Federal Court  Cour fédérale

Date: 20181128

Docket: IMM-2685-18

Citation: 2018 FC 1193

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Montréal, Quebec, November 28, 2018

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

SAHAL NACIM ABDOURAHMAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 (IRPA) of a decision rendered by a senior immigration officer (the officer) with Immigration, Refugees and Citizenship Canada (IRCC), dated October 31, 2017, rejecting a pre-removal risk assessment (PRRA) application.

II. Facts

[2] The applicant, aged 71 years old, was born in Somalia and is a citizen of Djibouti, a country where she lived for almost half her life.

[3] The applicant provided an account of a life replete with hardships and challenges that she says she wants to put behind her by moving to Canada. She was born in Somalia, but has never returned to that country since she was forced to leave for Djibouti at the age of 12.

[4] The applicant claims that she is a member of the Madhiban tribe, a minority that the rest of the population consider to be inferior and with whom any and all association is considered to be shameful. Nevertheless, she met a man who married her despite her Madhiban origins, even though he was a member of the Gadabuursi Haban Hafan tribe (on his father's side) and the Issa Mamassan tribe (on his mother's side). However, the couple allegedly decided to hide the applicant's ethnic origin in order to avoid reprisals from her husband's family.

[5] After the birth of her fourth child, Omar, born with a trisonomy disorder in 1980, the applicant's in-laws learned that she was from the Madhiban tribe. Even though she was pregnant, her husband allegedly immediately left her and her in-laws allegedly beat, assaulted, insulted and abused her, and also threatened to kill her. Her in-laws reportedly seized her three older children, leaving the applicant alone with Omar, and also took her fifth child away from her after she gave birth.

[6] The applicant indicated that she found refuge with the Moussa family, a family she had worked for before getting married. However, her in-laws allegedly continued to abuse her, which prompted her to leave Djibouti for Yemen with the help of a friend. She therefore left for Yemen with her son Omar, and worked there as a housekeeper for 30 years.

[7] Unfortunately, misfortune struck the applicant once again, when an air raid allegedly killed her son Omar and destroyed her employers' home, which is where she had lived. With nothing left for her in Yemen, she reportedly decided to return to Djibouti, where she was received by the Moussa children, who were now adults.

[8] When the applicant's in-laws caught wind of her return to Djibouti, they once again targeted her, made death threats against her and even went so far as to attack her in the Moussas' home, leaving her unconscious. She allegedly reported the attack to the police, who mocked her and refused to listen to her or to produce a report of the assault, due to her Madhiban origins.

[9] This incident allegedly motivated the applicant to leave Djibouti on August 29, 2016; she first travelled to the United States, and arrived there on August 30, 2016, and she then travelled to the Canadian border on September 2, 2016, where she applied for asylum. Her initial application was denied because she had already applied for asylum in the United States. She entered Canada illegally on April 9, 2017, with the intention of joining her niece. The applicant filed a second application for asylum, which was also rejected automatically in April 2017. However, she was offered an opportunity to apply for a PRRA, and she took advantage of that opportunity.

III. The officer's decision

[10] The officer rejected the PRRA application on October 31, 2017.

[11] According to the officer, the applicant had not established that she would be subject to risk of persecution, danger of torture, risk to life or risk of cruel and unusual treatment or punishment if she was removed to Djibouti. The lack of evidence to corroborate the applicant's allegations was a determinative factor for the officer, who stressed that the applicant did not provide any documentation or testimony from a third party concerning:

- The loss of her family members in Somalia;
- The birth of her five (5) children as well as her separation or her divorce;
- Her thirty (30) year stay in Yemen;
- Her return to Djibouti;
- The fact that her in-laws allegedly disowned her, then assaulted her or even the existence of her attackers;
- The fact that she was a victim of persecution, discrimination or death threats, due to her marriage or due to discrimination based on her ethnicity;
- The State's inability to ensure her protection; on the contrary, the officer interpreted the applicant's travels between Djibouti and other countries as proof that the State did not discriminate against the applicant.

