

Federal Court



Cour fédérale

Date: 20190513

Docket: IMM-3889-18

Citation: 2019 FC 665

Ottawa, Ontario, May 13, 2019

PRESENT: Mr. Justice Boswell

BETWEEN:

**NADIA SAID MOHAMOUD
(a.k.a. NADIA MOHAMOUD SAID)**

Applicant

and

**THE MINISTER OF IMMIGRATION,
REFUGEES AND CITIZENSHIP**

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Nadia Said Mohamoud (aka Nadia Mohamoud Said), claims she is a 21-year-old woman of Madibhan ethnicity who fears return to Somalia due to the risk she faces at the hands of Al Shabaab. She arrived in Canada in May 2017 and four weeks later sought refugee protection. The Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB] rejected her claim in August 2017, with identity and credibility being the determinative issues.

[2] The Applicant appealed the RPD's decision to the Refugee Appeal Division [RAD] of the IRB. The RAD dismissed the appeal in a decision dated July 17, 2018 and, pursuant to paragraph 111(1) (a) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [IRPA], confirmed the RPD's decision. The Applicant has now applied under subsection 72(1) of the IRPA for judicial review of the RAD's decision. She asks the Court to set aside the decision and return the matter for redetermination by another member of the RAD.

I. Background

[3] In her Basis of Claim [BOC] form, the Applicant stated she was working alone in her family's tea shop when a member of Al Shabaab approached her and demanded that she marry him. The RAD summarized the Applicant's testimony in this regard as follows:

[28] ... the Al Shabaab man came to her and demanded to marry her on December 13, 2016; she also said that the "same day", he went and made the demand of her father to marry the Appellant, before changing her testimony to indicate he returned "two days later" to make the demand of her father. Lastly, in testimony, the Appellant recounted that the man had attended her father's workplace to make the demand; whereas, the Narrative is clear that the man came to the family home. When asked to clarify, the Appellant continued to be very unsure about the dates, chronology, and location of the key events which she alleges resulted in the death of her father and led her to flee Somalia. By way of explanation, the Appellant only responded that she "got mixed up" about the dates of these events and that her testimony was correct and not her Narrative: that the Al Shabaab men attended her father's store and not her home, as set out in her Narrative.

[4] The Applicant's religious beliefs and practices are not clear in the record. In her BOC form and amended BOC, she identified as a Sunni Muslim and part of the Sufi sect known as Qadiro. At the RPD hearing, she again identified as a Sunni Muslim but said she was part of the

Shia sect. There also were inconsistencies about her arrival in Canada. The Applicant stated in her Background Declaration that she came to Canada with Farhia Ali using a fraudulent Canadian passport by pretending to be her daughter. She paid \$8,500 USD to a smuggler. She did not retain the passport used to enter Canada.

[5] To prove her identity, the Applicant explained that she did not have a passport because Somali was not issuing passports. In the absence of a passport, the Applicant submitted to the RPD two letters from Somali community groups in Canada, namely, the Dejinta Beesha Somali Multi-Service Centre [Dejinta Beesha] and the Midaynta Community Services [Midaynta]. These letters stated the Applicant likely was a Somali. She also submitted an affidavit from her mother and another from a childhood acquaintance.

[6] The Applicant presented as new evidence to the RAD a newspaper article about a bombing in Mogadishu by Al Shabaab dated October 16, 2017. The RAD referenced Rule 3(3)(g)(iii) which directs an appellant to include an explanation of how the documentary evidence meets the requirements of subsection 110(4) of the *IRPA*. Because the Applicant had not explained why this article should be accepted, the RAD indicated that, while it was not inclined to admit the article as new evidence, it nonetheless reviewed it and found it contained information which was before the RPD in the National Documentation Package [NDP] about sporadic attacks by Al Shabaab in Mogadishu.

[7] The RAD then turned to address the merits of the appeal, noting that although the RPD had erred by not setting out reasons for finding the witness's evidence unpersuasive, this error

was not determinative because the RAD was able to address the error from the evidence on record.

[8] With respect to the Applicant's contention that the RPD erred by citing no source for finding that Somali passports have been issued in Mogadishu since at least 2015, the RAD noted the Applicant's reference to an item in the NDP stating there is no recognized competent civil authority in Somalia to issue civil documents. The RAD preferred a more recent item in the NDP which showed that the Somali government had been issuing biometric passports since December 2013. The RAD agreed with the RPD's finding that it was incumbent upon the Applicant to provide testimony about what efforts she made to obtain identity documents, and it was open to the RPD to reject her explanation that she did not seek to obtain a passport as Somalia does not issue passports.

[9] The RAD disagreed with the Applicant's argument that the RPD did not consider the secondary documents purporting to establish her identity. In the RAD's view, review of the RPD's decision clearly showed that each of the secondary documents was considered by the RPD; but, cumulatively, they were found to be insufficient to establish the Applicant's personal and national identity when weighed against the significant credibility concerns regarding her testimony.

