

Date: 20121012

Docket: IMM-ABRA CADABRA-2012

Montréal, Quebec, October 12, 2012

PRESENT: The Honourable Mr. Justice Shore

With the close cooperation of Sarah Dennene

BETWEEN:

SCHEHERAZADE

Applicant

and

**CANADA (MINISTER OF
CITIZENSHIP AND IMMIGRATION)**

Respondent

**(DECISION AS LEARNING EXERCISE
FOR LAW STUDENTS CONCERNING
SCHEHERAZADE WHO IS CLAIMING
REFUGEE STATUS)**

Background

To understand a story, a reader will pay attention to the different lexical fields, descriptions, metaphors and enchanting characters whose destiny the reader would like to be able to change. A story is understood to this extent when even the unspoken is imagined.

The same holds true for the testimony of a refugee claimant, who relates her experiences from her own perspective. Thus, active listening is required to precisely identify the crux of the claim. The decision-maker's task, then, is to assess this testimony with its specific context.

This parallel could not be more aptly illustrated than by taking the story of Scheherazade, the heroine of *The Arabian Nights*, as a factual backdrop. She is claiming refugee status in Canada. Her stories become evidence that she was deprived of her liberty and forced to live her life through them. She was, in fact, a victim of a powerful form of violence that silenced her for almost three years. Scheherazade has a gift that enabled her to survive. This gift is the primary medium through which she expresses herself. The trier of fact must understand this. He or she must grasp the full depth of the symbolism to be able to understand the story.

This case is aimed at demonstrating metaphorically the legal tests applicable to a claim for gender-based persecution and addresses the unique challenges raised by the testimony of women victims of domestic violence.

For this reason, the legal issue of credibility was preferred to the issue of state protection, which was discussed in more detail in the *Little Prince* case.

To meet the needs of the exercise, Scheherazade's account shows the reality of women who are victims of violence.

I Introduction

I believe that ultimately we must give full effect in our society to the principle of equality. Women will never have equal status with men in the home if they don't also have equal status with men in the world outside. Violence against women in the home is an expression and manifestation of power and is perpetuated by the fact that men do and women do not have power in our society. The economic, political and social inequality of women in a society both fuels and justifies violence against women in a society which values power over all else. Saddest of all, those groups of women who are more unequal than others—women who are disabled, women who belong to ethnic minorities, and women who are senior citizens—are the most vulnerable and the most in need of support.

(Bertha Wilson, former judge of the Supreme Court of Canada, in a speech given in 1992 at a conference, see Bertha Wilson, *Law as Large as Life* at p 222; "Family Violence", *Canadian Journal of Women and the Law* (1992, 5, 1, pp 140-141).

1. These words spoken by Justice Bertha Wilson, who was the first woman appointed to the Supreme Court of Canada, emphasized the unequal power relationship between men and women as a source of the problem of violence against women.
2. Spoken in 1992, they still reverberate like an alarm signalling the distress of women who suffer this violence in silence.

3. Women are born into a patriarchal straitjacket with no possibility of existing for who they are: free beings who should enjoy the same fundamental rights as men. It will always be important, then, to struggle to overcome gender stereotypes; stereotypes that are not natural but a social construct. In the end, is that not what Simone de Beauvoir meant when she said [TRANSLATION] “one is not born a woman, one becomes one”?
4. There are some genuine calls for help that are deafening by their silence. Thus, the decision-maker must listen attentively to detect a tiny whisper. There are some cases like the case before us, Scheherazade's case.
5. The key to this story involves understanding the first 1001 nights where the days conveyed the anxiety of waiting for the next night. The anxiety that gnawed at Scheherazade from inside forced her to recount another story to ensure her survival. Her anxiety was relieved only through the stories she told. Her stories lived within her and were an integral part of her. Scheherazade lived elsewhere; she moved into a mystical kingdom.
6. The profound reality went beyond the illusion considered real because of the thoughts and eyes that betrayed. The thoughts were rationalized. The vision was considered clear whereas the reality was not in the appearances of the vision but was instead the vision of the soul.
7. To go beyond the brutality of crimes against humanity when the dust settles, this dust, which cannot harm, becomes the surroundings of a stable land that shine like diamonds in the sunlight. A quiet tent in a stable home becomes a palace, and each glass of water drunk in freedom becomes a crystal that kindles the human imagination

by the transparency of the empty space that leads up to a performance. What is poverty and wealth when a loaf of bread with a bit of salt and some water can sustain life better than delicious meat and aged wine in an atmosphere of cruelty, humiliation, degradation and destruction? It is up to human beings to choose how to perceive life. This choice belongs to each of us. The child inside every adult is dying of hunger. The child wants to satisfy his or her joys from human warmth, kindness, loyalty and an intrinsic understanding that gives each adult a sense of belonging in the same way that each child needs a welcoming family.

8. Since a voice is being raised here, it is important to listen to it:

[TRANSLATION]

Sir, I'm speaking to you from the depths of my soul to make sure that you listen to me from the depths of your soul. If I amaze you, it is not to deceive you but rather to ensure that the good inside me emerges and meets the good inside you so that this hearing reflects a real dialogue, so that I'm not a file number but a subject where two human beings meet, not on two balconies, speaking two separate monologues.

Imagine a bridge built by the two of us, me through my candour, through my way of expressing myself, you through active listening, an active vision and an active silence showing that you are really with me in this hearing room. I will transport you through my account; I invite you to come into my life so that you will understand my fate through my past in which you are not just a witness but a participant. I come from a poor but dignified family where values count more than costs including human dignity.

Sir, we often remember when it's too late. Think about the cases you've had. Where are those people now? Do you remember them as individuals, sir? Because I'm sure they remember you.

Sir, you have the privilege of deciding the fate of others, just as I decided my characters' destiny. I put my fate in your hands. What a responsibility, sir, to imagine yourself as a storyteller, deciding to begin or end the story of the individual who is before you.

Refugee status is not given to corpses. You have the opportunity, sir, to give others a reason for living so that they can reach their full potential.

You are the director of the story that becomes reality, me . . . I recounted my reality.

The tears that I shed during my life as a woman are not only my tears but the tears of generations of women who were only able to see clearly through their tears because nothing else gave them the opportunity to express what they were feeling.

The world is asleep. Canada is an enlightened society; I realized that when I arrived. The refrain of your decision, sir, will be a lullaby for every girl who will be born and for every woman who will have her real birth in Canada when her birth merely “gave her an existence” since her resurrection, her first real hopes will occur because of decisions like yours.

(Transcript of hearing, Tribunal Record [TR] at pp 300-333)

II Legal proceeding

9. This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act, 2001, c 27* [IRPA] in respect of a decision dated September 11, 2001, in which the RPD determined that the applicant, Scheherazade, is neither a refugee under section 96 of the IRPA nor a person in need of protection under section 97 of the IRPA.

III Facts

10. Scheherazade is a young 25-year-old woman, a citizen of the country Struggle.

11. At the age of 17, when she had finished her secondary education, she married Schahriar, ¹ sultan of Struggle. Scheherazade says that it was not a forced marriage and that her future husband promised that she could continue her studies because he really liked her talent as a storyteller.
12. The couple left to spend some time with members of the sultan's family in the country Everything is Going Well. Scheherazade claims that the marital difficulties began shortly after they left. Scheherazade maintains that her sisters-in-law did not like her and persecuted her. The abusive treatment took the form of insults and forced labour. First, her husband was opposed to Scheherazade continuing her studies. Possessive and jealous, he quickly forbade her to leave the house.
13. On their return to Struggle, the couple moved into the palace of Schahriar. Scheherazade claims that her husband forbade her from seeing her family again, became physically violent and threatened to repudiate her.
14. The sultan then threatened to kill her several times. Scheherazade states that she remained alive only by captivating her husband with her stories.
15. Scheherazade escaped from the palace with the assistance of a friend named Dinarzade.
16. She arrived in Canada on June 12, 2009, the date on which she claimed refugee protection. On arrival, she was taken care of by an association that assists women victims of domestic violence.
17. Since 2010, Scheherazade has been working as a storyteller in the children's section of a Montréal library.

¹ For purposes of the exercise, assume that the sultan is not an agent of the state.

IV Decision that is the subject of the judicial review

18. The RPD's negative decision is based primarily on the applicant's lack of credibility.

This finding stems from the vagueness of the applicant's testimony about the abuse she had suffered.

19. The RPD noted that the applicant was an articulate person with a special gift for storytelling and, consequently, it was astonished by the omissions in her testimony.

20. In addition, the RPD questioned the fact that the applicant had lived for almost three years without attempting to escape and determined that this behaviour was inconsistent with a subjective fear based on persecution.

21. The RPD explicitly stated that it had considered Guideline 4 on women refugee claimants fearing gender-related prosecution [Guidelines]. The RPD stated that it had shown sensitivity during the applicant's testimony.

22. In the alternative, the RPD found that Scheherazade had not availed herself of state protection and that this protection, because of the government's efforts, was available.

V Issue

23. The issues are as follows:

(1) Did the RPD err in applying the Guidelines when it assessed the applicant's testimony?

(2) Is state protection available to Scheherazade?

VI Relevant statutory provisions

24. The following provisions of the IRPA are relevant:

Convention refugee

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

Person in need of protection

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against

Définition de « réfugié »

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques:

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Personne à protéger

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée:

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article

Torture; or
(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

Person in need of protection

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection

premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant:

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

Personne à protéger

(2) A également qualifié de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

VII Submissions of the parties

25. The applicant submits, primarily, that the RPD erred by not considering the Guidelines in its assessment of the testimony.
26. Pursuant to the Guidelines, the RPD should not have faulted the applicant for omitting details about the abuse she had suffered. She says that Dr. Jasmine Aladin's psychological report, which was not discussed, explains the gaps in the applicant's testimony, which were caused by her vulnerability.
27. Thus, the applicant submits that the RPD erred by not taking into account her journal of 1001 nights, which in her view illustrates her distress while she was really a captive.
28. Moreover, the applicant argues that the documentary evidence showed that she could not seek the protection of her country.
29. Counsel for the applicant, Mr. Gallant, introduced the following into evidence:
 - applicant's Personal Information Form [PIF]
 - detailed journal of the stories of 1001 nights that Scheherazade recounted
 - Dr. Jasmine Aladin's psychological report
 - transcript of the hearing before the RPD
 - National Documentation Package for Struggle.
30. The respondent contends that the RPD's non-credibility finding was reasonable. He maintains that it is not this Court's role to substitute its assessment of the testimonial evidence for that of the RPD, which, because of its expertise, is in the best position to make the required determinations.

31. With respect to the evidence in the record, the respondent submits that the RPD is not required to list all the evidence that was tendered in support of the application and that it should be presumed that the RPD considered it.
32. The respondent states that the credibility issue is determinative and, on its own, defeats the refugee claim.

VIII Analysis

Standard of review

33. The issue of the applicant's credibility as well as the plausibility of the account falls within the factual assessment conducted by decision-makers at first instance. That is their primary role. Having had the advantage of hearing claimants, they are in the best position to assess the testimony. This Court must show deference (*Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 at para 4).
34. Accordingly, this Court has found that the issue of the application of the Guidelines is reviewable on a reasonableness standard (*Juarez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 890).
35. Therefore, the standard of reasonableness applies in this case. This standard of review is concerned with the existence of justification, transparency and intelligibility within the decision-making process (*Dunsmuir v New Brunswick*, 2008 SCC9, [2008] 1 SCR 190).
36. More recently, the Supreme Court of Canada in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708, explained the role of this Court as follows:

[15] In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show “respect for the decision-making process of adjudicative bodies with regard to both the facts and the law” (*Dunsmuir*, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome. [Emphasis added]

(1) Did the RPD err in applying the Guidelines when it assessed the applicant’s testimony?

Subjective fear

37. According to *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, 103 DLR

(4th) 1, the claimant must subjectively fear persecution, and this fear must be well-founded in an objective sense.

38. Scheherazade's refugee claim is based on a fear of gender-based persecution. In this case, Mr. Gallant submits that Scheherazade's persecution is linked to her condition as a woman, which is an innate characteristic, he says. He maintains that Scheherazade is a member of a particular social group: female victims of domestic violence (*Ward*).

39. The 1951 Geneva Convention relating to the Status of Refugees does not recognize gender as a ground of persecution. Canada, through the IRB, chaired by Ms. Nurjehan Mawani, was the first country to adopt guidelines for gender-based claims. In 1993, under paragraph 159(1)(h) of the IRPA, Guideline 4 was adopted regarding women refugee claimants fearing gender-related persecution.

40. These Guidelines propose an analytical framework to assist the decision-maker at first instance in responding to the unique challenges that characterize claims by persecuted women, both in terms of the basis of the claim and proving it.

Most gender-related refugee claims brought forward by women raise four critical issues which these Guidelines seek to address:

1. To what extent can women making a gender-related claim of fear of persecution successfully rely on any one, or a combination, of the five enumerated grounds of the Convention refugee definition?
2. Under what circumstances does sexual violence, or a threat thereof, or any other prejudicial treatment of women constitute persecution as that term is jurisprudentially understood?
3. What are the key evidentiary elements which decision-makers have to look at when considering a gender-related claim?
4. What special problems do women face when called upon to state their claim at refugee determination hearings, particularly when they have had experiences that are difficult and often humiliating to speak about? [Emphasis added]

41. These Guidelines are certainly not binding since they are not a statute or regulation, but the fact remains that they must be considered in “appropriate cases” (*Fouchong v Canada (Secretary of State)*, [1994] FCJ No 1727).

42. Although the RPD in this case explicitly mentioned that it had considered the Guidelines, that is not sufficient to avoid review of its decision on this basis (*Keleta v Canada (Minister of Citizenship and Immigration)*, 2005 FC 56, at para 15).

43. Scheherazade's situation is included in the third category set out in the Guidelines, “women who fear persecution resulting from certain circumstances of severe discrimination on grounds of gender or acts of violence either by public authorities or at the hands of private citizens”.

44. For a finding of persecution to be made, a claimant must prove the existence of serious harm that violates her fundamental human rights.
45. Under this framework, the definition of refugee must be interpreted in accordance with gender dimensions. In fact, according to the UNHCR Guidelines on gender-related persecutions:

B. WELL-FOUNDED FEAR OF PERSECUTION

9. . . . There is no doubt that rape and other forms of gender-related violence, such as . . . domestic violence . . . are acts which inflict severe pain and suffering – both mental and physical – and which have been used as forms of persecution, whether perpetrated by State or private actors.

(“Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees”, HCR/GIP/02/01 dated May 7, 2002)

46. In this case, it is important not to minimize the form of abuse that Scheherazade suffered, which amounted to persecution. According to the Guidelines, reference should be made to international instruments as an objective standard when characterizing the abuse of persecution as opposed to the country of origin’s social or traditional norms. Thus, the *Declaration on the Elimination of Violence against Women* states the following:

. . .

Recognizing that violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men,

...

Article 1

For the purposes of this Declaration, the term “violence against women” means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.

Article 2

Violence against women shall be understood to encompass, but not be limited to, the following:

(a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation; [Emphasis added]

47. As regards credibility, the Guidelines caution against making a hasty finding that the claimant is not credible because she is reluctant to testify about the abuse she has suffered. On numerous occasions, the Court has pointed out how important it is for the decision-maker at first instance to be sensitive to the factors that may influence the testimony of female claimants (*Newton v Canada (Minister of Citizenship and Immigration)*, 182 FTR 294, [2000] FCJ No. 738 (QL/Lexis); *Mayeke v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No. 758 (QL/Lexis); *Munoz v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1273; *Jones v Canada (Minister of Citizenship and Immigration)*, 2006 FC 405).

48. Specifically, with respect to spousal abuse, the Guidelines inform the decision-maker at first instance about the difficulties that may be encountered when a woman is testifying:

D. SPECIAL PROBLEMS AT DETERMINATION HEARINGS

Women refugee claimants face special problems in demonstrating that their claims are credible and trustworthy. Some of the difficulties may arise because of cross-cultural misunderstandings. For example:

1. Women from societies where the preservation of one's virginity or marital dignity is the cultural norm may be reluctant to disclose their experiences of sexual violence in order to keep their "shame" to themselves and not dishonour their family or community.
2. Women from certain cultures where men do not share the details of their political, military or even social activities with their spouses, daughters or mothers may find themselves in a difficult situation when questioned about the experiences of their male relatives.
3. Women refugee claimants who have suffered sexual violence may exhibit a pattern of symptoms referred to as Rape Trauma Syndrome, and may require extremely sensitive handling. Similarly, women who have been subjected to domestic violence may exhibit a pattern of symptoms referred to as Battered Woman Syndrome and may also be reluctant to testify. In some cases it will be appropriate to consider whether claimants should be allowed to have the option of providing their testimony outside the hearing room by affidavit or by videotape, or in front of members and refugee claims officers specifically trained in dealing with violence against women. Members should be familiar with the UNHCR Executive Committee *Guidelines on the Protection of Refugee Women*. [Emphasis added]

49. In the case under review, the refugee claim was rejected based on Scheherazade's testimony; the RPD faulted her for omissions in her testimony regarding the alleged persecution.

50. Accordingly, a careful review of the transcript is required to determine the merits of the RPD's decision:

MEMBER (to Scheherazade)

Q. What will you fear if you have to return to your country?

SCHEHERAZADE

A. Sir, let me tell you my story . . . you asked me why?

The story is that every day I'm in a fight for survival. My life is in danger. Every day, I risk losing my life. I never know when and where this could happen since my death sentence was suspended. I remain alive for as long as I interest, fascinate and captivate my husband. At the very moment when my stories are interrupted, when I am no longer charming, the sentence becomes more and more real.

Sir, imagine . . .

Q. Are you afraid of your husband? Exactly what abuse did you suffer?

A...(silence)

Q. Madam?

A Sir, the sultan married me because of my talent for telling stories that captivate him and make him dream. My life is suspended; as soon as he loses interest in my psychological and physical being, he is the only person who can decide my fate. I implore you to give me a chance to live to become a storyteller for the children in Canada and around the world. If I return to my country, my fate will be sealed, and I will no longer live among the dreams that I want to live, not just talk about.

