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Huis clos / Private Proceeding

Reasons and Decision – Motifs et décision

Claimant(s)

Demandeur(e)s d'asile

XXXX XXXX

Date(s) of hearing

Date(s) de l'audience

November 6, 2017
January 16, 2018

Place of hearing

Lieu de l'audience

Montréal, Québec

**Date of decision
and reasons**

**Date de la décision
et des motifs**

June 5, 2018

Panel

Tribunal

Harry Dortelus

Counsel for the claimant(s)

**Conseil(s) du (de la/des)
demandeur(e)s d'asile**

Syed Atiqur Rahaman

Designated representative

Représentant(e) désigné(e)

N/A

Counsel for the Minister

Conseil du (de la) ministre

Sylvie Lacaille (ASFC)

APPLICATION TO VACATE

REASONS FOR DECISION

[1] The following is the decision related to the Minister of Public Safety of Canada Application to Vacate the refugee protection of Mrs. XXXX XXXX, under section 109 of the *Immigration and Refugee Protection Act* (IRPA).

Procedures

[2] On February 20, 2001, The Tribunal gave refugee status to Mrs. XXXX (the Respondent) against Bangladesh.

[3] On February 18, 2009, the Minister of Public Safety of Canada asked the Tribunal to vacate her refugee protection under section 109 of the IRPA¹. The Minister alleged that the Respondent misrepresented the facts that allowed her to obtain refugee protection.

[4] Hearings to vacate refugee protection of the Respondent were held on November 6, 2017, and January 16, 2018. The Respondent and her son were questioned during the hearings.

[5] The Respondent was not found to be a “vulnerable person” according to the Chairperson Guideline 8². However the Tribunal accommodated her and allowed frequent pauses upon her request, as needed.

DECISION

[6] The Tribunal concludes that the Respondent obtained refugee protection on February 20, 2001, by misrepresenting or withholding material facts. However, the Tribunal concludes that other sufficient evidence was considered at the time of the first determination to justify refugee protection.

[7] The application is dismissed.

¹ Application of the Minister of Public Safety of Canada to vacate refugee protection of Mrs. XXXXXX XXXX, dated December 16, 2009;

² Chairperson’s Guideline 8 of the *Refugee Protection Division*: Guideline issued by the Chairperson pursuant to paragraph 159(1)(h) of the *Immigration and Refugee Protection Act: Procedures With Respect to Vulnerable Persons Appearing Before the IRB*. Effective date: December 15, 2006.

THE PARTIES

The Minister

[8] The Minister asks the Tribunal to vacate the respondent's refugee protection status obtained in February 2001 because the Respondent allegedly obtained her refugee status by misrepresenting or withholding material facts and the absence of remaining credible and trustworthy evidence at the time of the determination of her asylum claim to justify her refugee status.

[9] In her written application, the Minister alleges notably the following.

[10] In her asylum application submitted on November 23, 1999, the Respondent, Mrs. XXXX XXXX alleged that she feared her husband, XXXX XXXX because she was physically and psychologically persecuted by Mr. XXXX since they got married in 1977.

[11] In August 2002, the Minister learned that the Respondent's husband was living with her in Montreal under the fake name of XXXX XXXX and that he had claimed asylum in Canada under that false name and his asylum claim had been denied because he could not establish his identity.

[12] On February 14, 2003, immigration enforcement officers went to the Respondent's home and found a person named XXXX XXXX, while the Respondent was absent.

[13] Both Respondent's sons were interviewed in Bangladesh in the course of their permanent residence application made by the Respondent in Canada on their behalf. The Minister alleges that the Respondent's sons were unable to provide information about their father, Mr. XXXX, the Respondent's husband. Her sons' permanent residence applications were refused.

[14] The Minister alleges that the Respondent claimed refugee status in 1999 based on misrepresentation that she had fabricated the evidence, that there is no remaining credible and trustworthy evidence at the time of her asylum claim in 1999 to justify that decision and if that the Tribunal had known these facts in 1999, its decision would have been different.

