor did she take any of the Chairperson's guidelines into account. [Emphasis added.]

(*Gomez v. Canada (Minister of Citizenship and Immigration*), 2010 FC 765, [2010] F.C.J. No. 935 (QL/Lexis)).

[4] Guideline 4 is an instrument that is now firmly rooted in immigration decisions; its objective is to foster a consistent approach to claims by women who fear persecution by reason of their gender.

[5] Guideline 4 addresses the issue of women who claim refugee status or who, in some cases, appear before a PRRA officer and face special problems in demonstrating that their claims are credible and trustworthy. Women who have been victims of domestic violence may fall into that category. These women may exhibit a pattern of symptoms referred to as battered woman syndrome and may be reluctant to testify.

[6] Guideline 4 refers to the well-known comments of the Supreme Court of Canada regarding battered women syndrome in *R v. Lavallée*, [1990] 1 S.C.R. 852, 108 N.R. 321. In that decision, Justice Bertha Wilson addressed the mythology and other stereotypes about domestic violence:

> [54] Apparently, another manifestation of this victimization is a reluctance to disclose to others the fact or extent of the beatings. …

[7] The Court explained that expert evidence can then assist in dispelling the myths and provide an explanation as to why a battered woman remains in her situation, which amounts to a cycle of suffering.

[8] In addition, a passage from the documentary evidence submitted to the PRRA officer by the applicant shows that domestic violence toward women is still a widespread problem in Russia:

> … Violence against women and children, including domestic violence, remained a significant problem …

> …
>
> Domestic violence remained a major problem. As of March the Ministry of Internal Affairs maintained records on more than 4 million perpetrators of domestic violence. The ministry estimated that a woman died every 40 minutes at the hands of a husband, boyfriend, or other family member and that 80 percent of women had experienced domestic violence at least once in their lives. The ministry also estimated that 3,000 men a year were killed by wives or girlfriends whom they had beaten. However, the reluctance of victims to report domestic violence meant that reliable statistical information on its scope was impossible to obtain. Official telephone directories contained no information on crisis centers or shelters. Law enforcement authorities frequently failed to respond to reports of domestic violence.

(U.S. Department of State – 2009 Human Rights Report: Russia, Country Reports on Human Rights Practices, March 11, 2010).

III. Judicial procedure

[9] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), of the decision of a PRRA officer dated April 7, 2010, determining that the applicant is not at risk of persecution in Russia and that there are no substantial grounds to believe that she would be personally subject to a danger of torture or to a risk to her life or a risk of cruel and unusual treatment or punishment in her country.

IV. Facts

[10] The applicant, Olga Borisovna Abbasova, of Russian nationality, was born on November 25, 1983. She alleges that her life would be at risk if she returned to live in Russia, and that she would be at risk of cruel and unusual treatment by her former common-law partner, Victor Gatin. Mr. Gatin, who is a police officer, allegedly mistreated her and on several occasions committed acts of violence against her between 2003 and 2006. In addition, when she arrived in

Canada, she was allegedly swindled by Yafim Goikhberg, who posed as a lawyer specializing in immigration law, a scheme employed for the sole purpose of extracting money from the applicant.

[11] The applicant allegedly obtained a visitor visa on June 15, 2006, at the invitation of Father Johns, the founder of Le Bon Dieu dans la Rue, and arrived in Canada on June 25, 2006, with that visitor visa.

[12] In a decision dated February 2, 2009, the Refugee Protection Division (RPD) concluded that the applicant was not a Convention refugee or a person in need of protection and that her claim had no credible basis. The RPD found that the applicant was not credible and had not been able to establish her identity. On June 1, 2009, the application for leave and judicial review of that decision was dismissed by the Federal Court.

[13] On August 4, 2009, the applicant filed a PRRA application. On April 7, 2010, the PRRA officer made his determination that the applicant was not subject to a danger of torture or a risk of persecution or of cruel and unusual treatment or punishment or a risk to her life if she were returned to Russia.

[14] On June 8, 2010, the Federal Court granted a stay of the applicant's removal to Russia, her country of origin.

V. Decision under review

[15] The PRRA officer concluded that the applicant had not discharged her burden of establishing, by means of probative evidence, that she was a victim of domestic violence or that her former spouse was a member of the police. In addition, the PRRA officer assigned no weight to the new evidence submitted by the applicant in her PRRA application, that is, the public documentation dealing with police violence, and the problems of impunity and corruption in Russia, since, in the opinion of the PRRA officer, that evidence did not relate to the applicant's personal case, and rather related to the entire Russian population.

VI. Issues

[16] (1) Did the PRRA officer consider all of the relevant evidence at the time he rejected the applicant's PRRA application?

(2) Did the PRRA officer err in fact and in law by failing to apply Guideline 4 on women fearing gender-related persecution in his decision?

