

Recognizing Gender-Based Persecution in Canada

Are Canada's Gender Guidelines Being Used Consistently?

BY GREGORY A. KELSON

Les premières lignes directrices sur l'immigration au Canada, furent émises en 1993 et mises à jour en 1996. Elles ont servi de barème partout dans le monde pour accorder le statut de réfugié aux personnes persécutées en vertu de leur appartenance sexuelle. Utilisant un cas récent d'immigration en instance de règlement, cet article regarde si ces lignes directrices sont toujours utilisées dans tous les cas où le genre est mis en cause.

In a column written in the *Toronto Star* on May 2, 1999, columnist Michele Landsberg told the story of a woman from Iran, known only as Mina, who was to receive a “humanitarian and compassionate interview” to determine her final refugee status. Landsberg’s basic argument was that Canada’s ground-breaking immigration guidelines, “Women Refugee Claimants Fearing Gender-Related Persecution,” were virtually ignored in determining Mina’s case for refugee status in Canada. Since the guidelines were issued on March 9, 1993, nearly 900 women have been able to claim refugee status in Canada. In 1998, 127 women were granted refugee status under the guidelines (Landsberg 1999b). The questions before us now are: Are the guidelines being utilized as they should be? What steps should be taken as the Immigration and Refugee Board determines refugee status for a person under a claim of gender-based persecution?

Mina’s Story

Mina is an Iranian national who arrived at Toronto’s Pearson Airport in 1995. She was raised in a small town by a non-religious family where she studied and taught piano. As a teenager, “she was twice seized and whipped by squads of fanatic Islamic enforcers—once for playing mixed badminton and once for having a wallet picture of Michael Jackson” (Landsberg 1999a). She was being courted by a distant relative who was an Islamic fundamentalist and a member of the *Hezbollah*. He proposed marriage to her, but both she and her family dismissed the proposal (Landsberg 1999a).

Mina was arrested again in her mid-20s, “[t]hrown into an isolation cell, tied to a chair, beaten and kicked” (Landsberg 1999a). You can imagine her surprise when she saw that the colonel in charge of the prison was the same distant relative whose proposal she had turned down. It was not known why Mina was arrested again.

The colonel threatened Mina with execution unless she

agreed to marry him. A *mullah* was called in and “muttered a prayer and gave religious legitimacy to the ‘temporary concubinage’” (Landsberg 1999a). Mina was then raped repeatedly by her “husband,” both vaginally and anally, during her two-month imprisonment. She was locked in the colonel’s house after her imprisonment. Realizing that she was pregnant, Mina escaped the colonel’s home and underwent an abortion. Suffering from shock and heavy bleeding, her mother took her to a hospital where she was treated “after she lied about her ‘accidental miscarriage’ and soldier ‘husband’” (Landsberg 1999a). She fled Iran soon afterwards.

Mina arrived at Pearson Airport “a severely traumatized young woman” (Landsberg 1999a). Unfortunately, she received bad advice from a smuggler who arranged her flight to Toronto which forms the basis of her case. First of all, she was very well dressed and looked dignified—a very deceiving appearance considering what she was escaping from. She also did not mention her rape or “marriage” to officials at the airport when she was questioned.

When Mina appeared before the Immigration and Refugee Board (IRB), she again held back her responses because of an inadequate translator. The Board requested that Mina keep her answers “direct,” but her translator at the hearing misinterpreted the request and told Mina to keep her answers “short” (Landsberg 1999a). Ultimately, the Board found Mina not credible stating that,

it was “highly improbable, and therefore implausible” that a marriage took place without either family being present, or that Mina wouldn’t have altered her documents to reflect her proud new status as a married woman. (Landsberg 1999a)

Mina was not able to file an appeal to the Federal Court because, as Landsberg comments, “the 15-day deadline went past while she was being denied legal aid” (1999a). Mina’s last chance to remain in Canada was to submit to

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an application for an "humanitarian and compassionate interview."

Islamic marriage customs

It would seem that the IRB's ruling that Mina was not credible because neither family was present at the marriage relied on the western ideals of marriage and that expert testimony on the matter was not consulted. In Islam,

there are two types of marriage contracts that a man and woman can enter: (1) a permanent marriage, where the period of matrimony is not fixed; or (2) a "fixed-time" or temporary marriage where "the matrimonial relation is contracted with a woman for an hour, or a day, or a month, or a year, or more." This type of marriage is known as *Mut'ah* or *Sigha*. Based on the circumstances described in Ms. Landsberg's column, Mina entered into a *Mut'ah*, which permitted her "husband" to forcibly rape her.