[15] In her written observations³, the Minister argued that if the Respondent's husband was abusive toward her and that was the reason why she came here to claim asylum in 1999, he would not have made the efforts to travel to Canada, under a false identity and pay an agent only to find out where the Respondent was living.

[16] The Minister also argued that if the Respondent was scared of Mr. XXXX because of the abuses, when the latter was found in her apartment in Montreal, she would have notified the Canadian authorities for her safety. It was not a simple coincidence that her estranged husband was found in her apartment in Montreal.

[17] The Minister also brought to the Tribunal's attention that both the Respondent and Mr. XXXX, a.k.a. XXXX XXXX, lived within walking distance from the Respondent in Montreal for several years, which contradicted her allegation that she feared him.

[18] The Minister also said that documentary evidence showed that the Respondent and Mr. XXXX, aka XXXX, were living together and she questioned her divorce document because the Respondent and her son contradicted themselves regarding the way that they were able to obtain the documents and there are doubts regarding their authenticity.

[19] The Minister submits that her allegations of spousal abuse in her asylum claim were fabricated and the Respondent is still married to XXXX XXXX, a.k.a. XXXX XXXX. Regarding the second part of the decision process, residual elements of her asylum claim that could have warranted a positive decision, the Minister argues that the Tribunal cannot give any weight or even consider the new evidence produced by either party when exercising its discretion under section 109(2) of IRPA based on the Federal Court⁴.

The Respondent

[20] Her counsels asked the Tribunal to dismiss the Minister's application to vacate the Respondent's asylum claim.

³ Ministers Observations dated March 24, 2018.

⁴ Canada (Minister of Citizenship and Immigration) v. Wahab, 2006 FC 1554, par 29.

[21] Counsels for the Respondent argued that the allegations that she misrepresented herself in her asylum claim are speculative and there is insufficient evidence for the Minister to arrive to such conclusion.

[22] The respondent's counsel also argued that the alleged poison-pen evidence alleging that the Respondent was living with her husband in Montreal was provided by a third party, thus unreliable because the provider's motives were not known.

[23] Her counsel also alleged that the Respondent's case has been pending over several years and this has caused her grave pain and resulted in the deterioration of her health.

ANALYSIS

The law

[24] According to section 109 of IRPA:

Applications to Vacate

Vacation of refugee protection

109 (1) The Refugee Protection Division may, on application by the Minister, vacate a decision to allow a claim for refugee protection, if it finds that the decision was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter.

Rejection of applications

(2) The Refugee Protection Division may reject the application if it is satisfied that other sufficient evidence was considered at the time of the first determination to justify refugee protection. (Our emphasis.)

[25] The Tribunal first must determine if the Respondent obtained asylum in February 2001 based on misrepresentation or by withholding material facts. If that was the case, the Tribunal must determine if the residual evidence available at the time she was granted refugee status was then sufficient to justify refugee protection.

[26] The Tribunal concludes that the Respondent had obtained her Refugee status in 2001 based on misrepresentation and by withholding material facts from the Tribunal.

[27] However, after having examined the evidence which was analyzed by the Tribunal in 2001, the present Tribunal concludes that there was still sufficient evidence to warrant refugee protection.

The evidence

Current Health status of the Respondent

[28] At the first day of hearing, the Respondent was very erratic and provided inaccurate and vague answers to the Tribunal, though she understood the interpreter and the questions well. She was alert during the question period.

[29] At the subsequent hearing, her counsels provided a psychological report from Dr. XXXX⁵ to explain why she was not able to testify properly.

[30] The Tribunal notes that the Respondent is a XXXX year-old woman and the medical evidence provided by her counsels show that she has a decade-old history of "Systemic Lupus bone pain and difficulty sleeping"⁶. An updated medical letter stated that her condition is stable and made no mention of memory problems⁷.

[31] The Tribunal also took into consideration the report from Dr. XXXX, a psychologist⁸. The psychologist notes that, at the time of his assessment, the Respondent was emotionally overwhelmed and 'cognitively dysfunctional'.

