Federal Court  Cour fédérale

Date: 20180705

Docket: IMM-30-18

Citation: 2018 FC 688

Toronto, Ontario, July 5, 2018

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

HIBAAQ ABDULLAH ALI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review brought by the Applicant, a nineteen year old female who claims to be a citizen of Somalia. The Applicant challenges the December 11, 2017 decision [Decision] of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada, which confirmed a negative decision of the Refugee Protection Division [RPD] on the basis that the Applicant had failed to establish her identity as a Somalian citizen.

While the Applicant argues that the RAD made various errors, I accept two of them, which render the Decision unreasonable and require its reconsideration — namely, that the RAD drew its conclusions without regard to the totality of the evidence, and was microscopic with respect to the evidence it did consider.

II. Factual Background

[2] The Applicant claims to have been born in the village of Gowayne, near the city of Kismayo. She states that she is a member of the Sheikhal clan, coming from a family of goat-herders, and that she is a Sunni Muslim who follows the Sufi rites. She alleges that she cannot read or write, as she has a limited education, having attended school for only six months in an Islamic class with her sister and several boys. However, she states that her father taught her to write her name using English characters.

[3] The Applicant's claim for refugee protection in Canada is based on the following alleged events. In January 2017, five men dressed in Al-Shabaab clothing came to her family's home and accused her father of promoting prostitution by allowing his daughters to attend school. When her brothers refused to join the Al-Shabaab men in fighting against the government, the men shot her brothers and her father, and took the Applicant's sister with them. The Applicant and her mother fled, but received word that, three days after the attack, the Applicant's sister's body was left in front of their home, with a sign around her neck reading, "this happens to prostitutes".

[4] The Applicant states that she and her mother were able to sell their family's animals and, with that money, paid an agent to take the Applicant to Canada. She arrived here on February 18, 2017 and claimed refugee status.

III. Analysis

[5] The RAD's credibility findings and treatment of the evidence before it are reviewed by this Court on a standard of reasonableness (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35 [*Huruglica*]; *Majoros v Canada (Citizenship and Immigration)*, 2017 FC 667 at para 24). In other words, the Decision must be justified, transparent, and intelligible, and fall within the range of possible, acceptable outcomes, defensible in fact and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[6] Turning to the issue of identity documentation for the country in question, it is well-established that government documents in Somalia are virtually unobtainable, such that its refugee claimants must establish their identities through secondary sources.

[7] In this case, the RAD found that the RPD had based its negative identity decision on four factors: (i) the credibility of the Applicant's identity witness, (ii) the Applicant's testimony about her travel to and arrival in Canada, (iii) her testimony regarding her education, and (iv) limitations in her corroborating documents. As the RAD did not identify that the RPD had a meaningful advantage in making any of its findings, the RAD was required to review the RPD's decision on a correctness standard, based on the decisions in *Huruglica* (at para 70), and

X, Re, 2017 CarswellNat 2615 (Immigration and Refugee Board of Canada (Refugee Appeal Division) (WL Can).

[8] The RAD agreed with the Applicant that two of the RPD's findings were incorrect. First, the RAD agreed that the RPD's analysis in respect of the Applicant's travel to Canada was based on erroneous plausibility findings. The Applicant showed minimal knowledge of the name on her passport and could not provide many details regarding her travel. The RPD found that this was unreasonable and implausible, but the RAD agreed with the Applicant that it was possible that, given her youth and lack of education, her smuggler would only have provided her with limited information.

[9] Second, the RAD concluded that the RPD's findings in respect of the Applicant's education were in error. The RPD had determined, based on the Applicant's handwriting in signing her name and her demeanour during the hearing, that her claim of lacking a formal education was not credible. On appeal, the RAD agreed with the Applicant that the RPD's findings on this point were speculative and not supported in the evidence, and that the Applicant's explanation for being able to write her name using the English alphabet, namely that he father had taught her, was reasonable.

[10] At this point, I observe that — notwithstanding that the RAD in this case was required to review all of the RPD's findings on a correctness standard — it seems to me to be common sense that, where two of the RPD's four central findings were found to be seriously flawed, the RAD ought to have treated the RPD's remaining findings with heightened caution, since the RPD's

decision was already suspect. The RPD's decision was similar to a four-legged stool with two of its legs removed — only precariously upright.

