Federal Court  Cour fédérale

Date: 20160530

Docket: IMM-3457-15

Citation: 2016 FC 602

Ottawa, Ontario, May 30, 2016

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

UBAH IBRAHIM OMAR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Ubah Ibrahim Omar, the applicant in this case, seeks the judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada (RPD) to vacate a previous finding of refugee protection in favour of the applicant. The application for judicial review is made pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA). For the reasons that follow, the judicial review application must fail.

[2] Essentially, the applicant was successful in being awarded the protection of section 96 of the IRPA after having provided the RPD with a version of events that has proven to be a fabrication, either completely or at the very least materially. Events that involved the applicant starting in 1995, in what she claims is her country of origin, Somalia, could not have taken place because she has since admitted that she was a resident of the United States between 1995 and 2009. Furthermore, while in the United States she was convicted of an offence for which she received a sentence of 81 months in prison, conviction that was not disclosed to the Canadian authorities when she came to Canada in 2009 and sought refugee status. As such, the respondent claims that the applicant is not a Convention refugee or a person in need of protection, according to section 98 of the IRPA, because the offence committed in the U.S. falls under Article 1F of the *Refugee Convention*.

I. Facts

[3] The applicant, who claims to be born on January 1, 1982, came to Canada some time in 2009. According to her Personal Information Form (PIF) of July 27, 2009, she would have arrived in Winnipeg in May 2009. Until some time in May 2009, she, according to that PIF, was residing in Nairobi, in Kenya. She flew from Nairobi, through London, England and arrived in Toronto on May 26, 2009; she then travelled by car to Winnipeg arriving in Winnipeg on May 28, 2009. In her Statutory Declaration to Inland Enforcement Officers of the Canada Border Services Agency (CBSA) on May 14, 2014, the applicant, once she has been confronted with the fact that her fingerprints show that she resided in the United States, indicates that she came to Canada on May 25, 2009 and she crossed the border by being driven into Canada. As we shall see, it has been difficult to ascertain the facts concerning this applicant on many other issues.

[4] The PIF provides a narrative of what prompted the applicant to leave her country of origin, Somalia, and seek refugee status in this country. I shall focus on the portion of the narrative that starts in 1996. Prior to that year, it seems that there were difficulties for members of her clan, but the situation worsened significantly starting in 1996.

[5] The applicant speaks of militias terrifying her family, being specific that she remembered how her cousin, a baby at the time, was crying when her uncle was shot many times in the stomach. The applicant states that she studied in elementary school in a village in Somalia until 1999.

[6] In 1999, the applicant's parents decided to flee and they ended up in villages 100 miles away. She states that "after 3 days of walking, we arrived at Dhobley." The fear, she says, was constant. They would have to flee in the bush for days when they were attacked in the camps. According to her PIF, the applicant and her family stayed in Dhobley until 2004. At that time, they moved back to their village of origin to find the city under the rule of Islamic courts. The applicant claims that she got married on October 15, 2004. From that union, two children were born, one in August 2005 and the other in May 2007.

[7] As stated by the applicant, a most tragic event would have occurred in January 2007. At paragraph 9 of her narrative, one can read:

> In January 2007, I faced the biggest tragedy in my family. I was 5 months pregnant with my second child, Ednan. Our house was raided by the Islamic courts militias. I was terrified and it was horrible. My husband was beaten up and they took him. Later, he was killed and we buried him. I couldn't tolerate the situation. I was pregnant and had another small kid.

[8] The decision was made to leave Somalia in January 2009 because the situation in the city was, according to the applicant, getting worse. They therefore went back to Dhobley where the applicant met another man whom she married in secret despite the disapproval of her family. The applicant then says that her husband was taken away by the Al-Shabaab militia which, according to the applicant, "were looking for me. If they found me, they would have killed me. Because I was too scared, I decided to flee Dhobley leaving my family there. So I fled to Kenya in February 2009, before they came back."

[9] What is remarkable about the story, other than showing the applicant in a remarkably sympathetic way, being an innocent victim having survived such extraordinarily difficult circumstances, is that it did not happen. The applicant acknowledged to the authorities in 2014, once she was confronted with information coming from the United States, that she lived in the United States between 1995 and 2009.

