

Federal Court



Cour fédérale

Date: 20180406

Docket: IMM-3251-17

Citation: 2018 FC 373

Ottawa, Ontario, April 6, 2018

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

A.B.

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

PUBLIC JUDGMENT AND REASONS

[1] A.B. is a citizen of Sudan who claims to fear persecution in that country because she uncovered a corrupt scheme involving the Sudanese Ministry of Health. She claims to have an additional fear of persecution in Sudan based upon her profile as an advocate against the practice of female genital mutilation (FGM).

[2] A.B. is herself a victim of a form of FGM known as “infibulation”. Typically performed in childhood, infibulation involves the removal of portions of a girl’s external genitalia, and the

almost complete closing of the vaginal opening – something that can result in significant health problems.

[3] In addition to her other claims, A.B. asserted that she would face gender-based persecution if she were required to return to Sudan where, she says, she would be forced to marry and to have children, following which she would be required to undergo “reinfibulation”. This aspect of A.B.’s refugee claim was never addressed by the Immigration and Refugee Board, with the result that her application for judicial review will be granted.

I. **The Decisions Regarding A.B.’s Refugee Claims**

[4] The Refugee Protection Division of the Immigration and Refugee Board rejected A.B.’s refugee claim, finding that her credibility was fatally undermined by her failure to disclose that she had made an earlier unsuccessful refugee claim in Norway, based upon an entirely different story than the corruption-based story that she advanced in Canada. The RPD further found that A.B. had failed to establish that she would face persecution in Sudan as an anti-FGM advocate. At no point in its analysis, however, did the RPD ever address A.B.’s gender-based claim relating to her alleged fear of reinfibulation.

[5] A.B. appealed the RPD’s decision to the Refugee Appeal Division of the Immigration and Refugee Board. The RAD upheld the RPD’s negative credibility finding regarding the alleged corruption scheme involving the Sudanese Government. The RAD also found that A.B. had failed to establish that anti-FGM activists were at risk in Sudan. However, even though A.B. had expressly cited the failure of the RPD to deal with her alleged fear of persecution based on

her potential exposure to reinfibulation as one of her grounds of appeal, there is no mention whatsoever in the RAD's decision with respect to this aspect of her refugee claim.

II. Analysis

[6] Even if a claim is not clearly articulated by a refugee claimant, it is up to the decision-maker to consider the facts of the case and to determine whether the Convention definition has been met: *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 103 D.L.R. (4th) 1. In this case, however, A.B.'s alleged fear of reinfibulation-related persecution was expressly asserted in her Basis of Claim form. In addition, evidence was adduced and submissions were made regarding this aspect of A.B.'s claim before both the RPD and the RAD.

[7] A.B.'s claim was, moreover, clearly not frivolous, as there is country information in the record indicating that a substantial majority of Sudanese women undergo FGM (including infibulation) and reinfibulation. The Immigration and Refugee Board has, moreover, recognized that FGM is a violation of Article 3 of the *Universal Declaration of Human Rights and the United Nations Convention on the Rights of the Child* (CRDD T93-12198/12199/12187, Ramirez, McCaffrey, May 10, 1994, cited in *IRB Chairperson Guidelines IV: Women Refugee Claimants Fearing Gender-Related Persecution*). However, for some unknown reason, neither the RPD nor the RAD chose to assess this part of A.B.'s refugee claim.

[8] While there were undoubtedly serious reasons for questioning the truthfulness of A.B.'s corruption claim, the evidence that was before the RAD regarding her alleged fear of reinfibulation was in no way dependent upon her credibility. Her status as a survivor of FGM had been confirmed by a medical report. The country information further confirms that

reinfibulation remains a widespread practice in Sudan, where women are frequently required to undergo this procedure following the birth of a child.

[9] Counsel for the respondent has advanced arguments as to why A.B.'s claim of gender-based persecution related to her potential exposure to the practice of reinfibulation might be rejected by the Board. One such argument is that it is speculative for A.B. to claim that she would be forced to marry if she were to return to Sudan, seemingly suggesting that she could avoid persecution by choosing to remain single. Whatever the merits of this and other arguments may be, it is not the role of this Court to evaluate the evidence and to determine whether an applicant for refugee protection meets the definition of a "refugee". That is the role of the RPD in the first instance, and of the RAD on appeal.

[10] Moreover, even if the RAD were to find that A.B. failed to establish that she would be forced to marry if she were to return to Sudan, that would not be the end of the inquiry. The RAD would also have to consider whether a person should be expected to avoid a risk of persecution by making the choice not to marry or to have children.

[11] The ability to marry and to have children involve fundamental expressions of our sexuality and of our humanity, and have been recognized as fundamental human rights at international law: *Universal Declaration of Human Rights*, GA Res. 217 A (III), UN GAOR, December 10, 1948, Article 16, and the *International Covenant on Civil and Political Rights*, 1976] Can. T.S. No. 47, Article 23. The RAD would thus have to consider whether it would be reasonable to expect an individual such as A.B. to remain single and childless in order to avoid the risk of pregnancy, childbirth and reinfibulation, or whether that would constitute a serious interference with her basic human rights.

III. **Conclusion**

[12] The failure of the RAD to address a material aspect of A.B.'s refugee claim means that its decision lacks the "justification, transparency and intelligibility" required of a reasonable decision. Nor can it be said that the decision "falls within a range of possible acceptable outcomes which are defensible in light of the facts and the law": *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47, [2008] 1 S.C.R. 190. Consequently, the application is granted.

[13] A.B.'s case will be remitted to the RAD for redetermination, with the direction that it must expressly address the aspect of A.B.'s refugee claim based upon her alleged fear of reinfibulation. It is open to A.B. to adduce whatever additional evidence she deems appropriate before the RAD, which will have to determine whether any such evidence should be admitted as "new evidence".

[14] I agree with the parties that the case is fact-specific does not raise a question that is suitable for certification.

JUDGMENT IN IMM-3251-17

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted and the matter is remitted to a differently constituted panel of the RAD for re-determination in accordance with these reasons; and
2. The RAD must expressly address A.B.'s refugee claim based upon her alleged fear of reinfibulation.

"Anne L. Mactavish"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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