VII. Relevant legislation

[17] Section 113 of the IRPA deals with pre-removal risk assessment:

Consideration of application	**Examen de la demande**
113. Consideration of an application for protection shall be as follows:	**113.** Il est disposé de la demande comme il suit :
(*a*) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not	*a*) le demandeur d'asile débouté ne peut présenter que des éléments de preuve survenus depuis le rejet ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'il n'était pas raisonnable,

reasonably have been expected in the circumstances to have presented, at the time of the rejection;	dans les circonstances, de s'attendre à ce qu'il les ait présentés au moment du rejet;
(*b*) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;	*b*) une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires;
(*c*) in the case of an applicant not described in subsection 112(3), consideration shall be on the basis of sections 96 to 98;	*c*) s'agissant du demandeur non visé au paragraphe 112(3), sur la base des articles 96 à 98;
(*d*) in the case of an applicant described in subsection 112(3), consideration shall be on the basis of the factors set out in section 97 and	*d*) s'agissant du demandeur visé au paragraphe 112(3), sur la base des éléments mentionnés à l'article 97 et, d'autre part :
(i) in the case of an applicant for protection who is inadmissible on grounds of serious criminality, whether they are a danger to the public in Canada, or	(i) soit du fait que le demandeur interdit de territoire pour grande criminalité constitue un danger pour le public au Canada,
(ii) in the case of any other applicant, whether the application should be refused because of the nature and severity of acts committed by the applicant or because of the danger that the applicant constitutes to the security of Canada.	(ii) soit, dans le cas de tout autre demandeur, du fait que la demande devrait être rejetée en raison de la nature et de la gravité de ses actes passés ou du danger qu'il constitue pour la sécurité du Canada.

[18] Guideline 4 deals with special problems that may arise at determination hearings:

D. SPECIAL PROBLEMS AT DETERMINATION HEARINGS

Women refugee claimants face special problems in demonstrating that their claims are credible and trustworthy. Some of the difficulties may arise because of cross-cultural misunderstandings. For example:

1. Women from societies where the preservation of one's virginity or marital dignity is the cultural norm may be reluctant to disclose their experiences of sexual violence in order to keep their “shame” to themselves and not dishonour their family or community.

2. Women from certain cultures where men do not share the details of their political, military or even social activities with their spouses, daughters or mothers may find themselves in a difficult situation when questioned about the experiences of their male relatives.

3. Women refugee claimants who have suffered

D. PROBLÈMES SPÉCIAUX LORS DES AUDIENCES RELATIVES À LA DÉTERMINATION DU STATUT DE RÉFUGIÉ

Les femmes qui revendiquent le statut de réfugié font face à des problèmes particuliers lorsque vient le moment de démontrer que leur revendication est crédible et digne de foi. Certaines difficultés peuvent survenir à cause des différences culturelles. Ainsi,

1. Les femmes provenant de sociétés où la préservation de la virginité ou la dignité de l'épouse constitue la norme culturelle peuvent être réticentes à parler de la violence sexuelle dont elles ont été victimes afin de garder leur sentiment de « honte » pour elles-mêmes et de ne pas déshonorer leur famille ou leur collectivité.

2. Les femmes provenant de certaines cultures où les hommes ne parlent pas de leurs activités politiques, militaires ou même sociales à leurs épouses, filles ou mères peuvent se trouver dans une situation difficile lorsqu'elles sont interrogées au sujet des expériences de leurs parents de sexe masculin.

3. Les revendicatrices du statut de réfugié victimes

sexual violence may exhibit a pattern of symptoms referred to as Rape Trauma Syndrome, and may require extremely sensitive handling. Similarly, women who have been subjected to domestic violence may exhibit a pattern of symptoms referred to as Battered Woman Syndrome and may also be reluctant to testify. In some cases it will be appropriate to consider whether claimants should be allowed to have the option of providing their testimony outside the hearing room by affidavit or by videotape, or in front of members and refugee claims officers specifically trained in dealing with violence against women. Members should be familiar with the UNHCR Executive Committee *Guidelines on the Protection of Refugee Women*.

[Emphasis added.]

de violence sexuelle peuvent présenter un ensemble de symptômes connus sous le nom de syndrome consécutif au traumatisme provoqué par le viol et peuvent avoir besoin qu'on leur témoigne une attitude extrêmement compréhensive. De façon analogue, les femmes qui ont fait l'objet de violence familiale peuvent de leur côté présenter un ensemble de symptômes connus sous le nom de syndrome de la femme battue et peuvent hésiter à témoigner. Dans certains cas, il conviendra de se demander si la revendicatrice devrait être autorisée à témoigner à l'extérieur de la salle d'audience par affidavit ou sur vidéo, ou bien devant des commissaires et des agents chargés de la revendication ayant reçu une formation spéciale dans le domaine de la violence faite aux femmes. Les commissaires doivent bien connaître les *Lignes directrices pour la protection des femmes réfugiées* publiées par le comité exécutif du HCR.

[19] Guideline 8 on Procedures with Respect to Vulnerable Persons Appearing Before the IRB (Immigration and Refugee Board), effective December 15, 2006, defines the characteristics of a vulnerable person:

2. Definition of Vulnerable Persons	**2. Définition d'une personne vulnérable**
2.1 For the purposes of this Guideline, vulnerable persons are individuals whose ability to present their cases before the IRB is severely impaired. Such persons may include, but would not be limited to, the mentally ill, minors, the elderly, victims of torture, survivors of genocide and crimes against humanity, and women who have suffered gender-related persecution.	2.1 Pour l'application des présentes directives, une personne vulnérable s'entend de la personne dont la capacité de présenter son cas devant la CISR est grandement diminuée. Elle peut, entre autres, être atteinte d'une maladie mentale; être mineure ou âgée; avoir été victime de torture; avoir survécu à un génocide et à des crimes contre l'humanité; il peut aussi s'agir d'une femme qui a été victime de persécution en raison de son sexe.
2.2 The definition of vulnerable persons may apply to persons presenting a case before the IRB, namely, to refugee protection claimants (in the RPD), appellants (in the IAD), and foreign nationals or permanent residents (in the ID). In certain circumstances, close family members of the vulnerable person who are also presenting their cases before the IRB may qualify as vulnerable persons because of the way in which they have been affected by their loved one's condition.	2.2 La définition de personnes vulnérables peut s'appliquer à certaines personnes qui présentent un cas devant la CISR, notamment les demandeurs d'asile (SPR), les appelants (SAI), les étrangers ou résidents permanents (SI). Dans certaines circonstances, des membres de la famille proche qui présentent également leur cas devant la CISR peuvent aussi être considérés comme étant des personnes vulnérables à cause de la manière dont ils ont été touchés par la situation de l'être cher.
2.3 Persons who appear before the IRB frequently find the process difficult for various	2.3 Les personnes qui comparaissent devant la CISR trouvent souvent le processus

reasons, including language and cultural barriers and because they may have suffered traumatic experiences which resulted in some degree of vulnerability. IRB proceedings have been designed to recognize the very nature of the IRB's mandate, which inherently involves persons who may have some vulnerabilities. In all cases, the IRB takes steps to ensure the fairness of the proceedings. This Guideline addresses difficulties which go beyond those that are common to most persons appearing before the IRB. It is intended to apply to individuals who face particular difficulty and who require special consideration in the procedural handling of their cases. It applies to the more severe cases of vulnerability.	difficile pour diverses raisons, notamment à cause des contraintes de langue et de culture et parce qu'elles ont peut-être vécu des expériences traumatisantes qui sont à l'origine d'une certaine vulnérabilité. Les procédures de la CISR ont été conçues pour reconnaître la nature même du mandat de la CISR qui, de façon inhérente, fait intervenir des personnes pouvant être vulnérables. Dans tous les cas, la CISR prend des mesures pour assurer l'équité des procédures. Les présentes directives abordent des difficultés qui vont au-delà de celles auxquelles se heurtent habituellement la plupart des personnes qui comparaissent devant la CISR. Elles visent les personnes qui éprouvent des difficultés particulières et qui doivent faire l'objet de considérations spéciales sur le plan procédural dans le traitement de leur cas. Elles s'appliquent aux cas de vulnérabilité les plus sévères.
2.4 Wherever it is reasonably possible, the vulnerability must be supported by independent credible evidence filed with the IRB Registry.	2.4 Lorsque c'est raisonnablement possible, la vulnérabilité doit être étayée par des éléments de preuve crédibles et indépendants déposés auprès du greffe de la CISR.

VIII. Positions of the parties

[20] The applicant alleges that, in his analysis, the PRRA officer considered the RPD’s decision, which is a denial of justice. The applicant’s natural justice right to a full hearing was allegedly

violated by the fact that she believed she was represented by counsel, Mr. Goikhberg, when he was not in truth what he said he was.

[21] The respondent submits that judicial review of the PRRA application is not the appropriate remedy for the applicant's claim. The respondent suggests that the applicant should instead have awaited the RPD's decision on her motion to reopen, which was received by the Court on July 30, 2010, or should have made a new PRRA application.

IX. Standard of review

[22] According to *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraph 62, the first step in determining the applicable standard of review is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question" (see also *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 53).

[23] In *Selduz v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 361, 343 F.T.R. 291, the Federal Court dealt with the standard applicable to a PRRA decision:

> [9] The Court has held that the appropriate standard of review for a PRRA officer's findings of fact and on issues of mixed fact and law is reasonableness: see *Erdogu v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 407, [2008] F.C.J. No. 546 (QL); *Elezi v. Canada*, 2007 FC 40 [*sic*], 310 F.T.R. 59. In *Ramanathan v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 843, 170 A.C.W.S. (3d) 140 at paragraph 18, I held that where an applicant raises issues as to whether a PRRA officer had proper regard to all the evidence when reaching a decision, the appropriate standard of review is reasonableness.
>
> [10] Accordingly, the Court will review the PRRA officer's findings with an eye to "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible,

> acceptable outcomes which are defensible in respect of the facts and law." (*Dunsmuir v. New Brunswick*, 2008 SCC 9, 372 N.R. 1 at paragraph 47). However, where the PRRA officer fails to provide adequate reasons to explain why relevant, important and probative new evidence was not considered, then the court will consider that an error of law reviewed on the correctness standard.

[24] With respect to the application of the Guideline, a decision of the Court reviewing a conclusion by the RPD has held that "[t]he issue of the RPD's assessment of the Gender Guidelines will therefore be reviewed on a reasonableness standard" (*Juarez v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 890, [2010] F.C.J. No. 1107 (QL/Lexis) at para. 12).

X. Analysis

(1) Did the PRRA officer consider all of the relevant evidence at the time he rejected the applicant's PRRA application?

[25] Under paragraph 113(*a*) of the IRPA, the applicant may present only new evidence that arose after the rejection of the claim by the RPD. The PRRA must consider the risk of returning the person to his or her country of origin, in light of new facts that were not introduced before the RPD (*Alvarez v. Canada (Solicitor General*), 2005 FC 143, [2005] F.C.J. No. 164 (QL/Lexis), at para. 6).

[26] In *Raza v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385, [2007] F.C.J. No. 1632 (QL/Lexis), at paragraph 13, the Federal Court of Appeal summarized the criteria to be considered in determining when evidence is "new":

1. Credibility: Is the evidence credible, considering its source and the circumstances in which it came into existence? If not, the evidence need not be considered.

