

Federal Court



Cour fédérale

Date: 20150506

Docket: IMM-250-14

Citation: 2015 FC 590

Ottawa, Ontario, May 6, 2015

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

**OBSE MOHA MUSE (BY HER LITIGATION
GUARDIAN SUSAN WOOLNER)**

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Court finds that the Applicant's particular circumstances and vulnerabilities attract an increased vigilance for procedural fairness (see: *Benitez v Canada (Minister of Citizenship and Immigration)*, [2007] 1 FCR 107 at para 113 [*Benitez*]).

[2] Nonetheless, the onus rests upon the Applicant to establish identity and the well-foundedness of her claim (see section 106 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]).

[3] Whether further explanations will, in fact, be forthcoming is a matter of speculation as to what the ultimate outcome of the RPD will be; however, the principles of procedural fairness require that the Applicant, at least, be given the opportunity to provide answers. This will ensure that procedural fairness is witnessed in the examination and understanding given to the Applicant's claim, in light of her particular circumstances (of acknowledged mental challenges, in addition to scars and burns on her body as per the evidence, which must be adequately considered as per *Singh v Canada (Minister of Employment and Immigration)*, [1985] 1 SCR 177 [*Singh*]).

II. Introduction

[4] This is an application for judicial review pursuant to subsection 72(1) of IRPA of a decision rendered by the Refugee Protection Division [RPD] denying refugee protection pursuant to sections 96 and 97 of the IRPA.

III. Factual Background

[5] The Applicant is a 30-year-old citizen of Ethiopia who claims refugee status on the basis of her Oromo ethnicity and perceived political opinion. The Applicant claims that the following facts led to her refugee claim.

[6] In 2001, the Applicant's father, who is a well-known and respected member of the Oromo community in Jimma, Ethiopia, was falsely accused of involvement with the Oromo Liberation Front [OLF] and detained by the authorities.

[7] The Applicant claims that she and her family have since been targeted by the authorities as part of the widespread persecution of the Oromo ethnic community.

[8] In 2001, the Applicant, her siblings and their mother were detained for six months without trial following a complaint they made to the authorities in respect of the Applicant's father's detention.

[9] While in detention, the Applicant was threatened with sexual violence, injured and questioned about her alleged involvement with the OLF by prison guards.

[10] After their release, the family was repeatedly visited by the police and questioned, harassed and accused of being involved with the OLF. On one occasion, the Applicant's mother was arrested and detained for five months, during which time the Applicant and her siblings lived with their grandmother in another town, out of fear of police harassment.

[11] The Applicant ceased attending school because she suffered from depression and mental health issues related to her treatment in detention and the stress and anxiety associated with her father's situation.

[12] In 2004, the Applicant and her mother returned to the police station to inquire about the whereabouts of the Applicant's father. Following a verbal altercation with the police, the Applicant and her mother were arrested and detained for eight months. While in detention, the Applicant was questioned about the OLF and attacked by the prison guards. After their release, the police continued to search the Applicant's home.

[13] In 2008, the Applicant married and fled her hometown for Addis Ababa to escape police harassment; however, while she was living in Addis Ababa, the Applicant was informed by her mother that police were looking for the Applicant.

[14] Having lived in fear in Addis Ababa for two years, the Applicant saved enough money and traveled to Egypt with false documents. The Applicant's experience in Egypt proved challenging, as she had difficulty finding work and survived an attempted rape and robbery. The Applicant was then employed as a housekeeper and nanny for four children by a wealthy Egyptian woman [the employer]. Although the employer was abusive towards her, the Applicant felt as though she had nowhere to go. Moreover, the Applicant's husband informed the Applicant that the authorities were still looking for her in Ethiopia.

[15] The employer asked the Applicant to travel with her in order to look after her children and do housework during a trip to Canada, to which the Applicant acquiesced.

[16] Upon arrival at the Toronto airport, the Applicant escaped from her employer and claimed refugee status with a Canadian Border Services Agency [CBSA] officer.

[17] In response to the Applicant's diagnosis of suffering from schizoaffective disorder, depressive type, which impacts her ability to recall events, their chronology and duration, Ms. Susan Woolner was appointed as the Applicant's designated representative. Ms. Woolner assisted the Applicant in completing her Personal Information Form [PIF] and currently acts as the Applicant's litigation guardian.

[18] The Applicant's refugee claim was heard before the RPD on October 29, 2013.

IV. Impugned Decision

[19] On December 17, 2013, the RPD rejected the Applicant's refugee claim on the basis of identity, credibility issues and a lack of well-foundedness to the Applicant's fear of persecution.

A. *Identity*

[20] In its decision, the RPD identifies numerous issues regarding the Applicant's identity and finds that it is "not persuaded that the claimant is necessarily who she says she is and a citizen of Ethiopia" (RPD Decision, at para 10).

[21] First, the RPD notes that the documents provided by the Applicant do not have reliable security features.