[10] The RAD gave little weight to the Dejinta Beesha and Midaynta letters insofar as they purported to establish the Applicant's identity. According to the RAD, these letters could only serve to speak to her Somali background - not her personal identity or citizenship as people of

Somali ethnicity or descent live all around the world and factors like speaking the Somali language do not establish one's Somali citizenship. The RAD noted there were errors in the letters such as inconsistencies in the Applicant's clan membership and year of birth. Although the Midaynta letter was consistent with the Applicant's amended BOC, it differed from how she reportedly identified at the Dejinta Beesha interview and in her original BOC; the RAD thus found it did not support her identity absent credible and reliable testimony from her.

[11] With respect to the affidavit from the Applicant's mother, the RAD observed that the RPD had given this little weight due to inconsistencies between the affidavit and the Applicant's testimony on whether the family "flew" to Kenya from Somalia or took a bus, and whether the family sought political asylum in Kenya. The RAD noted the Applicant's argument that the use of the word "flew" is not inconsistent with her testimony as her mother could be using the term "flew" to indicate that they "fled" to Kenya. The RAD determined that, even if it accepted this purported linguistic error, it still could not find that the affidavit was sufficiently weighty as to overcome the Applicant's lack of credible testimony; nor could it find on the strength of this affidavit alone that she had established her identity.

[12] As to the affidavit from the elder sister of one of the Applicant's friends in Somalia who was her neighbour in Somalia, the RAD noted that the RPD had found this evidence was inconsistent, lacking in detail, not persuasive, and not sufficient to establish her identity absent credible testimony from her. The RAD accepted the Applicant's submission that the RPD failed to address why this affidavit was not persuasive. Nevertheless, upon the RAD's own review of

the Applicant's testimony and this affidavit, it ultimately agreed with the RPD's conclusion that the affidavit was unpersuasive to establish her identity.

[13] The RAD then reviewed the Applicant's oral testimony on her religious practice, finding inconsistencies on whether she was a Sunni or a Shia Muslim. The RAD also noted that she did not mention anything in her testimony about being a Sufi, despite basing part of her claim on that fact. The RAD found it problematic that the Applicant had identified herself at the Dejinta Beesha interview as part of the Yibir clan, before amending her BOC to reflect the Madibhan clan, and later identify as Madibhan at the interview with Midaynta. The RAD found this was a material inconsistency which undermined the Applicant's credibility regarding both her identity claim and her basis of claim.

[14] The RAD determined the Applicant was inconsistent during her testimony about the dates, chronology, and location of the key events resulting in her father's death and her fleeing Somalia; when these inconsistencies were brought to her attention, she could not clarify. The RAD agreed with the RPD that the inconsistencies remained unsatisfactorily explained by the Applicant and materially undermined her credibility with respect to the basis of her claim in addition to her overall credibility. The RAD noted that the RPD's decision did not rest solely on issues of delay and entry into Canada on false or fraudulent documents and, while these issues could be indicative of a lack of subjective fear and undermine a claimant's credibility, the RAD found the RPD had not erred when using these facts as part of a holistic credibility analysis.

[15] Overall, the RAD's independent analysis found the Applicant's lack of clear testimony on her religious identity, her clan identity, and her allegations about being targeted for marriage by Al Shabaab were sufficient to rebut the presumption of truthfulness.

[16] In concluding its reasons, the RAD found the Applicant's other arguments, concerning the *Gender Guidelines* and the RPD's comments about the prevalence of fraudulent documents in Somalia, were not determinative.

II. The Parties' Submissions

A. *The Applicant*

[17] According to the Applicant, the RAD inappropriately faulted her for not providing a Somali passport and ignored evidence that contradicted its finding about when the Somali government had started to issue passports. In the Applicant's view, the RAD did not apply the evidence to her circumstances; in that, to get a passport the majority of sources in the NDP state the application needs to be made in person and the process can be long and difficult.

[18] The Applicant says the RAD failed to properly or appropriately assess the weight of the Dejinta Beesha and Midaynta letters. In the Applicant's view, the inconsistency of clan affiliation between the two letters is immaterial because her claim is not based on belonging to the Madiban clan or the Yibir clan, each of which is a minority clan.

[19] According to the Applicant, the RAD's focus on inconsistencies in her testimony about the marriage demand, and her father's subsequent death, is Western-centric. The Applicant points out that she lived in a society where dates and times are not kept track of in comparison to westernized societies. The Applicant says the RAD was insensitive to the social and cultural differences in assessing her testimony about when the Al Shabaab member approached her and her father and, since the dates are different by only two days, this is not substantial enough to have doubted the Appellant's sworn testimony.

[20] In the Applicant's view, the refusal to marry an Al Shabaab member is a gender-related claim. The Applicant says the RAD should have considered and applied the *Gender Guidelines* with respect to her testimony concerning the dates on which the Al Shabaab member approached her and her father because, on these dates, traumatic events akin to rape occurred.