[12] The officer also deemed that the applicant, who had never lived alone, would be able to find somewhere to live with someone else and that therefore, she would not be subjected to the type of persecution that targeted single women in Djibouti.

[13] Lastly, the officer concluded that the applicant did not demonstrate, in a clear and convincing manner, that the State was unable to protect her.

IV. Issues

[14] The Court rephrased the applicant's questions as follows:

1) Does the applicant have to provide evidence in support of her affidavit?

2) Did the senior immigration officer render a reasonable decision?

[15] An officer's decision to reject a PRRA is reviewed by this Court against the standard of reasonableness (*Nhengu v Canada (Citizenship and Immigration)*, 2018 FC 913 at para. 5 [*Nhengu*]). This Court must therefore show deference and will intervene only if the officer's decision lacks justification, transparency and intelligibility or if the conclusion reached by the decision-maker falls outside the range of "possible, acceptable outcomes which are defensible in respect of the facts and law." (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para. 47).

V. Relevant Provisions

[16] The following provisions of the IRPA are relevant:

Humanitarian and compassionate considerations — request of foreign national	**Séjour pour motif d'ordre humanitaire à la demande de l'étranger**
25 (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and	**25** (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —,

may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.

soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

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 themself 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.

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.

Person in need of protection

Personne à protéger

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 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 themself 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.

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 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.

Application for protection

112 (1) A person in Canada,

Demande de protection

112 (1) La personne se

other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1).	trouvant au Canada et qui n'est pas visée au paragraphe 115(1) peut, conformément aux règlements, demander la protection au ministre si elle est visée par une mesure de renvoi ayant pris effet ou nommée au certificat visé au paragraphe 77(1).

VI. Analysis

A. *Is the applicant required to provide evidence in support of her affidavit?*

[17] In addition to her affidavit, the applicant also provided the following evidence: her birth certificate, her marriage certificate, her passport and an expert report establishing that she is a member of the Madhiban tribe. The officer indicated that he accepted the findings of the expert, but also concluded that the applicant should have provided additional evidence.

[18] According to the applicant, the officer must presume that testimony is truthful unless there is reason to doubt the testimony (*Maldonado v Canada (Minister of Citizenship and Immigration)*, [1980] 2 FC 302 at para. 5 [*Maldonado*] and *Conka v Canada (Citizenship and Immigration)*, 2018 FC 532 at para. 23). Moreover, since the officer did not cast any doubt on the applicant's credibility, the applicant believes that the officer should consider her comments as being truthful.

[19] The respondent claims that the presumption of truthfulness may be refuted if the officer could have expected certain evidence to have been corroborated by documentation and this corroborating documentation was not provided (*Adu v Canada (Minister of Employment and*

Immigration), [1995] FCJ No 114 (FCA) at para. 2 and *Haji v Canada (Citizenship and Immigration)*, 2009 FC 889 at paras. 8-10). The respondent maintains that in this case, the presumption can be refuted.

[20] In the decision rendered in *Nhengu*, supra, The Honourable Justice René L. LeBlanc aptly describes how case law manages to strike the right balance between applicants' obligation to advance the best possible arguments, while allowing applicants to justify why they were unable to provide certain key evidence:

> [9] In this context, the Minister's officer called upon to rule on a PRRA application has the right to expect, at least with respect to the crucial aspects of the application, that evidence other than solely the PRRA applicant's claims be provided with a view to determining whether the burden of proof borne by the latter has been met (*Ferguson* at paragraph 32; *Kioko* at paragraph 49). In other words, where such evidence exists or where it is not unreasonable to expect the applicant to have obtained it, the Minister's officer may consider the absence of this evidence in assessing the weight and probative value of the claims of risk cited in support of the PRRA application, unless the applicant has provided a satisfactory explanation of the reasons for the absence of this evidence in the application.