2. Relevance: Is the evidence relevant to the PRRA application, in the sense that it is capable of proving or disproving a fact that is relevant to the claim for protection? If not, the evidence need not be considered.

3. Newness: Is the evidence new in the sense that it is capable of:

   (a) proving the current state of affairs in the country of removal or an event that occurred or a circumstance that arose after the hearing in the RPD, or

   (b) proving a fact that was unknown to the refugee claimant at the time of the RPD hearing, or

   (c) contradicting a finding of fact by the RPD (including a credibility finding)?

   If not, the evidence need not be considered.

4. Materiality: Is the evidence material, in the sense that the refugee claim probably would have succeeded if the evidence had been made available to the RPD? If not, the evidence need not be considered.

5. Express statutory conditions:

   (a) If the evidence is capable of proving only an event that occurred or circumstances that arose prior to the RPD hearing, then has the applicant established either that the evidence was not reasonably available to him or her for presentation at the RPD hearing, or that he or she could not reasonably have been expected in the circumstances to have presented the evidence at the RPD hearing? If not, the evidence need not be considered

   (b) If the evidence is capable of proving an event that occurred or circumstances that arose after the RPD hearing, then the evidence must be considered (unless it is rejected because it is not credible, not relevant, not new or not material).

[27] In light of those criteria, it appears to the Court that the PRRA officer failed to consider new evidence that had been submitted to his attention: the evidence of the applicant's psychological condition.

[28] In his decision, the PRRA officer stated: [TRANSLATION] "as new evidence, the applicant submits public documentation dealing with police violence and the problems of impunity and corruption in Russia" (Decision of the PRRA officer at p. 5). He referred to one of the documents

submitted by the applicant, an article from *La Presse* dated March 2, 2010. The PRRA officer concluded that the information simply echoed the information previously submitted and did not relate to the applicant's personal situation (Decision of the PRRA officer at pp. 5-6).

[29] In the Court's opinion, the PRRA officer's assessment of that evidence is reasonable; the situation of battered women and the problems of impunity with law enforcement agencies are two phenomena that have hardly changed in Russia since the date of the RPD's decision, according to the evidence submitted. In his decision, the PRRA officer also undertook an analysis of whether adequate state protection was available, and concluded:

> [TRANSLATION]
> Domestic violence is still a serious problem in Russia, although the law criminalizes it. Nonetheless, in this case, the applicant has not discharged her burden of establishing, by means of probative evidence, that she was a victim of domestic violence or that her former spouse was a member of the police.

(Decision of the PRRA officer at p. 6).

[30] In addition to the documentary evidence, the applicant also filed new evidence relating to her psychological condition. In his decision, the PRRA officer stated that [TRANSLATION] "[t]he applicant has provided no new evidence or new facts concerning her allegations of domestic violence" (Decision of the PRRA officer at p. 5) and that it is not [TRANSLATION] "up to him to do a reassessment of the applicant's credibility and set aside the RPD's findings based on the same narrative" (Decision of the PRRA officer at p. 5). However, evidence of the applicant's psychological condition, as submitted to the PRRA officer, could be considered to be a change in the narrative, particularly if we consider the fact that the RPD found the applicant not to be credible based on her testimony. Possible evidence of the applicant's inability to testify should be taken into consideration.

[31] To begin, it must be noted that no psychological assessment of Ms. Abbasova had been filed before the RPD; the applicant had not yet sought psychological help as of February 2, 2009. In support of her PRRA application, the applicant filed the following evidence, *inter alia*:

1. a letter from Andrei Moskvitch dated August 17, 2009, addressed to the PRRA officer;
2. a letter from Irina Moskvitch dated August 17, 2009, addressed to the PRRA officer; and
3. a form concerning a consultation with the Programme régional d'accueil et d'intégration des demandeurs d'asile (PRAIDA) completed on July 31, 2009.

[32] The PRAIDA form provides a variety of information: it says that a psychiatrist in the cultural consultation service is the type of health professional recommended for this patient. More specifically, the form describes Ms. Abbasova's situation as follows:

> [TRANSLATION]
> - there is no diagnosis;
> - she is afraid around strangers; she is afraid they will hurt her. She has no friends;
> - she stayed in her home for a year without going out alone;
> - she was unable to state her identity at the IRB hearing. She said she was not Olga Abbasova;
> - she gives answers that are not responsive to the questions asked;
> - she becomes lost if she is alone; and
> - she feels depressed.

(Tribunal Record (TR) at p. 90).

[33] Because the document did not have to be signed, it is difficult to know whether a PRAIDA worker or a friend of Ms. Abbasova completed the form.

[34] The letters dated August 17, 2009, come from friends of Ms. Abbasova's family with whom she was living in Canada. In her letter, Irina Moskvitch stated that she helped the applicant undertake the process for getting psychological help:

> We went to PRAIDA – (Programme regional d'accueil et d'intégration des demandeurs d'asile) for the psychological consultation, where doctor gave her a referral to the Jewish General Hospital for the psychiatric assessment and treatment with probable diagnosis: social phobia, depression. Her appointment is for September 02, 2009.

(TR at p. 70).

