

Federal Court



Cour fédérale

Date: 20161017

Docket: IMM-692-16

Citation: 2016 FC 1150

Toronto, Ontario, October 17, 2016

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

ASHA ALI HUSSEIN

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The present Application for judicial review concerns a citizen of Somalia who claims refugee protection pursuant to s.96 and s.97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*) on the basis of well founded fear as a member of the minority Madiban clan and as a Sufi performer targeted by Al Shabaab.

[2] By a decision dated August 24, 2015, the Refugee Protection Division of the Immigration and Refugee Board (RPD) rejected the Applicant's claim on the basis of negative credibility findings resulting in a conclusion that the Applicant failed to establish her identity as a citizen of Somalia. Because the Applicant was unable to establish her identity by tendering official government documents, to establish her identity the Applicant provided her own sworn evidence, and independent evidence by way of a letter from her brother and the sworn testimony of a witness who testified at the hearing.

[3] At the time of the hearing, the Applicant was 67 years of age, is illiterate, and gave her evidence in Somali through an interpreter. The RPD rejected the Applicant's evidence on a finding of negative credibility due to contradictions and inconsistencies in her evidence. The Applicant appealed the RPD's decision to the Refugee Appeal Division (RAD). In its decision of December 15, 2015, which is presently under review, the RAD rejected the Applicant's appeal.

[4] Apart from her own sworn testimony, a crucial feature of the Applicant's effort to establish her identity before the RPD was the witness' sworn evidence.

[5] The RPD's evaluation of the witness' evidence is provided in paragraph 6 of the RPD decision as follows:

The claimant presented no identity documents. At the hearing, the claimant brought with her an identity witness whom she alleges she knew in Mogadishu. The claimant testified that the witness lived near her in Mogadishu and they last saw each other in 1990, before reconnecting one week ago in Canada. The claimant was asked the approximate age of the witness when they last saw each other in Mogadishu. The claimant testified that the witness was "very young" and, when asked to be more specific, then said she

was "middle-aged." When asked a third time to specify an age, the claimant said that the witness had been 14 or 15 in 1990 when she last saw her. According to the witness [sic] information, the witness was born in 1963 and therefore in 1990 the witness was approximately 27 years of age. When this was put to the claimant, the claimant said, "It's possible" and "she was a mature woman." The Panel finds that the claimant's testimony contradicts the witness' evidence. The Panel further finds that a 12 to 13 year difference in estimating the witness' age is a significant contradiction. The claimant's testimony that the witness was 14 is, in the Panels' [sic] view, vastly different than a woman of 27 years of age. While the claimant and the witness were consistent on certain aspects of the claimants' [sic] past, for example they consistently could testify to the size of the claimant's home, the Panel finds that this information does not overcome the basic credibility concerns raised by not knowing the witness's age at their last meeting.

[Emphasis added]

(Certified Tribunal Record, p. 28)

[6] The important feature of the passage quoted is that the RPD made a negative credibility finding with respect to the Applicant's testimony.

[7] In the decision under review at paragraphs 16 and 17, the RAD made the following statements:

The RPD found that the Appellant's evidence was confusing and contradictory. Her testimony contradicted her written narrative and her explanations for contradictions and inconsistencies were unreasonable. She appeared unfamiliar with her own evidence. The RAD has reviewed the recording of the hearing and also found the testimony to be confusing and contradictory. The RAD recognizes and respects the conclusions of the RPD on the Appellant's credibility as the RPD also had the opportunity to observe the Appellant while she gave her evidence.

The Appellant presented an identity witness stating that they knew each other in Mogadishu. The RPD asked questions of both the witness and the Appellant in order to test the evidence. The

Appellant stated that they last saw each other in 1990. She said that they had met one week prior to the hearing at a clan community center. The witness stated that the Appellant was a good friend of her mother and they had been neighbours in Mogadishu. She also stated that the last time they had seen each other was in 1990 prior to meeting in Canada. The Appellant said that when they last saw each other in Mogadishu, the witness was between 14 and 15. The RPD pointed out to her that the witness information showed that she was born in 1963 and that she would have been 27 when they last saw each other. The RPD concluded that a 12 to 13 year difference in estimating the witness's age was a significant contradiction and while the witness and the Appellant were consistent in certain aspects of their relationship, such as the size of the Appellant's home, this did not overcome the RPD's credibility concerns. The RAD also notes that in listening to the recording of the hearing, the RPD had to admonish the parties not to converse or look at each other while the witness was giving her testimony. The RAD recognizes and respects the conclusion of the RPD that the witness did not provide credible evidence as to the identity of the Appellant.

[Emphasis added]

[8] The important feature of the paragraphs quoted is that the RAD found that the RPD found that the witness did not provide credible testimony. Counsel for the Applicant argues that the RPD never made a conclusion regarding the credibility of the witness, and, thus, was in error in finding that the RPD found that the witness was not credible (Applicant's Memorandum of Argument, paras. 26 to 28). On the basis of the above quotations as emphasised, I find that Counsel for the Applicant is correct. Because the identified significant error in fact-finding is a key element of the RAD's independent assessment rejecting the Applicant's appeal, I find that the RAD's decision is unreasonable.

JUDGMENT

THIS COURT'S JUDGMENT is that the decision under review is set aside and the matter is referred back to a differently constituted panel for redetermination.

There is no question to certify.

“Douglas R. Campbell”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-692-16

STYLE OF CAUSE: ASHA ALI HUSSEIN v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: OCTOBER 11, 2016

JUDGMENT AND REASONS: CAMPBELL J.

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