[21] With respect to the documents that the officer expected to receive as evidence, the applicant claims that they were not essential to her application. Since her PRRA application was based on the fact that she would face persecution if she returned to Djibouti, because she is a member of the Madhiban tribe and because she is a single woman, she contends that any evidence provided should be to support these particular claims. As the applicant points out, the officer accepted the expert evidence indicating that she was a member of the Madhiban tribe.

[22] In this case, it seems unrealistic to demand certain documents that the officer considers to be missing. For example, the applicant indicated that she had had to leave all the documents behind when her husband chased her out of the family home. The same was true of all the documents that had been in her possession at the residence where she lived in Yemen and which were destroyed during an air raid. With respect to documents relating to her childhood in Somalia, the applicant had stated that she did not have any document from that period given that Somalia has a failed – even non-existent – public administration.

[23] With respect to certain documents, such as those confirming her divorce or the birth of her children, the applicant provided satisfactory explanations. Consequently, since the officer did not cast any doubt on the applicant's credibility, she should benefit from the presumption of truthfulness (*Maldonado*, supra); therefore, the officer should have assumed the facts, as described by the applicant, to be true.

B. *Did the senior immigration officer render a reasonable decision?*

[24] The applicant claims that she is at risk of being persecuted if she is forced to return to Djibouti or to Somalia. The officer determined that there was no need to conduct a PRRA for Somalia [TRANSLATION] "since the applicant was not being required to return to the country of her birth, a country that she left in 1959." The Court agrees with the officer on this point.

[25] The type of persecution that the applicant indicates that she will face in Djibouti is linked to two of her personal characteristics, i.e., her ethnic origin and her status as a single woman.

[26] With respect to the applicant's ethnic origins, the officer confirmed that the expert report, demonstrating that the applicant is from the Madhiban tribe, was accepted. However, the officer refused to believe that the applicant had been persecuted and that she would still be persecuted if she returned to Djibouti, due to her affiliation to this tribe. This finding is surprising for two reasons. First, the officer did not question the applicant's credibility. Second, the officer made reference to documents provided by the applicant, which explain that members of the Madhiban tribe are considered inferior to other tribes and that any and all association with them is considered to be shameful (Please refer to the details in the expert report, to the chaotic situation in Somalia, as well as to the precarious situation of the Madhiban tribe in Djibouti based on evidence demonstrating the conditions in the country). Given the Court's earlier conclusion that the applicant benefits from the presumption of truthfulness, the officer's finding that the applicant will not be persecuted by her in-laws seems unreasonable.

[27] The officer was also required to establish whether the applicant was at risk of being persecuted by society as a single woman in Djibouti. The officer determined that the applicant would be able to find someone to live with in Djibouti because she had always been able to do so in the past. The officer drew this conclusion based on the applicant's past experience, without questioning whether this inference would hold water given the applicant's current age. While it is true that she was always able to offer her services working as a servant or a housekeeper, the last time she was required to resort to such an undertaking dates back to the early 1980s. Therefore, this inference was not reasonable. Consequently, the officer should have analyzed the risks for a single woman in Djibouti, but failed to do so.

[28] The officer also concluded that the applicant did not discharge her burden of demonstrating that the State would be unable to protect her. However, the applicant stated that when she reported the attack that she suffered at the hands of her in-laws, the police did not help her because she is a member of the Madhiban tribe. For all the above reasons, the senior immigration officer's decision is unreasonable.

VII. Conclusion

[29] For the above reasons, this application for judicial review is allowed.

JUDGMENT in docket IMM-2685-18

THE COURT ORDERS AND ADJUDGES THAT the application for judicial review is granted. The decision is set aside and the file shall be referred back to another senior immigration officer for reconsideration. There is no question of general importance to be certified. The style of cause is amended in order to reflect the correct respondent, i.e., the Minister of Citizenship and Immigration.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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