[22] Second, the RPD raises concerns over the fact that the photograph used in the Applicant's national identity card, of a woman wearing a hijab, is the same photograph used in her school

transcript from five years earlier. The RPD also notes that the photograph of the Applicant taken at the Port of Entry [POE] shows a woman without a hijab, and at the hearing, the Applicant, also, appeared without a hijab.

[23] Third, the RPD finds that the Applicant provided inconsistent dates in respect of her marriage, as they appear on her marriage certificate and in her PIF and testimony. The RPD finds that the Applicant failed to provide a valid explanation for this discrepancy.

[24] Fourth, the RPD notes that the evidence relating to the passport used by the Applicant to travel to Canada is contradictory. In particular, the Applicant testified that she used an Egyptian passport under her own name; however, in an interview with a CBSA officer at the POE, the Applicant claimed that her employer held onto her passport because she feared that the Applicant would run away from her. The RPD finds it implausible that the employer would withhold the Applicant's passport with the objective of deterring the Applicant from escaping.

[25] Finally, the RPD finds that the Applicant failed to establish her Ethiopian nationality. The RPD notes that the Applicant's knowledge of the Oromo language alone is insufficient to identify her as an Ethiopian citizen because this language is also spoken by natives of Somalia and northern Kenya.

[26] The Court notes that although the RPD states that the Applicant's knowledge of the Oromo language "*does* sufficiently identify her as an Ethiopian citizen"; this is an apparent error, in articulation, given the RPD's previous analysis, it is clear that the RPD rejected the

Applicant's knowledge of Oromo as sufficient for establishing identity (RPD Decision, at para 15).

B. *Credibility*

[27] The RPD identifies numerous incoherencies in the Applicant's testimony and evidence which undermine her credibility.

[28] First, the RPD finds that the Applicant's account to the CBSA officer with respect to her mistreatment and abandonment at the airport by the employer for the purpose of withholding four months' worth of the Applicant's earnings is implausible.

[29] The RPD acknowledges that the Applicant was fearful, anxious and had difficulties understanding the interpreter at the POE. The RPD also does consider the counsel of the Applicant's submissions, specifying, that little weight should be assigned to the POE notes due to the Applicant's mental state; however, it finds nonetheless, that the Applicant had previously stated and confirmed, in her PIF and also with the CBSA officer, that she understood Amharic, which is, in fact, significantly, the language in which the POE interview was conducted and not Oromo, which the RPD find problematic. That is important to her identity as Amharic must be considered due to where it is spoken, and who speaks it.

[30] The RPD further notes that the Applicant omitted to include her second detention in her Claim for Refugee Protection in Canada application form (IMM5611), which further undermines her credibility.

C. *Well-foundedness of the Applicant's fear*

[31] The RPD finds that there is insufficient evidence to support a finding that the psychological symptoms experienced by the Applicant are a result of her alleged persecution and detentions, rather than a result of her mental illness arising out of other circumstances. Although the RPD accepts that the Applicant had experienced trauma, it is not persuaded that the persecutory events described by the Applicant took place.

[32] The RPD finds that even if the Applicant's evidence were to be found credible, it fails to establish a well-founded fear of persecution or a risk of facing harm or being arrested by the police upon return, for her perceived involvement with the OLF.

[33] Moreover, the RPD assigns little weight to letters provided by the Applicant's mother, uncle and school friend, inasmuch as they are undated, and were considered to lack credibility because of their uncertain authenticity.

[34] Finally, the RPD concludes that the Applicant's moves, first to Addis Ababa, then to Egypt, and finally to Canada, were motivated by a desire to improve her economic situation rather than a need to escape persecution (RPD Decision, at para 30).

V. Legislative Provisions

[35] The following provisions of the IRPA apply to the determination by the RPD of the Applicant's refugee claim:

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 themselves 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.

Person in need of protection

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

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.

Personne à protéger

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) 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

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

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

(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.

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

VI. Issues

[36] The following issues were raised by the Applicant:

- a) Did the RPD breach its duty of procedural fairness?
- b) Did the RPD err in its credibility findings?
- c) Did the RPD err in considering the well-foundedness of the Applicant's claim?

VII. Standard of Review

[37] The RPD's findings relating to identity and credibility, which are questions of fact and of mixed fact and law, and which stand at the core of the RPD's expertise, attract the standard of reasonableness (*Liu v Canada (Minister of Citizenship and Immigration)*, 2012 FC 377; *Diarra v Canada (Minister of Citizenship and Immigration)*, 2014 FC 123 at para 18).

[38] Consistent with the jurisprudence, issues of procedural fairness are reviewable on the standard of correctness.

VIII. Analysis

[39] The Applicant argues that she has been denied participatory rights inasmuch as the RPD did not allow her the opportunity to respond to its preoccupations in respect of the evidence provided, including answers in respect of the matters of time and place which the Applicant gave. Significantly, the Applicant allegedly is not aware of the Gregorian calendar as opposed to the Ethiopian calendar which requires consideration.

[40] In particular, the Applicant submits that the RPD made adverse identity and credibility findings on the basis of inconsistencies which were not put to her, including the following:

- a) The RPD made a negative inference from the fact that the Applicant's identity documents' photographs showed a woman with a hijab, whereas in her photograph taken at the POE, and at the hearing, the Applicant was not wearing a hijab.