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Islamic law provides that, in order for a marriage to be valid, "mere tacit approval and consent, or written agreement, is not sufficient," the *Nikah*, or marriage formula, must also be pronounced. And it does not necessarily have to be pronounced by the man and woman—a representative, such as a *mullah* in Mina's case, can pronounce the *Nikah* on behalf of either the man, or woman, or both.

The *Nikah* must be pronounced in correct Arabic, although there are allowances to pronounce it in other languages. The formula for the *Mut'ah* is as follows: The woman says "*Zawajtuka nafsi fil muddatil ma'lumati 'alal mahril ma'lum*" (I have made myself your wife for an agreed period and agreed *Mahr*). The man responds immediately afterwards with "*Qabiltul*" (I have accepted). If the couple is represented by others, the formula is as follows: The representative of the woman says, "*Matta'ru muwakkilati muwakkilaka fil muddatil ma'lumati 'alal mahril ma'lum*" (I have given my client to your client in marriage for the agreed period and the agreed *Mahr*). The representative for the man will then immediately respond, "*Qabiltul tazwija li muwakkili hakaza*" (I accepted this matrimonial alliance for my client this way).¹

Generally, witnesses are not required for *Mut'ah*. As one Islamic scholar puts it,

[The couple] themselves can pronounce the sentences of marriage [the *Nikah*]. However if the girl is virgin [sic], then the boy needs the permission of her guardian beforehand. But her guardian does not

have to be present as witness [sic] when they are pronouncing the marriage sentences.²

Furthermore, temporary marriages need not be registered, nor is a wife entitled to any inheritance rights. Thus, the man is at a distinct advantage to enter into a temporary marriage because it enables him to legally have sex with his "wife" and not have to share any of his property with her once the marriage period expires.

Determining credibility

There are several factors that must be taken into consideration in order to determine a claimant's "credibility." Pfeiffer outlines these factors as follows:

- (1) the applicant's demeanor, (2) the applicant's testimonial consistency, (3) the applicant's ability to present specific facts regarding his persecution, and (4) the consistency between the applicant's claim of persecution and the known human rights record of his homeland. (142)

With respect to demeanor, "the credibility of an applicant's testimony rests not only upon what he says, but also how he says it" (Pfeiffer 143). Western views of how people interact have a strong bearing on one's perception of a person's demeanor. For example, eye contact, how a person smiles, speech rate and variations, the pitch of one's voice as well as other factors are used to determine if a person is being truthful in their testimony (Pfeiffer).

The cross-cultural confusion which is inherent in any communication between speakers from different cultures can affect the immigration judge's, or tribunal's, perception of an applicant's credibility. Using a translator exacerbates this confusion and impacts on the perception of the credibility and the reliability of the immigration judge's findings. For example, a listener who is trying to decide whether a speaker is telling the truth is more likely to disbelieve the message if the speaker delivers it in a fragmented fashion (Pfeiffer). Thus, an immigration judge or tribunal would probably be more inclined to trust an interpreter rather than an applicant who speaks in "broken English" and may hesitate during the giving of testimony.

Furthermore, it is incumbent upon immigration officials to keep in mind that, for the most part, refugee status claimants have undergone—as Mina did—severe stress. There is the very real possibility that the claimant may be suffering from post-traumatic stress disorder (PTSD) which can cause a person to "experience a number of emotional responses when remembering [an] event" (Pfeiffer 145). A psychological exam is necessary in this situation because "the discrepancy between the traumatic events recounted and the applicant's apparent lack of emotional response to them" could cloud an immigration judge's perception of the applicant's credibility (Pfeiffer 145).

Problems in the translation process, as was the case in Mina's hearing, can also lead to inconsistencies in testimony. This, too, has a tremendous influence on "credibility determination" (Pfeiffer 146) and unfortunately, all-too-often, misunderstandings and mistranslations are "inevitable."