[10] It is on May 14, 2014 that the applicant was interviewed by CBSA officers, years after having sought successfully refugee status in this country. In her Statutory Declaration, she attests being born on January 1, 1982. At first, she denied having ever lived in United States from 1995 to 2009. However, once told that her fingerprints had been sent to the United States, she acknowledged having lived in the United States. She also acknowledged that she had been convicted for assault following an incident in 1998. If the date of birth is truly January 1, 1982, that means that she came to North America when she was 13 years old and was convicted at 18 for a crime committed while she was 16 years of age.

[11] When asked at the interview with CBSA what her real name was, she would have answered “Laila Mohamed” and her real date of birth was indicated as being January 1, 1974, and not January 1, 1982 as she had indicated in her PIF as well as in her claim for refugee protection in Canada. At the end of the Statutory Declaration, the applicant would have said that “[t]o be honest, my real name is Ubah Omar. I used the Laila Mohamed name to go to the U.S. My Auntie said I was her daughter.” The matter of her age was not resolved however.

[12] The story of the applicant did not become any clearer with her testimony before the RPD in the present case where the government seeks to vacate the refugee status. The applicant answered questions from her own counsel, yet the story remained murky. There was confusion, for instance, as to when the applicant first went to Kenya. To a question from her counsel, she answered “1990” (page 20 of the transcript). The applicant would have been 8 years old in 1990. However, just a few pages later (p. 28), after having indicated to counsel that the applicant lived in Nairobi, she was asked how old she was when she left Kenya. The answer was “[r]oughly 20. It was a long time ago. I am not really sure.” Here, it is one of two things. In order to have been around 20 when she left Kenya in 1995, the applicant would have had to be born around 1974-1975. The other option, if it is true that she was born in 1982, would have been that the applicant stayed in Kenya for 12 years in order to have left when she was around 20. That means that, according to that story, she would have left Kenya in 2002, which is impossible because she was incarcerated in Minnesota by year 2000.

[13] That difficulty did not escape counsel for the applicant. Probably because counsel recalled that the applicant had first supposedly gone to Kenya in 1990 and that she claims that

she was born in 1982, counsel asked at page 28: “So you were in Kenya about 12 years?” The answer was simply “We always lived in a camp.”

[14] The applicant seems to double down at page 25 of the transcript when she answers a question about her age when she was in Dhobley by saying “[a]bout eight or nine. It was around the time we left Somalia.” That suggests being born in 1982. The narrative was not made any clearer where, a few pages later (page 31 of the transcript), questions are asked about the assistance the applicant would have received in order to leave Nairobi to come to North America in 1995. One can read at lines 15-19 of page 31:

> Q: It says here, “she made contacts with an agent Chet (phonetic), a dark skinned man.” Did that happen?
>
> A: Before coming along with my aunt, I was planning to leave on my own and that’s when she was looking for an agent for me.

In 1995, the applicant would have been 13 years old if she was born in 1982, but 21 if born in 1974. It is hard to fathom that someone 13 years old would be looking for an agent and was planning to leave on her own to come to America. Being around 20 would be more plausible.

[15] The matter of those dates came back at the bottom of page 32 and top of page 33 of the transcript. First, there is the part of the testimony where the applicant claims that she received $4,000.00USD from her uncle in order to allow her to travel to the United States. The applicant states that she used only a part of the money for the travel and sent the rest to her family. That seems to have taken by surprise counsel who asked about his understanding that the applicant was not in touch with her mother at that point. The applicant countered that she would get information about her mother when she was in a refugee camp. Thus, counsel asked about where

the money could be sent if they did not have a stable address and she did not know where they were. The applicant answered by saying:

> A. There were people who would travel from the camp and go to Doblay [*sic*] to take food over to those people in general who are struggling and I would just tell them to find them.
>
> Q: I see. Were they at Doblay [*sic*]?
>
> A: Yes, because Doblay [*sic*] and Kismayo are very close.

[16] It is somewhat surprising because in her PIF, the applicant contended that when they left Kismayo, they fled to villages 100 miles away. She then says that"[a]fter 3 days of walking, we arrived in Dhobley." It must also be remembered that the applicant claimed she was 13 years old at the time she would have made those arrangements to send money, received from an uncle, to her parents who lived in a refugee camp. That led directly to the last exchange about the age and the period of time during which the applicant would have stayed in Kenya.

