

Federal Court



Cour fédérale

Date: 20110224

Docket: IMM-4032-10

Citation: 2011 FC 216

Ottawa, Ontario, February 24, 2011

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

**CLIFFORNA CLEVORN TOUSSAINT
(A.K.A. CLIFFORNA CLEVO TOUSSAINT
(TOUSSAINT, CLIFFORNA CLEVORN)
(A.K.A. TOUSSAINT, CLIFFORNA CLEVO)**

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review by Clifforna Clevorn Toussaint challenging a decision by Refugee Protection Division of the Immigration and Refugee Board (Board) dated June 18, 2010 by which her application for refugee protection was refused.

Background

[2] Ms. Toussaint entered Canada from St. Vincent and the Grenadines at the age of 18. She did not initiate her application for refugee protection for 5 years, but when she did she claimed to be the victim of several years of physical and sexual abuse both at the hands of her mother's common-law husband and her grandmother's husband. She claimed to have sought protection at the age of 15 from the local police but nothing meaningful was done to stop the abuse. She came to Canada in July 2003 "to get away from her mother's husband, Gurney" who she alleged continued to be a threat.

The Board Decision

[3] The Board convened at Toronto on May 7, 2010. Most of Ms. Toussaint's testimony is not contained in the transcript of the hearing presumably because the recording equipment was not turned on after an early off-the-record discussion. According to a letter from the Board, the missing testimony was given during a period of one hour and eleven minutes, representing most of the hearing.

[4] The Board did not accept Ms. Toussaint's testimony of abuse and it found her lacking in credibility. It doubted her explanation for the delay in seeking protection and concluded that she did not possess a subjective fear of anyone in "St. Lucia" [sic]. The Board's remaining credibility concerns were limited to three perceived inconsistencies in Ms. Toussaint's evidence and one response which it found implausible. The Board found that Ms. Toussaint "was not abused as she alleges". On the issue of state protection, the Board noted that Ms. Toussaint had presented no corroborative evidence of a complaint to the authorities but it also acknowledged that she was "a

minor while living in St. Vincent [and] therefore cannot be faulted for not approaching the police more persistently”. Surprisingly, later in its decision the Board found that Ms. Toussant “did not make sufficient efforts to obtain state protection” and, in the result, had failed to demonstrate “that adequate state protection would not be available to her”.

Issues

[5] What is the legal significance of the Board’s failure to produce a complete transcript of its hearing having regard to the Applicant’s challenges to the reasonableness of the Board’s evidentiary findings?

Analysis

[6] A failure by the Board to produce a transcript of the evidence taken before it may constitute a denial of natural justice if a reviewing court is unable to properly dispose of the issues raised. A helpful summary of the relevant authorities can be found in *Canada v Liang*, 2009 FC 955, [2009] FCJ No 1168, where Justice Robert Mainville stated the guiding principle as follows:

24 The recent case law from the Federal Court indicates that where the fundamental issues at stake concern the reasonableness of the assessment of the credibility of a witness by an administrative tribunal, and where the absence of a record of the testimony of the concerned witness leads to the conclusion that the Court cannot deal adequately with the concerns raised, then a new hearing may be required: *Agbon v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 356, at paras. 3-4 (O’Reilly J.) ; *Singh v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 426, at para. 3 (Beaudry J.); *Nguigi v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 432, at paras. 47-49 (Russell J.); *Khaira v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1071, at paras. 14 to 16 (Blais J., now C.J. F.C.A.); *Vergunov v. Canada (Minister of Citizenship and Immigration)*, (1999), 166 F.T.R. 94, at paras. 13-14 (Pelletier J.); *Ahmed v. Canada (Minister of Citizenship and Immigration)*, (2000), 182 F.T.R. 312, at para. 18 (Dawson J.).

25 In this case, there are serious credibility issues raised by the Minister and confirmed by the Panel in regards to the testimony of Mr. Qiang Liang, issues which seem to lead to the conclusion that the Panel's decision is not reasonable in these circumstances. However, the Court cannot fully and adequately review these issues since a transcript of the proceedings is not available. Moreover, there are also important credibility issues raised by the Immigration Officer in regards to Ms. Rong Ji Zeng and, in the absence of a transcript of the proceedings before the Panel, the Court has no basis on which to review how and why the Panel disregarded these issues.

