



IMMIGRATION AND REFUGEE BOARD
(REFUGEE PROTECTION DIVISION)

LA COMMISSION DE L'IMMIGRATION
ET DU STATUT DE RÉFUGIÉ
(SECTION DE LA PROTECTION DES RÉFUGIÉS)

IN PRIVATE
HUIS CLOS
TA3-01625

CLAIMANT(S)

DEMANDEUR(S)

(a.k.a.)

DATE(S) OF HEARING

10 May 2004

DATE(S) DE L'AUDIENCE

DATE OF DECISION

20 May 2004

DATE DE LA DÉCISION

CORAM

Heather Gibbs

CORAM

FOR THE CLAIMANT(S)

Munyonzwe Hamalengwa

POUR LE(S) DEMANDEUR(S)

REFUGEE PROTECTION OFFICER

Walter Kawun

AGENT DE PROTECTION DES RÉFUGIÉS

DESIGNATED REPRESENTATIVE

REPRÉSENTANT DÉSIGNÉ

MINISTER'S COUNSEL

CONSEIL DE LA MINISTRE

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These are the reasons for the decision of the Refugee Protection Division in the claim to refugee protection of (a.k.a. , a 21-year-old citizen of Kenya. The claimant alleges a well-founded fear of persecution on the basis of her sexual orientation. In addition, she fears being forced into marriage by her grandfather.

Facts as alleged

The claimant alleges in her Personal Information Form (PIF) that she is “bisexual, with pronounced lesbianism”.¹ She is Muslim. She alleges that when her grandfather discovered she was bisexual, he immediately arranged that she should be married to an old man who already had several wives, one of whom apparently died of HIV/AIDS.

The claimant wrote in her PIF that she ran away from home to the home of a friend in , but after one week was located and brought back by force. She alleges to have been kept under virtual house arrest. The claimant then pretended to agree with the marriage plans, in order to gain some measure of freedom while planning her escape.

The wedding was planned for , 2002. On 2002, the claimant left Kenya with a genuine passport and Canadian Visitor's Visa. She made a refugee claim approximately three weeks after arrival, on 2003.

¹ Exhibit C-1, PIF narrative, p. 17 of 21.

Analysis

The issues identified at the outset of the hearing were credibility, objective basis, and subjective fear (delay).

Identity

The claimant has established her personal identity through production of an original Kenyan identity card² and genuine passport. Her sexual identity, however, has not been established. This will be discussed further under “credibility”.

Credibility

Sworn testimony is presumed to be credible unless there is good reason to doubt its credibility. Inconsistencies, implausibilities and contradictions may be taken into consideration in determining the credibility of testimony.³

Apart from her identity documents, the claimant provided no corroborating material of any kind. The panel is left only with her testimony. I find her story to be replete with implausibilities. These, combined with the delay in her departure from the country and in making a refugee claim on arrival, aspects which indicate a lack of

² Copy in Exhibit R-2, attached to Canada Visitor's Visa (CVV) information.

³ Maldonado v. Canada (Minister of Employment and Immigration), [1980] 2 F.C. 302 (C.A.), at 305.

subjective fear, lead me to conclude on a balance of probabilities that she does not fear persecution in Kenya.

Subjective fear: Delay

The claimant obtained her passport on 2002. She obtained a Canadian Visitor's Visa (CVV) two days later, on 2002. She remained in Kenya, living with her parents, however, for another five months. The claimant left Kenya on 2002; allegedly a mere four days before the arranged marriage date of 2002. When asked why she waited for so long, she testified she was saving money to pay for her ticket to Canada. The claimant was asked why she did not go to another, closer country, which would cost less, such as the United Kingdom (through which the claimant transited). She responded that her sister knew about Canada and was helping her. I find the response does not adequately explain the questions raised by waiting five months in the home of her alleged persecutor.

Further, the claimant's allegation about how she saved up the money for travel was not credible. She testified she "pinched" a little here and there, from the money her parents gave her to purchase wedding necessities, such as gold and clothing. She believes the full amount made available to her for such purchases was the equivalent of approximately \$3,000 Canadian. She testified that her ticket cost approximately \$1,300. I do not find it credible that the claimant "pinched" such a large amount, fully one third

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of the total amount for her wedding preparation, without the knowledge of her mother or the "wedding planner" woman who accompanied her. These two women would undoubtedly have kept a close watch on this large amount of money and have demanded an accounting for its disbursement.

The claimant also delayed approximately three weeks after arriving, before making a refugee claim. She testified that she had intended to claim refugee protection from the "get-go", but the man in front of her in line at the Toronto airport made a refugee claim. His treatment scared her; as everyone was aware what he was doing. In addition, she testified she had a legal visitor's visa so decided to enter legally first, then do some research in the library before making a claim.

I do not find her explanation satisfactory. The claimant allegedly was planning her escape from Kenya for at least 9 months (from the engagement in until departure in), with the destination Canada from the beginning. I also note that the CVV issued to the claimant notes that she was to attend a wedding in Canada. It is an equally plausible explanation, and a more logical and reasonable one, that she attended the wedding first, before deciding to make a claim.