What the [immigration judge or tribunal] perceives as an inconsistent response may be only an applicant's misunderstanding of the question or a translator's misunderstanding of what the applicant actually said. A successful translator must be familiar with the languages and cultures of both participants in the conversation. (Pfeiffer 147)

Therefore, it is important that the official hearing a claimant's testimony keep an "open mind." Furthermore, if a person is suffering from PTSD, her testimony will almost always appear inconsistent simply because she is only just beginning to remember the pertinent facts of her case, and the events she recalls may come back to her in a random manner. According to Pfeiffer:

If an applicant is suffering from PTSD, his memory of the persecution may be impaired. Among the varied reactions that are associated with PTSD, two symptoms are particularly relevant to the asylum applicant's circumstances. Many PTSD sufferers experience a loss of memory and confusion, a psychological mechanism which lessens their stress responses. By not remembering specific details, the applicant delays acceptance of the trauma and the negative emotions associated with the memory of the event. (148-49)

Along with an applicant's demeanor, and the assessment of the consistency of the testimony being presented, immigration officials are obliged to evaluate all the facts relating to the case. An U.S. appellate court has stated that:

When objective evidence does not exist ... the applicant's own testimony must set forth specific facts that give rise to an inference that the applicant was persecuted or has some other good reason to fear persecution on one of the specified grounds. (*Carvajal-Munoz v. INS*)

In a precedent-setting case in the United States before the Board of Immigration Appeals (BIA), Immigration Judge, Donald Ferlise, ruled that Fauziya Kasinga, a woman from Togo who was granted asylum by the BIA because of the threat of female circumcision, was not a credible witness based on facts that were presented to him. Karen Masulo, Ms. Kasinga's attorney, told the BIA that,

Judge Ferlise's credibility determination is based on a set of incorrect assumptions about the cultural norms and practices in Togo, and the inappropriate

use of the judge's own concept of "common sense." (Masulo 387)

Judge Ferlise's ruling against Ms Kasinga was based on four factors: (1) the judge found inconsistent testimony when Ms Kasinga stated that although it was the norm that females in her tribe underwent female circumcision, she and her sisters were protected from the practice by their influential father until his death, after which, her new husband and paternal aunt insisted that she submit to the practice; (2) Ms Kasinga testified that she had not been in touch with her mother and did not know where she was at the time that she left Togo (her paternal aunt banished her from the family after she took over as head of the family, as was the custom of the tribe); (3) Ms Kasinga was allowed to stay in the house of a German woman she had just met at the airport for two months; and (4) by coincidence, she met another Nigerian in Germany who sold her the passport to come to the United States. Ms Masulo argued that,

perhaps Ms Kasinga's story does not comport with the judge's notion of how the world is, but one should be careful not to rely upon so-called "common sense" assumptions. Common sense is culturally determined and thus not universal.... (Masulo 389)

Establishment of an objective basis of the applicant's fear of gender-based persecution is vital, thus expert testimony and the admission into evidence of reports from government agencies and non-governmental organizations should be considered by the immigration judge (Bashir; Kelson 1998). In Mina's case, the U.S. Department of State, in its 1999 annual human rights report on Iran, noted:

The law [in Iran] allows for the practice of Siqeh, or temporary marriage, a Shi'a custom in which a woman or girl can become the wife of a married or single Muslim male after a simple and brief ceremony. The Siqeh marriage can last for a night or as little as 30 minutes. The bond is not recorded on identification documents, and according to Islamic law, men may have as many Siqeh wives as they wish, although these wives are not granted rights associated with traditional marriage.

Such a report would have been very useful in Mina's hearing before the IRB on her claim of a forced marriage. In the Fauziya Kasinga case, the BIA admitted into evi-

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Zahra Parvinian (from Iran). *Women, Food and Storytelling Eco-Art Exhibit*.
Photo: Anuja Mendiratta ©1998.

dence two reports from the U.S. State Department on Togo which confirmed the human rights record of that country with respect to female circumcision.

In summary, it is absolutely crucial for refugee claimants to be able to present their testimony in as relaxed a situation as possible, so that an application can concentrate on the factual details of his/her testimony. Expert witnesses who have knowledge of the applicant's culture or customs should be called in order to help determine credibility without western bias colouring an immigration judge's or tribunal's perceptions. Furthermore, psychological tests should be considered to determine whether a claimant is suffering from post-traumatic stress disorder which may significant impact on the testimony presented.

