Federal Court Cour fédérale

Date: 20230530

Docket: IMM-5238-22

Citation: 2023 FC 757

Vancouver, British Columbia, May 30, 2023

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

FATOUMA MOHAMED ALI
SAFIA MOHAMED DAOUD

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Ms. Ali's application for a pre-removal risk assessment [PRRA] was denied. As she had previously claimed refugee status in the United States and was ineligible to do so in Canada, she was afforded a hearing. She now seeks judicial review of the negative PRRA decision. I am dismissing her application, because the process followed by the PRRA officer was fair and the decision itself was reasonable. In particular, the fact that Ms. Ali was not provided with a recording of the PRRA hearing did not result in a breach of procedural fairness.

I. Background

[2] Ms. Ali and her daughter Safia are citizens of Djibouti. In 2016, they travelled to the United States and claimed refugee status. In 2019, as their application had not been decided yet, they came to Canada with the intent of claiming refugee status. However, because they had already made a claim in the United States, they were ineligible to do so in Canada, pursuant to paragraph 101(1)(c.1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act]. Rather, they applied for a PRRA. Nevertheless, pursuant to section 113.01 of the Act, they were entitled to a hearing.

[3] In the PRRA application, Ms. Ali alleged various forms of harassment because she and her husband were opponents to the government. In particular, she alleges that she joined an opposition party, the Alliance républicaine pour le développement [ARD], only to quit when it decided to join a coalition government. Members of the ARD then began to harass her and accuse her of being against both the ARD and the governing party. When she received a summons from the police, she decided to leave the country. Moreover, she alleged that she was a member of the Afar ethnic group, who face strong discrimination. She also expressed her fear that her daughter would be subject to female genital mutilation [FGM], a frequent practice in Djibouti, to which she was personally subjected.

[4] Ms. Ali's PRRA application was denied. The officer reviewed the evidence regarding persecution on the basis of political opinion, but found that her testimony was vague, that the authenticity of the police summons was doubtful and that the country condition evidence did not

show that ordinary members of the ARD would face persecution. The officer also found that there was little evidence regarding the situation of Ms. Ali's husband. The officer then turned to the allegations regarding discrimination against women in Djibouti, but found that Ms. Ali, given her profile, would not be exposed to the situation described in the country condition evidence. With respect to the risk of FGM, the officer acknowledged the high incidence of the practice in Djibouti, but noted that Ms. Ali had not provided medical evidence that her daughter had not already been subjected to the practice and found that, in any event, there was no evidence that she was the subject of any specific threats or pressure. Moreover, the officer rejected Ms. Ali's fear of persecution based on her Afar ethnicity, because she did not prove that she would be perceived as Afar and the evidence was insufficient to show that she would be at risk of persecution on that basis. Lastly, the officer reviewed a doctor's note and a psychotherapy assessment report, but gave them low weight in establishing risk of persecution in Djibouti.

[5] Ms. Ali now seeks judicial review of the negative PRRA decision.

II. Analysis

[6] I am dismissing Ms. Ali's application. She raises a wide array of grounds to challenge the decision. Some of these grounds pertain to procedural fairness, and others to the merits of the PRRA decision. I will deal with each in turn.

A. *Procedural Fairness*

[7] Ms. Ali's main contention is that she should have been provided with a recording of the PRRA hearing and that the failure to do so gave rise to a breach of procedural fairness. She also argues that unfairness resulted from the lack of an interpreter and from certain comments made by the officer in the notes taken during the hearing.

(1) Lack of Recording

[8] Ms. Ali claims that the process before the PRRA officer was unfair because she was not provided with a recording of the hearing. As the hearing proceeded by videoconference, she asserts that it would have been easy to record it. While she was provided with the officer's notes, she argues that these notes are not sufficient for a meaningful review of the decision, for example in respect of the officer's finding that her evidence was vague.

[9] I would first highlight that there is no evidence that the hearing was recorded. There is no indication to that effect in the certified tribunal record [CTR]. Moreover, there is no evidence that Ms. Ali requested the PRRA officer to record the hearing and to provide the recording afterwards. The issue only arose in the context of the present application for judicial review. This would normally be a bar to any allegation of procedural unfairness, as the matter must be raised at the earliest occasion. For the sake of completeness, however, I will analyze Ms. Ali's submissions.