[7] I am satisfied that the evidentiary issues raised on this application cannot be properly assessed in the absence of complete transcript of the evidence and that this matter must therefore be returned to the Board for reconsideration.

[8] Ms. Toussaint has deposed that the Board was in error when it found that there was an inconsistency between her Personal Information Form (PIF) and her testimony about her age when her stepfather came into the household.. She claims that there was no such inconsistency. She alleges a similar error with respect to the Board's finding of contradictory testimony as to her age when she was threatened by her stepfather. Without a transcript, I cannot assess the validity of these assertions.

[9] The Board did not accept Ms. Toussaint's explanation for her delay in seeking refugee protection. Ms. Toussaint says that this conclusion was unreasonable in the face of her testimony. This is an issue which would require the Court to assess her evidence and it is impossible to do justice to the argument in the absence of a complete transcript.

[10] Ms. Toussaint's arguments have added cogency, however, in the face of three clear errors by the Board on the face of its record. Ms. Toussaint deposes that during the hearing the Board asked her about what it perceived to be an omission from her PIF about an incident of alleged sexual abuse. The Board was then advised by counsel that the incident was documented in the PIF and the Board agreed. All of this is verified in the limited transcript that was produced. Nevertheless, the Board's reasons repeat this error and impugn Ms. Toussaint's credibility on the basis of this supposed omission. This mistake is an important aspect to the Board's later conclusion that Ms. Toussaint was never a victim of abuse.

[11] A small part of Ms. Toussaint's testimony on the issue of delay was also recorded and transcribed. This evidence concerned Ms. Toussaint's knowledge of her boyfriend's immigration status in Canada. The Board was of the view that if Ms. Toussaint's boyfriend had been a refugee claimant, she would have been aware of the process for seeking similar protection. The Board attributed testimony to Ms. Toussaint that she did not know if he was a refugee claimant or not – a statement it did not find believable. I accept that if Ms. Toussaint had indeed testified that she did not know whether or not her boyfriend was a refugee claimant the Board's adverse inference would have been reasonable. But what Ms. Toussaint actually said was that her boyfriend had come to Canada as a visitor and that as far as she was aware he did not seek refugee protection. This is a very different response than the bare statement attributed to Ms. Toussaint that she had no appreciation for her boyfriend's immigration status.

[12] A significant part of the Board's state protection analysis involved an assessment of Ms. Toussaint's testimony culminating in a finding that she "did not make sufficient efforts to

obtain state protection before leaving for Canada” -- a statement that it repeated in its concluding remarks. This is in contrast to the Board’s earlier finding that Ms. Toussaint “was a minor while living in St. Vincent [and] therefore cannot be faulted for not approaching the police more persistently”. This appears to be a material inconsistency on the face of the Board’s reasons which casts real doubt upon its state protection analysis. Once again, access to a transcript would have assisted the Court in better understanding how the Board arrived at these starkly different conclusions.

[13] The rest of the Board’s state protection analysis is a largely one-sided assessment of country condition evidence. That analysis ignores a substantial body of evidence in the record concerning the inadequacies of state protection in St. Vincent for victims of domestic abuse. I do not agree with the Respondent that in this case the issue of state protection can be neatly isolated from the evidence concerning Ms. Toussaint’s risk narrative and profile. A proper state protection analysis could only be based on a careful assessment of Ms. Toussaint’s testimony. In the absence of a transcript, I am left to speculate about the adequacy of the Board’s assessment of much of that evidence such that the state protection analysis is rendered suspect.

Conclusion

[14] In the result, this application for judicial review is allowed with the matter to be remitted to a different-decision maker for reconsideration on the merits.

[15] Neither party proposed a certified question and no issue of general importance arises on this record.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is allowed with the matter to be remitted to a different-decision maker for reconsideration on the merits.

“ R. L. Barnes ”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4032-10

STYLE OF CAUSE: TOUSSAINT v MCI

PLACE OF HEARING: Toronto, ON

DATE OF HEARING: February 10, 2011

**REASONS FOR JUDGMENT
AND JUDGMENT:** BARNES J.

DATED: February 24, 2011

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