> Q: Ok. What year did you come to the U.S.?
>
> A: 1999.
>
> Q: 1999. Earlier you said 1995. Was that wrong?
>
> A: Sorry I didn't mean to say 1999. 1995.
>
> Q: Ok. But you were born in '82. In '95 you'd be 13, not 20.
>
> A: I came on false passport and that passport – my aunt brought me to the United States pretending me to be her daughter and her daughter was an actual person. Her age was 20, so I came with her information which said that she was 20. She was born in 1975.
>
> Q: Is this the daughter who died of sickness?
>
> A: Yes.
>
> Q: So you were – you were in Somalia not for 12 years, you came – you were in Kenya for 5 years, is that right?

A: Yes.

[17] As can be seen, the arithmetic is deficient. It was never made clear how old the applicant was when she came to the United States in 1995, but common sense dictates that there is a significant difference between a young girl of 13 (if born in 1982) and a young woman of 20 or 21 (if born in 1974). Furthermore, sending money to a refugee camp where her parents are residing was never explained. And coming to the United States on her own from Kenya, using an agent, at age 13 is remarkable. Again, common sense dictates that this is an endeavour that is quite significant for a young girl of 13 years old.

[18] There is also the matter of the American work permit. At the revocation hearing before the RPD on November 14, 2014, the applicant was examined by counsel for the Minister. The applicant stated that she had "legal status" in the United States between 1995 and 1998, when she was charged for the crime that resulted in an imprisonment term of 81 months. She explained that she had a "work permit", a "green card" (transcript, p.7). Evidently, getting a "green card", in 1995, makes sense if you were born in 1974, much less so if born in 1982.

[19] Then, there is the conviction entered in the state of Minnesota against the applicant. An altercation occurred in July 1998 between the applicant and another Somalian woman. As a result of the altercation, the other Somalian woman suffered 7 cuts to her face. Two of the cuts in the cheek area were deep and the eyelid of that person was also cut. Was also noted by the policeman who interviewed that person a cut below her left earlobe.

[20] There were apparently witnesses to the incident and the police interviewed them. One of the two witnesses indicated that the applicant used a “ring knife,” which is shaped like a hook.

[21] The applicant had a version of events that was, in the words of the RPD member, quite “sanitized.” Among other things, the applicant denied having used a knife in the altercation.

[22] In the end, according to the information in the records held in the U.S. (Minnesota Criminal history), the applicant was convicted of the more serious offence of assault in the first degree, a felony under Minnesota state law which carried a maximum penalty of 20 years imprisonment. According to the evidence, the offence reads:

> Whoever assaults another and inflicts great bodily harm may be sentenced to imprisonment for not more than 20 years or to payment of a fine of not more than $30,000, or both.

[23] For a first offender, the applicant was sentenced to 81 months in prison, the sentence being imposed on April 7, 2000. According to the record, the applicant served close to four years of her sentence in custody, being released on February 19, 2004. Her sentence expired on May 15, 2006.

II. Decision under review

[24] On June 26, 2015, the so-called “vacation application” pursuant to s 109 of the IRPA was the subject of a decision. The RPD concluded that the previous panel did not know about the time spent in the United States, the true identity, and the criminal record of the applicant. The panel was of the view that the facts withheld or misrepresented were material.

[25] Furthermore, the panel was of the view that the offence committed and for which the applicant was convicted in Minnesota constitutes a serious non-political crime committed outside the country. In reaching that conclusion, it equated the American offence with sections 267 and 268 of the *Criminal Code* of Canada. These offences carry terms of imprisonment of 10 years and 14 years; receiving a sentence of 81 months' imprisonment for an offence that is punishable in Canada by 14 years' imprisonment was, in the view of the panel, a serious crime.

[26] In the view of the panel, the previous panel would have concluded that the applicant had committed a serious non-political crime outside of Canada.

[27] Given that a person found to have committed a serious non-political crime outside of the country of refuge cannot be found to be a Convention refugee or a person in need of protection, the panel declined to consider if there would be other sufficient evidence before the first panel to justify refugee protection (subsection 109(2) of the IRPA).

III. Analysis

[28] The applicant mounts an attack on the RPD decision on a number of fronts.