[35] Similarly, in his letter dated August 17, 2009, Andrei Moskvitch stated:

> As you may have read in the new documents submitted to you, Olga is suspected to have a medical condition called "social phobia" and a possible depression. She will undergo a medical examination with a psychologist on September 02, 2009 in the Jewish General Hospital. It seems quite clear that the lack of ability of the Minister to establish Olga's credibility and to establish a credible basis of her claim was due to her impossibility to interact with the Minister during the hearing. This impossibility seems to have risen from her medical condition which may be diagnosed on September 02, 2009.
>
> Please accept and take into consideration any additional documents from the hospital which we will provide you after September 02, 2009, as we believe these documents may be crucial for your decision
>
> I understand that you have a policy of not accepting any documents past your established deadline, however, I ask you to disregard this policy in the case of Olga Abbasova as you are dealing with a human life and not just a piece of paper. [Emphasis added.]

(TR at p. 67).

[36] In his decision, the PRRA officer referred to the letters that were filed, but did not explain why he did not analyze the new information they provided:

> [TRANSLATION]
> Mr. and Mrs. Moskvitch, with whom the applicant has been staying since she came to Canada, also stated, in letters placed in the record, that the applicant suffered from mental problems, probably from social phobia, and that is why she was unable to

> answer the member's questions. They say she is to see a psychologist on September 2, 2009.
>
> Note that the applicant was able to attend at the Canadian embassy in Moscow on two occasions for an interview in order to obtain a visa. She was able to travel to Canada and six months later to attend before an immigration officer to claim refugee protection. Each time, she was able to answer their questions.

(Decision of the PRRA officer at pp. 4-5).

[37] It is not for the Court to reassess the evidence submitted to the PRRA officer and that is not what it intends to do; nonetheless, the developments in Ms. Abbasova's evidence, particularly regarding her psychological condition, could have been considered to be relevant if they had been analyzed. More specifically, in her particular case, as shown, a psychological problem apparently impaired Ms. Abbasova's ability to testify. That evidence could have been central to the determination of credibility, considering that the RPD and, subsequently, the PRRA officer found Ms. Abbasova not to be credible based on the answers she gave in her testimony. The PRRA officer further stated:

> [TRANSLATION]
> It is also reasonable to think that if the applicant suffered from a pathology that prevented her from testifying, the member would have realized this and adjourned the hearing. [Emphasis added.]

(Decision of the PRRA officer at p. 5).

[38] The RPD cannot be asked to have the same expertise as a health professional, on the same basis as a psychiatrist. Mental illnesses and other psychological traumas are sometimes difficult to detect, and that is why it is important to analyze the psychological reports submitted to the Court.

[39] With respect to the doctor's reports, Ms. Abbasova, in her affidavit dated July 7, 2010, filed in the Federal Court, referred to her stay application in which two medical reports from the Jewish General Hospital in Montréal were filed. The PRRA officer was therefore aware that Ms. Abbasova had approached PRAIDA, but does not seem to have had the subsequent medical reports in hand. In his decision, the PRRA officer explained:

> [TRANSLATION]
> It should be noted that the applicant submitted no diagnosis by a psychologist and no evidence of medical care for mental problems from which her inability to testify could be established. Although the applicant has been in Canada since June 2006, she did not consult PRAIDA (Programme régional d'accueil et d'intégration des demandeurs d'asile) for a psychological referral until July 31, 2009, which was after receiving the PRRA program and when all her other remedies had failed.

(Decision of the PRRA officer at p. 5).

[40] If the following evidence is not considered there would be a denial of justice. In his letters, Dr. G.E. Jarvis, Director of the Cultural Consultation Service, described Ms. Abbasova's medical case as follows:

> … She is chronically anxious, has periods of tearfulness, feels completely lost, cannot plan ahead for her future, is unable to answer questions because she cannot remember details, and is completely dependent on a family friend with whom she lives. The patient presents herself, in many ways, like a child, despite her chronologic age, and is unable to make decisions alone nor can she explain her current predicament in a meaningful way. For example, when asked why she came to Canada, she does not even mention the abuse recorded in her PIF, but talks about working in Canada. She does not trust men and only tolerates the interview with great difficulty. When asked if I can review with her the status of her application for residence in Canada, she becomes quiet, almost fearful, and insists that her friend return to the interview. When asked about her relationship to the friend, she cannot answer at all, but seems confused and hesitant, even close to tears.
>
> …
>
> From past history, it seems that the patient has always been a slow learner with difficulty in basic school subjects, such as mathematics and written language. She graduated from a special program from which she earned a certificate in child education. There is reported abuse by parents and her boyfriend …

(Letter from Dr. Jarvis, October 30, 2009, Application Record (AR) at p. 36).

[41] In the letter dated November 19, 2009, Dr. Jarvis even referred to "sequelae of head trauma due to beatings by former boyfriend" (AR at p. 39).

[42] With respect to these medical reports, the Court specifies that the *Federal Courts Rules*, SOR/98-106, at Rules 55, 60, 312 and 313, allow the Federal Court to take new evidence into consideration, if the judge considers it appropriate.