[32] However, the Tribunal noted that the psychologist saw the Respondent only once (in December 2017), after she was unable to adequately testify and had provided erroneous answers to the Tribunal. None of the previous medical reports stated that the Respondent had cognitive or memory issues. The Tribunal gave more credibility to the medical reports where the Respondent had been followed for more than a decade.

[33] There is no evidence that the Respondent has any memory problems that would impede on her capacity to testify about the main elements of her case, though the Tribunal understands that the Respondent claimed asylum in 1999, almost two decades ago, and that it would be unfair to ask her microscopic questions regarding forms that she filled out at the time of her asylum claim in

⁵ R-14, Psychological Report from DrXXXXXXXXX dated January 3, 2018.

⁶ University Health Network Emergency Service Network, 5 April 2010.

⁷ Exhibit R-13, various medical letters and reports.

⁸ Psychology Report from Dr. X. XXXXXXXXX dated January 3, 2018.

1999 and expect her to provide accurate dates. The Tribunal will assess her credibility based on the relevancy of the facts in relation to the present decision.

Testimony

[34] The Respondent and her counsel admitted at the outset of the hearing and she reiterated during her testimony that XXXX XXXX is the same person as XXXX XXXX, her former husband.

[35] There were major contradictions and inconsistencies in her testimony regarding her story in 2001 and the documentary evidence and her explanation were not credible or coherent. The Tribunal understands that these events took place a long time ago and the Respondent's current health is fragile. The evidence established that she had misled Canadian authorities about her marital status with her husband when she claimed asylum in 2000.

[36] However, there was sufficient evidence at the time of her claim to conclude that she was a victim of conjugal violence and that she was persecuted and would be persecuted if she was to return to her country when she had claimed asylum.

[37] As the basis for her asylum claim, in 1999 the Respondent wrote in her Personal Information Form (PIF)⁹ that she was raped by her boyfriend and his friends in May 1976 after she was given something to drink. Her family had later arranged her marriage to XXXX XXXX in June 1977.

[38] According to that story, her husband became physically and mentally abusive a year after the marriage because she could not bear a child. He later mistreated her because her family failed to pay the promised dowry and her husband started to drink heavily and kept asking for money from her family and continued to beat her. Her husband learned about her 1976 rape in 1996 and continued to physically and mentally abuse her.

[39] She asked him for divorce, but he refused. In August 1999, she left her home while he was on a business trip and went to her sister's place with her sons; he continued to look for her and threatened to kill her if he ever found her. "My husband called almost every house of my relatives

⁹ Exhibit M-3, pages 16 to 20.

he knew or personally visited and threatened to kill me. In spite of complaints registered at the police station police did nothing,” she wrote in 1999¹⁰. She was granted asylum based on that story¹¹.

[40] In her testimony in the present application to vacate, the Respondent said that her husband knew of the 1976 rape 5 or 6 months after their marriage, but she wrote in her PIF that it was in 1996. There is a gap of almost 20 years between her two versions of events. She was unable to explain this when she was confronted by the Minister.

[41] In her PIF she wrote that when she left her husband in 1996, she went to her sister’s place. But in her testimony, she said that it was to her mother’s place. When she was told that in 1996 her mother was no longer alive; she replied that when she used to leave her home she used to go to her mother’s place.

[42] The Respondent testified that she left her husband only once. She was unable to answer these two important questions, where she went and when her husband knew of the alleged gang rape of 1976, two important elements of her asylum claim of 1999.

[43] The Respondent was asked by the Minister if she or her children had any contact with her estranged husband when she left him in 1996. She replied no to both questions. The Minister confronted her with the documentary evidence which showed that the Respondent was living in Montreal with XXXX XXXX, her husband, which she denied.

[44] According to the documentary evidence¹², an immigration officer went to the Respondent’s house in Montreal and a man named XXXX XXXX was in the apartment of the Respondent and told the immigration officer that he was visiting the Respondent whom Mr. XXXX described as his girlfriend.

[45] The Respondent admitted at the outset of the hearing that XXXX XXXX is the same person as XXXX XXXX, her former husband. The Respondent alleged at the hearing that XXXX, a young man with whom she was living in order to share the rent costs of her apartment, had given a key to MrXXXX XXXX to explain why he was in her apartment in Montreal in February 2003.

¹⁰ Exhibit M-3, page 17.

¹¹ Exhibit M-4, RPD Asylum Claim Decision of Mrs. XXXXXX XXXX, February 20, 2001.

¹² Exhibit M-7: E-mail from XXXXXX XXXXXXXX to CPC Vegreville, page 32.

[46] The Tribunal did not find the Respondent credible. She alleged in her asylum claim in 1999 that she had left her country because she feared MrXXXX XXXX, her former husband. But on February 14, 2003, Mr. XXXX(whom she later admitted was, in fact, Mr. XXXX, her former husband), was found in her apartment and there is no evidence that she was being manipulated by Mr. XXXX or they had reconciled.

[47] The Tribunal also observed that the Respondent hired a lawyer in 2009 to represent her in the Minister's application to vacate her refugee protection status¹³. In that letter, the Respondent's counsel was requested a DNA test from the Respondent's sons to establish their affiliation with Mr. XXXX. This evidence showed that, as late as 2009, the Respondent did not tell her lawyer that Mr. XXXX was in fact the same person as Mr. XXXX, the father of her sons and her husband. She was still misleading Canadian authorities about the true identity of her husband.

[48] The Tribunal did not believe that it was a mere coincidence that Mr. XXXX was in the apartment of the Respondent in August 2002. They were living together and tried fraudulently to allege that they were estranged to secure their separate asylum claims.

[49] Furthermore, according to Exhibit M-6, the Respondent was living at the same address with XXXX XXXX as of August 2002¹⁴. While this fact alone would be insufficient, when added to the above facts, it brings a corroboration of the evidence that shows that the Respondent was, in fact, living at the same address with Mr. XXXX XXXX whom she admitted was her husband.

[50] If the Respondent was being persecuted and mistreated by Mr. XXXX since their first year of marriage, 1977 as she claimed; that she filed for divorce because of the alleged abuses in 1997 and left her home in 1999 to escape the violence from Mr. XXXX, they would not have been living together in Montreal in 2002, because it was based on her fear of Mr. XXXX that she had claimed asylum in Canada in 1999.

[51] The evidence also showed that the Respondent's sons had lied when the Canadian Immigration Officer showed them the picture of Mr. XXXX, a.k.a. XXXX, in Bangladesh during their permanent residence interview¹⁵. The Respondent acknowledged that her sons lied to the

¹³ Exhibit M-13: Letter of Mandate acceptance from Mr. XXXXX dated March 9, 2009.

¹⁴ Exhibit M-6: E-mail from CPC-Enquiries to XXXXXXXXXXX XXXX dated August 7, 2002.

¹⁵ Exhibit M-8:CAIPS print out – file B040589113 XXXXX XXXXXXXXXXX XXXXX XXXX – 10-01-1979.

immigration officer because they were scared. I did not find this explanation credible because her sons were not under threat. They lied in order to secure the acceptance of their permanent residency applications.

Witness, Mr. XXXX XXXX XXXX

[52] The witness did not testify when the Respondent claimed asylum in 1999. According to the law, the tribunal must take under consideration the information that was available at the time of the first refugee decision.

[53] XXXX XXXX XXXX testified on behalf of the Respondent in the present application. The Tribunal did not find his testimony accurate or trustworthy because he contradicted several allegations made by the Respondent. The witness was XXXX years-old in 1999 and the Tribunal expected him to give precise and credible information, which he failed to deliver.

[54] The witness said that he recalled his mother being abused by his father and he had gone to a hostel several times because of his parents' ongoing arguments and that his mother used to live with her parents before she came here in 1999. He said that he was not aware of his father's whereabouts and he stayed with his aunt in Bangladesh until 2009.

[55] The Respondent never said that she used to send her children to a hostel because she feared for their safety. He also testified that his mother had taken them to her sister's place and that she had left, although she had testified that they had all moved and stayed there. This testimony cannot be taken into account when analyzing the evidence available to the first panel that granted the claimant asylum.

