

Federal Court



Cour fédérale

Date: 20151211

Docket: IMM-938-15

Citation: 2015 FC 1379

Ottawa, Ontario, December 11, 2015

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

ZAMZAM HAROUB MOHAMED

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Zamzam Haroub Mohamed has brought an application for judicial review of a decision of the Refugee Protection Division [RPD] of the Immigration and Refugee Board. The RPD found that Ms. Mohamed is not a Convention refugee under s 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA], nor a person in need of protection as defined by s 97 of the IRPA.

[2] For the reasons that follow, I have concluded that the RPD reasonably rejected Ms. Mohamed's claim based on the lack of credibility and plausibility of many aspects of her story, and the insufficiency of evidence to establish her identity. The application for judicial review is therefore dismissed.

II. Background

[3] Ms. Mohamed is a person of undetermined citizenship. Her claim for refugee protection was based upon the following assertions.

[4] Ms. Mohamed claims to be 34 years old and a citizen of Somalia. She says that she is a member of the Bajuni clan, the traditional people who live in the coastal areas of southern Somalia. According to Ms. Mohamed, she spent her entire life on the island of Chula where she married and had three children. She never attended school, but studied the Qur'an. Ms. Mohamed speaks only Kibajuni, the traditional language of the Bajuni.

[5] On July 7, 2014, Ms. Mohamed and her family fled from their homes because of an attack by al Shabaab, an al Qaeda affiliate in Somalia. They travelled by boat to Mombasa, Kenya. Once there, the leader of the Bajuni community arranged for Ms. Mohamed to be smuggled to Canada using a fraudulent British passport. Ms. Mohamed left her husband and children behind in Mombasa.

[6] Ms. Mohamed departed Mombasa on September 24, 2014, and travelled by plane to Addis Ababa, Ethiopia. An English-speaking Bajuni woman named Nyabwana escorted her.

They arrived together in Toronto on September 25, 2014. Ms. Mohamed made a claim for refugee protection on October 22, 2014.

[7] In a decision dated January 22, 2015, the RPD denied Ms. Mohamed's request for refugee protection on the ground that there was no credible basis for her claim.

[8] Ms. Mohamed did not submit any documents to establish her identity before the RPD. She said that she did not have a birth certificate because she was not born in a hospital. The RPD acknowledged that Somalia has not had a functioning government since 1991, and did not draw an adverse inference from Ms. Mohamed's inability to provide official documents to prove her identity. However, the RPD made several adverse findings regarding the plausibility and credibility of Ms. Mohamed's story.

[9] Halima Timamy was called as a witness to prove Ms. Mohamed's identity. Ms. Mohamed initially claimed that they had met at a wedding in Somalia in 1999. Ms. Timamy testified that Ms. Mohamed had attended the wedding in Somalia, but later admitted that she could not recall seeing Ms. Mohamed there. According to Ms. Mohamed and Ms. Timamy, they met in Canada when they encountered each other by chance at a Shoppers Drug Mart in Toronto and were introduced by a mutual friend. The RPD found it highly improbable that two members of the minority Bajuni community would meet each other in Toronto by chance.

[10] The RPD concluded that Ms. Timamy was not a credible witness, and that she had been presented to the panel in order to mislead it. The RPD drew a negative inference from inconsistencies in Ms. Mohamed's and Ms. Timamy's testimony regarding when and how they

met in Toronto. The RPD also found that Ms. Timamy had little knowledge of Ms. Mohamed's past life in Somalia and Kenya. Although she demonstrated some knowledge of Ms. Mohamed's family, the RPD found that it "defied common sense" that Ms. Timamy would have so little knowledge of Ms. Mohamed's background or the reasons why she had fled Somalia, given that they had spoken on numerous occasions.

[11] The RPD rejected Ms. Mohamed's credibility based upon the implausibility of many of her assertions. Ms. Mohamed testified that she flew directly from Addis Ababa to Toronto without stopping. But in her Schedule 12 Form, she stated that the flight had stopped in Rome, Italy. When questioned about this discrepancy, Ms. Mohamed testified that her plane had stopped but she could not remember where. The RPD reasoned that Ms. Mohamed's first trip abroad would have been a "memorable experience", and it was implausible that she could not recall that her plane had stopped in Rome.

[12] The RPD also found it implausible that Ms. Mohamed did not know the name that appeared on her fraudulent passport. According to the RPD, common sense dictated that a smuggler would ensure that Ms. Mohamed had memorized the name on her fraudulent passport. Ms. Mohamed testified that she did not speak to any border officials when she arrived in Canada because she could not speak English and her escort spoke on her behalf. The RPD found it implausible that the authorities would not ask her a single question upon her entry into Canada.