[43] Moreover, in rare exceptional cases, when the parties are before the first-level decision-maker, they may agree to submit evidence after the date of the PRRA hearing. For decision-makers at all levels, procedural fairness sounds a rarely heard alarm, and that alarm must be heard if injustice is not to be done. The rules of procedural fairness direct that the decision-maker be in possession of the evidence before making a decision, as was held in *Ortega v. Canada (Minister of Citizenship and Immigration*), 2008 FC 1407, [2008] F.C.J. No. 1818 (QL/Lexis), at paragraph 14. In that decision, the PRRA officer had been informed, in the application form, of the applicant's intention of filing newspaper articles; the articles were not put in the appropriate file, and were not considered by the PRRA officer. In *Selduz*, above, at paragraph 23, the Court allowed the application because the PRRA officer had failed to consider a medical report in his analysis. Justice Michael L. Phelan stated in *Clarke v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 357, [2009] F.C.J. No. 441 (QL/Lexis), at paragraph 16, that procedural fairness permits a review application to be allowed in cases where "the missing records went to the very basis of the claim and the reasons for denying the PRRA". With the information available, it is not possible for the

Court to determine the reasons why the medical reports were not submitted, when Mr. Moskvitch had undertaken to do that once the assessment was completed. The PRRA officer did not hold a hearing and relied on Ms. Abbasova's testimony before the RPD.

[44] Moreover, even without the hospital reports, it might have been possible for the PRRA officer to conclude, at the very least, that Ms. Abbasova had requested a psychological assessment and had met with a health professional after the RPD made its decision. The option of holding a hearing could have been considered since the issue was the applicant's credibility; however, Ms. Abbasova did not request that. Section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations) sets out the specific factors the officer must consider in determining whether a hearing is required. That section reads as follows:

Hearing — prescribed factors	**Facteurs pour la tenue d'une audience**
167. For the purpose of determining whether a hearing is required under paragraph 113(*b*) of the Act, the factors are the following:	**167.** Pour l'application de l'alinéa 113*b*) de la Loi, les facteurs ci-après servent à décider si la tenue d'une audience est requise :
(*a*) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act;	*a*) l'existence d'éléments de preuve relatifs aux éléments mentionnés aux articles 96 et 97 de la Loi qui soulèvent une question importante en ce qui concerne la crédibilité du demandeur;
(*b*) whether the evidence is central to the decision with respect to the application for protection; and	*b*) l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection;
(*c*) whether the evidence, if accepted, would justify allowing the application for	*c*) la question de savoir si ces éléments de preuve, à supposer qu'ils soient

protection.	admis, justifieraient que soit accordée la protection.

[45] Justice Michael A. Kelen stated that in deciding an exceptional case, as in *Zokai v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1103, 141 A.C.W.S. (3d) 809,

> [14] …[t]he common law duty of fairness requires that an applicant be given a reasonable opportunity to present evidence and to participate in the application process, especially where, as here, a negative decision would have a profound impact on the life of the applicant. *Haghighi v. Canada (Minister of Citizenship and Immigration)*, [2000] 4 F.C. 407 (F.C.A.); *Mojzisik v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 33 at paragraph 21. In this case, it is evident, with the benefit of hindsight, that the applicant was not given such an opportunity so there was a breach of the duty of fairness.

[46] The PRRA officer does not indicate in his decision why he disregarded the new preliminary psychological evidence that he did not have an opportunity to discuss with the parties at a hearing. As Justice Léonard Mandamin observed in a decision dealing with procedural fairness, psychological evidence should be relevant in the case of women refugees:

> [19] The documentary evidence discloses that women are at a higher risk of sexual assault and other gender related crimes because of the conflict in Columbia. The Applicant is a vulnerable female who is a reported rape victim. In these circumstances the Guidelines concerning Women Refugee Claimants Fearing Gender-Related Persecution issued by the Chairperson pursuant to section 159(1)(h) of *IRPA* are applicable and the psychological assessment should be relevant. The PRRA Officer gives no reason for ignoring the expected psychological assessment of the Applicant, nor did she take any of the Chairperson's guidelines into account. [Emphasis added.]

(*Gomez*, above).

[47] In some cases, nothing can be decided without at least giving thorough consideration to the reports of experts and the people around an individual who has been abused and where the vicious circle of abuse has itself led to learning difficulties, as might be the case for the applicant. Some of

the evidence in this case may, potentially, corroborate the applicant's account. In addition, the more significant evidence that was not expressly analyzed in the reasons for decision is, the more prepared the Court will be to "...infer from the silence that the agency made an erroneous finding of fact 'without regard to the evidence'" (*Bains v. Canada (Minister of Employment and Immigration)* (1993), 63 F.T.R. 312 (F.C.T.D.), quoted in *Kaybaki v. Canada (Minister of Citizenship and Immigration*), 2004 FC 32, 128 A.C.W.S. (3d) 784, at para. 5).

[48] This case turns on its facts. The applicant did not give coherent answers to questions at the RPD hearing, possibly because of a psychological problem caused by trauma. Accordingly, the applicant's account must at least be taken into consideration by the PRRA officer and if the applicant cannot testify, the officer must at least consider whether the applicant's inability to testify in fact is the result of her trauma as attested to by the expert's report.

[49] The evidence shows that Ms. Abbasova cannot answer by herself. That paralysis could be due to the fact that she has never been able to defend herself or assert herself, this being an integral part of the battered woman syndrome, particularly in view of the severe learning disabilities from which she suffers.

[50] This is certainly not a precedent; rather, it is a case that turns on its facts as the rarest possible case for persons who may have been abused and are not accustomed to defending themselves, exacerbated by enormous learning challenges.

[51] The applicant's evidence that forms the basis of the risk to her as a woman persecuted in Russia might be credible if the evidence as a whole is examined, along with the multiple sources: the applicant's silent testimony, the letters from people close to her, and her psychological situation. The PRRA officer should have analyzed all of that evidence in order for his decision to be reasonable.

