

Federal Court



Cour fédérale

Date: 20120816

Docket: IMM-404-12

Citation: 2012 FC 999

Ottawa, Ontario, August 16, 2012

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

ADEN MAHARI

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Ms. Aden Mahari, the Applicant, applies for judicial review of the December 14, 2011 decision of the Refugee Protection Division of the Immigration and Refugee Board (RPD) refusing her claim for refugee protection pursuant to section 96 and subsection 97(1) of the Act.

[2] The RPD refused the Applicant's claim on the basis of negative credibility findings against the Applicant and insufficient evidence establishing that the Applicant was persecuted in Eritrea.

[3] The Applicant submits the RPD ignored the psychiatric medical evidence, erred in finding her failure to claim refugee status in South Africa undermined her credibility, erred in drawing a negative inference about her being a Pentecostal Christian, and erred in finding she faced a generalized risk in Eritrea rather than a personalized risk.

Background

[4] The Applicant is a citizen of Eritrea. She entered Canada as Aden Mahari in April 2009. However, on September 20, 2010, Canada Border Services Agency provided a biometric match for the Applicant under Aden Mehari Ghebreyesus. The Applicant is also documented as Eden Mehari.

[5] She claims a fear of persecution if deported to Eritrea on the basis of religion and as a failed asylum seeker. She says she is of Pentecostal faith. Her third common-law spouse has been arrested in Eritrea for his religious beliefs and she left Eritrea following that incident.

[6] The Applicant has a history of mental illness. Due to years as a victim of violence and abuse, she suffers from symptoms consistent with major depressive disorder, such as poor sleep, appetite, energy and concentration and memory difficulties. The Applicant was receiving treatment 20 years ago when she took antidepressant medication. However, she stopped after ten days and turned to religion as a source of healing.

[7] She left Eritrea for Sudan and South Africa. She stayed in South Africa for four months where she worked with a temporary permit. The Applicant testified that she had not applied for

refugee status in South Africa since she believed that there was no such thing in that country. However, she later explained that she could not obtain a replacement passport from the Eritrean Embassy since she had applied for refugee status in South Africa. There is no documentary evidence of such an application. Eventually, the Applicant paid an agent to provide the documents for her travel from South Africa to Canada.

[8] There are numerous inconsistencies between the information in the Applicant's Personal Information Form (PIF) and the information provided during her testimony before the RPD. During the hearing before the RPD, doubts were raised with regard to the Applicant's identity, refugee claim history and the information in the PIF.

[9] Most notably, the Applicant provided an incorrect date of birth and hid the fact that she had been denied a visa for the United States. Following the Respondent's disclosure of a biometric match, the Applicant provided an amended PIF. When asked about the contradictions in her PIF and testimony, the Applicant testified she could either not remember that she had provided such information or she had been afraid to disclose information.

Decision Under Review

[10] As a preliminary matter, the RPD Member considered and refused the Applicant's recusal application made following the Member's refusal to answer the question regarding participation in the selection process of decision makers of the new Division under the *Balanced Refugee Reform Act* (the Test). The RPD dismissed the Applicant's application for recusal for lack of evidence, stating that the application was only based on pure speculation.

[11] The RPD dismissed the Applicant's claim for refugee protection essentially on negative credibility findings. As such, the RPD dismissed the Applicant's claim under sections 96 and 97.

[12] After a lengthy discussion regarding the Applicant's identity, the RPD accepted the Applicant's Eritrean Identity card, confirmed by information from the Minister. The RPD also accepted that the Applicant was an Eritrean national. Nonetheless, the RPD described the Applicant's failure to disclose her alias as an attempt to obscure her true identity.

[13] The RPD gave little probative value to the Applicant's amended PIF. The RPD noted that the Applicant had failed to sign the amended pages as required by the RPD Rules and noted that the Applicant could not recall the amended documents.

Relevant Legislation

[14] The *Immigration and Refugee Protection Act*, SC 2001, c 27 provides:

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

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) 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.

...

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 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

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.

...

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

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

Issues

[15] Three issues arise in this case:

1. Did the RPD err by refusing the application for recusal?
2. Did the RPD err in its credibility findings and assessment of the evidence?
3. Did the RPD err by finding that the Applicant did not face a personalized risk under section 97?

Standard of Review

[16] The Supreme Court of Canada held in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 that there are only two standards of review: correctness for questions of law and reasonableness involving questions of mixed fact and law and fact. The Supreme Court also held that where the standard of review has been previously determined, a standard of review analysis need not be repeated.

[17] Findings as to credibility and weighing of the evidence made by the RPD are subject to deference. As such, a standard of reasonableness will apply. *Aguebor v Canada (Minister of Employment and Immigration)*, 160 NR 315, [1993] FCJ 732 (FCA). Courts will only intervene if

the Officer's decision was based on an erroneous finding of fact made in a perverse or capricious manner or a decision that was made without regard to the material before it. *Ventura v Canada (Minister of Citizenship and Immigration)*, 2012 FC 463 at para 25.

Analysis

1. Did the RPD err by refusing the application for recusal?

[18] The Applicant relied on media reports that revealed a high failure rate among current RPD Members regarding the Test. The Applicant criticizes the Member's refusal to answer the Applicant's question as to whether the Member took the Test. The Member refused to answer, stating that the question is irrelevant to the matter at bar. The Applicant believed otherwise and submits that the Member should have recused himself based on this refusal. The Applicant does not provide any legal authorities to support this argument.

