

Federal Court



Cour fédérale

Date: 20120717

Docket: IMM-8831-11

Citation: 2012 FC 897

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, July 17, 2012

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

**PALESA HYACINTH POLASI
KATLEHO POLASI**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review filed in accordance with subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA) of a decision by the Refugee Protection Division (RPD) dated November 10, 2011, that the applicants are not refugees under section 96 of the IRPA or persons in need of protection under section 97 of the IRPA.

I. Alleged facts

[2] Palesa Hyacinth Polasi (female applicant) and her minor son, Katleho Polasi, who was two months old at the time, entered Canada on August 22, 2008.

[3] When they arrived, the applicants were detained for identity purposes. The female applicant had a passport from Swaziland that turned out to be a fake. At the time, the female applicant indicated that she was born in Lesotho and that she became a citizen of South Africa when her mother married a citizen of that country. After one month in detention, the female applicant indicated that she was in fact born in South Africa. After subsequently stating that her son was born in South Africa, she also admitted that her son was actually born in Ireland. The female applicant explained that she lied about her identity and that of her son so that it would be more difficult to remove them.

[4] The female applicant was born in South Africa on October 25, 1979, to a mother from South Africa and a father from Lesotho. She apparently lived in Lesotho from 1983 to 1993 before going back to South Africa to avoid circumcision. Her parents then purportedly got divorced, but the female applicant was apparently then raped several times by her mother's new spouse (Mr. X), starting at 14 years of age. While Mr. X was serving a three-year prison sentence in 1998 for embezzlement and theft, the female applicant allegedly met a man, who she married in 2001. A few months later, Mr. X was apparently released and, out of jealousy, tried to kill her. Her husband was then apparently shot and wounded in the arm during an altercation.

[5] The female applicant testified that there was another assault in 2005 and that she then divorced her husband and fled to Ireland, where her refugee claim was rejected in 2007. It was in Ireland that she purportedly had a relationship with an undocumented Nigerian man, a relationship

that led to the birth of her son. The man apparently then left her and the female applicant then came to Canada to claim refugee protection.

II. Impugned decision

[6] After two hearings on May 20 and September 28, 2011, the RPD member found that the applicants are not refugees or persons in need of protection.

[7] The member first clarified the issue of the applicants' identity. After reviewing the documentation submitted, the panel was satisfied with the female applicant's identity and with the fact that she is a citizen of South Africa. The fears raised with respect to a removal to Lesotho therefore did not apply. Regarding her son, he does not have Irish citizenship, but the female applicant is in the process of acquiring South African citizenship for her son and her refugee claim was therefore also examined with respect to South Africa.

[8] According to the RPD, the determinative issues were credibility and state protection. The member found that the female applicant was not credible and that her testimony was not trustworthy. The member first noted false statements made to the Canadian immigration authorities upon her arrival in Canada and found that those false statements, despite the female applicant's subsequent admissions, demonstrate clear intent to mislead authorities, which affects her credibility. The panel also raised several contradictions between her testimony during the hearing and a sworn statement bearing the stamp of the South African police dated April 17, 2005, found in the female applicant's bag upon her arrival in Canada (Tribunal Record at pages 274-275). The panel identified the following contradictions (RPD Decision at paragraph 24):

1. Mr. X allegedly assaulted the claimant and shot and wounded in the arm the person who she claimed was her husband in June 2001, or

one month before her wedding on August 1, 2001, and not in December 2001.

2. The name of the victim who was allegedly wounded by Mr. X is different from the claimant's husband's name.
3. The claimant had previously reported in 2001 that Mr. X had raped her, that is, well before February 2005, which she testified is when she first reported the rapes.
4. The document indicates that Mr. X was arrested in June 2001 and that he was serving a seven year sentence. The claimant's Personal Information Form (PIF) and testimony did not indicate in any way that such a sentence had been imposed in 2001.
5. Although the document is dated April 17, 2005, it does not mention the offence committed by Mr. X in February 2005.