[11] I now turn to the remaining findings that the RAD reviewed, one of which concerned the Applicant's failure to provide any evidence from the woman she stayed with for three months after her arrival in Canada. The RPD held that the Applicant ought to have provided something from this woman to assist her in establishing a timeline, and on appeal, the RAD agreed that it was unreasonable for the Applicant to fail to use evidence from the woman she stayed with to corroborate aspects of her testimony.

[12] I agree with the Applicant that the RAD's findings on this point cannot stand. It was the Applicant's evidence — which neither the RPD nor the RAD took issue with — that the Applicant stayed with this woman, but that the woman had no prior knowledge of the Applicant and could not therefore have assisted in establishing the Applicant's identity. Since the issue in dispute was the Applicant's Somalian citizenship, it was unreasonable for the RAD to fault the Applicant for failing to summons this individual — particularly when her evidence from an organization with expertise in Somalia and Somalians was found to be insufficient by both the RPD and RAD, for being, essentially, too remote from the Applicant. On this point I note that the reasoning in *Hadi v Canada (Citizenship and Immigration),* 2018 FC 590 [*Hadi*] (at paras 25-26) is distinguishable, as in this case the Applicant provided evidence of her identity from other sources.

[13] As a result, I do not see how evidence from the woman the Applicant stayed with could have had any bearing on the Applicant's claim. Furthermore, it is unclear what conclusion the RAD drew from the Applicant's failure to provide evidence from this woman, and whether or the extent to which this failure impacted on the Applicant's credibility. Considering that the RAD's Decision rested on only a few findings, in my view, its failure to identify the impact of the lack of evidence on this point is not reasonable. Indeed, the RAD ultimately concluded that the Applicant was neither a credible nor trustworthy witness, but failed to identify the precise basis for this finding. It is well-established in the case law that negative credibility findings must be made in "clear and unmistakable terms" (*Hilo v Canada (Minister of Employment and Immigration)*, [1991] FCJ No 228 (Federal Court of Canada – Appeal Division) at para 6).

[14] The RAD was also tasked with reviewing the RPD's findings on the Applicant's identity witness, a man who she stated knew her in Somalia. The Applicant testified before the RPD that this witness had worked at a restaurant in Kismayo, and that his father was friends with her father.

[15] Regarding the restaurant, the Applicant testified that her family used to go to Kismayo to buy clothes and food, and when they did so, they ate at the restaurant. She testified that she went to the restaurant twice a month, for about a year and half, sometimes with her father, and sometimes with her mother. She stated that her witness would not have a lot of contact with her, but that they would talk a little bit when he was serving them food. The Applicant testified with respect to the name of the restaurant, that the restaurant was in a big building made of bricks, and that it had many tables inside for people to eat.

[16] The witness, for his part, testified that the Applicant had come to the restaurant twice a month — except that he had never met the Applicant's mother. He stated "when they come with females or women at – was I was not paying a lot of attention […] I remember very well coming – when, when, when she comes with her dad 'cause her dad and my dad were friends […] I don't remember very well seeing her mom".

[17] After hearing her witness's testimony, the Applicant explained that her witness would probably not have seen her mother because "when women are together they are – in the restaurant they are put in a, in a separate, in separate room" where they were served by a woman. The Applicant further explained that when she attended at the restaurant with her father, she was permitted to sit with him because she was young.

[18] The RPD did not accept the Applicant's explanation for the witness's inability to remember if the Applicant ever attended at the restaurant with her mother. It held that the Applicant had had an opportunity to describe the restaurant and had not mentioned that there were separate rooms for men and women, and neither had her witness done so. The RPD held that, if having separate rooms was "common in Somalia", it was "reasonable to expect" that the Applicant or her witness would have provided that detail.

[19] As a result, the RPD held that the Applicant's witness did not have knowledge of the Applicant that had been acquired as a result of any prior association, and so could therefore not establish the Applicant's identity.

[20] The Applicant contested this finding before the RAD. However, the RAD upheld the RPD's findings, concluding that the Applicant had put forward "insufficient evidence to support [her] contention that the restaurant in Kismayo had separate rooms for men and women" or that "this [was] common practice in Somalia". The RAD further held that there was insufficient evidence before it to support the Applicant's position that "the absence of such evidence [could] be explained by her cultural context".