[13] Finally, the RPD found that Ms. Mohamed did not have the demeanour of someone who lacked education. She was able to provide the exact birth dates of her husband and children based on the Gregorian calendar, and the exact date of her mother's death. The RPD also noted

that Ms. Mohamed had used a “stylized cursive signature” a total of 16 times on her application forms. The RPD found that her signature was not “the work of someone who was learning to sign their name for the first time in their life”, and did not accept her explanation that she had practiced her signature upon arrival in Canada.

[14] The RPD found that Ms. Mohamed had failed to establish her personal or national identity. Because she was unable to establish her identity, the RPD determined there was no credible basis for Ms. Mohamed’s claim.

III. Issues

[15] This application for judicial review raises the following issues:

- A. Is affidavit evidence that was not before the RPD admissible in these proceedings?
- B. Did the RPD breach Ms. Mohamed’s right to procedural fairness?
- C. Were the RPD’s implausibility findings reasonable?

IV. Applicable Legislative Provisions

[16] Section 106 of the IRPA provides as follows:

The Refugee Protection Division must take into account, with respect to the credibility of a claimant, whether the claimant possesses acceptable documentation establishing identity, and if

La Section de la protection des réfugiés prend en compte, s’agissant de crédibilité, le fait que, n’étant pas muni de papiers d’identité acceptables, le demandeur ne peut raisonnablement en justifier la

not, whether they have provided a reasonable explanation for the lack of documentation or have taken reasonable steps to obtain the documentation.

raison et n'a pas pris les mesures voulues pour s'en procurer.

[17] Section 11 of the *Refugee Protection Division Rules*, SOR/2012-256 states that:

The claimant must provide acceptable documents establishing their identity and other elements of the claim. A claimant who does not provide acceptable documents must explain why they did not provide the documents and what steps they took to obtain them.

Le demandeur d'asile transmet des documents acceptables qui permettent d'établir son identité et les autres éléments de sa demande d'asile. S'il ne peut le faire, il en donne la raison et indique quelles mesures il a prises pour se procurer de tels documents.

V. Analysis

A. *Is affidavit evidence that was not before the RPD admissible in these proceedings?*

[18] In support of her application for judicial review, Ms. Mohammed submitted her own affidavit which purported to provide an explanation for why she was able to recall specific dates based on the Gregorian calendar, and why she used a consistent, stylized signature on 16 different occasions. This evidence was intended to respond to a number of the RPD's concerns regarding her credibility.

[19] As a general rule, the evidentiary record before the Court in an application for judicial review is restricted to the evidentiary record that was before the decision-maker (*Association of*

Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright), 2012 FCA 22 [*Association of Universities and Colleges*] at para 19). There are a few recognized exceptions to the general rule, and the list of exceptions may not be closed (*Association of Universities and Colleges* at para 20). The only recognized exception that might apply in this case is evidence that is necessary to bring to the attention of the Court procedural defects that cannot be found in the record of the decision-maker.

[20] Ms. Mohamed argues that her affidavit is necessary to establish a breach of procedural fairness. However, there is nothing to suggest that she could not have provided the explanations offered in her affidavit to the RPD during the hearing. She was represented by counsel. It was incumbent upon Ms. Mohamed to provide any necessary explanations to the RPD. For reasons that I discuss in greater detail below, I am satisfied that she was given a reasonable opportunity to do so, and accordingly her affidavit is not admissible in these proceedings.

B. *Did the RPD breach Ms. Mohamed's right to procedural fairness?*

[21] The RPD is under a general duty to confront claimants with inconsistencies in their evidence, and to give them an opportunity to respond (*Westres Torres v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 212 at para 5, citing *Guo v Canada (Minister of Citizenship and Immigration)*, [1996] FCJ No 1185, 65 ACWS (3d) 991). Whether the RPD must explicitly put the inconsistency to the claimant will depend on the facts of each case (*Ongeldinov v Canada (Minister of Citizenship and Immigration)*, 2012 FC 656 at para 21).

[22] Ms. Mohamed says she was not given an opportunity to respond to the RPD's concern that the style of her signature was not that of a person who was learning to sign her name for the first time. However, the transcript of the hearing confirms that the RPD asked Ms. Mohamed whether she had ever written anything with a pen and paper before, whether she could write in Bajuni, how she had come up with her signature, and whether she had ever used it before she arrived in Canada. These questions provided Ms. Mohamed with ample opportunity to explain that she had diligently practiced her signature upon her arrival in Canada, if that was the explanation she wished to provide.

[23] It is true that the RPD did not explicitly confront Ms. Mohamed regarding her ability to recall numerous dates using the Gregorian calendar. In its decision, the RPD observed that the Islamic calendar is typically used in rural parts of Somalia. In the affidavit that she filed in these proceedings, which I have found to be inadmissible, Ms. Mohamed says that, on the advice of the Bajuni community, she memorized all the dates of her family members' birthdays before leaving for Canada.