[9] The panel noted the female applicant's explanation that she had obtained the document for her refugee claim in Ireland, but that the content was apparently not true and that is why she did not sign it, did not use it in Ireland and also did not plan to use it to support her claim in Canada. The panel was unsatisfied with these explanations and did not understand why the female applicant had therefore brought this document to Canada or why she had not taken steps to obtain a new truthful report. Because it did not believe her explanations, the panel was of the opinion that these significant contradictions undermined the female applicant's credibility on the essential elements of her claim.

[10] The RPD also called into question the female applicant's testimony with respect to the charging and conviction of Mr. X and found that her testimony was hesitant and not spontaneous. The RPD also noted that a psychological report submitted as evidence by the female applicant did not contain any mention of the alleged crimes committed by Mr. X regarding her husband's gunshot wounds. According to the member, the lack of any reference to those events reinforced the finding that those allegations never occurred.

[11] As for the state protection issue, the member noted that, even if he had believed the hardship alleged by the female applicant, she did not demonstrate that it was objectively unreasonable for her to seek protection from the authorities or to establish the inability of the South African state to ensure adequate protection.

III. Issue

1. Did the RPD err in its assessment of the credibility of the applicants' account?
2. Did the RPD err in its assessment of state protection?

IV. Applicable standard of review

[12] The parties agree that the applicable standard for issues of credibility and state protection is reasonableness (*Huerta v Canada (Minister of Citizenship and Immigration)*, 2008 FC 586 at paragraphs 14-15, [2008] FCJ 737). Consequently, the Court will intervene only if the decision does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47, [2008] 1 SCR 190).

V. Analysis

A. *Did the RPD err in its assessment of the credibility of the applicants' account?*

[13] The female applicant argues that a determinative error of fact was committed in this case because she disclosed the information on her true identity starting September 22, 2008, during an interview with an immigration officer, but that the necessary amendments to the Personal Information Form (PIF) were not made before the hearing. Indeed, the record of a detention review hearing on September 26, 2008, confirms that the female applicant disclosed her true identity in 2008 (Tribunal Record at pages 341-344). However, that admission does not invalidate the panel's

observation that the female applicant lied to the Canadian authorities when she arrived in Canada and that this could reasonably impact her credibility.

[14] Furthermore, even though the failure to update the PIF certainly created confusion at the start of the first hearing before the RPD, the female applicant is, in large part, responsible for the problems because she was asked a few times before her testimony whether the content of the PIF was correct and whether there were any other changes that needed to be made to it. The female applicant did not point anything out at that time (Tribunal Record at pages 378-380):

BY COUNSEL (to claimant)

Q. Thank you. And can you confirm the content of this personal information form and... yes, the content of the personal information form are true and correct to the best of your knowledge?

A. Yes.

- Thank you.

BY MEMBER (to claimant)

Q. And is it complete as the date of the hearing today?

A. Yes.

Q. Is it complete?

A. Yes.

[15] In any event, when counsel for the female applicant later realized the error, the member allowed the female applicant and her counsel to go through the PIF and change it to reflect the new version of the facts.

[16] The female applicant also states that the panel marginalized two pieces of sure proof, that is, the above-mentioned psychological report (Tribunal Record at pages 255-256) and a medical report from the Johannesburg hospital dated January 22, 2009, that confirms that the her former spouse

was hospitalized in December 2001 and in February 2005, the first time for a gunshot wound in the arm and the second time for a gunshot wound in the head (Tribunal Record at page 254).

[17] The panel's decision addressed those two documents in the following manner (RPD Decision at paragraphs 30-31):

30 The panel also considered the psychological report filed in evidence by the claimant. When asked about the complete lack of reference to the alleged crimes committed by Mr. X with respect to her husband being shot and wounded, the claimant testified that she had not told the psychologist because her former husband was not there and because it was to treat her anxiety.

31 The panel is not satisfied with those explanations. Although the claimant's former husband is not in Canada, if these allegations that her husband was shot and wounded were true, the panel finds it reasonable to believe that the claimant would have mentioned them to substantiate the sources of her anxiety. In the circumstances, the lack of reference to these alleged incidents reinforces the panel's finding that these allegations are not credible. Also, since the panel does not believe that these acts with a weapon occurred in the circumstances alleged, it attaches no probative value to the medical report submitted by the claimant to confirm these events.