[10] There is little case law regarding the procedural fairness requirements in the specific context of a mandatory PRRA hearing pursuant to section 113.01 of the Act. The Minister's guidelines regarding PRRA hearings (whether held pursuant to section 113.01 of the Act or section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227) provide that the officer's notes are the only record of the hearing.

[11] It may be good policy to record PRRA hearings, as my colleague Justice Alan Diner suggested in *Divya v Canada (Citizenship and Immigration)*, 2022 FC 620 at paragraphs 18–20 [*Divya*]. This might help in resolving cases where the applicant provides evidence that the hearing unfolded differently than what is recorded in the notes. The failure to record the hearing, however, does not necessarily result in a breach of procedural fairness: *Ashenafi v Canada (Citizenship and Immigration)*, 2022 FC 1331 at paragraph 11.

[12] Hearings before the Refugee Protection Division [RPD] may be taken as a point of comparison. The RPD does not have an obligation to record refugee protection hearings: *Kandiah v Canada (Minister of Employment and Immigration)* (1992), 141 NR 232 (FCA) at paragraph 7 [*Kandiah*]; *Antunano Martinez v Canada (Citizenship and Immigration)*, 2019 FC 744 at paragraph 7. As my colleague Justice John Norris pointed out in *Patel v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 804 at paragraph 31:

> In cases where there is no statutory right to a recording, "courts must determine whether the record before it allows it to properly dispose of the application for appeal or review. If so, the absence of a transcript will not violate the rules of natural justice" (*Canadian Union of Public Employees, Local 301 v Montréal (City)*, 1997 CanLII 386 (SCC), [1997] 1 SCR 793 at para 81). On the other hand, if the court cannot dispose of an application before

> it because of the absence of a transcript, this will violate the rules of natural justice.

[13] In the present case, there is simply no evidence that the absence of an audio recording of the PRRA hearing prevented Ms. Ali from making her case on judicial review. The notes contain each question asked by the officer and Ms. Ali's answers. They are quite detailed. They allow the Court to understand why the officer found that Ms. Ali's "explanations about her role in the [ARD] party were vague."

[14] Ms. Ali, however, argues that one cannot really know if her answers were vague in the absence of a word-by-word transcript or audio recording. The officer may well have noted only a summary of her answers, not doing justice to what she really said. Nevertheless, Ms. Ali retains the burden of proving that a breach of procedural fairness occurred. She had other means than a recording to do so: *Kandiah*, at paragraph 9. Yet, her affidavit is silent about this issue; she did not say that her answers were more fulsome than what appears in the officer's notes. This is in contrast to cases such as *Divya*, where the applicant provides evidence contradicting the officer's account of the hearing. Given this, it is not enough for Ms. Ali to argue that a full audio recording might hypothetically have provided support for her grounds for judicial review. In particular, a recording or transcript would have been of little help in ascertaining whether she misunderstood a question.

(2) Lack of an Interpreter

[15] At the PRRA hearing, Ms. Ali was represented by counsel. Prior to the hearing, counsel informed the officer that Ms. Ali did not want to have an interpreter, but that she "might face issues due to language barrier." In the decision, the officer noted:

> Communication may have been difficult on some occasions since the applicant did not want to request an interpreter, but Counsel was able to support her client and reformulate questions when necessary. She also took the opportunity to bring forward clarifications in her post-hearing submissions . . .

[16] Ms. Ali now argues that proceeding in this fashion was unfair. She contends that as soon as the officer realized that she had difficulty understanding the questions and expressing herself, they should have adjourned the hearing and called an interpreter.

[17] I fail to see any breach of procedural fairness here. Ms. Ali cannot complain about the lack of simultaneous interpretation because she expressly waived this right through her counsel, as in *Bilal v Canada (Citizenship and Immigration)*, 2005 FC 1692 at paragraph 24; *Habboob v Canada (Citizenship and Immigration)*, 2021 FC 162 at paragraphs 15–23. Moreover, issues regarding translation must be raised at the earliest opportunity: *Mohammadian v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 191 at paragraph 19, [2001] 4 FC 85; *Baloch v. Canada (Citizenship and Immigration)*, 2022 FC 1373 at paragraphs 27–42. Ms. Ali failed to do so. Rather, her counsel intervened to clarify questions when needed. In these circumstances, Ms. Ali can hardly fault the PRRA officer for not adjourning the hearing.