Q. What type of violence did you suffer? Did he hit you?

A. . . . help me to live according to God's calculation, not the calculation of a human being deciding my fate like an accountant closing a financial account.

Q. When did he start assaulting you?

A. I . . . don't remember exactly.

(Transcript of hearing, TR at p 601)

51. Indeed, it appears, as the RPD noted, that when Scheherazade testified, she did not give precise details about the alleged violent acts. In contrast, Scheherazade's testimony was more fluid when she recounted happy memories:

MEMBER (to Scheherazade)

Q. When did you get married?

A. I was 17 years old. My wedding day was a beautiful day. The day that all young women in my country wait for. There were no other voices. There was light everywhere. The musicians were playing wonderful music as if it would never stop. All the relatives and friends were there as if they would never leave.

(Transcript of hearing, TR at p 300)

52. At the outset, we should be wary of all stereotypes. Can Scheherazade really be faulted, in this specific social context, for not trying to escape and for telling stories for almost three years? Through the many daily tasks that she was responsible for, through her condition as a woman, Scheherazade resigned herself to exist without living her life. She endeavoured to bury her pain and sadness deep within herself so as to not reveal them.
53. Her physical and psychological integrity were damaged and her dignity was profoundly affected.
54. As she herself stated, as a young adult, her wedding day was a rare opportunity for hopes and dreams. Instead, her youth was stolen from her by years of abuse. Her laughter quickly faded to be replaced by tears.
55. It is also important to mention that, based on the documentary evidence in the record, the fear of being ostracized, humiliated and even beaten because of her status as a divorced or repudiated woman may also be a factor forcing some women to endure this type of violence (Tab 1001 of the National Documentation Package for Struggle dated March 20, 2011, entitled [TRANSLATION] “Violence against Women”). According to this documentary evidence, women who are alone, divorced or repudiated with no “connection to a man” cannot talk about their condition or their fate.
56. While Scheherazade's account revealed that she really was captive and had no options, it is also important to remember Justice Wilson’s remarks in *R v Lavallee*,

[1990] 1 SCR 852 [*Lavallee*], that some women victims of spousal abuse suffer such trauma that they do not try to flee from the partner who is abusing them:

Expert evidence on the psychological effect of battering on wives and common law partners must, it seems to me, be both relevant and necessary in the context of the present case. How can the mental state of the appellant be appreciated without it? The average member of the public (or of the jury) can be forgiven for asking: Why would a woman put up with this kind of treatment? Why should she continue to live with such a man? How could she love a partner who beat her to the point of requiring hospitalization? We would expect the woman to pack her bags and go. Where is her self-respect? Why does she not cut loose and make a new life for herself? Such is the reaction of the average person confronted with the so-called “battered wife syndrome”. We need help to understand it and help is available from trained professionals.

The gravity, indeed, the tragedy of domestic violence can hardly be overstated. Greater media attention to this phenomenon in recent years has revealed both its prevalence and its horrific impact on women from all walks of life. Far from protecting women from it the law historically sanctioned the abuse of women within marriage as an aspect of the husband’s ownership of his wife and his “right” to chastise her. One need only recall the centuries old law that a man is entitled to beat his wife with a stick “no thicker than his thumb”.

Laws do not spring out of a social vacuum. The notion that a man has a right to “discipline” his wife is deeply rooted in the history of our society. The woman’s duty was to serve her husband and to stay in the marriage at all costs “till death do us part” and to accept as her due any “punishment” that was meted out for failing to please her husband. One consequence of this attitude was that “wife battering” was rarely spoken of, rarely reported, rarely prosecuted, and even more rarely punished. Long after society abandoned its formal approval of spousal abuse tolerance of it continued and continues in some circles to this day.

57. Thus, Justice Wilson in *Lavallee* highlighted the importance of expert evidence in identifying the psychological distress of women victims of spousal abuse.

58. Moreover, in *Abbasova v Canada (Minister of Citizenship and Immigration)*, 2011 FC 43 [*Abbasova*], where the factual background was similar, this Court made the following remarks:

[66] Very rarely, there are cases in which silence in itself is a representation of the pain felt by the person, and this occurs in cases where the silence is so striking that there are not even any falsehoods to be considered; rather, there is a silence that could be reconciled only when considered with tangible or concrete evidence from persons other than the applicant, to disclose the case of the applicant herself.

[67] This presents the greatest challenge to the quasi-judicial and judicial system, because of the fact that the evidence is never internal, is never central; rather, it is presented by the people who have observed, analyzed and assessed the person under consideration, where the decision-maker could know the individual only through others, such as a person who stands silent on her own account. There is nothing more eloquent than a silent cry that makes no sound, and so the voices around the person concerned, rather than the person herself, must be listened to. Some people are abused to the point that they cannot testify, and only the people around them are able to express, in their own voices, what the person concerned is not able to express. [Emphasis in the original]

59. In this case, the RPD did not discuss psychiatrist Jasmine Aladin's psychological report, which had been introduced into evidence and to which Mr. Gallant referred at length in his submissions. It is settled law that the Court may infer that an administrative agency made an erroneous finding of fact from its failure to mention relevant evidence (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*), [1998] FCJ 1425, [1998] FCJ 1425 (QL/Lexis)).

60. The following passage from Dr. Jasmine Aladin's report is pertinent:

[TRANSLATION]

Scheherazade appeared to me to be a young woman who lived in an imaginary world for 1001 days and nights. This imaginary world was a refuge from the present that allowed her to dream of better tomorrows. In this way, she shut herself up in symbolism and archetypes. It seems that this protected her for three years. When she arrived in Canada, at the beginning of the psychoanalytic process, it was difficult for her to talk about herself in the first person and to recount her experiences clearly. For this reason, it could be difficult for her to testify about the abuse she has suffered. It is difficult to evaluate the extent of the psychological and physical abuse she suffered.

Scheherazade has been trying to rebuild her self-esteem since she arrived in Canada. Through her work as a storyteller in a library, she tells her stories to children in a new way, not to avoid death, but out of passion. Moreover, her stories provide a faithful representation of Scheherazade's aspirations. Her vulnerability has become her strength, enabling her to understand vulnerable persons like children and women, to listen to them and as a result, to be understood by them.

To understand vulnerable persons, we need to see from the point of view of the person who was a victim, which Scheherazade knows how to do through her stories.

(Psychological report, TR at pp 333-334)

61. A review of the transcript reveals stories within a story like the stories of the 1001 nights, forming a whole that must be understood.
62. Clearly, Scheherazade fully seized the opportunity to be heard, challenging the RPD in her own words, certainly, but consistent in the specific context.
63. The collection of the stories of the 1001 nights that was submitted into evidence is important and is the appendix to the applicant's PIF. As highlighted in the psychological report, these stories assist in understanding Scheherazade's personality.
64. The story, *The Seven Voyages of Sinbad the Sailor*, to cite only that one, eloquently illustrates Scheherazade's deprivation of liberty.
65. In this story, it is important to note, Scheherazade recounts the seven fascinating voyages through the voice of a character (Sinbad), who is himself describing them to another character, thus showing all the forced silence in which Scheherazade was confined for a number of years, unable to express her longings and desires.
66. Through Sindbad's voice, Scheherazade, eager for freedom, dreamed of many voyages to appease her desire to flee to a better, more just world. This story is steeped in poetry and adventures.

67. Sinbad crosses seas, which are natural obstacles to the traveller, and they become his playground. Scheherazade thus dreamed of being able to cross the seas to a country where she would be free instead of just contemplating it through a window pane between two moments of solitude. Through Sindbad, Scheherazade even explains that this road to freedom in order to be saved will not be a rest at all.

While I was in this plight, darkness descended on me, and the winds and waves drove me on all night and the next day, until the tub carried me to a lofty island with trees bowing over the inlet. I caught hold of a branch and swung myself onto the land with its help. But when I reached the shore, I found that my legs had cramps and were numb, and my feet bore traces of the nibbling of fish on their soles. In all, I felt nothing but anguish and fatigue and threw myself down on the ground like a dead man. Before I knew it, I fainted and did not recover my senses until the next morning, when the sun rose and revived me.

(First Voyage of Sindbad the Seaman, *Arabian Nights: the Marvels and Wonders of the Thousand and One Nights*, adapted from Richard F. Burton's unexpurgated translation by Jack Zipes, Signet Classic, 1991, at p 509)

68. In the same way, Scheherazade's testimony provided the RPD with all the tools to see clearly into her refugee claim. The distress signal could not be more blatant:

SCHEHERAZADE (to the member)

A. I'm not well, sir. Ease my sorrow that weighs on me as a woman, improve my condition as a woman by your decision. Make sure it is recognized. It's not worth living if I can't be a complete human being. I ask you to not consider me as a number among the statistics of people whose refugee claims you accepted or rejected this year. I don't want to be a number to be counted but a person who counts. Does this country think about the cost when it accepts people or about the intrinsic value of each human being who can, in turn, give back to the country? Canada is a young country that was not even imagined in the *Arabian Nights*. Canada is a new creation that today is receiving a person from an ancient world. What you give us with your enthusiasm for a life appropriate for young souls will be rewarded by individuals

from ancient countries who have a history and wisdom that will help this new land develop a way of life that provides hope and serves as a model for other nations. You are, sir, the storyteller of your decision, the director of my future life.