[18] The female applicant states that the finding regarding the psychological report is unreasonable because the document was not submitted in evidence to establish the facts in support of her refugee claim, but instead to determine her psychological state. I cannot share this opinion. The report demonstrates that the female applicant was asked to describe the events that had apparently caused her anxiety and fear. It is therefore not unreasonable for the member to have considered why the female applicant apparently failed to mention, during twelve sessions, the armed assaults by Mr. X against herself and her husband (Tribunal Record at page 255):

. . . Finally, although not fully assessed because of the specific nature of the referral, Miss Polasi reported a series of traumatic sexual assaults by her father as well as subsequent symptoms which

appeared to be consistent with Posttraumatic Stress Disorder (PTSD; including a number of somatic and re-experiencing symptoms). These experiences were reported only after she was asked about other situations in her life which might make her anxious or frightened, and she appeared to be quite upset and tearful when describing them.

[Emphasis added.]

[19] Regarding the medical report, given the significant contradictions and concerns raised in the female applicant's testimony, it was not unreasonable for the member to have attached no probative value to the medical report in confirming the circumstances surrounding the events alleged by the female applicant.

[20] As such, regarding the contradictions between her testimony and the police report found in her bag when she arrived in Canada, the female applicant argued the following in her memorandum (Female Applicant's Memorandum of Facts and Law at paragraph 30):

[TRANSLATION]

30. Remember that she made efforts since Ireland to obtain it for the purposes of submitting it as part of her refugee claim, but that she had received a document containing information that did not reflect the events that had occurred. Thus, she did not submit it in support of her refugee claim in Ireland; she also did not even sign it, or endorse its contents. She, however, did not get rid of it and it was in her bag upon her arrival in Canada when it was seized by the Canadian authorities;

...

[21] The female applicant reiterated the same thing in her affidavit (Affidavit of Palesa Jessica Polasi at paragraphs 34-37):

34. It is at this point of my testimony that the Board Member confronted me with contradictions between the police report that had

been seized in my bag upon my arrival in Canada and my testimony. I explained to the Board Member that I asked a friend in South Africa to get this statement – that I did on April 17th, 2005 – to support my refugee hearing in Ireland, but that she explained [*sic*] me that the authorities said that we had to hire a lawyer for such a request. We did so and, unfortunately, when I receive [*sic*] the document, I found out so much informations [*sic*] were wrong;

35. The Board Member told me that it did not explain why there was those contradictions. I answered that I was trying to explain that I don't know what happened, that I was not there, that I did not sign it because the content was false, that I did not get that document in order to produce it to the Canadian authorities, but to the Irish authorities, but that unfortunately the Canadian immigration officers seized this document that was forgot [*sic*] in my bag;

36. The Board Member was not satisfied with my explanations and was asking me if I had anything else to add. I added it is why I did not sign [*sic*] because I did not agree with the content. I reiterate [*sic*] that I did not want to produce it in Canada and that even in Ireland I did not submit it because I was not satisfied;

37. Again, the Board Member asked me if I had other explanations. I did not have anything else to add. So I just repeated that I did not agree with the content of that document;

...

[22] As described in her affidavit, when confronted by the contradictions between her testimony and the content of the police report during the second hearing, the female applicant immediately questioned the truthfulness of the contents of that document. Nevertheless, during the first hearing before the RPD, the member had also brought that same document to the attention of the female applicant to confirm its authenticity (Tribunal Record at pages 437-438):

BY MEMBER (to claimant)

Q. Is [the baptismal register] the only one document incorrect or false?

A. Yes.

- Because there's another one sworn statement.

BY MEMBER (to counsel)

- Maybe you could show her, Counsel, since we're in the false documents, I just want to make sure if it's true, we're in the false documents.

BY CLAIMANT (to member)

- No, I went to police station.

BY MEMBER (to claimant)

Q. Is it a false or a true document, madam?

A. That is...

Q. The sworn statement?

A. The truth.

Q. How can we make sure that's a true document when the other one is a false one? Can you tell us why we have to believe you?

A. Because I went to the police station and I reported.

BY COUNSEL (to member)

- It also has a stamp of Johannesburg central police station.

A. Well, there's another stamp on the other document and she said that's a false document. So...

- Yes, and she's testifying that this is a true document.

BY MEMBER (to claimant)

Q. So, the sworn statement is a true document?

A. Yes.

[23] As we can see, the female applicant confirmed the authenticity of that document and in no way called its content into question even though she was certainly given the opportunity to do so. As summarized in the member's decision, the report put in doubt the first incident between her husband and Mr. X, states that Mr. X was imprisoned for seven years and does not mention the

incident of February 2005. Under those circumstances, it was reasonable for the panel to doubt the truthfulness of the female applicant's testimony when it was put in doubt by the content of the police report previously obtained by the female applicant. The Court therefore does not see reasons to amend the RPD decision regarding the credibility of the female applicant.

[24] During the hearing, counsel for the applicants argued that the confirmation of the authenticity of the document by the female applicant during the first hearing had to be assessed considering that the questions asked on that point were general and did not open the door to a detailed response. That argument is unacceptable. The issues were to the point, on topic and did not cause confusion. The female applicant replied and must live with the consequences of her answers.

[25] Furthermore, counsel, using the hearing transcript, tried to give a different tone to her written submissions. She asked the Court to note that it took the member a long time to realize that the female applicant had, in the month following her arrival, corrected her original data and that the delay had influenced his mindset with respect to her credibility. Regarding the psychological report, counsel argued during the hearing that, by not taking into account its content on the female applicant's precarious state, the member did not do justice to the female applicant. After reviewing the decision and the hearing transcript, I am of the opinion that the member performed his role by being constantly determined to understand the female applicant's ambiguous version. His questions are a clear indication of this. It seems unfair to want to blame him in such manner now. The female applicant is responsible for the outcome. Her version, in a number of areas, changed during the two hearings and the member noted this and made the appropriate findings. He was therefore entitled to comment on the female applicant's precarious credibility using facts in support thereof.

B. Did the RPD err in its assessment of state protection?

[26] The female applicant argues that the finding by the RPD regarding state protection is unreasonable because it does not rely on the documentary evidence and because it failed to consider Guideline 4 in its analysis and the female applicant's situation. The female applicant's memorandum cites long excerpts from the documentary evidence, including the following excerpt that, in fact, supports the panel's decision (Female Applicant's Memorandum of Facts and Law at paragraph 41, page 250):

3.7.6 Conclusion. Domestic violence is widespread in South Africa but there is in general sufficient protection and internal relocation is also an option where in the particular circumstances of the applicant's case it is not considered unduly harsh for them to relocate. 9 USSD 2008: South Africa (Section 5), AI Report 2009: South Africa & AI Report 2008: South Africa 10 USSD 2008: South Africa (Section 5) & AI Report 2008: South Africa 11 USSD 2008: South Africa (Section 5), AI Report 2009: South Africa & AI Report 2009: South Africa 12 USSD 2008: South Africa (Section 2) South Africa OGN v5.0 11 June 2009. The grant of asylum or Humanitarian Protection is unlikely therefore to be appropriate and unless there are specific reasons why sufficient protection would not be available to the individual applicant and why it would be unduly harsh to expect them to relocate internally, such claims may be certified as clearly unfounded.

...

[Emphasis added.]

[27] Thus, the documentary evidence supports the RPD's finding regarding the existence of state protection and furthermore, it is also useful to point out that the female applicant confirmed during her testimony that Mr. X was sentenced to 20 years in prison for attempted murder following the incident in 2005. Therefore, if her testimony is indeed true, it clearly demonstrates the ability of the authorities to protect the female applicant and her son (Tribunal Record at page 485).

[28] For all of these reasons, this Court is of the opinion that the decision by the RPD is not unreasonable, that it falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law and that the Court's intervention is not warranted.

[29] The parties were invited to submit a question or questions for certification. None was submitted.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed and no question is certified.

“Simon Noël”

Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-8831-11

STYLE OF CAUSE: PALESA HYACINTH POLASI et al
v THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: July 10, 2012

**REASONS FOR JUDGMENT
AND JUDGMENT:** SIMON NOËL J.

DATED: July 17, 2012

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