(3) Comments in the Officer's Notes

[18] Ms. Ali also takes exception to comments in the notes to the effect that the officer found certain answers vague or was under the impression that Ms. Ali did not understand the question. In the original certified tribunal record, these comments are highlighted in yellow. It is unclear whether they were made during the interview or afterwards.

[19] There is nothing untoward in these comments. To a large extent, they are related to the steps the officer took to overcome the "language barrier". A global reading of the notes shows that Ms. Ali had difficulty providing details about her involvement in the ARD party. In two instances, counsel intervened and reworded the question or asked additional questions. In another instance, the officer repeated the question. The single instance where the officer did not repeat the question does not appear to have played a significant role in the decision. To the extent that Ms. Ali's answers were objectively vague, the officer did not breach procedural fairness by recording this in the notes.

B. *Reasonableness*

[20] Ms. Ali also argues that the PRRA decision is unreasonable. Her submissions on this issue, however, are not focused on the findings of the PRRA officer regarding what was then her main allegation, namely, persecution because of her dealings with the ARD party. Rather, Ms. Ali now impugns the treatment of what were little more than bare allegations. Given the paucity of the evidence tendered, it is difficult for Ms. Ali to argue that the PRRA officer overlooked evidence or reached unreasonable conclusions. I will nevertheless discuss briefly

Ms. Ali's submissions regarding FGM, her Afar ethnicity and the situation of women in Djibouti. I will also deal with the PRRA officer's comments regarding her psychological evidence.

[21] Before doing so, I wish to highlight certain points common to all these issues. The record shows that some issues were only tangentially raised in the submissions made on behalf of Ms. Ali. The submissions were poorly organized and sometimes referred to a different country. It appears that the officer tried to be generous and exhaustive in analyzing them. This must be kept in mind when reviewing the officer's decision. Quite simply, judicial review is not an opportunity to reargue the case or to fault the officer for not analyzing submissions that were never made.

[22] Likewise, given the shortcomings of the submissions and evidence, the PRRA officer can hardly be faulted for not asking questions regarding certain issues or not performing independent research into certain aspects of the claim. The officer can identify the determinative questions and focus on them in questioning the applicant. Moreover, while PRRA officers have a duty to be generally aware of the contents of the national documentation package [NDP] regarding an applicant's country, this does not require them to build the applicant's case, especially where there is little to no evidence supporting certain grounds.

(1) FGM

[23] The officer relied on two propositions to dispose of the allegations that the daughter could be subjected to FGM: (1) there was no medical evidence that the daughter had not already

been subjected to the procedure; and (2) there was no evidence of any specific threat of FGM by anyone. While proposition (2) is reasonable and sufficient to dispose of the issue, I am troubled by proposition (1).

[24] Implied in Ms. Ali's claim of fear was an assertion that her daughter had not already been a victim of the practice. There was no reason to doubt this assertion, and it should benefit from the presumption of truth. If the officer had doubts in this regard, they should have given notice to Ms. Ali and an opportunity to respond. I am unaware of any rule, practice or requirement that parents who fear that their daughters will be exposed to FGM must provide medical evidence that it has not happened yet. Ms. Ali could not have reasonably expected to be required to provide this.

[25] This error, however, is not determinative. The officer found that the fear of FGM could not justify refugee status because Ms. Ali had not identified where the threats of FGM would come from. The officer stated, "There is no information in the submission suggesting that any clearly identified members of the applicant's family or members of the community would pressure or threat [sic] her daughter to undergo FGM."

[26] This finding is reasonable. It is based on the evidence. Ms. Ali's affidavit contained only one paragraph regarding this issue, which did not identify any specific threats coming from family or community members. Ms. Ali had the onus of proving who would pressure her to have her daughter subjected to FGM. Without such evidence, Ms. Ali's fear lacks an objective basis. I

would add that the officer did not have to question Ms. Ali about the source of potential threats, because Ms. Ali did not allege any.

(2) Afar Ethnicity

[27] The officer accepted that the Afar are subject to discrimination and that Ms. Ali is Afar. However, they noted that there was no evidence as to whether Ms. Ali would be perceived as Afar and whether she would personally be subject to discrimination amounting to persecution. Moreover, the officer noted that there was insufficient evidence regarding the ethnic identity of Ms. Ali's husband and whether he had been laid off for that reason.

