Federal Court  Cour fédérale

**Date: 20160303**

**Docket: IMM-3447-15**

**Citation: 2016 FC 260**

**Ottawa, Ontario, March 3, 2016**

**PRESENT: The Honourable Mr. Justice Annis**

**BETWEEN:**

**FADUMO SHARIF ABDULLAHI**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## JUDGMENT AND REASONS

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA or the Act] challenging a decision by the Refugee Appeal Division [the Board or RAD] confirming the Refugee Protection Division's [RPD] finding that the Applicant, Fadumo Sharif Abdullahi (a.k.a. Habiba Mohammed Ilmi), is neither a Convention refugee nor a person in need of protection pursuant to sections 96 and 97 of

the Act. The Applicant is seeking to have the RAD decision set aside and sent back for redetermination by a different panel.

[2] For the reasons that follow, the application is dismissed.

## I. Background

[3] The Applicant is allegedly a citizen of Somalia and a single female of the Asharaf minority clan who fear the majority clan, Habar Gidir, and the terrorist group, Al Shabaab.

[4] The Applicant alleges that after a series of events in Somalia including undergoing female genital mutilation [FGM], being the recipient of death threats, and an attempt of being sold and forced into marriage, she married a man her age in order to protect herself from forced marriage. As a result of this marriage, death threats were directed at her husband and he ran away three months after their wedding and was never heard of again.

[5] In October 2012, the Applicant travelled to the United States with a smuggler's assistance. Upon arrival, the authorities determined by means of a fingerprint match that the Applicant's name was Faduma Sharif Adbullahi and not Habiba Mohamed Ilmi, the name she provided. The Applicant remained in detention until her claim was denied on June 13, 2013 despite having a credible basis.

[6] On July 31, 2013, the Applicant entered Canada and claimed refugee protection. Her refugee protection application was heard in five different hearings spanning from

December 2013 to November 2014. On March 30, 2015, the RPD ultimately rejected the refugee claim upon concluding that the Applicant failed to establish her identity on a balance of probability and that her evidence lacked credibility in other material areas of her claim.

[7] On April 21, 2015, the Applicant appealed the RPD decision to the RAD and on July 8, 2015, the RAD confirmed the RPD decision. The RAD decision forms the basis of this judicial review.

## II. Impugned Decision

[8] The Applicant submitted two pieces of evidence she wished the RAD accept as new. The first was a witness affidavit intended to corroborate the Applicant's identity [the identity evidence], whereas the second was a Registered Psychotherapist's report intended to establish that the Applicant suffered from PTSD which adversely impacted her testimony before the RPD. The RAD found this evidence was available prior to the RPD's decision and therefore failed to meet the test for new evidence of subsection 110(4) of the Act.

[9] In reviewing the record before the RPD, the RAD considered whether the RPD erred in its assessment of the Applicant's medical report, interpretation issues, use of a "fake name," clan and religious identity, and risk profile. The RAD found that on all elements, except for the Applicant's risk factor, the RPD's findings were reasonable. As for the Applicant's risk factors, the RAD agreed with the RPD that it was under no obligation to consider risk factors as the Applicant failed to establish her identity in regards to her belonging to a minority clan, or that she is a citizen of Somalia.

## III. Issues

[10] The following issues arise in this application:

1. Did the RAD err in refusing to admit the Applicant's newly submitted evidence?

2. Did the RAD err in its credibility findings?

## IV. Standard of Review

[11] It is common ground that the deferential standard of review of reasonableness applies to the issue of the RAD's decision to admit new evidence (*Singh v Canada (Minister of Immigration and Citizenship)*, 2014 FC 1022, para 42 [*Singh*]) and the reasonableness of its credibility findings (*Cabdi v Canada (Minister of Immigration and Citizenship)*, 2016 FC 26, para 16).

## V. Analysis

### A. *Did the RAD err in refusing to admit the Applicant's newly submitted evidence?*

[12] The Applicant submits that it was unreasonable for the RAD to reject the Applicant's new material evidence in order to answer deficiencies in her case raised by the RPD. The RAD must consider the Applicant's right to submit evidence to answer to the weaknesses in her claim

in order to fully benefit from the RAD's fact-based appeal (*Singh*, para 55; *Awet v Canada (Minister of Citizenship and Immigration)*, 2015 FC 759, para 10).

[13] I find that the RAD reasonably rejected the Applicant's new evidence. The Applicant, in arguing otherwise, mischaracterizes the respective roles of the RPD and the RAD with respect to the issue of introducing new evidence. The RAD does not operate as a *de novo* appeal that allows an appellant to provide "improved" evidence of a similar nature on an issue that was canvassed and decided by the RPD, when this evidence could reasonably have been introduced before the RPD (*Dhillon v Canada (Minister of Citizenship and Immigration)*, 2015 FC 321, para 18).

[14] I agree with the RAD that the Applicant must put her best foot forward before the RPD, and present all the evidence that is available at the time, whether aware of it or not, unless there is an aspect of injustice arising from unexpected new facts, or old facts that no reasonable amount of due diligence could have turned up. It is not intended to be a tune-up procedure for the RAD that upon learning in deficiencies in the Applicant's case, additional evidence that could have been presented to the RPD may be presented as new evidence before the RAD.

[15] In other words, responding to an inadequacy identified by the RPD in a party's case cannot be a legitimate foundation for the party to claim that had she known about the deficiency she could have presented better evidence that was always in existence from persons that could have been called, in this case from her cousin. This would make the RPD process a monumental waste of time, which is surely not Parliament's intention in providing appeal rights.

[16] Additionally, the *Singh* decision bears no resemblance to the introduction of new evidence in this matter. Its ratio must not be extended to unrelated fact situations that undermine the ordinary finality of the RPD decision except on a proper basis of appeal under the Act. In *Singh*, the Applicant only discovered after the RPD decision that a key document, which related to the determinative issue of identity, had been retained by the Applicant's solicitor when he had reasonable grounds to believe that it was in the possession of the Citizenship and Immigration Canada, via his lawyer. The Court described a fairly liberal interpretation of what constitutes evidence that "was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented" in appeals before the RAD when it was found to be an honest mistake about who had possession of the key document. It is the sort of case where the interests of justice call for an exception in what is intended to be a flexible administrative process. The case did not involve calling a witness who was available before the hearing to testify on an issue vetted at length by the RPD, and on top of that, whose evidence could have been presented on the subject matter before the termination of the RPD process.

[17] Similarly, the Psychotherapist's report cannot be admitted to explain away problems in the evidence from the forensic medical evidence of the physician who provided evidence to the RPD. In this matter before the RPD, the Applicant provided post-traumatic behavioural forensic medical evidence concluding that the Applicant had demonstrated multiple symptoms of post-traumatic stress disorder, depression and anxiety as a consequence of her experiences of FGM. Apart from the Applicant being depressed however, the forensic medical expert reported no perceived delusions by the Applicant, who she described as exhibiting normal insight and judgment, in addition to a coherent thought process.

[18] The evidence from the second psychologist expert does not fit the category of evidence that "was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented." Indeed, I think it is highly unlikely that it would be appropriate to present forensic opinion evidence after the fact based on what occurred before the RPD. Moreover, to allow the second medical forensic report to provide contrary evidence or more complete evidence from that of the medical expert in the RPD hearing, would in effect be allowing the impeachment of the first expert called by the Applicant.

[19] In addition, medical expertise is not permissible after a hearing in an attempt to "bootstrap" and explain why a witness was found incredible, inconsistent or otherwise unreliable before the RPD. Lawyers are trained to overcome such problems, or at least raise concerns about an applicant's ability to testify before the decision-maker in the first instance. This issue must be raised at the hearing: *Diaz Serrato v Canada (Minister of Citizenship and Immigration)*, 2009 FC 176 at paragraph 22, as follows:

> [22] Let us not forget that an expert report is a piece of evidence like any other; hence it was up to the RPD to decide how much weight it should be given. It is not for the expert to decide if the inconsistencies in the applicant's testimony could be excused by his Post Traumatic Stress Syndrome. Having analyzed the evidence, the RPD found that there it was not a question of amnesia or forgetting incidents but of inconsistencies. In other words, the RPD found that there was no relation between the syndrome found and the inconsistencies.

[20] Accordingly, I find no reviewable error in the RAD's exercise of discretion to refuse to admit the new evidence tendered by the Applicant.

B. *Did the RAD err in its credibility findings?*

[21] The Applicant submits that the RAD erred when it found the Applicant not credible because of inconsistencies and other problems arising during her testimony. Specifically, the Applicant submits that the RAD focused too heavily on the Applicant's use of her real name, which was not significant; ignored mitigating factors such as the *Gender Guidelines* and the doctor's report; did not consider cultural practices in the Applicant's country when assessing the Applicant's clan and religious identity; and failed to assess the Applicant's risk profile.

[22] The hearings and record in this matter are extensive. They commenced on December 9, 2013 and continued over five sittings until November 12, 2014, almost an entire year. It is well-established that credibility findings are the heartland of the RPD's core functions. It is not surprising therefore, given the extensive amount of evidence introduced in these proceedings and related commentary of the RPD on a large number of credibility issues, that no reviewable errors or patently unfounded credibility findings were demonstrated.

[23] Based on the record, I conclude that the RAD's credibility findings are reasonable and based on various inconsistencies between the Applicant's Basis of Claim form and testimony that cannot simply be explained by arguments of poor interpretation by the RPD. I do not find for example that the RAD unreasonably disagreed with the Applicant's argument that what she described as issues arising from poor interpretation were in fact inconsistencies or contradictions in her testimony and the documentation. Similarly, the RAD could reasonably conclude that the

RPD was justified in finding important inconsistencies in the Applicant's testimony concerning the use of her "fake name."

[24] In the same vein, I see no reviewable error in the RAD's confirmation that the RPD found inconsistencies in several adverse impacts on the Applicant's credibility from her failure to know her natural clan and the confusion over the dates when she said to have learned of this when her father was threatened in 2003. Cultural foundations do not appear obvious to explain the different descriptions of her husband as her father's relative or the inconsistency in religious cultural evidence or timing of dates relating to her father's situation. Additionally, the RPD thoroughly considered the Gender Guidelines, which were not a matter of contention before the RAD.

[25] Ultimately, the RAD agreed with the RPD's conclusions that the Applicant was not able to establish her identity as a citizen of Somalia, not to mention whether she is married, or single, or any other important markers in order to discern whether she fitted any type of risk profile.

[26] The Court finds no reviewable errors that could undermine the RAD's analysis of the RPD's credibility findings. In this respect, the Court generally agrees with the Respondent that the Applicant is asking the Court to reweigh the evidence on a number of different points that contributed to the adverse credibility findings, which is obviously not the Court's role.

## VI. Conclusion

The application is dismissed. No question is certified for appeal.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application is dismissed and no question is certified for appeal.

"Peter Annis"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-3447-15 |
| **STYLE OF CAUSE:** | FADUMO SHARIF ABDULLAHI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | FEBRUARY 11, 2016 |
| **JUDGMENT AND REASONS:** | ANNIS J. |
| **DATED:** | MARCH 3, 2016 |

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| Manuel Mendelzon | FOR THE RESPONDENT |

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