The Applicant submits that this observation is inaccurate because the Applicant wore a hijab at the hearing and at the POE. The Applicant could have easily explained that she had been asked to remove her hijab by a CBSA officer for her POE photograph.

The Applicant argues that the RPD's failure to confront the Applicant with this perceived inconsistency amounts to a breach of procedural fairness.

- b) The RPD found that the evidence in respect of the Applicant's travel documents was inconsistent. The RPD found that the POE officer's notes indicate that the Applicant traveled with a passport under the name Zeneba Musadik Mohamed, which the Applicant did not recognize when it was showed to her by a CBSA officer at the POE.

The Applicant submits that the RPD did not confront her with these perceived contradictions emerging from the CBSA officer's notes, denying her the opportunity to meaningfully respond to the RPD's preoccupations. Moreover, the Applicant submits that she was consistent in testifying that she was unaware of the nature and contents of her passport used to travel to Canada because her employer withheld it from her during their travels.

- c) The RPD found that the Applicant's knowledge of the Oromo language was not sufficient to establish her identity as an Oromo woman from Ethiopia, because Oromo is also spoken in Somalia and Northern Kenya.

The Applicant contends that the RPD never confronted the Applicant with this apparent inconsistency for the purposes of establishing her identity, and failed to

consider the Applicant's testimony in regard of her knowledge of the Oromo community, customs, culture, and geography.

- d) The Applicant further submits that the RPD failed to consider the explanations provided by the Applicant in respect of different dates of marriage, as found in her marriage certificate and as declared in her PIF, which were due to the Ethiopian and Gregorian calendars, respectively. The Applicant submits that the RPD erred in concluding that the Applicant "had no explanation" for this apparent inconsistency.

[41] The content of procedural fairness is variable and contextual (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at par 21 [*Baker*]).

[42] The right of a hearing in the context of a refugee claim requires that an individual be given a meaningful opportunity to present his or her case fully and fairly and "have decisions affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decision" (*Baker*, above at paras 28 and 30).

[43] This is consistent with the principle that proceedings under the IRPA which might result in deprivation of life, liberty or security of the person concerned, and which are based on a credibility assessment, must be conducted in accordance with the principles of fundamental justice, which in this case, require a full fair hearing (*Singh*, above).

[44] This Court has found that where a claimant has failed to present acceptable documentation in respect of establishing identity, the RPD must consider the evidence as a whole. The RPD must also take into account whether the claimant has provided a reasonable explanation for the lack of documentation or has taken reasonable steps to obtain the documentation (*Yang v Canada (Minister of Citizenship and Immigration)*, [2009] FCJ 848 at paras 6 and 7).

[45] Nonetheless, the onus rests upon the Applicant to establish identity and the well-foundedness of her claim (see section 106 of the IRPA).

[46] The Court finds that the Applicant's particular circumstances and vulnerabilities attract an increased vigilance for procedural fairness (see: *Benitez*, above at para 113).

[47] Most notably, the evidence clearly specifies that the Applicant suffers from a schizoaffective disorder, a depressive type of such due to traumatic past experiences, as well as a history of suicidal behavior, all of which requires particular consideration of the directives found in the *Chairperson Guideline 8: Procedures with Respect to Vulnerable Persons Appearing Before the IRB* and in the *Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution* (Psychological Assessment Report by Dr. Gerald M. Devins, Ph.D., dated August 4, 2012; Certified Tribunal Record).

[48] The Court is not convinced that the RPD raised its major concerns with the Applicant and that she had been given a meaningful opportunity to make observations to dispel the RPD's

doubts in respect of her identity, as required by the principles of procedural fairness. For instance, it is unclear whether the Applicant was wearing a hijab at the POE, which led the RPD to conclude that the woman wearing a hijab in the Applicant's identity documents may not have been the Applicant, contrary to the RPD assertion. It is significant that evidence on file states that the Applicant, in fact, wore a hijab at her RPD hearing. This aspect of the Applicant's claim requires further examination.

[49] Whether further explanations will, in fact, be forthcoming is a matter of speculation as to what the ultimate outcome of the RPD will be; however, the principles of procedural fairness require that the Applicant, at least, be given the opportunity to provide her answers. This will ensure that procedural fairness is witnessed in the examination and understanding given to the Applicant's claim, in light of her particular circumstances (of acknowledged mental challenges, in addition to scars and burns on her body as per the evidence, which must be adequately considered as per the *Singh* decision above).

[50] As the reasonableness of the RPD's credibility findings hinges upon the procedural fairness issues, it is unnecessary for the Court to address them in turn.

IX. Conclusion

[51] In light of the aforementioned, the application is granted for a hearing anew by a differently constituted panel.

JUDGMENT

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

There is no serious question of general importance to be certified.

"Michel M.J. Shore"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-250-14

STYLE OF CAUSE: OBSE MOHA MUSE (BY HER LITIGATION
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DATED: MAY 6, 2015

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