[21] I agree with the Applicant's characterization of this finding as one involving implausibility. In fact, the matter before me shares similarities with *Selvarasu v Canada (Citizenship and Immigration)*, 2015 FC 849 [*Selvarasu*], a case which also raised issues of credibility concerns surrounding identity. There, Justice Southcott found that the RPD's analysis with respect to inconsistent testimony was unreasonable:

> [31] … The RPD stated that it was not credible the applicant would not have previously known that his passport was obtained through a bribe and, given that identity is a central issue for the applicant to demonstrate, that he would not have taken steps to inform himself, once safely in Canada, about the circumstances in which his passport was obtained.
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> [32] I agree with the applicant's characterization of these statements as implausibility findings. In so finding, the RPD was speculating about what the applicant should have done or what would have been the reasonable course of action. Implausibility findings should only be made in the clearest of cases, where the facts as presented are outside the realm of what could reasonably be expected or where the documentary evidence demonstrates that that the events could not have happened in the manner asserted by the claimant (*Valtchev v Canada (MCI)*, 2001 FCT 776 at para 7). In the present case, there was no evidence that the applicant's explanation was not the truth, and such explanation cannot be characterized as outside the realm of reasonableness. Therefore, with respect, the RPD's conclusion on this point was itself unreasonable.

[22] Justice Grammond, similarly, found that the RPD had made unreasonable implausibility findings in dismissing the explanation of an unsophisticated Somali claimant (*Mohamud v Canada (Citizenship and Immigration)*, 2018 FC 170 [*Mohamud*] at para 8).

[23] In the case before me, the Applicant offered an explanation for the discrepancy between her testimony and that of her witness once it became apparent that one was needed, and this explanation was not outside of the realm of what was reasonable. Further, this Court has warned against turning a refugee claim into a memory test (*Shabab v Canada (Citizenship and Immigration)*, 2016 FC 872 at para 39, citing *Sheikh v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 568 (Federal Court of Canada – Trial Division)), or basing credibility findings on a microscopic treatment of the evidence (see *Attakora v Canada (Minister of Employment and Immigration)*, [1989] FCJ No 444 (Federal Court of Canada – Appeal Division), or scrutinizing a claimant's evidence through a Canadian lens (*Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 at para 9). I find that the RAD's analysis engages all of these errors — by faulting the Applicant for not testifying at the first instance to details which she could not have known would be critical, and for ignoring the context of the Applicant's claim, which supported her later explanation of gender segregation at the restaurant.

[24] It must be remembered that the Applicant was only eighteen at her refugee hearing. For most of the events that she was describing, she was a young girl. That she lived in a rural and unsophisticated environment, and a segregated society where she was deprived of an education on the basis of her gender, in addition to being subject to allegedly horrific events, had to all be

taken into account. The RAD paid lip service to this context, but ultimately adopted a microscopic approach to the evidence, and a Canadian lens.

[25] Finally, I agree with the Applicant that the RAD rendered its Decision without reasonably addressing all of the evidence before it. The Applicant provided positive evidence in the form of an affidavit from her mother — which the RAD mischaracterized as a letter, a letter from Midaynta Community Services, and detailed testimony about her family's life in Somalia. When making findings regarding a claimant's identity, the RAD must consider the totality of the evidence (*Yang v Canada (Citizenship and Immigration)*, 2009 FC 681 at para 6).

[26] I am well aware of the jurisprudence stating that deference is owed to the RPD's and RAD's identity determinations (*Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 at para 48). These principles were recently applied in *Hadi*, where this Court upheld the RPD's decision to fault the applicant for failing to call supporting witnesses, and for having a dearth of any supporting documentation. However, the contextual backdrop in this judicial review differs from *Hadi*'s in significant ways, including the nature of the refugee claim, the alleged profile of the Applicant (including age), the circumstances of her flight from Somalia, and the evidence she did offer before the RPD. Thus, I find this case to be distinguishable from *Hadi*. Rather, the analysis in this case discloses errors that are similar to those outlined in *Selvarasu* and *Mohamud*, and the Decision is therefore similarly, fatally flawed.

IV. Conclusion

[27] This application is allowed. No questions for certification were argued, and given the fact-based nature of this application, I agree that none arise.

JUDGMENT in IMM-30-18

THIS COURT'S JUDGMENT is that

1. This application for judicial review is granted.

2. The matter is remitted to the RAD for redetermination by a differently constituted panel.

3. No question for certification was argued, and none arose.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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