[56] The evidence shows that the respondent's estranged husband, Mr. XXXX XXXX, a.k.a XXXX, claimed asylum in Canada in 2001. His claim was rejected because he failed to establish his identity and the documents he provided then, including his marriage certificate was found to be fraudulent¹⁶.

¹⁶ Exhibit M-12: RPD decision in the claim of XXXXX XXXXXXXXX, dated February 17, 2003;
Exhibit M-25: E-mail exchanges and report from liaison officer in Singapore about verification of Mr. XXXXXXXXS's marriage and divorce certificates.

[57] The Respondent testified that she has been divorced from Mr. XXXX since June 2001¹⁷ and submitted a divorce affidavit as evidence. However, the divorce and marriage documents provided by Mr. XXXX were found to be fraudulent after verification was made in Bangladesh by a Canadian Liaison Officer in 2015¹⁸.

[58] The Minister's representative alleged that there were similarities between MrXXXX XXXX false marriage documents, which may suggest that the respondent's own marriage documents are also fraudulent. But the Minister did not provide any objective evidence to corroborate the allegation. In our opinion, alleged similarities of the respondent's divorce documents is insufficient to establish that they are not genuine.

[59] The Respondent testified that she suffered abuses at the hands of Mr. XXXX. But even if the Tribunal found that her story contained several contradictions and she may have exaggerated; it still found that there was sufficient evidence remaining to establish a serious possibility that she was physically and mentally persecuted by Mr. XXXX when she claimed asylum in Canada in 1999. The fact that the evidence shows that they were living together in Montreal did not mean that she was not a victim of conjugal violence in her country.

[60] According to the evidence, Mr. XXXX's asylum claim was rejected and the Canadian authorities have not been aware of his whereabouts since 2009¹⁹. The Respondent testified that she had been divorced from MrXXXX XXXX since 2001 and provided a copy of the affidavit of her divorce²⁰. The fact that she divorced MrXXXX XXXX in May 2001, less than two years after she arrived in Canada, can certainly infer that there were serious problems in her marriage contemporaneous with her 1999 asylum claim as she alleged.

[61] The present Tribunal also notes that in the February 2001 decision, the previous Tribunal had analyzed the documentary evidence available in regard of women conditions in Sri Lanka. That Tribunal wrote in its decision in 2001, "The situation of women despite serious efforts deployed by the Government in order to ensure better protection for women, they still have great

¹⁷ Exhibit R-13, documents 1-3.

¹⁸ Exhibit M-25 : *Ibid*;

¹⁹ Exhibit M-13: E-mail from XXXX XXXXXX to Mission-Dhaka dated 14 October 2003; and Exhibit M-14: Other pictures of XXXXXX XXXXXXXXXXXX – ID: XXXX-XXXX

²⁰ Exhibit R-13: Document 2, Copy of Affidavit of divorce of Mrs. XXXXX, dated 22 May 2001.

difficulty seeking protection due to the police attitude and corruption and as well as the reluctance of the majority of women and their families to report such violence”²¹.

[62] In our opinion, these are clear evidence that the respondent was the victim of conjugal violence when she claimed asylum in Canada in 1999, though she withheld important information regarding her relation with MrXXXX XXXX and she may have exaggerated the facts of her story.

[63] Though the Respondent may have obtained her refugee status by providing inaccurate facts about alleged incidents and she was living in Canada with her husband shortly after she had obtained asylum in 2001, the fact remained that there was sufficient remaining evidence for the panel to grand her refugee protection in 2001.

[64] The Tribunal concludes that other sufficient evidence was considered at the time of the first determination to justify refugee protection.

DECISION

[65] The Minister’s Application to Vacate refugee protection is rejected.

Harry Dortelus

Harry Dortelus

June 5, 2018

Date

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²¹ Exhibit M-4: RPD Asylum Claim Decision of Mrs. XXXXXXX XXXXX, February 20, 2001.