B. *The Respondent*

[21] The Respondent says it was reasonable for the RAD to find the Applicant could have obtained a Somali passport in view of the documentary evidence stating that passports have been issued in Somalia since at least December 2013. It also was reasonable, in the Respondent's view, for the RAD to find the Applicant's secondary evidence not persuasive.

[22] According to the Respondent, it was reasonable for the RAD to find there were significant and material credibility concerns, including inconsistencies regarding the Applicant's evidence and allegations. The Respondent points to these inconsistencies: (i) in her BOC form the Applicant stated that she was a Sunni Muslim but in her testimony she said she was a Shia

Muslim; (ii) in her original BOC form she stated she was a member of the Yibir minority clan but in her amended BOC stated that she was a member of the Madibhan clan; (iii) her story about how she left Somalia was inconsistent; and (iv) she lacked subjective fear as she failed to make a refugee claim at the first opportunity.

III. Analysis

A. *Standard of Review*

[23] The applicable standard for review of the RAD's decision is reasonableness (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35).

[24] The reasonableness standard tasks the Court with reviewing an administrative decision for the existence of justification, transparency and intelligibility within the decision-making process and determining whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). Those criteria are met if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16).

[25] So long as "the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its

own view of a preferable outcome”; nor is it “the function of the reviewing court to reweigh the evidence”: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61.

B. *Was the RAD’s Decision Reasonable*

[26] I agree with the Applicant that the RAD inappropriately faulted the Applicant for not providing a Somali passport and ignored evidence that contradicted its finding about when the Somali government started to issue passports. The RAD found the Applicant should have been able to access a Somali passport and did not accept her reason that passports were not being issued. The documentary evidence the RAD referenced to determine passports have been issued since December 2013 ignores contradictory evidence about the difficulty of obtaining a Somali passport and when they started to be issued.

[27] The documentary evidence shows that, although passports are being issued in Somalia, they are difficult to obtain. The RAD stated passports were available without considering documentary evidence suggesting that the Applicant may have had to: (i) pay a fee; (ii) wait for a passport in Mogadishu for up to one month; (iii) provide an identification card and a birth certificate, despite the fact that the documentary evidence shows most birth certificates were destroyed during the civil war and many people never had a birth certificate in the first place; and (iv) obtain a criminal background check. Although other documentary evidence in the NDP suggests lower thresholds, such as a wait time of only one week, in my view it was incumbent on the RAD to address why it did not consider this evidence. The RAD’s only reason in this regard was that it chose the most recent documentary evidence, but this was not factually correct as there was more recent information in the NDP about the issuance of passports.

[28] In the Applicant's circumstances a passport may not have been available to her for several reasons: (i) she came to Canada with only \$300 in cash and had to pay a smuggler \$8,500 USD, which would leave her with little money to pay a passport fee; (ii) she left Somalia less than a month after her father's death and there was a requirement to wait for a passport in Mogadishu for up to one month; (iii) she had no identification documentation and there appears to be a requirement for this; and (iv) a criminal background check would be required. In my view, the RAD unreasonably faulted the Applicant for not providing a Somali passport and ignored evidence contradicting its finding about when the Somali government began to issue passports.

[29] The RAD's unreasonable finding about the issuance of Somali passports does not, however, render its entire decision unreasonable when it is reviewed as an "organic whole" (*Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd.*, 2013 SCC 34 at para 54).

[30] The cornerstone of the RAD's decision in this case was the Applicant's credibility. The RAD identified various inconsistencies in the Applicant's testimony and evidentiary record, such as her clan membership, which were less than adequately explained or accepted. The Applicant's contention that her clan membership was not determinative of the claim misses the point that this inconsistency was one of several which led to the RAD finding a general lack of credibility. Even though the Applicant's clan membership was clarified in her amended BOC and was consistent in her testimony, it was reasonable for the RAD in the face of this inconsistency to assign little weight to the Dejinta Beesha and Midaynta letters. In my view, the RAD also

reasonably assessed the other secondary documentation, namely, the affidavits from the Applicant's mother and the elder sister of one of the Applicant's friends. When viewed as a totality, the evidence before the RAD was such that it was reasonable to dismiss the Applicant's appeal.

IV. Conclusion

[31] The Applicant's application for judicial review is dismissed. The RAD reasonably assessed the evidence and the Applicant's testimony in a transparent, justifiable, and intelligible manner, and its decision is an outcome which is defensible in respect of the facts and the law.

[32] Neither party raised a serious question of general importance; so, no such question is certified.

JUDGMENT in IMM-3889-18

THIS COURT'S JUDGMENT is that: the application for judicial review is dismissed;
and no question of general importance is certified.

“Keith M. Boswell”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3889-18

STYLE OF CAUSE: NADIA SAID MOHAMOUD, (a.k.a. NADIA MOHAMOUD SAID) v THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: MARCH 6, 2019

JUDGMENT AND REASONS: BOSWELL J.

DATED: MAY 13, 2019

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