

Federal Court



Cour fédérale

Date: 20170517

Docket: IMM-4285-16

Citation: 2017 FC 507

Toronto, Ontario, May 17, 2017

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

**MAHA YOUSOF HIMAT HASSAN,
AYA ELFATHI AHMED KHALAFALLA,
AHMED ELFATHI AHMED KHALAFALLA,
AND ASEEL ELFATHI AHMED
KHALAFALLA**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision made by the Refugee Protection Division of the Immigration and Refugee Board [RPD] dated September 26, 2016, which determined that the applicants have no credible basis for their claims and are neither Convention refugees nor persons in need of protection.

[2] Ms. Hassan, the principal claimant, made her claim on the basis of political persecution. She claimed that her activism on behalf of the Nubian community of Sudan put her at risk of persecution from the Sudanese government. She also made separate claims on behalf of her two daughters, Aya and Aseel, on the basis that they were at risk of female genital mutilation [FGM] from Ms. Hassan's extended family if they were returned to Sudan.

[3] The determinative issue in this application is the RPD's assessment of the FGM claims for Aya and Aseel. The RPD found insufficient evidence that they had not already been subject to FGM, but did not reasonably consider the objective country condition evidence regarding the prevalence of FGM in Sudan or the timeline of when the daughters were actually in Sudan.

[4] Ms. Hassan and her minor children are nationals of Sudan. While it did not give credence to their reasons for doing so, the RPD accepted that the family moved to Saudi Arabia in 2006. While living in Saudi Arabia, Ms. Hassan gave birth to Aseel who, at the time of the RPD hearing, was aged five. The applicants did not return to Sudan until 2016, when they returned for a period of eight days so the children could see their sick grandmother, at her request.

[5] The RPD found that Ms. Hassan's testimony lacked credibility. It did not accept that she faced political persecution in Sudan, or that she personally feared that her daughters would be subject to FGM. Whether or not that finding was reasonable, the RPD was still obligated to examine whether, on the basis of the country condition evidence, the daughters faced a serious possibility of gender persecution if they were returned to Sudan. It is well-established that where a claimant has not personally experienced a form of persecution, the RPD is nonetheless

obligated to examine whether a personal risk can be inferred from the experiences of similarly-situated persons: *Salibian v Canada (Minister of Employment and Immigration)*, [1990] 3 FCR 250 at paras 16-18 (FCA); *Josile v Canada (Citizenship and Immigration)*, 2011 FC 39 at para 22.

[6] The RPD acknowledged that country documents state that FGM remains widespread in Sudan. It cited the fact that 88 percent of girls and women aged between 15 and 49 in Sudan “have undergone this barbaric practice and this is well documented in our National Documentation Package, Exhibit 3”. The RPD also stated that though the prevalence of FGM was high all over the country it varied and was as high as 99 percent in the north. The applicants were from the north. Nonetheless, the RPD believed that it could not rely on Ms. Hassan’s testimony about whether her daughters had already been subject to FGM. The RPD found no other evidence capable of supporting the conclusion that they had not. The RPD explained that Ms. Hassan’s failure to adduce a medical report about whether her daughters had already been subjected to FGM was fatal to their claims.

[7] While the RPD assessed the National Documentation Package for the prospective risk of FGM in Sudan, it failed to consider whether the same evidence, combined with the timeline of when the daughters were physically present in Sudan, could allow it to infer whether or not they had already been subject to FGM. When referring to the prevalence of FGM for women aged 15 to 49 as 88 percent, the RPD did not include the immediately following words from the National Documentation Package: that “[g]irls were generally cut when 5 to 11 years old.”

[8] Aya was aged 4 when the family left Sudan and Aseel was not yet born. Having clearly reviewed the National Documentation Package indicating the ages at which young girls are at risk of forced FGM, the RPD should then have personalized that risk to the minor Applicants. The ages of the daughters at the time of leaving the Sudan originally, and their ages of 16 and 5 respectively when returning to the Sudan, should have been considered by the RPD. If that had been done, the RPD would have seen that when Aya left Sudan she was not yet of an age where FGM was normally practiced. It would also have seen that Aseel had never spent time in Sudan other than the fleeting one-week visit in March 2016 when she was 5 years old.

[9] There is no evidence that the RPD turned its mind to the likelihood, based on the evidence in the National Documentation Package, that the minor Applicant daughters had not in fact been subjected to FGM. This is particularly so for Aseel, as there was evidence that FGM is not practiced in Saudi Arabia. Had the RPD considered whether the daughters were physically present in Sudan at ages when they were at risk of FGM, it is not clear whether it would still have required a medical assessment before finding that they were at risk of gender persecution.

[10] After reflecting on the lack of consideration by the RPD of such a crucial aspect of the claims by the minor daughters, it is my view that it is not possible to find that the RPD's decision falls within the range of possible, acceptable outcomes defensible on the facts before it. For that reason, the decision is unreasonable and the application is allowed.

[11] This matter is to be returned to the RPD for determination by a different panel.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is allowed.
2. The matter is to be returned to the RPD for redetermination by a different panel.
3. No question for certification arises on these facts.

"E. Susan Elliott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4285-16

STYLE OF CAUSE: MAHA YOUSOF HIMAT HASSAN ET AL v THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

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JUDGMENT AND REASONS: ELLIOTT J.

DATED: MAY 17, 2017

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