(2) Did the PRRA officer err in fact and in law by failing to apply Guideline 4 on women fearing gender-related persecution in his decision?

[52] Guideline 4 is an instrument that is now firmly rooted in immigration decisions; its objective is to foster a consistent approach to claims by women who fear persecution by reason of their gender.

[53] The Guidelines do not have the force of a statute or regulations: they are "an aid in the assessment of the evidence, particularly of women, who fear persecution" (*Saleh v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1074, 141 A.C.W.S. (3d) 621, at para. 7). Although the Guidelines are issued by the Chairperson of the RPD under section 159 of the IRPA, they have also been applied to decisions by PRRA officers (for example: *Martinez v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 31, [2010] F.C.J. No. 41 (QL/Lexis) and *Joseph v. Canada (Solicitor General)*, 2006 FC 165, 146 A.C.W.S. (3d) 311 at para. 19).

[54] The Guideline addresses the issue of women who claim refugee status or who, in some cases, appear before a PRRA officer and face special problems in demonstrating that their claims are credible and trustworthy. Women who have been victims of domestic violence may fall into that

category. These women may exhibit a pattern of symptoms referred to as battered women syndrome and may be reluctant to testify.

[55] The Guideline refers to the well-known comments of the Supreme Court regarding battered women syndrome in *Lavallée*, above. In that decision, Justice Wilson addressed the mythology and other stereotypes about domestic violence:

> [54] Apparently, another manifestation of this victimization is a reluctance to disclose to others the fact or extent of the beatings. …

[56] The Court explained that expert evidence can then assist in dispelling the myths and provide an explanation as to why a battered woman remains in her situation, which amounts to a cycle of suffering.

[57] The courts must therefore be particularly sensitive to the difficulty an applicant has in testifying. As Justice Denis Pelletier stated in *Newton v. Canada (Minister of Citizenship and Immigration*) (2000), 182 F.T.R. 294, [2000] F.C.J. No. 738 (QL/Lexis):

> [17] The Guidelines are an aid for the CRDD panel in the assessment of the evidence of women who allege that they have been victims of gender-based persecution. The Guidelines do not create new grounds for finding a person to be a victim of persecution. To that extent, the grounds remain the same, but the question becomes whether the panel was sensitive to the factors which may influence the testimony of women who have been the victims of persecution. … [Emphasis added.]

[58] In *Martinez*, above, Justice Yvon Pinard provided a summary of how the Guidelines are applied (quoting *Munoz v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1273, 302 F.T.R. 67, at paragraph 33):

> [22] ... the purpose of the Guidelines is to "ensure that gender-based claims are heard with sensitivity" and "in some circumstances, the RPD is not even required to mention the Guidelines in its decision" (at paragraph 30).

[59] In this case, the RPD's decision mentioned Guideline 4 (Decision of the RPD at p. 2).

[60] The RPD has also adopted Guidelines (Guideline 8) dealing with the situation of vulnerable persons. A woman who has suffered gender-related persecution may fall within the definition of a vulnerable person (section 2.1 of Guideline 8). Treatment of these persons requires special consideration (sections 1.4 and 1.5 of Guideline 8). A person's vulnerability may make it difficult for them to testify:

a. a person's vulnerability may affect memory and behaviour and their ability to recount relevant events;	a. la vulnérabilité d'une personne peut affecter sa mémoire et son comportement, de même que sa capacité de relater des événements pertinents;
b. the vulnerable person may be suffering from symptoms that have an impact on the consistency and coherence of their testimony;	b. la personne vulnérable peut éprouver des symptômes qui ont des répercussions sur la cohérence de son témoignage;
c. vulnerable persons who fear persons in a position of authority may associate those involved in the hearing process with the authorities they fear;	c. la personne vulnérable qui craint les personnes en position d'autorité peut associer celles qui participent au processus d'audience aux autorités qu'elle craint;
d. a vulnerable person may be reluctant or unable to talk about their experiences.	d. la personne vulnérable peut être réticente ou incapable de parler de ses expériences.

[61] Expert evidence can then be very useful for determining whether the person whose case is being considered is a person who can be considered to be “vulnerable” (section 8 of Guideline 8). In addition, circular reasoning must be avoided in applying the Guidelines, and the Guidelines must not be ruled out prematurely in cases where the applicant is found not to be credible: the Guidelines “… exist, in part, to ensure that social, cultural, traditional and religious norms do not interfere with the proper assessment of an applicant's credibility” (in a decision reviewing a decision of the RPD relating to the application of Guideline 4: *Diallo v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1450, 259 F.T.R. 273 at para. 33).