Natural justice

[29] First, after the hearing before the RPD in the instant case (decision issued on January 26, 2015), it was discovered that the hearing before the RPD which led to the granting of the refugee status to the applicant (January 13, 2011) had not been recorded. The applicant tried to make hay

out of that absence. She relied on the case of *Toussaint v MCI*, 2011 FC 216 for the proposition that the failure to produce the transcript may constitute the denial of natural justice if the reviewing court is unable to properly dispose of the issues raised.

[30] This is not a new proposition. The matter was decided authoritatively by the Supreme Court of Canada in *Canadian Union of Public Employees, Local 301 v Montreal (City)*, [1997] 1 SCR 793 [*Canadian Union of Public Employees*]. The Court puts the proposition thus, at paragraph 83:

> As I have stated, in the absence of a statutory right to a recorded hearing, a party's rights to natural justice will only be infringed where the court has an inadequate record upon which to base its decision.

[31] The hearing to vacate a decision focuses on the misrepresentations or the withholding of material facts. Here, those facts relate the applicant's true identity, her criminal record and, of course, her time spent in the U.S. The issue is therefore whether identity, criminal record and time spent in the U.S. and not in Somalia were before the first RPD. If they were, there were no misrepresentations or withholding of material facts.

[32] Because there is no recording or transcript of the proceedings that led to the January 13, 2011 decision, the applicant contends that it cannot be established that facts about her identity, her presence in the U.S. and her criminal record were withheld. That argument cannot succeed.

[33] In the case at hand, what we have are two diametrically opposed sets of facts that cannot be reconciled. On the one hand, the record before the first RPD describes the very difficult

circumstances in which the applicant alleged she found herself in Somalia and Kenya between 1996 and 2009. Clearly those circumstances were before the first RPD panel; they are featured in the short decision rendered on January 13, 2011, concluding that "there is a serious possibility of persecution if you returned to Somalia and I accept your claim under section 96 of the Immigration and Refugee Protection Act." Obviously, two paragraphs in the decision that lead to the conclusion of the RPD are the two most salient features of the events over a period of time when, in fact, the applicant was in the United States:

[34] I reproduce the two paragraphs for better clarity:

> In 1999 your family fled to Dhobley 100 miles away and lived in a camp without work, school or proper security. You remained there until 2004 when you returned to Kismayo and got married. You and your first husband had two sons. In 2007, while still pregnant with one of your sons, your husband was killed by a militia.
>
> You and your parents and children returned to Dhobley in 2009 where you met and married your second husband. He was abducted by Al-Shabaab shortly after and after you came to Canada you learned he was killed. You fled to Kenya and your friends and relatives assisted you in your passage to Canada. You feel that if you return to Somalia as a woman from a minority clan without protection, you will be harmed or killed.

[35] The applicant suggests that the current Board's reasoning, to the effect that the time spent in the United States, the true identity and the criminal record of the applicant were not brought to the attention of the previous Board, holds only if these would have been mentioned inevitably in the reasons of the panel granting refugee status, had the applicant stated them in the original application. I have my doubts that such is the test. That seems to require a level of certainty beyond even reasonable doubt, inevitability carrying arguably a complete absence of doubt, approaching Descartes' metaphysical certainty. Assuming for the sake of the discussion that

doubt should favour the applicant, I have no doubt that identity, criminal record and especially the time spent in the U.S. would have been considered and mentioned. That is so because the two versions are so irrevocably opposed. One cannot suffer in Somalia, and for those facts to be noted specifically in the RPD's ruling, and be in the United States at the same time. If the whereabouts of the applicant during that period had been put to the RPD, it is impossible that they would not have been noted such that the RPD would have failed to consider the matter fully. We are not talking small incremental discrepancies. It is rather the narratives for a period of 15 years that are impossible to reconcile. There is no need for the transcript before the first RPD panel to know that a completely different set of facts were not presented. It is not only unlikely that the episode in the United States was never alluded to before the first RPD panel, it is impossible. It follows that the rights to natural justice for lack of transcript have not been infringed because this Court has an adequate record in order to base its decision on whether there should have been a vacation of the refugee claim.

Vacating the decision

[36] Second, the applicant takes issue with the decision to grant the application under section 109 of the IRPA. Such decision is reviewed on a standard of reasonableness, as most matters are nowadays. In *Frias v Canada (Citizenship and Immigration)*, 2014 FC 753, my colleague Justice Luc Martineau wrote:

> 9 The standard of review that applies to the panel's decision regarding the vacation of refugee protection status is reasonableness. The same is true for the question of whether a person is subject to Article 1F(b) of the Convention…

I share that view which is supported by the authorities.

[37] The application to vacate is made pursuant to section 109 of the IRPA which reads:

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.	109 (1) La Section de la protection des réfugiés peut, sur demande du ministre, annuler la décision ayant accueilli la demande d'asile résultant, directement ou indirectement, de présentations erronées sur un fait important quant à un objet pertinent, ou de réticence sur ce fait.
(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.	(2) Elle peut rejeter la demande si elle estime qu'il reste suffisamment d'éléments de preuve, parmi ceux pris en compte lors de la décision initiale, pour justifier l'asile.
(3) If the application is allowed, the claim of the person is deemed to be rejected and the decision that led to the conferral of refugee protection is nullified.	(3) La décision portant annulation est assimilée au rejet de la demande d'asile, la décision initiale étant dès lors nulle.

[38] In order to be successful, the applicant will have to satisfy this Court that the decision under review does not fall within the range of possible, acceptable outcomes defensible in law and in facts. Under subsection 109(1), the RPD must be satisfied that the misrepresenting or withholding was with respect to material facts, that those facts relate to a relevant matter and that the decision to be vacated was obtained as a result of the direct or indirect withholding or misrepresenting of facts.

[39] It is difficult to see how this set of facts is not material as the applicant told a very sympathetic story that simply did not occur; it was a fabrication. Where the applicant was and

what she had to endure are relevant matters in refugee protection cases. Knowing what the true circumstances of the applicant were when she made her refugee claim in 2009, it is in my view perfectly reasonable for the second RPD panel to conclude that the decision would have been otherwise. It is not for this Court to substitute its view of the facts to the extent that the decision falls within a range of possible, acceptable outcomes.

[40] The applicant argues, in effect, that the decision would have been the same the second time around because of her gender and her nationality, thus relying on subsection 109(2). In other words, it would suffice to establish that she is Somalian for the refugee protection to be granted. No authority was offered in support of such a bold proposition.

[41] At any rate, the applicant, had all of the circumstances been presented to the first RPD panel, would have been faced with being excluded from consideration as a refugee by the operation of section 98 of the IRPA. It reads:

98 A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.	**98** La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.

[42] Is relevant to this case Article 1F(b) which reads:

F The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:	F Les dispositions de cette Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser :
…	…

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;	b) Qu'elles ont commis un crime grave de droit commun en dehors du pays d'accueil avant d'y être admises comme réfugiés;
…	…

[43] The second RPD panel came to the conclusion that the offence for which the applicant has been found guilty and convicted in the state of Minnesota falls squarely within the confines of Article 1F(b). Using a knife that cuts like a razor, according to the version given by one of the witnesses to the incident to the police, and cutting deeply into the face of the victim is an offence punishable by 14 years imprisonment if committed in Canada. Section 268 of the *Criminal Code* describes the offence in the following fashion:

268 (1) Every one commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant.	268 (1) Commet des voies de fait graves quiconque blesse, mutile ou défigure le plaignant ou met sa vie en danger.
…	…

[44] The applicant seems to be making two arguments concerning the offence in the United States. First, she relied on her sanitized version of the assault to suggest that the offence as committed was not as serious as it may seem when reading the provision creating the said offence. Second, she claims that she did not have a good understanding of the offence for which she was being convicted and for which she claimed she entered a guilty plea.

[45] There is no value to the argument that the guilty plea is such that there is no resolution to the contestation of the seriousness of the offence. A guilty plea is the recognition that the

individual has committed the crime as charged. The essential elements of the offence are acknowledged formally; in this case, the applicant concedes that she was convicted of "assault second degree dangerous weapon" and "assault first degree great bodily harm". The more serious of the two offences, punishable by 20 years' imprisonment, requires that the assault result in the infliction of great bodily harm. As for "assault second degree dangerous weapon", it is the use of the dangerous weapon which inflicts substantial bodily harm that is prohibited. Whether the applicant pled guilty to these offences or was found guilty, it remains that she has caused bodily harm. There is no point in arguing that, in her mind, the applicant did not consider the bodily harm to be significant. Actually, it was reasonable for the second RPD panel to conclude that the bodily harm was significant in view of the police reports of interviews with witnesses.

[46] The version of events offered by the applicant is simply not consistent with the guilty pleas that would have been entered. She has acknowledged in the most formal way that she inflicted substantial bodily harm and great bodily harm. Evidently, with maximum penalties as high as those provided by the Minnesota statute, they are considered to be objectively serious offences. The fact that a prison sentence of 81 months was imposed on a first offender would tend to signal that the offence as committed was also subjectively serious.

[47] In the circumstances of this case, the presumption that a crime punishable in Canada by imprisonment for 10 years is a serious crime (*Febles v Canada (Minister of Citizenship and Immigration)*, 2014 SCC 68, [2014] 3 SCR 431 [*Febles*]) has not been displaced. As the Court put it at paragraph 62 of *Febles*, "… the ten-year rule should not be applied in a mechanistic, decontextualized, or unjust manner." However, in this case, it is anything but decontextualized or

unjust. It is not only that the offence is punishable in this country by 14 years of imprisonment, but also the fact that a significant term of imprisonment was imposed in the circumstances. Accepting the evidence found in the police reports in Minnesota, which is perfectly reasonable, obviously the offence as committed has a measure of viciousness that brings it in the realm of a serious crime.

[48] As for the issue raised by the applicant about the lack of interpretation in the judicial proceedings in Minnesota, there is no evidence to support that contention. At any rate, it is not surprising that the RPD concluded that it is highly unlikely that a guilty plea and the imposition of a significant term of imprisonment would have taken place without the accused, the applicant, being able to understand. As part of the police investigation, the reports indicate that they resorted to the use of interpreters in order to ensure that the then suspect understood the questions as well as the process (Miranda warning). It is reasonable to conclude that it is highly unlikely that a court in the state of Minnesota would not have taken the steps to ensure that the applicant understood fully the process while the police did.

[49] In view of the reasonable findings concerning the application of section 98 of the IRPA it was not necessary for the RPD to consider further subsection 109(2) of the IRPA (*Aleman v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 710). One never reaches subsection 109(2) if the person cannot claim to be a Convention refugee or a person in need of protection. That is the case by operation of section 98 of the IRPA. The consideration of whether there is sufficient evidence at the time of the first determination to justify refugee protection

simply does not arise. There was no need to consider whether being a Somalian woman is sufficient to grant refugee states as the applicant was disqualified by the operation of section 98.

[50] I should say that, had the matter been argued by counsel, I would have been tempted to conclude that establishing that a serious crime of a non-political nature is sufficient to satisfy the requirements of subsection 109(1). By definition, and through the operation of section 98, the fact that such a crime was not disclosed constitutes a material fact relating to a relevant matter: the applicant cannot be a Convention refugee or a person in need of protection. As clearly found, there cannot be other sufficient evidence at the time of the first determination because there should not have been a first determination. But more fundamentally, the applicant would have been disqualified by the operation of section 98. That disqualification, in and of itself, would result from the withholding of material facts, without having to go any further. However, the full argument was not presented to the Court and I refrain from reaching a definitive conclusion.

Error in the RPD decision

[51] The applicant argues that the RPD was wrong to state at paragraph 16 of the decision that "the respondent at the hearing testified that she had used an alias in entering Canada and had misrepresented her whereabouts and her criminality in the U.S." because the applicant, the respondent in the vacate proceedings before the RPD, did not testify that she used an alias.

[52] The respondent in these proceedings concedes that the applicant did not testify to using an alias, as this applicant claims her real name is Ubah Ibrahim Omar. The error, or misunderstanding, is understandable. After having operated under the name Laila Mohamed for

more than 13 years in the United States, the applicant would have used the name Omar when she came to Canada. Even in her Statutory Declaration made to the Canada Border Services Agency officers on May 14, 2014, the applicant presents herself as Ubah Omar, with a date of birth of January 1, 1982, but also known as Laila Mohamed, with a date of birth of January 1, 1974. That Statutory Declaration is itself confusing as she presents herself as Ubah Ibrahim Omar and denies having lived in the U.S. until she is advised that her fingerprints reveal the use of a different name. When asked for her real name, the applicant answered "Laila Mohamed", her real date of birth being January 1, 1974. There is then the final question and the answer:

> Q. Where did the name you are using now come from?
>
> A. It's just a Somalian name. To be honest, my real name is Ubah Omar. I used the Laila Mohamed name to go to the U.S. My Auntie said I was her daughter.

It is not exactly surprising that Laila Mohamed, with her criminal record, would have chosen to cross the border between the United States and Manitoba using a different name. What is the alias and what is not remain shrouded in some fog. Similarly, the applicant stated before the RPD being born in 1982, yet it is unlikely that she was born in 1982 in view of her testimony as a whole. 1974 would be more likely. However, it is too strong to say that the applicant testified that she used an alias. The transcript of the hearing before the RPD does not confirm testimony to that the effect. We only know that two names have been used by this person.

[53] However, as can be seen from the two preceding paragraphs, the acknowledged error is inconsequential. It changes nothing, or very little, to the withholding and misrepresentations made by the applicant at the time she sought refugee status in this country. The

misrepresentations about her past, including the tragedies she would have suffered in Somalia and her conviction in Minnesota, are of course much more significant.

[54] The applicant argues that the real possibility that the result was affected ought to be the test for errors of law as for errors of fact. Even if that were to be the test, which is contested by the respondent to be the appropriate test and on which I offer no view, it is clear that the proposed test cannot be met on the facts of this case. If it is true that the applicant did not testify that she used an alias, it remains that she did misrepresent much more important facts having significant probative value. It is also certainly true that this applicant has used different names and dates of birth. And then, there is the complete fabrication of more than 13 years of her life (1995 to 2009). There is nothing of consequence that can be drawn from the error about what the applicant testified to and there is no real possibility that the result was or even could have been affected.

IV. Question of general importance

[55] Counsel for the applicant suggested that there may be serious questions of general importance that would stem from this case (section 74 of the IRPA). One is whether the duty of fairness is breached because a recording or a transcript of the first RPD decision where refugee status was granted is not available.

[56] There is no statutory right to a recording or a transcript. It follows that there is a violation of the duty of fairness only if the Court cannot properly dispose of the application for review without the transcript (*Canadian Union of Public Employees*, above). Here, I am fully satisfied

that it is impossible that the applicant could have testified before the first RPD panel that not only did she suffer tragedies in Somalia between 1996 and 2009, but she was living in the U.S. at the time, even residing in an American prison for close to four years. The conflict between the two sets of events is complete and irremediable. The RPD panel would have had to explain why one version is favoured over the other. It is clear that the true version, involving residency in the U.S., was never presented by the RPD. It follows that there is no question of general importance given the facts of this case.

[57] The other proposed question is concerned with the error made by the RPD about the testimony of the applicant having testified that she used an alias. It is suggested that the question be whether the test is that there is a real possibility that the error affected the result or whether the result is reasonable absent the error. As I have found, even if the applicant's preferred test is applied to the facts of this case, there is no doubt that the error was inconsequential and that there was no real possibility it would have affected the result.

[58] In this case, these two questions never really arose because the facts of the case did not require a response. The law is clear that a transcript is mandatory only if required by statute. The thing in which the applicant was interested is whether the real story of the period 1995-2009 was before the first RPD. For the reasons given, it is impossible that it was before the Board and this Court was able to dispose of the judicial review application without a transcript showing that the matter was never raised before the first RPD. In the peculiar circumstances of this case, the question proposed does not transcend the interests of the parties (*Singh v Canada (Minister of*

Citizenship and Immigration), 2016 FCA 96). This is not a serious question of general importance.

[59] As for the second proposed question, the issue the applicant suggests be the certified question never arose. There was no need to decide on a test because it was so clear that even the more advantageous test for the applicant could not be met. That proposed question could not be dispositive of the appeal (*Lai v Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 FCA 21). As the Court of Appeal pointed out, "a certified question is not a reference of a question to this Court", which is why the question must have been dealt with by the Federal Court before it can be certified. This Court did not opine on the appropriate test. There was no need.

[60] As a result, this judicial review application must fail. No question is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the judicial review application is dismissed.

There is no serious question of general importance.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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