69. Thus, Scheherazade provided the RPD with a reference encyclopaedia from which the story emerges, a dictionary of terms that defines the situation, a portrait gallery that offers an exhibit of images and background music through which everything harmonizes, and the cacophony is removed. This enables us to understand her story. From reading the transcript, it is possible to hear a constant refrain demonstrating the leitmotif of Scheherazade's life without which the conditions and culture of the country would remain misunderstood.
70. It was incumbent on the RPD to assess the evidence with the Guidelines in mind (*Abbasova; Jones v Canada (Minister of Citizenship and Immigration)*, 2006 FC 405). The negative credibility finding is based on omissions, not contradictions. As the evidence shows, these omissions are explained by Scheherazade's difficulty in speaking about her past and are psychological in nature. In light of the entire record, there does not appear to be a willingness to fabricate evidence.
71. Scheherazade's case is based on a fundamental principle. Every woman has the right to make her own decisions. The principle of the inviolability of the human person requires ensuring that every woman can make decisions about her life publicly without enduring discrimination based on gender. This fundamental right is not extinguished by marriage.

72. Scheherazade lived most of her life as a woman-object obliged to obey and at the mercy of her husband's wishes, which is one of the most powerful forms of abuse because it sinuously acquires an air of normality, and its victim resigns herself to it.
73. Abused, Scheherazade lived in fear and sadness whereas all human beings are born free and equal in dignity and rights without distinction (*Universal Declaration of Human Rights*). Those words may certainly seem obvious, but they will never be repeated often enough.
74. This type of abuse is not carved in stone or inevitable. It is definitely not confined to one specific culture or country.
75. The RPD's decision represents for Scheherazade the 1002nd story, allowing her to live a life she dreamed of. This will not just be a story but the beginning of a life. The passport of imagination is exchanged for a real passport in the reality that will be, for Scheherazade, a never-ending story.
76. Thus, Scheherazade, in addition to a dark past, also appeared before the panel with a present that guarantees a brilliant future. In fact, Scheherazade leads storytelling workshops in Montréal libraries.

MEMBER (to Scheherazade)

Q. And what do you like about your work?

SCHEHERAZADE (to the presiding member)

A. The innocence of children does not give them a weapon other than wondrously charming the person they are talking to. Children also know how to listen, sir. They have a natural gift for projecting themselves into the story and participating in it through their insatiable curiosity.

They do not categorize. Each story is a whole.

Children have something universal whereas adults are divided by their lack of understanding. They try to divide people instead of uniting them. Each story is written for the child inside us. Children are the only ones who do not complicate words to the point of making them incomprehensible.

(Transcript of hearing, TR at p 600)

77. These remarks invited the decision-maker at first instance to understand the importance of Scheherazade's stories. They are her primary mode of expression and contain a precise and precious vocabulary. The stories from the past enabled her to survive, certainly physically but also psychologically, by giving her the opportunity to express herself when she could not speak freely. The stories she has been telling since then reveal her hope in the future generation. Scheherazade arouses the children's interest in reading and brings them into a world of fantasy, encouraging them to dream about new possibilities. Her stories are no longer a weapon of subsistence but an instrument of learning for an audience without any malice. Scheherazade has gone from being a victim to a helper.
78. Consequently, the RPD erred in applying the Guidelines by finding that the account was implausible; it also erred by faulting Scheherazade for omissions and hesitations that are explained by her vulnerability, as the psychological evidence shows.
79. Scheherazade's behaviour, in this regard, is therefore not inconsistent with a subjective fear based on persecution. Scheherazade, like many other women victims of spousal abuse, was in survival mode throughout the entire relationship. In this case, since the RPD did not discuss the evidence in the record, it had to be analyzed. When understood, this evidence answered the RPD's questions and formed a credible basis for the claim.
80. In making this finding, this Court's goal is not to substitute its factual assessment for that of the RPD, which is primarily responsible for this task. In this regard, this

Court's comment in *Griffith v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 1142 (QL/Lexis) is relevant:

[3] In quoting the applicant's story as follows, I am not directing the CRDD on the redetermination to accept the applicant's evidence; it is for members of the panel to make their own findings of fact. Instead, my purpose is to simply stress the point that, in considering a story such as the one the applicant tells and in making a finding of credibility, a decision maker must consider the evidence from the perspective of the teller, and, in particular, give careful consideration to what conduct might be expected of a woman living under the violent conditions described. Indeed, as pointed out below, this is the purpose of the Gender Guidelines, which I find to be a positive, enlightened, and necessary effort by the Immigration and Refugee Board to ensure knowledgeable and sensitive consideration of the evidence of women claiming refugee status because of violence within a relationship. A problem in the present case is that, quite apart from the manifest breach of natural justice found, there is no evidence that the Gender Guidelines were followed. [Emphasis added]

(2) Is state protection available to Scheherazade?

81. Last, the RPD found, in the alternative, that state protection was available. Given the RPD's error concerning the subjective fear, the objective analysis cannot be determinative here. Indeed, as stated in *Jimenez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 727, the objective fear analysis must be carried out after the subjective fear has been assessed, otherwise there is a risk that the decision will be made in a factual vacuum:

[15] In other words, other than in exceptional cases, the analysis of the availability of state protection should not be carried out without first establishing the existence of a subjective fear of persecution. The panel responsible for questions of fact should therefore analyze the issue of subjective fear of persecution, or, in other words, should make a finding as to the refugee claimant's credibility and the plausibility of his or her account, before addressing the objective fear component, which includes an analysis of the availability of state protection.

[16] The analysis of the objective fear should therefore normally be done after the analysis of subjective fear, since the particular context that is

unique to each case is often determinative in the objective analysis. As such, a refugee claimant who has no subjective fear of persecution cannot normally allege absence of state protection. As well, the analysis of the availability of state protection will vary considerably, depending on the subjective fear in issue. [Emphasis added]

82. In this case, for the reasons outlined above relating to the subjective fear of persecution, this Court is of the view that the RPD was unable to review the objective evidence taking into consideration the applicant's personal circumstances.

83. Moreover, the documentary evidence, analyzed in light of the specific context of the case, indicated that state protection was not available to Scheherazade:

[TRANSLATION]

A number of sources indicate that women victims of domestic violence suffer this type of abuse in silence for fear of being ostracized or divorced. It appears that women believe they are unable to escape from the abusive environment. Family pressures also encourage them to endure the abusive situation. In addition, the rare legal remedies are discriminatory and favour the spouse, making it difficult for women to obtain custody of their children or a divorce.

Despite new awareness policies that the government has put in place, sources reveal that family violence complaints are not taken seriously.

(Tab 1002 of the National Documentation Package for Struggle dated March 21, 2011, entitled [TRANSLATION] "Access to Justice")

84. As the Special Rapporteur, Yakin Ertürk, correctly noted, violence against women and the lack of legal remedies are justified in some societies by the patriarchal system in force:

This universal phenomenon is embedded in a patriarchal legacy, at the core of which lies the interest of a social group in sustaining and controlling socially acceptable lines of reproduction of the species. Within this context,

as an institutionalized social mechanism, male power is used to control women's reproductive capacity and sexuality. The honour and prestige of a man, in many instances, are intrinsically associated with the conduct of the women related to them.

(United Nations. December 26, 2003. Commission on Human Rights. Report of the Special Rapporteur, Yakin Ertürk, on violence against women, its causes and consequences, entitled "Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women")

IX Conclusion

85. For the reasons outlined above, the RPD's decision is unreasonable and must be set aside. The case is therefore remitted for reconsideration by a differently constituted panel.

86. In closing, there is no doubt that Scheherazade related her account in the form of a story. As she was leaving the hearing room, she spontaneously provided a lesson in humanity at the end of her story:

[TRANSLATION]

Thank you, sir, for giving me the privilege of telling my story in a courtroom in your free country. You gave me the privilege of telling stories that are no longer just stories for children or the child within the adult, but stories that have been experienced and understood by adults in their heart of hearts. You gave me the opportunity to go from a fictional dimension to a real dimension. You followed the thread of my stories. Following this thread of hope enables us to touch a grace that comes from beyond us. You are the messenger of this grace.

Finally, sir, idealism can only succeed if cynicism does not destroy the initiative of the will to transform the reality of today into the promise of tomorrow. [Emphasis added]

(Transcript of hearing, TR at p 1003)

JUDGMENT

THE COURT ORDERS AND ADJUDGES that

1. the application for judicial review is allowed;
2. no serious question of general importance is certified.

“Michel M.J. Shore
Judge

**FEDERAL COURT
SOLICITORS OF RECORD**

DOCKET: IMM-ABRA CADABRA-2012

STYLE OF CAUSE: SCHEHERAZADE v.
MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Université du Québec à Montréal (UQAM)
Montréal, Québec

DATE OF HEARING: October 10, 2012

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

DATED: October 11, 2012

APPEARANCES:
Antoine Gallant FOR THE APPLICANT

Ali Baba FOR THE RESPONDENT

SOLICITORS OF RECORD:
Antoine Gallant
Lawyer
Montréal, Quebec
FOR THE APPLICANT

Ali Baba
Deputy Attorney General of Canada
FOR THE RESPONDENT