[24] I am not prepared to find that the RPD breached Ms. Mohamed's right to procedural fairness by failing to explicitly ask her why she was able to recall dates using the Gregorian calendar. The RPD is not obliged to confront a claimant with each of its credibility concerns (*Gougoushvili (Litigation Guardian of) v Canada*, 2013 FC 1214 at para 23). Ms. Mohamed was aware that her credibility and alleged lack of education were central to her claim, and that these matters would inevitably be the focus of the RPD's decision.

C. *Were the RPD's implausibility findings reasonable?*

[25] The RPD is entitled to consider plausibility, common sense and rationality when assessing a refugee claim (*Ye v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1221 at para 29). Findings of implausibility and credibility are owed a high level of deference, and are reviewable by this Court against the standard of reasonableness (*Wu v Canada (Minister of Citizenship and Immigration)*, 2009 FC 929 at para 17).

[26] As Justice Décarý held in *Aguebor v Canada (Minister of Citizenship and Immigration)* (1993), 160 NR 315 at para 4, “[t]here is no longer any doubt that the Refugee Division, which is a specialized tribunal, has complete jurisdiction to determine the plausibility of testimony ... As long as the inferences drawn by the tribunal are not so unreasonable as to warrant our intervention, its findings are not open to judicial review”.

[27] I acknowledge Justice Gleason’s caution in *Aguilar Zacarias v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1155 at para 10 that “plausibility determinations are best limited to situations where events are clearly unlikely to have occurred in the manner asserted, based on common sense or the evidentiary record”. The RPD’s findings of implausibility must be reasonably drawn and must be set out in “clear and unmistakable terms” (*Lubana v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 at para 9).

[28] Ms. Mohamed takes issue with three implausibility findings made by the RPD. She relies on this Court’s decision in *Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 (FC) at para 9, [2001] FCJ No 1131, and argues that implausibility findings should be

made only in “the clearest of cases”. They should not be based on a Canadian perspective of what is plausible.

[29] First, Ms. Mohamed takes issue with the RPD’s finding that it was implausible that officers with the Canada Border Services Agency [CBSA] did not ask her a single question upon her entry to Canada. She also disputes the RPD’s finding that it was implausible that a person travelling under a fraudulent British passport would not know the full name they had adopted. I disagree. It was reasonable for the RPD to assume that CBSA officers would question Ms. Mohamed upon her arrival in Canada, particularly given that she was travelling under a passport issued by an English-speaking country. I agree with the RPD that a person travelling on a fraudulent passport would make an effort to learn the name that appeared on the document.

[30] Second, Ms. Mohamed disputes the RPD’s finding that it was implausible that she would not remember that her plane landed in Rome when she travelled from Ethiopia to Canada, even though she did not disembark. The RPD rejected her story not only because it assumed that her first trip abroad would be a “memorable experience”, but also because of the inconsistency between what Ms. Mohamed stated in her Schedule 12 Form and her testimony at the hearing. There was a clear evidentiary basis for the RPD’s adverse finding of credibility on this point.

[31] Third, Ms. Mohamed takes issue with the RPD’s finding that it was implausible that she would meet Ms. Timamy by chance in Toronto. She also says that the RPD’s assumption about what two Bajuni women might discuss was based on a Canadian notion of plausibility. Again, the RPD’s rejection of Ms. Timamy’s testimony was based on numerous factors, only one of which was her inability to provide details of Ms. Mohamed’s past life in Somalia and Kenya.

[32] It is noteworthy that Ms. Mohamed has not challenged the RPD's most important adverse credibility finding. Ms. Timamy initially testified that she had first met Ms. Mohamed at a wedding in Somalia, but later admitted that this was not true. The RPD's conclusion that Ms. Timamy had been presented to the panel in order to mislead it was extremely damaging not only to Ms. Timamy's credibility, but also to Ms. Mohamed's.

[33] Pursuant to s 106 of the IRPA, Ms. Mohamed had the burden to establish her claim. In the words of Justice Snider, "it is up to the claimant to produce acceptable documentation establishing his or her identity. This is a high burden, as it should be" (*Su v Canada (Minister of Citizenship and Immigration)*, 2012 FC 743 at para 4). The establishment of a claimant's identity is central to any claim for refugee protection. The RPD is therefore entitled to draw an adverse credibility finding from the claimant's failure to establish her identity (*Keita v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1115 at para 21).

[34] The only evidence before the RPD that supported Ms. Mohamed's identity as a citizen of Somalia was her ability to speak Bajuni. However, country documentation confirmed that citizens of Kenya also speak Bajuni. Ms. Mohamed was not able to speak Somali, so she could not establish her identity on this basis. Finally, the only evidence offered by Ms. Mohamed to show that she had made efforts to obtain documentation was that she had asked her husband for a copy of their marriage certificate. This was not forthcoming.

[35] It was reasonably open to the RPD to reject Ms. Mohamed's claim based on the lack of credibility and plausibility of many aspects of her story, and the insufficiency of her evidence to

establish her identity. I am satisfied that the RPD's decision falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law.

JUDGMENT

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

No question is certified for appeal.

"Simon Fothergill"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-938-15

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