Immigration and Refugee Board guidelines

When the IRB Guidelines, "Women Refugee Claimants Fearing Gender-Related Persecution," were issued in 1993 and subsequently updated in 1996, it marked the standard that many countries have since followed in granting refugee status to women on the basis of gender-based persecution. When the guidelines were first released by Nurjehan Mawani, the IRB Chairperson, she noted that

the independence of IRB members "must be exercised within a framework of law, precedent, and careful reasoning if it is to serve the claimants coming before us and the community-at-large." Members are expected to following the guidelines when adjudicating gender-based claims such as Mina's or "they will be expected to provide written reasons explaining why they are [not] doing so" (Mawani 243). Ms. Mawani's reasoning for this is solid:

Fairness demands, at a minimum, that the person appearing before us understand why a particular set of Guidelines was not followed in deciding his or her claim. By contrast, fairness also requires that they have the opportunity to argue that the Guidelines should not be applicable to their claim. As a matter of course, a reviewing court will have an interest in examining a Member's or Adjudicator's rationale for departing from the Guidelines when judicial review of a decision is taken. (243)

The guidelines are the first source that IRB members should attend to when determining claims of persecution that are gender-based. Ironically, it does not give much "credibility" to Canada to have developed these guidelines and then only use them in selective cases.

A final word

Mina was due to have a final review of her case during a "humanitarian and compassionate interview" that was to take place in Etobicoke. Many church groups had written letter of support for her and I submitted a letter based on this article to the Canadian Immigration Centre. Mina, along with several witnesses, testified before the Canadian Immigration Centre where "her forced marriage, rape and torture, were fully heard for the first time" (Landsberg 1999b). As of this writing, Mina's case was referred to a special Risk Review committee for further consideration, but her deportation order still stands.

In a speech that I gave at the Canadian Women's Studies Association Annual Meeting in 1998 in Ottawa, I stated that,

Canada is the envy of the Western world when it comes to their refugee determination system. Canada can be proud that they have been the world leader in their recognition of gender-based persecution. (Kelson 1998b)

But, if Canada is to remain the envy of the western world, it must be more consistent in the use of its guidelines in determining credibility and refugee status for women refugees in Canada. Cases like Mina's should never go this far. Let's hope with all the attention this case has drawn, that it will finally be resolved within the basis of Canadian law.

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¹Source of information regarding Islamic marriage customs was obtained online at: <http://shialink.org/marriage/article.html>

²Source of this quote was obtained online at: <http://www.al-islam.org/encyclopedia/chapter6a/8.html>

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"Women, Food and Storytelling" An Eco-Art Exhibit

The portraits of immigrant women featured in this issue are part of a body of work entitled, "Women, Food and Storytelling," which was produced by Anuja Mendiratta and exhibited at an eco-art festival held by York University in the Spring of 1998 in Toronto. The immigrant women portrayed in these photographs were participants in a food and life-skills training program sponsored by FoodShare Metro Toronto, an organization committed to working with communities to improve access to affordable, nutritious food. As part of this program, the women participated in a series of popular and educational workshops tracing their cultural, culinary, and ecological "roots" and "routes" of their favourite foods.

Through storytelling and the sharing of recipes, food became a powerful code for understanding issues of migration, globalization, labour, sexism, economic trends, history, etc. The women explored the following questions: To which people(s) and places can the recipes be traced? Through what physical, economic, and cultural routes did the food and recipes travel to reach Canadian soil? How were the dishes transformed along the way? What are the historical, cultural, political, and ecological origins of these foods? What routes did the women themselves take to come to Canada?

While many culinary traditions around the world make a version of beans and rice, for Maurine Campbell (on the back cover), Jamaican peas and rice are special because of the wonderful flavour of thyme. Joyce Lowe (on page 28), prepared and shared stories about a Christmas-time dish, popular in Guyana, called pepper pot. Once in Canada, Meaza Afewerki (on page 107), could not easily find *teff*, a grain required to make her Eritrean dish, *taita* and *tzebbiy*, so she experimented with blending other grains such as rice and barley in order to approximate the original recipe. Tamara Darien (on page 5) uncovered that the saltfish essential to the Jamaican national dish, ackee and saltfish, is actually cod from the North Atlantic which came to the Caribbean as part of historical trade patterns. Victoria Gallardo (on page 90) found that she could trace influences of both her European and Indigenous ancestors in *pastel de choclo*, a Chilean corn and beef casserole. Zahra Parvinian (on page 152) shared stories of Iranian *lavash* (a flat bread) which is commonly served with cheese and fresh herbs.

By looking deeply at the foods dear to their hearts and kitchens, these women were able to render visible some of their own personal and collective histories.

—Anuja Mendiratta