[19] The RPD did not err in refusing the application for recusal. In *Gillani v Canada (Minister of Citizenship and Immigration)*, 2012 FC 533 [*Gillani*], counsel raised the argument to the effect that there was a reasonable apprehension of bias and institutional incompetence for failure to disclose whether or not the Member had failed the Test. This argument was rejected by the Court on the basis of lack of evidence and factual basis, stating the argument was based on speculation and was farfetched. The Applicant's assertion here rests on similar speculation. As this argument is thus the same as in *Gillani*, I dismiss it on the same grounds.

2. *Did the RPD err in its credibility findings and assessment of the evidence?*

[20] The Applicant criticizes the RPD for basing its negative credibility findings on the confusion surrounding the Applicant's identity which the Applicant states the RPD established notwithstanding the confusion.

[21] The Applicant also submits that the RPD failed to take into account the Applicant's psychiatric assessment in its consideration of the Applicant's difficulties during her oral testimony. According to the Applicant, that assessment revealed that the Applicant suffered from symptoms consistent with major depressive disorder, leading to poor energy and concentration and memory lapses. As such, the Applicant argues that the RPD erred in making negative credibility findings against the Applicant without due consideration of this psychiatric assessment.

[22] The Applicant further submits that the RPD erred by finding that the Applicant's failure to claim refugee status in South Africa undermined the veracity of her refugee claim. The Applicant states there is no requirement that a refugee seek protection in the country nearest to her home, or even in the first state to which she flees.

[23] Finally, the Applicant submits that the RPD erred in its assessment of her religious belief. The Applicant argues that the RPD erred by drawing a negative inference from the lack of corroborating evidence with regard to the Applicant's faith.

[24] The RPD's credibility findings are to be afforded deference. Such findings are unreasonable only when they are made without regard to evidence before it. In the matter at bar, the RPD made

negative credibility findings on the basis of what it considered the Applicant's intent to deceive. The Applicant did not disclose her aliases and only did so when confronted with the biometric evidence.

[25] While the Applicant argued that the memory lapses were explained by her medical condition, the Applicant's inconsistencies go beyond that of memory difficulties. The Applicant's evidence contained multiple contradictions between her oral testimony and PIF. The RPD reasonably recognized that psychiatric reports were not a "cure-all" for the multiple deficiencies in the Applicant's testimony. In *CAN v Canada (Minister of Citizenship and Immigration)*, 2011 FC 822, the Court found that it was appropriate for the RPD to assess psychological and social services evidence in light of its earlier negative credibility findings.

[26] The RPD did more than simply consider the psychiatric report. The RPD acknowledged the contents of the report, but doubted its probative value considering the issues surrounding the Applicant's credibility. The RPD is entitled to decide to give little weight to the psychiatric report, considering its negative credibility findings.

[27] The RPD also did not err when it further doubted the Applicant's credibility following her failure to claim at the first opportunity in South Africa. In *Gavryushenko v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 1209, Associate Chief Justice Lutfy's (as he then was) stated:

The fact that a person does not seize the first opportunity of claiming refugee status in a signatory country may be a relevant factor in assessing his or her credibility, but it does not thereby constitute a waiver of his or her right to claim that status in another country.
[Emphasis added]

Accordingly, I find the RPD may consider the Applicant's failure to claim refugee status in South Africa in assessing her credibility.

[28] Contrary to the Applicant's assertion, the RPD did not dismiss the Applicant's faith through the lack of corroborating evidence. It is the RPD's role to assess and weigh contradictory evidence. The RPD acknowledged the letter from the Eritrean Movement for Democracy and Human Rights saying the Applicant is a follower of the Pentecostal faith. However, the RPD gave the letter little probative value considering the Applicant's inability when testifying to recall the name of the church she allegedly attended in Toronto. In doing so, the RPD was weighing contradictory evidence. I see no error in the RPD's assessment giving little weight to the letter.

3. *Did the RPD err by finding that the risk faced by the Applicant is a generalized risk, not personalized under section 97?*

[29] The Applicant submits that she will suffer a personalized risk upon return to Eritrea. She explains she faces personalized risk due to her faith and her status as a returning asylum seeker. Moreover, she states that the RPD erred by finding that personalized risk and generalized risk are mutually exclusive.

[30] The RPD found, considering its negative credibility findings and the little weight given to the Applicant's evidence, there was insufficient evidence to establish personalized risk in the Applicant's situation.

[31] The RPD relied on *Prophète v Canada (Minister of Citizenship and Immigration)*, 2008 FC 331 to conclude that while it acknowledged that the situation in Eritrea is dire, there was insufficient evidence to link the systemic and generalized violation of human rights in Eritrea to the Applicant's specific circumstances.

[32] I find the RPD's determination of generalized risk as opposed to personalized risk to the Applicant to be reasonable.

[33] Neither party submitted a question of general importance for certification.

Conclusion

[34] While it is acknowledged that the Applicant does suffer from the consequence of a major depressive disorder, it was reasonable for the RPD to rely on the Applicant's multiple inconsistencies with regard to her identity, to her contradictory explanation about her sojourn in South Africa, and her failure to identify the Pentecostal Church she attended to find the Applicant as not credible. These inconsistencies go well beyond those related to memory lapses. It is the Applicant herself who undermined her credibility.

[35] In result, I find the RPD's negative credibility findings reasonable. The application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. No question of general importance is certified.

“Leonard S. Mandamin”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-404-11

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**REASONS FOR JUDGMENT
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APPEARANCES:

Aurina Chatterji

FOR THE APPLICANT

Brad Gotkin

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Max Berger Professional Law
Barristers and Solicitors
Toronto, Ontario

FOR THE APPLICANT

Myles J. Kirvan
Deputy Attorney General of Canada
Toronto, Ontario

FOR THE RESPONDENT