The claimant testified that her sexual orientation was discovered in 2001. The marriage was allegedly ordered by her grandfather "immediately". In 2002 she learned the wedding day was to be , 2002. The claimant explained there was a long delay before the wedding day because there were "many ceremonies" to

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go through first. However, the claimant's description of her grandfather's reaction to his discovery of her sexual orientation is inconsistent with such a long delay. The picture she painted of him was a powerful, controlling and angry man, who arranged the marriage to ensure she did not exhibit lesbian tendencies again. In addition, the claimant's opposition to the marriage would reasonably mitigate against a delay.

The claimant's description of her situation was one of virtual house arrest. However, she was able to obtain her own passport and CVV. She was able to obtain significant amounts of money for travel. She worked (albeit at the family business). She had access to the Internet. Her actions indicate she was not under the complete control of her family.

The claimant appears to be particularly adept at misleading Canadian authorities. In her CVV application, she indicated that she was to travel with her sister to a wedding in Canada. At the hearing, the claimant denied there was any wedding, and that her sister ever came to Canada. She alleges to have written her own invitation letter from Canada, and sent it to herself over the Internet.

She told CIC she had been working for two years, when it was apparently only two months. She wrote herself a letter on the family business letterhead, which she allegedly signed herself, to confirm her employment and holiday time to attend the wedding.

The claimant presented bank records to the Canadian Embassy in Nairobi, to show she had a KSH bank balance. She explained that she actually had no access to the money in her account, and "pinched" the bank account records from their filing place at home, in order to show the Canadian authorities that she had adequate funds to travel internationally. When asked why there was so much money in her account, she testified that it was dowry money. The claimant explained that she went with her father when he opened the account, but she had no actual access to it. This testimony is not credible, as dowry is a matter for the parents of the bride, and particularly so in this case where there is no explanation as to why her father would have opened the account in her name, if she was to have no access to it, and had vociferously objected to the marriage at first.

I find the following statement of principle by Justice O'Halloran in relevant to this case:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in the combining skilful exaggeration with partial suppression of the truth.

⁴ v. [1952] 2 D.L.R. 354 (B.C.C.A.) at 357.

I draw a negative inference regarding the claimant's credibility, due to her actions in delaying her exit from Kenya and in making a refugee claim in Canada.

Sexual orientation

The PIF is silent on the important question of how the claimant's grandfather found out about her sexual orientation. In oral testimony, the claimant described how her sexual orientation was discovered by her cousin, who told her mother, who told her father and grandfather. The claimant's evidence in this regard was cursory and lacking in the details one would normally expect of a lived experience.

The sexual encounter which was apparently discovered by her cousin took place in a classroom. She testified that not many people were there, as year-end exams were finished. She had also completed her exams, she testified, but was at the school to get away from the house. The panel finds the event implausible. Even if few people were around, a classroom is not a discreet place to engage in taboo homosexual behaviour in Kenya.

Further, it was only after a series of questions that the claimant eventually explained how her cousin must have seen her: she testified that, in fact, she did not see her cousin, but assumes this was the occasion on which she was seen since her cousin later told her "I was looking for you at the school." There was no explanation as to why her cousin was looking for the claimant that day, nor why she would think to look for her

at school after exams were over, nor any mention of this confrontation until after prolonged questioning.

The claimant testified that, when confronted by her grandfather, she at first denied she was homosexual and then admitted it, when he said she was seen. This is not credible. First, her rapid admission to her grandfather is hard to understand when she allegedly was not aware her cousin had seen her. She explained that her grandfather was specific about incidents, so she knew she must have been witnessed. However, the claimant's description of the conversation with her grandfather was at first vague ("we know about how you make out with those girls and stuff"), and only became more detailed upon re-telling later in the hearing. Specifically, the fact that her grandfather made any reference to her cousin was only added after she had recounted the incident in the schoolroom.

The claimant testified that she knew homosexuality was not accepted in Kenya, as she once saw two naked men in the middle of a mob, with tires over them (indicating they were to be lynched), because they were homosexual. One would reasonably expect her, then, to be fearful at the thought of expressing homosexual behaviour openly. Despite her testimony that her encounters were "discreet", the claimant testified that her homosexual encounters with other "girls" were all on school property or at the mosque. The incidents in the mosque occurred during a break in religious instruction in the classroom; the other students left, but the claimant and her partner stayed behind and

“made out”, she testified. Other incidents allegedly took place in the field surrounding the school, or in the classroom after hours. The panel finds these experiences to be surprisingly indiscreet. I do not find her allegations to be credible.

As I have found there is insufficient credible and trustworthy evidence upon which a reasonable fear of persecution can be found, similarly there is insufficient evidence of a risk to life or a risk of cruel and unusual treatment or punishment.

Conclusion

For all of the reasons listed above, the claim is rejected.

“Heather Gibbs”
Heather Gibbs

DATED at Toronto this 20th day of May, 2004.