[62] In *Jones v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 405, 148 A.C.W.S. (3d) 114, in the context of a fact situation similar to this case, Justice Judith A. Snider reviewed a decision of the RPD in relation to the sensitivity that must be exhibited by the decision-maker:

> [14] Above and beyond the merits of each individual discrepancy pointed out by the Board, I am concerned with the lack of sensitivity apparent in the Board's approach to the Applicant's testimony. In this case, the Applicant made detailed allegations of severe psychological, physical, and sexual abuse lasting over several years. It is apparent from the hearing transcripts that the Applicant had some difficulty recalling exact dates of incidents during her time with her boyfriend.
>
> ...
>
> [16] There are many indications in the hearing transcript of the Applicant's difficulty in sorting out the timeline of events between 1999 and 2003, prior to coming to Canada. Generally, memory gaps may be a reason to draw an adverse credibility inference, but when the claimant is a victim of severe domestic abuse, the Board must be alive to the possibility that these gaps are psychological in nature. Here, I see no indications that the Board took this into account. I find myself echoing Justice Tremblay-Lamer's comments in *Keleta v. Canada*(*Minister of Citizenship and Immigration*), 2005 FC 56, at para. 15:
>
> > In other words, substance prevails over form when considering whether the principles in the guidelines were properly applied and thus the fact that the guidelines were mentioned at the outset of the

> Board's decision in the present application does not preclude *a priori* an attack on the decision on this basis.
>
> [17] Instead of exhibiting awareness of the Applicant's possible difficulties in recalling her past, the Board appears hypercritical of differences between the Applicant's testimony and PIF. This is despite that fact that the Board relies primarily on omissions rather than contradictions (which are more troubling), and that the Applicant explained at the hearing that she had emotional difficulty in completing her PIF (see for example Certified Tribunal Record at p. 373).
>
> [18] In my view, with all of this in mind, the Board was obliged to consider whether the discrepancies it identified and relied on to undermine the Applicant's credibility were the result of psychological difficulties and not of a desire to fabricate evidence. While the Board was not bound to accept the testimony, it was obliged, in this case, to weigh the evidence with the *Gender Guidelines* in mind. In my view, it did not do so. [Emphasis added.]

[63] Similarly, Ms. Abbasova's testimony mainly involved omissions rather than contradictions. Moreover, the fact that Ms. Abbasova works in a childcare centre does not mean that she cannot be a psychologically vulnerable person. On the contrary, the fact that she spends her time with very young children, who are themselves vulnerable, may be seen as evidence of her own vulnerability. Fragile and vulnerable people can work with fragile and vulnerable people, with children who are not violent toward them.

[64] In addition, a passage from the documentary evidence submitted to the PRRA officer by the applicant shows that domestic violence against women is still a widespread problem in Russia:

> … Violence against women and children, including domestic violence, remained a significant problem …
>
> …
>
> Domestic violence remained a major problem. As of March the Ministry of Internal Affairs maintained records on more than 4 million perpetrators of domestic violence. The ministry estimated that a woman died every 40 minutes at the hands of a husband, boyfriend, or other family member and that 80 percent of women had experienced domestic violence at least once in their lives. The ministry also

> estimated that 3,000 men a year were killed by wives or girlfriends whom they had beaten. However, the reluctance of victims to report domestic violence meant that reliable statistical information on its scope was impossible to obtain. Official telephone directories contained no information on crisis centers or shelters. Law enforcement authorities frequently failed to respond to reports of domestic violence.

(U.S. Department of State – 2009 Human Rights Report: Russia, Country Reports on Human Rights Practices, March 11, 2010).

[65] In this case, did the PRRA officer exhibit the reasonableness that sensitivity in his consideration of the applicant's case required? He should at least have considered whether the applicant is a person potentially contemplated by Guidelines 4 and 8. The evidence that may not have been given sufficient weight, and that might have greater weight, should be considered again. For people in such exceptional circumstances, where the silence on their own part is so eloquent, it is necessary at least to consider the evidence that is not silent, the evidence from other sources submitted in support of the case presented by the applicant.

[66] Very rarely, there are cases in which silence in itself is a representation of the pain felt by the person, and this occurs in cases where the silence is so striking that there are not even any falsehoods to be considered; rather, there is a silence that could be reconciled only when considered with tangible or concrete evidence from persons other than the applicant, to disclose the case of the applicant herself.

[67] This presents the greatest challenge to the quasi-judicial and judicial system, because of the fact that the evidence is never internal, is never central; rather, it is presented by the people who have observed, analyzed and assessed the person under consideration, where the decision-maker

could know the individual only through others, such as a person who stands silent on her own account. There is nothing more eloquent than a silent cry that makes no sound, and so the voices around the person concerned, rather than the person herself, must be listened to. Some people are abused to the point that they cannot testify, and only the people around them are able to express, in their own voices, what the person concerned is not able to express.

[68] In some cases the quasi-judicial and judicial system becomes the voice of those who have no voice (for example: *Erdogu v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 407, 166 A.C.W.S. (3d) 311). As Justice John Maxwell Evans stated in *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35 (F.C.T.D.), 83 A.C.W.S. (3d) 264:

> [17] However, the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence": *Bains* v. *Canada (Minister of Employment and Immigration)* (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact. [Emphasis added.]

X. Conclusion

[69] The Court recognizes that Ms. Abbasova's case has to be referred back to another PRRA officer for reconsideration. The PRRA officer's reasoning will have to take into account all the evidence placed in the record of Ms. Abbasova's case and assess that evidence having regard to the Guidelines, which direct that a reasonable approach be taken, resulting in sensitivity to the difficulty a refugee claimant who fears persecution by reason of gender has in testifying. A reasonable

approach requires sensitivity, particularly in assessing the subjective evidence submitted by Ms. Abbasova, which might lead to a decision different from the one made by the PRRA officer in this case. Accordingly, the matter is referred back for redetermination.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that

(1) the application for judicial review be allowed;

(2) the matter be reconsidered by a different PRRA officer;

(3) no question was submitted for certification.

"Michel M.J. Shore"
Judge

Certified true translation
Susan Deichert, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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