[28] I see nothing unreasonable in these findings. In the evidence and submissions, Ms. Ali's Afar ethnicity was mainly an aspect of her allegations of political persecution. There was very little discussion of the fact that Afar ethnicity, alone, could ground a claim for refugee status. Nevertheless, the PRRA officer reviewed country condition evidence provided by Ms. Ali as well as additional evidence found in the NDP and found that Ms. Ali did not prove that the discrimination to which she might be personally exposed would amount to persecution. Ms. Ali has not shown that in so finding, the officer overlooked relevant evidence or made mistakes that would render the decision unreasonable.

(3) Situation of Women in Djibouti and Cumulative Discrimination

[29] Ms. Ali also challenges the portion of the decision that deals with gender discrimination because it fails to address cumulative discrimination. Again, this issue was only tangentially

raised before the PRRA officer. In the pre-hearing and post-hearing submissions, counsel did not mention gender-based discrimination. It is only in her post-hearing affidavit that Ms. Ali stated that she was "persecuted because of my gender and belonging to a particular social group the Afar."

[30] Once again, the officer reviewed the NDP, but found insufficient evidence that the conditions described therein would affect Ms. Ali. In particular, the officer noted that discrimination against women, in particular single women, was more prevalent in rural areas, whereas Ms. Ali used to live in Djibouti City. The officer also noted the lack of evidence that Ms. Ali underwent experiences of gender discrimination while living in Djibouti City. In this context, the officer's finding that Ms. Ali does not have a well-founded fear of persecution arising from gender discrimination is reasonable.

[31] With respect to cumulative discrimination, there is simply no mention of it in the materials before the PRRA officer. Ms. Ali cannot raise a new ground for protection on judicial review. Neither did she explain the nature of the cumulative discrimination that the PRRA officer should have considered.

(4) Psychological Evidence

[32] Lastly, Ms. Ali challenges the PRRA officer's analysis of her psychological evidence, which consists of a short note from a doctor as well as a pre-treatment assessment from a psychotherapist.

[33] Here again, the submissions before the PRRA officer were quite unclear as to the purpose of this evidence. Before the hearing, no allegations of persecution based on mental health condition were made. When the psychological evidence was submitted, it was part of a request for accommodations at the hearing. In the post-hearing submissions, this evidence was mainly mentioned to explain potential omissions in Ms. Ali's testimony, although there is a mention of the lack of mental health services in Djibouti. Nevertheless, Ms. Ali's post-hearing affidavit mentioned that "a mental condition is a reason for seeking asylum."

[34] Ms. Ali argues that the officer should not have required the doctor and the psychotherapist to provide evidence relevant to Ms. Ali's alleged fear of persecution in Djibouti. However, this is not what the officer did. Rather, the officer explored various ways in which this evidence could be relevant to the claim, but excluded one of these possibilities, that it could corroborate the objective basis of Ms. Ali's fear. This finding is reasonable. Moreover, the officer analyzed other potential manners in which this evidence could be relevant.

[35] Ms. Ali also submits that the officer failed to consider evidence that mental health services are almost inexistent in Djibouti. However, the officer noted that the psychotherapist recommended only ten weekly sessions and no further treatment, and concluded that there was no evidence that her mental health condition was such that she would be exposed to persecution on that account. Given the paucity of the evidence, the latter finding was reasonable, and the question of the availability of mental health services in Djibouti was not determinative. While I do not wish to minimize Ms. Ali's symptoms, they simply do not support her submission that she might be imprisoned because of her mental condition.

III. Disposition

[36] For these reasons, Ms. Ali's application for judicial review will be dismissed.

[37] Ms. Ali asked that I certify the following question for the consideration of the Federal Court of Appeal:

> Does the failure of the Officer to produce an audio recording or transcript for a mandatory PRRA hearing constitute a breach of procedural fairness, interfere with the Applicant's effective ability to challenge the decision and impede the Court's ability to carry out its judicial review function?

[38] I decline to certify this question. It is not a question of general importance, because, as I have explained above at paragraph [12], a breach of procedural fairness related to the lack of a transcript or recording can only be assessed in relation to the specific circumstances of each case. Moreover, this issue would not be determinative, as Ms. Ali did not request that the hearing be recorded.

JUDGMENT in IMM-5238-22

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. No question is certified.

"Sébastien Grammond"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Arghavan Gerami	FOR THE APPLICANTS
Narin Sdieq	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Gerami Law Professional Corporation Ottawa, Ontario	FOR THE APPLICANTS
Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT